

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
Mr. Claude Majeau
Mrs. Jacinthe Th  berge

Tariff of levies to be collected by CPCC in 2010 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 22, 2009, the Canadian Private Copying Collective (CPCC) filed, pursuant to section 83 of the *Copyright Act*,¹ a statement of proposed levies to be collected in 2010 in respect of the reproduction for private use of musical works embodied in sound recordings, of performers' performances of these works or of sound recordings in which such works and performances are embodied ("private copying"). On February 14, the Board published the proposed tariff in the *Canada Gazette*, along with notices detailing the right of any person to object.

¹ R.S.C. 1985, c. C-42 [*Act*].

[2] In its proposed statement, CPCC sought to maintain the current tariff rates of 24¢ for audio cassettes and 29¢ for CD-R, CD-RW, CD-R Audio, CD-RW Audio and MiniDiscs, which were calculated based on the prerecorded CD proxy used by the Board in previous decisions.

[3] The Canadian Association of Broadcasters (CAB) and Z.E.I. Media Plus Inc. (ZEI), a Canadian distributor of recording media, filed timely objections. CAB withdrew its objection on May 25, 2009. ZEI does not challenge the rates proposed by CPCC. It only challenges the type or kind² of medium CPCC seeks to levy. In essence, ZEI restated its position with respect to the 1997 to 2009 tariffs: that so-called professional CD-Rs³ are a sub-kind of data CDs that should be carved out of the tariff because they are not ordinarily used by individual consumers to copy music.

[4] Subsequently, at the Board's request, CPCC updated the calculation of the tariff rates in accordance with the most recent data from the Music Monitor Survey, the information that the Board relied on in its previous calculation of the tariff rates. In revising the calculation of the rates, CPCC proposed an additional adjustment to the proxy model to account for the additional value afforded to copiers from the copy of individual tracks rather than of an entire album. This rationale was applied by the Board in its decision certifying the *Access Copyright Elementary and Secondary School Tariff, 2005-2009*.⁴ The combined adjustments did not alter the proposed rates by CPCC.

[5] The hearing into this matter took place on November 24, and 25, 2009.

II. PRELIMINARY ISSUE: OBJECTION OF ZEI

[6] ZEI's objection in this tariff proceeding is a sequel to an ongoing dispute between CPCC and ZEI, the heart of which is whether or not data CDs may constitute more than a single kind of medium.⁵ On September 22, 2009, the Board declined to vary the private copying tariffs for 1999 to 2007, on the basis of factors inherent in any decision dealing with transactions that predate the application to vary without examining the merit of ZEI's allegations on the existence of a sub-kind of unleviable professional CDs, which had not been accounted for to date.⁶ Consequently,

² The parties tended to use "type". The English version of the *Act* uses "kind". The French version is silent. We use the terms interchangeably.

³ Hereinafter, CD-Rs will be referred to as CDs.

⁴ *Access Copyright Elementary and Secondary School Tariff, 2005-2009* (July 17, 2009) Copyright Board Decision at paras. 173-175.

⁵ For an overview of the litigation opposing CPCC and ZEI, see *Private Copying Tariff, 2008-2009* (December 5, 2008) Copyright Board Decision at paras. 7-9 [PC V]; *Private Copying 1999-2007 Z.E.I. Media Plus Inc.'s Application to Vary* (October 19, 2009) Copyright Board Decision at paras. 1-8 [PC 1999-2007].

⁶ *Ibid.* PC 1999-2007.

in denying ZEI's application to vary, the Board declared that the examination of the 2010 tariff was to proceed on the basis of the parties' filings for the 2008-2009 tariff.⁷

[7] The issue ZEI raises is best addressed in isolation from the analysis of the 2010 tariff proposal. Ruling in favour of ZEI, while reducing the number of data CDs at play, would have no impact on our understanding of the evidence in support of the proposed rates or our choice of methodology to set the tariff. Accordingly, we will first rule on ZEI's submission that professional CDs should not be subject to the private copying levy before proceeding with our analysis of the 2010 tariff proposal.

III. POSITION OF THE PARTIES

[8] ZEI submits that data CDs are not a single, homogeneous kind of medium. More specifically, it contends that professional data CDs are a separate type that should be carved out of the tariff because they are not ordinarily used by individual consumers to copy music.

[9] When it first applied to the Board, ZEI claimed that some brands of CDs are of superior quality for duplication or other professional purposes. It was unable to adduce any substantiating evidence and abandoned this position. ZEI only contends that professional CDs are not used by consumers because of intrinsic and extrinsic characteristics that distinguish them from other CDs: professional CDs are unbranded, packaged in bulk and labelled in a manner that does not comply with the *Consumer Packaging and Labelling Act*.⁸

[10] ZEI argues that any characteristic that serves to distinguish two types of CDs with respect to their ordinary use cannot be ignored if the private copying regime is to be fair and equitable.

[11] ZEI contends it is not convenient for consumers to use unbranded, bulk CDs to copy music, in contrast to professional users such as duplicators who will use a batch of CDs all at once. It also contends that manufacturers that package CDs in a way that does not comply with the *CPLA* arguably do not intend to distribute their products to consumers. This speaks to the apparent purpose of the medium. In addition, ZEI contends that consumers cannot purchase professional CDs by reason that they are not available where consumers ordinarily shop. Thus, professionals must be the ones actually using the recording medium.

[12] ZEI further contends that CPCC bears the onus of proving that consumers use professional CDs in a non-marginal way to copy music and that it has failed to do so. At best, CPCC may be able to prove that professional CDs are available to the public but availability to the public is not

⁷ *Ibid.* at para. 9.

⁸ R.S.C. 1985, c. C-38 [*"CPLA"*]; see also the *Consumer Packaging and Labelling Regulations*, C.R.C., c. 417 [*"Regulations"*].

evidence of non-marginal use by individual consumers. Availability for purchase by the public merely establishes that CDs are purchased by one or more of three market segments (professional, private for music and private for non-music), but not by one specifically.

[13] CPCC argues that a medium can only be divided into different types if there are technological or physical (intrinsic) distinctions that cause a type of CD to not be used to copy music, such as format or recording capability. Conversely, one cannot rely on extrinsic characteristics to establish that a distinct type of CD exists. CPCC argues that extrinsic characteristics, such as packaging, labelling and branding, considered on their own, only show that a medium is used for multiple purposes, some of which include copying music.

[14] Alternatively, CPCC contends that if the distinctions ZEI proposes can be used to segregate professional CDs from others, ZEI has failed to discharge the burden of proving that these distinctions are not minor ones that can easily be manipulated to avoid the levy.⁹ Moreover, CPCC contends that the record establishes that consumers are indeed purchasing professional CDs.

IV. EVIDENCE

[15] The parties agreed that the matter could be heard exclusively on the basis of documentary evidence, most of which had already been filed in the context of the 2008-2009 tariff proceedings and subsequent interlocutory applications. The record was supplemented by evidence from a parallel proceeding involving a tariff enforcement dispute between CPCC and ZEI before the Federal Court.

A. TERMINOLOGY

[16] For the ease of the reader, before turning to the evidence, it is necessary to clarify a few issues of semantics.

i. Professional CDs and ZEI Brands

[17] Because the evidence was partly gathered in the context of an enforcement dispute between CPCC and ZEI that largely focused on certain brands of CDs, namely Princo, Taiyo Yuden, Mitsui (MAM-A) and MPO Hi-Space, the evidence filed in support of establishing the existence of professional CDs referred to these brands. Other manufacturers may also make professional CDs. As a result, we sometimes refer to these “ZEI brands” as a proxy for professional CDs.

