Copyright Board Canada

Commission du droit d'auteur Canada

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Regime Copying for Private Use
Copyright Act, subsection 83(8)

Members Mr. Justice John H. Gomery
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Tariff of levies to be collected by cpcc, in 1999 and 2000, for the sale of blank audio recording media, in Canada, in respect of the reproduction for private use of musical works embodied in sound recordings, of performer's performances of such works and of sound recordings in which such works and performances are embodied

Reasons for decision

TABLE OF CONTENTS

I. INTRODUCTORY REMARKS

A. LEGISLATIVE FRAMEWORK

On March 19, 1998, Part VIII of the *Copyright Act* [1] [the "*Act*"] came into force. [2] Until then, copying any sound recording for almost any purpose infringed copyright.[3] In practice, that

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[1] R.S.C. 1985, c. C-42, as amended.

[2] Bill C-32, now *An Act to Amend the Copyright Act*, S.C. 1997, ch. 24, ss. 50, 53; Order Fixing the Dates of the Coming into Force of Certain Sections of the [Copyright] Act, P.C. 1998-365, March 12, 1998, *Canada Gazette* Part II, Vol. 132, No. 7, page 1149. Part VIII was one of the highlights of the long-awaited Phase II reform of the *Act*.

[3] Private copying never was fair dealing within the meaning of the *Act*. Arguments to the contrary confuse the

prohibition was largely unenforceable. Part VIII legalizes one such activity: copying of sound recordings of musical works onto recording media for the private use of the person who makes the copy [hereafter "private copying"]. At the same time, a levy is imposed on blank audio recording media to compensate authors, performers and makers who own copyright in those sound recordings.

The structure of Part VIII eloquently highlights the purpose of the regime.

Section 79 sets the scene by providing a number of definitions. These determine who benefits from the levy, and what is subject to it.

Section 80 legalizes private copying onto audio recording media.[4]

Section 81 creates the right to remuneration for copying activities outlined in section 80. It also determines who shares in the remuneration: authors of musical works in which copyright subsists in Canada (which means virtually any author throughout the world) as well as performers and makers who are citizens or residents of Canada or of a country referred to in a ministerial statement made pursuant to section 85 of the *Act*.[5]

Section 82 sets out how the remuneration is to be paid, when, to whom, and for what. The remuneration takes the form of a levy. Manufacturers and importers of blank audio recording media ordinarily used by individual consumers to copy sound recordings pay the levy when they sell or otherwise dispose of such media in Canada. The payment is made for the benefit of eligible copyright owners to a single collecting body designated by the Board.

Section 83 outlines how the levy is to be set. Collective societies (or "collectives") must file proposed tariffs for the benefit of their members or lose their right to remuneration.[6] Anyone can object to the proposals. After hearing from collectives and objectors, the Board sets a fair and equitable tariff and designates the collecting body. It also allows rights owners who are not members of a collective to claim their share of the levy.

Sections 84 to 88 deal with various incidental aspects of the regime. They determine that the levy

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Canadian concept of fair dealing and the American notion of fair use. In Canada, fair dealing is a defence to copyright infringement. It is triggered when a protected work is used fairly for research, private study, criticism, review or news reporting. Copying a musical work for any other purpose infringes the copyright holder's reproduction right. Also, exceptions should not be read into the *Act* where there are none: *Cie générale des Établissements Michelin - Michelin & Cie* v. *C.A.W. - Canada* (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) at 379. Consequently, there is no implied exemption for those who copy music to listen to in the car or while jogging.
This makes it unnecessary to debate whether copying of a whole work can constitute fair dealing: see *Allen* v. *Toronto Star Newspapers Ltd.* (1997), 36 O.R. (3d) 201 (Div. Ct.); *Zamacoïs* v. *Douville*, [1944] Ex. C.R. 208, *contra*.

[4] Section 80 does not legalize (a) copies made for the use of someone other than the person making the copy; and (b) copies of anything else than sound recordings of musical works. It does legalize making a personal copy of a recording owned by someone else.

[5] A statement is intended to target countries that afford Canadian performers and makers material reciprocity as regards private copying of sound recordings. None has been made to date.

[6] This is explained later: see III.A.1., infra (text accompanying note 31).

is to be shared amongst collectives in the proportions fixed by the Board and outline how the Minister can add to, or subtract from, the eligible repertoire of performers and makers. They exempt from the levy any entity that represents persons with a perceptual disability and set out Cabinet's regulatory powers. Finally, they specify what the collecting body's rights are against those who do not pay the levy.

B. THE PROCESS LEADING TO THE HEARINGS

On March 31, 1998, pursuant to subsection 83(1) of the *Act*, the Canadian Mechanical Reproduction Rights Agency (CMRRA), the Neighbouring Rights Collective of Canada (NRCC), the *Société de gestion des droits des artistes-musiciens* (SOGEDAM), the *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (SODRAC) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN) filed with the Board proposed tariffs for the benefit of those who are entitled to share in the remuneration right granted by subsection 81(1) of the *Act*. As required by section 53 of *An Act to Amend the Copyright Act*, the proposed tariffs were to be effective for the years 1999 and 2000. They were published in the *Canada Gazette* on June 13, 1998. The Board also gave notice that anyone wishing to object to the proposed tariffs could do so within 60 days of the publication.

Public reaction was overwhelming. The Board received some 3,000 objections and letters of comment. Those who complained included not only manufacturers and importers of recording media, but also a variety of persons who use recording media for purposes other than private copying: churches, recording production houses, artists, makers of motivational and educational tapes, software companies, schools, radio stations, persons with disabilities and others. They challenged everything from the amounts being asked to the very existence of the regime. Most took issue with the fact that audio recording media that were not used to make private copies of sound recordings would nevertheless be subject to the levy. Letters of comment continued to arrive until the very end of the hearings.

Many of those who filed objections intended to limit their participation to doing just that. Over the following months, participants were apprised of their rights and obligations. As a result of these communications, of consolidations and other factors, the number of participants dropped first to approximately 60, and then to nine by the start of the hearings:

- the Canadian Private Copying Collective (CPCC), acting on behalf of all collectives that had filed proposed tariffs;
- the Canadian Storage Media Alliance (CSMA), representing major importers of blank audio recording media (Fuji Photo Film Canada Inc., Sony of Canada Ltd., Maxell Canada, Memtek Canada Ltd. [Memorex], AVS Technologies Inc. [TDK] and Kodak Canada Inc.);
- the Independent Canadian Recording Media Coalition, a coalition of smaller suppliers of blank audio recording media (Precision Sound Corporation, Summit Media Ltd. and Western Imperial Magnetics Inc.), together with the Evangelical Fellowship of Canada, Camrose Church of God, Grande Prairie Alliance Church, First Church of the Nazarene, United Church of God and Messrs. Ken Dahl, Al Schmalz and Greg Watrich (churches and individuals that object to the levy being applied to media used by churches in their

outreach ministry) [collectively "ICRMC"];
- the First Evangelical Lutheran Church;
- Bluebird Events and Studio A-Mirador, two independent producers of prerecorded musical materials;
- the Attorney General for the province of British Columbia, acting on behalf of that province's Court Services Branch;
- Mr. L. Graham Newton, audio recording and mastering engineer;
- Mr. Wes Klause, who among other things, manufactures catalogues in CD format.

Late in the proceedings, the Board discovered that the Council of Canadians with Disabilities had mistakenly been prevented from participating in the process. Representatives of that organization were asked to express their views in person before the Board. They did so on September 21, 1999, immediately before the beginning of oral arguments.

The following are the Board's reasons for its decision in the private copying matter. The process required two pre-hearing conferences and the issuance of an unprecedented number of preliminary rulings, including one dealing with paragraph 16(1)(*c*) of the *Official Languages Act.* It also led to a motion being filed before the Federal Court of Appeal. The motion, which sought to prevent the Board from proceeding with the matter, was dismissed on August 12, 1999.[7] The Board held hearings over thirteen days from August 24 to September 10, 1999. Oral arguments required four days, ending on September 24, 1999.

C. THE PARTICIPANTS' POSITIONS

CPCC submits that the private copying regime is constitutionally valid, that the proposed tariffs were validly filed and that it is entitled to claim in respect of all the eligible repertoire, including any foreign repertoire likely to be the subject of a ministerial statement. It submits that the Board cannot grant exemptions, proposes a very encompassing definition of audio recording medium and of the notion of ordinary use. It asks that the levy be set, for each 15 minutes of available recording time, at 20¢ for analog media, 39¢ for MiniDiscs, digital audio tapes (DATs), CD-Rs Audio and CD-RWs Audio, and 9¢ for CD-Rs and CD-RWs.

CSMA takes no position on any of the constitutional issues. It argues that a large part of the eligible repertoire is not properly before the Board and therefore, should not be taken into account in setting the amount of the levy. It claims that record companies are not the makers of sound recordings within the meaning of the *Act*. Its interpretation of the notions of audio recording medium and ordinary use is much more restrictive; for example, it maintains that only media of a type most often used for private copying are subject to the levy, and would exclude from the scheme all media other than audio cassettes. Finally, it asks that the levy be a percentage of the wholesale price of no more than 3 per cent for audio cassettes and 1 per cent for recordable CDs.

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[7] *Evangelical Fellowship of Canada* v. *Canadian Musical Reproduction Rights Agency* (C.A.), August 18, 1999, [1999] F.C.J. No. 1391, Court File No. A-371-99 (Rothstein J.A.).

ICRMC submits that Part VIII of the *Act* is not copyright law, that it contravenes sections 2 and 15 of the *Canadian Charter of Rights and Freedoms* [the *Charter*] [8] and that it may be improperly enacted tax law. It also asks that CPCC bear the burden of establishing all the facts of the case.

The Attorney General of British Columbia submits that media sold to institutional users are not subject to the levy and in the alternative, that the levy is a tax that cannot be collected from a province.

The First Evangelical Lutheran Church objects to the levy applying to it on several counts, including that it is not an individual consumer, that it does not make private copies and that it already owns a reproduction licence.

Bluebird Events and Studio A-Mirador ask that those who use audio recording media to develop or distribute their own intellectual property not be subject to the levy. Studio A-Mirador also argues that custom length blank cassettes could not possibly meet the definition of "blank audio recording medium".

Mr. Graham Newton objects to the existence of the private copying regime and argues that at the very least, only media actually used for private copying should be subject to the levy. In the alternative, he asks that those who use media for purposes other than private copying have access to a simple exemption scheme similar to tax exempt numbers.

Mr. Wes Klause argues that the imposition of the levy on recordable CDs used for purposes other than private copying would slow technological development by increasing costs.

The Council of Canadians with Disabilities asks that persons who use audio cassettes to overcome environmental barriers be exempt from the levy. In the alternative it asks that no levy be put on cassettes that have poor to moderate fidelity.

