Copyright Board Canada

Commission du droit d'auteur Canada

Date 2007-05-11

Citation Files: Private Copying 2005, 2006 and 2007

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

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Tariff of levies to be collected by CPCC in 2005, 2006 and 2007 on the sale of blank audio recording media, in Canada, in respect of the reproduction for private use of musical works embodied in sound recordings, of performers' performances of such works or of sound recordings in which such works and performances are embodied

Reasons for decision

I. INTRODUCTION

[1] This is the fourth decision certifying a final tariff that the Canadian Private Copying Collective (CPCC) may collect 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"). This tariff applies in 2005, 2006 and 2007. The tariff on blank audio cassettes is reduced from 29 to 24¢. The tariff for CD-Rs and CD-RWs remains at 21¢. The tariff for CD-Rs Audio, CD-RWs Audio and MiniDiscs is reduced from 77 to 21¢.

A. THE PROCESS LEADING TO THE HEARING

[2] CPCC filed, pursuant to section 83 of the *Copyright Act* (the "*Act*"), separate proposed statements of levies for 2005, 2006 and 2007. They were published in the *Canada Gazette* on April 10, 2004, April 30, 2005 and February 25, 2006, along with notices detailing the right of any person to object.

[3] The Board heard this matter on October 24, 2006, some 30 months after the proposed statement for 2005 was published. This delay resulted from a number of factors.

[4] On December 12, 2003, the Board issued the decision certifying the *Private Copying Tariff, 2003-2004*.[1] Both CPCC and the objectors asked the Federal Court of Appeal to review this decision. After the publication of the proposed tariff for 2005, the Board, at the request of the parties, postponed the examination of the proposal until the Court ruled on the application for judicial review.

[5] On December 14, 2004, the Federal Court of Appeal set aside the levy on the non-removable memory permanently embedded in digital audio recorders on the ground that such memory is not an "audio recording medium" within the meaning of section 79 of the *Act*.[2] On February 10, 2005, CPCC sought leave to appeal to the Supreme Court of Canada on this issue. CPCC asked that the levies remain unchanged until the matter was resolved. On July 28, 2005, the Supreme Court of Canada denied CPCC's application. CPCC and the objectors then spent several months exchanging on procedural issues and other matters.

[6] In an order dated January 31, 2006, the Board identified 11 issues or matters that it considered to be raised by the parties. These were identified as:

1. accounting for the zero-rating scheme in the amount of the levy;
2. setting the terms and conditions for the zero-rating scheme;
3. the conduct of certain rights holders;
4. fair dealing;
5. the proportion of media used to make private copies has declined; that decline may be such that some media may no longer qualify;
6. the Stohn/Audley model and its relevance;
7. adopting a different tariff structure;
8. changes to the reporting requirements;
9. designation of CPCC as collecting body;
10. avoidance (grey and black markets); and
11. constitutionality of the regime.

The order prescribed the sequence in which the parties would file their evidence with respect to each matter and the matters each objector would be entitled to address. It asked the parties to identify other relevant matters. It also set a pre-hearing conference for February 22, 2006, to discuss the issues raised by the order and to set a timetable for the proceedings.

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[1] Decision certifying the *Private Copying Tariff, 2003-2004*, December 12, 2003 (hereafter *Private Copying III*).
[2] *Canadian Private Copying Collective v. Canadian Storage Media Alliance (F.C.A.)* [2005] 2 F.C.R. 654 (hereafter *CPCC v. CSMA*).

[7] On February 24, 2006, the Board identified matters 1, 5, 6, 7, 8 and 10 as those that remained to be addressed. The order clarified the status of the parties and requested comments on the issue of confidentiality. It advised the parties that the proposed statement for 2007 would be published the following day and set a tentative date of May 1, 2006 for a pre-hearing conference during which matters raised by this proposal could be discussed. The order expressed the Board's wish to hear the three proposed tariffs together, and set a timetable leading to a hearing on October 24, 2006. Since the proposal for 2007 raised no new matter or issue, the May 1 pre-hearing conference was cancelled.

[8] On May 16, 2006, at the request of CPCC, the Board clarified matters 4 and 6. On May 29, the Board formally joined the examination of the three proposed tariffs. On October 2, the Board asked 14 further questions targeting specific matters raised in CPCC's evidence. On November 27, December 4 and 18, after the hearings were concluded, the Board requested additional information. CPCC filed its final submissions in this matter on January 17, 2007.

[9] A series of interim decisions allowed CPCC to continue to collect the levies even though no final determination had been reached.

B. THE PARTIES' POSITIONS

[10] The rates that CPCC proposed for 2005 to 2007 are the same that the Board certified for 2003-2004: 29¢ for each audio cassette of more than 40 minutes, 21¢ for each CD-R and CD-RW and 77¢ for each CD-R Audio, CD-RW Audio and MiniDisc. For 2005 and 2006, CPCC also proposed levies on the non-removable memory permanently embedded in a digital audio recorder, but this request was abandoned as a result of the decision of the Federal Court of Appeal in *CPCC v. CSMA*. The only changes CPCC asked for were to the administrative provisions. These are reviewed below, in paragraphs 95, 96 and 107.

[11] The Canadian Broadcasting Corporation objected to the proposals for all three years. It withdrew its objections after coming to an agreement with CPCC on the zero-rating of its purchases of blank audio recording media.

[12] The Canadian Association of Broadcasters also objected to the proposed tariffs for all three years. It too withdrew its objections after reaching a settlement with CPCC ensuring that the agreement it had come to in 2003-2004 concerning the zero-rating of its purchases of blank audio recording media, will continue to apply to its members until the end of 2007. The agreement also provides that CPCC will not collect a levy on computer hard drives used by broadcasters primarily for broadcasting purposes.

[13] The Canadian Storage Media Alliance (CSMA) objected to the tariff proposals for 2005 and 2006. As time went on, it became clear that the main focus of the objections was the proposed amendments to the administrative provisions for 2006. CSMA subsequently agreed to an

amended version of those provisions, which was included in the 2007 tariff proposal. On February 24, 2006, the Board allowed CSMA to maintain a "watching brief", entitling it to watch the proceedings, to receive copies of the Board's orders and notices and to file arguments.

[14] The Retail Council of Canada, Wal-Mart Canada, The Business Depot Ltd. (Staples/ Business Depot), Best Buy Canada, London Drugs, InterTAN Canada Ltd. (d.b.a. RadioShack Canada) and Costco Wholesale Canada Ltd., (collectively, the "Retailers") objected to the proposed tariffs for 2005 and 2006. They withdrew their objections in order to avoid responding to CPCC's interrogatories. On May 8, 2006, they were also allowed to maintain a watching brief and to file arguments on the proposed new audit provisions, based solely on the record of the proceedings. They did not object to the 2007 proposal.