⁹ *Private Copying Tariff, 1999-2000* (December 17, 1999) Copyright Board Decision at 31-32 [PC I].

ii. Unbranded and Branded CDs

[18] The evidence tends to refer interchangeably to “unbranded” and “professional” CDs and conversely, to “branded”, “retail” or “other” CDs. Referring interchangeably to unbranded and professional CDs confuses “characteristic” and “type”.

[19] “Unbranded” CDs share a characteristic: they have no markings on their surface, allowing for, among other things, future branding by others. “Unbranded” CDs tend to be used by private labels or by commercial or institutional entities for duplication purposes. On the other hand, “branded” CDs generally bear the brand markings of the manufacturer, such as Memorex or Sony. These CDs are prevalent in retail outlets. Although the record shows that unbranded Memorex CDs or branded Princo CDs do exist, more often than not, Memorex CDs will be “branded”, whereas Princo CDs will be “unbranded”.

B. REVIEW OF THE EVIDENCE

[20] The amount and variety of evidence filed by the parties in support of their claims are noteworthy. It follows that there is no need to review all of the evidence; an overview of the most relevant exhibits suffices to convey the evidentiary basis on which we rely to reach a decision.

i. Affidavit, Examinations and Cross-Examination of Danielle Gravel

[21] Danielle Gravel is an employee of ZEI who has been involved in the purchase and sale of blank CDs since 1999. From a distributor’s perspective, Ms. Gravel provided insight into the structure of the market, brand specific information and consumer preferences. She also conveyed what ZEI considers a professional CD and why it does so.

[22] Ms. Gravel submitted that professional CDs are promoted for business applications and distributed for sale to businesses. Furthermore, she set out distinctions between the packaging and labelling of professional and “retail” CDs.

[23] Ms. Gravel’s affidavit was supported by the following exhibits: excerpts of Anna Bucci and Laurie Gelbloom witness statement for the 2005-2007 private copying proceedings; the transcripts of their testimony in the same proceedings, wherein they acknowledge that certain ZEI brands of CDs are almost exclusively used for duplication purposes; correspondence with Princo America disclosing that the marketing strategy of the company is to focus on the duplication market exclusively; and, photos of CDs that ZEI considers to be professional CDs.

ii. Affidavits and Transcripts of Cross-Examinations of Laurie Gelbloom

[24] Laurie Gelbloom is general counsel to CPCC. Ms. Gelbloom filed two affidavits, seeking to demonstrate that CDs should not be segregated because professional CDs are offered for sale to consumers just like any other CD. Ms. Gelbloom's implicit assumption is that if certain CDs are available to consumers, consumers purchase them and therefore, they are leviabale. The affidavits were supported by a vast amount of documents compiled in the course of ongoing collection and enforcement activities, including tables documenting relevant information in respect of market sightings and voluntary reporting of ZEI brands, summaries of CD brands, investigators' reports detailing market sightings and purchases of ZEI brands and unbranded CDs, an analysis of the nature of ZEI's sales with supporting documents, CD purchases by Ms. Gelbloom, Santa Clara Inc. Blank Media Industry Reports, and copious evidence of advertisement clippings, Internet offers, vendor profiles and photographs of CDs.

[25] Overall, the cross-examinations of Ms. Gelbloom on her affidavit of October 21, 2008 convey CPCC's approach in targeting media in its tariff, the tools and assumptions on which it relies.

[26] Ms. Gelbloom stated that market sighting is the determining factor in choosing which media to target in the private copying tariffs. Packaging, labelling or distribution channels are not factors for which CPCC has accounted in its decisions. Insofar as its zero-rated program is concerned,¹⁰ CPCC has never looked at whether there is brand skewing, or whether the zero-rated CDs have common characteristics.

[27] Ms. Gelbloom elaborated on earlier statements made in the context of the 2005-2007 private copying proceedings and explained that CPCC acknowledges that certain brands are used for duplication purposes, which are not subject to the levy when they are imported and material is printed on them before selling them in Canada. A levy is payable only when such media is sold blank in Canada. It has always been CPCC's position that duplicators would use certain brands but that these brands are also being offered for sale by resellers in retail outlets and individual consumers purchase the media, such that it is a medium that is being used to copy music. Furthermore, new information led CPCC to conclude that its previous statements in respect to the use of duplication brands were exaggerated.

¹⁰ *Private Copying Tariff, 2001-2002* (December 15, 2000) Copyright Board Decision at 16 [PC II]; *Private Copying Tariff, 2003-2004* (December 12, 2003) Copyright Board Decision at 18 [PC III]; *Private Copying Tariff, 2005-2007* (May 11, 2007) Copyright Board Decision at paras. 34-40 [PC IV].

iii. CD Quality Overview Reports

[28] Media Sciences prepared two reports,¹¹ focusing on the quality distinctions between ZEI brands and other CDs. Media Sciences found that there were no distinctions but since ZEI no longer contends that professional CDs are of superior quality, there is no need to elaborate further.

iv. Santa Clara Consulting Group Reports

[29] Santa Clara Consulting Group produces annual surveys of the data media industry to provide insight into the ways manufacturers are selling optical media into the market and their relative success. CPCC partly relies on these reports to guide its decision in respect of the private copying tariff. Up until now, CPCC had only filed excerpts of the reports as evidence before the Board. ZEI asked CPCC to file all of the reports going back to 1998. For our purposes, it suffices to highlight the most recent ones.

[30] The *Flexible Media Industry for Data Recording (2008)* report evaluates the market shares of CDs manufacturers overall and in each distribution channel. The report defines and divides the distribution channels into five categories: data processing supply distributors, office products, computer/software dealers, mass merchandisers and government-institutional/direct. The report also divides the CD market into two primary categories: branded and unbranded, which it defines respectively as “the main line brands” and “that produced by a manufacturer that does not bear a manufacturer’s name on the product or the packaging”.¹² Unbranded CDs are typically sold by “lower tier vendors”,¹³ by private label vendors or as generic product. Unbranded media also includes products that are sold for use in commercial software duplication and data distribution.

[31] The *CD Tracker, 2007 Year End Review* report examines the global market of CD writers and media products by region. It is broken into three sections: industry, market and competition. This study finds that in the Americas, branded disc sales vastly exceed unbranded sales, which typically involve duplication and private-label businesses. Similarly to the *Flexible Media Report, 2008*, the *CD Tracker* divides the distribution channels into distributors, direct, retail, software duplicators and private label/other.

¹¹ ZEI submission of September 25, 2008 at Tab 1: *CD Quality Overview*, Media Sciences Inc., September 18, 2008 and at Tab 2: *CD-R Quality Comparative Analysis*, Media Sciences Inc., September 17, 2008.

¹² Santa Clara Consulting Group, *The Flexible Media Industry for Data Recording, Canadian Market, 2008* (June 2008) at 13 [*Flexible Media Report, 2008*], ZEI Application Record Tab G-11.

