

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. Claude Majeau
Mr. J. Nelson Landry

Tariff of levies to be collected by CPCC in 2015 and 2016 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 November 8, 2013 the Canadian Private Copying Collective (CPCC) filed with the Board a statement of proposed levies to be collected in 2015-2016 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 ("private copying"), pursuant to section 83 of the *Copyright Act*¹ (the "*Act*"). This statement was published in the *Canada Gazette* on December 7, 2013 together with a notice concerning the right of anyone to object to it in writing until February 5, 2014. The proposed tariff targeted recordable compact discs (CD-R, CD-RW, CD-R Audio, and CD-RW Audio: together "blank CDs").

[2] The Retail Council of Canada (RCC) and Mr. Sean Maguire (as an individual) objected to this proposed tariff.

¹ R.S.C., c. C-42.

[3] On February 28, 2014, CPCC wrote to the Board with a proposed schedule in which no interrogatory phase was requested. The schedule was designed to allow the Board to receive and analyze evidence during 2014 and certify a tariff before the end of the year.² On March 24, 2014, RCC commented on this schedule, stating that it agreed with the schedule subject to two reservations. First, any reports that would be filed must be filed in their entirety. Second, since the evidence to be filed may be different than evidence filed in previous private copying proceedings, the decision whether or not to have a hearing should be taken only once the statement of case of CPCC has been filed. Mr. Maguire agreed with this second point. On March 26, 2014, the Board adopted the schedule of proceedings, denied RCC's request for any reports to be filed in their entirety³ and ruled that the manner in which the hearing would proceed would be determined at a later stage.

[4] On July 24, 2014, a day before the date set for the objectors to file their case, Mr. Maguire withdrew his objection to the proposed tariff. On July 25, 2014, RCC announced that it would not be filing a statement of case in this matter while maintaining its objection to the proposed tariff. However, section B.1 of the *Directive on Procedure* states that “[p]articipants who fail to file a statement of case are deemed to have withdrawn from the proceedings.” Accordingly, RCC was deemed to have withdrawn from the proceedings as of July 25, 2014.

[5] On September 12, 2014, the Board sent questions to CPCC. The record was perfected on October 8, 2014, with the filing of CPCC's responses. Like in *Private Copying Tariff, 2011*,⁴ no hearing was held, because there were no objectors.

II. EVIDENCE

A. WITNESS STATEMENT OF LYETTE BOUCHARD

[6] Ms. Lyette Bouchard, Chair of the Board of Directors of CPCC, filed a witness statement,⁵ explaining the operations of CPCC. She made two main points. First, CPCC revenues have fallen to \$9.93 million in 2012. As a consequence, expenses make up 15.66 per cent of these revenues, a higher proportion than in the past. Second, as of May 5, 2014, 85.4 per cent of funds available for distribution in respect of the years 2000 to 2012 have been distributed to rightsholders.

² If a tariff is not certified before the end of 2014, an interim tariff must be certified for CPCC to be able to continue to collect royalties.

³ The Board found that any ruling relating to the production of reports was premature at the time, because the parties had not yet filed their cases.

⁴ *Private Copying Tariff, 2011* (17 December 2010) [Copyright Board Decision](#).

⁵ Exhibit CPCC-2.

B. REPORT OF PAUL AUDLEY

[7] Mr. Paul Audley, president of Paul Audley and Associates, filed a report with three stated purposes. “The first is to provide the most recent available data relevant to the use of recordable CDs for the purpose of copying music. The second is to develop projections of the degree to which blank CDs are likely to be used to copy music in 2015 and 2016. The final purpose is to compare these projected figures to the standard the Copyright Board has applied in previous decisions to determine whether a particular medium is ordinarily used for the purpose of copying music.”⁶

[8] Mr. Audley indicated that the Music Monitor Survey for the period April 1, 2013 to March 31, 2014 shows that 48 per cent of the individuals surveyed reported that the last time they copied any content onto a blank CD, they copied music. This figure is very similar to responses for all years since 2006-2007. Mr. Audley also indicated that in 2013-2014, individuals estimated that 51 per cent of their copying onto blank CDs was of music, a figure also consistent with the percentages estimated since 2006-2007. Finally, a total of 248.9 million tracks of recorded music were copied onto blank CDs in 2013-2014, 33 per cent lower than the 373.5 million tracks copied in 2010-2011.

[9] Mr. Audley incorporated a (confidential) forecast of the Santa Clara Consulting Group for the numbers of CDs sold to individuals into his report. Because this forecast is confidential, we do not discuss it further.

[10] Mr. Audley developed projections for the number of tracks copied on blank CDs for the years 2015 and 2016. In 2015, he forecasts that 169.6 million tracks will be copied; for 2016, the corresponding figure is 124.3 million tracks. He also forecasts the number of CDs to be used for private copying at 6 and 4.7 million, respectively.

