

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2019-088]

Copying for Private Use

Copyright Act, s. 83(1), 83(8) and 83(8.1)

TARIFFS OF LEVIES TO BE COLLECTED BY CPCC
IN 2020 AND 2021 ON THE SALE OF BLANK AUDIO RECORDING

DECISION OF THE BOARD

Reasons delivered by:

The Honourable Robert A. Blair
Ms. Nathalie Théberge
Ms. Katherine Braun

Date of the Decision:

December 13, 2019

I. DECISION OVERVIEW

[1] The Canadian Private Copying Collective (CPCC) proposed a tariff with a levy of 29¢ for each blank CD made in, or imported, into Canada.

[2] CPCC makes two main submissions. First, based on the application of principles used by the Board in previous decisions, blank CDs continue to meet the Board’s threshold to qualify as a medium ordinarily used by individual consumers to copy music. Second, the existing levy of 29¢ cents on blank CDs is fair and equitable and should remain the same for 2020 and 2021.¹

[3] For the reasons below, we conclude that blank CDs qualify as a “blank audio recording medium” under s. 79 of the *Copyright Act*² (the “Act”), and agree that a levy of 29¢ for each blank CD is appropriate.

II. BACKGROUND

[4] On March 29, 2019, the CPCC filed with the Board proposed levies to be collected in 2020 and 2021 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 *Act*.

[5] CPCC is an umbrella organization that represents 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 Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (“SODRAC”) is no longer a member of CPCC, but CPCC is still mandated to collect and distribute royalties to SODRAC.³

[6] The proposed tariff targets recordable compact discs (CD-R, CD-RW, CD-R Audio, and CD-RW Audio: together “blank CDs”). It seeks a levy of 29¢ for each blank CD.

[7] On April 26, 2019, the Board published the proposed tariff in the *Canada Gazette*. No objections were filed. On August 9, 2019, in accordance with the Board’s Notice 2019-044, CPCC filed with the Board its evidence to support the levy.

[8] CPCC proposed that the present proceeding proceed on “paper-only” with no need for an oral hearing.⁴

¹ CPCC-1 at paras 2, 4, and 52.

² *Copyright Act*, R.S.C. 1985, c. C-42.

³ CPCC-1 at para 1.

⁴ CPCC-1 at para 2.

III. EVIDENCE

A. Lisa Freeman, Executive Director, CPCC

[9] Ms. Lisa Freeman, Executive Director of CPCC, filed a witness statement that discusses CPCC's management and staff, its financial position, the distribution of royalties, and enforcement of the tariff.⁵

B. Benoît Gauthier, President, Circum Network Inc.

[10] Mr. Benoît Gauthier, as an expert witness for CPCC, updated the variables the Board considered in its decision to certify the 2018-2019 private copying tariffs and provided projections for the years 2020 and 2021.

[11] Data about the pattern of music copying in Canada come from the Music Monitor Survey (MMS) conducted by Circum Network Inc. The methodology of the MMS remained the same from 2001-2002 to 2015-2016. However, while the core questions remained the same in the 2019 survey, Mr. Gauthier modified the surveying approach from telephone-based to web-based.

[12] Mr. Gauthier's projections of the variables to examine whether blank CDs are ordinarily used for private copying are presented below.

a) Number of tracks copied

[13] The most recent MMS data before 2019 are from 2015-2016. The MMS provided an estimate that, in 2015-2016, Canadians copied 252.3 million tracks onto blank CDs. According to the MMS, there were 232.8 million tracks copied onto blank CDs in 2019.⁶

[14] Mr. Gauthier projects that 218.3 million copies of music tracks will be made onto blank CDs in 2020 and 204.8 million in 2021.⁷

b) Percentage of all tracks copied onto blank CDs

[15] Mr. Gauthier explains that since the Board moved away from using this indicator in *Private Copying 2018-2019*⁸, he did not forecast this indicator for 2020-2021.⁹

c) Number of blank CDs purchased by individuals

[16] In past private copying proceedings, CPCC relied on data from the Santa Clara Consulting Group (SCCG) reports to calculate the number of blank CDs sold in the Canadian market that are being purchased by individuals. SCCG does not produce a report on the topic anymore.¹⁰ Instead, Mr. Gauthier projects the sales of blank CDs in Canada based on CPCC revenues. He states that his calculation is valid

⁵ CPCC-2.

⁶ CPCC-3 at para 14.

⁷ CPCC-3 at para 17 and Table 2.

⁸ *Private Copying 2018-2019* (1 December 2017) Copyright Board at paras 36-47.