¹³ This term probably encompasses wholesalers and other types of distributors but not retailers.

v. Lists of Importers Reporting Sales of CDs Manufactured by Mitsui, Taiyo Yuden, Princo and MPO (ZEI Brands)

[32] CPCC provided the lists to ZEI to fulfill an undertaking given during the course of Ms. Gelbloom's cross-examination. The first table sets out the companies that have reported and paid levies on ZEI brand CDs, the year and the circumstances in which they did so. The second sets out these distributors' status of enrolment in CPCC's zero-rated program and where applicable, the reasons for their non-enrolment or for the termination of the agreement. These documents reveal that several distributors of ZEI brands are not zero-rated.

vi. Investigative Reports

[33] CPCC asked a number of investigators to assess the market presence of CDs. Some were instructed to target ZEI brands in particular. Others were instructed to target unbranded CDs. Their reports reveal that at times the alleged purposes for which the investigators purchased CDs were not of consumer nature. For example, in one case the investigator pretended to want to make a large purchase (he did not pretend to be a consumer) and in another, investigator pretended to want 1000 units for a school project (not a consumer and not music). This said, the reports provide direct and indirect evidence that ZEI brands and unbranded CDs are available where consumers shop and that purchases of such CDs have been made in stores and online.

V. ISSUES

[34] By an order dated September 22, 2009, the parties were advised that the Board expected them to address the following issues at the hearing.

- a) Which characteristics can be used to distinguish between various types of recording media?
- b) Is there sufficient evidence on the record of these proceedings to conclude that there exists a type of blank CD that presents one or more relevant characteristics which have not been accounted for to date and that is not ordinarily used by individual consumers to copy music?
- c) If the answer to b) is yes, should the tariff account for this type of CDs? And if so,
 - i) how should the tariff be worded to account for such CDs?
 - ii) how can the current reporting requirements be modified to minimize grey or black market transactions and to otherwise ensure the integrity of the regime?

VI. ANALYSIS

[35] The definitions of "audio recording medium" and "blank audio recording medium" in section 79 are central to the debate before us.

79. In this Part,

“audio recording medium” means 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;

“blank audio recording medium” means

- (a) an audio recording medium onto which no sounds have ever been fixed, and
- (b) any other prescribed audio recording medium;

[36] For the reasons that follow, we conclude that professional CDs cannot be isolated as a separate type of medium. The record does not allow us either to identify one or more characteristics that are sufficiently stable to allow that distinction to be made, or to conclude that consumer use of professional CDs to copy music is so low that these CDs do not meet the definition of “blank audio recording medium”. To succeed, both conditions would have to be satisfied.

A. WHICH CHARACTERISTICS CAN BE USED TO DISTINGUISH BETWEEN VARIOUS TYPES OF RECORDING MEDIA?

[37] There is a distinction to be made between the characteristics used to determine whether two media are of different types or kinds and the “factors that will determine whether a given kind of medium is ordinarily used by individual consumers for copying sound recordings.”¹⁴ Generally, for reasons that follow, it is preferable that the first be determined by using hard, intrinsic characteristics or attributes, while both hard (invention, design) and soft, extrinsic characteristics (promotion, actual use) can be used to determine the ordinary use of a type of media.¹⁵

[38] Parliament intended the private copying regime to be sensitive to market realities and to have the flexibility to adapt to a changing environment.¹⁶ The regime is designed to allow the Board maximum flexibility to include and exclude the required elements in order to be as fair as possible to all concerned and to reinforce the nexus that is required to maintain the constitutionality of the regime. Therefore, if there is a strong, clear correlation between a characteristic, intrinsic or not, and the use (or lack thereof) of a recording medium by individual consumers to copy music, then this correlation must be taken into account in deciding whether there is a separate, non-leviable type of medium, subject to what follows.

¹⁴ *PC III*, *supra* note 10 at 35.

¹⁵ *Ibid.* at 35, 45.

¹⁶ *Ibid.* at 35.

[39] Too rigid an interpretation of the definition of “audio recording medium” can equally contradict the intention of Parliament. Too restrictive an interpretation could strip the regime of any meaning if it resulted in failure to adequately compensate eligible rights holders.¹⁷ For that reason, a recording medium is not an “audio recording medium” only if it is plainly meant for a purpose other than private copying.¹⁸ In the same vein, “a broad interpretation of the definition helps to level the playing field for importers and manufacturers by ensuring that only those media that clearly are not used to make private copies are not subject to the levy.”¹⁹

[40] In order to maintain this equilibrium, it is possible but not recommended to rely on differences in extrinsic characteristics alone to differentiate between types of media.²⁰ Characteristics distinguishing different types of media should not be capable of easy manipulation for the purpose of avoiding the tariff.²¹ Generally speaking, extrinsic characteristics are easier to manipulate than intrinsic ones. Nonetheless, in *PC III*, the Board noted several non-intrinsic characteristics on which it could or had previously relied to segregate a medium, such as actual use, promotion and marketing, price and rate of adoption in the market. It rejected the use of packaging as a “typing” characteristic on the basis that its use was “not easy”, not because it was irrelevant.²² The Board has also been very liberal in labelling as “intrinsic physical attributes” characteristics such as size, convenience²³ and compatibility.²⁴ Convenience, for example, is a mostly extrinsic characteristic since it depends largely on user perception. Yet, lack of convenience is the reason why the Board excluded cassettes of less than 40 minutes from the tariff.²⁵

[41] It is not possible to simply ignore so-called extrinsic characteristics in distinguishing between “types” of media, by reason that, as we just demonstrated, the line between intrinsic and extrinsic characteristics is not clear. Intrinsic qualities, such as the technological differences between a CD and a DVD, are “invisible” to the individual consumer, who is the object of the regime. Presented with unbranded CDs and DVDs, the consumer is unable to tell which is which. Branding is equally equivocal. Branding is a physical characteristic that does not affect the quality of a CD as an audio recording medium. Once branded, it is difficult to “de-brand” a CD.

¹⁷ *PC I*, *supra* note 9 at 29-30.

¹⁸ *Ibid.*, at 32.

¹⁹ *Ibid.* at 30.

²⁰ For example where distinctions impact ordinary use, see *Ibid.* at 31, where the recording capacity of cassettes was found to affect consumer use while other characteristics, such as “removed protect tabs” were found to be insignificant on the basis that too much specificity opened the door to levy avoidance.

²¹ *Ibid.* at 31-32.

²² See *PC III*, *supra* note 10 at 44, where the Board refused to segregate, on the basis of packaging characteristics, removable memory “bundled” with any particular product from the same removable memory sold separately.

²³ *PC I*, *supra* note 9 at 31.

²⁴ *PC III*, *supra* note 10 at 45.

²⁵ *PC I*, *supra* note 9 at 31.

Yet, unbranded CDs will commonly come to bear a private label brand as they progress through the consumption chain. Is branding an extrinsic or intrinsic quality? In the end, the label ascribed to a characteristic is not determinative. What matters is whether or not the characteristic is sufficiently stable and obvious to be verifiable. The more stable and obvious the characteristic of a medium is, the easier it will be to establish a clear correlation between that characteristic and the behaviour of individual consumers.

B. THE RECORD FAILS TO ESTABLISH THAT THERE IS A KIND OF BLANK CD THAT IS NOT ORDINARILY USED BY INDIVIDUAL CONSUMERS TO COPY MUSIC

[42] As stated earlier, we can find that professional CDs are a separate, non-leviable kind of recording medium only if the record allows us to conclude both that professional CDs share one or more characteristics that allow a distinction to be made between those and other CDs *and* that consumer use of professional CDs to copy music is so low that these CDs do not meet the definition of “blank audio recording medium”. On both questions, the record does not support that conclusion.

i. The Record Does Not Disclose One or More Characteristics That Are Sufficiently Stable to Allow a Distinction to Be Made Between Professional and Other CDs

[43] In the present case, there is no clear correlation between the distinguishing characteristics ZEI proposes, that is branding, packaging and labelling, and consumer use to copy music or lack thereof, to establish the existence of professional CDs. The characteristics ZEI proposes are too “soft”, too ambiguous to identify a sub-type of CD that consumers do not use to copy music.

