

December 12, 2003

What is the Copyright Board?

The Copyright Board is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of works protected by copyright, when the administration of these rights is entrusted to a collective society. The Board also supervises agreements signed between users and collective societies and can issue licences when the copyright owners cannot be located.

What is "Private Copying"?

Before the *Copyright Act* was amended in 1998, copying any sound recording for almost any purpose infringed copyright, although, in practice, the prohibition was largely unenforceable. The amendment to the *Act* legalized private copying of sound recordings of musical works onto audio recording media - i.e., the copying of pre-recorded music for the private use of the person who makes the copy. In addition, the amendment made provision for the imposition of a levy on blank audio recording media to compensate authors, performers and makers who own copyright in eligible sound recordings being copied for private use.

What specific forms of blank recording media are subject to the levy?

Analog Audio Cassette Tapes: All analog audio cassettes with a recording time of 40 minutes or more are subject to the private copying levy. No distinction is made among types of cassettes according to bias, nor between standard length and custom length cassettes.

CD-R and CD-RW: These recordable and re-writeable digital media are typically used in CD writers found in personal computer systems. They are used to record and store data, including sound recordings.

CD-R Audio and CD-RW Audio: CD-R Audio and CD-RW Audio are recordable and rewritable digital media formats, respectively, that are electronically marked for use in certain consumer audio recording equipment.

CD-R Audio and CD-RW Audio products were 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. Otherwise, they are technologically identical to their non-Audio counterparts.

Audio CD-Rs and CD-RWs are marketed as such, and are generally sold at a higher price than ordinary CD-Rs and CD-RWs. They also represent a very small percentage of the overall Canadian recordable CD market.

MiniDisc: This is a rewritable digital medium (i.e., a 2 ½ inch disc) that relies on data-compression to store recorded music, primarily for use in portable MiniDisc audio players.

Non-Removable Memory Permanently Embedded in a Digital Audio Recorder: This covers two general types of memory embedded in digital audio recorders (such as MP3 players) capable of recording and playing back music files most commonly stored in MP3 format. The first category covers solid state memory, containing no moving parts. Typically this type of memory has between 32 and 256 Megabytes (Mbs) of storage capacity. The second category covers spinning hard-disk drives that are technically similar to those found in personal computers. The capacity of these storage devices is much larger, ranging from 5 to over 200 Gigabytes (Gbs).

What specific forms of recording media are not subject to the levy?

The Board concluded in its first private copying decision, issued in 1999, that Digital Audio Tape (DAT) and micro-cassettes are not typically used by individuals for copying music for private use and, therefore, are not subject to a levy.

The Board concluded in the decision issued today that recordable and rewritable DVDs, removable memory cards (such as SmartMedia, CompactFlash and Secure Digital Memory cards) and removable micro hard drives are not ordinarily used by individuals for the purpose of copying music at this time. Therefore, these media are not subject to a levy.

I buy blank CDs regularly to store data from my computer. Are they subject to the levy?

Yes. Both "ordinary" CD-Rs and CD-RWs and their "Audio" counterparts can be used to copy music, and both are commonly used for this purpose. In fact, in volume terms, most CDs used to copy music are "ordinary" CD-Rs and CD-RWs (subject to a levy of 21¢), not "Audio" products (subject to a levy of 77¢).

In establishing the levy rates on ordinary CD-Rs and CD-RWs, the Board has taken into account the fact that they have other uses than recording music, such as storing data and digital images. In contrast, Audio CD-Rs and CD-RWs are generally used solely for the purpose of copying music. As a result, the per unit levy rate on ordinary CD-Rs and CD-RWs is well below the rate applicable to Audio CD-Rs and CD-RWs. The current per unit levy rates for each are provided below.

How were the levies for 2003 and 2004 established?

The Copyright Board conducted an extensive public proceeding which started in March 2002 when it published the statement of proposed levies for the period 2003-2004 in the *Canada Gazette*. The proposal was made by the Canadian Private Copying Collective (CPCC) on behalf of eligible rights holders (i.e., eligible authors, eligible performers and eligible makers). Evidence in support of the proposed tariffs was filed with the Board by CPCC. Counter evidence was provided by a number of objectors including major manufacturers and importers of blank audio recording media, major retailers of such media as well as other organizations and individuals. In fact, the Board received over 1,500 submissions on the proposed levies.

The levies certified in the current decision are based on the evidence provided by these parties, including testimony provided by expert witnesses. The Board also took into account the evidence and testimony on the record of its two previous private copying proceedings.

What are the new private copying levy rates set by the Board?