Pursuant to the directive on procedure applicable in this matter, the Board also received written comments from the Canadian Association of Broadcasters, the Canadian School Boards Association and Mr. Glenn Sanderse, President of Compact Data Inc.

D. NATURE OF THE EVIDENCE PRESENTED

During the hearings, the Board heard from the collectives, from small and large manufacturers, wholesalers, importers, distributors and retailers of various types of audio recording media and recording hardware in Canada and the United States and from information technology companies, practitioners of new media, broadcasters, school boards, persons who use audio recording media to record spoken word, data, images, art, maps, geological surveys and operators of duplication facilities. It also heard from Canadian, American and European economists, survey specialists and other experts as well as representatives of the international

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[8] Part I of the *Constitution Act* 1982 (R.S.C. 1985, Appendix A II, No. 44), being Schedule B of the *Canada Act* (U.K.), 1982, c. 11.

recording media industry.

Oral or written evidence was offered on: the evolution of sound recording technology, the various types of available recording equipment, their operation and the quality of results obtained in making copies of musical works; the origin of the private copying regime; the structure and revenues of the music industry; the impact of home taping on rights owners and on the recording industry; the structure, revenues and profits of the recording media industry; the marketing of audio recording media and audio recording hardware, including claims about the uses they can be put to; the pricing and availability of recordable media and recording hardware in stores, by mail, by phone order and over the Internet, in Canada and the United States; who purchases audio recording media; the various uses to which they are put; the probable impact of the levy on manufacturers, retailers and consumers; the impact of similar measures elsewhere; the public perceptions of the regime and reactions to its implementation; serial copy protection initiatives and technologies; the potential inefficiencies, distortions and grey market activity that may arise from the imposition of the levy; the organization of private copying collectives and the manner in which they went about securing their repertoire; the availability of music on the Internet; the impact of Canadian content rules on the use of music on radio.

Evidence produced included submissions to parliamentary committees relating to the adoption of Bill C-32, ministerial statements, product samples, marketing materials, surveys and expert reports, as well as American, European and other legislation dealing with copy protection measures, home taping and other issues.

II. PRELIMINARY LEGAL ISSUES

Objectors raise a number of constitutional challenges. Some also claim that the private copying regime offends the *Charter*. Before addressing these issues, the Board must rule on whether it has the power to deal with them.

A. CAN THE BOARD RULE ON CONSTITUTIONAL AND *CHARTER* ISSUES?

Any agency, even one exercising purely administrative functions, has the power to interpret and apply its enabling statute. Indeed, every decision maker has the power to deal with constitutional issues of division of powers, and all discretionary powers must be exercised in a manner that is consistent with the *Charter*.[9] However, only a decision-maker that has the power to decide general questions of law can rule on *Charter* issues, and only if it has jurisdiction over the parties, the subject matter and the remedy sought.[10]

The power to consider general questions of law can be explicit or implicit.[11] The *Act* does not

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[9] *Cooper* v.*Canada* (*Canadian Human Rights Commission*), [1996] 3 S.C.R. 854, ¶ 20 (Lamer C.J.), ¶ 55-56 (La Forest J.); *Baker* v. *Canada (Minister of Citizenship and Immigration)* (Unreported, July 9, 1999, S.C.C.) ¶ 53.
[10] *Cooper*; *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.
[11] *Cuddy Chicks*, page 14e; *Cooper*, ¶ 46.

grant the Board the express power to decide questions of law. The Federal Court of Appeal has ruled that the Board can deal with legal and jurisdictional issues as a necessary incident to its statutory powers,[12] but has never declared whether this is equivalent to a power to decide general questions of law. Yet the Board has repeatedly decided general questions of copyright law, private law and administrative law. Various Federal Court decisions have even approved the Board's rulings on a number of legal issues of a general nature.[13] Consequently, it would seem that the Board does have the power to decide general questions of law when this is necessary to fulfil its mandate.

A number of other factors culled from other court decisions also tend to favour the Board having the power to address constitutional and *Charter* issues. The Board fulfils adjudicative functions. It is one of sixteen federal tribunals whose decisions are reviewable only by the Federal Court of Appeal. That Court has afforded the Board a considerable amount of deference. The Board's Chair is a judge, either sitting or retired, of a superior, county or district court. The Board must deliver reasons for its decisions. It deals with a small number of files that are in general fairly complex and lengthy. Its procedures allow it to compile a reliable evidentiary record.

Finally, in the case at hand, the Board has jurisdiction over the parties, the subject matter and the remedy sought. Collectives and objectors have legitimate standing in this matter. The levy and its application to various types of media are clearly within the Board's jurisdiction, as is the certification of the tariff or how to tailor it to the circumstances of the case.

For the reasons given above, the Board can rule on the constitutional and *Charter* issues raised in these proceedings.

B. Is Part VIII Valid Copyright Law Within the Meaning of the Canadian Constitution?

Copyright is a matter of exclusive federal jurisdiction. In order to determine whether Part VIII of the *Act* is valid copyright law, the Board must look at the subject matter of the private copying regime. If its dominant feature, or pith and substance, is within the scope of copyright, then the whole regime is validly enacted. Any features that may infringe on provincial powers are incidental and inconsequential to the constitutional validity of the legislation.

ICRMC and the Attorney General of British Columbia contend that Part VIII lacks sufficient connection to copyright law principles to constitute valid copyright law. The Board disagrees. Part VIII provides compensation to rights holders for an activity that involves the use of a subject matter that is properly within the purview of copyright and is difficult or impossible to monitor;

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[12] *CTV Television Network Ltd*. v. *Canada (Copyright Board)*, [1993] 2 F.C. 115 (C.A.); *FWS Joint Sports Claimants* v. *Canada (Copyright Board)*, [1992] 1 F.C. 487 (C.A).

[13] For example, in FWS Joint Sports Claimants, *supra*, Note 12, the Court found that the Board had correctly ruled on a number of such issues, including whether there is copyright in the compilation of television programs in which others own copyright, whether there is copyright in the playing of a sports game, who is the first owner of the rights in the broadcast of a sports game, and the circumstances under which parol evidence can be admitted to interpret or contradict the terms of a contract.

it legalizes the activity and requires those who manufacture or import media used for the activity to pay the compensation. The nexus between these three elements of the regime is obvious: the remuneration right is a corollary of the right to private copy.

Part VIII does not specify which media are subject to the levy: the regime is structured to allow for technological developments in audio recording media. Still, there is a clear link between the activity, the amount of the compensation and the goods being levied. Only private copying of music triggers compensation in the form of a levy. Only media ordinarily used for that activity are subject to the levy. The Board's determination of which types of recording media are ordinarily used by the individual consumer to pursue the legalized activity, and which are not, helps to reinforce this nexus.

Some of the media subject to the levy are not used to private copy. Furthermore, the Canadian regime does not allow for the sort of exemptions that certain Australian legislation contained. Nevertheless, whether Part VIII relates to copyright cannot depend on the existence of a perfect correlation between the activity being legitimized and the media being targeted. After all, it is the near impossibility of controlling private copying that gave rise to the legislation in the first place. As stated by the Australian High Court in a decision upon which ICRMC puts great reliance, using language very similar to that found in Part VIII:

> "Whilst it may be accepted that not all blank tapes which are purchased are used for the purpose of the private copying of sound recordings, it is obvious that those which are used for this purpose must result in loss to copyright owners because of the loss of sales of sound recordings which would otherwise have taken place. *The royalty imposed by the legislation is imposed only upon the sale of blank tapes which are ordinarily used for the purpose of copying sound recordings and sales of blank tapes which are ordinarily used for other purposes are excluded from the levy.*" [14] (Emphasis added)

The Australian legislation stated expressly which media were subject to the levy. By doing so, it did not allow the regime to adapt to changes in technology or markets; the nexus between the activity and the media subject to the levy could only weaken with time. In Canada, Parliament sought instead to allow the connection to remain constant, by allowing the Board to make the nexus between activity, media and levy as strong as fairly and realistically possible. The Board decides which media are "of a kind ordinarily used by individual consumers" to make private copies; it adopts a comprehensive scheme for determining the amount of the levy to be imposed, taking into account the extent to which various kinds of media are used for the targeted activity. In doing so, the Board gives effect to the legislative intent and reinforces the connection between the forsaking of the right over reproduction in private copying and the remuneration afforded by the legislative scheme.

In its pith and substance, then, Part VIII deals with the rights of copyright holders and of those who copy their works. Eligible authors, performers and makers get a right to remuneration. This

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[14] *Australian Tape Manufacturers Association Ltd and Others* v. *Commonwealth of Australia*, [1993] 112 A.L.R. 53. (H.C.).

is in return for allowing individuals to copy musical works for their own private use. As determined by the Board, the amount of the levy is reasonably and equitably proportional to the amount of use made of audio recording media to actually record musical works. This is a matter which falls squarely within the ambit of subsection 91(23) of the *Constitution Act, 1867*. This remains true even though the application and effects of Part VIII are unlike any other provisions of Canadian intellectual property law and might impose a levy on some audio recording media that may not in fact be used for private copying.

Part VIII is properly anchored within federal powers and was validly enacted by Parliament pursuant to subsection 91(23) of the *Constitution Act, 1867*. Any incursion into property and civil rights is incidental and therefore inconsequential from a constitutional standpoint.

C. IS THE PRIVATE COPYING LEVY A TAX?

ICRMC and the Attorney General of British Columbia also contend that the private copying levy is a tax. If they are correct, Part VIII was improperly enacted, since the manner in which it was introduced does not comply with sections 53 and 54 of the *Constitution Act, 1867*. If the levy is a tax, section 125 of that Act also makes it clear that provinces are not subject to it.

The recent decision of the Supreme Court of Canada in *Westbank First Nation* [15] sets out how to decide whether a levy is a tax or something else:

> "... The central task is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.
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> In order to determine whether the impugned charge is a 'tax' or a 'regulatory charge' ..., several key questions must be asked. Is the charge: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme? If the answers to all of these questions are affirmative, then the levy in question will generally be described as a tax.
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> As is evident from the fifth inquiry described above, the Court must identify the presence of a regulatory scheme in order to find a 'regulatory charge'. To find a regulatory scheme, a court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

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[15] *Westbank First Nation* v. *British Columbia Hydro and Power Authority*, (Unreported, September 10, 1999, S.C.C.).

> This list is not exhaustive. In order for a charge to be 'connected' or 'adhesive' to this regulatory scheme, the court must establish a relationship between the charge and the scheme itself. This will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour." [16]

The private copying levy is not a tax for two reasons. First, although it is set by a public body that also determines who will collect it, it is not levied by a public body, but by the collective or other entity that, in the Board's view, best satisfies the requirements of Part VIII.[17] Neither is the levy set at the initiative of a public body: only collectives or the collecting body can set in motion the process leading to the certification of a tariff. Second, the levy is not intended for a public purpose, but to compensate a circumscribed category of beneficiaries (eligible authors, performers and makers) for the use of their copyrighted material through payments made by a circumscribed category of obligors.[18] It does not provide a public authority with a source of revenue, but offers private individuals a source of income.