[15] Mr. Lorenzo Tartamella, representing Dataware Corporation, objected to the 2006 tariff proposal. That objection was withdrawn because of difficulties in answering CPCC interrogatories. On May 29, 2006, the Board also allowed Mr. Tartamella to maintain a watching brief at the same conditions as the Retailers.

[16] Rogers Wireless Inc. objected to the 2006 proposal only as it related to non-removable memory permanently embedded in a digital audio recorder. It withdrew its objection after the Supreme Court of Canada denied CPCC's application for leave to appeal, when it became clear that the levy would not apply to such memory.

[17] Seven individuals objected to the 2007 tariff. On April 24, 2006, the Board enquired as to their intention of participating in the hearings. Four of them stated that they would not; two did not answer. One said he would participate but subsequently did not comply with the directive on procedure. As a result, the Board ruled that all of these persons had abandoned their objections.

[18] As can be seen, over time, all of those who objected to the proposed tariffs withdrew from the process, were deemed to have abandoned their objections or ceased to actively oppose the proposed tariffs. CPCC was thus alone to participate in the hearing.

C. EVIDENCE

[19] Six witnesses appeared at the request of CPCC in these proceedings.

[20] Ms. Anna Bucci, Executive Director of CPCC, testified about the collective's structure, its administrative costs and distribution activities, as well as to the cost and effects of the zero-rating program. This program exempts those who use a significant amount of some audio recording media for professional or institutional use from payment of the levy. These professional users must register with CPCC and purchase media from distributors, manufacturers or importers approved by CPCC.

[21] CPCC's General Counsel, Ms. Laurie Gelbloom, outlined the nature and extent of the enforcement activities initiated by the collective. She reported on the more than 80 audits undertaken by CPCC, and outlined the difficulties encountered by auditors in the course of some of these. She explained the status of each lawsuit initiated as part of CPCC's enforcement activities. She also compared thoroughly the leviable sales reported to CPCC with the sales estimation developed by the Santa Clara Consulting Group (SCCG) and offered possible explanations for the differences between the numbers.

[22] Mr. Derek Malcolm, a partner in the accounting firm of Grant Thornton, auditor for CPCC, presented a report explaining why, in his view, changes to the language of the audit and confidentiality provisions of the tariff are necessary to ensure thorough and timely audits.

[23] Mr. Derek Leebosh, Senior Associate with Environics Research Group in Toronto, presented the results of a telephone survey commissioned by CPCC and the subsequent report entitled "Public Opinion on the Levy on Blank CDs and Other Music Recording Media".

[24] Once again, Mr. Benoît Gauthier, President of Circum Network Inc. provided insight into the private copying habits of Canadians. He reported on the results of his ongoing survey on the use of blank media in Canada, updating and completing the information provided in 1999, 2000 and 2002. The data used for the present hearing focused on more than 12,000 telephone interviews conducted between July 2005 and June 2006.[3]

[25] CPCC's final witness, Mr. Paul Audley, President of Paul Audley & Associates Ltd. and one of the engineers of the Stohn/Audley valuation model used to set the rates in 1999 and 2000, explained how the Board should apply the model in this instance. He also provided insight and analysis on some of the questions the Board addressed to CPCC.

II. ANALYSIS

[26] Having examined the record of these proceedings and the answers that CPCC provided to the numerous questions addressed to it during this process, we conclude that the following issues must be addressed before determining the final rates. First, what is the size of the blank media market: is tariff avoidance the issue that the Board feared in *Private Copying III*? Second, is the zero-rating scheme relevant to setting the levy in general, and for audio cassettes in particular? Third, is the Stohn/Audley model, used in 1999[4] and 2000[5] (but not in 2003) to derive the tariff rates, still relevant; is it still reliable? Fourth, should the rates be discounted to account for controlled composition clauses? Fifth, what rates does the model yield, are these rates fair and

[3] Exhibit CPCC-4 (hereafter the "Music Monitor Survey").
[4] Decision certifying the *Private Copying Tariff, 1999-2000*, December 17, 1999 (hereafter *Private Copying I)*.
[5] Decision certifying the *Private Copying Tariff, 2001-2002*, December 15, 2000 (hereafter *Private Copying II)*.

equitable and should a separate rate continue to apply to CD-R Audio, CD-RW Audio and MiniDiscs? Finally, should the reporting and confidentiality provisions of the tariff be amended as CPCC proposes?

A. The Blank Audio Recording Media Market

[27] In *Private Copying III*, the Board had expressed serious concerns about the size of the grey and black markets as a proportion of the total Canadian market for blank CDs. Discrepancies existed between the number of leviable sales reported to CPCC and the data found in the SCCG reports. Opinions were offered on the number of blank CDs sold without the levy being paid. In the end, the Board was left thinking that there may be massive levy evasion. This time, CPCC presented credible evidence that leads us to believe that this is not a concern.

[28] Thus, Ms. Gelbloom reconciled the number of leviable units reported to CPCC with the data provided in the SCCG reports. In her opinion, a difference exists because SCCG figures include CD-Rs that are exported from Canada, as well as those imported into Canada for duplication purposes, neither of which are subject to the levy. Ms. Gelbloom also explained how CPCC actually uses quarterly SCCG data to track volumes and brands of blank media transiting the Canadian market. CPCC takes into account SCCG projections and compares those to the amounts actually reported to CPCC by importers and manufacturers.

[29] Ms. Gelbloom provided satisfactory answers to all the questions we had raised concerning brands offered on the Internet at prices near or below the amount of the levy. Sometimes, retailers offer these products as loss leaders. In all instances, CPCC knew of the brands even though some had not been reported to it, the sources of these brands had been identified through enforcement efforts, and litigation had been initiated against importers in appropriate cases.

[30] As well, Ms. Gelbloom described how various unreported brands of CDs had been identified through tips, enforcement efforts (including private surveillance) and litigation. Over the past three years, CPCC has initiated legal proceedings in 21 cases, with many of these resulting in awards of large amounts for unpaid levies.

[31] Three things clearly come out of these proceedings. First, some blank media importers will go to extraordinary lengths in order to gain a competitive advantage by avoiding payment of the levy. Second, these attempts at levy evasion are as much under control as can be expected in this sort of market. CPCC has set up a solid and effective enforcement program. It has gained over time a thorough understanding of the relevant market through a variety of means, including retail surveys, market tracking information, attendance at trade shows and Internet-based research. This, coupled with enforcement efforts as well as investigation of tips and administrative audits, allows us to conclude that the black market for blank media in Canada remains under control and is not the issue that the Board feared some three years ago.

