

Copyright Board
Canada



Commission du droit d'auteur
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Citation *CPCC – Private Copying Tariff (2022-2024)*, 2021 CB 12

Members Katherine Braun
The Honourable Luc Martineau
René Côté

Proposed Tariff Considered Tariff of Levies to be Collected by CPCC in 2022, 2023, and 2024 on the Sale of Blank Audio Recording Media, in Canada.

Approval of Proposed Tariff
As
CPCC – Private Copying Tariff (2022-2024)

REASONS FOR DECISION

I. INTRODUCTION

[1] The Canadian Private Copying Collective (CPCC) is an umbrella organization representing songwriters, recording artists, music publishers and record companies through its member collectives, namely the Canadian Musical Reproduction Rights Agency, Re:Sound Music Licensing Company, and the Society of Composers, Authors and Music Publishers of Canada. As of December 31, 2018, the Society for Reproduction Rights of Authors, Composers, and Publishers in Canada (SODRAC) is no longer a member of CPCC, but CPCC is still mandated to collect and distribute royalties to SODRAC.

[2] CPCC submitted its first proposed tariff pertaining to private copying to the Copyright Board (the “Board”) in 1998. In each of the subsequent proceedings, the Board has assessed the evidence anew (“*de novo*”), based on the submission filed.

[3] On October 15, 2020, pursuant to Section 83 of the *Copyright Act*¹ (the Act), CPCC filed its proposed tariff of levies to be collected on the sale of blank audio recording media in Canada, respecting the reproduction for private use of musical works embodied in sound recordings,

¹ *Copyright Act*, RSC 1985, c C-42.

performers' performances of such works, or sound recordings in which such works and performances are embodied ("private copying") for the years 2022, 2023 and 2024 (the "Proposed Tariff").

[4] Blank audio recording media is defined in the Proposed Tariff as recordable compact discs (CD-R, CD-RW, CD-R Audio, and CD-RW Audio) made in, or imported into Canada (together "blank CDs").

[5] On October 23, 2020, the Proposed Tariff was published on the Board's website. It proposes a levy of \$0.29 per blank CD sold. There are no objectors to this Proposed Tariff.

[6] After careful review of the evidence, we are satisfied that the Proposed Tariff will form the basis for a fair and equitable tariff during its term 2022-2024. In particular, the evidence reasonably supports our determination that blank CDs will qualify as a medium "ordinarily used" for copying music in 2022, 2023, and 2024. Accordingly, we approve a levy of \$0.29 per blank CD sold in Canada, to be collected by CPCC over the term of the approved tariff.

[7] For the reasons below, we approve the Proposed Tariff as *CPCC – Private Copying Tariff (2022-2024)*.

II. BACKGROUND

[8] In this section, we summarize the legal background of the private copying regime and provide a discussion of the meaning of "ordinarily used" by individual consumers for the purpose of copying music.

[9] The private copying regime came into force in 1998. Part VIII of the Act sets forth its legislative scheme. It provides that it is not an infringement of copyright to reproduce a sound recording onto an "audio recording medium" for the private use of the individual who makes the copy.²

[10] In return, the regime provides that 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 reproduction onto an "audio recording medium" for private use of sound recordings and musical works and performers' performances embodied therein.³ This compensation takes the form of a levy set by the Board, to be paid in respect of each blank audio recording medium disposed of in Canada.⁴

[11] Not all types of media used to copy music can attract a levy. Pursuant to the Act, only an "audio recording medium" can be subject to a levy, defined in Section 79 as a recording medium

² *Ibid*, s.80.

³ *Ibid*, s.81.

⁴ *Ibid*, s.82.

onto which a sound recording may be reproduced and that is of a kind “ordinarily used” by individual consumers for that purpose. If a medium is not so used, then it does not qualify as an audio recording medium and the right to remuneration does not apply.

