

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 William J. Vancise
Mrs. Sylvie Charron
Mrs. Jacinthe Th  berge

Tariff of levies to be collected by CPCC in 2008 and 2009 on 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 performers' performances of such works or of sound recordings in which such works and performances are embodied

Reasons for decision

I. INTRODUCTION

[1] On January 31, 2007, the Canadian Private Copying Collective (CPCC) filed a statement of proposed levies for 2008 and 2009, to be collected in respect of the reproduction for private use of musical works embodied in sound recordings, of performers' performances of these works or of sound recordings in which such works and performances are embodied ("private copying"). On February 10, 2007, the Board published in the *Canada Gazette* the proposed tariff and a notice concerning the right to object. This is the fifth time since the inception of the private copying regime that the Board is called upon to certify a tariff on the sale, in Canada, of blank audio recording media.

[2] The Canadian Broadcasting Corporation (CBC), the Retail Council of Canada (RCC), the Canadian Association of Broadcasters (CAB), the Canadian Storage Media Alliance (CSMA), the Canadian Wireless Telecommunications Association (CWTA) and Dataware Corporation filed timely objections to the proposed tariff. Some individuals also expressed interest in the proceedings.

[3] The proposed tariff targeted, among other things, products that can record, store and play back sound recordings without the need for an external recording medium (“digital audio recorders”). On April 10 and 20, 2008 CSMA and RCC respectively applied for a ruling that the Board could not certify a tariff that targets digital audio recorders; in their view, the Federal Court of Appeal had already ruled¹ that these devices are not “audio recording media” as defined in the *Copyright Act*. On July 19, 2007, the Board dismissed the applications.² On January 10, 2008, the Federal Court of Appeal quashed the Board’s decision.³ On March 27, 2008, the Board struck out all portions of the proposed tariff dealing with digital audio recorders.⁴ On June 8, 2007, CPCC had already indicated that it was no longer seeking to levy removable electronic memory cards. As a result, the proposed tariff for 2008-2009 now targets only audio cassettes, recordable and rewritable CDs and MiniDiscs.

[4] Meanwhile, on December 18, 2007, the Board had issued a decision extending on an interim basis the application of the existing tariff for the period starting on January 1, 2008.⁵

[5] As a result of the decision of the Federal Court of Appeal, CSMA withdrew from the proceedings. The CAB and CBC also withdrew after reaching an agreement with CPCC including the application of the zero-rating program. CWTA withdrew after receiving confirmation that the tariff would not apply to removable electronic memory cards or mobile phones. Dataware Corporation also withdrew. RCC, the only remaining objector, stated that it would not present evidence or call witnesses but would maintain a “watching brief”. Consequently, CPCC was the only party who participated in the process.

[6] In order to expedite matters and to properly protect the public interest, the Board sent to CPCC a number of questions in advance of a one-day hearing held on April 28, 2008. On May 13, 2008, CPCC provided written answers to some of the Board’s questions.

[7] On May 30, 2008, Z.E.I. Media Plus Inc. (Z.E.I.) filed motions with the Board. Z.E.I. sought to intervene in the present proceeding and to vary all past tariffs, claiming that certain types of recordable CDs are not ordinarily used by consumers to copy music and as such, cannot be the subject of a private copying levy. The Board allowed Z.E.I. to intervene and put in place a process that would allow creating the evidentiary record required to deal with Z.E.I.’s allegations.

[8] On November 6, 2008, CPCC requested that the Board certify a tariff for 2008-2009 without waiting to deal with Z.E.I.’s application to vary. At the same time, CPCC undertook to either

¹ *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, (F.C.A.)[2005] 2 F.C. 654.

² *Private Copying 2008-2009 (Preliminary Motions)*, [Board decision of July 19, 2007](#).

³ *Apple Canada Inc. v. Canadian Private Copying Collective 2008 FCA 9*.

⁴ *Private Copying 2008-2009 (Preliminary Motions)*, [Board decision of March 27, 2008](#).

⁵ *Interim tariff of levies to be collected by CPCC in 2008 on the sale of blank audio recording media in Canada*, [Board decision of December 18, 2007](#).

refund or not collect any levy on recording media which the Board might decide ought not to be levied as a result of Z.E.I.'s application to vary.

