

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date of Decision 2000-12-15

Date of Reasons 2001-01-22

Citation FILE: Private Copying 2001-2002

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

Members Mr. Justice John H. Gomery
Mr. Stephen J. Callary
Mrs. Sylvie Charron

Tariff of levies to be collected by CPCC, in 2001 and 2002, for 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 performer's performances of such works and of sound recordings in which such works and performances are embodied

Reasons for decision

I. INTRODUCTION

These reasons deal with the proposed private copying tariff filed by the Canadian Private Copying Collective (CPCC) for the years 2001 and 2002. The certified tariff sets the levy that manufacturers and importers of blank audio recording media must pay for the benefit of eligible authors, performers and producers in respect of the reproduction for private use of sound recordings of musical works [hereafter "private copying"]. The filing of the proposed tariff, its publication in the *Canada Gazette* and the notice concerning the right to object were made in accordance with section 83 of the *Copyright Act* [the "Act"].

The Canadian Advanced Technology Alliance, Magra Multi Media, Mr. Graeme Oliver, musician, and the Canadian Storage Media Alliance (CSMA) filed timely objections to the proposed tariff. The first three objectors either withdrew their objection or did not comply with the established procedure. As a result, only CPCC and CSMA participated in the process from start to finish. The pre-hearing conference, hearing and arguments extended over eight days from June 6 to November 28, 2000.

This is the second decision dealing with private copying. The first, issued on December 16, 1999,¹ set the levy at 23.3¢ for audio cassettes, 5.2¢ for CD-Rs and CD-RWs and 60.8¢ for CD-R Audio, CD-RW Audio and MiniDiscs.² An application for judicial review of that decision was dismissed by the Federal Court of Appeal on June 14, 2000.³

For the reasons given below, the private copying levy is increased to 29¢ for audio cassettes, 21¢ for CD -Rs and CD-RWs, and 77¢ for CD-R Audio, CD-RW Audio and MiniDiscs. The wording of the tariff remains essentially unchanged.

Less than nine months have elapsed between the publication of the proposed tariff and that of the approved tariff on December 15, 2000. The nature of the markets in which the levy is collected required that the new tariff be certified before January 1, 2001.⁴ This would have been impossible to achieve without the diligent cooperation of CPCC, CSMA and their counsel. The Board thanks them for this.

II. THE PRIVATE COPYING REGIME

Part I.A of the 1999 decision describes the private copying regime. In a nutshell, the regime legalizes private copying, which is the reproduction, for private use, of sound recordings of musical works. In return, those who make or import recording media ordinarily used to make private copies are required to pay a levy on each such medium. The Board sets the levy and designates a single collecting body to which all royalties are paid.

The regime is universal, which means that all importers and manufacturers of blank audio recording media pay the levy. However, in fixing the amount of the levy, the Board takes into account the fact that these media are not exclusively used to copy music. The levy is reduced proportionally to reflect non-music recording uses of the media.

In light of some of the participants' comments at the hearings, the Board wishes to underline two principles.

First, the private copying regime legalizes copying for the private use of the person making the copy. It does not legalize copying for use (private or otherwise) by a third party: a CD that a person burns for the use of another is not a private copy. On the other hand, it is not required that the source or target medium be lawfully owned; using a stolen prerecorded CD to make a private copy on a stolen CD-R involves two instances of theft but no copyright infringement.

¹ *Tariff of levies to be collected by CPCC in 1999 and 2000 for the sale of blank audio recording media in Canada*, www.cb-cda.gc.ca/decisions/c17121999-b.pdf, 4 C.P.R. (4th) 15 [the "1999 decision"].

² CD-Rs can be written onto only once (although it seems possible to do so over several sittings). CD-RWs may be written onto many times. CD-R Audio and CD-RW Audio, which were developed first and foremost for the US market, are encoded so as to be recognized as audio products when played on digital audio recording equipment. They may not be readable by all CD-ROM drives; otherwise, they are technologically identical to their non-audio counterparts. MiniDiscs are rewritable media that are smaller, but otherwise technologically similar to CD-RWs.

³ *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency*, www.fja.gc.ca/en/cf/2000/orig/html/2000fca_26945.o.en.html, 7 C.P.R. (4th) 68, 257 N.R. 283.

⁴ It is for that reason that the Board opted to publish the certified tariff before issuing its reasons.

Second, it is important to always keep in mind that the final product (the recorded CD) and each of the components used to create this product (blank medium, reproduction right, CD burner, time and effort required to make copy, etc.) are not the same. Private copying levies are paid in respect of the right to reproduce sound recordings and the other underlying copyright subject-matters they contain, nothing else. In these reasons, “music” refers only to this bundle of copyrights.

