Copyright Board Canada

Commission du droit d'auteur Canada

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

Members Mr. Justice William J. Vancise
Mrs. Francine Bertrand-Venne
Mrs. Sylvie Charron

Proposed Tariffs Considered PRELIMINARY MOTIONS

CPCC's proposed tariff of levies to be collected in 2008 and 2009 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] On January 31, 2007, the Canadian Private Copying Collective (CPCC) filed a statement of the levies it proposes to collect in 2008 and 2009 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"). The statement was published in the *Canada Gazette* on February 10, 2007. The Canadian Storage Media Alliance (CSMA) and the Retail Council of Canada (RCC), among others, filed objections to the proposed tariff.

[2] CPCC seeks to levy, among other things, products that can record, store and play back sound recordings without the need for an external recording medium ("digital audio recorders"). CSMA and RCC brought motions pursuant to subsection 66.7(1) of the *Copyright Act* (the "*Act*") seeking an order to prevent the Board from considering or approving the portions of the proposed tariff on digital audio recorders. They contend that the Federal Court of Appeal has

already decided in *Canadian Private Copying Collective v. Canadian Storage Media Alliance*[1] that digital audio recorders do not fall within the definition of "audio recording medium" under the *Act*. They submit that the Board has no jurisdiction to consider or approve a levy on these devices. Alternatively, they argue that CPCC should be prevented from requesting such a levy on the basis of issue estoppel, cause of action estoppel or abuse of process.

[3] Subsequent to receiving the motions from CSMA and RCC, the Board issued an order on April 30, 2007 asking the parties to answer the following questions:

1. Is it now settled law that a digital audio recorder is not a "medium", as this word is used in the definition of "audio recording medium" set out in section 79 of the *Copyright Act*?
2. Does issue estoppel or cause of action estoppel prevent CPCC from arguing that a digital audio recorder is a medium?
3. Assuming that the answer to questions 1 and 2 is no, is a digital audio recorder a "recording medium, regardless of its material form, onto which a sound recording may be reproduced"? Put another way, if a digital audio recorder is ordinarily used by individual consumers for the purpose of reproducing sound recordings onto it, is it an "audio recording medium" as defined in section 79 of the *Copyright Act*?

II. HISTORICAL OUTLINE

[4] Before dealing with those questions it is useful to set out the chronology of decisions dealing with private copying. Part VIII of the *Act*, the private copying regime, came into force in 1998. The first decision dealt with a proposed tariff seeking levies on products such as analog audio cassettes, digital audio tapes, MiniDiscs, Recordable Compact Discs (CD-R), Rewritable Compact Discs (CD-RW), Recordable Audio Compact Discs (CD-R Audio) and Rewritable Audio Compact Discs (CD-RW Audio).[2] All of those products are recorded onto and played back in separate equipment which is not levied. In *Private Copying III*,[3] the Board set out in detail the chronology of its earlier decisions. The progression of the tariffs certified by the Board demonstrates the gradual evolution of the objects to which the tariffs applied. In 2003-2004, CPCC requested, among other things, that the scope of the tariff be expanded to impose levies on the following products:

> (vi) Non-removable electronic memory cards or non-removable flash memory storage media of any type incorporated into an MP3 player or into any similar device with internal electronic or flash memory that is intended for use primarily to record and play music;

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[1] [2005] 2 F.C. 654 (hereafter *CPCC v. CSMA*).
[2] Decision certifying the *Private Copying Tariff, 1999-2000*, December 17, 1999 (hereafter *Private Copying I*).
[3] Decision certifying the *Private Copying Tariff, 2003-2004*, December 12, 2003 (hereafter *Private Copying III*).

> (vii) Non-removable hard drives incorporated into an MP3 player or into any similar device with an internal hard drive that is intended for use primarily to record and play music; […][4] [our emphasis]

[5] The Board found that the memory embedded within a digital audio recorder qualified as an audio recording medium and as such was subject to a levy. It stated:

> As regards the physical characteristics of the product itself, the definition of an "audio recording medium" could hardly have been drafted more broadly. Specifically, the English version of the text contains the clause, "regardless of its material form". To the Board, the plain and ordinary meaning of this phrase rules out the possibility that the levy was intended to apply only to "removable" media, let alone only to audio cassettes.
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> This language also demonstrates that it is not determinative whether the medium is affixed, incorporated or otherwise integrated in a device. Its breadth supports the conclusion that liability to pay a levy cannot be dependant upon physical characteristics alone. A medium that is incorporated into a device remains a medium.[5] [our emphasis]

[6] CSMA applied by way of judicial review to set aside the decision of the Board on the basis that the Board "erred in law [...] in coming to the decision that 'digital audio recorders' with embedded non-removable memory constitute an 'audio recording medium' [...] ".[6]

[7] Mr. Justice Noël, speaking for a unanimous court, identified the issue relevant to this motion as follows:

> [133] […] whether a permanently embedded or non-removable memory, incorporated into a digital audio recorder (MP3 player), retains its identity as an "audio recording medium" and can be levied as such under Part VIII.
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> [142] The four members of the CSMA who appear as applicants in this judicial review application argue that the Board erred in law in holding that a permanently embedded memory in a digital audio recorder (MP3 player) is a medium and, as such, leviable under Part VIII.
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> [143] The applicants argue that, when incorporated into a digital audio recorder, the embedded memory becomes integrated in, and inseparable from, this device, and thus loses

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[4] Proposed *Private Copying Tariff, 2003-2004*, s. 2 (definition of "blank audio recording medium").
[5] *Private Copying III*, *supra* note 3, at pages 37-38.
[6] Application for judicial review of CSMA, CPCC Memorandum of Argument (Response), Tab E, page 14, Ground (a). CSMA also challenged the decision on other grounds that were rejected and that are not relevant to this decision.

its separate identity. Hence, it cannot be said that a manufacturer or importer who sells a digital audio recorder also sells the embedded memory.[7]

[8] He then found that embedded memory is not a "medium":