[32] There is no evidence either that consumers purchase large amounts of blank media from non-Canadian suppliers so as to avoid paying the levy (the so-called grey market). The explanation for this may be simple. Blank CD purchases remain a very small proportion of individual consumers' budget; the impact on consumers can only be marginal, thus providing very little incentive for grand scale levy avoidance.

[33] We note the issues raised in this respect in the final submissions of Mr. Tartamella. We agree that the SCCG reports may not be perfect and that the data pertaining to Canada might not be as detailed as one might wish for on a number of smaller brands of CDs. Still, we are satisfied that this and other information are sufficient to allow CPCC to detect the vast majority of levy evasion activities.

B. THE ZERO-RATING SCHEME

[34] From the very outset, CPCC opted to allow certain users to purchase some blank audio recording media without having to pay the levy. This zero-rating scheme, as it came to be known, evolved over time, as did the Board's perception of it. First, the program applied only to audio cassettes and MiniDiscs. *Private Copying I* encouraged its creation; *Private Copying II* called it a market reality and took it into account in setting the levy rate for audio cassettes. Beginning September 1, 2003, the program was expanded to apply to recordable CDs. In *Private Copying III*, the Board came to the conclusion that the scheme was "illegal". It also expressed fears that the expansion of the program would lead to unfair results. Objectors had convinced the Board that zero-rating CDs might greatly impact the distribution channels for those media. CPCC itself had estimated that potential registrants could number in the thousands, thus diverting millions of CDs from the normal supply chain. New registration fees also elicited fears of unfairness and possible arbitrary application of the program.

[35] Ms. Bucci explained what actually had happened in the last three years, and in doing so, allayed the Board's earlier fears in this respect. The new program has been running at a loss since its inception. Fewer than 600 commercial organizations have registered. Most importantly, in 2005, zero-rated CDs represented approximately two per cent of the total of levied and exported units. The main use of the program remains for audio cassettes and not-for-profit organizations.

[36] The number of organizations registering to buy CDs without paying the levy has been nothing like what CPCC envisaged in 2003. The reasons for this remain obscure. It may be that organizations do not consider the extra cost of the levy significant enough to enroll in the program.

[37] What remains to be determined is the impact of the zero-rating scheme on audio cassettes. In *Private Copying II*, the Board concluded that even though it could not itself create exemptions, it was permissible for legal, practical and public policy reasons to take the zero-

rating scheme into account by excluding audio cassettes that are sold levy-free from the calculation of the levy. The Board added that the program was a market reality that should be taken into account in setting the rate. Not doing so would result in an unfairly low rate.[6]

[38] In *Private Copying III*, the Board confirmed that it could not create exemptions. However, it further ruled that because the zero-rating program had no legal basis, it was therefore illegal. This meant that its effects could not be taken into account in setting the tariff. The Federal Court of Appeal confirmed this ruling.[7]

[39] Logically, this should have led to a reduction in the rate for audio cassettes. The Board however decided to leave the rate as it was, stating that the cassette market had reached its maturity and that consumers had accepted the levy on these media. As well, since all other rates were left unchanged, it seemed fair that the rate for audio cassettes should also remain the same.

[40] We believe the time has come for the audio cassette levy rate to no longer account for the impact of the zero-rating program. The reasons that led the Board to leave the rate the same three years ago no longer exist. This is a moribund market, not a mature market. Any reservations the Board may have had about the legal nature of the program were removed by the Federal Court of Appeal. The rate we certify for audio cassettes will be adjusted accordingly.

C. The Relevance and Reliability of the Stohn/Audley Valuation Model

[41] When there is no established market in which a price for the relevant rights has been developed, the Board generally proceeds by examining the price established for a similar use as a proxy for the price the Board is asked to set. In *Private Copying I* and *II*, the Board used as proxy a model proposed by CPCC and developed by Messrs. Stephen Stohn and Paul Audley (hence the “Stohn/Audley model”). Generally, the model attempts to derive the value of a private copy of a sound recording by comparison to the remuneration received by rights holders from the sale of a prerecorded CD. CPCC proposes to use this model once again to demonstrate that the rates it is asking for are below what the model would yield and are therefore, reasonable.

[42] In *Private Copying III*, the Board had expressed qualms regarding the continued use of the valuation model, because of uncertainties raised by the evidence, among other considerations. As already explained in paragraphs 27 to 33, some of these concerns have been addressed by CPCC, and they no longer create problems as regards the model.

[43] In the current instance, CPCC is not asking for any increase. To justify maintaining the rates as they now stand, CPCC reviewed all the factors considered in the model and updated them

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[6] *Private Copying II*, at pages 16-18.
[7] *Private Copying III*, at pages 22 to 29; *CPCC v. CSMA*, at paragraphs 58, and 75 to 127.

with the information obtained from the Music Monitor Survey, and other evidence submitted during and after the hearing at the request of the Board. This led CPCC to conclude that even though their proposal is to maintain the rates at their present levels, they could easily have been increased.

[44] The participation of persons other than CPCC in these proceedings was minimal. No objector participated in the hearings. Mr. Tartamella and the Retailers filed written comments on a few issues, but none on the application of the Stohn/Audley model. In the end, it was left to the Board to raise issues about each step of the model, to point out where the evidence submitted seemed unconvincing, incomplete or contradictory.

[45] As already stated, the model is based on the approximate remuneration received by rights holders from the sale of a prerecorded CD. From the beginning, the Board has believed that another way to proceed would be to use the market for authorized music downloads as a proxy.[8] However, for reasons that were explained in the past, this was impossible in practice, and continues to be so. As Mr. Audley pointed out in his evidence, a major element of the calculation, that is, the authors' remuneration, was still not known at the time of the hearing. This problem is now resolved, as the Board has ruled on the remuneration of authors in this market.[9] Now that this piece of the puzzle is known, we could be closer to an alternative to the Stohn/Audley model. The Board will still need to assess it, and in particular whether the digital download market is mature enough to use as a proxy by the time the hearings into the private copying tariff for 2008 and 2009 are held.

[46] Although certain aspects of the valuation model have been criticized in this and previous hearings, it remains an important tool to assess the relevance and impact of private copying activities on rates. A good part of the model is based on fairly hard data, such as the analysis of typical contractual relationships involved in the production of sound recordings. This model is still relevant today, albeit with some adjustments.

[47] Some of these adjustments can readily be made. For example, the model can account for controlled composition clauses by estimating their prevalence and impact in the market for prerecorded CDs. The average number of tracks per CD is already part of the model, so that any change in that average can be reflected without difficulty. The decline in the market share of record club and budget-line sales has been accounted for, as has the significant reduction in the suggested retail list price (SLRP) of prerecorded CDs.

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[8] *Private Copying I*, at page 36.