III. THE PARTICIPANTS’ POSITIONS

Generally, CPCC relied on the approach retained by the Board last year, with a number of adjustments. For example, CPCC requested that the Board take into account the fact that it forbears from collecting the levy on some media. It also asked that the Board set different levies for audio cassettes of different lengths. Finally, it argued that changes in the markets justified doubling the levy for CD-R Audio, CD-RW Audio and MiniDiscs, tripling it for audio cassettes and increasing it tenfold for CD-Rs and CD-RWs.

CSMA opposed any increase in the levy. It reiterated most of last year’s arguments while adding a few others. Thus, it argued that CD-RWs should not be subject to the regime and that the Board could not or should not take CPCC’s voluntary zero -rating scheme into account in establishing the levy.

IV. THE EVIDENCE AND RECENT DEVELOPMENTS

Oral and written evidence was offered on the evolution of sound recording technology; the structure, revenues and profits of the recording medium industry; the marketing of recording media and recording hardware, including their suitability for recording music from the Internet; the pricing and availability of recording media and recording hardware; the various uses of recording media; the probable impact of the levy on manufacturers, retailers and consumers; serial copy protection initiatives; the possible emergence of grey markets; the impact of the regime and of the zero-rating scheme; and the ease of accessing music on the Internet.

The evidence relating to certain specific questions will be dealt with later. Generally, the Board finds that the situation has evolved significantly in at least four respects.

First, if it is not already the case, soon more private copies will be made on digital media than on analog media. Digital private copying is no longer reserved for techies, and is now becoming a commonplace activity. CD burners are being sold in numbers that were not even imaginable last year.

How private copies are made has not really changed. What has changed is the flexibility, speed and user-friendliness of the tools used to create digital private copies, regardless of the source of the original; this is how consumers now use most of the digital recording media they purchase. It is also becoming easier to play digital private copies, regardless of medium or format. Available hardware is becoming increasingly capable of reading both CD-RWs as well as CD-Rs. The same hardware still reads prerecorded CDs, but is also becoming capable of deciphering CDs containing MP3 files.

Second, the growth in sales of digital media is consistent with what the Board predicted in 1999. Based on the evidence adduced in these proceedings, the Board expects sales of CD-Rs and CD-RWs in Canada to increase from 49 million units in 1999 to 78.5 million in 2000, 113 million in 2001 and 138 million in 2002. A CD-R on which 80 minutes of music can be recorded, rather than the usual 74, is now available; this medium, often sold at the same price, seems to be gaining market share rapidly.

On the other hand, sales of blank audio cassettes have fallen much more rapidly than expected. Institutional consumption remains more or less the same, but consumer demand is collapsing. Based on the evidence, the Board expects Canadian sales to be approximately 14 million units in 1999 and 12 million in 2000, and to continue to decline by approximately 10 per cent per year in 2001 and 2002.

The market share of other digital media remains marginal. The market for MiniDiscs is holding steady and CD-R Audio and CD-RW Audio continue to meet the needs of a minority of audiophiles. Sales of these media may drop or stabilize; the Board estimates that they should certainly not grow by more than 50 per cent per year.

Third, the pricing of recording media has changed substantially. The price of audio cassettes has risen, probably in part as a result of the levy, since this is a market where little margin remains to cut production costs. The price of digital media has dropped dramatically, even with the levy. Savvy consumers can now pay less for a CD-R than for an audio cassette. Private copying onto audio cassettes may even become insignificant once the installed base of home, car and portable CD players reaches a critical mass.

Fourth, the role of the Internet is growing at an impressive rate. Access to MP3 music files is increasing rapidly even though the way in which this is done raises a number of serious and complex legal questions. Demand for files that can be downloaded for a fee, while remaining marginal for the time being, is increasing. As a rule, what is legitimately available to web surfers is limited to short extracts or promotional copies with a limited lifespan. Other business models (subscriptions, streaming) are being tried. Finally, large record companies are beginning to test the market.

At the same time, the availability of MP3 players is mushrooming and their capacity is increasing, in some cases to as much as 6Gb (making it possible to store 100 hours of music). Finally, measures aimed at controlling music availability over the Internet are continuing but their impact remains uncertain.

On some other matters, however, it is not as easy to draw clear conclusions from the evidence. CPCC's survey evidence is a case in point. CSMA made much of the credibility of these data and sought above all to discredit the evidence adduced by CPCC. The Board finds this unfortunate. It much prefers that objectors offer alternatives, especially in a market that is changing as rapidly as the one under examination, which makes it impossible to simply rely on the data from the previous year. This is all the more true in this instance, as the Board had specifically asked that the parties attempt to reach a common understanding on the underlying fact situation.