> [148] […] I do not believe that it was open to the Board to establish a levy on memory embedded in digital audio recorders. In my respectful view, Part VIII of the Act and the definition of "audio recording medium" gave the Board no such authority.
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> [149] The Board established the levy on the basis that it could, in effect, look through the device being sold and reach the permanently embedded memory found therein. The Board twice noted that the levy sought by the CPCC, and approved by it was on "memory in devices" but not on "devices" (*Private Copying III*, at paragraphs 126 and 194).
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> [150] The conceptual difficulty inherent in the exercise on which the Board embarked in certifying a levy on the memory embedded in a device, but not on the device itself, is illustrated by the tariff which it certified (*Private Copying III*, at paragraph 225):
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> > For non-removable memory permanently embedded in a digital audio recorder, the Board adopts rates of $2 for each recorder that can record no more than 1 Gb of data, $15 for each recorder that can record more than 1 Gb and no more than 10 Gbs of data, and $25 for each recorder that can record more than 10 Gbs of data. [Emphasis added.]
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> [151] Although the Board purported to establish a levy on the embedded memory, it acknowledged that this memory could not, looked at on its own, allow for the establishment of the levy; the device into which the memory was embedded had to be considered (*Private Copying III*, at paragraph 153):
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> > Hard discs in personal computers are technically indistinguishable from those in some digital audio recorders. It appears therefore, inappropriate to generalize about the uses of all embedded memory. However, the distinction, in the Board's view, is that where a medium is permanently incorporated into a certain type of device, it becomes possible to categorize that medium and evaluate its use as a unique "kind" of "audio recording medium", based on the intrinsic characteristics of the device into which the medium has been incorporated. [Emphasis added.]
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> Hence according to the Board, permanent memory embedded in an MP3 player comes within the definition, whereas the identical memory embedded into other devices does not (*Private Copying III*, at paragraph 155).
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> [152] It can be seen from the Board's own reasoning and from the tariff which it certified that it is the device that is the defining element of the levy and not the memory incorporated

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[7] *CPCC v. CSMA*, *supra* note 1, at paragraphs 133, 142-143.

therein. The Board cannot establish a levy and determine the applicable rates by reference to the device and yet assert that the levy is being applied on something else.

[153] [...] as desirable as bringing such devices within the ambit of Part VIII might seem, the authority for doing so still has to be found in the Act.

[154] The Board found this authority in the definition of "audio recording medium". It focussed on the phrase "regardless of its material form" to hold that Parliament intended that a levy be established on a medium, regardless of its incorporation into a device. In the words of the Board, "A medium that is incorporated into a device remains a medium" (*Private Copying III*, at paragraph 131).

[155] There are a number of problems with the Board's analysis. First, according to the Board's own reasoning, a memory does not become an "audio recording medium" unless and until it is incorporated into the appropriate device (*Private Copying III*, at paragraphs 152 and 161). It is therefore difficult to see how such a memory can be said to remain a medium when embedded into a device.

[156] Second, upon being incorporated into a device, a memory undergoes no change in form. It is therefore difficult to see how the Board can rely on the phrase "regardless of its material form" to justify its conclusion. Furthermore, to rely on this phrase, the Board first had to identify an "audio recording medium". According to its own reasons, a memory is not an "audio recording medium" unless and until embedded into a digital audio recorder.

[157] It is apparent that the phrase on which the Board relied to "see through" a digital audio recorder and reach the memory embedded therein does not support its conclusion when regard is had to its own findings.

[...]

[160] [...] The Board erred when it held that it could certify a levy on the memory integrated into a digital audio recorder.

[161] Subsection 82(1) of the Act imposes a levy on manufacturers and importers of blank media. By the words of paragraph (*a*) thereof, the liability for the payment of the levy can only arise "on selling or otherwise disposing of those blank audio recording media".

[162] The Board therefore had to look at what was being sold or disposed of by the importers (it is common ground that there are no manufacturers of digital audio recorders in Canada), and determine whether the subject-matter of the sale or disposition came within the ambit of the definition.

[163] The Board did not ask itself that question. [...][8]

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[8] *CPCC v. CSMA*, *supra* note 1, at paragraphs 148-157 and 160-163.

[9] The order of the Court was to set aside "the decision of the Board certifying a levy on the non-removable memory permanently embedded in a digital audio recorder [...]".

[10] Mr. Justice Noël then added that a digital audio recorder is not a "medium":

> [158] The Board acknowledges that, when it enacted Part VIII, Parliament could not have envisioned recent technological developments (*Private Copying III*, at paragraph 133). Indeed, the legislative history of Bill C-32, which amended the Act to include Part VIII, shows that at the time, Parliament was looking at blank audio tapes as the cause of the harm to rightsholders and had been made aware of proposals in other countries (including the U.S.) to extend the levy to the hardware which recorded and played these blank audio tapes. Nevertheless, Parliament chose to limit the levy to blank medium [...]
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> [159] This shows that Parliament's definition of "audio recording medium" stands in contra-distinction with a recorder or similar devices as these were known to exist at the time and whose function it is to record and play blank audio tapes. No one has ever pretended that tape recorders came within the ambit of the definition.
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> [160] A digital audio recorder is not a medium; the CPCC recognized so much when it asked that the levy be applied on the memory found therein but not on the recorder itself. [...]
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> [161] Subsection 82(1) of the Act imposes a levy on manufacturers and importers of blank media. By the words of paragraph (*a*) thereof, the liability for the payment of the levy can only arise "on selling or otherwise disposing of those blank audio recording media".
>
> [162] The Board therefore had to look at what was being sold or disposed of by the importers (it is common ground that there are no manufacturers of digital audio recorders in Canada), and determine whether the subject-matter of the sale or disposition came within the ambit of the definition.
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> [163] The Board did not ask itself that question. However, it seems clear that if it had, the subject-matter of the sale or disposition was a digital audio recorder or a device as the Board called it, but not a medium as defined. In the absence of such a sale, no liability can arise for the levy.
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> [164] In my respectful view, it is for Parliament to decide whether digital audio recorders such as MP3 players are to be brought within the class of items that can be levied under Part VIII. As Part VIII now reads, there is no authority for certifying a levy on such devices or the memory embedded therein.[9]

[11] CPCC sought leave to appeal to the Supreme Court of Canada on the ground that the Federal Court of Appeal had erred in finding that non-removable memory is not an "audio recording medium" within the meaning of section 79 of the *Act*. Leave was denied.