[9] Decision certifying the *CSI Online Music Services Tariff, 2005-2007*, March 16, 2007 (hereafter *Online Music*).

[48] The main drawback of the model is that some of its most important variables are based on soft data or estimates. The so-called ancillary or secondary copy adjustment (made to reflect the lower value of private copies), the percentage of blank CDs purchased by individuals, or the number of private copies made onto audio recording media, are derived from the Music Monitor Survey. Though the survey is conducted with the utmost professionalism, it documents what the interviewed consumers think they did, not necessarily what they actually did. Also, some of its results may seem counterintuitive, although this can be explained, as paragraphs 82 and 83 demonstrate.

[49] Therefore, it remains useful to go through the model to get a sense of what the rates ought to be, taking care to question the numbers when warranted.

D. CONTROLLED COMPOSITION CLAUSES

[50] A controlled composition clause (CCC) is a contractual arrangement between a record label and a recording artist. It allows the label to obtain a mechanical licence at a reduced rate when the artist owns or controls some or all of the copyright in the musical works the artist records. Typically, it reduces the rate per track by 25 per cent, freezes royalties at the rate in effect at the time of entering into the contract, caps the number of tracks for which royalties must be paid and treats up to 15 per cent of CDs as "free goods" for which no royalties are payable. In Canada, two factors limit the impact of CCCs. The agreement between the Canadian Musical Reproduction Rights Agency (CMRRA) and the Canadian Recording Industry Association (CRIA) imposes a number of "caps" on the discounts offered. Moreover, the Society for the Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) has never included the clause in its agreements with Quebec independent record producers and has refused since 1995 to renew its contract with CRIA precisely to avoid the application of such a clause.

[51] In *Private Copying I*, the Board refused to adjust authors' royalties on account of CCCs based on the finding that these clauses had little or no impact in Canada. The record of the recent proceedings dealing with the CSI's online music services tariff (2005-2007) shows that this finding missed the true issue. Most importantly, CCCs have a direct impact on the Canadian revenues of American singers/songwriters who, as songwriters, are entitled to a share of the private copying levy.

[52] The Board asked CPCC whether the 1999 decision should be revisited to account for controlled composition clauses and if so, what the impact of those clauses should be on the amount of the levy. CPCC appeared to concede that some account should be taken of CCCs. Accordingly, it filed an analysis that estimates the overall impact of CCCs on the actual mechanical licence rate paid on average in Canada. The resulting correction is outlined in paragraph 54 and is reflected in our calculation of the levy.

E. WHAT THE MODEL YIELDS

[53] Most of paragraphs 54 to 80 outline the rates that the application of the Stohn/Audley model would yield if we used the figures proposed by CPCC. Detailed calculations can be found in the Appendix to these reasons. Throughout we offer comparisons with the related figures that the Board used in 2000 in *Private Copying II*. Comparisons with what CPCC proposed in 2003 are sometimes made; however, since *Private Copying III* did not use the model to set the rates, these comparisons can be inherently problematic.

i. General Adjustments

a. Authors' Remuneration

[54] The first step in the Stohn/Audley model involves estimating the remuneration received by authors from the sale of a prerecorded CD. It starts with the mechanical licence rate, stated as 7.7¢ for 2005 and 2006, as agreed to between CMRRA and CRIA. That rate is adjusted to 6.95¢ to account for the impact of CCCs in the Canadian market.[10] By comparison, in *Private Copying II*, the Board used 7.55¢. The next element is the average number of tracks per prerecorded CD, derived from an analysis of actual sales of prerecorded CDs as reported to SoundScan. This number has increased from 14 in *Private Copying II* to 15 today. Discounts for record clubs and budget lines are also applied. These numbers are down, mainly because the importance of record clubs has decreased significantly. The numbers had to be adjusted once the results from the analysis of CCCs were factored into the calculations.[11] The resulting estimate for the authors' remuneration of $1.0086 per prerecorded CD is shown at line F of the Appendix.

b. Performers' and Makers' Remuneration

[55] The combined remuneration of performers and makers is estimated by using the SLRP for prerecorded CDs. According to CPCC, this has declined from $19.98, the figure used in *Private Copying II*, to $17.98 in 2004. More recent evidence is not available. The current figure could be lower.

[56] The Retailers suggested that the figure should be much lower, given that the actual selling price of prerecorded CDs has fallen considerably in the past few years. While this is true, it is not relevant. Royalties paid to performers and makers are based on the SLRP, not the selling price.

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[10] An Analysis of the Impact of Controlled Composition Clauses on the Mechanical Licensing Rate Paid in Canada Under the CMRRA and SODRAC Agreements, Exhibit CPCC-14, at page 5.
[11] *Ibid*.

[57] For reasons already mentioned, the record club deduction is again lower here than in *Private Copying I* or *II*. This leads to an estimated performers' and makers' remuneration of $1.9991 (Appendix, Line M), for a total remuneration for authors, performers and makers of $3.0077 per prerecorded CD (Appendix, Line N). This number is slightly higher than the one used in *Private Copying II*.

c. Adjustment for Qualifying Repertoire

[58] No changes were brought to this third element of the Stohn/Audley methodology. The Board still considers that most private copies are of recordings that are eligible as regards the authors' repertoire. The figure used is 96 per cent. The figures for performers and makers are 28 and 22 per cent. The resulting remuneration of qualifying repertoire is $1.4617 (Appendix, Line S).

d. Adjustment for Ancillary Nature of Activity

[59] In the past, the Board has considered that the copy made by the owner of a CD was worth half of the original. For copies made from other sources, the Board applied a reduction of 25 per cent. In *Private Copying II*, the evidence showed that half of all copies were made from prerecorded CDs owned by the person making the copy. In 2005-2006, this proportion was 25 per cent according to the Music Monitor Survey. The total reduction to apply to take into account the ancillary nature of the activity is therefore 31.25 per cent. This leads to the adjusted remuneration of $1.0049 indicated at line V of the Appendix.

e. Paid Downloads and Promotional Copies

[60] In *Private Copying III*, the Board stated that private copies of downloaded files for which the right to copy has already been paid should be excluded from the calculation of the levy. There is no need to compensate rights holders through the private copying levy when the same rights holders have granted the right to copy. However, the Board did not apply a discount at that time, not having any evidence of the extent of the activity.

[61] In this instance, the Music Monitor Survey indicates that 6 per cent of all tracks copied were bought online, with the right to copy the track onto different media. An additional 3 per cent of all tracks copied were promotional and available for free from commercial sites. CPCC argues that the levy rate for digital media[12] should be reduced to account for purchased downloads, but that the promotional downloads should be ignored. CPCC believes that only rarely is the right to further copy the music explicitly included in those promotional downloads. We disagree.

[12] The number of downloaded files that are copied onto audio cassettes is insignificant.