[44] The notion of “branding” itself is not as simple as it may appear at first blush. First, the parties do not agree on what is branded and what is not.²⁶ By unbranded, do we mean any CD with a blank surface that is printable or must the packaging also be devoid of any branding? According to the *Flexible Media Report*, it could mean either or.²⁷ At the hearing, ZEI stated that “you will find an unbranded CD referred to as silver or white printable or thermal printable or inkjet printable.”²⁸ Thus, if we relied on ZEI’s description to identify “unbranded” CDs, in perusing the evidence, we would find that most manufacturers, across the spectrum, offer unbranded CDs. CPCC filed a significant amount of advertisement clippings featuring the brands Phillips, Ridata, OEM, PRODISC, Playo, Dysan, Verbatim, Sony and Imation which describe the advertised CDs as printable, unbranded or blank face. Furthermore, CPCC’s brand

²⁶ For ZEI’s position, see ZEI Statement of Case Amended at paras. 109-112; Affidavit of Danielle Gravel, at para. 32, ZEI Application Record Tab C and transcripts at For CPCC’s position, see transcripts at 105-06.

²⁷ *Flexible Media Report*, 2008, *supra* note 12 at 13.

²⁸ Transcripts at 238.

summaries reveal that Fuji, Maxell, Memorex and Sony also offer CDs with printable surfaces.²⁹ Conversely, there is a sufficient amount of advertising featuring Mitsui, Princo, Taiyo Yuden and Hi-Space CDs with a logo or design. Based on this evidence, we cannot find that on its own, branding establishes the existence of a distinct kind of CD.

[45] Second, in addition to the definitional difficulties, discriminating on the basis of branding may give rise to enforcement issues. While it is impossible to “de-brand” a branded CD, it is quite possible and not uncommon to print information on the surface of an unbranded CD either before or after the manufacturer or importer first disposes of it. In fact, according to the Santa Clara reports, unbranded CDs are available from major manufacturers and smaller concerns and are commonly sold as house brand, private label and bulk products.³⁰

[46] Given the way the private copying regime works, dealing with the issue of private labels and house brands would be far from obvious. Subsection 81(1) of the *Act* provides that the levy is paid by the importer or the manufacturer of leviable media. Presumably, if CDs were branded only after the importer has disposed of them, no levy would be paid. Section 80 of the *Act* authorizes the private copying on any audio recording medium irrespective of whether or not a levy was paid; marking the CD would transform it from a professional CD into an audio recording medium. As such, no law would be broken if the subsequently branded CD was used for the private copying of music. Branded or unbranded, CDs can be used to copy music.

[47] Third, nothing in the record suggests that branding in and of itself increases the probability that a CD will be purchased by a consumer, or that the consumer will use the CD to copy music. To begin with, the Santa Clara reports do not state that unbranded CDs exclusively target the commercial or professional market or are not distributed to retailers; rather, they report that unbranded CDs are typically sold by lower tier vendors, by private label vendors or as generic product and distributed to the duplication and office supply sectors.³¹ Similarly, the fact that the *CD Tracker* report noted that manufacturers of ZEI brands were more active in the duplication segment of the market cannot be interpreted as meaning that they are inactive in other sectors.³² On the contrary, other evidence, such as the ZEI sales report, market sightings summary, investigator reports, promotional and marketing activities³³ and customer reviews³⁴ refute such an assumption.

²⁹ Brand Summaries, Exhibit LG-4 to the Affidavit of Laurie Gelbloom; see also Investigator Reports, Exhibit LG-7 to the Affidavit of Laurie Gelbloom; Exhibit LG-8 to the second Affidavit of Laurie Gelbloom.

³⁰ *Flexible Media Report, 2008, supra* note 12 at 62; see also transcripts at 101-06, 343-44.

³¹ *Ibid.* at 13.

³² *CD Tracker 2000 Report, ZEI Compendium, Tab 8* at 180, 198, 214 and 243.

³³ See for example, Exhibit LG-2 to the Affidavit of Laurie Gelbloom, at Tab Taiyo Yuden, where the brand is being promoted for both professional and consumer audio recording applications, for “outperform[ing] the competition in recording accuracy and superior durability of data and audio applications.”; Tab Princo: “[...] Princo’s CD discs the

[48] For these three reasons, branding fails to meet the threshold to serve as a distinguishing characteristic. It is not sufficiently stable and obvious to be verifiable and thus, we are unable to find a clear correlation between branding and consumer use.

[49] Packaging is a clear example of an extrinsic characteristic. One can separate the package from the medium. Accordingly, packaging is an inherently unstable characteristic that could easily be manipulated for tariff avoidance purposes. CDs packaged in a way that rendered them not subject to a levy could easily be repackaged before being distributed in the retail market. If repackaged CDs were ultimately used for the private copying of music, rights holders would be deprived of compensation and would not have any legal recourse for the reasons previously explained. “Typing” CDs on the basis of packaging would unduly complicate the administration of the tariff. CPCC would inevitably need to intensify and expand its enforcement activities to ensure that packaging was not being manipulated for tariff avoidance purposes. In this case, packaging does not meet the threshold to serve as a distinguishing characteristic. It is not sufficiently stable and obvious to be verifiable.

[50] Furthermore, it was unclear to us as to which form of packaging was considered “professional”. ZEI spoke of “bulk” packaging without setting out what that meant precisely. Meanwhile, there is no obvious distinction in packaging on the record in the present case. All CDs, branded or unbranded, irrespective of the manufacturer, are packaged in a variety of ways and sizes. Packaging options include hard plastic or shrink wrap spindles, cake boxes, jewel-cases, slim cases, flip boxes, cardboard boxes with sleeves. The number of CDs per package ranges from one to 100 or more. It is reasonable to assume that shrink wrap falls into the “bulk” packaging category and that jewel cases do not. But what about spindles of 100 or more? Is a shrink wrap package of 50 CDs a bulk product? Based on the market sightings of ZEI brands, it would seem that only a small proportion of these CDs are sold with the combined so-called “bulk” characteristics (i.e. in shrink wrap package of 100 units or more).

[51] Based on the available information for 2008, 50 per cent of Mitsui CDs were sold in 100 unit shrink wrap packages; 25 per cent of Princo CDs were sold either in packages of 100 or in shrink wrap but none had both “bulk” attributes, and only 50 per cent of Taiyo Yuden were sold in packages of 100 units and none were in shrink wrap. The information available for the period

ideal choice for applications such as video recording, MP3 storage, audio CDs, digital photos and desktop publishing [...]”; Tab Hi -Space: “great for storing music, games and video’s”; Exhibit LG-3 to the Affidavit of Laurie Gelbloom, Tab spindle: “[...] Princo’s CD discs the ideal choice for applications such as video recording, MP3 storage, audio CDs, digital photos and desktop publishing [...]”; Tab Jewel Case: “Princo discs are the ideal media for application such as library storage, duplication and retrieval, desktop publishing with large image storage, software sample developing and new programs testing as well as personal medical records.”; “Hi -Space [...] Great for storing music, games and video’s”; Exhibit LG-4 to the Affidavit of Laurie Gelbloom for “other CDs” overview and promotional content.

³⁴ Web pages, Exhibit LG-3 to the Second Affidavit of Laurie Gelbloom.