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[9] *CPCC v. CSMA*, *supra* note 1, at paragraphs 158-164.

[12] As stated earlier, CPCC's proposed tariff for 2008-2009 seeks to levy, among other things, digital audio recorders instead of the memory embedded in them.

III. POSITION OF THE PARTIES

[13] We agree with CSMA that subsection 66.7(1) of the *Act*[10] grants the Board the power to issue the orders requested and to make an initial determination as to whether the proposed statement of royalties is within the terms of the *Act.*[11]

[14] CSMA and RCC submit the Board is without jurisdiction to certify the tariff requested by reason of the finding of the Federal Court of Appeal that "digital audio recorders" do not fall within the definition of "audio recorded medium" with the result that the matter is *res judicata*. They also contend that CPCC is estopped from proposing a levy on digital audio recorders or that the application is an abuse of process. Finally, if we are to find that the issue of digital audio recorders as media is not settled, they urge us to adhere to the reasoning of the Federal Court of Appeal in any event.

[15] For its part, CPCC submits that the statements dealing with a digital audio recorder as medium in *CPCC v. CSMA* are *obiter* and as such not binding. CPCC also maintains that none of the principles invoked to prevent it from seeking a levy on digital audio recorders can or should apply to it under the circumstances. Finally, CPCC attempts to demonstrate that logic and a purposive analysis of the private copying regime dictate the conclusion that digital audio recorders must be recording media for the purposes of Part VIII of the *Act*.

IV. ANALYSIS

A. IS IT NOW SETTLED LAW THAT A DIGITAL AUDIO RECORDER IS NOT A "MEDIUM" AS THIS WORD IS USED IN THE DEFINITION OF "AUDIO RECORDING MEDIUM" SET OUT IN SECTION 79 OF THE *COPYRIGHT ACT*?

[16] CSMA and RCC argue that the Federal Court of Appeal in *CPCC v. CSMA* found that a digital audio recorder is not a medium within the meaning of section 79 of the *Act* with the result that digital audio recorders cannot be leviable under Part VIII of the *Act*. The Board has therefore no jurisdiction to consider a levy on these devices.

[17] In their submission, an attempt to certify a levy on digital audio recorders rather than on the memory embedded within recorders is an attempt, based on semantics, to circumvent the

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[10] 66.7(1) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its decisions and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

[11] See *CTV Television Network Ltd. v. Canadian Copyright Board*, [1993] 2 F.C. 115 (C.A.), at paragraphs 16, 18.

decision of the Federal Court of Appeal. They contend the Court made it clear that the reason the memory in digital audio recorders was not leviable was precisely because the memory is part of the device. They rely on the following statement of Mr. Justice Noël: "The Board cannot establish a levy and determine the applicable rates by reference to the device and yet assert that the levy is being applied on something else."[12]

[18] In their submission, the statement that a digital audio recorder is not a medium was central to, and a fundamental part of, the conclusion that the Court reached. The propositions that (a) memory embedded into a device loses its identity, (b) the proper focus of the analysis is the device and (c) a device is not a medium are parts of a single whole. The focus of the tariff was on the device. The essence of the question was whether a digital audio recorder can be levied. The Board had asked the wrong question. It was then up to the Court to determine the proper focus of the Board's examination, to state the right question and then to answer it.

[19] CPCC does not agree. In its submission, the statement that a digital audio recorder is not a medium is *obiter*, does not form part of the *ratio decidendi* of the decision and is not binding on the Board.

[20] Thus, the issue before us is reduced to whether the conclusion that a digital audio recorder is not a medium is binding on the Board. To determine what the Federal Court of Appeal decided we must examine precisely what was in issue before the Board and ultimately what had to be decided by the Court. To that end, we must examine the proposed tariff, the tariff certified by the Board in 2003 as well as the underlying reasons for the Board's decision to certify a levy on the memory permanently embedded in digital audio recorders.

[21] The tariff proposed by CPCC for 2003-2004 sought a levy on a number of new digital storage media, including memory cards, flash memory and micro-hard drives when "incorporated into each MP3 player or into each similar device […] intended for use primarily to record and play music". CSMA and others objected to the proposed levy on these objects on the basis that once incorporated into the device, the memory lost its identity as a recording medium. It argued that CPCC was seeking a levy on a device and not a medium within the meaning of section 79. CPCC argued that the non-removable memory in a digital audio recorder did not lose its identity and could be viewed separately for the purpose of applying a levy and could be characterized as an audio recording medium within the meaning of section 79 because the recorder and the memory inside it are "ordinarily used" for the purpose of copying sound recordings.

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[12] *CPCC v. CSMA*, *supra* note 1, at paragraph 152.

[22] The proposed tariff only targeted the memory in a digital audio recorder and not the recorder itself with the result that the issue of whether or not the recorder itself was a medium or an "audio recording medium" was irrelevant to the question the Board had to decide. If the memory lost its identity when incorporated into the digital audio recorder, CPCC had asked for a levy on something that did not exist for the purposes of the private copying regime and the proposed tariff was fatally flawed irrespective of whether the recorder itself was a medium or not.

[23] Indeed, it was not open to the Board to even consider whether it might impose a levy on digital audio recorders, simply because CPCC's proposed statement of royalties did not target digital audio recorders. The Board can do many things with a proposed statement of private copying levies, but it cannot expand the list of recording media that it targets. No one asked for a levy on the digital audio recorder itself, therefore the issue of whether it could be the subject of a levy never arose.