Promotional copies are a marketing tool, meant to entice the customer to eventually buy more material by a particular artist. The very nature of promotional copies is to ensure that as many people as possible hear the songs. It would not be logical for rights holders to impose stringent restrictions on their use. We would therefore include promotional downloads in any correction made to account for authorized downloads.

ii. Specific Media

a. Audio Cassettes

[62] CPCC did not offer much new evidence as regards audio cassettes, except to state its agreement with the Board's position in *Private Copying III* that there is no need to modify the rate to make an adjustment for zero-rated cassettes.

[63] Three main factors would lead to a change in the levy rate as compared to 2001-2002. First, the adjusted remuneration that is used as the starting point for the calculation of individual rates is now higher, as shown in Line V of the Appendix. Second, the Music Monitor Survey shows that the proportion of cassettes used to copy music has decreased from 65 to 59 per cent. These changes yield a rate of close to 30¢.

[64] The third factor is the impact of zero-rating. For the reasons set out in paragraph 40, we believe that there is no longer any reason to account for zero-rating in the rate.

[65] According to the evidence, 22 per cent of all audio cassette sales reported to CPCC in 2005 were subject to zero-rating. This figure is very similar to the 20 per cent that the Board used in *Private Copying II* to account for the impact of the regime. In that same decision, the Board stated that most of the increase in the rate from 23.3¢ in 1999-2000 to 29¢ in 2001-2002 was attributable to the Board taking the zero-rating scheme into account.[13]

[66] The easiest way to remove the impact of the scheme on the rate for audio cassettes is to apply the reverse correction. If 95 per cent of audio cassettes on which the levy was paid were bought by individuals, and if 20 per cent of all audio cassettes sold were zero-rated, then it is legitimate to assume that 75 per cent of all audio cassettes were bought by individuals. This is the number we use in Line AC of the Appendix so as to ensure that the rate for audio cassettes is no longer increased to account for the zero-rating scheme.

[67] With these changes, we certify a rate of 24¢ for audio cassettes. This is 5¢ less than the previous rate of 29¢.

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[13] *Supra*, note 6.

[68] Quite clearly, the audio cassette is a medium that is decreasing in importance. The number of units sold in 2005 is a third of the number for 2001. Audio cassettes now generate less than 5 per cent of all royalties collected by CPCC. Still, for now, we believe that they remain a recording medium ordinarily used by consumers to copy music.

b. CD-R Audio, CD-RW Audio and MiniDiscs

[69] The Audio line of products was created in part to comply with the requirements of the US *Audio Home Recording Act.*[14] These CDs are encoded so as to be recognizable as audio recording media when played on digital audio recording equipment. They may not be readable on all CD-ROM drives, but otherwise, they are identical to their non-Audio counterparts. Earlier decisions of the Board have always treated Audio CDs and MiniDiscs as a bundle.

[70] In *Private Copying III*, the Board expressed concerns about the lack of information and evidence on these media. At that time, the Board added that it would be inclined to apply the same rate as that of the other blank CDs, but preferred to maintain the *status quo*.

[71] We find ourselves in the same situation. CPCC filed no specific information on the proportion of CD-R Audio, CD-RW Audio or MiniDiscs being bought by individuals, or on the proportion of those media that are used to copy music. What we do know is that the Audio line constitutes less than one per cent of the total blank CD market, and MiniDiscs five times less.

[72] In the past, the Board had assumed that 95 per cent of these media are bought by individuals and that of those, 95 per cent are used to copy music. CPCC argues that it is still reasonable to make those assumptions. In its view, the Audio line is unlikely to be used in any professional application, because of the high price with no quality enhancement. Only consumers owning recording devices especially designed to work with the Audio line will buy these media.

[73] The Board is unwilling to continue to accept these assumptions, for the following reasons. First, we asked CPCC three years ago to provide more accurate information about this line of products. It has not done so. Even the additional submissions that CPCC filed after the Board specifically raised the possibility of merging the Audio and "data" lines merely repeated past assumptions. Second, the Music Monitor Survey makes the distinction between rewritable and other CDs, but not between Audio and regular CDs. Therefore, the numbers it provides for the proportion of CD-Rs bought by individuals and for the proportion of those used to copy music are an average for regular and Audio CD-Rs. Either these numbers are the same for both, or they are not. If they are higher for Audio CD-Rs, thus justifying a higher rate, they will be lower for regular CD-Rs, which would call for a lower rate.

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[14] 17 U.S.C. §1001-10 (1992).

[74] Third, Audio CDs and MiniDiscs always were, and always will remain, marginal products. There are even fewer sound recordings copied onto them than onto cassettes. Fourth, according to CPCC itself, consumers do not choose to buy these media, but do so because nothing else will work with the recording equipment that they own. They pay a higher price, but they do not get higher quality reproduction. Paying a higher levy for the Audio line is an additional burden hard to justify in the circumstances.

[75] For these reasons, we certify as royalty for CD-Rs Audio, CD-RWs Audio and MiniDiscs the same amount that we certify in paragraph 87 for CD-Rs and CD-RWs.

c. CD-R and CD-RW

[76] The first important variable to take into account in setting the rate for CDs is the proportion of blank CDs purchased by individuals. In *Private Copying II*, the Board used 45 per cent. In 2003-2004, CPCC suggested that individuals purchased 70.8 per cent of blank CDs; the Board did not use this figure, for the reasons set out in paragraph 27.

[77] This time, we tend to agree with CPCC's evidence to the effect that individuals purchase 50.3 per cent of all CDs. Assuming that 156.9 million CDs were sold from July 2005 to June 2006, this would mean that 78.9 million of these were purchased by individuals.

[78] The second important variable to determine is the proportion of CDs purchased by individuals that were used to make private copies. In *Private Copying II*, the Board used 56 per cent. In 2003-2004, CPCC proposed 65 per cent. CPCC's evidence this time would suggest 60 per cent. Again, that figure seems reasonable.

[79] Another significant number is the percentage of units that are wasted by individuals during attempts at copying music on blank CDs. In *Private Copying II,* the Board set that proportion at 12 per cent. In *Private Copying III*, CPCC had reported a figure of 5 per cent. This time, according to the Music Monitor Survey, consumers declared having wasted 3 per cent of their CDs. It is to be expected that over time, individuals will become more proficient at copying and software will become more user-friendly. This should result in a decrease in the proportion of blank CDs that are wasted while attempting to copy music.

[80] The last important figure to incorporate in applying the Stohn/Audley model to blank CDs is the correction for Internet downloads. If we were to apply the figures offered by CPCC and the principles we outlined in paragraphs 60 and 61, this would result in a discount of 9 per cent.