⁹ CPCC-3 at para 21.

¹⁰ CPCC-3 at para 22.

because of the high statistical correlation between the number of blank CDs sold annually in the Canadian market and the number of blank CDs on which CPCC derives revenues.¹¹

[17] Assuming the same trend in CPCC's revenues for 2006-2019 continues, Mr. Gauthier estimates revenues of \$1.1 million in 2019, \$0.9 million in 2020, and \$0.7 million in 2021. He uses these figures to estimate both the market size for blank CDs in Canada and the number of blank CDs bought by individuals for 2019-2021.

d) Percentage of CDs and the number of blank CDs used to copy music

[18] In 2015-2016, 33 per cent of blank CDs bought by individuals were used to copy music. The 2019 MMS indicates that 30 per cent of blank CDs were used to copy music in 2019. Mr. Gauthier explains that these statistics show that the ratio was fairly stable from 2015 to 2019.¹² He assumes that the same 30 per cent will hold in 2020 and 2021.

[19] In Mr. Gauthier's opinion, his projections for the

number of music tracks copied onto blank CDs in 2020 and 2021, the number of blank CDs bought by individuals, the proportion of the media used to copy music, and the number of blank CDs used by individuals to copy music are well beyond the historical thresholds used by the Copyright Board to consider a medium as ordinarily used to copy music.¹³

C. Marcel Boyer, Professor

[20] Professor Marcel Boyer, another expert witness for CPCC, filed a report¹⁴ in which he reiterates the findings of his previous report¹⁵ from the 2018-2019 private-copying proceeding, using the updated retail-pricing data provided by CPCC. In particular, he opines that the caution exercised by the Board in maintaining the levy rate of 29¢ because of the maturity of the market reflects an appropriate level of prudence and sound economic reasoning. He also opines that the market for blank CDs appears to have "plateaued," as opposed to suffering a complete demise, which had been previously predicted by the Board.

[21] He concludes that "[g]iven that the amounts involved are not marginal for rights holders, and given that the practice of 29¢ per Blank CD levy is "a reality in the marketplace", to use the Board's expression, precautionary principles justify maintaining the levy at its present level".¹⁶

¹¹ CPCC-3 at paras 23–31.

¹² CPCC-3 at paras 32, 34.

¹³ CPCC-3 at para 44.

¹⁴ CPCC-4.

¹⁵ CPCC-4A.

¹⁶ CPCC-4 at paras 10–11, 13.

IV. DO BLANK CDs QUALIFY AS AN “AUDIO RECORDING MEDIUM” UNDER SECTION 79 OF THE ACT?

A. Legal Background

[22] 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 person who makes the copy.¹⁷

[23] 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 the reproduction onto an “audio recording medium”, for private use, of sound recordings and the musical works and performers’ performances embodied therein.¹⁸ This compensation takes the form of a levy set by the Board following the filing of a proposed tariff by CPCC, to be paid in respect of each blank audio recording medium disposed of in Canada.¹⁹

[24] 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. Section 79 of the *Act* defines an “audio recording medium” as a recording medium onto which a sound recording may be reproduced and that is of a kind *ordinarily used by individual consumers for that purpose*.

[25] In this proceeding, the Board must first determine whether blank CDs qualify as an audio recording medium in 2020 and 2021, as defined under Section 79 of the *Act*. If the Board is of the view that blank CDs are ordinarily used by individual consumers for the purpose of copying music in 2020 and 2021, it must then determine what the levy payable by makers and manufacturers of blank CDs will be.

B. Meaning of *ordinarily used by individual consumers for the purpose of copying music*

[26] The *Act* is silent on the manner in which ordinariness is to be assessed. In the early years of the regime, where the use of certain media for the purpose of copying music was relatively new, the Board’s analysis focused on qualitative considerations to determine whether an audio recording medium was “ordinarily used”.²⁰

[27] 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.²¹ At the time, CPCC argued that if a medium were used regularly or normally by individuals 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, stated that the

¹⁷ *Copyright Act*, s. 80.

¹⁸ *Copyright Act*, s. 81.

¹⁹ *Copyright Act*, s. 82.

²⁰ See e.g., *Private Copying 2003-2004* (12 December 2003) Copyright Board 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). [*Private Copying (2003–2004)*]

²¹ *Private Copying 1999-2000* (18 December 1999) Copyright Board. [*Private Copying (1999–2000)*]

levy should apply only to the media most often used to copy music, excluding thereby media whose share of the market was marginal.