[24] The Board did not consider the status of the recording device to be relevant. The Board identified the questions for determination as follows:

> There are two aspects of this provision [section 79] that are relevant to the Board in these proceedings. The first relates to the proper interpretation of the phrase "ordinarily used by individual consumers for that purpose". The second relates to the relevance of a medium's physical attributes ("a recording medium regardless of its material form"), particularly the significance of its incorporation into a device.[13]

[25] The Board ultimately dismissed the objectors' argument that memory loses its separate identity upon incorporation into a device. The Board concluded: "It follows that non-removable memory permanently embedded in such a device falls within the definition of an 'audio recording medium' under the *Act*."[14]

[26] CSMA asked the Federal Court of Appeal to set aside the Board's decision based on the same arguments it had raised before the Board. Again, CSMA framed the issue in terms of a device/medium dichotomy, stating in its application that the Board had decided "that 'digital audio recorders' with embedded non-removable memory constitute an 'audio recording medium'".[15] The Board made no such decision. Significantly, the Federal Court of Appeal framed the issue to be decided differently, in terms that mirrored the Board's approach: "[...] whether a permanently embedded or non-removable memory, incorporated into a digital audio

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[13] *Private Copying III*, *supra* note 3, at page 33.
[14] *Private Copying III*, *supra* note 3, at page 46.
[15] Application for judicial review of CSMA, CPCC Memorandum of Argument (Response), Tab E, page 13, Remedy (a).

recorder (MP3 player), retains its identity as an 'audio recording medium' and can be levied as such."[16]

[27] The question before the Court was, therefore, whether the Board had correctly decided that memory does not lose its identity as an "audio recording medium" when incorporated into a digital audio recorder. The Court did not identify as an issue the question of whether or not a digital audio recorder is a "medium", even though CSMA argued it should be so identified.

[28] Deciding if a digital audio recorder is a medium was irrelevant because that determination contributed nothing to the resolution of the issue before the Court. Succinctly put, if the memory incorporated into a digital audio recorder retained its identity as an audio recording medium, the Board had correctly granted a levy on that memory as long as it was ordinarily used by individual consumers to reproduce sound recordings. If it did not retain its identity when incorporated into a recorder, then the memory was not a medium, could not be an audio recording medium and could not be the subject of a levy and the Board had erred in certifying a levy on non-removable memory.

[29] The Court's central conclusion confirms this: "[...] I do not believe that it was open to the Board to establish a levy on memory embedded in digital audio recorders. In my respectful view, Part VIII of the Act and the definition of 'audio recording medium' gave the Board no such authority."[17]

[30] The Court explained its conclusion as follows: "from the Board's own reasoning and from the tariff which it certified [...] the device [...] is the defining element of the levy and not the memory incorporated therein. The Board cannot establish a levy and determine the applicable rates by reference to the device and yet assert that the levy is being applied on something else."[18] The memory does not retain its identity as a medium when incorporated into a device if it does not become an audio recording medium until it is incorporated into the device. Finally, the Board could not rely on the phrase "regardless of its material form" to find that a medium incorporated into a device remains a medium since the memory undergoes no change in material form when it is incorporated into a device; the Board had to find that the memory is an "audio recording medium" before its incorporation into the device. The Court concluded that "the phrase on which the Board relied to 'see through' a digital audio recorder and reach the memory embedded therein does not support its conclusion".[19]

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[16] *CPCC v. CSMA, supra* note 1, at paragraph 133.
[17] *Ibid.*, at paragraph 148.
[18] *Ibid.*, at paragraph 152.
[19] *Ibid.*, at paragraph 157.

[31] In CPCC's submission, that reasoning forms the *ratio decidendi* of the decision. CPCC puts its position this way:

> […] the Court concluded that the memory incorporated into a digital audio recorder does not retain its identity as an "audio recording medium" and therefore cannot be levied under Part VIII. Furthermore, in concluding at paragraph 152 that "it is the device that is the defining element of the levy and not the memory incorporated therein", the Court decided that the Board had erred in certifying the levy on memory as proposed by CPCC. The Court reinforced this conclusion at paragraphs 161 to 163 of its decision, where it found that what the Board had purported to levy (memory in the device) was in fact not the subject matter of a sale under section 82(1) of the Act which gives rise to the liability to pay levies. That subject matter, the Court pointed out, was a digital audio recorder, which the Board had not levied.[20]

The application of the law to the facts on which the Court's decision was founded was complete. Nothing more was required. The statements that a "digital audio recorder is not a medium" and that "as Part VIII now reads, there is no authority for certifying a levy on such devices […]"[21]are not a necessary part of the Court's conclusion that non-removable memory does not retain its identity. These statements are *obiter*.

[32] We agree with CPCC. The Court found for the purposes of the private copying regime, memory embedded into a digital audio recorder cannot be treated separately from the digital audio recorder. Yet the Board focussed on the memory. In so doing, the Board committed a reviewable error. Put another way, the Board did not ask itself the right question. If the Board did not answer the right question, then there is no answer to be scrutinized in order to decide whether it was right or wrong.

[33] CSMA argues that in order to set aside the levy, the Court had to rule that a digital audio recorder is not a medium. We do not agree. Had the Court stated that a digital audio recorder is a medium, we doubt that it would have (a) modified the tariff to state clearly that the levy is on the recorder, (b) dismissed the application and let the wording of the tariff stand, though it purported to levy the memory, not the recorder, or (c) sent the matter back to the Board with instructions to amend the tariff so as to make it clear that the tariff is on the recorder. We suspect instead that the Court would have made the statement, noted that CPCC's proposed tariff focussed on the wrong object and for that reason, issued the order it did.

[34] CSMA and RCC maintain that the focus of the tariff was on the device, based on the fact that the tariff was set at a certain sum "for each recorder".[22] However, they fail to mention two things. First, the key provision of the tariff, the definition of "blank audio recording medium",

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[20] CPCC's Memorandum of Argument, at paragraph 33.
[21] *CPCC* v. *CSMA*, *supra* note 1, at paragraphs 160, 164.
[22] *Private Copying Tariff, 2003-2004*, s. 3.

focuses expressly on "non-removable memory, including solid state and hard disk, that is permanently embedded in a digital audio recorder".[23] The decision was to put a levy on memory. That is the decision that the Court was asked to review. That is what the court noted several times.[24] Second, Part VIII of the *Act* neither defines nor uses the word device. By focussing on the notion of device, CSMA diverted attention from the real question raised by CPCC's proposed tariff, that is, whether the non-removable memory in the recorder was an audio recording medium within the meaning of section 79 of the *Act*.