[81] The rate yielded by applying the Stohn/Audley model strictly, using the figures proposed by CPCC, would then be 29¢, which is 8¢ more than the current rate of 21¢. This may seem counterintuitive. According to CPCC's own data, when the 2001-2002 and 2005-2006 periods are compared, the number of tracks copied onto blank CDs decreased by close to 10 per cent,

from 706 million to 639 million, while the number of blank CDs sold increased by slightly more than 35 per cent. These factors would tend to lower significantly the rate for blank CDs.

[82] Other factors tend to increase the amount of the levy. In *Private Copying II*, the adjusted remuneration was $0.8653; it now is $1.0049 or 16 per cent higher. The proportion of CDs purchased by consumers has increased. The proposed change in the waste factor from 12 to 3 per cent would entail a directly proportional increase in the final rate. All in all, then, and subject to what we say in paragraph 86, the Stohn/Audley model seems to be quite robust, and an increase from 21 to 29¢ is not obviously irrational. Furthermore, CPCC's own approach in applying the model reflects changes over time in the blank CD market and in what consumers do with them. In 2000, its final proposal for blank CDs was 49¢. In 2002, it asked for 59¢. What the model would yield this time is less than half of this.

[83] More importantly, as we already mentioned, comparisons between the rate set for 2003-2004 and the rate we set today are inherently problematic. In *Private Copying III*, the Board did not so much set a rate as freeze it to the level set using the Stohn/Audley model in 2001. Therefore, one cannot test the reliability of the model by comparing the current situation to that which prevailed at the time of *Private Copying III.* Instead, one must go back to the data used in *Private Copying II*, which is the data for 1999-2000. Needless to say, one then gets a completely different picture. Over that period, for example, the number of tracks copied onto CDs has almost tripled, increasing from 233 million to 639 million. All other things being equal, then, the total amount of royalties collected should increase by a similar factor.

[84] This helps explain why we found it useful to go through the Stohn/Audley model to get a sense of what the rates ought to be. However, we will not use the results obtained by applying the model, for two reasons.

[85] The first is that CPCC is asking only for 21¢. Though the Board is not bound by the *ultra petita* principle, it must nevertheless ensure that a fair process is used when setting a tariff that is above what a collective society asked for. Here, these considerations make it simply impossible to go beyond what CPCC asked for.

[86] The second is that we would not have accepted some of the figures that CPCC proposed without further testing their reliability. We suspect that more than 3 per cent of blank CDs are wasted when consumers attempt to copy music. We would not be surprised if the number of paid and promotional downloads was greater than what the Music Monitor Survey reports, or if we were to learn that the survey underestimates the amount of unused recording space.[15] Finally,

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[15] The survey estimates at 16.5 or so the number of tracks put onto each CD used to copy. Yet, when one divides the number of tracks copied onto CDs according to the survey by the number of CDs used by individuals to copy music according to the evidence offered by Mr. Audley, one gets a number of approximately 14.

given what occurs in the online music market, it may be that the adjustment to account for the ancillary nature of additional private copies ought to be increased.[16] That being said, we are convinced that even after applying a range of corrections to account for our misgivings, we probably would have certified a rate higher than 21¢.

[87] For the reasons just set out, the Board certifies the rate applicable to blank CDs at 21¢ as requested.

[88] The market for blank CDs probably reached its peak in 2005. According to SCCG forecasts, total sales are expected to steadily decrease starting in 2006 and to represent only a small fraction of what they were by 2010. This decline in CD sales undoubtedly tracks the increase in popularity of new technologies such as digital audio recorders, USB keys and other devices and media. In the absence of a levy on those devices and media, this will inevitably lead to a significant reduction in the amounts generated by the private copying regime. In fact, we estimate that as a result of the Federal Court of Appeal removing the levy we set in *Private Copying III* on digital audio recorders, CPCC collected $35 million less in royalties for the three years starting in 2004.

F. CERTIFIED RATES AND TOTAL ROYALTIES

[89] For the years 2005 to 2007, the Board certifies the following rates:

- 24¢ for each audio cassette of 40 minutes or more in length. This is a decrease of 5¢ compared to the current rate of 29¢.
- 21¢ for each CD-R or CD-RW. This is the same as the current rate.
- 21¢ for each CD-R Audio, CD-RW Audio or MiniDisc. This is approximately 70 per cent less than the current rate of 77¢.

[90] The Board estimates that these rates will generate a total amount of royalties of approximately $29.5 million for 2005. This is a reduction of about $1 million compared to what the previous rates would have generated. Eighty-five per cent of that reduction is due to the lower rate certified for the Audio line and for MiniDiscs, and the rest to the lower rate certified for audio cassettes.

[91] The rates the Board certifies apply as of January 1, 2005. CPCC will therefore have to reimburse manufacturers and importers for the amounts collected in excess. We estimate these amounts to be approximately $2.5 million. However, it is not for us to determine who, in the supply chain leading to the final consumer, will be the ultimate beneficiary of these refunds.

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[16] *Online Music*, at paragraph 88.

G. CHANGES TO ADMINISTRATIVE PROVISIONS

[92] From the onset, auditing some manufacturers and importers of blank audio recording media has proven to be a problem. Before visiting the premises where the audit is to be conducted, CPCC always sends a notification letter with a list of the types of documents the auditors require. Yet, conducting audits is more often than not complex, difficult and protracted. In 2006, CPCC undertook 31 audits. In 17 cases, auditors encountered resistance to the provision of documents necessary to complete their task; in nine of these, this made it impossible to complete the audit. These problems are becoming even more prevalent as CPCC steps up its enforcement efforts, resulting in more companies reporting sales or importation, and thus more companies requiring auditing.

[93] For these reasons, CPCC has asked for two changes in the administrative provisions of the tariff. The first concerns the nature of the information that importers and manufacturers of blank media must keep for audit purposes. The second deals with CPCC's ability to share information it obtains.

i. Audits

[94] From 1999 to 2004, the private copying tariff provided that: "Every manufacturer or importer shall keep and preserve for a period of six years, records from which CPCC can readily ascertain the amounts payable and the information required under this tariff." This wording is similar to that of most audit provisions found in other tariffs certified by the Board.

[95] The proposed tariff for 2006 adds the following to the earlier provision:

> [...] These records must be original source documents and must be sufficient to determine all sources of supply, volume of media acquired or manufactured and disposition of such media. Such records will include but are not restricted to sales, purchases, inventory and financial statements. The auditor is entitled to conduct all reasonable procedures and make all reasonable inquiries inside and outside the company to confirm the completeness and accuracy of the information reported to the CPCC.

[96] The proposed tariff for 2007 substitutes the following to the second sentence of the previous paragraph:

> Such records will include but are not restricted to sales, purchases and inventory records, and financial statements when these are reasonably necessary to verify the accuracy and completeness of the information provided.

