

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2016-12-16

Citation File: Private Copying 2017

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

Members The Honourable Robert A. Blair
Mr. Claude Majeau
Mr. J. Nelson Landry

Tariff of levies to be collected by CPCC in 2017 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

A. OVERVIEW

[1] On November 5, 2015, the Canadian Private Copying Collective (CPCC), filed with the Board a statement of proposed levies to be collected in 2017 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* (the "*Act*").¹ The proposed tariff targeted recordable compact discs (CD-R, CD-RW, CD-R Audio, CD-RW Audio: together "blank CDs"). The proposed tariff set the levy at \$0.29 for each CD.

[2] The Board published the proposed tariff in the *Canada Gazette* on November 21, 2015.

[3] No one filed objections to the proposed tariff.

¹ *Copyright Act*, R.S.C., 1985, c. C-42.

[4] On July 22, 2016, the Board put several questions to CPCC.² CPCC responded on September 1, 2016. This perfected the record.

[5] For the reasons that follow, the Board:

- i. holds that CDs remain an “audio recording medium” for 2017;
- ii. certifies a levy of \$0.29 per blank CD sold in 2017; and
- iii. apportions the levy at 58.2 per cent to authors, 23.8 per cent to performers, and 18.0 per cent to makers of sound recordings, as the Board did in *PC 2015-2016*.³

B. THE CPCC

[6] CPCC is an umbrella organization whose member collectives represent songwriters, recording artists, music publishers and record companies. CPCC has been mandated by its members to collect and distribute private copying levies on behalf of its member collectives.⁴

II. EVIDENCE

[7] In addition to its statement of case,⁵ CPCC filed three exhibits: a witness statement of Ms. Laurie Gelbloom, General Counsel of CPCC;⁶ an expert report by Mr. Paul Audley, President of Paul Audley & Associates Ltd., Ms. Lisa Freeman, Independent Consultant and Mr. Benoît Gauthier, President of Circum Network Inc;⁷ and a second expert report by Mr. Audley, Ms. Freeman, and Mr. Gauthier, responding to the questions posed to CPCC by the Board.⁸

[8] In her witness statement, Ms. Gelbloom described CPCC’s structure, history, efforts at enforcement, and its distribution activities. She also described CPCC’s revenues and expenses, and compared the current figures with historical ones.

[9] In the first report by Mr. Audley, Ms. Freeman, and Mr. Gauthier, the authors focused on the question of whether CDs qualify as an “audio recording medium,” as that term is defined in the *Act*. As described by the authors, the report had three purposes:

First, it provides the most recent available data on the copying of music onto recordable CDs for those variables considered by the Copyright Board in its decision to certify the 2015 and 2016 private copying tariffs. Second, we develop projections of these data for the year of the proposed tariff, 2017. Finally, we consider these projected figures in light of the standards

² Notice of the Board *CB-CDA 2016-076* (July 22, 2016). [*Notice 2016-076*]

³ *Private Copying 2015-2016* (12 December 2014) Copyright Board Decision at para 36. [*PC 2015-2016*]

⁴ Exhibit CPCC-2 at p. 1.

⁵ Exhibit CPCC-1.

⁶ Exhibit CPCC-2.

⁷ Exhibit CPCC-3.

⁸ Exhibit CPCC-4.

the Copyright Board has applied in previous private copying decisions to determine whether recordable CDs may still be considered ordinarily used for the purpose of copying music.⁹

[10] The report updated the following variables: the total number of tracks copied onto blank CDs; the percentage of all tracks copied onto blank CDs; the number of blank CDs copied by individuals; and the percentage copying events accounted for by music. For each of these variables, it provided the most recent data and a statistical forecast through the end of 2017. Using these variables, the report concluded that the use of CDs for private copying was “ordinary” as the Board had used that term in the past.

