

Copyright Board
Canada



Commission du droit d'auteur
Canada

Date 2010-12-17

Citation File: Private Copying 2011

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 2011 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 work s and performances are embodied

Reasons for decision

[1] On March 31, 2010, the Canadian Private Copying Collective (CPCC) filed with the Board, pursuant to section 83 of the *Copyright Act* (the "Act"),¹ a statement of proposed levies to be collected in 2011 on the sale of blank audio recording media, in Canada, in respect of the reproduction for private use of musical works embodied in sound recordings, of performers' performances of such works or of sound recordings in which such works and performances are embodied ("private copying"). This statement was published in the *Canada Gazette* on June 12, 2010, along with a notice concerning the right of anyone to object to it.

[2] CPCC proposed to maintain the rates to what was known at the time of filing: 24   for audiocassettes and 29   for CD-R, CD-RW, CD-R Audio, CD-RW Audio and MiniDiscs. There were no objections to the proposed tariff.

[3] On October 4, 2010, the Board asked CPCC to update the data of the monthly Music Monitor Survey it has been conducting for several years as well as the valuation model used by the Board in earlier decisions (the "Stohn/Audley model"). The Board also asked CPCC to provide specific

¹ R.S.C. 1985, c. C-42.

information pertaining to the use of MiniDiscs for the purpose of private copying. CPCC filed this information on November 12, 2010.

[4] On May 19, 2010, the Board certified the *Private Copying Tariff, 2010*. Reasons followed several weeks later.² In that decision, the Board concluded that audiocassettes were no longer ordinarily used by consumers to copy music and, as a result, no levy should attach to them. The evidence CPCC subsequently filed in response to the Board's request for updated data in this instance no longer makes reference to audiocassettes. We can therefore treat the matter as settled with respect to those.

[5] CPCC is not proposing any increase in the rate for CDs and MiniDiscs. Nevertheless, the evidence it filed would lead one to conclude that the rate should be increased to 74¢. According to CPCC's numbers, three changes in the annual data explain this increase. First, the total number of music tracks copied increased from 1.4 to 1.9 billion, leading to an increase in music tracks copied onto blank CDs from 295.9 to 463.4 million. This, in turn, led to an increase in the average number of tracks copied on a blank CD from 18.1 to 26.4. Second, while the total number of blank CDs purchased decreased from 101.2 to 65.6 million, the number of blank CDs purchased by individuals only edged down from 39.3 to 38.9 million. This led to a substantial increase in the proportion of CDs bought by individuals, from 38.8 per cent to 59.3 per cent. Third, the adjustment for the value added through selection of individual tracks, which the Board applied for the first time in *Private Copying Tariff, 2010* increased from 32 per cent to 39 per cent.

[6] As a general rule, we believe that a tariff should reflect trends of markets to which it applies. A tariff that would reflect short term market changes would be modified too often. This would generate instability, uncertainty and adjustment costs for both rights owners and users. In this instance, and for the reasons that follow, we believe the information submitted by CPCC with respect to the blank CD market is not reflective of a long term trend and should thus not be used to set the levy.

[7] The market for blank CDs is contracting at a very rapid pace, to the benefit of other, newer copying technologies. The blank CD is reaching the end of its technology life cycle; its market is expected to become insignificant within the next few years. In this context of such rapid changes, the information CPCC is able to obtain, especially that derived from surveys, necessarily becomes less reliable. The annual changes that can be observed may not reflect trends, but either short term, transitional or erratic variations. For instance, the increase in the proportion of CDs bought by individuals is the result of a sharp decline in the purchase of blank CDs for business

² [Private Copying Tariff, 2010 \(November 2, 2010\) Copyright Board Decision.](#)

and commercial use. Such an increase clearly is not reflective of a permanent change, as individuals are also expected to eventually reduce the quantity of blank CDs they buy.

[8] Other results are intuitively questionable. One can readily accept that the number of tracks copied onto digital audio recorders (such as iPods) is going up. It is far more difficult to admit that the number of copies onto CDs has gone up by more than 50 per cent in one year. We would tend to believe, absent hard evidence to the contrary, that this number should stay the same or go down, and not increase by any significant amount. In the same vein, we doubt that within one year, consumers increased the average number of music tracks they copy on each CD by more than 45 per cent.

[9] Finally, some of the data supplied in evidence, if correct, may be used improperly. The average number of tracks being copied on a blank CD is a case in point. The adjusted remuneration per track, the proxy for setting the levy rate, is calculated assuming an average number of tracks on a prerecorded CD of 15. If the average number of tracks on a prerecorded CD was higher than 15, the adjusted remuneration per track would accordingly be reduced. Yet, the model assumes that regardless of the number of tracks being copied on a blank CD, the adjusted remuneration per track applies. This and other adjustments used in setting the amount of the private copying royalties may have to be re-examined if the market changes as rapidly as CPCC implied.

[10] That being said, CPCC only asks that the rate remain the same. There is no reason to believe that it should be lowered. The fact that fewer consumers purchase fewer blank CDs is not, of itself, evidence that those who still purchase CDs use them any differently. Even the Stohn/Audley model, were it used with appropriate corrections, would almost certainly lead to a constant or higher rate than 29¢. We can thus only conclude that the rate should stay the same. Consequently, we are certifying for blank CDs for the year 2011, a rate of 29¢.

[11] To date, mainly because of a lack of information, MiniDiscs have been subject to the same rates as CDs. The evidence now provided by CPCC shows a strong and continuing declining trend in the number of units of MiniDiscs reported sold in Canada, going from 293,774 in 2005 to 7,773 in 2009. In comparison, the Board concluded that audiocassettes should no longer be included in the tariff when there were an estimated 1.7 million units sold.³ Clearly, the use of MiniDiscs in Canada is now marginal.

³ Exhibit CPCC-5, filed in the record of the proceedings leading to the certification of the *Private Copying Tariff, 2010*.

[12] Based on the information we have, we can only conclude that MiniDiscs are no longer being ordinarily used by consumers for making private copies, and as such, are no longer subject to the tariff.

I. APPORTIONING THE LEVY AMONG COLLECTIVE SOCIETIES

[13] There is no reason to change the apportionment of the levy among collectives for 2011 only a few short months after this was done for 2010. Accordingly, authors are entitled to 58.2 per cent of royalties, performers to 23.8 per cent and makers to 18.0 per cent.

A handwritten signature in black ink, appearing to read "Gilles McDougall". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

Gilles McDougall
Acting Secretary General