2006-2008 was to the same effect. The percentage of Mitsui CDs sold in 100 unit shrink wrap packages dropped to 40 per cent. There were no Princo CDs with both “bulk” packaging characteristics offered for sale. The percentages of Princo CDs sold in packages of 100 dropped to 14.29 per cent and in shrink wrap to 7.14 per cent. The percentages of Taiyo Yuden CDs with both “bulk” characteristics increased, but only to 25 per cent.³⁵

[52] Furthermore, to distinguish professional from other CDs based on the failure to comply with the *CPLA* labelling requirements is even more problematic. To start with, the parties were unable to agree on what the *CPLA* requirements are.³⁶

[53] ZEI argues that there are four readily identifiable labelling requirements imposed by the *CPLA* regarding the sale of prepackaged CDs to consumers for individual use: 1) the principal display panel of the label must be located on that part of the container normally displayed to the user; 2) the principal display panel of the label must identify the common name of the product in terms of its generic name or function; 3) the principal display panel of the label must contain a declaration of net quantity of the CDs sold; and, 4) the label (not necessarily the principal display panel) must contain the name and address of the place of business of the producer, or of the person from whom the product was produced for resale.

[54] CPCC contends that insofar as CDs sold in clear wrapping or plastic cases, the requirements of the *CPLA* would be satisfied by the label being located on the box or in an invoice or waybill located inside the box pursuant to section 5 of the *Regulations*,³⁷ which provides that a label does not have to identify the goods if the contents are visible and identifiable. CPCC also contends that unbranded CDs advertised for sale over the Internet comply with the *CPLA* pursuant to subsection 7(2) of the *Regulations*, which provides that a label does not have to be applied to the container if it is affixed to a “display card” on which the container is mounted by reason that

³⁵ Although we had data going back to 2002, we chose not to use data from 2005 and earlier because they concern a period during which CDs were not fully commoditized. Using that data would have provided a skewed picture of the current market.

³⁶ See ZEI Outline of Arguments at paras. 26-45; CPCC Memorandum of Fact and Law at paras. 94-97; see also transcripts at 106, 114, 119, 163, 239-243.

³⁷ *Regulations*, *supra* note 8, s. 5. The provision reads as follows:

5.(1) A prepackaged product that

(a) does not consist of food,

(b) is usually sold to a consumer by numerical count,

(c) is packaged in such a manner that the product contents are visible and identifiable, and

(d) has a label applied to it in accordance with sections 7 to 11 that shows the information referred to in subparagraph 10(b)(i) of the Act in the form and manner prescribed by these Regulations,

is exempt from subparagraph 10(b)(ii) of the Act. [...]

both the product description and numerical count are indicated on the web order form, as well as the manufacturer's name.³⁸

[55] ZEI takes issue with CPCC's interpretation of the definition of label, the definition of container and the exclusion at subsection 7(2) of the *Regulations* with respect to mounting a container on a display card. It argues that the shipping boxes of CDs are not "containers" within the meaning of subsection 2(1) of the *CPLA*. ZEI contends that CDs are not prepackaged by the box and there is no evidence that individual consumers purchase CDs by the box. ZEI also contends that unbranded CDs without a label would fail to meet the requirement that the principal display panel of the label must identify the common name of the product in terms of its generic name or function. Purchasers of unbranded blank discs would not be able to identify, by visual means, whether they were purchasing blank CDs or DVDs. Moreover, an invoice and label are clearly two separate things. The purpose of a label is to identify a product which suggests some form of physical attachment to the product. The purpose of an invoice is to confirm a sale transaction and is not physically attached to the prepackaged product, but rather handed to the purchaser or enclosed with the shipping container. If it was sufficient that the information be contained in an invoice handed to the purchaser, the *CPLA* would have provided as much. Finally, a display card is a tangible object. Thus, for the display card exclusion to apply, the container must be physically mounted to the display card. The terms of the exclusion do not open the door to the idea that the exclusion could apply to the virtual mounting of a container to a web page.

[56] The interpretation and application of the *CPLA*, while probably not as generous as CPCC contends, is not as obvious or clear-cut as ZEI would have us believe. The parties' divergent positions demonstrate that the *CPLA* leaves ample room for interpretation as to what is and what is not intended for consumers. It also bears noting that ZEI chose to ignore some of the *CPLA* requirements, including those dealing with language, which in our view are highly relevant in a Canadian context. ZEI argued that "the bilingual requirement has all sorts of -- if you look over the *Regulations* and the Act, there are exceptions to the bilingual requirement."³⁹ ZEI did not contend that the exceptions applied to recording media. It simply chose to limit its argument to the four other requirements.

[57] Granted, it is fair to accept as a presumption that CDs sold in packages that do not comply with the *CPLA* or the *Regulations* are not intended for consumer use. This characteristic certainly speaks to the apparent purpose, which the Board has stated was relevant.⁴⁰ However, there is enough evidence of retailer non-compliance with the *CPLA* in the retail marketplace and on the

³⁸ CPCC Memorandum of Fact and Law at paras. 94-97; Exhibits LG-3, LG-4, LG-6 and LG-7 to the Affidavit of Laurie Gelbloom.

³⁹ Transcripts at 242.

⁴⁰ *PC III*, *supra* note 10, at 35.

Web to refute the presumption.⁴¹ Blank CD retailers as a group appear to be far more likely to ignore *CPLA* requirements than, say, supermarkets in respect of food labelling. Finally, whether the package in which a CD is sold complies or not with the *CPLA* is inconsequential insofar as determining whether the CD has the capability and convenience as a medium on which consumers can copy music. Thus, we cannot find that there is a correlation between non-compliant *CPLA* labelling and consumer use. The characteristic is not sufficiently obvious and stable to be verifiable. *CPLA* compliance could be manipulated for levy avoidance purposes in the same way as packaging. Consequently, non-compliant *CPLA* labelling does not constitute an appropriate distinguishing characteristic.

[58] Thus, branding, packaging and labelling characteristics, considered on their own or cumulatively, only tend to show that a medium is used for multiple purposes, one of which is copying music. Evidence about marketing and promotional activities supports a finding that there is no distinction between professional and other data CDs insofar as their intended purpose.⁴²

ii. The Record Does Not Disclose That Consumer Use of Professional CDs to Copy Music Is so Low That These CDs Do Not Meet the Definition of “Audio Recording Medium”

[59] Even if it were possible to distinguish between professional and other CDs on the basis of the proposed characteristics, we find that actual consumer use of professional CDs to copy music is not so marginal that they fail to meet the statutory definition of “audio recording medium”. Rather than establishing the existence of a distinct kind of medium, the diverging extrinsic characteristics show that CDs are used for multiple purposes by all users, including by individual consumers to copy music.

[60] In analysing whether certain characteristics affect the “ordinary use” of a medium, it is necessary to focus on consumer use, to the exclusion of others.⁴³ Sometimes, this involves looking at the relative importance of consumer use of a particular medium. A medium essentially reserved for corporate or professional uses will not qualify even if a few eccentric individuals use the technology to make private copies of music.⁴⁴ Conversely, the fact that only one or five per cent of a given type of medium is sold to individual consumers does not mean that it does not qualify.⁴⁵ So long as a non-marginal number of consumers use a medium for private copying in a fashion that is not marginal, it will be leviable. Consequently, “ordinary use, as that expression is

⁴¹ CPCC Compendium, Tabs 3, 5A; transcripts at 106, 114, 119.

⁴² *Supra* note 33.