The private copying levy is, to paraphrase the Supreme Court of Canada, a charge "adhesive" to a regulatory scheme, created to complement it. The levy is central to the achievement of the scheme. Part VIII prescribes everything that is required to achieve the purpose of legalizing private copying while ensuring that eligible rights holders are compensated for the value of those private copies. It establishes who files tariffs, who pays, who collects, and who can receive a share of the levy. It charges the Board with setting the levy, which must be fair and equitable; this can only mean that a connection must exist between the amount paid by the importers and manufacturers of targeted media and the extent of the activity that triggers the payment. Indeed, no other realistic scheme could provide a stronger link between the amount of use and the amount of payment.

The scheme is also meant to affect behaviour. Knowing that copying musical works for their own use is now allowed may well encourage individual consumers to do so. This would result in the wider dissemination of musical works, in an increase in the sale of audio recording media, and in increased creative efforts on the part of creators, artists and producers as a result of the possibility of equitable compensation.

Finally, those who are most directly concerned with the scheme benefit from it and caused the need for it. By selling and actively marketing blank audio recording media, manufacturers and importers encouraged the now legalized activity and directly profited from it.[19] They contributed to the need for the regulation. They now stand to benefit from the scheme if, as just stated, the legalization of the activity leads to an increase in the sale of their products.

In the end, the private copying levy probably is closest in nature to the regime under review in

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[16] *Ibid.*, ¶ 30, 43, 44.
[17] Paragraph 83(8)(*d*) of the *Act*.
[18] *Massey-Ferguson Industries Ltd.* v. *Saskatchewan (Minister of Agriculture)*, [1981] 2 S.C.R. 413, at 432.
[19] The fact that from a legal perspective, manufacturers did not authorize private copying within the meaning of the *Act* is irrelevant to the determination of whether they benefited from the illegal copying of sound recordings.

Massey Ferguson.[20] The regime is essentially compensatory. The sums received by the collecting body are liquidating payments to satisfy the claims of eligible rights owners to the compensation they are entitled to under section 81 of the *Act*. Beneficiaries and obligors are circumscribed by the particular activity or enterprise in which they are engaged. The fact that the regime imposes an additional cost of doing business does not make it a tax in the constitutional sense.

As helpful as it may have been in understanding whether the private copying regime is copyright law, the decision in *Australian Tape Manufacturers Association* is of little use in deciding whether the levy constitutes a tax. The Australian High Court's conclusion that the Australian scheme was indeed a tax was based on constitutional rules and principles of interpretation that are foreign to Canadian law. For example, the court, expressly rejecting the analysis of the Supreme Court of Canada in *Massey-Ferguson,*[21] ruled that an exaction can be a tax even if it is not collected for public or governmental purposes:

> "There is no reason in principle ... why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public." [22]

This clearly runs contrary to principles outlined by the Supreme Court of Canada to this day. If only for that reason, the Australian ruling cannot be followed in determining whether the Canadian levy is a tax.

The private copying levy is not a tax, but a compulsory charge, imposed pursuant to a regulatory scheme directly related to copyright. It is meant to provide for a payment, in lieu of a royalty, as compensation for the copying of copyrighted works as a result of the legalization of private copying of recorded musical works. Since Part VIII is not a taxation scheme, it applies to provincial governments.

D. DOES PART VIII OF THE *ACT* CONTRAVENE PARAGRAPH 2(A) OR SUBSECTION 15(1) OF THE *CHARTER*?

ICRMC submits that Part VIII infringes freedom of religion and is discriminatory. In its view, by requiring that all audio recording media be subject to the levy, Part VIII hinders the dissemination of the Gospel by adherents to the Evangelical Christian movement. The Council of Canadians with Disabilities adds that discrimination may exist with respect to persons who must rely on audio recording media to pursue certain activities.

i. Freedom of Religion

The essence of freedom of religion is the right to entertain, to exercise and to declare religious beliefs without fear of reprisal, and the right to manifest these religious beliefs by practice or by

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[20] *Supra*, note 18, at 432.
[21] *Ibid*.
[22] *Australian Tape Manufacturers Association*, *supra*, Note 14, at 58 (quoting *Air Caledonie International* v. *Commonwealth* (1988), CLR 462, at 467), 60-62.

teaching and dissemination. In *Edward Books*,[23] the Supreme Court struck down the *Retail Business Holidays Act* of Ontario, because its effects imposed a financial burden on those retailers who observed a religious holiday on days other than Sunday. This was found to infringe on freedom of religion. However, the Court makes it clear that not all financial burdens infringe on religious freedom:

> "Section 2(*a*) does not require the legislature to eliminate every minuscule state-imposed cost associated with the practice of religion. Otherwise the *Charter* would offer protection from innocuous secular legislation such as a taxation act that imposed a *modest sales tax extending to all products*, including those used in the course of religious worship... The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct *might reasonably or actually be threatened*. For a state-imposed cost or burden to be proscribed by s. 2(*a*) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited *if the burden is trivial or insubstantial*." [24] [Emphasis added]

Part VIII of the *Act* clearly meets the proviso outlined in *Edward Books* and therefore does not offend paragraph 2(*a*) of the *Charter*. The measure extends to all audio recording media. The impact of the levy on religious organizations is likely to be insubstantial: a 30 per cent levy would increase the operating costs of the Evangelical Fellowship of Canada by less than half of one per cent,[25] and those of the First Evangelical Lutheran Church of Calgary by less than two one-hundredths of one per cent.[26] Finally, as some of the media that will not be subject to the levy may be eminently suited to the purposes of religious organizations, the measure cannot be said to threaten religious activities in any way.

The Board also agrees with CPCC that any attempt to further analyse the impact of the levy on freedom of religion is premature if only because it is not known at this time what proportion of the levy will in fact be passed on to consumers.

ii. Discrimination

A discrimination prohibited by subsection 15(1) of the *Charter* occurs if a law creates a distinction which "... has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society." [27] Such a discrimination is established by demonstrating that there is (a) a legislative distinction, (b) which results in a denial of one of the four equality rights on the basis of the rights claimant's membership in an identifiable group, and (c) that is "discriminatory" within the meaning of

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[23] *R.* v. *Edward Books & Art Ltd.*, [1986] 2 S.C.R. 713.
[24] *Id.*, at 759.
[25] $1,200 out of $2.7M: transcripts at 3069.
[26] Approximately $47 out of more than $360,000: Exhibits FEL Church-3, pages 7-36, FEL Church-5, pages 9-6.
[27] *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143, at 174.

section 15.[28] A distinction is discriminatory within the meaning of section 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.[29]

Part VIII does not create a distinction amongst any identifiable group in the Canadian population. It does not create a distinction by adverse effect on any of the groups whose exercise of their religion involves an economic cost. It does not on its face impose any burden on one group that it does not impose on others, nor does it limit anyone's opportunities. To the extent that importers and manufacturers choose to pass on the cost of the levy to consumers, everyone who uses blank audio recording media will pay the levy.

Finally, Part VIII is not likely to threaten anyone's full membership in Canadian society. Indeed, the legislation attempts to soften the impact of the regime on those whose ability to achieve a sense of self-worth may remotely be affected. Paragraph 86(1) of the *Act* exempts from the levy societies, associations or corporations that represent persons with a perceptual disability. Section 2 of the *Act* labels as "perceptual disability" any disability that affects a person's ability to read or hear works in their original format, including sight or hearing impairment, the inability to focus or move one's eyes, the inability to hold or manipulate a book, or any impairment relating to comprehension. It would appear that through those associations, anyone whose ability to achieve personal fulfilment depends on the use of audio recording media is sheltered from the economic impact of the levy, however insignificant that may be.

Since the Board finds no *Charter* infringement, it is unnecessary to analyze Part VIII under section 1 of the *Charter.*

III. STATUTORY INTERPRETATION AND ISSUES OF MIXED FACT AND LAW

A. THE VALIDITY OF CPCC'S CLAIM TO ALL OF THE ELIGIBLE REPERTOIRE

Objectors argue that CPCC cannot claim royalties for all the eligible repertoire for at least two reasons. First, some or all of the entities that filed proposed tariffs did not qualify. Second, those that did can only claim royalties for the repertoire they actually administer. CPCC counters that even a collective that does not yet administer some rights holders' private copying rights can validly file a tariff, as long as it has secured the appropriate corporate authority to do so.

The evidence filed on these subjects concerning the nature of the relationships between the various collectives and their members as regards private copying was at best fragmentary. Nevertheless, it demonstrates that as of March 31, 1998 (the date by which proposed tariffs were to be filed), AVLA Audio-Video Licensing Agency Inc. (AVLA), the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ), the *Société de gestion collective de l'Union des artistes* (ArtistI), SOGEDAM and SODRAC had executed written instruments which expressly referred to the administration of

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[28] *Egan* v. *Canada*, [1995] 2 S.C.R. 513.
[29] *Ibid*.

private copying rights with at least some of their members. SOCAN, ACTRA Performers' Rights Society (APRS), the American Federation of Musicians (AFM) and CMRRA had not, but their internal corporate rules had been amended to allow them to administer those rights. Those changes had been made by bodies (e.g., a board of directors) on which some rights holders sat. The Board also believes it is reasonable to infer that each organization recruited new members after these changes intervened and before March 31, 1998. By that same date, NRCC's member collectives had empowered it to act as a collective of collectives. CPCC's creation occurred several months later, and the collectives that had filed proposed tariffs authorized CPCC to act on their behalf. Finally, no one claiming to represent rights holders took issue with the claims made by CPCC or its member collectives.

What was sometimes referred to as the "chain of title" issue raises two questions. First, is the Board properly seized of the private copying matter? Second, to what extent is the eligible repertoire entitled to remuneration?

i. Is the Board properly seized of the private copying matter?

The answer to this question depends on whether CMRRA, NRCC, SOGEDAM, SODRAC and SOCAN, who filed proposed tariffs on March 31, 1998, were private copying collectives at that time.

A collective that does not administer at least some private copying rights cannot validly file a proposed tariff pursuant to subsection 83(1) of the *Act*. This remains true even though the wording of that provision does not expressly state that filing collectives must be private copying collectives. It states that the societies must have been "authorized to act for that purpose", adding that the authorization must take the form of an assignment, grant of licence, appointment as one's agent or other form of authorization.