[28] After having reviewed dictionaries and court decisions and taken into consideration 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.²²

[29] 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; consequently, the notion of ordinariness, as used in the definition of audio recording medium, had to be interpreted as including all non-negligible uses.²³

[30] 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.²⁴

[31] On judicial review of the decision²⁵, 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.

[32] In response to the proposition put forward by CSMA, the Court stated that a percentage approach alone would be arbitrary.²⁶ 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.²⁷

[33] In later decisions, the Board’s analysis of ordinariness became more data-driven, focusing on a set of statistical variables. The Board would look at data filed by CPCC, such as the number of tracks copied onto CDs or the percentage of CDs used by individuals to copy music, to determine whether a medium is “ordinarily used”.

²² *Private Copying 1999-2000, supra* 21 at p. 29.

²³ *Private Copying 1999-2000, supra* 21 at p. 30.

²⁴ *Private Copying 1999-2000, supra* 21 at p. 31.

²⁵ *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency*, 2000 CanLII 15571 (FCA). [AVS]

²⁶ *AVS, supra* note 25 at para 8.

²⁷ *AVS, supra* note 25 at para 6.

V. ANALYSIS OF THE EVIDENCE FILED BY CPCC

A. Whether blank CDs will be ordinarily used to copy music in 2020 and 2021

[34] We have summarized above the evidence put forward by CPCC. In this section, we analyze CPCC's evidence, namely the three statistics put forward by CPCC, with a view to determining whether CPCC has demonstrated that blank CDs still qualify as a recording medium and thus, must attract a levy.

Number of music tracks copied onto blank CDs

[35] Mr. Gauthier forecasts that 218.3 million copies of music tracks will be made onto blank CDs in 2020 and 204.8 million in 2021, based on the MMS survey.

[36] Although the methodology of the 2019 survey (web-based) differs from the methodology of the 2015-2016 and prior surveys (telephone-based), Mr. Gauthier is of the view that this does not disqualify the 2019 survey for the purpose of projecting a trend, and explains that he ensured the consistency of the 2019 data by comparing the data to the previous surveys based on several indicators.²⁸ His opinion is that web-based surveying is now more practical and, in some ways, more precise than telephone-based surveying used in previous MMS surveys. Mr. Gauthier states that the survey data are representative of the Canadian population aged 13 and over.²⁹

[37] We accept Mr. Gauthier's forecasts for the number of copies of music tracks onto blank CDs in 2020 and 2021.

Percentage of blank CDs used to copy music

[38] Mr. Gauthier projects that 30 per cent of blank CDs will be used to copy music in 2020 and 2021. The 30 per cent is based on the 2019 survey and consistent with the trend for 2015-2016.

[39] We accept Mr. Gauthier's projection for the per cent of blank CDs that will be used to copy music in 2020 and 2021.

Number of blank CDs purchased by individuals

[40] While the methodology Mr. Gauthier used to project the number of blank CDs purchased by individuals is in our view sensible, we have some important technical concerns with his estimations. The main issue is that the high statistical correlation between the number of blank CDs sold annually in the Canadian market and the number of blank CDs on which CPCC derives revenues (99 per cent as Mr. Gauthier calculates)³⁰ does not create a reliable measure to forecast the number of blank CDs sold in Canada.

[41] First, the calculation is circular because, based on the private-copying levy, a high correlation between the number of blank CDs sold annually in the Canadian market and the number of blank CDs on

²⁸ CPCC-3 at paras 6-7, 10-11.

²⁹ CPCC at para 10.

³⁰ CPCC-3 at para 27.

which CPCC derives revenues is already established; and that is the reason such a high correlation is observed.

[42] Second, a simple correlation between two variables for ten years (2006-2015) is, in our view, inadequate to forecast six more years of the relationship between them (2016-2021). Even in larger samples, more statistical tests are required to establish such a relationship between two “time-series” variables. In general, forecasting six more years of data (2016-2021)³¹ based on only ten actual data points (2006-2015)³² leads to inaccuracies regardless of the methodology used.

[43] For the reasons discussed above, we do not find Mr. Gauthier’s projections for the number of blank CDs purchased by individuals reliable.

Conclusion

[44] Given the above, and while we do not consider that the statistics pertaining to the number of blank CDs purchased by individuals adduced in evidence are reliable, we are of the view that the two other statistics adduced in evidence, although not perfect, are nonetheless sufficiently reliable to allow us to form an impression on ordinariness.

[45] Taken together, the number of tracks forecast to be copied in 2020 and 2021, respectively 218.3 and 204.8 million, and the projection that 30 per cent of blank CDs will be used to copy music during that period, convince us that during 2020 and 2021, blank CDs will be ordinarily used by individual consumers for the purpose of copying music.