[35] The question of whether a digital audio recorder can be levied would have been relevant only if CPCC had asked to set a levy on the recorder. The Board has never been asked to set a levy on computers, telephones, answering machines (or the cassettes they are used with) or pacemakers. No one has felt the need to expound on whether or not those devices are audio recording media. More importantly, we doubt that the Board would undertake to determine whether a digital audio recorder is a medium without taking some account of the meaning of the words "medium" and "*support*" elsewhere in the *Act*.

[36] The statements that a "digital audio recorder is not a medium" and that "as Part VIII now reads, there is no authority for certifying a levy on such devices […]" are not a necessary part of the Court's conclusion that non-removable memory does not retain its identity. These statements are "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential".[25]

[37] The answer to the first question is no. We find it is not settled law that a digital audio recorder is not a medium as this word is used in the definition of "audio recording medium" in section 79 of the *Act*.[26]

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[23] *Ibid*., s. 2 (definition of "blank audio recording medium").

[24] "the levy [...] approved [...] was on 'memory [...]' not 'devices'" [...] "[...] the Board embarked in certifying a levy on the memory [...] not on the device [...]": *CPCC v. CSMA, supra* note 1, at paragraphs 149-150.

[25] *Black's Law Dictionary*, 8th ed, *s.v.* "Obiter Dictum". See also: *Davidner v. Schuster*, [1936] 1 D.L.R. 560 (Sask. C.A.).

[26] Since hearing this matter, the Ontario Court of Appeal released its judgment in *Authorson Estate v. Canada (Attorney General)* [2007 ONCA 501]. Counsel for RCC immediately drew it to our attention and submitted in a written memorandum that it was relevant to the issue of *res judicata* before us. We asked CPCC and CSMA not to comment on either the decision or on RCC's memorandum unless asked. In the end, we did not request comments.
Authorson can be distinguished in at least two respects. First, the issue that the plaintiff class was attempting to raise was central to the disposition of the matter before the Supreme Court of Canada and the courts below. For the reasons we have already given, we find that the issue CPCC raises in this case was not, and could not have been, before the Board or the Federal Court of Appeal. Second, the plaintiff class in *Authorson* attempted to advance a new theory of the case during the continuation of the very same proceedings, after the issue had been addressed and dealt with. The examination of the proposed tariff for 2008-2009 is not the continuation of the proceedings that resulted in the certification of the tariff for 2003-2004.

B. DOES ISSUE ESTOPPEL OR CAUSE OF ACTION ESTOPPEL PREVENT CPCC FROM ARGUING THAT A DIGITAL AUDIO RECORDER IS A MEDIUM?

[38] CSMA and RCC submit that CPCC is estopped from proposing a levy on digital audio recorders either on the basis of issue estoppel or cause of action estoppel. RCC also contends that to permit CPCC to file a tariff in the circumstances of this case amounts to an abuse of process by relitigation.

i. Issue Estoppel

[39] CSMA and RCC submit that issue estoppel is applicable in the present circumstances in order to put finality to the issues between the parties. They rely on *Danyluk v. Ainsworth Technologies Inc.*[27] where the Court stated:

> [18] The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
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> [21] These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[40] The Supreme Court in *Danyluk* established a two-step process.[28] The first is to determine whether the party requesting the application of issue estoppel has established three pre-conditions: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties are the same in both proceedings. The second step involves the consideration as to whether special circumstances warrant the non-application of issue estoppel in the particular case.

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[27] [2001] 2 S.C.R. 460 (hereafter *Danyluk*).
[28] *Ibid*., at paragraphs 25, 33.

[41] The doctrine of *res judicata* is part of the general law of estoppel and has two distinct forms: issue estoppel and cause of action estoppel. Donald J. Lange in his text *The Doctrine of Res Judicata in Canada* [29] summarized these doctrines as follows:

> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.

[42] In *Angle v. Minister of National Revenue* [30] the issue of what is meant by the same question was considered by the Supreme Court. Dickson J. for the majority stated:

> It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. That is plain from the words of De Grey C.J. in the *Duchess of Kingston's* case [(1776), 20 St. Tr. 355, 538n.], quoted by Lord Selborne L.J. in *R. v. Hutchings* [(1881), 6 Q.B.D. 300], at p. 304, and by Lord Radcliffe in *Society of Medical Officers of Health v. Hope* [(1960) A.C. 551]. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: per Lord Shaw in *Hoystead v. Commissioner of Taxation* [(1926) A.C. 155].

[43] In *Danyluk*, Binnie J. for the Court adopted the following passage from *McIntosh v. Parent*[31]:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. *Any right, question, or fact <u>distinctly put in issue and directly determined</u> by a Court of competent jurisdiction* as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, <u>once determined</u>, must, as between them, be taken to be conclusively established so long as the judgment remains. [Underlining in original; italics are ours.]

Mr. Justice Binnie continued:

> This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell, supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or

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[29] 2nd ed. (Markham: LexisNexis Butterworths, 2004), at page 1.
[30] [1975] 2 S.C.R. 248, at page 255.
[31] [1924] 4 D.L R. 420, at page 422, quoted in *Danyluk, supra* note 27, at paragraph 24.

> incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.[32]

[44] We have already found that the statement made by the Federal Court of Appeal that "a digital audio recorder is not a medium" is *obiter*. *Obiter dicta* are not fundamental to the decision arrived at in earlier proceedings and do not create an estoppel. Estoppel extends only to material facts and the conclusions of law and/or mixed fact and law that were necessarily determined in the earlier proceedings. That is not the case here and the first precondition, that is, that the same question has been decided, has not been met.

ii. Cause of Action Estoppel

[45] The leading Canadian authority on cause of action estoppel is *Grandview (Town) v. Doering* [33] which adopted the following passage from *Henderson v. Henderson*[34]:

> I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[46] Those principles were summarized by Hewak C.J.Q.B. in *Bjarnarson v. Manitoba* [35] as follows:

1. There must be a final decision of a court of competent jurisdiction in the prior action;
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [mutuality];
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been

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[32] *Danyluk*, *supra* note 27, at paragraph 24.
[33] [1976] 2 S.C.R. 621, at page 634.
[34] 1843, 3 HARE 100, at page 115.
[35] (1987) 21 C.P.C. (2d) 302 (Man. Q.B.), at page 305.

argued in the prior action if the parties had exercised reasonable diligence.