In interpreting this provision, it is clear that the "purpose" referred to must be the administration of private copying rights. Since such a purpose must be something that can be achieved through "assignment, grant of licence, appointment as one's agent or otherwise", it cannot be a reference to the authority to file proposed tariffs as such. No licence or agency agreement is required to authorize the filing of a tariff. By contrast, assignments, licences and agency agreements are how the administration of copyright is usually secured. Furthermore, the transaction must relate to private copying rights. A collective that has secured the administration of performing rights cannot use this mandate to claim the power to act as a private copying collective.

In addition, the necessary authorizations from right holders must be secured by the time set in the *Act* for filing proposed tariffs (in this case, March 31, 1998). The only way rights holders can be remunerated for private copying is through the collection of levies by the collecting body under the authority of a certified tariff.[30] The Board cannot certify a tariff for a given year if no proposed tariff is filed by March 31 of the previous year; absent such a filing, it is not seized of

[30] That is true even of so-called orphans: subsection 83(11) of the *Act* does not come into play unless a certified tariff is in place.

the matter. Consequently, lack of filing results in the loss of the right to remuneration. Viewed another way, manufacturers and importers are entitled to sell audio recording media without having to pay anything if no proposed tariff is filed on time. To allow rights holders to retroactively alter the state of the matter to the prejudice of importers and manufacturers would be contrary to the scheme of the *Act*. Common law rules cannot be invoked to achieve a result contrary to that scheme, and ratification cannot retroactively change the natural consequences of the statutory regime set out in the *Act*. Consequently, unless a collective acts as a private copying collective (that is, for the benefit of rights owners who have already authorized it to act on their behalf) when it files the proposed tariff of royalties, the filing is invalid.

However, the authorization can be secured by any implicit or explicit means available at common law. For example, rules governing implicit contract agency or agency by ratification may very well work in a putative collective's favour where some rights holders were instrumental in getting the entity to file the tariff or to acquire the necessary corporate authority to administer rights. Thus, CMRRA's directors, who are also music publishers and therefore rights holders under Part VIII, granted CMRRA an implicit mandate to administer their private copying rights when they voted in favour of the collective becoming a private copying collective.

Based on these principles, all entities that filed proposed tariffs were authorized to do so pursuant to subsection 83(1) of the *Act*. AFM, CMRRA, APRS and SOCAN had received implicit mandates to act on behalf of rights holders who sit on their board of directors. SOGEDAM and SODRAC had clearly secured proper authorizations from at least some of their members, as had AVLA, SOPROQ and ArtistI for the benefit of NRCC. Moreover, as stated earlier, each member recruited after changes were made to the collectives' adhesion contracts and before March 31, 1998 formally authorized them to administer their private copying rights. In any event, proposed tariffs were properly filed by SODRAC with respect to eligible authors, by SOGEDAM and NRCC with respect to eligible performers, and by NRCC with respect to eligible makers. All colleges of rights holders are therefore properly before the Board.

ii. The share of the eligible repertoire entitled to remuneration

In the Board's view, certified tariffs must account for all eligible subject matters of a type for which proposed tariffs were validly filed.

The repertoire cannot be limited to the filing collectives' repertoire at the time of filing, or at any other particular date during or after the certification process. This would run against the essentially prospective nature of the tariff and render subsection 83(11) of the *Act* (the orphans' provision) meaningless.[31] The only interpretation consistent with that provision is that the

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[31] That provision states that "An eligible author, eligible performer or eligible maker who does not authorize a collective society to file a proposed tariff ... under subsection (1) is entitled, in relation to

(a) a musical work,

(b) a performer's performance of a musical work, or

(c) a sound recording in which a musical work, or a performer's performance of a musical work, is embodied,

as the case may be, to be paid by the collective society that is designated by the Board ... the remuneration referred to in section 81 if such remuneration is payable during a period when an approved tariff that is

eligible repertoire includes all works, performer's performances or sound recordings of a kind for which a proposed tariff was filed.

As already stated, proposed tariffs were properly filed for all three eligible colleges. Moreover, the Board is satisfied that at the time of filing proposed tariffs, SODRAC, SOGEDAM and NRCC had secured a sufficient number of authorizations from rights owners to administer private copying rights in each and every possible type of works, performers' performances and sound recordings comprising the eligible repertoire. This is only reinforced by the Board's conclusion that all proposed tariffs were properly filed.

Subsection 83(1) of the *Act* provides that a tariff is filed "for the benefit of" a collective's rights owners. That proviso must not be read as limiting the ambit of the tariff a collective can file. First, the French version is less restrictive; it only requires that a collective, act "*au nom*" of its rights owners. Second, to limit the repertoire before the Board to that of the members of the eligible societies either would again render subsection 83(11) of the *Act* meaningless or would require rights holders to bear the burden of compensating orphans out of their own share of the remuneration. Third, the proviso should not be interpreted in a way that impinges on the prospective nature of the regime. Fourth, subsection 83(8), combined with the requirement to designate a single collecting body, clearly contemplates a single tariff structure; to require that collectives file proposed tariffs dealing only with their own repertoire would run against the scheme of the *Act*. Consequently, a collective that files a proposed tariff, while doing so for the benefit of its rights holders, may take all of the eligible repertoire into account, including the part belonging to members of other collectives, non-members and unknown persons.

B. THE IMPORTANCE OF THE ELIGIBLE REPERTOIRE IN PRIVATE COPYING

CPCC relies on a report based upon a radio airplay survey prepared by its experts Paul Audley and Stephen Stohn (Stohn/Audley) [32] to ask that the eligible repertoire be set at 100 per cent for authors, 37 per cent for performers and 31 per cent for makers. At the request of the Board, CPCC subsequently offered an analysis of record sales which set the percentages at 30 per cent for performers and 25 per cent for makers. In both cases, CPCC takes into account foreign performers and makers who it argues are potentially eligible. CPCC asks that the Board rely on both surveys to determine the share of eligible repertoire, suggesting that radio airplay receive three times the weight of sales.

CSMA argues that the radio survey results are biased in favour of eligible rights holders because of Canadian content rules imposed by the Canadian Radio-television and Telecommunications Commission (CRTC) on radio broadcasters. It asks that the Board rely only on the record sales study, adding that even those estimates are overstated. It requests that no account be taken of foreign performers and makers.

The two studies do not give a perfect indication of the performers' and makers' repertoire used

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applicable to that kind of work, performer's performance or sound recording is effective ..."

[32] Exhibit CPCC-22.

for private copying, but contain sufficient information to enable the Board to reach a conclusion. The Board hopes that more complete sales data will be made available when future tariffs are filed. For the purposes of the present tariff, and for the reasons given by CSMA, the Board agrees that the radio airplay survey probably overstates eligibility rates for performers and makers. For one thing, their share of air time is much higher than their share of sales, and nothing indicates that the former is a better predictor of private copying than the latter. On the other hand, the sales study probably understates the amount of private copying attributable to Canadian recordings by focussing only on the top 250 selling albums in Canada and by not fully taking into account French language sales in Quebec. For these reasons, the Board uses a simple average of the results obtained from the two surveys.

No account is taken of foreign performers and makers. Section 79 of the *Act* is clear: only Canadian performers and makers are entitled to share in the levy until the Minister issues a statement pursuant to section 85 of the *Act*. Should such a statement take effect before this tariff expires, CPCC will be free to ask that the tariff be varied pursuant to section 66.52 of the *Act*.

Based on these considerations, the Board concludes that 28 per cent of private copies are made using the repertoire of eligible performers, while 23 per cent use the repertoire of eligible makers.

Some account has to be taken of the musical works that are no longer protected by copyright. CSMA argues it is five per cent; CPCC argues it is three. Based on the little information it was provided, the Board concludes that 96 per cent of private copies are made using the repertoire of eligible authors.

On a related issue, ICRMC argues that the "maker" of a sound recording is not the record company but the person (sometimes called the "artistic producer") who directs the artistic and creative work leading to the production of the sound recording. The Board does not accept this interpretation. According to section 2 of the *Act*, the maker of a sound recording is the person who undertakes the arrangements necessary for the first fixation of the sounds. Section 2.11 adds that these include arrangements for entering into contracts with performers, financial arrangements and technical arrangements required for the first fixation of the sounds for a sound recording. The mention of contractual and financial arrangements is clearly meant to refer to those who take on the financial risk of producing records, not to the person who shapes the sounds of the record and provides artistic advice to the performers.

C. THE MEANING OF "ORDINARILY USED BY INDIVIDUAL CONSUMERS"

Section 79 of the *Act* defines "audio recording medium" as "a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose ...". No one questions whether it is possible to reproduce sound recordings onto the media targeted by CPCC, or the concept of an individual consumer. The meaning of the phrase "ordinarily used", however, is at issue.

CPCC submits that if a medium is regularly, commonly or normally used by individuals for private copying, then it qualifies, adding that there can be more than one common use for a type of medium. CSMA argues that the levy should apply only to the media that are most often used

for private copying, and would exclude media (e.g., MiniDiscs) whose share of the market is marginal, even if most or all are used to make private copies.

Although the word "ordinarily" is broad, context sensitive and "very fluid",[33] dictionaries and case law greatly help in understanding its meaning. "Ordinary" is used to describe anything from that which is regular, normal or average, to what is merely recurring or consistent.[34] Therefore, the ordinary character of an occurrence is not necessarily a function of quantity, but rather a matter of consistency. One can ordinarily spend Christmas with one's family even though this only occurs once a year: the regularity of a person's visit with kin makes it "ordinary".

Court decisions also tend to emphasize consistency rather than frequency.[35] An ordinary activity need not be a person's main activity, as long as it is one which is not rare or abnormal or minimal, that is, not trivial or insignificant.[36] The use of a secondary residence by a family needs to be consistent, not frequent, in order for it to be ordinary.[37]

Modern statutory interpretation generally gives to an expression the meaning that a reasonable individual would ascribe to it, taking into account the context, linguistic conventions and what we know of the world, including the purpose of the legislation where the expression is found and the policy considerations motivating its use.[38] So the purpose of the regime is of primary importance in interpreting as fluid a notion as "ordinary".[39] One of the purposes of the regime is to legalize private copying. Another is to adequately compensate eligible authors, performers and producers of musical works. This will not happen if the definition of "blank audio recording medium" is interpreted restrictively. Too restrictive an interpretation will strip the regime of any meaning. A broad interpretation of the definition helps to level the playing field for importers and manufacturers by ensuring that only those media that clearly are not used to make private copies are not subject to the levy. Consequently, ordinary use, as that expression is found in the definition of "audio recording medium", ought to be interpreted as including all non-negligible uses.

Therefore, a person who made two copies of sound recordings onto a type of medium in each of the last two years ordinarily uses that type of medium for private copying, even though that same person may well use many more such media for other purposes: a medium can have more than

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[33] *R.* v. *Johnny* (1983), 149 D.L.R. (3d) 710, at 714. (B.C.C.A.)