For the period from January 1st, 2003 to December 31st, 2004, the Board certified the following levy rates:

- *Audio cassettes* (of 40 minutes or more in length): 29¢ each
- *CD-R and CD-RW*: 21¢ each
- *CD-R Audio, CD-RW Audio and MiniDisc*: 77¢ each
- *For non-removable memory permanently embedded in a digital audio recorder*: \$2 for each recorder that can record no more than 1 Gb of data, \$15 for each recorder that can record more than 1 Gb and no more than 10 Gbs of data, and \$25 for each recorder that can record more than 10 Gbs of data.

What were the rates initially proposed by CPCC for the years 2003 and 2004?

CPCC proposed rates of 51¢ for each audiocassette, 59¢ for each CD-R of 100 megabytes (Mbs) or more, 49¢ for each CD-RW of 100 Mbs or more, \$1.15 for each CD-R Audio and CD-RW Audio or MiniDisc, and 65¢ for each blank DVD. For removable electronic memory cards, or a removable hard drive, CPCC sought a rate from 0.221¢ to 0.55¢ for each Mb. For (a) removable electronic memory cards sold bundled with a music device, or a removable micro-hard drive sold bundled with a music device, or (b) non-removable memory incorporated into a music device, or a hard drive incorporated into a music device, CPCC proposed rates from 0.193¢ to 1.08¢ for each Mb depending on capacity.

Who pays the levy?

Manufacturers and importers are responsible for paying the levy on each unit of leviable media that they sell or otherwise dispose of in Canada. While the levy is paid at the wholesale level, it is generally accepted that the costs of the levy are passed on to end users.

Who benefits from the levy?

The entitlement to receive remuneration in respect of private copying of sound recordings benefits eligible authors, eligible performers and eligible makers. This is a corollary to the right of individuals to copy musical works for their own private use.

CPCC has been designated as the collecting body for the private copying levy. CPCC is also responsible for distributing the amounts generated by the levy to collective societies representing eligible authors, eligible performers and eligible makers. Member collectives of the CPCC include:

- 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)

For more information, please consult CPCC's Web site: www.cpcc.ca

Is anyone exempt from paying the levy?

The Board cannot grant exemptions from the levy. However, the *Copyright Act* does grant one exemption to associations representing persons with perceptual disabilities.

Nevertheless, at the time of the initial implementation of the private copying levy, CPCC introduced a zero-rating program permitting manufacturers and importers to sell blank audio recording media to certain categories of users without having to pay the levy. These include religious organizations, broadcasters, law enforcement agencies, courts, tribunals, court reporters, provincial ministers of education and members of the Association of Universities and Colleges of Canada, music and advertising industries. CPCC's initial zero-rating program applied to audio cassettes tapes, CD-R Audio, CD-RW Audio and MiniDiscs.

During the course of the current proceedings, CPCC announced plans to extend the scope of the zero-rating program to include ordinary CD-Rs and CD-RWs and, at the same time, broaden the range of eligible users. However, objectors to CPCC's private copying proposal raised a number of concerns with the existing or planned extended CPCC zero-rating program claiming, among other things, that the program is inherently unauthorized, illegal and unfair.

On this issue, the Board majority agreed that it does not have the legal authority to exempt those who are, under the *Act*, liable for the payment of levies, and nor does CPCC. As a consequence, it considers CPCC's existing or planned expanded zero-rating program to be illegal. The Board majority also noted that aside from the lack of legal support for CPCC's program, it has serious reservations regarding the fairness of the extended program and grave concerns regarding the potential impact of the program on the market for blank CDs in Canada.

The dissenting member disagreed with the analysis of the majority on this issue of the zero-rating program. In his dissent, Vice-Chairman Callary noted that because in the past, the Board strongly encouraged CPCC to create such a program, it ought now to accept the unavoidable consequences of its own action and take into account the reality of the levy's application. Vice-Chairman Callary also stated his concerns for those many organizations which have relied on the existence of a zero-rating program and that could now find themselves faced with a major unexpected potential liability.

How much revenue is expected to be generated by the levy?

CPCC has indicated that it collected roughly \$7 million in 2000, the first year of the regime, and about \$24 million in 2001. CPCC claimed during the hearing earlier this year that it expects to collect in the order of \$28 million for 2002.

While the rates have been maintained at the same level in 2003 and 2004 as they were in 2001 and 2002, the Board nevertheless expects that ongoing growth in the volume of blank audio recording media sales could provide CPCC with higher revenues collected over the course of 2003 and 2004. However, the Board also notes that CPCC's planned extended zero-rating program, if implemented, would negatively affect its revenues. Consequently, the Board is unable to provide a reliable forecast of CPCC's revenues for the period covered by the current decision.