CPCC's attitude was very different. The survey conducted by *Réseau Circum* and Mr. Benoît Gauthier's analysis of this data showed clear and substantial progress over last year. The efforts made were praiseworthy and no doubt will lead to the development of increasingly reliable data that may be used in the medium term to better capture real trends. Despite the limitations inherent in any survey of this kind, this is without a doubt the best data that the Board could hope to obtain, given the instability of the market, the novelty of the phenomena being examined and the time available to conduct these studies. For these reasons, little weight is given to the criticisms expressed by CSMA's witnesses concerning CPCC's evidence.⁵ The Board did, however, retain certain reservations with respect to data based on time periods, preferring to use "last event recall" data.

The Board must nevertheless exercise its judgment in selecting, interpreting and using these results. For this reason, the figures retained by the Board are often different from those put forward by CPCC. When dealing with a market that is evolving rapidly, the Board must reflect what *it* believes is occurring. It accordingly accepts to act as if it were "faced with assessing damages for copyright infringement: 'the tribunal must do the best it can, although it may be that the amount awarded will really be a matter of guesswork'."⁶

On another issue, the Board did not rely on data pertaining to music downloaded from the Internet. Available data on this subject is too uncertain. Moreover, there is nothing to indicate that use of the eligible repertoire is different when making private copies from the Internet than with conventional private copying. While other factors (gratuitous offerings, nature of contractual relationships, amount of royalties) might have a longer-term impact, much in this area remains to be analysed. Clearly, copying from the Internet could well become a central concern in the near future; still, it would be premature to venture onto this topic at this time. However, one can expect that a large share of the next hearings will address this matter.

V. THE AMOUNT OF THE LEVY

A. THE TARIFF STRUCTURE

For the reasons set out in Part V.A of the 1999 decision, the Board will use the current tariff structure. It rejects, among other suggestions, the creation of a three-tiered levy for audio cassettes on the ground that this would unnecessarily increase the administrative burden on manufacturers and importers.

B. CALCULATION OF THE AMOUNT

Appendix I summarizes the calculation of the amount of the levy for each type of medium. Unless stated otherwise, the figures used are those provided by CPCC. In the following reasons,

⁵ Obviously, no weight is given to criticisms that the Board finds unfounded, such as those dealing with the tendency of teenagers to exaggerate, as they are based on clearly erroneous assumptions concerning the distribution of households.

⁶ *Neighbouring Rights, NRCC Tariff 1.C. (CBC - Radio) for the years 1998 to 2002*, 29 September 2000, www.cb-cda.gc.ca/decisions/m29092000-b.pdf, p. 9 (endnotes omitted).

references to a line are to a line in the Appendix. Also, in the text of these reasons, figures are rounded to the nearest penny. In calculating the actual amount of the levy, only whole numbers were used.

i. Establishing the typical remuneration for a prerecorded CD

a. Authors

For the reasons set out in Part V.C.1.a of the 1999 decision, the Board uses the average royalty to be paid to authors during the relevant period, namely 7.55¢ per track [Line A]. The evidence shows that in Canada, Canadian prices apply to foreign recordings. The Board once again refuses to take into account the so-called controlled composition clauses for the reasons given in 1999, and also because the evidence shows that American record companies, who benefit from these clauses, do not ask that they be applied in Canada.

The Board accepts CPCC's estimate showing that the average prerecorded CD now contains 14 tracks [Line B]. CSMA's evidence on this point is too impressionistic to be retained.

Finally, the Board agrees to take into account the market share attributable to record club and budget-line sales at this stage of the calculation. What the Board is establishing is the amount to be paid for the right to reproduce a sound recording and the underlying copyright subject-matters when the right is used to produce a private copy. The proxy price it uses is the remuneration paid to all rights-holders for any prerecorded CD. It is safe to assume that a record club CD is just as likely to be copied as a top-line CD. This adjustment, which last year was incorporated into the adjustment made to reflect the "secondary nature of the market", is now made separately [Lines C, D and E].

Based on these determinations, authors typically receive 95¢ for a prerecorded CD [Line F].

b. Performers and Makers

The Board repeats the calculation made in Part V.C.1.b of the 1999 decision for the same reasons, subject to three adjustments.

First, the Board accepts that the suggested retail list price (SRLP) is now \$19.98 [Line G]. However, it will not adjust this price to reflect anticipated inflation during the life of the tariff. The evidence adduced in this regard is too speculative. As well, those who bear the cost of the levy need stability.

Second, for the reasons stated earlier, the Board accepts to take into account the market share attributable to record club and budget-line sales at this stage of the process [Lines C, J and K].

Third, the Board takes into account the payments made by record companies to the *American Federation of Musicians* for the benefit of session musicians [line L]. The Board is satisfied that this amount has now been credibly established. In addition, it is satisfied that the amount a performer pays to the artistic producer (which the Board formerly chose to exclude from the calculation of the levy) is a legitimate cost incurred by the performer in the process leading to the

creation of the master tape, and must therefore be included in calculating the levy.