II. ANALYSIS

[9] Since the inception of the private copying regime, the Board has always applied or examined the “Stohn/Audley model” (a valuation model proposed by CPCC and developed by Messrs. Stephen Stohn and Paul Audley) before certifying the tariff. That model has always used the amount of remuneration received by rights holders from the sale of a prerecorded CD as the proxy for the amount they should receive for private copying. Yet, both CPCC and the Board have always felt that an alternative, possibly better proxy, would be the market for digital downloads (the “digital proxy”). There have always been several obstacles to using that proxy. We conclude once again that these obstacles have not yet been sufficiently eliminated.

[10] One obstacle relates to the degree of maturity of the digital download market. Between 2005 and 2007, that market grew very rapidly, essentially doubling every year. Messrs. Stohn and Paul Audley are convinced that the market is mature enough to be used as a reliable proxy. We are not. Physical CDs are still ten times more important than digital downloads in the recorded music market. It would be premature to use a proxy that is based on such a small share of the market, particularly when information is readily available on the rest of the market and that a satisfactory valuation model based on that information has been tested several times.

[11] Another obstacle in using the digital proxy is the unavailability of information in respect of two of the three types of rights holders. We now know what authors get paid for the reproduction of musical works in digital downloads: the Board set that remuneration in March 2007.⁶ However, information still is insufficient to use the digital proxy to derive the remuneration of the other two groups of rights holders. New arrangements are emerging between record companies and rights holders; as a result, Mr. Stohn was unable to provide reliable numbers on the performers' and makers' remuneration in the digital download market. Using the digital proxy at this point would imply an asymmetric treatment between the authors' remuneration and the performers' and makers' remuneration, since we would have to continue to rely on the physical CD proxy for the latter. This asymmetry becomes particularly problematic in the treatment of the value of ancillary copies, for reasons that need not be expanded upon.

[12] Consequently, we conclude that the digital proxy is not robust enough to be useable in these proceedings. On the other hand, the Stohn/Audley model, based on the prerecorded CD proxy, continues to be sufficiently reliable to be of help in setting the royalty rates. In the rest of these reasons, all references to lines are to lines in the appendix.

⁶ *CMRRA/SODRAC Inc. (Online Music Services) for the Years 2005 to 2007*, [Boarddecision of March 16, 2007](#).

A. GENERAL ADJUSTMENTS

i. Authors' Remuneration

[13] Messrs. Stohn and Audley estimate at 8.2¢ the weighted average of royalty rates applicable to mechanical licences issued by the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for the Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) in 2008. After applying deductions to account for controlled composition clauses, free goods provisions and songs longer than five minutes, they obtain a rate of 7.30¢. This is what we use as the starting point for setting the authors' remuneration.

[14] The second deduction reflects the record club and the budget-line sales. Messrs. Stohn and Audley estimate that these now are only 10.19 per cent of sales. Applying the same 25 per cent discount as in the past results in a discount of 2.55 per cent to be applied to the starting point. Using 15 as an average number of tracks on a prerecorded CD, we obtain an authors' remuneration of \$1.07. (Line F)

ii. Performers' and Makers' Remuneration

[15] The first step is to set the base CD price. Most record companies no longer base royalties on the suggested retail price list, but rather on the published price to dealers (PPD). We accept this and use the average PPD of \$12.98 provided by CPCC.

[16] The typical royalty rate for performers is in the range of 14 to 16 per cent of PPD. We use the average of 15 per cent. As in the past, we increase that proportion by half, to 22.5 per cent, to account for the makers' portion of the remuneration.

[17] Messrs. Stohn and Audley submit that although container deductions and free goods allowances have been abandoned, record companies typically offer a high-volume discount in the range of 5 to 15 per cent. We agree with this discount and therefore use the average of 10 per cent. We also apply a discount of 50 per cent of the top-line CD royalty for budget-line and record club sales. Further adding the payment of 7¢ made to the American Federation of Musicians results in a performers' and makers' remuneration of \$2.56. (Line N) The total royalties per prerecorded CD is \$3.63. (Line O)

iii. Qualifying Repertoire Adjustment

[18] The use of the qualifying repertoire of performers and makers with regard to private copying is now 30 and 23 per cent respectively, a slight increase compared to what the Board used in the past. The authors' qualifying repertoire use remains unchanged at 96 per cent. These repertoire adjustments bring the imputed remuneration to \$1.70. (Line T)

iv. Adjustment for Ancillary Nature of Activity

[19] Consistent with what the Board has done in the past, we apply a deduction of 50 per cent to the 20 per cent of private copies that are made of a prerecorded CD the copier owns and of 25 per cent on all the other copies. The resulting adjusted remuneration for all rights holders is \$1.19. (Line W) Using an average of 15 tracks per prerecorded CD, we obtain an adjusted remuneration per track of 8¢. (Line X)

B. SPECIFIC MEDIA

i. Audio Cassettes

[20] In 2006-2007, 26.1 million private copies were made onto audio cassettes.⁷ This number has decreased consistently since 1998. It remains lower than the number of personal musical copies made onto either DVDs or memory cards, which are not yet subject to the levy. We agree with Messrs. Stohn and Audley that the importance of audio cassettes as a medium for private copies will continue to decrease.