[97] Mr. Malcolm, who has conducted a number of audits for CPCC, testified that the current general reference to "records" is not sufficient to adequately identify the types of business documents that manufacturers and importers of blank media should retain and make available to

CPCC auditors. He also was of the opinion, based on the difficulties he has experienced over time in conducting audits, that clarifying the ambit of certain audit procedures that can be undertaken is necessary.

[98] CSMA agrees with the provision as it is worded for 2007. Mr. Tartamella applauds CPCC's request for clearer audit provisions, adding that an extended power to audit is the "only key to information".[17]

[99] On the other hand, the Retailers filed extensive comments seeking to demonstrate that the new audit provisions are unnecessary, possibly outside of the Board's jurisdiction as being akin to Anton Piller orders and potentially vulnerable to a *Canadian Charter of Rights and Freedoms* ("*Charter*") challenge.

[100] We believe that CSMA's and Mr. Tartamella's attitude is the one to adopt. As we stated in paragraph 31, there are a number of blank media importers who will go to extraordinary lengths in order to gain a competitive advantage by avoiding to pay the levy. CPCC must have available to it the tools required to deal effectively with these importers. To simply provide for what are in effect appropriate rules of governance cannot prejudice anyone.

[101] Contrary to what the Retailers allege, there are no similarities between an Anton Piller order and a CPCC audit. The Anton Piller order is an *ex parte* order from a Court, intended to prevent the destruction of evidence. It orders a person to allow unannounced access to premises by a person or persons and to allow them, in effect, to seize records. Refusal to comply with the order may result in a citation for contempt of court. Recognizing that the order can be invasive, the Court will normally provide for strict safeguards. The order will be issued only if a proper court action has been instituted against the defendants. The requesting party must display utmost good faith and offer a strong *prima facie* case. The order usually provides that an independent solicitor be present to act as an officer of the Court. A detailed report must be filed with the Court, carefully describing the objects or documents seized. All records seized must be photocopied and returned as soon as possible. Before some courts, the moving party will be required to provide security for costs as a matter of course.

[102] In contrast, a CPCC audit seeks only to verify that a media importer or manufacturer is acting in conformity with the tariff. There is no surprise visit; the audited party is contacted in advance to schedule the audit. The audit is not a court order; refusal to comply does not result in contempt proceedings, although it may constitute a violation of the tariff. Forced entry on the premises would only be possible with an order of the court; refusal to grant access to the auditors has no immediate consequences. An auditor is not allowed to seize or confiscate objects or

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[17] Tartamella Submissions, November 17, 2006, at page 4.

documents, only to consult documents and request copies; and again, non-compliance with the request will have no immediate consequences. Finally, an audit is a normal business practice; there is no requirement that a civil action be instituted before or after an audit is conducted.

[103] The Federal Court has already settled the issue of the possible vulnerability of CPCC audits to *Charter* challenges. When properly carried out, those audits do not constitute an unreasonable search and seizure.[18]

[104] Section 9 of the tariff will be worded to reflect what CPCC seeks to achieve. There is no need to discuss whether the provision will apply to past events or records. On the one hand, the records that the provision requires be kept are records that any commercial operation is required to keep in any event by other rules of law; it is therefore reasonable to expect that such records were kept in the past. On the other, an audit is an event that takes place at a specific time or over a period of time. It can only be conducted according to the rules that are known to apply at that time. Therefore, the new provision will apply to all audits to be conducted after the tariff is published as well as to all audits currently being conducted.

ii. Confidentiality

[105] CPCC also asks for changes to section 10 of the tariff, dealing with the obligation to "treat in confidence information received from a manufacturer or importer pursuant to this tariff". Here again, a review of the evolution of the wording of the section might be useful.

[106] The relevant parts of section 10 of the *Private Copying Tariff, 2003-2004* provide as follows:

> 10. (1) Subject to subsections (2) to (5), CPCC shall treat in confidence information received from a manufacturer or importer pursuant to this tariff, unless the manufacturer or importer consents in writing to the information being treated otherwise.
>
> (2) CPCC may share information referred to in subsection (1)
>
> (i) with the Copyright Board;
>
> (ii) in connection with proceedings before the Copyright Board;
>
> (iii) to the extent required to effect the distribution of royalties, with the collective societies represented by CPCC, once aggregated to prevent the disclosure of information dealing with a specific manufacturer or importer; or

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[18] *Canadian Private Copying Collective v. Cano Tech Inc. (F.C.)* 2006 FC 28, paragraphs 103-117; appeal dismissed, 2007 FCA 14 (hereafter *Cano Tech*).

(iv) if ordered by law or by a court of law.

(3) [...]

(4) Subsection (1) does not apply to information that is publicly available, or to information obtained from someone other than the manufacturer or importer, who is not under an apparent duty of confidentiality to the manufacturer or importer.

(5) Notwithstanding the foregoing, the corporate name of a manufacturer or importer, the trade name under which it carries on business and the types of blank audio recording media reported by it pursuant to paragraph 8(d) shall not be considered confidential information.

[107] The proposed provision for 2005 is identical. For 2006 and 2007, CPCC asks that subsection (2) be amended so as to allow it to share information "with other persons, but only as required by CPCC to carry out its audit responsibilities under section 9 herein or its enforcement activities pursuant to section 88 of the *Act*".

[108] CPCC wants to be able to use information provided pursuant to section 8 of the tariff or gathered during audits conducted pursuant to section 9, mostly to confront possible levy evaders with proof of their importation into Canada and sale of blank audio recording media. At present, when CPCC obtains from a person copy of a document concerning the delivery of blank CDs to that person by a supplier, CPCC cannot divulge that document to the supplier without the consent of the person who provided the document, even though the supplier obviously knows of the document. Absent such consent, CPCC must seek a court order to be relieved of its confidentiality obligations.[19] This is both time consuming and expensive.

[109] The Retailers are of the opinion that since so far the courts have been inclined to grant relief from confidentiality obligations when CPCC requests it, there is no need for change. The Board does not agree. We see no reason to prevent CPCC from using information for enforcement and audit purposes without an order of a court, as long as the person to whom the information is being provided already is, or ought to be,[20] privy to the information. Significantly, the rulings that courts have issued to date show that CPCC has not abused its audit powers and that its auditors proceed with care and govern themselves according to generally accepted rules of conduct.

[110] CPCC will be allowed to share information with those who know, or are presumed to know, the information. The wording of the tariff is adjusted accordingly. For the reasons set out

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[19] *Cano Tech*, para. 71; *CPCC v. 9087-0718 Québec Inc.*, *Vortek Systèmes s.e.n.c.*, 2006 FC 283; *CPCC v. Fuzion and Yeung*, 2006 FC 1284.