Based on these determinations, performers and makers typically receive \$1.90 for a prerecorded CD [Line M].

The typical payment to all rights-holders is therefore \$2.86 per CD [Line N].

ii. Adjustment for the Use of the Non-Eligible Repertoire [Lines O to S]

The Board repeats the calculation made in Part V.C.2 of the 1999 decision, using the sales data provided by CPCC this year. The reasons given in Part III.B of the 1999 decision for using both the sales analysis and the air time survey are still valid, even though CPCC did not conduct a new air time survey.

CSMA suggested, without supporting evidence, that the adjustment for authors be increased from 4 to 10 per cent, relying on last year's record in this respect. The Board prefers to abide by its 1999 decision.

Based on these determinations concerning the use of eligible repertoire, *eligible* rights-holders account on average for \$1.38 of the price of a prerecorded CD [Line S].

iii. Ancillary Nature of the Private Copying Activity

Last year's decision to treat private copying as a "secondary market" was undoubtedly the most controversial part of the Board's ruling. Yet, what is really important is not whether this is a "market",⁷ but whether the act of making a private copy possesses ancillary characteristics that could have an impact on the amount to be paid for the reproduction right, without which the activity simply cannot take place.

A prerecorded CD is in fact a set of characteristics, including the right to reproduce the sound recording. It is not unreasonable therefore to argue that, other things being equal, this right should attract an identical remuneration. Both CPCC and CSMA outlined a long series of factors which they thought would tend to reduce or increase the economic significance of the activity or the price to be paid for what is needed for the activity to happen.

The Board notes at least two factors which might tend to reduce the price that consumers would be willing to pay for the reproduction right they need to make private copies.

First, one-half of private copies are second copies for the person making them.

Second, one might expect that consumers would not be willing to pay as much for some of the tools needed to make a private copy as is paid for the same tools in the prerecorded CD market.

⁷ A private copying market cannot exist since, if the media are resold, the activity no longer constitutes private copying. On the other hand, a market for reproduction rights clearly exists, and without that right, it is impossible to make private copies.

First of all, the fact that a private copy does not contain some of the characteristics of a prerecorded CD may reduce its importance in the eyes of consumers. As well, consumers seem reluctant to ascribe great value to intangible contents if the container has little value. Counsel for CPCC convincingly showed that the value of the content is not based on the value of the container, especially when the container is used solely to deliver the contents. The value of the contents is often much greater than that of the container. This being acknowledged, as things now stand, consumers would probably resist any attempt to set the price of the reproduction right required for private copying at the same level as the reproduction right used to produce a prerecorded CD.⁸ Naturally, rights-holders would like to set the price of the reproduction right so as to maximize their revenues. Given the choice of receiving \$ 1 for each of ten copies or \$3 for each of three copies, other things being equal, they would undoubtedly opt for the former.⁹

On the other hand, the Board notes three factors which might lead to an increase in the price that consumers would be willing to pay for the reproduction right they need to make private copies.

First, one-half of private copies are the only copy owned by the person making them.

Second, in the longer term, the fact that some of the characteristics of a prerecorded CD (distribution, packaging) are entirely absent from a private copy could favour some of the remaining characteristics when the final price is allocated. The contribution of the rights-holders remains the same. It is even possible to reduce the price to consumers while increasing the revenues of rights-holders. Indeed, some Internet music distribution contracts seem to allocate to them sums that are both a higher amount per unit sold and a larger proportion of the retail sales price.¹⁰

Third, most copies are of individual tracks or selections made to produce compilations rather than copies of complete albums.¹¹ It may be that in the longer term consumers will agree to pay more for the music they want as long as they do not have to pay for the music they do not want.

Last year, the Board discounted its proxy by one-half for the reason, *inter alia*, that consumers copy mainly what they already own. The evidence now makes it necessary to revise this conclusion.

The Board again intends to discount the levy attributable to second copies by one-half based on

⁸ The growing importance of the Internet could possibly change this assumption, since more and more, people will come to separate the medium from the music.

⁹ However, while it is true that a correlation is often made between the price of the intellectual property used to produce goods and their price, it is incorrect to state that this correlation always remains the same. The price paid for music on a prerecorded audio cassette compared with a prerecorded CD shows this clearly: when they exist, variations are only rarely in direct proportion to the price of the final product.

Furthermore, the argument that rights-holders always receive a constant share of the cost of producing the copy does not hold, *inter alia* for the reason the Board gave last year in refusing to impose a percentage tariff: the price of the medium and that of the intellectual property do not change in lockstep.

¹⁰ Contracts offered by MP3.com are a case in point.

¹¹ Last year, the Board rejected evidence to the same effect. The fact that the study conducted this year confirmed this datum, combined with changes in the technology, now make this finding more credible, in the Board's view.

the principle of declining marginal utility [Line T]. This does not involve duplication with the discount applied earlier to reflect sales of low-price prerecorded CDs: the marginal utility of a copy of such a CD declines just as much as that of a top-line CD.