[34] See e.g., *Black's Law Dictionary,* 5th ed. (regular; usual; normal; common; often recurring; exercised by, or characteristic of, the normal or average individual); *Oxford English Dictionary*, 2nd ed. (As a matter of regular practice or occurrence. In the ordinary or usual course of events or state of things; in most cases, usually, commonly); *Dictionary of Canadian Law* (which defines ordinary use as a use which is commonplace, customary, normal, regular or usual in the course of everyday life).

In French, the meaning of "*habituel*" ranges from "*Qui tient de l'habitude par sa régularité*" to "*normal*" or "*très fréquent*".

[35] See e.g., *Thomson* v. *M.N.R.*, [1946] 1 D.L.R. 689 (S.C.C.).

[36] *Verrier* v. *Minister of National Revenue* (1988), 23 F.T.R. 217, ¶ 6.

[37] See e.g., *Bailey* v. *Bailey*, [1992] O.J. 967 (Gen. Div.).

[38] Côté, P.-A., *Interprétation des lois*, 2nd ed. (Cowansville, Yvon Blais, 1990) at 234; Sullivan, R., *Driedger on the Interpretation of Statutes*, 3rd ed. (Toronto, Butterworths, 1994), at 131.

[39] *R.* v. *Johnny*, *supra*, note 33.

one ordinary use.

Furthermore, since the definition speaks of ordinary use *by individual consumers*, the analysis must focus on the person who uses the medium for her own enjoyment, to the exclusion of others. Thus, the fact that only five per cent of a given type of medium is sold to individual consumers does not mean that it does not qualify. In fact, all those media, including the 95 per cent sold to "non-consumers", will be subject to the levy as long as a non-marginal number of consumers use them for private copying in a fashion that is not marginal.

By contrast, media essentially reserved for corporate or professional uses will not qualify even if a few individuals use the technology to make private copies of music. The "personal consumer use" must involve more than a few eccentrics.

Based on these principles, the Board concludes that all audio cassettes with a playing time of 40 minutes or more qualify. The evidence suggests that C-45 cassettes are the shortest standard length that can conveniently be used to make private copies of music. Anything else is simply not convenient; total sales of these and shorter length cassettes are in fact minimal. However, the Board uses the 40 minute threshold to ensure that manufacturers do not adjust cassette length for the sole purpose of avoiding the tariff. [40]

The Board notes CPCC's opposition to such a determination. The CPCC fears that the market might try to evade the levy by manufacturing different cassette lengths, or by placing pre-recorded sounds on otherwise blank media. Nevertheless, for the reasons stated above, the Board considers that audio cassettes of a length of 40 minutes or less are not audio recording media ordinarily used by individual consumers to copy music.

No distinction will be made between Type I and other cassettes. Type I cassettes represent 72 per cent of the market. If, as the Board concludes later, close to two-thirds of all cassettes are used for private copying, then a large number of Type I cassettes must be used for that purpose. Furthermore, the testimony and demonstation of Mr. David Basskin, President of CMRRA, clearly showed that the quality of copies now made onto Type I cassettes is for all intents and purposes the same as for those made onto other types.

Neither will the Board distinguish between standard length and custom length cassettes or cassettes with other characteristics (e.g., record protect tabs removed) that may make them less suited to private copying. Too much specificity may open the door to levy avoidance by marketing new lengths and types of cassettes to consumers.

MiniDisc, CD-R Audio and CD-RW Audio also qualify. Even though these media account for only one per cent of total sales, they are mostly, if not exclusively, targeted at consumers and sold for the purpose of copying music.

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[40] It would not be surprising if as a result of this decision, some of the uses that are not targeted by the tariff migrated to shorter formats. For example, Mr. Bruce Clemenger, Director of National Affairs, The Evangelical Fellowship of Canada, noted that the length of a religious sermon is usually somewhere between 30 and 40 minutes: transcripts at 3039.

Finally CD-R and CD-RW qualify. The proportion of these media used for private copying is almost certainly between 5 and 15 per cent. Even the lower figure would mean that two million private copies were made onto these media in 1999. Such a number definitely meets the threshold of ordinariness as the Board interprets it.

Audio recording media that are clearly meant for purposes other than private copying are excluded. A case in point are microcassettes commonly used in dictating machines. Digital audio tapes are another, as for all practical purposes, they are used by professionals, not by individual consumers.

The definition of what is a blank audio recording medium is an open one. As markets evolve, new types may be identified if the Board is satisfied that consumers have found other ways to make private copies of their favourite music.

IV. ANALYSIS OF THE ECONOMIC EVIDENCE

Participants presented evidence about the nature and structure of the blank audio recording media industry, the economic impact of the levy proposed by CPCC and the impact that an emerging grey market might have on the relevant market. The evidence put forward by CPCC consists of a study prepared by the accounting firm of Grant Thornton. CSMA was content to rely on a rebuttal prepared by Professor James Brander and the testimony of a number of manufacturers, importers, resellers, purchasers and users of audio recording media. Each issue is examined in turn.

As will become clear, while the economic framework presented by Grant Thornton provides a helpful analytical tool, the study does not provide a reliable estimate of the likely economic impact of the proposed levy on the demand for blank audio recording media or on the revenues and employment levels of Canadian manufacturers and importers. Having said this, given that CSMA provided no quantitative economic impact evidence of its own, and since the amount of the levy is substantially lower than what CPCC proposed, the Board can only conclude that the tariff as certified should not have a significant negative effect on the industry.

A. THE BLANK AUDIO RECORDING MEDIA INDUSTRY

Extensive information on the Canadian blank audio recording media industry was provided during the course of these proceedings, addressing both current market characteristics and expected trends in the industry.

The specific forms of blank audio recording media covered in the proposed tariff includes audio cassettes, digital audio tapes (DATs), MiniDisc, CD-R, CD-RW, CD-R Audio and CD-RW Audio.[41] New forms of audio recording media are rapidly emerging. These include Digital

[41] CD-R stands for CD-recordable; these media can be written onto only once. CD-RW stands for CD-recordable rewritable; these media can be written onto many times. The Audio line of products was created at least in part to comply with US legal requirements. They are encoded so as to be recognized as audio products when played on digital audio recording equipment and may not be readable by all CD-ROM drives, but are otherwise

Versatile Discs (DVDs), memory sticks, smart cards and flash memory in portable audio equipment (such as the Diamond Rio) used to store and playback MP3 audio files typically downloaded from the Internet.

Current market trends for audio cassettes and digital media are fundamentally different. More than 80 per cent of Canadian households own a tape recorder, but demand for audio cassettes has been steadily shrinking. It declined by some 40 per cent between 1994 and 1998, and is expected to shrink by a further 12 per cent annually in 1999 and 2000. The majority of cassette sales will continue to consist of Type I tapes of 90 minutes in length.

By contrast, penetration for CD-R copying equipment (or "CD burners") is currently very low but should grow rapidly and with it, the demand for recordable CD media. According to witnesses for CSMA, that growth is currently driven by commercial users who use media to store data rather than copy music. However, the evidence and documents filed, including marketing materials and evidence of private copying practices in other countries, lead the Board to believe that the use of digital media for private copying is growing rapidly in Canada, and already represents a greater share of the market than most CSMA witnesses were prepared to acknowledge.

The share of other forms of digital recording media is much smaller, and probably will remain so. DAT recorders are almost exclusively used by professionals and DAT tape sales are not expected to grow significantly. MiniDisc technology has only attracted limited interest to date and CD Audio recorders have only recently become available in Canada. Sales volumes for the associated media are consequently negligible; percentage growth in their sales may be rapid, but volumes are likely to remain very small relative to the blank media industry as a whole.[42]

The Canadian marketplace is supplied by roughly 20 manufacturers and importers. Most media are imported rather than manufactured domestically.

CSMA's eight members, who account for more than 90 per cent of the Canadian audio cassette market and 60 per cent of the recordable CD market, rely exclusively on foreign-made media purchased through their parent companies. The balance of the industry is made up of independent firms which generally import blank audio recording media and, in a very few cases, assemble audio cassettes.

The following table summarizes the estimates of CSMA's industry panel of wholesale and retail prices for the various types of media under consideration.

TABLE I / TABLEAU I
Blank Recording Media Prices / Prix des supports audio vierges

Blank Recording Media / Supports audio vierges	Wholesale Price / Prix de gros	Retail Price / Prix de detail

technologically identical to their non-Audio counterparts.

[42] It may also be that the sale of CD-R Audio technology will never take off in Canada. Canadian legislation does not require the installation of copy protection mechanisms on digital audio recording equipment.

Type I Cassette de type I (1998)	$0.80	$0.89 - $1.49
Type II Cassette de type II (1998)	$1.60	$1.79 - $2.99
Type IV Cassette de type IV (1998)	$2.00	$3.99 - $6.99
DAT / Bande audionumérique (1998)	$8.80	$10.00 - $13.00
MiniDisc / Minidisque (1998)	$3.80 - $4.20	$5.00 - $6.00
CD-R Audio (1998)	$4.50 - $5.50	$8.00 - $10.00
CD-RW Audio (1998)	$9.00 - $11.00	$15.00 - $18.00
CD-R (current / actuellement)	• $1.70	$1.70 - $2.50
CD-RW (current / actuellement)	$2.00 - $5.00	$3.50 - $10.00

Prices are currently falling for most types of media, dramatically so in the case of CD-Rs. The relatively wide price ranges reflect packaging and branding variations, among other factors. Prices are currently falling for most types of media, dramatically so in the case of CD-Rs. The relatively wide price ranges reflect packaging and branding variations, among other factors.

CSMA also provided data on industry revenues and unit sales. Information was presented regarding sales trends in each case. Based on the information provided, the following table summarizes unit sales for 1998, along with the Board's expectations of the likely unit sales for 1999 and 2000.

TABLE II / TALEAU II
Blank Recording Media Sales Volumes (in millions of units)
Volumes de ventes de supports audio vierges (en millions d'unités)

Recording Media / Support	**1998** [43]	**1999** [44]	**2000**
Cassettes	23.9	20.9	18.5
DAT / Bandes audionumériques	0.1	0.1	0.1
MiniDisc / Minidisques	0.1	0.1	0.2
CD-R/RW Audio	-	0.2	0.3
CD-R/RW	21	46	88
Total	45.1	67.3	107.1

Anecdotal evidence was provided about the impact of downloading music from the Internet using MP3 and other similar formats. *Wired* magazine, in its August 1999 edition,[45] estimates

[43] Transcripts at 1618-1639; Exhibit CSMA-8, grossed up by just over 10 per cent to reflect sales by companies not included in the ITA/IRMA industry survey data provided in the exhibit: see Exhibits CSMA-37 and CPCC-23 (Appendix 4).

[44] The 1999 and 2000 estimates are based on the testimony of CSMA witnesses and the evidence filed. Given the absence of reliable price elasticities, the estimates do not take into account any impact the levy may have on sales.