⁴³ *PC I*, *supra* note 9, at 30.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

found in the definition of ‘audio recording medium’, ought to be interpreted as including all non-negligible uses.”⁴⁶

[61] More concretely, in *PC I*, the Board stated that MiniDiscs were leviable even if the media accounted for only one per cent of total sales.⁴⁷ In *PC IV*, the Board reached the same conclusion even though by then there were fewer sound recordings being copied on MiniDiscs than onto cassettes.⁴⁸ Similarly, in *PC I*, a levy was imposed on CDs even though only five per cent of them were used by individual consumers to copy music.⁴⁹ If one looks at the combined sales volumes of CD-Rs and CD-RWs for 1998 to 2000,⁵⁰ which amounted to 21 million, 46 million and 88 million respectively, this means that the Board believed that the sale of 1.05 million, 2.3 million and 4.3 million units satisfied the threshold of “ordinary use”.

[62] In comparison, the sales volumes of professional CDs to outlets open to individual consumers surpass this “ordinary use” threshold simply by taking into consideration ZEI’s sales. The weighted sales of the four ZEI brands (used here as proxy for professional CDs) to resellers exclusively amount to 5,475,645 out of a total of 30,213,966, or 18.1 per cent of ZEI’s total sales. If one includes companies that are both resellers and duplicators, the sales increase to 9,468,824 or 31.3 per cent of ZEI’s total sales. The numbers speak for themselves; consumer access to professional CDs is not trivial. It is even more so, if we add the levied sales of zero-rated importers and vendors.⁵¹

[63] Market availability is not, in and of itself, proof of actual use by consumers to copy music, let alone an ordinary use. However, there is direct and indirect evidence demonstrating that professional CDs are available where consumers shop and that non-marginal purchases have been made by consumers in stores and online.⁵² Investigators not posing as professional users made a sufficient number of purchases of professional CDs in retail stores that are clearly accessible to the general public to support that conclusion.⁵³ We are cognizant that we must weigh this type of evidence carefully, as investigators with a mandate do not truly conduct themselves as ordinary individuals, even if they purport to do so. Still, this evidence establishes that unbranded CDs are being offered to the general public and presumably, more than a few eccentric individuals are purchasing these CDs, otherwise retailers would cease selling them.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 32.

⁴⁸ *PC IV*, *supra* note 10 at paras. 71, 74.

⁴⁹ *PC I*, *supra* note 9 at 30; see also *PC III*, *supra* note 10 at 36.

⁵⁰ *PC I*, *supra* note 9 at 36, Table 2.

⁵¹ To this total, we could add another 220,200 CDs, which is a conservative estimate of the weighted levied ZEI brands sales of zero-rated companies. See *2008 Brands and Units Final*, filed by CPCC on November 3, 2009.

⁵² CPCC Compendium, Tabs 3, 5A.

⁵³ See for example, CPCC Compendium, *Exhibit LG-7: Relevant excerpts from LG-7 to the Affidavit of Laurie Gelbloom, dated October 21, 2008* at Tabs 3-B, C, D, E, H, I, M.

Furthermore, based on the customer reviews of Internet purchases, we know that individual consumers are indeed purchasing unbranded CDs.⁵⁴ The same reasoning applies to the purchases made by Ms. Gelbloom.

[64] Marketing and promotional activities also support the position that consumers purchase professional CDs and use them no differently than other data CDs. Unbranded CDs are being promoted to copy music, albeit not to the same extent as branded CDs. For example, the promotional material quoted in footnote 33, *supra*, shows that Taiyo Yuden CDs are promoted for both professional and consumer audio recording applications, for “outperform[ing] the competition in recording accuracy and superior durability of data and audio applications”; Pringo CDs are promoted as “[...] the ideal choice for applications such as video recording, MP3 storage, audio CDs, digital photos and desktop publishing [...]”; and, Hi-Space CDs are being promoted as “great for storing music, games and video’s”.⁵⁵

[65] Therefore, even though duplicators, businesses or techies may be much more likely to purchase unbranded bulk CDs, we find, based on the evidence, that the proportion of professional CDs reaching consumers is not negligible, and that consumers who do purchase professional CDs are just as likely to use them to copy music as other CDs. Essentially, the situation is similar to that of CDs in *PC I*, where the Board found that “recordable and rewritable CDs were ordinarily used by individual consumers, even though, as a proportion of total blank CDs sold, individual consumers accounted for a relatively small share. The evidence clearly established that individual consumers who did use blank CDs, often used them for copying music, and that, in total, a very substantial number of CDs were used for that purpose.”⁵⁶

[66] In conclusion, based on the analysis of both the characteristics and the use by consumers of CDs, there is no basis on which we could segregate professional CDs in this instance.

[67] We also have doubt, given the evidence in this case, that professional CDs can be segregated because data CDs are a single type of medium.

[68] The bar must be set even higher to succeed in segregating a medium into separate types based on extrinsic characteristics. Extrinsic characteristics, in the absence of other intrinsic

⁵⁴ Exhibit LG-3 to the Second Affidavit of Laurie Gelbloom, Web pages.

⁵⁵ For further examples of promotional content, see product description in investigator reports, First Affidavit of Laurie Gelbloom, LG-7; Market Sightings of ZEI brands spreadsheet and sample of print advertisements identified in the spreadsheet, First Affidavit of Laurie Gelbloom, LG-1; Market Tracking Advertisements- Generic/Unbranded Sightings (Not Pictured), Second Affidavit of Laurie Gelbloom, LG-1; Market Tracking Advertisements- Generic/Unbranded Sightings (Pictured Advertisements), Second Affidavit of Laurie Gelbloom, LG-1; Internet Advertisement of Unbranded Media and corresponding clippings *en liasse*, Second Affidavit of Laurie Gelbloom, LG-2; Research-Investigation spreadsheet listing the web-based advertising identified by CPCC, First Affidavit of Laurie Gelbloom, LG-2.

⁵⁶ *PC III*, *supra* note 10 at 36.

distinctions, show only that versatile media are used for multiple purposes, one of which is copying music. Based on our knowledge and the record before us, this is exactly the case for CDs.

[69] Having said this, we do not need to decide whether or not it is possible to segregate a medium based on non-intrinsic characteristics since the record clearly conveys that there is no obvious characteristic distinguishing CDs.

VII. DETERMINATION OF THE LEVY RATE

[70] It is now necessary to consider CPCC's request for the tariff for 2010.

A. AUDIO RECORDING MEDIA

[71] In our opinion, the time has come to review whether the blank media that were previously subject to a levy still qualify as media ordinarily used by individual consumers to make private copies. The following table shows the proportion of all private copying made onto specific media.

TABLE/TABLEAU

Percentage of total private copies of tracks made by media type (1999-2009)
 Pourcentage du total des copies privées de pistes en fonction du type de support (1999-2009)

	1999-2000	2001-2002	2005-2006	2006-2007	2008-2009
Audiocassette/Cassette audio	306.3M (54%)	173.4M (19%)	36.4M (4%)	26.1M (2%)	8.9M (1%)
CD	234.1M (41%)	706.1M (76%)	639.4M (69%)	696.5M (43%)	265.7M (21%)
DVD	n/a s.o.	n/a s.o.	0.5M (0%)	29.4M (2%)	57.1M (4%)
Digital Audio Recorder/Enregistreur audio numérique	n/a s.o.	n/a s.o.	206.8M (22%)	807.8M (50%)	860.4M (68%)
Others/Autres	28.6M (5%)	43.4M (5%)	47.2M (5%)	70.3M (4%)	79.1M (6%)
Total	569.0M	932.8M	930.3M	1,630.1M	1,271.2M

Note: These figures were taken from the Réseau Circum Inc. reports filed with the Board with respect to the various private copying tariffs. Totals may not add up due to rounding. The total number of private copies by media type does not correspond to total indicated for 2001-2002 due to the imprecision of certain responses.