[47] The cases do not go so far as to suggest that a litigant cannot raise a separate and distinct cause of action in a litigation because he might have done so on the occasion of an earlier litigation on a different issue. There is a difference between a defence which is intimately related to the issues in the earlier litigation on the one hand and a separate litigation against the party to the earlier litigation which stands on its own separate set of facts and could have been brought at any time without reference to the issue raised.

[48] In our opinion, the central issue raised before the Federal Court of Appeal is distinct and separate from the issue raised on the filing of the tariff in this case. The Federal Court of Appeal was faced with the narrow issue of whether a permanently embedded memory in a digital audio recorder is a medium within the meaning of the *Act*. To the extent that the Court dealt with the issue of whether a digital audio recorder is itself a medium, this was *obiter*, not fundamental to the decision arrived at and not "necessarily determined" in the proceedings.

iii. Abuse of Process

[49] The doctrine of abuse of process was discussed by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees, Local 79*.[36] Madam Justice Arbour distinguished the doctrine of abuse of process from estoppel as follows:

> [43] [...] In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe*, *supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter*, *supra*, and *Demeter*, *supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.
>
> […]
>
> [51] [...] Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same

[36] [2003] 3 S.C.R. 77.

> issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[50] Lange comments on the relationship between the doctrines of abuse of process by relitigation, issue estoppel and cause of action estoppel.[37] He points out that the use of abuse of process by relitigation is largely a response to perceived if not actual deficiencies in the complex doctrines of issue estoppel and cause of action estoppel. In circumstances where the strict rules of estoppel have not or cannot be met, the case of abuse of process by relitigation may be established in order to provide relief. The courts have invoked this doctrine as a concurrent ground with estoppel as a judicial safety net to possible error in the application of the complex estoppel doctrines. Abuse of process is rarely invoked in and of itself so as to preclude relitigation. In our opinion, the doctrine has no application in the present circumstances.

[51] To paraphrase counsel for CPCC, the separate identity of memory within a digital audio recorder was an issue in 2003; it is not now. What is the defining element of a digital audio recorder for the purposes of the regime was an issue in 2003; it is not now. This time the issue is whether a digital audio recorder is an audio recording medium for the purposes of the private copying regime. The issue was not framed that way by the Board or the Court.

[52] The answer to the second question is no. Examining for the first time the issue of whether a digital audio recorder is a "recording medium" cannot threaten the integrity of the process before the Board or the finality of its decisions, be unfair or oppressive or offend anyone's sense of fair play and decency.

iv. Relitigating Issues Before the Board

[53] Estoppel and abuse of process are largely inapplicable to Board proceedings. Tariffs settle matters only for the period during which they apply. Issues are regularly re-examined or re-litigated before us. Neither the Canadian Association of Broadcasters' repeated attempts to obtain a modified blanket licence nor those of FWS Joint Sports Claimants to receive a share of retransmission royalties that is greater than viewing were illegitimate or threatened the finality of the Board's decisions.

[54] Indeed, RCC and CSMA have been known not to live by the standards they now ask us to impose on CPCC. In 1998, RCC chose not to file an objection, thereby depriving itself of the opportunity to make the elaborate constitutional and *Charter* arguments that it then advanced in *Private Copying III*. No one proposed that it should live with the strategic choice it made in 1998 and be foreclosed from raising these arguments in 2003. CSMA specifically requested in *Private*

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[37] *Supra* note 29, at pages 373 *et seq*.

Copying III that the Board change its interpretation of the words "ordinarily used", though the matter had been disposed of in *Private Copying I*.

C. Is a digital audio recorder a "recording medium, regardless of its material form, onto which a sound recording may be reproduced"?

[55] Section 79 of the *Act* defines audio recording medium as: "a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium."

The question we asked sets aside the issue of whether digital audio recorders are ordinarily used by individual consumers for the purpose of reproducing sound recordings which requires substantial evidence. Our focus is solely on the rest of the definition.

[56] All parties agree that the Board's third question should be answered by an examination of the relevant definition in the *Act*. They disagree however on the approach to be taken. CPCC focusses on the words of the definition itself to determine whether it could include digital audio recorders. CSMA and RCC begin by looking at the legislative history of the private copying regime to determine what Parliament intended to exclude from the regime at the time of enactment.

[57] CSMA and RCC endorse the analysis of the Federal Court of Appeal on this issue. In their view, the central question was whether the expression as defined is broad enough to include objects that can record and play back sound recordings. They maintain that there is a clear dichotomy, founded on the Parliamentary history of the private copying regime, between recording media, which can be levied, and record/playback devices, which cannot. Their reasoning is as follows. Parliament did not intend to levy tape recorders. Tape recorders are devices. Digital audio recorders are devices. Therefore, Parliament did not intend to levy digital audio recorders.

[58] CPCC starts by looking at the nature of copyright and the objects of the copyright system. In its submission, that system can only function when it promotes the creation of works while at the same time ensuring an optimal distribution and use of those works. In 1997, Parliament created the private copying regime with two objectives in mind: to legalize private copying onto audio recording media and to provide fair and equitable compensation for rights holders for those copies through a levy on blank audio recording media. Neither purpose is fulfilled if the expression "audio recording medium" is interpreted restrictively. The public interest in the

encouragement and dissemination of works of the arts and intellect is not served and creators are deprived of a just reward.[38]

[59] CPCC then looks at the definition of "audio recording medium" itself and submits that in order to be an audio recording medium, an object must meet five conditions. First, the object must be a medium, which CPCC defines as a thing that can "hold" ("*supporter*") something else. Second, the focus of the analysis ought to be on function, not form. Anything that can store something else is a medium. The English version of the definition states this expressly: "a recording medium regardless of its material form". The French version makes the express statement unnecessary through the use of the word "*tout*". Third, the medium must be capable of storing sound recordings. In the English version, this is required by the words "onto which a sound recording may be reproduced". In the French version, it is required by the word "audio". Furthermore, storing sound recordings is the *only* function on which the definition focuses: something that can fulfil that function as well as others still qualifies. Fourth, the reproduction of the sound recording onto the medium must be relatively permanent. Fifth, the medium must be ordinarily used by individual consumers to reproduce sound recordings. As CPCC points out, the manner in which question 3 is worded relieves it from looking at this element of the test.