A. MEANING OF ORDINARILY USED BY INDIVIDUAL CONSUMERS FOR THE PURPOSE OF COPYING MUSIC

[12] The Board’s role is to assess the submitted evidence and form an impression of ordinariness. As it has stated in past decisions, “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.”⁵

[13] The Act is silent on the manner in which “ordinariness” is to be assessed. The Board had to interpret the notion of “ordinarily used by individual consumers” in 1999 in the first decision pertaining to the private copying regime.⁶

[14] At the time, CPCC argued that if a medium were used regularly or normally by individual consumers to copy music, it would ordinarily be used to copy music and therefore would qualify as an audio recording medium pursuant to the Act. Conversely, the Canadian Storage Media Alliance (CSMA), representing importers of blank audio recording media, said the levy should apply only to media most often used to copy music, thereby excluding media whose share of the market was marginal.

[15] After reviewing court decisions and reference resources, and consideration of the principles of statutory interpretation, including the purpose of the regime, the Board concluded that “ordinarily” bore a connotation of consistency and regularity rather than quantity or frequency. As such, for an activity to be ordinary, it did not have to be a person’s main activity, as long it was an activity that was not rare, abnormal, or minimal.⁷

[16] Applying this broad interpretation to the context of the Act, the Board concluded that ordinary use, as referred to in the definition of audio recording medium, meant that only those media clearly not being used to copy music would not be subject to a levy. Thus, the notion of ordinariness had to be interpreted as including all non-negligible uses.⁸ The Board added that since the definition of audio recording medium referred to ordinary use by individual consumers, the analysis had to focus on those who use the medium rather than on those who use other media to copy music.⁹

⁵ *Private Copying (2015-2016)* (12 December 2014), online: Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366746/index.do?q=copie+priv%C3%A9>>, para 31.

⁶ *Private Copying (1999-2000)* (17 December 1999), online: Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366578/index.do?q=copie+priv%C3%A9>> [*Private Copying (1999–2000)*].

⁷ *Ibid*, at p 29.

⁸ *Ibid*, at p 30.

⁹ *Ibid*, at p 31.

[17] On judicial review of the decision,¹⁰ the applicant, CSMA, argued that the words “ordinarily used” should have been interpreted by the Board as meaning usually, commonly, or mainly. They also suggested an approach to determine whether a medium was ordinarily used to copy music, namely, that only if a medium were used to copy music at least half of the time, such uses be considered ordinary. The Court dismissed the application by CSMA, stating that a percentage approach alone would be arbitrary.¹¹ Furthermore, it agreed with the Board that because the definition of “audio recording medium” included the words “by individual consumers”, it was the usage by individual consumers that had to be ordinary, not the use of the product generally.¹²

[18] The Board’s evaluation of evidence pertaining to private copying may comprise both qualitative and quantitative considerations. In the early years of the regime, the use of certain media for the purpose of copying music was relatively new and the Board had little knowledge of how some media were used. The Board’s analysis focused on qualitative considerations to determine whether an audio recording medium was “ordinarily used”.¹³ In later years as more quantitative evidence became available, the Board’s analysis of ordinariness became more data-driven, focusing on several variables to determine whether a medium is “ordinarily used”. For example, the Board examined data filed by CPCC such as the number of tracks copied onto blank CDs, the number of blank CDs purchased, and the percentage of blank CDs used by individual consumers to copy music. The weight given to these data and qualitative considerations by the Board has varied over the years, according to the Board’s evaluation of the reliability and sufficiency of the submitted evidence.

III. ISSUES

[19] In this proceeding, we must first determine whether blank CDs will qualify as an audio recording medium as defined under Section 79 of the Act. If we are of the view that blank CDs will qualify as a recording medium for the purpose of copying music in 2022, 2023 and 2024, then we must determine what the levy payable by makers and manufacturers of blank CDs will be for those years.

[20] In our analysis, we focused on two relevant issues:

1. Will blank CDs be “ordinarily used” by individual consumers to copy music in 2022, 2023, and 2024?
2. If the answer to the first question is yes, what should be the levy on the sale of blank CDs in 2022, 2023, and 2024?

¹⁰ *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency*, 2000 CanLII 15571 (FCA). [AVS]

¹¹ *Ibid*, para 8.

¹² *Ibid*, para 6.