However, factors such as possible consumer resistance to high prices lead the Board to conclude that where a private copy is the only one owned by the person making it, consumers still would agree to pay less for the music than is paid in this regard for prerecorded CDs. The strength of the market for the latter shows that they remain for the time being the main source of sound recordings for the average consumer. In the absence of precise data that might be used for this adjustment, the Board sets it at 25 per cent [Line U].

The net adjustment to account for the ancillary nature of the copying activity is therefore 37.5 per cent, and the adjusted remuneration of all eligible rights -holders in a private digital copy is 87¢ [Line V]. This adjustment is not in any way a value judgment on the overall contribution of artistic creation. It is simply the consequence of the Board's conclusion that in the current private copying "market", the price paid for the reproduction right would tend to stabilize at a lower level than in the market for prerecorded copies.

iv. Other Adjustments

As in 1999, the formula used this year makes adjustments for the percentage of media purchased by individual consumers, the percentage of those purchases used to copy music, the percentage of waste and the difference between digital and analog media.

The Board also makes an adjustment to reflect the fact that audio recording media have a capacity for more music than is contained on a typical prerecorded CD. Last year, CPCC requested such an adjustment on the assumption that all the available space was used. This year, the Circum survey concluded that only 85 per cent of the available recording time is actually used [Line X].

The Board makes the requested adjustment, but reduces it for reasons that will be set out later. The evidence adduced this year is more convincing. The Board refused to make the adjustment in 1999 on the ground that consumers primarily copied complete albums and that some technical ability was required to make a compilation on a CD. It appears that these factors have become much less significant over the last several months. Moreover, if consumers are not in the habit of putting more than the 58 minutes of music that are contained on an average album onto a blank CD, one is entitled to wonder why manufacturers market a CD-R that can contain 80 minutes of music instead of 74.

At the request of CSMA, the amount of the levy is rounded to the nearest penny.

a. Audio Cassettes [Lines AA to AC]

CPCC asked that the levy on audio cassettes be set separately, using as a starting point the royalties paid for music reproduced on prerecorded cassettes. The Board prefers to rely on last year's formula, which was proposed by CPCC itself. Such an approach is simpler. Moreover, audio cassettes are used above all to reproduce CDs, not other cassettes. As in the 1999 decision,

the starting point for the calculation of the final rate for audio cassettes is one-half of the rate used for digital media.

We come now to the question of the proportion of audio cassettes purchased by consumers. This year, this issue requires addressing whether the zero-rating scheme should be taken into account in determining the amount of the levy.

Last year's decision recognized that the Board cannot create other exemptions than that found in subsection 86(1) and that the tariff should not serve as a mechanism allowing certain users to purchase media without having to pay the levy. Moreover, the decision took no account of the zero-rating scheme that CPCC proposed to establish on its own account.

The program is now in place. In practice, all those who use a significant amount of media other than CD-Rs and CD-RWs for professional or institutional purposes have access to it. At first, CPCC required applicants to purchase at least one thousand units per year. A number of measures now tend to mitigate the impact of this requirement. For example, a supplier may consolidate purchases from a number of clients. Similarly, the program may be accessed through distributors and not merely through manufacturers or importers. As a result, more than 20 per cent of audio cassette sales reported to CPCC are now zero-rated. The sums thus saved are in the hundreds of thousands of dollars. What is more, CPCC has devoted substantial resources to the implementation of the program and will be required to do so on an ongoing basis if the program is maintained.

CPCC asks that the Board take the program into account in establishing the levy on audio cassettes. CSMA, for its part, argues that the Board cannot do so in law and should not do so, in any event, since the system is too incomplete, is purely voluntary and does not apply to most of the eventual beneficiaries.

The Board continues to believe that it cannot itself create exemptions but concludes for legal, practical and public policy reasons that it is permissible to take the zero-rating scheme into account by excluding audio cassettes that are sold levy-free from the calculation of the levy.

First, this does not involve creating exceptions for anyone's benefit or including the scheme in the tariff. All that is done is to take into account, in setting the amount of the levy, a mechanism that is now a market reality, like any other.

Second, a tariff that did not take the zero-rating scheme into account would not be a fair tariff. In practice, the private copying regime's continued existence depends on the availability of some exemption scheme. Including zero-rated media in the calculation of the levy imposes on authors the cost of not collecting the levy as well as the cost of maintaining the administrative structure required to operate what is now an essential element of the system.

Third, excluding zero-rated media from the calculation of the levy ensures that a more targeted group, more likely to engage in private copying, bears the cost of the regime. This meets and promotes the regime's objectives. Far from weakening the nexus between the activity and the medium on which the levy is paid, it strengthens it.