Note: Ces chiffres sont tirés des rapports de Réseau Circum Inc. déposés auprès de la Commission en ce qui a trait aux différents tarifs pour la copie privée. Il se peut que les totaux ne concordent pas du fait que les données ont été arrondies. Le nombre total de copies privées par type de support ne correspond pas au total indiqué pour 2001-2002 en raison de

l'imprécision de certaines réponses.

[72] It can be seen from the Table that the percentage of private copying being done on audiocassettes has consistently decreased since 1999. From 2 per cent in 2006-2007, it fell to less than 1 per cent in 2008-2009. In absolute terms, the number of tracks copied onto audio cassettes fell from 26.1 million in 2006-2007 to 8.9 million in 2008-2009. By comparison, the number of private copies made onto DVDs, which the Board did not qualify as an audio recording medium ordinarily used by consumers to private copy music,⁵⁷ is about six times more in 2008-2009.

[73] The percentage of Canadians who have used an audiocassette for any purpose in the last 12 months fell to 3 per cent in 2008-2009. This compares to 7 per cent for DVDs, which, as noted above, did not qualify as an audio recording medium. The percentage of audio cassettes being used to copy music declined from 57 per cent in 2006-2007 to 43 per cent in 2008-2009.

[74] In our opinion, based on the above information, the use of audiocassettes to copy music has now become a marginal behaviour. Even though audiocassettes are used to copy music in a percentage of 43 per cent, they are now used so rarely that they are the exception, rather than the rule. Quite clearly, audiocassettes have become an outdated technology for making private copies of music and in our view, are not now being ordinarily used by consumers for such use.

[75] The same cannot be said of CDs. Although the percentage of all private copies made on CDs is also decreasing, the percentage for 2008-2009 is 21 per cent. The percentage of Canadians using CDs for any purpose is at 15 per cent. CDs are being used to copy music in a percentage of 44 per cent. Thus, in our opinion, CDs continue to qualify as a medium under the private copying regime.

[76] Insofar as MiniDiscs are concerned, we do not have specific information on their use for the purpose of private copying. These have been subject to the same levy rates as the audio line of CD-Rs and CD-RWs, which were later amalgamated to CD-Rs and CD-RWs. In the absence of specific information, we will leave their status unchanged for this tariff.

B. CD-R, CD-RW, CD-R AUDIO, CD-RW AUDIO AND MINIDISCS LEVY RATES

[77] To determine the rates for recordable CDs and MiniDiscs for 2010, we again use the valuation model proposed by Messrs. Stohn and Audley, used by the Board in most of its past decisions. CPCC has reiterated that the market for digital downloads is their preferred proxy. We continue to believe that this market is potentially a better proxy. However, as was the case in *PC V*, there is still insufficient information in respect of the remuneration of two of the three types of

⁵⁷ *Ibid.* at 45.

rights holders, namely the performers and the makers, for us to use it at the present time. Therefore, we continue to use the prerecorded CD proxy.

[78] CPCC proposes a new adjustment to the proxy model in 2010 to take into account the additional value resulting from consumers making copies of selected individual tracks rather than of an entire album. This adjustment is discussed in detail later in these reasons.

[79] In what follows, all references to lines are to lines in the Appendix.

i. Authors' Remuneration

[80] Messrs. Stohn and Audley estimate the weighted average of royalty rates applicable to mechanical licenses issued by the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for the Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) at 8.4¢ per track for 2010. After applying deductions to account for controlled composition clauses, free goods provisions and songs that are longer than five minutes, they obtain a rate of 7.45¢. This is the rate we use.

[81] Messrs. Stohn and Audley estimate that record club and budget-line sales are now only 8.9 per cent of total sales. Applying the same 25 per cent discount as in the past results in a discount of 2.23 per cent (8.9×0.25), and an effective average royalty per track on a prerecorded CD of 7.28¢. Using an average number of tracks on a prerecorded CD of 15, the author's remuneration is \$1.0922. (Line F)

ii. Performers' and Makers' Remuneration

[82] As we noted in *PC V*, most record companies now base royalties on the published price to dealers (PPD). We accept this basis and use the average PPD of \$12.98 provided by CPCC. We also set the typical royalty rate for performers at 15 per cent of the PPD as calculated by Messrs. Stohn and Audley, increasing this proportion by half to account for the makers' portion of the remuneration. (Line L)

[83] We then apply a 10 per cent discount for high-volume sales and a 50 per cent discount for record club and budget-line sales (Line K). Adding the payment of 7¢ made to the American Federation of Musicians (AFM) results in a combined performers' and makers' remuneration of \$2.5944. The resulting total remuneration per prerecorded CD for authors, performers and makers is \$3.6866 ($1.0922 + 2.5944$).

iii. Qualifying Repertoire Adjustment

[84] The use of the authors' qualifying repertoire remains unchanged at 96 per cent while that of the qualifying repertoire of performers and makers is now 33 and 25 per cent respectively, a

slight increase compared to what the Board used in the past. Taking into account the equal split between performers and makers, these repertoire adjustments bring the imputed remuneration to \$1.8009. (Line T)

iv. Adjustment for Ancillary Nature of Activity

[85] As we have done in the past, we apply a deduction of 50 per cent to the 24 per cent of private copies that are made of a prerecorded CD that the copier owns and a deduction of 25 per cent on all other copies. The resulting adjusted remuneration is \$1.2426, and, using an average of 15 tracks per prerecorded CD, an adjusted remuneration per track of 8.28¢. (Line X)

v. Adjustment for Value Added Through Selection of Individual Tracks

[86] CPCC submits that when individuals make private copies of recorded music, they are most frequently copying either selected tracks from a single album or selected tracks from more than one album in order to make a compilation. According to CPCC, greater monetary value attaches to tracks that consumers have selected than to tracks purchased as part of an album.

[87] CPCC contends they now have evidence of the extent of the premium attached to selected tracks as a result of several years of operation in Canada of online music services such as iTunes. Such services offer consumers the opportunity to buy either individual tracks or complete albums. Therefore, CPCC submits that in order to establish the appropriate value of a private copy, it would be better to amend the current methodology to reflect the fact that, generally speaking, selected tracks rather than complete albums are copied.

[88] CPCC notes that the Board applied the same principle when it stated that “[...] a page that is photocopied has value added by the mere fact that it was picked.”⁵⁸ CPCC contends the statement is equally applicable to this tariff.

[89] To calculate what the actual adjustment for value added through selection of individual tracks should be, Messrs. Stohn and Audley submit that 80 per cent of all tracks copied were either selected tracks from an individual album (5 per cent) or a compilation of tracks selected from more than one album (75 per cent). They also submit that based on the 2008 sales reports of the online music services,⁵⁹ the average price of a single track sold was \$1.05 and that the average price of a track sold as part of an album was 75¢. Messrs. Stohn and Audley therefore submit that a 40 per cent premium ($(\$1.05 - 0.75) / 0.75$) should be attached to the ability to

⁵⁸ *Supra* note 4, at para. 174.

⁵⁹ Under *CSI's online music services tariff*, each online music service is required to render sales reports that indicate the price of each permanent download sold as a single track or as part of an album or bundle.

select individual tracks of an album. Since this premium only applies to the 80 per cent of tracks privately copied, the value-added adjustment should be 32 per cent (0.80×40).