¹³ See e.g., *Private Copying (2003-2004)* (12 December 2003), online: Copyright Board, <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/366587/index.do?q=copie+priv%C3%A9>>, at p 8. (The Board excluded DVDs from the definition of audio recording medium because technical distinctions among various DVD formats meant that most of those formats were not compatible with the burners and players that were used at the time.)

IV. EVIDENCE

[21] On July 30, 2021, CPCC filed its evidence with the Board. In summary, it argues that, taken together - the number of tracks forecast to be copied; its forecast that a quarter of blank CDs purchased will be used to copy music; and, signs of an active market for sales of blank CDs - indicate that blank CDs will be “ordinarily used” by individual consumers to copy music during 2022-2024. CPCC also contends that the Board should approve a levy of \$0.29 per blank CD sold, to be collected by CPCC during the same years.¹⁴

[22] In support of its proposed tariff, CPCC submitted evidence from three witnesses: Lisa Freeman, Executive Director, CPCC; Marcel Boyer, Professor Emeritus; and Benoît Gauthier, President, Circum Network Inc.

A. LISA FREEMAN, EXECUTIVE DIRECTOR, CPCC

[23] Ms. Freeman filed a witness statement that discussed CPCC’s management and staff, its financial position, the distribution of royalties, and enforcement of the tariff.¹⁵ An appendix to this witness statement included the data from the NPD Group relating to the number of blank CDs sold and the prices at which they were sold.

B. MARCEL BOYER, PROFESSOR EMERITUS

[24] In his written testimony, Professor Boyer¹⁶ states that the updated data on retail pricing of blank CDs and the results of the 2021 Music Monitor Survey (MMS) filed in the evidence have not changed his opinion concerning the appropriateness of the \$0.29 levy. He maintains that, since the updated data are broadly similar to previous data filed in past tariff proceedings on private copying, the absence of any meaningful change suggests there is no reason to adjust the proposed levy.

[25] Professor Boyer also comments on two criteria of Section 66.501 of the Act. In respect of paragraph 66.501(a), he claims that the Canadian retail market for blank CDs is competitive, and that he is not aware of any concerns expressed about the market for blank CDs and, that all markets are “reasonably competitive” unless there is evidence to the contrary.

[26] Professor Boyer’s evidence also considers the public interest as concerns the proposed levy, echoing paragraph 66.501(b) of the Act. He explains that he examined three elements: the fairness of the proposed levy, the impact of the proposed levy, and the ability to pay. He concludes that a levy of \$0.29 satisfies all three of these elements.

¹⁴ CPCC-1, para 4.

¹⁵ CPCC-2.

¹⁶ CPCC-4.

C. MR. BENOÎT GAUTHIER, PRESIDENT, CIRCUM NETWORK INC.

[27] Mr. Gauthier provided forecasts on the pattern of private copying of music in Canada for the years 2022, 2023, and 2024, using the MMS conducted by Circum Network Inc. The methodology of the MMS remained the same over the 2001-2016 period, but Mr. Gauthier modified his surveying away from telephone-based to web-based participant panels in 2019, claiming that web-based surveying was more practical and precise. He claims the survey data are representative of the Canadian population aged 13 and over.¹⁷ Mr. Gauthier's forecasts are summarized below.

i. Number of Tracks Copied

[28] Calculation of the number of tracks copied was previously made based on annual MMS data, but this survey became occasional after the 2013-2014 survey year. Mr. Gauthier follows the Board's preferred method for forecasting.¹⁸ His forecasts indicate fewer tracks copied onto blank CDs each year: for 2022, he forecasts 227.7 million tracks copied onto blank CDs, declining to 224.5 million tracks (2023), and to 221.3 million tracks (2024).

ii. Number of blank CDs purchased by individual consumers

[29] Prior to 2019, Mr. Gauthier used data from the Santa Clara Consulting Group,¹⁹ which are no longer produced, combined with "anchor" questions from the MMS, to calculate the number of blank CDs purchased by individual consumers in the Canadian market.