CPCC argues that a levy that takes the zero-rating scheme into account should assume that 95 per cent of audio cassettes are sold to consumers. CSMA suggests 80 per cent instead. It argues that a large number of potential beneficiaries are not registered with CPCC. Yet, some of them are undoubtedly taking advantage of the scheme through the manufacturer, importer or distributor. What is relevant is not the number of potential beneficiaries who do not take advantage of the scheme but the number of audio cassettes they purchase. Those who do not take advantage of the zero-rating scheme probably use fewer audio cassettes than those who do. The figure proposed by CPCC takes for granted that one-fifth of the audio cassettes purchased currently that could be zero-rated are not. Given the efforts made by CPCC to allow and even encourage involvement in the scheme, this seems more than adequate.

Regarding the proportion of audio cassettes purchased by consumers and used for private copying, CPCC proposed the figure of 81 per cent, while CSMA prefers 60 per cent. Last year, the Board used 80 per cent. At that time, 90 per cent of private copies were made on audio cassettes; that proportion will probably soon fall below 50 per cent, if this has not already occurred. In the Board's view, the decline in audio cassette sales only accounts for part of that shift. The other factor that might explain it is a drop in the proportion of audio cassettes purchased by individual consumers that are used for private copying. The major shift from analog to digital private copying helps to reinforce this conclusion. The Board cannot accordingly accept the figure suggested by CPCC. In the absence of other evidence on this point, it will opt for a figure of 65 per cent.

Finally, for the reasons set out above, the Board makes an adjustment to take available recording time into account. Relying on the average weighted length of a cassette, CPCC proposes an adjustment of 20 per cent. The Board reduces this adjustment by one-half [Line AB] for two reasons. First, some audio cassettes continue to be used for copying complete albums. Second, the very nature of a cassette (e.g., cueing problems) means that it is more difficult to make full use of the available recording time than on a digital medium.

Consequently, the levy on audio cassettes is set at 29¢ [Line AC]. Most of the increase from 23.3¢ to 29¢ is attributable to the zero-rating scheme being taken into account.

b. CD-R Audio, CD-RW Audio and MiniDiscs [Lines AG to AI]

The calculation remains the same as in the 1999 decision subject to the adjustment to reflect available recording time. CPCC proposes an adjustment of 8 per cent. The Board reduces this adjustment to 6 per cent [Line AH] because some of these media continue to be used for copying complete albums. The reduction is smaller than that applied to other digital media, since rewritable media (CD-RW Audio and MiniDiscs) account for a much larger share of the market for this category of media than for other digital media.

Consequently, the levy for CD -R Audio, CD-RW Audio and MiniDiscs is set at 77¢ [Line AI].

c. CD-Rs and CD-RWs [Lines AD to AF]

The Board rejects at once CSMA's argument that CD-RWs are not blank audio recording media. There is no need to repeat here the reasoning found in Part III.C of the 1999 decision, which

continues to apply. The Board is satisfied that the proportion of CD-RWs used for private copying purposes is equal to or greater than that of CD-Rs which were being used for that purpose when the 1999 decision was issued. Furthermore, CD players are increasingly able to read rewritable CDs and the price differential between a CD-R and a CD-RW has narrowed substantially; these factors can only increase consumers' tendency to use rewritable media for private copying.

CSMA views CPCC's decision not to propose a tariff for certain media (e.g., MP3) that are more likely than CD-RWs to be used for private copying as an admission CD-RWs are not audio recording media. Even assuming that such an admission was relevant, the Board does not share this view. The most that one is allowed to conclude is that CPCC decided not to collect levies on these media in order to focus its energies on the dominant medium, the recordable CD.

Last year, the Board estimated that consumers purchased one-fifth of all CD-Rs and CD-RWs. CPCC, using some of Circum's least reliable data, would have increased that figure to 57.5 per cent. However, the evidence shows that twice as many CD-Rs and CD-RWs were sold in 2000 than in 1999. An increase from 20 to 57.5 per cent of the consumers' share of that market would then mean that sales to consumers have increased sixfold. The Board finds this figure surprising, even taking into account the shift from analog to digital private copying. The Circum survey concluded that the proportion of tracks copied onto digital media had also grown six to sevenfold, from 6 to 41 per cent of all tracks copied.

If one were to assume that the total amount of private copying has not changed,¹² this would mean that the percentage of media acquired by consumers and used to make private copies would also remain unchanged; yet the same survey concluded that this figure had increased from 40 to 56 per cent. In the circumstances, and since the Board intends to use the figure of 56 per cent as the proportion of media used for private copying, the Board prefers to use the figure of 45 per cent as the consumer share of all media purchased. This figure reflects the phenomenon of telescoping of data noted by both CPCC and CSMA.¹³ There is quite simply no basis for the figure of 18 per cent proposed by CSMA, or that of 25 per cent advanced by Professor James A. Brander.