Future sales of CD-Rs and CD-RWs are most difficult to predict. They are expected to grow rapidly and to become the dominant medium. Given the early stage of development of the market, it is not surprising to see that forecasts vary widely. The Board accepts CSMA's industry panel's estimate that some 21 million CD-Rs, including a relatively small number of CD-RWs, were sold in Canada in 1998, and in spite of the panel's less optimistic predictions, the Board expects that significant growth will occur during 1999 with sales of CD-Rs and CD-RWs surpassing 45 million, and further doubling to 88 million in 2000.

[45] Exhibit Board-2.

that between January and June 1999, 17 million MP3 files were downloaded each day. If this is correct, some 6 billion songs will be copied from the Internet in 1999, as compared to worldwide CD sales of 846 million in 1998. Many of these songs can then be burned onto blank CDs at home as personal compilations of music. The convergence of software availability, mass market pricing of CD burners and the slowness of the music industry's response in the form of the Secure Digital Media Initiative (SDMI) may have contributed to the explosive worldwide growth in recordable CD sales. The Board hopes to hear statistical evidence on the impact of this new phenomenon on private copying behaviour in the future.

B. THE ECONOMIC IMPACT OF THE LEVY

The Grant Thornton study looks at the potential impact of the levy on blank audio recording media from three perspectives.

First, even after adding the proposed levy, the cost of making home copies will remain well below the cost of pre-recorded sound recordings and, therefore, will continue to be an attractive choice for consumers. This is clearly the case with audio cassettes; as the established base of cassette recorders is large, the marginal cost of copying primarily consists of the cost of the cassette, with or without the levy. The relative cost of copying on CD-Rs is sensitive to the volume of copying involved. To date, relatively few consumers possess a CD burner; consequently, the study includes the amortized cost of the burner in its calculation of the marginal cost of making a copy onto a CD-R. It concludes that the cost of home copying on CD-Rs will generally be lower than the price of pre-recorded CDs if an individual copies at least 5 CDs per year.

Second, based on a theoretical consumer choice model, Grant Thornton seeks to demonstrate how an average household might react to the levy. Presuming that the average household's expenditure on these items is fixed, it shows that the introduction of the levy would result in a contraction of demand for all blank audio media. The contraction would be less pronounced for CD-Rs, given the lower relative price increase applicable to CD-Rs under CPCC's proposal. With a relatively minor increase in blank audio media expenditure, the average household could offset the impact of the levy; in doing so, it would substitute CD-Rs for analog media. Grant Thornton claims that this response to the levy is likely given the small increase in expenditure involved (i.e., in the order of $6 per household per year), among other reasons.

Third, Grant Thornton constructs an econometric model to estimate the impact of the proposed levy. The model involves the estimation of individual demand regressions for normal bias tapes, high bias tapes and CD-Rs; the intent is to estimate the individual impact of variables such as blank audio recording media prices, audio equipment prices and income on the demand for each type of medium. In effect, the exercise involves estimating the impact of the levy on the demand for normal tapes, high bias tapes and CD-Rs, holding all else constant.

Based on its econometric model, Grant Thornton finds that the proposed levy would stimulate overall demand for blank recording media, thereby increasing overall revenues and employment levels for Canadian importers and manufacturers. This counterintuitive finding is attributable to the lower percentage price increase proposed for CD-Rs relative to analog blank audio recording media. Grant Thornton expects this to generate a substitution effect causing consumers to shift

from tapes to CD-Rs more rapidly than otherwise. Based on these findings, Grant Thornton concludes that the introduction of the proposed levy will have a positive impact on the blank audio recording media industry in Canada.

The Board is of the opinion that Grant Thornton's home copying cost analysis sheds little light on consumers' likely reaction to the levy. In terms of the anticipated consumer shift from analog to digital recording technologies, it fails to fully account for the new equipment costs that most consumers would have to incur.

The theoretical household consumer choice model is also of limited practical value. It simply assumes that the average household will increase its audio recording media expenditures to cover the cost of the levy and, in the process, shift from analog to digital media. It fails to consider where that money will come from, given that the average household must live within a fixed budget and that most would have to purchase a CD burner before making a single digital copy. Simply assuming that the average increase is small and easily absorbed is ultimately not helpful.

Finally, the econometric estimates of the impact of the levy are unreliable. The general lack of statistical precision of the parameter estimates associated with the demand models renders the impact estimates derived using the models virtually meaningless absent any sensitivity analysis. As Grant Thornton conceded and as the statistical results clearly demonstrate, all three demand models are plagued by multicollinearity problems. To address this problem, Grant Thornton chose to remove a number of variables from each of the models, including the time trend and substitute blank audio recording media price variables. However, even with the removal of several variables, the vast majority of the remaining parameters are still statistically insignificant. Even if this were not the case, the removal of key variables would not necessarily increase the accuracy of the remaining parameter estimates. The reported results strongly suggest that the models are incapable of accurately disentangling the individual effects of the various factors affecting demand levels for each form of blank audio recording media being modelled.[46]

C. THE IMPACT OF GREY MARKET TRANSACTIONS

Both CPCC and CSMA examine potential grey market activities arising from the introduction of a blank audio recording media levy in Canada.[47] Grant Thornton recognizes that price differences relative to the US could be significant for cassettes, less so for CD-Rs. Despite this, it offers several reasons as to why grey market activities would likely not be significant. These include the low value of the Canadian versus the US dollar, the lack of legitimate distribution channels for grey market sellers, the relatively modest amount of the levy relative to the average household's recreational expenditures, and evidence that suggests that consumers generally see the levy as "fair". It suggests that marketing activities such as loss leader pricing and bundling could help reduce the impact of the levy on consumers, and that security labelling, such as "levy paid" indicated on products, could reduce grey market activities. It also suggests that shipment

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[46] I.e., accurately identifying own price, cross price, diffusion versus other effects.

[47] For the purposes of this decision, grey market sales are sales in Canada of substitutable non-levied blank audio recording media. A grey market is a legal market that develops from the importation of goods from abroad. Ordinarily, these goods sell below the domestic market prices, even after custom duties have been paid.

costs and exchange rate considerations would largely eliminate the incentive to import CD-Rs through the Internet from the US with or without the levy in place.

Professor Brander took issue with Grant Thornton's conclusions on the grey market. In his view, many factors would increase grey market activities if the proposed levy was approved. Large differences in price would exist. Exchange rate fluctuations would ultimately affect the price for all blank media, whether purchased on the grey market or through conventional channels. It would be relatively easy to bring tapes back from the US when crossing the border. Internet or telephone sales channels would provide easy means of purchasing tapes directly from abroad. Small numbered companies could set up on a "hit and run" basis to import and distribute grey market media. And, more importantly, commercial users with large-scale requirements could readily bulk order direct from the US.

Several of CSMA's industry witnesses also believe that significant grey market activities would result from the introduction of CPCC's proposed levy. They admit that grey market activities are not uncommon today, even without the levy in place. Prices are changing rapidly, especially with respect to CD-Rs, making it difficult to forecast and compare prices that may exist in Canada relative to the US after the levy is in place.

There is little in the way of reliable evidence on the record that could serve to reasonably estimate the impact a levy may have in this respect. The likelihood of increased grey market activities is directly related to differences in price in Canada relative to other countries, especially the US. Such activities already occur even in the absence of a levy.

The levy that the Board sets in this decision will not, in its opinion, have a significant effect on grey market activities in Canada. Some argue that anything more than a token amount will have an impact in a market with slim profit margins and arguably highly elastic demand. However, this must be weighed against the significant barriers and inconvenience faced by anyone wishing to import blank audio recording media for their own use. As for those who may attempt to retail grey market media in Canada, they are subject to the levy since they import blank audio recording media for the purpose of trade. One can expect CPCC to react to commercial grey market activities if they become significant.

The experience of the 19 European countries that have implemented tape levy schemes indicates the need for cooperation between the collective, the importer and the retailer if the implementation of a regime is to avoid large-scale price distortions in the marketplace. European countries that have been most successful in this respect have implemented schemes that take into account the interest of tape retailers as well as those of rights owners. This may involve public education and promotional campaigns, public recognition for those who make a special effort in carrying out their obligations under the levy, and ensuring that the proceeds from the levy are perceived as beneficial for all parties concerned in building a strong music industry.

V. THE AMOUNT OF THE LEVY

In order to set the amount of the levy, the Board must deal with tariff structure, select a valuation methodology and proceed to certain adjustments.

A. THE TARIFF STRUCTURE

CPCC asks for a tariff set at a fixed amount per 15 minute interval. CSMA prefers a rate set as a percentage of the wholesale price.

A tariff set as a percentage of the wholesale price would be unfair. Wholesale prices of blank audio recording media are expected to fall significantly; the value of the underlying intellectual property will not.[48]

Furthermore, for administrative ease and simplicity, and to minimize the cost of determining the levy payable, it is more appropriate to establish it at a set price for each type of medium, rather than on the basis of 15-minute intervals. For the same reasons, types should be established only where the proportion of media used for private copying varies significantly. Consequently, the Board establishes a single rate for all audio cassettes, one for CD-R/RWs and one for CD-R/CD-RW Audio and MiniDiscs.

B. THE VALUATION MODEL

CPCC, through Messrs. Stohn and Audley, offered the only complete valuation model.

There is presently no market-based mechanism that can be relied on to establish the value for the use of music rights for private copying. Messrs. Stohn and Audley therefore considered several alternative proxies in an attempt to reflect the value of private copying by considering comparable situations involving the use of copyrighted music where voluntary transactions occur between a willing seller and a willing buyer. The one they prefer values private copying based on the remuneration that would typically flow to rights holders in the case of pre-recorded CDs. Such a proxy can be measured and documented with reasonable accuracy. CPCC argues that the remuneration flowing from the purchase of pre-recorded media should be used to set the levy since the privately made copy contains exactly the same material as the pre-recorded original and serves as a substitute for it.

Professor Brander disagreed with this approach. In his view, it reflects the price a willing seller was prepared to charge for the right to copy music, but not the price that would result in the marketplace. He argued that a copy has a reduced value for the consumer, resulting from the diminishing marginal utility associated with a copy. He referred to several approaches that could be used to establish that diminished utility or alternatively, to adjust the levy derived using the Stohn/Audley model.

Messrs. Stohn and Audley recognize that the price of underlying rights varies, with a lower price applying to secondary market channels. This is why they factor into their model the lower royalties that are commonly paid for record club and budget line sales. They also recognize that the price of underlying rights is less, at least with respect to performers and makers, when a musical work is recorded on a lower price medium – e.g., analog cassette tapes versus CD.

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[48] Professor Brander recognized this shortcoming during his testimony: transcripts at 2934.