[20] We would not want to allow an importer to prevent CPCC from showing a bill of sale to the supplier identified in the document by claiming that the document is a forgery.

in paragraph 104, there is no need to address the issue of retrospective application of the provision.

H. Other Issues

i. Apportionment of Levies Amongst Collective Societies

[111] We heard no discussion on this issue. The levy will be apportioned in the same way as in *Private Copying III*. Thus, collective societies representing eligible authors are entitled to 66 per cent, eligible performers to 18.9 per cent, and eligible makers to 15.1 per cent. We also note that in CPCC's proposed tariff, SOGEDAM (*Société de gestion des droits des artistes-musiciens*) is no longer mentioned as being entitled to a share of the sums allocated to eligible performers.

ii. Use of Survey Evidence

[112] Counsel for the Retailers urged the Board to disregard the survey evidence filed by CPCC, claiming that it was irrelevant to the issue at hand as well as unreliable. Counsel referred to the decision of the Supreme Court of Canada in *Mattel Inc. v. 3894207 Canada Inc.*[21] as authority for so doing. We conclude that this decision has no possible application in this instance.

[113] *Mattel* dealt with the likelihood of confusion between a famous trademark and another mark. Before the applications judge, the appellant sought to introduce new evidence in the form of a public opinion survey. The principal attack on this survey rested on its relevance. Binnie J. stated that the survey was not responsive to the point at issue, was irrelevant and should be excluded.

[114] CPCC presented two surveys. The first is the Music Monitor Survey. CPCC has filed its equivalent since the very first private copying hearings. It has none of the characteristics that would lead a court, applying *Mattel*, to conclude that it should be excluded. The survey is prepared under the direction of a seasoned professional and has withstood the test of three cross-examinations. It is well designed and impartially administered. The questions it asks are directly relevant to understanding the private copying market in Canada; so are its findings. Its results are overall reliable and valid.

[115] The second survey, conducted by Environics Research Group, is a typical public opinion survey. CPCC presented it in an attempt to demonstrate that a majority of Canadians consider the private copying levy to be fair and equitable, that the Canadian public has accepted the levies at their present levels and that the Board should have no problem in maintaining them. We took no account of it in reaching our decision. Consequently, that issue is moot.

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[21] [2006] 1 S.C.R. 772 (hereafter *Mattel*).

iii. Status of Participants

[116] In these proceedings, we first allowed CSMA to maintain a watching brief. We eventually extended a similar status to the Retailers and to Mr. Tartamella. In the end, this decision proved to be unnecessary. According to the Board's directive on procedure, anyone can submit comments on a matter before the date set for presenting or filing oral or written arguments. Subsequent events proved that these "observers" would have been able to offer whatever useful comments they might have without our creating an ostensibly new level of participation that only helped to create confusion.

Claude Majeau
Secretary General

APPENDIX
Private Copying 2005-2007
Levy Rate Calculation

AUTHORS' REMUNERATION		
A	Mechanical licence royalty per song per top-line CD	$0.0695
B	Average number of tracks per CD	15
C	Record club and budget-line sales percentage	13%
D	Record club and budget-line discount	25%
E	Adjustment for record club and budget-line sales [C × D] 0.13 × 0.25	3.25%
F	Authors' remuneration [A × B × (1 – E)] 0.0695 × 15 × (1 – 0.0325)	$1.0086

PERFORMERS' AND MAKERS' REMUNERATION		
G	Top-line CD suggested retail list price	$17.98
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 × J] 0.13 × 0.5	6.5%
L	Payments to the *American Federation of Musicians*	$0.07
M	Performers' and makers' remuneration [(G × H × (1 – I) × (1 – K)) + L] (17.98 × 0.18 × (1 – 0.3625) × (1 – 0.065)) + 0.07	$1.9991
N	Total royalties per prerecorded CD [F + M] 1.0086 + 1.9991	$3.0077

QUALIFYING REPERTOIRE ADJUSTMENT		
O	Eligible authors' weighted share of private copies [(F ÷ N) × % of private copies using eligible authors' repertoire] 1.0086 ÷ 3.0077 × 96%	32.2%
P	Eligible performers' weighted share of private copies [(M ÷ N) × % of private copies using eligible performers' repertoire ÷ 2] 1.9991 ÷ 3.0077 × 27.5% ÷ 2	9.1%
Q	Eligible makers' weighted share of private copies [(M ÷ N) × % of private copies using eligible makers' repertoire ÷ 2] 1.9991 ÷ 3.0077 × 22% ÷ 2	7,3%
R	Qualifying repertoire's weighted share of private copies [O + P + Q] 32.2 + 9.1 + 7.3	48.6%
S	Imputed remuneration of qualifying repertoire per CD [N × R] 3.0077 × 0.486	$1.4617

ADJUSTED REMUNERATION (ANCILLARY NATURE OF ACTIVITY)		
T	Adjustment for copies made from copier-owned CDs [% of private copies × 50%] 25% × 50%	12.5%
U	Adjustment for copies from other sources [% of private copies × 25%] 75% × 25%	18.75%
V	Adjusted remuneration [S × (1 – (T + U))] $1.4617 × (1 – (0.125 + 0.1875))	$1.0049
W	Average length of prerecorded CD [B × 4'10"] 15 × 4'10"	62.5 min.
X	Average percentage of recording time actually used on a prerecorded CD	87%

Y	Percentage of copies already authorized (through paid downloads and promotional copies)	9%

LEVY RATE FOR AUDIO CASSETTES		
AA	Weighted average recording capacity	82.6 min.
AB	Recording capacity adjustment [((AA × X) – W) ÷ W ÷ 2] ((82.6 × 0.87) – 62.5) ÷ 62.5 ÷ 2	7.5%
AC	Levy rate on cassettes [V ÷ 2 × % purchased by individuals × % of purchases used to private copy × (1 + AB)] $1.0049 ÷ 2 × 0.75 × 0.59 × (1 + 0.075)	$0.24

LEVY RATE FOR CD-Rs, CD-Rs AUDIO, CD-RWs, CD-RWs AUDIO AND MINIDISCS		
AD	Average recording capacity	79.1 min.
AE	Recording capacity adjustment [((AD × X) – W) ÷ W × 0.66] ((79.1 × 0.87) – 62.5) ÷ 62.5 × 0.66	6.7%
AF	Levy rate on CD-R, CD-R Audio, CD-RW, CD-RW Audio and MiniDiscs [V × % of CD-Rs purchased by individuals × % of CD-Rs purchased and used to private copy × (1 – % waste) × (1 + AE) × (1 – Y)] $1.0049 × 0.503 × 0.6 × (1 – 0.03) × (1 + 0.067) × (1 – 0.09)	$0.29