Regarding the proportion of these media used by consumers to make private copies, CPCC relied on data that everyone recognizes as reliable to suggest 56 per cent. CSMA suggested 40 per cent although its expert witness, Professor Brander, mentioned 50 per cent. The Board will use the figure put forward by CPCC.

The Board applies the discount of 12 per cent suggested by CPCC to account for wasted media.

Once again, the Board agrees to make an adjustment to reflect available recording time. CPCC proposes an adjustment of 12 per cent. The Board reduces this adjustment by one-third on the ground that some people continue to make copies of complete albums [Line AE].

¹² The Circum survey concludes on the contrary that it declined by 40 per cent.

¹³ Telescoping refers to a surveyed person's tendency to exaggerate the number of occurrences as the time period for which the question is being asked gets longer.

Consequently, the levy on CD-Rs and CD-RWs is set at 21¢ [Line AF].

The figures used by the Board assume that approximately one -quarter [$0.45 \times 0.56 = 0.252$] of CD-Rs are used for private copying. It should be noted that the Circum survey contains at least one estimate that appears to validate this conclusion. The survey estimates the number of tracks copied at 233 million. The Board estimates that an average of 15 tracks are copied onto each blank digital medium. This would mean that during the reference period, 24 per cent [$(233M \div 15) \div 65M$] of the media sold were used for private copying. This finding, while based on estimates that may be crude at times, is nevertheless reassuring, given the uncertainty and changing nature of the information available to the Board.

As a result of this decision, the levy on CD-Rs and CD-RWs increases from 5.2¢ to 21¢. This is a very significant increase. Having considered the potential impact of such an increase, the Board does not wish to phase it in. First, the amount of the levy is the logical conclusion of the approach the Board considers the fairest under the circumstances. Second, the price of digital media cannot keep on falling indefinitely. It is consequently important to take advantage as quickly as possible of the structural changes taking place in the market if manufacturers and importers are to have the opportunity to make the necessary adjustments while at the same time minimizing the apparent impact of the levy on consumers.

VI. FACTORS PROPOSED THAT WERE NOT TAKEN INTO ACCOUNT

No adjustment is made for hedonic factors (recording quality and pleasure), frequency of use or the so-called inherent advantage of private copies over prerecorded CDs. These factors are too uncertain and subjective to be taken into account, especially given the reservations expressed with respect to some of them by CPCC's own experts and the limited impact they would have on the final decision.

VII. THE GREY MARKET

CSMA argued that a parallel (or grey) market has developed since the imposition of the levy. This conclusion relies on certain discrepancies between sales data supplied by organizations specialized in data reporting and the number of media, the sales of which were reported to CPCC for the purposes of the regime. These differences do not lead the Board, for the moment, to draw such conclusions. It would have been surprising if CPCC had succeeded in putting in place effective compliance mechanisms in less than a year, especially since its efforts were devoted primarily (and rightly so) to getting the tariff certified, and to implementing the zero-rating scheme.

The Board expects that CPCC will now take advantage of the time available to vigorously pursue compliance with the regime so as to minimize tariff avoidance; anything else could result in an inequitable distribution of the burden of the levy.

VIII. AMOUNT OF THE LEVY

Last year, the Board expected that the levy would raise \$8.8 millions in the year 2000. The evidence seems to indicate that this amount will be closer to \$7.6 millions once the zero-rating

scheme has been taken into account. Continuing to take this scheme into account, if the data the Board has relied upon for the purposes of these reasons are confirmed, it can be anticipated that the levy will raise approximately \$26.9 millions in 2001 and \$32.3 millions in 2002.

IX. APPORTIONING THE LEVY AMONG COLLECTIVE SOCIETIES

Section 84 of the *Act* requires that the collecting body distribute the levies to the collective societies representing eligible authors, eligible performers and eligible makers, in the proportions fixed by the Board. Neither CPCC nor CSMA alluded to the matter. Last year, CPCC was content to file an agreement reached by its member collectives on the issue, and asked that the tariff reflect the agreement.

The Board intends to proceed as it did last year, for the reasons set out in Part VI.B of the 1999 decision. Consequently, the percentage applicable to each college is that college's share of all private copies [Lines O to Q] over the weighted qualifying repertoire adjustment [Line R]. As a result, authors are entitled to 66 per cent [$32 \div 48.5$], performers to 18.9 per cent [$9.2 \div 48.5$] and makers to 15.1 per cent [$7.3 \div 48.5$].

A handwritten signature in black ink that reads "Claude Majeau". The signature is written in a cursive, flowing style.