Subject to the adjustments identified below, the general framework proposed by Messrs. Stohn and Audley can reasonably be used as a starting point to set the amount of the levy. It has the merit of using as a proxy what has to be the most similar market possible, a market which itself allows for fluctuations according to market conditions. It also has the merit of being the only complete model offered by any participant.

C. CALCULATING THE AMOUNT

The Board's calculation of the levy is summarized in the following table:

TABLE III / TABLEAU III **CALCULATION OF THE LEVY / CALCUL DE LA REDEVANCE**		
A. *Authors' remuneration* / *Rémunération des auteurs* [mechanical licence royalty per song per top-line CD × average number of songs per CD] / [prix de la licence de reproduction mécanique par chanson par CD haut de gamme × nombre moyen de chansons par CD]	7.1¢ × 13	$0.923
B. *Performers' and makers' remuneration* / *Rémunération des artistes-interprètes et producteurs* [Top-line CD SLRP × % royalty × discounts] / [PDS d'un CD haut de gamme x % de redevance x réductions]	$19.50 × .18 × (1 • .363)	$2.23587
C. *Total Royalties per top-line CD / Redevances totales par CD haut de gamme* [*A*+*B*]	$0.923 + $2.23587	$3.15887
D*. Eligible authors' weighted share of all private copies / Part pondérée des copies privées revenant aux auteurs admissibles* [(*A* ÷ *C*) × % of private copies using eligible authors' repertoire] / [(*A* ÷ *C*) × % des copies privées utilisant le répertoire des auteurs admissibles]	($0.92 ÷ $3.15887) × 96%	27.96%
E. *Eligible performers' weighted share of all private copies* / *Part pondérée des copies privées revenant aux auteurs-interprètes admissibles* [(*B* ÷ *C*) × % of private copies using eligible performers' repertoire ÷ 2] / [(*B* ÷ *C*) × % des copies privées utilisant le répertoire des artistes-interprètes admissibles ÷ 2]	($2.23587 ÷ $3.15887) × 28%÷2	9.91%
F. *Eligible makers' weighted share of all private copies* / *Part pondérée des copies privées revenant aux producteurs admissibles* [(*B* ÷ *C*) × % of private copies using eligible makers' repertoire ÷ 2] / [(*B* ÷ *C*) × % des copies privées utilisant le répertoire des producteurs admissibles ÷ 2]	($2.23587 ÷ $3.15887) × 23%÷2	8.14%
G. *Qualifying repertoire's weighted share of all private copies / Part pondérée des copies privées attribuable au répertoire admissible* [*D* + *E* + *F*]	27.96% + 9.91% + 8.14%	46.01%
H. *Imputed remuneration of qualifying repertoire per top-line CD* / *Rémunération imputée du répertoire admissible par CD haut de gamme* [*C* × *G*]	$3.15887 × 46.01%	$1.45339
I. *Adjusted remuneration (secondary market)* / *Rémunération rajustée (marché secondaire)* [*H* ÷ 2]	$1.45339 ÷ 2	$0.72670
J. *Levy on cassettes / Redevance sur les cassettes* [*I* ÷ 2 × % media purchased by individuals × % of purchases used to private copy (no waste factor)] / [*I* ÷ 2 × % des supports achetés par des	$0.72670 ÷ 2×.8×.8	$0.233

consommateurs × % des achats utilisés pour la copie privée (pas de facteur de perte)]		
K. *Levy on CD-R Audio, CD-RW Audio, MiniDisc / Redevance sur les CD-R audio, les CD-RW audio et les minidisques* [*I* × % media purchased by individuals × % of purchases used to private copy × (1 • % waste)] / [*I* × % des supports achetés par des consommateurs × % des achats utilisés pour la copie privée × (1 • % de perte)]	$0.72670 × .95 × .95 × (1 • .075)	$0.608
L. *Levy on CD-R, CD-RW / Redevance sur les CD-R et les CD-RW* [same as *K* / meme équation qu'en *K*]	$0.72670 × .20 × .40 × (1 • .10)	$0.052

The model chosen by the Board first estimates the average remuneration that typically flows to all authors, performers and makers for a top-line pre-recorded CD [paragraph *1*, below]. That amount is reduced first to remove the non-eligible repertoire [*2*], and then to account for the nature of the private copying market [*3*]. The amount is further adjusted to ensure that the levy accounts only for private copying of sound recordings: sales to others than individual consumers, uses other than private copying and wasted or spoiled media are discounted. Another adjustment is made for audio cassettes to account for differences between analog and digital recordings [*4*].

i. Establishing the Typical Remuneration for a Top-Line Digital Recording

The first step is to establish how much authors, performers and makers typically get for the sale of a top-line pre-recorded CD.

a. Authors

CPCC asks that the starting point be 7.1¢ per song. This is the price at which reproduction licences are currently issued. CSMA suggests to reduce this amount to 6.1¢ to account for the fact that some older licences may set a lower price. The Board accepts Mr. Stohn's testimony to the effect that even in those cases, industry practice is to pay the current rate. In any event, the tariff is prospective.

The Board also accepts the Stohn/Audley's estimate that the average compact disc contains 13 selections. Other estimates proved unconvincing.

The Board rejects CSMA's proposal to adjust authors' royalties for the so-called "controlled composition" clauses. These are much less prevalent in Canada than in the US; in markets such as Quebec, they have disappeared altogether.

Based on these determinations, authors typically receive 92¢ for a top-line CD [(7.1 × 13)].[49]

[49] In the text of these reasons, the figures are rounded to the nearest penny. No rounding was made for the purposes of calculating the actual amount of the levy. See Table III.

b. Performers and Makers

Messrs. Stohn and Audley base the remuneration to performers and makers on a suggested retail list price (SRLP) of top-line pre-recorded CDs of $19.50. Nothing suggests this estimate is not appropriate.

According to Messrs. Stohn and Audley, the royalty payable to the recording artist who does not pay the costs of a sound recording, while known to vary, is typically in the order of 12 per cent of the SRLP. This rate is normally subject to further reductions representing 36.3 per cent.[50] In cases where the recording artist pays the costs of a sound recording and approaches a record company to manufacture, distribute and market it, the royalty is typically 50 per cent higher or 18 per cent.

In the Board's view, the record company that pays royalties of 18 per cent to a recording artist acts only as promoter and distributor; the performer is the maker. Consequently, 18 per cent of the SRLP appears to account for the remuneration of both performer and maker and will be used as basis for the calculation of the levy.[51]

Messrs. Stohn and Audley suggested other adjustments. For example, they proposed to add an amount for the record companies' development and administrative costs, and a profit margin. In the Board's view, this merely serves to inflate the remuneration rate.

Other adjustments deserve greater attention. For example, it appears that record companies make additional payments to AFM on account of "session" musicians, who clearly are performers. On the other hand, the royalty payable to a recording artist typically includes the remuneration payable to the artistic producer, who does not share in the private copying levy. The Board considers that these factors, and possibly others, roughly offset one another; as a result, 18 per cent of the SLRP, reduced by 36.3 per cent, fairly accounts for what performers and makers receive on the sale of a top-line pre-recorded CD.

Based on these determinations, performers and makers typically receive $2.24 for a top-line CD [$19.50 × .18 × (1•.363)]; all rights owners typically receive $3.16 [.92¢ + $2.24].

ii. Adjusting for the Use of the Non-Eligible Repertoire

The next step involves an adjustment to discount the non-eligible repertoire. This involves two elements. The first, already considered, requires establishing the share of private copies that uses the eligible repertoire.[52] The second requires setting relative values or weights for the three colleges of rights owners. The two sets of figures are then used to calculate the weighted share of

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[50] These are known as the "container deduction" and "free goods" allowance. The resulting discounted royalty is sometimes referred to as the "penny rate".

[51] CSMA sought an adjustment to reflect the variation in typical royalty rates for artists associated with independent labels, major Canadian labels or Quebec-based labels. The Board accepts that the adjusted rate of 18 per cent already accounts for this.

[52] See Part III.B, *supra*.

all private copies for each college [Table III, lines *D*, *E* and *F*]. Added up, these give us the weighted share of all private copies attibutable to all the eligible repertoire [Table III, line *G*].

While alternative weighting schemes were discussed, CPCC and CSMA agree that the most appropriate way of aggregating data for the three colleges is to rely on the ratio of the remuneration received per top-line album by authors on the one hand, and performers and makers on the other, and then to split equally between them the combined share attributable to performers and makers. The Board agrees with this approach. This means that on a sound recording where all rights owners are eligible, authors would receive 29.2 per cent [0.92 ÷ 3.16] of the royalties, while performers and makers would receive each 35.4 per cent [2.24 ÷ 3.16 ÷ 2]. Applying these factors to the percentages that represent the eligible repertoire in each college means that overall, the levy should be set at 46 per cent of what it would be if all of the repertoire being copied were eligible, i.e.:

(1) 96% of 29.2% =	27.96%
(2) 28% of 35.4% =	9.91%
(3) 23% of 35.4% =	8.14%
Total:	46.01%

(See Table III, line G)

Based on these determinations about the use of the eligible repertoire, eligible rights holders account on average for $1.45 of the price of a top-line CD [$3.16 × .46]; non-eligible authors, performers and makers account for the rest.

iii. Adjusting the Remuneration to Account for the Secondary Nature of the Market

The next step involves adjusting the remuneration to the characteristics of the private copying market.

In the Board's view, if there were a free market for private copies, the price paid for the underlying intellectual property would be much lower than royalties paid for top-line recordings. It is not reasonable to assume that consumers would pay as much for the underlying rights in a private copy of a CD they already own; on this point, the Board agrees with Professor Brander. It is also not reasonable to assume that there is a one-to-one correlation between lost sales and private copying activity. Economic theory tells us that faced with such market conditions, rights owners would lower their prices in order to maximize their revenues.

The recording market already sets lower prices in secondary markets such as record club and budget line sales. Authors get roughly 75 per cent of the royalties of top-line recordings, while performers and makers only get half. In the Board's view, prices performers and makers get in secondary markets better reflect what would occur in a free market for private copies. This conclusion is supported by Professor Brander's alternative valuation models. Consequently, the proxy will be discounted by 50 per cent to reflect the secondary nature of the private copying market.

Based on these determinations, the adjusted remuneration of all eligible rights holders in a

private digital copy is 73¢ [$1.45 ÷ 2].

iv. Other Adjustments

Messrs. Stohn and Audley, mostly relying on the Circum Network survey, make further adjustments to account for the proportion of blank recording media purchased by individual consumers and for the proportion of those purchases used to make private copies. They also propose an adjustment to account for price differences between digital and analog media.

CSMA agrees with these adjustments, adding that consideration should be given to unused recording time and wasted media. It also proposes that the Board rely more on the findings of the AC Nielsen survey, although it accepted the Circum Network survey in other respects.