[11] Finally, Mr. Audley compared the forecasts to the thresholds established by the Board in previous decisions. The number of blank CDs used for private copying and the number of tracks copied both exceed the relevant thresholds.⁷ As such, Mr. Audley concluded that CDs continue to qualify as a medium ordinarily used for the purpose of private copying.

C. REPORT OF PAUL AUDLEY AND BENOÎT GAUTHIER

[12] Mr. Audley and Mr. Benoît Gauthier, of Circum Network Inc., filed a report⁸ to answer a set of technical questions posed by the Board. The report had three parts. First, the report set out two separate forecasting techniques that the authors used to perform the forecasts requested by the

⁶ Exhibit CPCC-3, at para. 1.

⁷ These thresholds are, respectively, 1.05 million blank CDs sold for private copying and 26.1 million tracks copied onto blank audiocassettes.

⁸ Exhibit CPCC-4.

Board. Second, the report gave the forecasts using the two techniques. Finally, the report compared the new forecasts to the thresholds used by the Board.

[13] As explained by Messrs. Audley and Gauthier, the data set contained data from 2006-2007 to 2010-2011 and for 2013-2014. That is, data for the years 2011-2012 and 2012-2013 are missing. In technique 1, the annualized percentage change⁹ for the period 2010-2011 to 2013-2014 is applied to the years 2014-2015, 2015-2016, and 2016-2017. The rationale for this technique is that more recent data are more useful for forecasting the future than those coming from the more distant past.

[14] In technique 2, the annualized percentage change from 2010-2011 to 2013-2014 is applied to the years 2011-2012 and 2012-2013. This has the effect of filling in the missing data. The average percentage change from 2006-2007 to 2013-2014 is then applied to the years 2014-2015, 2015-2016, and 2016-2017. The rationale for this technique is that using more data is usually better than using less.

[15] In both techniques, the forecasts are obtained from April of the first year to March 31 of the following year. The forecasts for the calendar year 2015 is thus one-fourth the forecast for 2014-2015 plus three-fourths the forecast for 2015-2016; the forecast for 2016 is created analogously.

[16] Table 1 reports the forecasts of Messrs. Audley and Gauthier.

Table 1: Forecasts of Messrs. Audley and Gauthier
Tableau 1 : Prévisions de MM. Audley et Gauthier

Variable	Technique 1		Technique 2	
	2015	2016	2015	2016
Number of tracks copied on blank CDs (million) / Nombre de pistes copiées sur CD vierges (en millions)	198.9	174.8	204.5	182.6
Percentage of all tracks copied / Pourcentage de toutes les pistes copiées	9.10%	8.20%	8.40%	7.20%
Number of CDs bought by individuals (million) / Nombre de CD achetés par des particuliers (en millions)	14.4	11.8	12,8	10.2
Percentage of music in copying on CDs / Pourcentage de musique copiée sur CD	50%	51%	48%	48%

⁹ Since the time elapsed between July 2010 and March 2013 is 2.75 years, the annualized percentage change between these two years is the total percentage change between these two years divided by 2.75.

[17] Finally, Messrs. Audley and Gauthier compared their forecasts to the Board's thresholds and found (again) that CDs continue to qualify as a medium ordinarily used for the purpose of private copying.

III. ANALYSIS

A. TWO FORECAST TECHNIQUES

[18] As explained above, CPCC has offered two techniques to forecast the values for 2015 and 2016. Both techniques fill in the missing data for 2011-2012 and 2012-2013 using the year before and the year after. The annualized average is computed by taking the percentage change between 2010-2011 and 2013-2014 and dividing that percentage change by 2.75. In our view, that procedure is appropriate.

[19] However, where the procedures differ is by how they create the forecasts for the fiscal years 2014-2015, 2015-2016, and 2016-2017. In technique 1, the percentage change is continued from the preceding years into the forecast years. In technique 2, the average percentage change is applied from the years 2006-2014 to the forecast years. In our view, technique 2 is the better technique, for the following two reasons. First, technique 2 uses more data than does technique 1. Second, technique 2 better tracks the historical changes in the variables.

B. RELEVANCE OF VARIABLES

[20] There are four variables that are forecast using technique 2: Number of tracks copied on blank CDs (million); Percentage of all tracks copied; Number of CDs bought by individuals (million); and, Percentage of music in copying on CDs.

[21] Of these four variables, two carry less useful information for the purpose of the present case. The first is the percentage of music in copying on CDs. This has been relatively constant over time. As shown in Table I of Exhibit CPCC-4, this variable has ranged between 44 and 53 per cent without a definitive upward or downward trend. When a relevant variable is relatively constant, its ability, on its own, to affect a binary decision (whether CDs qualify or CDs do not qualify) is severely limited.