[21] The percentage of all private copies made onto audio cassettes declined from 4 per cent in 2005-2006 to 2 per cent in 2006-2007. However, it remains that 57 per cent of audio cassettes are being used to copy music. This ratio is much higher than the corresponding number (7 per cent) for DVDs. We thus conclude that audio cassettes continue to be ordinarily used by individuals to copy music.

[22] In earlier decisions, the Board assumed that the value of analogue copying on audio cassette was half of the value of digital copying. We continue to apply the same adjustment.

[23] Zero-rated sales accounted for about 23 per cent of total sales of audio cassettes. Adding to this number an estimate of 5 per cent for levied sales to others than individuals, Messrs. Stohn and Audley suggest that 72 per cent of all blank audio cassettes have been purchased by consumers. We agree and use the same number.

[24] Finally, Messrs. Stohn and Audley assume that because of an unused recording capacity estimated at 18 per cent, the average number of tracks recorded on an audio cassette is 17.3. Since this is the only information we have, we accept this assumption.

[25] The rate we obtain for audio cassettes is 28¢. (Line AC) The rate we certify is 24¢, the rate proposed by CPCC.

⁷ Exhibit CPCC-3, page 36, Table 4.10.

ii. CDs

[26] For the reasons set out in *Private Copying IV*,⁸ a single rate will apply to all types of recordable CDs and to MiniDiscs.

[27] The first important variable in setting the royalty rates for CDs is the percentage of all CDs bought by individuals. Messrs. Stohn and Audley submit that this percentage for 2006-2007 is 54.1 per cent. This is close to the number used in *Private Copying IV* and accords with our overall perception that the recordable CD market is both mature and stable. We accept that number.

[28] According to the record, music constituted 53 per cent of the copying being done on CDs in 2006-2007, a number close to, though slightly lower than the one the Board used in the last decision. This is the number we use.

[29] For the same reasons as in the past, copies made from paid downloads and promotional tracks obtained from the Internet should be removed from the total. In *Private Copying IV*, the Board set at 6 per cent the amount of copies from paid downloads and 3 per cent the amount of promotional tracks. This time, CPCC puts those numbers at 3 and 2 per cent respectively. These percentages become 3 and 3 per cent when only leviable media are considered.

[30] We conclude however that the adjustment should be higher. As indicated in the Music Monitor Survey,⁹ the percentage of copies from paid downloads is calculated based on the number of tracks bought on the Internet. However, we know that consumers buying tracks on the Internet are also buying the right to make several additional copies. The number of paid copies that should be removed from the calculation of the levy must include additional copies for which the right to make the copy has already been paid, but only if the copy is being made on a CD.¹⁰ On average, a person who buys a track on the Internet makes an additional 2.7 copies, 0.69 of which are made on a CD, DVD or MiniDisc.¹¹ In response to the Board's questions, Mr. Benoît Gauthier of Circum Network estimated that 0.66 additional copies are being made on CDs. A deduction of 4.98 per cent (3×1.66) should thus be applied to account for the direct and indirect copies made from paid downloads on CDs. Adding promotional copies leads to a total adjustment of 7.98 per cent.

⁸ *Tariff of levies to be collected by CPCC in 2005, 2006 and 2007 on the sale of blank audio recording media in Canada*, Board decision of May 11, 2007, paragraphs 69 to 75.

⁹ Exhibit CPCC-3, page 40.

¹⁰ Copies made onto digital audio recorders and computers are not private copies, since these are devices, not media: *Apple Canada Inc. v. Canadian Private Copying Collective* 2008 FCA 9. Consequently, CPCC gets nothing for the billion or more copies made on these devices.

¹¹ Exhibit CPCC-4, Table 3.2, page 14.

[31] The average number of tracks copied on a CD is the last important factor in determining the royalty rate. CPCC's calculations assume that on average, individuals copy 47 tracks per CD. If that number and all others used in calculating the CD levy are correct, then 2.1 billion private copies were made on CDs in 2006-2007. This is much higher than the 700 million such copies reported to have been made in the Music Monitor Survey.