[30] In *Private Copying 2020-2021*²⁰, Mr. Gauthier used a new methodology. Using data on the annual royalties collected by CPCC from the sale of blank CDs, he forecast the number of blank CDs purchased by individual consumers. In its decision, the Board concluded that results based on the MMS were not perfect" but "sufficiently reliable" and accepted those forecasts. However, the methodology using annual royalties collected to determine the number of blank CDs purchased was not regarded as a reliable measure, as it was created through "circular" reasoning.²¹

[31] In the present proceeding, Mr. Gauthier did not use data on annual royalties collected to estimate the number of blank CDs purchased. Instead, data from the NPD Group on the volume of blank CDs purchased was used. The NPD Group collects "point-of-sale" data from over 8,100

¹⁷ CPCC-3, para 22.

¹⁸ M. Gauthier interpolates the missing data and extrapolates the new data based on the average annual growth rate for the last period 2015/16 to 2020/21, a methodology we find acceptable.

¹⁹ CPCC-3, para 72.

²⁰ *Private Copying (2020-2021)* (13 December 2019), CB-CDA 2019-088, online: Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/item/454552/index.do?q=copie+priv%C3%A9>> [*Private Copying (2020-2021)*].

²¹ *Ibid*, paras 40-43.

businesses across Canada, including websites, mobile apps, and traditional stores. They claim their data coverage captures 80% of total sales of blank CDs in the Canadian retail market.²²

[32] Mr. Gauthier's forecasts show 2.42 million blank CDs purchased by individual consumers in 2021, declining to 1.96 million (2022); to 1.58 million (2023); and, to 1.28 million (2024).

iii. Percentage of Blank CDs used to copy work

[33] Mr. Gauthier used the MMS to calculate the percentage of blank CDs purchased to copy music. Use of blank CDs has continued to decline since 2006, when 53% of all blank CDs purchased by individual consumers were used to copy music. By 2019, that number declined to 30% of blank CDs used to copy music.

[34] Mr. Gauthier forecasts that 26% of purchased blank CDs will be used to copy music in 2022; declining to 25% (2023); and to 24% (2024).

iv. Price of Blank CDs

[35] Mr. Gauthier used NPD Group data to provide estimates on the retail prices of blank CDs sold in Canada over the 2017-2020 period. Retail prices of blank CDs have remained relatively stable; they depend on the packaging, such as a spindle of 100 CDs, or 50 CDs, or 10 CDs. As retail pricing greatly exceeds \$0.29 per blank CD, CPCC claims that the levy is a full-cost pass-through to the individual buyer.²³ This is the first time that data from the NPD Group has been used in a private copying tariff proceeding.

V. ANALYSIS OF THE EVIDENCE

A. THE IMPORTANCE OF RELIABLE AND SUFFICIENT DATA

[36] The Act provides that the Board fix royalty and levy rates and related terms and conditions that are fair and equitable.²⁴ To do this, the Board requires reliable and sufficient evidence.

[37] In *Private Copying 2020-2021*, the Board noted that data submitted by CPCC were "not as up to date as they could be"²⁵ and that CPCC's evidence had become less reliable. The reasons for decision suggested some ways CPCC could improve their evidence.

²² CPCC-3, para 76.

²³ CPCC-1, para 49; CPCC-2A, para 7. (The information on retail prices of blank CDs is designated as confidential information.)

²⁴ *Supra* note 1, s. 66.501.

²⁵ *Supra* note 20, para 54. See also, *Private Copying (2018-2019)* (1 December 2017), CB-CDA 2017-148, online: Copyright Board <<https://decisions.cb-cda.gc.ca/cb-cda/decisions/fr/item/366771/index.do?q=copie+priv%C3%A9+2018-2019>>, para 71.

[38] Accordingly, in this proceeding, the Board issued Notice CB-CDA 2021-015 on February 23, 2021, with some questions for CPCC. CPCC filed its response to the Notice as part of its Statement of Case.

B. ISSUE 1: WILL BLANK CDS BE ORDINARILY USED TO COPY MUSIC IN 2022-2024?

[39] Our determination on the ordinary use of blank CDs by individual consumers to copy music over the term of the proposed tariff includes consideration of the meaning of the concept “ordinarily used” and the evidence submitted.