[11] The second report by Mr. Audley, Ms. Freeman, and Mr. Gauthier focuses on the evidence in support of the proposed levy of \$0.29. In general, the report updates a number of variables used in the Stohn/Audley model.¹⁰ This model is based on the remuneration that would typically flow to rights holders in the case of prerecorded CDs. Some of these variables are not updated; the authors explain why they are unlikely to have changed since their last measurement.

[12] In addition, this report contains an update of the “Music Monitor Tables” – tables which have been updated continuously since 2010. These tables measure aspects of private copying discussed in the first report which had not been updated. The report also discusses ancillary copies and the apportionment of the levy between authors, performers and makers. Finally, the report characterizes a number of models to set the levy as being demand-oriented.

III. ANALYSIS

A. ARE CDs AN “AUDIO RECORDING MEDIUM” UNDER SECTION 79 OF THE ACT?

[13] Eligible authors, performers, and makers of sound recordings have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of sound recordings, and the musical works and performers’ performances embodied therein.¹¹

[14] Under section 79 of the *Act*, “audio recording medium” is defined as

⁹ *Supra* note 8 at para 1.

¹⁰ For a brief description of the Stohn/Audley model, see *Private Copying 2012, 2013 and 2014* (30 August 2013) Copyright Board Decision at paras 24ff. [*PC 2012-2014*] For a more extensive demonstration of the operation of the Stohn/Audley model, see *Private Copying 2008-2009* (5 December 2008) Copyright Board Decision at paras 12-36. [*PC 2008-2009*]

¹¹ *Supra* note 1, ss 81(1).

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, excluding any prescribed kind of recording medium.¹² [emphasis added]

[15] In *PC 1999-2000*, the Board emphasized that the phrase “ordinarily used” requires a finding of fact in regards of each potential audio recording medium.¹³ The concept incorporates both qualitative and quantitative considerations.

[16] In its Statement of Case, CPCC submits that CDs were “ordinarily used” by individual consumers to copy music at the time of their submissions, and will continue to be so through 2017. In particular, it pointed to four variables measured in a study that Mr. Benoît Gauthier conducted for CPCC (the “Music Monitor Survey”): i) the number of tracks copied onto blank CDs, ii) the percentage of all tracks copied onto all media and devices that are copied onto blank CDs, iii) the number of blank CDs bought by individuals, and iv) the percentage of music copied onto blank CDs by individuals during their most recent copying event.

[17] According to Mr. Gauthier, the number of tracks projected to be copied onto blank CDs in 2017 is about 220 million; the percentage of all tracks projected to be copied onto blank CDs is about 8 per cent; the number of blank CDs projected to be bought by individuals is about 9 million; and the percentage of music copied onto blank CDs by individuals during their most recent copying event is about 33 per cent.

[18] In its discussion of these variables, CPCC points to the Board’s previous decisions, wherein it found media to be “ordinarily used” even where values for these variables were lower than those in this matter. CPCC argues that very little is required for a medium to qualify. In particular, it points to previous findings by the Board that:

- two million tracks copied onto a media type annually by individuals was held to “definitely [meet] the threshold of ordinariness as the Board interprets it;”¹⁴
- cassette tapes qualified as “ordinarily used” even when only 2 per cent of all private copying occurred on cassette tapes;¹⁵ and
- CDs qualified as “ordinarily used” even when only an estimated 40 per cent of CDs purchased were used to copy sound recordings.¹⁶

¹² *Ibid* at s 79.

¹³ *Private Copying 1999-2000* (17 December 1999) Copyright Board Decision at pp 28-30. [*PC 1999-2000*]

¹⁴ *Ibid* at p. 32.

¹⁵ *PC 2008-2009*, *supra* note 10 at para 21.

¹⁶ *Private Copying 2003-2004* (12 December 2003) Copyright Board Decision at p. 26.