[32] The Board asked CPCC to explain this discrepancy. The first part of CPCC's answer relates to the total number of private copies made on CDs. Although the Board used the total of about 700 million included in table 4.10 of CPCC-3, CPCC argued that a better estimate would take imprecise or incomplete responses into account and that the correct number would be 854 million.

[33] CPCC also answered that the estimate of unused capacity is less reliable and that, to the extent that this percentage is higher, the average number of tracks copied onto each blank CD would be lower, leading to a lower number of tracks being remunerated by the regime.

[34] We accept CPCC's answers, but go further. We agree that the estimate of unused capacity of a CD is largely uncertain because, in our opinion, individuals will pay little attention to it. Blank CDs are inexpensive, often bought in large quantities, and available everywhere. This would generally not provide a strong incentive for individuals to optimize the use of the memory space available on each CD to a point where at least 47 tracks would be copied on a single CD. We have thus performed the following calculations to estimate the average number of tracks copied on a blank CD.

[35] Using CPCC's revised Tables 4.5 and 4.6 provided in response to the Board's questions, we estimate the total number of private copies made onto blank CDs to be 823.8 million. Based on an estimate of 161 million blank CDs sold in 2006-2007, and using the proportions of 54.1 per cent of blank CDs bought by individuals, of 53 per cent of all copying that involves music and of 3 per cent of wastage, we obtain 44.8 million CDs used for the private copying of music. The average number of tracks per CD thus obtained is 18.4. This number obviously implies a percentage of unused memory capacity much higher than what CPCC is reporting. It is nevertheless the number we intend to use in the calculations that follow. This number will ensure that the number of remunerated private copies is not disproportionate to the number of copies reported in the Music Monitor Survey.

[36] Performing all the deductions and using the average number of tracks copied on a CD as determined above, we obtain a rate of 37¢ for all types of CDs and MiniDiscs. (Line AG) The rate we certify is 29¢, which is the rate proposed by CPCC.

III. APPORTIONING THE LEVY AMONG COLLECTIVE SOCIETIES

[37] As the Board did in the past, the percentage applicable to each college of rights holders corresponds to that college's share of all private copies of the qualifying repertoire. [Line S] As a result, authors are entitled to 60.1 per cent [28.21 ÷ 46.92], performers to 22.6 per cent [10.59 ÷ 46.92] and makers to 17.3 per cent [8.12 ÷ 46.92].

IV. RATE INCREASE AND TOTAL ROYALTIES

[38] This decision leaves the rate for audio cassettes at 24¢ but increases it from 21 to 29¢ for CDs. Two main reasons explain this significant raise. First, increased mechanical licence royalties, coupled with the elimination of container deductions and free goods allowances in the calculation of the performers' and makers' remuneration, greatly add to our estimation of the total remuneration per prerecorded CD. Second, the use of compression technology raises from 15 to 18.4 the average number of tracks copied on a blank CD used to copy music.

[39] We estimate that the royalty rates we certify would have generated total royalties for the year 2008 to an amount of about \$29 million.¹² In spite of the CD levy rate increase we are certifying, total royalties nevertheless remain similar to what CPCC has collected on average in the past. This reflects the fact that blank CD sales should go down. Should this forecast not materialize, the estimated amount of royalties would be adjusted accordingly.

V. THE IMPACT OF THIS DECISION ON Z.E.I.'S APPLICATION TO VARY

[40] Z.E.I. claims that certain types of recordable CDs are not ordinarily used by consumers to copy music and as such, cannot be the subject of a private copying levy. On that basis, it asks that the Board remove the levy on such media not only for 2008-2009, but also from the very inception of the regime. Notwithstanding Z.E.I.'s claim, we can certify the 2008-2009 tariff without causing prejudice to either CPCC or Z.E.I.

[41] If, as a result of Z.E.I.'s application, the Board rules that certain recordable CDs are not subject to the levy, the amount of the levy per CD would almost certainly increase. The number of leviable CDs would decrease by the number of CDs that become non-leviable, while the number of private copies would change little if at all, since by definition, non-leviable CDs would not be used to make private copies. In other circumstances, this might cause a prejudice to CPCC. In this instance, however, the rate we certify is all that CPCC is asking. Consequently, certifying the tariff before addressing Z.E.I.'s claims is not prejudicial to CPCC. Postponing the certification of the tariff, on the other hand, would harm CPCC and those who are entitled to

¹² CPCC has undertaken not to collect retroactively any increase in the rate.

share in the levy, since as a matter of practice, it is impossible for CPCC to retroactively collect an increase in the royalties.