[90] We are of the opinion that the mere fact that an individual track is selected for copying (as opposed to a complete album) provides additional value to this track. We agree that the price structure used by the online music services is a reflection of such a difference in value. In addition, since both SOCAN and CSI tariffs with respect to online music services are expressed as a percentage of the selling prices of both individual tracks and albums, rights holders already receive a higher remuneration for tracks that are sold individually. We see no reason why this should not be also applied to private copies.

[91] We will use the number provided by CPCC, since this is the only information we have, and set at 32 per cent the adjustment necessary to reflect the value added by the selection of individual tracks. Therefore, the final remuneration per track to authors, performers and makers increases to 10.94¢. (Line AA) This is the basic proxy value of a track used in the calculations below for the determination of the rate.

vi. Final Levy Rate

[92] Messrs. Stohn and Audley submit that the percentage of all CDs purchased by individuals is 38.8 per cent in 2008-2009,⁶⁰ compared to 54.1 per cent in 2006-2007. In addition, according to the information submitted by CPCC, music constituted 44 per cent of the copying being done on CDs in 2008-2009 as compared to 53 per cent in 2006-2007. We accept these percentages.

[93] Copies made from paid downloads and promotional tracks obtained from the Internet are removed from the total. Messrs. Stohn and Audley indicate that in 2008-2009, 6 per cent of all tracks that were copied onto blank CDs were made from paid downloads and 4 per cent from promotional tracks, for a total adjustment of 10 per cent. The figure of 10 per cent is slightly higher than the 7.98 per cent used by the Board in *PC V* but this increase appears reasonable given that the market for paid downloads is increasing in importance. We therefore use the 10 per cent number.

[94] Another downward adjustment is required to reflect cases when copying onto a CD is not carried out successfully and the CD is spoiled. Based on the information provided by CPCC, the rate of spoilage is estimated at 5 per cent, a 2 percentage point increase from that used by the Board in the previous decision. We would tend to expect that this number decreases over time as individuals become more proficient at copying and that newer software becomes more user friendly. Nevertheless, as this is the only information we have, we will use this number.

⁶⁰ Had professional CDs been excluded from the calculation of the levy as requested by ZEI, this percentage would have been higher.

[95] The final factor to consider in determining the royalty rate is the average number of tracks copied onto a CD. Based on the information provided by CPCC regarding the total estimated number of tracks copied onto blank CDs in 2008-2009; the total estimated number of blank CDs sold in 2008-2009; 38.8 per cent of blank CDs purchased by individuals; 44 per cent of all copying involving music; and, 5 per cent of wastage; Messrs. Stohn and Audley calculate that the average number of tracks is 18.1. This is similar to the number of 18.4 used in *PC V* and we will use it.

[96] Taking all the adjustments into consideration results in a rate of 29¢. (Line AE) This is the rate we certify.

C. APPORTIONING THE LEVY AMONG COLLECTIVE SOCIETIES

[97] The percentage applicable to each college of rights holders corresponds to that college's share of all private copies of the qualifying repertoire. Accordingly, authors are entitled to 58.2 per cent ($28.44 \div 48.85$), performers to 23.8 per cent ($11.61 \div 48.85$) and makers to 18.0 per cent ($8.80 \div 48.85$) of royalties.

D. ESTIMATE OF TOTAL ROYALTIES

[98] Based on the information provided by CPCC, we estimate that the total royalties collected by CPCC for CDs will amount to approximately \$15 million for 2010. This is a reflection of the extent to which the sales of CDs are expected to have declined in 2010 compared to the previous years.



Gilles McDougall
Acting Secretary General

APPENDIX Private Copying 2010 Levy Rate Calculation

AUTHORS' REMUNERATION		
A	Mechanical licence royalty per song per top-line CD	\$0.0745
B	Average number of tracks per CD	15
C	Record club and budget-line sales percentage	8.9%
D	Record club and budget-line discount	25%
E	Adjustment for record club and budget-line sales [C × D]	2.23%

	0.089×0.25	
F	Authors' Remuneration [A × B × (1 - E)] $0.0745 \times 15 \times (1 - 0.0223)$	\$1.0922

PERFORMERS' AND MAKERS' REMUNERATION		
G	Top-line CD published price for dealers	\$12.98
H	Royalty to performer (in percentage)	15.1%
I	High-volume discount	10%
J	Record club and budget-line discount	50%
K	Adjustment for record club and budget-line sales [C × J] 0.089×0.5	4.45%
L	Adjustment to account for makers' remuneration	1.5
M	Payments to the <i>American Federation of Musicians</i>	\$0.07
N	Performers' and makers' remuneration [(G × H × (1 - I) × (1 - K) × L) + M] $(12.98 \times 0.15 \times (1 - 0.1) \times (1 - 0.0445) \times 1.5) + 0.07$	\$2.5944
O	Total royalties per prerecorded CD [F+N] $1.0922 + 2.5944$	\$3.6866

QUALIFYING REPERTOIRE ADJUSTMENT		
P	Eligible authors' weighted share of all private copies [(F ÷ O) × % of private copies using eligible authors' repertoire] $1.0922 \div 3.6866 \times 96\%$	28.44%
Q	Eligible performers' weighted share of all private copies [(N ÷ O) × % of private copies using eligible performers' repertoire ÷ 2] $2.5944 \div 3.6866 \times 33\% \div 2$	11.61%
R	Eligible makers' weighted share of all private copies [(N ÷ O) × % of private copies using eligible makers' repertoire ÷ 2] $2.5944 \div 3.6866 \times 25\% \div 2$	8.80%
S	Qualifying repertoire's weighted share of all private copies [P + Q + R] $28.44 + 11.61 + 8.80$	48.85%
T	Imputed remuneration of qualifying repertoire per CD [O × S] 3.6866×0.4885	\$1.8009

ADJUSTMENT FOR ANCILLARY NATURE OF ACTIVITY		
U	Adjustment for copies made from copier-owned CDs [% of private copies × 50%] $24\% \times 50\%$	12%

V	Adjustment for copies from other sources [% of private copies × 25%] $76\% \times 25\%$	19%
W	Adjusted remuneration [$T \times (1 - (U + V))$] $\$1.8009 \times (1 - (0.12 + 0.19))$	\$1.2426
X	Adjusted remuneration per track [$W \div B$] $1.2426 \div 15$	\$0.0828

ADJUSTMENT FOR VALUE ADDED THROUGH SELECTION OF INDIVIDUAL TRACKS		
Y	Selected tracks (% of all tracks)	80%
Z	Adjustment for selected tracks	40%
AA	Final remuneration per track $(100\% + (Y \times Z)) \times X$ $(100\% + (80\% \times 40\%)) \times 0.0828$	\$0.1094

LEVY RATE FOR CDS		
AB	Average number of tracks copied on a CD	18.1
AC	Percentage of copies already authorized (through paid downloads and promotional copies)	10%
AD	Percentage of units spoiled	5%
AE	Levy rate for CDs [$AA \times \% \text{ purchased by individuals} \times \% \text{ of purchases used to private copy} \times (1 - AC) \times (1 - AD) \times AB$] $\$0.1094 \times 0.39 \times 0.44 \times (1 - 0.10) \times (1 - 0.05) \times 18.1$	\$0.29

Note: Calculations were made without using rounded figures. As a result, the rounded figures in the formulas may not result in the precise figures shown in this Appendix