[19] While the Board referred to some of these variables in past Private Copying decisions, the Board regularly started to refer to all four together from *PC 2010*¹⁷ onward, explicitly considering them in *PC 2012-2014*¹⁸ and *PC 2015-2016*.¹⁹

[20] Over the period 2010-2016, the Board has used these four variables in different ways and with varying degrees of emphasis. In general, the Board has found these variables useful. So do we.

[21] As noted above, the Board has said in previous decisions that “the concept of ‘ordinarily used’ cannot be seen as purely quantitative. [...] A qualitative and quantitative approach is more in line with the purpose of Part VIII, in that it allows the levy to more easily adapt to market realities and the private copying habits of Canadians.”²⁰ Furthermore, “the language, context and purpose of section 79 do not support [a bright line] approach. It is clear that Parliament desired, above all, sensitivity to market realities and the flexibility to adapt to a changing environment.”²¹ We adopt that approach here.

[22] We note that the forecasted percentage of music copied onto blank CDs by individuals (about 33 per cent) is historically low. For CDs, this variable has varied between 40 per cent and 50 per cent. For other media for which the Board has certified a levy in the past, this percentage was higher than 50 per cent. However, 33 per cent remains a significant measure, in our opinion. In the matter before us, we believe that the forecasted total number of sound recordings copied onto CDs and the forecasted total number of CDs used to reproduce sound recordings are together sufficiently significant as to outweigh the lower relative use of CDs for sound recordings.

[23] For these reasons, we conclude that CDs are ordinarily used by individual consumers to make reproductions of sound recordings, and qualify as an “audio recording medium,” as defined in section 79 of the *Act*.

[24] We therefore turn to the question of the amount of the levy.

B. THE AMOUNT OF THE LEVY

[25] In *PC 2010*, the Board fixed a rate of \$0.29 per CD using a modified model proposed by CPCC witnesses Messrs. Stohn and Audley. The Board also set a rate of \$0.29 in *PC 2011*, *PC*

¹⁷ *Private Copying 2010* (2 November 2010) Copyright Board Decision at paras 71ff. [*PC 2010*]

¹⁸ *PC 2012-2014*, *supra* note 10 at paras 19-22.

¹⁹ *Supra* note 3 at paras 20-25.

²⁰ *Supra* note 16 at p. 35.

²¹ *Ibid.*

2012-2014 and PC 2015-2016, using variants of the general rationale that the current levy is a reality in the marketplace.

[26] In its Statement of Case, CPCC submits that the levy of \$0.29 per CD is fair and equitable. It points to the Board's decisions in *PC 2012-2014*, as well as *PC 2015-2016* as support.²² It further notes that, given that the Stohn/Audley model had been previously rejected by the Board, there is no appropriate model for computing the amount of the levy.

[27] On July 22, 2016, the Board issued *Notice 2016-076*,²³ asking CPCC, among other things, to supply additional evidence in support of the proposed levy.

[28] In its response, CPCC considered three pricing models.²⁴ The response which best supports its proposed rate of \$0.29 comes from its consideration of demand-oriented pricing:

By partaking in the current market for blank CDs, a significant portion of Canadian consumers are saying that they are willing to pay \$0.29 for the private copying levy as part of their purchase decisions. So, without further study or analysis, we know that at that quantum of levy, a sizeable portion of the Canadian public considers that the perceived value of a blank CD justifies the amount they pay, which includes payment of the \$0.29 levy. We don't know how many more or fewer Canadians would buy more or fewer blank CDs if the levy were higher or lower (bringing the retail price up or down); this information is not available. But we know that the current levy establishes a demand and supply point of equilibrium that is acceptable to the consumers currently purchasing blank CDs.²⁵

[29] CPCC also considers the variables used in the Stohn/Audley model, and suggests that – were it to be used – the resulting levy would be higher than \$0.29.²⁶

[30] In response to the Board's question on individuals' willingness to pay for blank CDs and the effect that the (perhaps increasingly) ancillary nature of copies of sound recordings on CDs should have on the levy, CPCC responded (broadly speaking) that it does not have evidence to evaluate these effects in any detail.²⁷

[31] We continue to be of the view that the Stohn/Audley model is not – without significant modifications – suitable for calculating the amount of the levy. As such, we agree with CPCC that there is no model before us that would permit the Board to compute the amount of the levy.