The Board's formula adjusts for the percentage of media purchased by individual consumers, the percentage of those purchases used to copy music, the percentage of waste and price differences between digital and analog media.

a. Adjusting for Larger Capacity and Reuse

Typical pre-recorded CDs contain between 50 and 60 minutes of music and can be copied with ease onto a 60 or 90-minute cassette. Typical recordable CDs can record up to 74 minutes of music. However, the Board will not adjust the levy to reflect the longer playing time of blank audio recording media as compared to pre-recorded ones for the following reasons. First, experts on both sides agree that consumers do not use blank audio recording media to full capacity when copying music. Accounting for the longer playing time of blank audio recording media would trigger a further correction for unused capacity; the Board's approach makes this adjustment unnecessary. Second, many blank audio recording media are used to record complete albums rather than personalised compilations. This is especially true of CD-Rs. An entire recorded CD can be copied onto another CD with relative ease; compiling 13 or more tracks from different sources on a computer's hard drive before copying these onto a CD usually takes a good deal longer and requires greater technical skill.

Messrs. Stohn and Audley argue that if unused capacity is to be taken into account, so should reuse of blank media. The Board is not convinced of this. Reusing the medium erases the existing content. The value of a temporary copy probably is lower than that of a permanent one. Most significantly, CD-Rs cannot be reused.[53]

b. Adjusting for the Market Share of Media Actually Used for Private Copying and for Differences Between Analog and Digital Media: the Final Rate

(i) Audio cassettes

CPCC and CSMA favour deriving the remuneration applicable to audio cassettes directly from

[53] Sales of CD-RWs, which can be reused, are so low as not to affect this conclusion.

the rate set for digital media, rather than having the rate calculated separately. The Board agrees. The retail and wholesale prices of top-line pre-recorded cassettes are approximately half of those of top-line CDs. Consequently, the starting point for calculating the final rate for audio cassette should be half the starting point for digital media.

Messrs. Stohn and Audley assume that all audio cassettes are purchased by individual consumers. CSMA suggests that the figure is only 60 per cent. There is little evidence to assist the Board in this respect; the truth probably lies somewhere in between. Accordingly, the Board will use 80 per cent in its calculations. In this case, as for all other types of media, the denominator includes sales to those who may benefit from CPCC's proposed zero-rating scheme [54] and to associations representing persons with perceptual disabilities.

Next, CPCC suggests that consumers use 87 per cent of the cassettes they purchase to copy sound recordings. CSMA's estimates range from 69 to 76 per cent. The Board will use a mid-range number of 80 per cent.

As audio cassettes are reusable, there is no need to provide for an adjustment for wasted media.

Consequently, the levy for audio cassettes is set at 23.3¢ [73 ÷ 2 × 0.8 × 0.8].

(ii) CD-R Audio, CD-RW Audio and MiniDisc

CD-Rs Audio, CD-RWs Audio and MiniDiscs and their accompanying hardware are marketed for the sole purpose of copying music, and it is reasonable to assume that 95 per cent of these media are purchased by individual consumers. It is also reasonable to assume that 95 per cent of individual consumers' purchases of those media are used to copy pre-recorded sound recordings, the rest being used to copy other types of music. Finally, it can be expected that some percentage of those media will be wasted or spoiled. In the absence of any hard evidence on this subject, the Board considers reasonable to allow for an adjustment of 7.5 per cent on this account.

Consequently, the levy for these media is set at 60.8¢ [73 × .95 × .95 × (1 • .075)].

(iii) CD-Rs and CD-RWs

Messrs. Stohn and Audley submit that 38 per cent of CD-Rs and CD-RWs are purchased by individual consumers. CSMA suggests a figure of somewhere between 15 and 20 per cent. Again, the evidence on this matter is fragmentary and, to some degree, unsatisfactory. Twenty per cent seems a reasonable estimate of the consumer segment of that market at this time. The Circum Network survey produced such a small sample of respondents who were using digital equipment for private copying purposes that its results, in this respect, are unreliable.

Messrs. Stohn and Audley then suggest that 54 per cent of CD-Rs and CD-RWs purchased by individual consumers were used to copy music. CSMA suggests a much lower figure of 18 per cent; it discounts blank audio recording media that have been purchased but not used yet. It is not

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[54] See Part VI.D, *infra*.

reasonable to assume that none of these media will be used to copy music. On the other hand, these media are very often used for purposes such as backing up data and software applications, dealing with large texts and storing photographs. In the Board's view, based on the little information available, individual consumers use 40 per cent of the CD-Rs and CD-RWs they purchase to copy sound recordings.

It seems easier to spoil a CD-R than a CD-R Audio, CD-RW Audio or MiniDisc; the Board will thus allow a 10 per cent spoilage adjustment.

Consequently, the levy for these media is set at 5.2¢ [73 × .20 × .40 × (1 • .10)].

If the projected sales figures set out in Table II prove to be correct, the levy will generate approximately $8.85 million dollars in 2000. This figure does not take into account the impact of any grey market activity or of the proposed zero-rating scheme.

VI. OTHER MATTERS

A. DESIGNATING THE COLLECTING BODY

Given the absence of debate on the issue, CPCC is designated as the collecting body for the private copying tariff pursuant to paragraph 83(8)(*d*) of the *Act*.

B. APPORTIONING THE LEVY AMONG THE COLLECTIVES

Section 84 of the *Act* requires that the collecting body distribute the levies to the collectives representing eligible authors, eligible performers and eligible makers, in the proportions fixed by the Board. CPCC was content to file an agreement reached by its member collectives on the issue, and asked that the tariff reflect the agreement.

The Board sees no reason to act in this manner. The formula used to set the amount of the levy is the logical reflection of the valuation of the three repertoires, ultimately derived from the proxy submitted by the experts for the CPCC. It is reasonable that this be reflected in the apportionment of the royalties. Collectives remain free to agree otherwise.

The manner in which CPCC proceeded made it impossible to allocate the royalties among the various collectives representing part of any given college of rights owners. Consequently, the tariff allocates the shares to each college globally.

The percentage applicable to each college is that college's share of all private copies [Table III, lines *D* to *F*] over the weighted qualifying repertoire adjustment [Table III, line *G*]. As a result, authors are entitled to 60.8 per cent [27.96 ÷ 46.01], performers to 21.5 per cent [9.91 ÷ 46.01] and makers to 17.7 per cent [8.14 ÷ 46.01].

C. THE TARIFF WORDING

Only the following comments are required concerning the wording of the tariff.

i. Title

The title reflects that which the tariff truly does. It is not "for" private copying (which would tend to imply that media not used for that purpose are not subject to the levy) but (as is stated in s. 81) "in respect of" private copying.

ii. Notes

Three notes precede the tariff. They provide information that cannot really be put in the core of the tariff. The Board considers that this information should be included at the start of the tariff, to ensure that the tariff is never circulated without them.

Note 1 paraphrases sections 82 and 86, which set out in essence the liability of payers, in language that may be more easily understood by the average reader. Notes 2 and 3 address undertakings made by CPCC but which are strictly speaking outside the purview of the tariff.

iii. Definition of "Blank Audio Recording Medium"

The expression is defined in the *Act* and therefore, cannot be modified by the Board. However, the Board sought to incorporate into the tariff a form of the definition that informs the reader while responding to market evolution.

The definition of "audio recording medium" is not needed in the tariff; for that reason, that notion is merged into the definition of "blank audio recording medium." The media that the tariff targets explicitly are listed but the definition remains open ended.

The definition also allows for Cabinet designations. Consequently, if one occurs, there will be no argument that the tariff ought to be changed to account for those media. A footnote is included to inform the reader that no such declaration has been made to date.

iv. Exempt Media

Subsection 3(2) paraphrases the provisions of the *Act* that identify which sales do not trigger the levy. While strictly speaking unnecessary, this subsection allows the reader to know at a glance which media can be sold without having to take the levy into account.

v. Administrative Provisions

For reasons of consistency, the Board favoured the formulation used in the neighbouring rights and other relevant tariffs over what the participants proposed.

The Board opted for reports and payments every two months, with the option for those whose payments are relatively small to report every six months. The Board hopes that this will reconcile both the need for timely payments with a reduction of the reporting burden on smaller manufacturers and importers.

As with other Board tariffs, manufacturers and importers will be required to pay for an audit if

royalties are underreported by ten per cent. However, this threshold will be raised to twenty per cent for the first two accounting periods of 2000 to allow manufacturers and importers to adjust to the new tariff.

vi. Duration of the Tariff

Section 53 of *An Act to Amend the Copyright Act* requires that the first private copying tariff the Board certifies be for the years 1999 and 2000.

However, in a letter addressed to the Board and a press release both dated January 18, 1999, the members of CPCC stated that they would delay collecting the levy until the earlier of the date of the Board's decision on the proposed levy or December 31, 1999. In doing so, the collectives responded to mounting public pressure and uncertainty surrounding the potential retrospective application of the tariff. The Board thought it appropriate to refer to this undertaking in the notes preceding the tariff to bring it to the attention of readers.

D. THE ZERO-RATING SCHEME

The Board cannot shelter from the levy users who do not make private copies. The only exception can be found in section 86 of the *Act*, which provides that no levy is payable on sales to associations representing persons with perceptual disabilities. Principles of statutory interpretation require the Board to conclude that it cannot create further exceptions.

Furthermore, it cannot be seriously argued that institutional or corporate buyers are exempt from the levy. The levy targets media, not persons. It is paid by manufacturers and importers, who are then free to integrate it to their pricing decisions in any manner they wish.

To help alleviate the effect of the levy on certain groups, CPCC has proposed to enter into agreements according to which manufacturers and importers would be allowed to sell recording media to certain categories of users without having to pay the levy. Much time was spent discussing CPCC's proposal. As the Board cannot create exemptions, the tariff is not the place to deal with such a scheme. Again, no account was taken of that proposal in setting the levy. Recording media subject to the scheme were treated on the basis that the levy would be collected on their sale. As a result, there is no need to discuss the merits of Bluebird Events' alternative proposal.

Having said this, the existence or absence of a mechanism that accommodates certain users of media who have to live with the consequences of the regime although they are not the reason for which it was created may well have an impact on the amount that constitutes a reasonable rate. For example, a rate so high that it threatens a manufacturer's existing relationship with large institutional clients could well be inherently unreasonable, irrespective of the value of the underlying intellectual property, unless CPCC finds a way to accommodate the manufacturer so that it can maintain that relationship. Fortunately, in the Board's view, the rates set in this decision are at a level such that they need not be examined from that angle, at least for the time being.

CPCC's proposed scheme and any revisions made to it are facts that must be brought to the

attention of manufacturers, importers and users of blank audio recording media. This is why the notes preceding the tariff make express reference to it.

Claude Majeau
Secretary to the Board