[42] Certifying the 2008-2009 tariff now does not prejudice Z.E.I. either. CPCC has undertaken to reimburse, with interest, any levy on recording media which the Board might decide ought not to be levied as a result of Z.E.I.'s application to vary. We rely on that undertaking to act as we do now. We are convinced that CPCC will respect its undertaking. The Board remains seized of the application to vary the tariffs for 1999 to 2007.

A handwritten signature in black ink, reading "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau
Secretary General

APPENDIX
Private Copying 2008-2009
Levy Rate Calculation

AUTHORS' REMUNERATION		
A	Mechanical licence royalty per song per top-line CD	0.0730
B	Average number of tracks per CD	15
C	Record club and budget-line sales percentage	10.19%
D	Record club and budget-line discount	25%
E	Adjustment for record club and budget-line sales $[C \times D] 0.1019 \times 0.25$	2.55%
F	Authors' remuneration $[A \times B \times (1 - E)] 0.073 \times 15 \times (1 - 0.0255)$	\$1.0671

PERFORMERS' AND MAKERS' REMUNERATION		
G	Top-line CD published price for dealers	12.98
H	Royalty to performer (in percentage)	15%
I	High-volume discount	10%
J	Record club and budget-line discount	50%
K	Adjustment for record club and budget-line sales $[C \times J] 0.1019 \times 0.5$	5.1%
L	Adjustment to account for makers' remuneration	1.50
M	Payments to the <i>American Federation of Musicians</i>	0.07
N	Performers' and makers' remuneration $[(G \times H \times (1 - I) \times (1 - K) \times L) + M] (12.98 \times 0.15 \times (1 - 0.1) \times (1 - 0.051) \times 1.5) + 0.07$	\$2.5644
O	Total royalties per prerecorded CD $[F + N] 1.0671 + 2.5644$	\$3.6315

QUALIFYING REPERTOIRE ADJUSTMENT		
P	Eligible authors' weighted share of private copies $[(F \div O) \times \% \text{ of private copies using eligible authors' repertoire}] 1.0671 \div 3.6315 \times 96\%$	28.21%
Q	Eligible performers' weighted share of private copies $[(N \div O) \times \% \text{ of private copies using eligible performers' repertoire} \div 2] 2.5644 \div 3.6315 \times 30\% \div 2$	10.59%
R	Eligible makers' weighted share of private copies $[(N \div O) \times \% \text{ of private copies using eligible makers' repertoire} \div 2] 2.5644 \div 3.6315 \times 23\% \div 2$	8.12%
S	Qualifying repertoire's weighted share of private copies $[P + Q + R] 28.21 + 10.59 + 8.12$	46.92%
T	Imputed remuneration of qualifying repertoire per CD $[O \times S] 3.6315 \times 0.4692$	\$1.7039

ADJUSTMENT FOR ANCILLARY NATURE OF ACTIVITY		
U	Adjustment for copies made from copier-owned CDs $[\% \text{ of private copies} \times 50\%] 20\% \times 50\%$	10%
V	Adjustment for copies from other sources $[\% \text{ of private copies} \times 25\%] 80\% \times 25\%$	20%
W	Adjusted remuneration $[T \times (1 - (U + V))] \$1.7039 \times (1 - (0.10 + 0.20))$	\$1.1927
X	Adjusted remuneration per track $[W \div B] 1.1927 \div 15$	\$0.0795

LEVY RATE FOR AUDIO CASSETTES		
Y	Weighted average recording capacity	82.6
Z	Average track length of recorded music	3.92
AA	Unused percentage of recording capacity	18%
AB	Average number of tracks copied on a audio cassette $[Y \times (1 - AA) \div Z]$	$82.6 \times (1 - 0.18) \div 3.92$
AC	Levy rate on cassettes $[X \div 2 \times \% \text{ purchased by individuals} \times \% \text{ of purchases used to private copy} \times AB]$	$\$0.0795 \div 2 \times 0.72 \times 0.57 \times 17.3$

LEVY RATE FOR CDs		
AD	Average number of tracks copied on a CD	18.4
AE	Percentage of copies already authorized (through paid downloads and promotional copies)	7.98%
AF	Percentage of units spoiled	3%
AG	Levy rate on CDs $[X \times \% \text{ purchased by individuals} \times \% \text{ of purchases used to private copy} \times (1 - AF) \times (1 - AE) \times AD]$	$\$0.0795 \times 0.541 \times 0.53 \times (1 - 0.03) \times (1 - 0.0798) \times 18.4$