²² *Supra* note 5 at paras 36-40.

²³ *Supra* note 2.

²⁴ *Supra* note 8 at pp 1-3.

²⁵ *Ibid* at p. 3.

²⁶ *Ibid* at p. 13.

²⁷ *Ibid* at pp 14-18.

[32] We therefore set the levy at \$0.29. This amount is fair and equitable for the reasons already explained in *PC 2015-2016*, and with which we agree.

[33] While we do not have evidence to what extent purchasers of blank CDs are aware of the existence of the levy – and therefore cannot conclude that they are willing to pay \$0.29 for the private copying levy – we do have evidence that some Canadians are willing to pay a price for blank CDs that reflects this levy amount. In particular, we know that Canadians purchase CDs at a price that, on average, marginally exceeds the existing levy of \$0.29.²⁸ In this sense, the \$0.29 levy is a “reality in the marketplace,” as that term was used in the *PC 2012-2014*.²⁹

[34] Furthermore, CPCC claimed that its analysis shows that “the \$0.29 rate is a rate substantially lower than the application of the Stohn/Audley would generate.”³⁰ We reiterate the Board’s previously expressed concerns with the Stohn/Audley model³¹ and add two new ones. First, the model was designed for copying from CD to CD, not copying digital downloads to CDs. This is evidenced by the fact that the most recently used version of the model used the prerecorded CD proxy. Second, the original model was designed assuming that people purchased whole albums, not individual tracks.³²

[35] Using the Stohn/Audley model today would require a number of adjustments, some of which are difficult to quantify with the evidence adduced in this matter. However, making the easily quantifiable adjustments (as mentioned in Exhibits CPCC-3 and CPCC-4) to the aforementioned digital-download proxy suggests that CPCC is correct: a properly specified Stohn/Audley-type model would likely generate a levy rate greater than \$0.29.

[36] Considering all the foregoing, we certify a levy of \$0.29 per blank CD sold in 2017.

C. APPORTIONMENT OF THE LEVY

[37] In *Notice 2016-076*, the Board asked the CPCC to “[c]omment in detail on the appropriate apportionment between authors, performers, and makers.” In response, CPCC provided a history of the apportionment, and noted that since 2010,

the CPCC has not been asked by its members to revisit the question of either repertoire use or its relationship with the allocation of levies. Presented with no new evidence or arguments, the Board indicated it saw no reason to reconsider the existing apportionment, and therefore has not. Similarly, for 2017, the CPCC has not asked the Board to reconsider the status quo,

²⁸ See Exhibit CPCC-3C (confidential) at p. 16 (Table 16).

²⁹ *PC 2012-2014*, *supra* note 10 at para 45.

³⁰ *Supra* note 8 at p. 13.

³¹ See *PC 2012-2014*, *supra* note 10 at paras 29-41.

³² This is not true of the digital-download proxy proposed by CPCC in 2012. See Exhibit CPCC-13, Alternative Levy Rate Calculation in *PC 2012-2014* proceedings.

which it still finds to be appropriate, in terms of both the Board's methodology, and the evidence used in the Board's calculations.³³

[38] We have been given no reason to revisit the apportionment of the levy in this matter. As such, we fix the apportionment of the levy at 58.2 per cent to authors, 23.8 per cent to performers, and 18.0 per cent to makers of sound recordings, as the Board did in *PC 2015-2016*.

A handwritten signature in black ink, appearing to read 'Gilles McDougall', written in a cursive style.

Gilles McDougall
Secretary General

³³ *Supra* note 8 at p. 20.