[40] In *Private Copying 2020-2021*, the Board accepted that forecasts of two variables - the number of tracks copied onto blank CDs and the percentage of blank CDs used to copy music - were sufficiently reliable to conclude that blank CDs would be “ordinarily used” by individual consumers to copy music. In the present proceeding, evidence on these same two variables over the 2022-2024 period serve to support our assessment of ordinariness, plus one more, the number of blank CDs that will be purchased by individual consumers.

[41] We generally accept Mr. Gauthier’s forecast relating to the number of tracks to be copied onto blank CDs. In addition, we find NPD Group data to be satisfactory and the forecasts to be reliable. NPD’s data coverage represents a major share of blank CD retail sales in Canada. Finally, we also generally accept that the proportion of blank CDs that will be used to copy music, forecast to be between 24% to 26% over the term of the tariff, is indicative of ordinary use.

[42] Therefore, we consider that forecasts for all three variables adduced into evidence - the number of tracks copied onto blank CDs, the percentage of blank CDs used to copy music, and the number of blank CDs purchased - are sufficiently adequate to allow us to form an impression on ordinariness. Taken together, these forecasts indicate a “non-negligible” use of blank CDs for private copying over 2022-2024. In our view, these forecasts allow us to conclude that blank CDs will be “ordinarily used” by individual consumers to copy music over the term of the tariff.

[43] However, we are of the view that design changes to the MMS in the last few years have created some data reliability issues. The MMS is now conducted using pre-existing panels rather than random sampling of the Canadian population. While all forecasts contain some degree of error, using the same pre-existing panels repeatedly can introduce bias into the MMS data and raises questions about the representativeness of survey respondents vis-à-vis the Canadian population. Returning to random sampling would be an improvement.

C. ISSUE 2: WHAT SHOULD BE THE LEVY ON THE SALE OF BLANK CDS IN 2022-2024?

[44] Prior to the *Private Copying Tariff 2012-2014* decision, the levy was set at \$0.29 using a

model called Stohn-Audley²⁶. The amount of the levy has remained at \$0.29 since then. We are not aware of any opposition to the existing levy or evidence that the existing levy rate is unfair, inappropriate, or inequitable and should therefore be modified.

[45] Various market participants (manufacturers, importers, wholesalers, retailers, and consumers) have formed expectations that incorporate the \$0.29 levy. Business plans incorporate the levy and some degree of pass-through. As noted above, retail prices of blank CD exceed \$0.29, which is consistent with a well-functioning market that incorporates the levy. It also seems reasonable to conclude that the \$0.29 levy is accepted by those who benefit from it.

[46] Therefore, we conclude that a levy of \$0.29 per blank CD purchased by individual consumers in the Canadian market over the 2022-2024 period is fair and equitable.

D. WHAT IS THE APPROPRIATE APPORTIONMENT OF THE LEVY AMONG RIGHTS HOLDERS?

[47] Section 84 of the Act requires that we apportion the levy among authors, performers, and makers of sound recordings. The percentage applicable to each college of rights holders corresponds to that college's share of all private copies of the qualifying repertoire. We were not asked to change the apportionment and we have no reason to believe that the existing apportionment is no longer appropriate. Accordingly, authors shall receive 58.2 per cent of royalties; performers to 23.8 per cent; and makers to 18.0 per cent.

VI. DECISION

[48] Having considered the evidence, we conclude that the Proposed Tariff forms the basis for a fair and equitable tariff during for the 2022-2024 period, as required by Section 66.501 of the Act.

[49] We find that some of the evidence submitted is reasonably supportive for us to conclude that blank CDs will be "ordinarily used" to copy music in 2022, 2023, and 2024. We also find that a levy of \$0.29 is appropriate during these years.

[50] Without modification, we approve the Proposed Tariff under the title *CPCC – Private Copying Tariff (2022-2024)*.

²⁶ *Private Copying, 2010* is the last time the model was used. The Stohn-Audley model was used to set the \$0.29 levy. The model equated the levy to the total compensation that would have been paid for a hypothetical pre-recorded CD containing the tracks privately copied onto the blank CD. This model was discarded by the Board in that proceeding as no longer reliable, since the technology was reaching the end of its life.