Claude Majeau
Secretary General

X. APPENDIX I

**PRIVATE COPYING 2001-2002
LEVY CALCULATION**

Authors' Remuneration		
A	Mechanical licence royalty per song per top-line CD (2001-2002 average) $7.4¢ \times 7.7¢ \div 2$	\$0.0755
B	Average number of tracks per CD	14
C	Record club and budget-line sales percentage	40%
D	Record club and budget-line discount	25%
E	Adjustment for record club and budget-line sales $[C \times D] 0.4 \times 0.25$	0.1
F	Authors' remuneration $[A \times B \times (1 - E)] 7.55 \times 14 \times (1 - 0.1)$	\$0.9513

Performers' and Makers' Remuneration		
G	Top-line CD suggested retail list price	\$19.98
H	Royalty (in percentage)	18%
I	Applicable discounts (container, free goods allowance)	36.25%
J	Record club and budget-line discount	50%
K	Adjustment for record club and budget-line sales $[C \times J] 0.4 \times 0.5$	0.2
L	Payments to the <i>American Federation of Musicians</i>	\$0.07
M	Performers' and makers' remuneration $[(G \times H \times (1 - I) \times (1 - K)) + L] (\$19.98 \times 0.18 \times (1 - 0.3625) \times (1 - 0.2)) + \0.07	\$1.9042
N	Royalties per prerecorded CD $[F + M] \$0.9513 + \1.9042	\$2.8555

Qualifying Repertoire Adjustment		
O	Eligible authors' weighted share of all private copies $[(F \div N) \times \% \text{ of private copies using eligible authors' repertoire}] 0.9513 \div 2.8555 \times 96\%$	32%
P	Eligible performers' weighted share of all private copies $[(M \div N) \times \% \text{ of private copies using eligible performers' repertoire} \div 2] \$1.9042 \div 2.8555 \times ((34\% + 21\%) \div 2) \div 2$	9.2%
Q	Eligible makers' weighted share of all private copies $[(M \div N) \times \% \text{ of private copies using eligible makers' repertoire} \div 2] \$1.9042 \div 2.8555 \times ((28\% + 16\%) \div 2) \div 2$	7.3%
R	Qualifying repertoire's weighted share of all private copies $[O + P + Q] 32 + 9.2 + 7.3$	48.5%
S	Imputed remuneration of qualifying repertoire per prerecorded CD $[N \times R] \$2.8555 \times 0.485$	\$1.3845

Adjusted Remuneration (Ancillary Nature of Activity)		
T	Adjustment for copies made from copier-owned CDs $[\% \text{ of private copy} \times 50\%] 50\% \times 50\%$	25%
U	Adjustment for copies from other sources $[\% \text{ of private copy} \times 25\%] 50\% \times 25\%$	12.5%
V	Adjusted remuneration $[S \times (1 - (T + U))] \$1.3845 \times (1 - (0.25 + 0.125))$	\$0.8653
W	Average length of prerecorded CD $[B \times 4'10"] 14 \times 4'10"$	58.33 min.

X	Average percentage of recording time actually used	85%
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Royalty for Audio Cassettes		
AA	Weighted average recording capacity	82.6 min.
AB	Discounted adjusted recording capacity $[(AA \times X) - W] \div W \div 2$ $(82.6 \times 0.85) - 58.33) \div 58.33 \div 2$	10%
AC	Levy on cassettes $[V \div 2 \times \% \text{ purchased by individuals} \times \% \text{ of purchases used to private copy (no waste factor)} \times (1 + AB)]$ $\$0.8653 \div 2 \times 0.95 \times 0.65 \times (1 + 0.1)$	0.29

Royalty for CD-Rs and CD-RWs		
AD	Average recording capacity $(74 + 80) \div 2$	77 min.
AE	Discounted adjusted recording capacity $[(AD \times X) - W] \div W \times 0.66$ $(77 \times 0.85) - 58.33) \div 58.33 \times 0.66$	8%
AF	Levy on CD-R and CD-RW $[V \times \% \text{ purchased by individuals} \times \% \text{ of purchases used to private copy} \times (1 - \% \text{ waste}) \times (1 + AE)]$ $\$0.8653 \times 0.45 \times 0.56 \times (1 - 0.12) \times (1 + 0.08)$	0.21

Royalty for CD-R Audio, CD-RW Audio and MiniDiscs		
AG	Recording capacity	74 min.
AH	Discounted adjusted recording capacity $[(AG \times W) - W] \div W \times 0.75$ $(74 \times 0.85) - 58.33) \div 58.33 \times 0.75$	6%
AI	Levy on Audio products and MiniDisc $[V \times \% \text{ purchased by individuals} \times \% \text{ of purchases used to private copy} \times (1 - \% \text{ waste}) \times (1 + AH)]$ $\$0.8653 \times 0.95 \times 0.95 \times (1 - 0.075) \times (1 + 0.06)$	0.77