[46] As mentioned earlier, it is the usage by individual consumers that must be ordinary, not the use of the product generally. While the two statistics do not directly speak to “individual” uses as opposed to “general” uses³³, in our view, the figures on usage that we consider reliable are sufficiently high to allow us to conclude that blank CDs will be used ordinarily by individual consumers to copy music.

[47] For those reasons, we conclude that blank CDs qualify as an audio recording medium in respect of which the Board must approve a levy.

B. Analysis of the Levy

[48] CPCC has proposed a levy of 29¢ per blank CD for 2020 and 2021, arguing that it has been the “reality in the marketplace” and citing previous decisions of the Board in support of its position.

[49] The Board first set a levy of 29¢ in *Private Copying 2010* using the Stohn-Audley model.³⁴ However, in *Private Copying 2012-2014*, the Board explained that, “when a technology reaches the end of its life cycle, the information that can be obtained, especially from surveys, will tend to be sufficiently

³¹ CPCC-3, Table 5.

³² CPCC-3, Table 6.

³³ As an example, we are not able to distinguish between whether there is a set of individual consumers that will ordinarily use blank CDs to copy music or whether there is a wider set of consumers that will exceptionally use blank CDs to copy music.

³⁴ *Private Copying 2010* (2 November 2010) Copyright Board at paras 77–96.

unstable to become unreliable”.³⁵ For that reason, the Board abandoned the Stohn/Audley model. Since that time, the Board has issued five private copying decisions, each without the benefit of a formal model (or a proxy)³⁶, maintaining the rate at 29¢ based on the reasoning that the rate had become a “reality in the marketplace”.

[50] We are approving a rate of 29¢ per blank CD, for the following reasons. First, the levy has been fixed at 29¢ since 2008, and since 2012, the Board has approved that rate continuously on the basis that it has, in its view, become a reality in the marketplace. Second, there has been no opposition to the existing levy, and no evidence made available to the Board to the effect that the 29¢ levy should be modified. Third, it seems reasonable to conclude that this amount is accepted by those who benefit from the levy.

Conclusion

[51] Considering the above analysis, we therefore conclude that a 29¢ levy is a fair and equitable rate and reflects the public interest.

C. Apportionment of the levy among rights holders

[52] Section 84 of the *Act* requires that we apportion the levy among authors, performers and makers. The percentage applicable to each college of rights holders corresponds to that college’s share of all private copies of the qualifying repertoire.

[53] We were not asked by CPCC to change the apportionment and we have no reason to believe that the existing apportionment is no longer representative of each college’s share. Accordingly, authors are entitled to 58.2 per cent of royalties, performers to 23.8 per cent and makers to 18.0 per cent.

D. The issue of data quality

[54] As the Board indicated in its most-recent private-copying decision, the data presented by CPCC are “not as up to date as they could be”.³⁷ Over time, CPCC’s forecasts have become less reliable.

[55] To that end, it would be helpful to the Board if CPCC were able to submit more robust economic evidence in the future to support a determination of “ordinarily used” and a “fair and equitable” tariff. For example, CPCC may want to consider providing a better explanation of the manner in which collected data is weighted in the aggregated figures, and as well providing some enhancement to the MMS survey regarding the following:

- data that would demonstrate the extent to which consumers are aware of the presence of a levy on blank CDs and the effect on their behaviour, if any; and

³⁵ *Private Copying (2012–2014)* (30 August 2013) Copyright Board at para 34. [*Private Copying (2012–2014)*]

³⁶ *Private Copying 2011* (17 December 2010) Copyright Board at paras 7–10, *Private Copying 2012-2014*, *supra* note 35 at paras 45–46, *Private Copying 2015-2016* (12 December 2014) Copyright Board at para 34, *Private Copying 2017* (16 December 2016) Copyright Board at para 28, *Private Copying 2018-2019*, *supra* note 8 at para 89.

³⁷ *Private Copying 2018-2019*, *supra* note 8.

- the extent to which copies made onto blank CDs are already authorized (e.g., by a user agreement).

VI. THE TARIFF

[56] In accordance with the above reasons, we approve a tariff with a levy of 29¢ per blank CD for 2020 and 2021, to be apportioned as follows: 58.2 per cent to authors, 23.8 per cent to performers and 18.0 per cent to makers.

Reasons certified by the Secretary General,

A handwritten signature in black ink, appearing to read 'Lara Taylor', with a stylized flourish at the end.

Lara Taylor