[60] In our view, whether digital audio recorders are media must be decided according to the modern interpretation of the law that, generally speaking, "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[39] More specifically, the interpretation should accord with the purpose of the *Act* in general and of the private copying regime in particular. Preferably, the interpretation of the word "medium" should accord with the meaning to be given to the same word elsewhere in the *Act*. It must also accord with the intention of Parliament in two respects. First, audio cassettes might be levied but tape recorders will not. Second, the determination of what is a medium should not depend on the characteristics of pre-existing technology. Finally, we should follow the admonition of the Federal Court of Appeal that "where its language and underlying rationale permit, legislation should be interpreted in a way that takes account of technological developments".[40]

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[38] *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336; *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, at paragraph 40.

[39] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21. RCC suggested in argument that the definition of audio recording medium should be interpreted restrictively because the private copying regime is akin to a tax. There is no need to address this issue.

[40] *SOCAN v. CAIP*, [2002] 4 F.C. 3, at paragraph 122.

[61] While the proposed test may be overly stringent, we generally agree with CPCC's approach.[41] Applying this test, there is no doubt that a digital audio recorder is an audio recording medium. It stores relatively permanent reproductions of sound recordings. That is all that the definition requires. We agree that Parliament intended to levy audio cassettes but not tape recorders. That is of no help, however, in deciding whether a digital audio recorder is an audio recording medium. That we must decide by using the words of the definition.

[62] CSMA and RCC contend that, on a proper interpretation of the definition of "audio recording medium", media and devices are mutually exclusive. We disagree. The question to be answered is not "Is a digital audio recorder a device or a medium?", but rather, "Is a digital audio recorder an 'audio recording medium' within the meaning of section 79?" The focus of the definition is on the ability to store reproductions of sound recordings, not on the ability to record and playback sound recordings. What matters is that digital audio recorders store reproductions of sound recordings, not that they can make or play such reproductions. A tape recorder is not a recording medium not because it *can* play music, but because it *cannot* store it.

[63] The private copying regime revolves around a single definition, that of audio recording medium. Devices are not excluded from that definition, they are simply not mentioned. A device can be a medium as long as it stores relatively permanent reproductions of sound recordings. An audio cassette contains spools and rollers, a magnetic tape and a pressure pad, enclosed in a protective plastic case: that makes it a device. The same can be said of the MiniDisc, with its magneto-optical disc housed in a cartridge with a sliding door. The reasoning of CSMA and RCC that a digital audio recorder is not an audio recording medium breaks down.[42]

[64] Some of the CSMA's and RCC's own arguments demonstrate how the medium/device dichotomy is irrelevant, at least with respect to equipment that does not require an external medium in order to record or play sound recordings. For example, at paragraph 28 of its response, RCC states that both tape recorders and digital audio recorders "require storage media". Given the decision of the Federal Court of Appeal, the storage medium cannot be the embedded memory, since the memory has no existence separate from the digital audio recorder itself. Therefore, if a storage medium is required, it has to be the digital audio recorder itself.

[65] Parliamentary history is of little help in determining whether a device that can store as well as play sound recordings is a "medium". Parliament clearly intended that devices that can play

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[41] For example, the requirement that the reproduction be relatively permanent may be unnecessary. It relies on an assumption that fixation is essential for a work or other copyright subject matter to exist. For reasons that need not be explained here, we believe that the universal application of fixation as a requirement in Canadian copyright law is antithetical to some forms of protection that our act affords. See Gervais and Judge, *Intellectual Property: The Law in Canada* (Toronto: Thomson/Carswell, 2005), at page 15.

[42] During oral argument, an attempt was made to distinguish between "simple" devices and others. No such distinction was made by anyone up to that point and we do not intend to elaborate on it.

music only when used with a medium on which a levy is payable would not themselves be leviable. Devices that can copy and play sounds without an external medium being inserted in them (e.g., computers) existed at the time the legislation was passed. Yet the transcripts of parliamentary proceedings that CSMA filed show that attention was focussed solely on media that could store recordings but not play them on the one hand, and devices that could play recordings only if media were inserted into them on the other. Advances in hardware and software needed for home computers to be practically used to store sound recordings had not occurred in 1995, when the private copying regime was debated, or in 1997 when it was passed. References to private copying are to audio cassettes, audio tapes, recordable CDs and diskettes. A number of references to computers being used to store music were made in the context of the debate leading to the adoption of section 30.9 of the *Act*, which allows radio stations to make "transfer of format" copies to their servers, which are not home computers.

[66] RCC argues that devices and media are mutually exclusive and in support of that position points to an Australian Report and to American copyright legislation. One need spend little time on these submissions. A report of the Australian Copyright Council[43] containing a passing comment on the state of Canadian law is not persuasive. The American *Audio Home Recording Act*[44] deserves a little more attention, by reason that the Federal Court of Appeal relied on it to give some credence to the medium/device dichotomy. That legislation was adopted in 1992; it was then inconceivable to even imagine a personal device that would be powerful enough to record and store sound recordings. It expressly entrenches the medium/device dichotomy. For example, it defines a "digital audio recording medium" as something which makes recordings "by use of a digital audio recording device". This distinction is not found in the Canadian definition of "audio recording medium". Indeed, by comparison with the American legislation, the term "audio recording medium" in section 79 is remarkably broad and flexible and appears designed to transcend the technical limitations imposed by tapes and tape recorders.