[22] The second is the number of CDs bought by individuals. This measures the ordinariness of the use of CDs themselves, not the ordinariness of private copying onto CDs. While it is true that the number of CDs purchased for the purpose of private copying cannot be greater than the number of CDs purchased by individuals, this upper bound is of limited usefulness for the binary decision facing us.

[23] The other two variables remain relevant. The first is the number of tracks copied onto CDs. If it drops below a certain level, so few tracks are being copied onto CDs that the copying behaviour

could become marginal and in turn ceases to be ordinary, as that term is understood under section 79 of the *Act*.

[24] The second variable is the percentage of all copied tracks that are copied onto CDs. If this percentage drops below a certain threshold, CDs could cease to be considered as a medium ordinarily used by individual consumers to reproduce sound recordings.

[25] To be sure, these two variables are related. Indeed, the second is the numerator of the first, with the denominator being the total number of tracks copied onto any medium or device, leviable or not. It is not mathematically problematic to use two variables that are related; in fact the contrary would be true. Were the two variables unrelated and could the variables possibly move in opposite directions, there would be a problem in identifying when the threshold has been reached (in either direction).

C. DO CDS QUALIFY AS AUDIO RECORDING MEDIA?

[26] The core issue in this decision is whether or not CDs qualify as a medium ordinarily used for private copying, pursuant to section 79 of the *Act*. In our opinion, they do for the following reasons.

[27] Those copies constitute more than 170 million tracks. This exceeds both the two million tracks level at which CDs were qualified initially and the 8.9 million tracks level at which cassettes were disqualified in 2010.

[28] In addition, more than seven per cent of copies made on any medium or device are on CDs. This exceeds both the five per cent level at which CDs were qualified initially and the two per cent level at which cassettes were disqualified in 2010. We note however that this ratio is contextual, not determinative, for two reasons.

[29] First, this ratio has the undesirable property of being affected by the copying made onto non-leviable media and onto devices. In the limit, the absolute amount of copying onto CDs might remain unchanged, while the ratio of copying onto CDs might drop precipitously if non-leviable copying increases rapidly. As the relative amount of non-leviable copying to leviable copying grows, this ratio is progressively less relevant in determining whether or not CDs qualify.

[30] Second, it is not altogether clear whether the thresholds (five or two per cent) are more relevant, or whether it is the trends in this ratio that are more relevant. A further decrease in this ratio, combined with a further decrease in the number of tracks copied might lead a future panel

to extrapolate the downward trends, just as the panel implicitly extrapolated the upward trends in *Private Copying Tariff, 1999-2000*.¹⁰

[31] For us, simply being above the thresholds is not sufficient. A finding that a medium is ordinarily used for the purpose of private copying is a matter of impression, taking into account not only levels but also trends.

[32] The trends in private copying onto CDs are clearly moving downward, if in a non-linear fashion. Absent a dramatic change in behaviour, CDs *will* cease to qualify as a medium ordinarily used for private copying at some point in the future, possibly as early as 2017. Our impression of private copying behaviour is such, however, that CDs still qualify for 2015 and 2016. Thus, we certify a tariff for those two years.

D. THE RATE

[33] In *Private Copying Tariff 2012, 2013, 2014*,¹¹ the Board considered the question of whether the existing levy of \$0.29 was too high, too low, or appropriate. The argument by CPCC was that the Stohn-Audley model indicated a higher rate; the argument of RCC was that international experience suggested a lower rate. The Board rejected both the Stohn-Audley model and the comparisons with international rates, preferring to maintain and certify the rate of \$0.29.

[34] As the Board wrote:

The current levy is a reality in the marketplace. Leaving it unchanged both provides rights holders with some compensation until none is payable any longer, while avoiding some of the perverse effects that too rigid a calculation based on actual consumption may have on the pricing of a good at the end of its life cycle.

Accordingly, we certify a levy of 29¢ per blank CD.¹²

[35] For the same reasons, we continue to believe that the levy should remain stable, and certify a rate of \$0.29 per blank CD for the years 2015 and 2016.

E. APPORTIONING THE LEVY AMONG RIGHTS HOLDERS

[36] Section 84 of the *Act* requires that we apportion the levy among authors, performers and makers. We were not asked to change the existing apportionment and see no reason to do so.

¹⁰ *Private Copying Tariff, 1999-2000* (17 December 1999) [Copyright Board Decision](#).

¹¹ *Private Copying Tariff, 2012, 2013, 2014* (30 August 2013) [Copyright Board Decision](#).

¹² *Supra* note 11 at paras. 45-46.

Accordingly, authors are entitled to 58.2 percent of royalties, performers to 23.8 per cent and makers to 18.0 per cent.

A handwritten signature in black ink, appearing to read "Gilles McDougall". The signature is fluid and cursive, with the first letter of each word being significantly larger and more stylized than the others.

Gilles McDougall
Secretary General