[67] Comparisons with other provisions of the *Act* that use the word "medium" are enlightening.[45] The term "medium" is used four times elsewhere in the *Act*, while the term "*support*" is used some twenty times. A device that can record, store and play a copyright subject matter is a medium/*support* for the purposes of other provisions of the *Act*. A BlackBerry storing thousands of copyrighted emails is a "single medium" within the meaning of subsection 38.1(3). An iPod can be the *support* onto which a sound recording or a performer's performance is first fixed or onto which a pre-existing sound recording is further reproduced. A computer is a

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[43] Australian Copyright Council, *Remuneration for Private Copying in Australia: A Discussion Paper* (September 2001).
[44] *Audio Home Recording Act of 1992*, 17 U.S.C. §§ 1001 *et seq*.
[45] We take for granted that no one will challenge the fact that a digital audio recorder is a recording object of some kind. The only issue remaining therefore is whether it is a medium.

support onto which broadcasters wishing to avail themselves of section 30.9 can make so-called transfer of format copies.

[68] Logic also dictates that a digital audio recorder be a recording medium for the purpose of the private copying regime. (1) Memory embedded into a digital audio recorder is not a medium. (2) In deciding whether a digital audio recorder can be subject to a levy, all attention must be focussed on the digital audio recorder itself. (3) A reproduction of a sound recording must be stored on something. (4) In Part VIII of the *Act*, that thing is called a medium. (5) A digital audio recorder stores reproductions of sound recordings. (6) The digital audio recorder is a medium. We know that propositions 1, 2, 3 and 5 are true. Therefore, proposition 6 must be true as long as proposition 4 is. Put another way, the issue is: for the purposes of Part VIII of the *Act*, can a sound recording be stored on something other than a medium? In our opinion, answering yes to this question would not help achieve the purposes of the regime or of the *Act*.

[69] CSMA insisted on the need for a clear line to distinguish what is leviable from what is not. It is easy to determine whether an object is capable of storing relatively permanent reproductions of sound recordings. It is much more difficult to decide whether what is in effect a computer more powerful than anything available in 1997 shares with a tape recorder characteristics that CSMA purports are essential and yet were neither defined in the *Act* nor expressly articulated by Parliament.

[70] CSMA expressed misgivings about the possibility that cellular phones and computers might end up being leviable. We see no inherent problem with this scenario. A thing that is ordinarily used by individual consumers to make private copies should not be excluded from the private copying regime for the sole reason that it has other uses. Indeed, all media that are currently subject to the levy can be used for purposes other than private copying.

[71] The meaning of "audio recording medium" should be determined by examining the plain and ordinary meaning of section 79, in a manner consistent with the object and purpose of the *Act* and Parliament's intention. Sound recordings can be reproduced onto a digital audio recorder. The purpose of the *Act* as stated in *Théberge* and other recent decisions of the Supreme Court of Canada is to achieve "a balance between promoting the public interest in the encouragement and dissemination of works of the art and intellect and obtaining a just reward for the creator".[46] Parliament's specific intention in enacting Part VIII was to deal with a market failure by allowing individual consumers to make private copies onto audio recording media without infringing copyright and to compensate rights holders for the private copying of their music, performances and sound recordings. To rule that digital audio recorders are not audio

[46] *Théberge*, *supra* note 38, at paragraph 30.

recording media does not serve the purpose of the *Act* or that of Part VIII. It instantly makes the conduct of millions of Canadians illegal, and even possibly criminal.

[72] CSMA and RCC insisted that the reasoning of the Federal Court of Appeal, even if not binding, ought to be highly persuasive. With the greatest of respect, we disagree.

[73] The reasoning of the Court leading it to conclude that a digital audio recorder is not a medium depends on the following propositions. (1) When it adopted the private copying regime, Parliament was looking at blank audio tapes as the cause of the harm to rights holders, knew of other countries that levied hardware used to record those tapes and decided not to levy that hardware. (2) The definition of audio recording medium stands in contra-distinction with a tape recorder or similar devices as these were known to exist at the time and whose function it is to record and play blank audio tapes. (3) A digital audio recorder is not a medium; CPCC recognized as much.

[74] There was no attempt to either match or contrast the characteristics of digital audio recorders with the terms of the definition of audio recording medium. There was no explanation of why digital audio recorders should not be levied simply because tape recorders are not. There is no statement (let alone an explanation) of why, for the purposes of the regime, a digital audio recorder and a tape recorder are one and the same. Neither the similarities between digital audio recorders and tape recorders, nor the differences between a digital audio recorder and an audio cassette, are so strong as to make the proposition self-evident. The focus of the contra-distinction on which the Court relied was between audio tapes and a tape recorder or similar devices *as these were known to exist at the time*.

[75] The answer to the third question is yes. For all of the above, we are of the opinion that a digital audio recorder is an "audio recording medium" if it is later established that it is ordinarily used by individual consumers to reproduce sound recordings.

V. REMAINING ISSUES

[76] Three other matters warrant short comments.

[77] At times, CSMA and RCC attempted to justify conclusions of law by relying on earlier statements or concessions made by CPCC before the Board or the Federal Court of Appeal. It goes without saying that contrary to what paragraph 160 of *CPCC v. CSMA* appears to imply, a litigant's concession on a legal issue in a proceeding is not binding or conclusive.[47]

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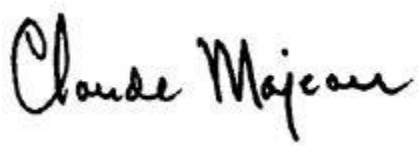
[47] *R. v. Silveira*, [1995] 2 S.C.R. 297, at paragraph 100; *M. v. H.*, [1999] 2 S.C.R. 3, at paragraph 211; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, at

[78] CPCC submitted that the Federal Court of Appeal exceeded its jurisdiction in holding that a digital audio recorder cannot be levied under Part VIII of the *Act*. It is not necessary for us to decide this issue, which is properly left to another forum.

[79] CPCC also suggested the Court's statement according to which a digital audio recorder is not a medium can somehow be explained by the fact that the Court was focussing on digital audio recorders without memory. That statement is as unfounded as it is startling (to use CPCC's own word). Even though the examples the Court used to support its reasoning were of devices that cannot record or play sound recordings on their own, its references to digital audio recorders clearly were to devices with memory embedded in them.

VI. DISPOSITION

[80] The applications by CSMA and RCC are dismissed.



Claude Majeau
Secretary General

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paragraph 44.