Copyright Board Canada

Commission du droit d'auteur Canada

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

Members The Honourable William J. Vancise
Mr. Claude Majeau
Mr. J. Nelson Landry

Tariff of levies to be collected by CPCC in 2012, 2013 and 2014 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 March 31, 2011, the Canadian Private Copying Collective (CPCC) filed with the Board a statement of proposed levies to be collected in 2012-2013 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"), pursuant to section 83 of the *Copyright Act*[1] (the "*Act*"). This statement was published in the *Canada Gazette* on May 14, 2011, together with a notice concerning the right of anyone to object to it in writing until July 13, 2011.

[2] The Board received objections from 21 corporations and 17 individuals. On August 18, 2011, the Board requested that objectors confirm their intention to participate fully in the process. Fourteen answered the notice; those who did not were deemed to have withdrawn and their notices of objection were treated as letters of comment.

[1] R.S.C., c. C-42.

[3] The proposed tariff targeted recordable compact discs (CD-R, CD-RW, CD-R Audio, CD-RW Audio: together "blank CDs") and, for the first time, electronic memory cards. On September 1, 2011, CPCC abandoned its claim with respect to all memory cards except microSD cards.

[4] On November 18, 2011, pursuant to section 66.51 of the *Act*, CPCC asked for an interim tariff on blank CDs. On December 19, the Board granted the application.

[5] On January 16, 2012, CPCC filed a statement of proposed levies for 2014. This statement was published in the *Canada Gazette* on February 11, 2012. In addition to some new objectors to the 2014 tariff, eight of the Objectors to the 2012-2013 tariff also objected to it.

[6] The proposed tariff for 2014 targeted only blank CDs and microSD cards. In all other respects, it was identical to the 2012-2013 proposal.

[7] On April 19, 2012, CPCC moved to join the consideration of both tariffs. The Board granted the motion. The hearing was initially set to start on May 15, 2012. Pursuant to a request from the Objectors, the Board postponed the hearing date to October 9, 2012.

[8] On July 3, 2012 the Minister of Industry announced that he intended to introduce regulations exempting microSD cards from private copying levies, pursuant to sections 79 and 87 of the *Act*. On July 20, 2012, at the request of the Objectors, the Board split the hearing into two phases. In Phase I, the Board would hear all the evidence dealing with CDs and CPCC's evidence dealing with microSD cards. If Phase II was required, the Board would hear the Objectors' evidence dealing with microSD cards.

[9] The Phase I hearing took place on October 9 and 10, 2012. Seven objectors participated in the hearing: the Retail Council of Canada (RCC), Samsung Electronics Canada Inc. (Samsung), Panasonic Canada Inc. (Panasonic) and a Coalition comprised of LG Electronics Canada, Inc., Micron Technology Inc., SanDisk Corporation and Research in Motion Limited. For the reasons set out below, it was not necessary to hold a Phase II hearing.

[10] The *MicroSD Cards Exclusion Regulations (Copyright Act)*[2] ("*Regulations*") were registered and came into force on October 18, 2012 and were published in the *Canada Gazette* on November 7, 2012. The *Regulations* exclude microSD cards from the definition of "audio recording medium" under section 79 of the *Act* from the date they came into force. As a result, microSD cards cannot be subject to a private copying levy from that date.

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[2] SOR/2012-226.

[11] On November 29, 2012, the Board requested the parties to answer the four questions set out in paragraph 50 below, in order to ascertain the possible impact of the *Regulations* on the Board's ability to set a fair levy on microSD cards from January 1 to October 17, 2012. The record of these proceedings was perfected on February 8, 2013, when the Objectors replied to CPCC's submissions on these questions.

A. POSITION OF THE PARTIES

[12] CPCC proposed to maintain the current rate of 29¢ per blank CD and to set rates of 50¢ per microSD card of one gigabyte or less, $1.00 per card of more than one but less than eight gigabytes, and $3.00 per card of eight gigabytes or more. It argued that both blank CDs and microSD cards qualify as audio recording media and that the proposed rates are reasonable.

[13] The Coalition, Panasonic and Samsung argued that microSD cards do not qualify as audio recording media, that the proposed rates are excessive and that the proposed reporting obligations are unduly burdensome and require the reporting of information unnecessary for the administration of the tariff.

[14] RCC raised similar grounds of objections. In addition, it challenged the constitutionality of Part VIII of the *Act*. It also argued that CDs no longer qualify for a levy by reason that they are no longer ordinarily used by consumers to copy music.

B. ANALYSIS

i. Is Part VIII constitutional?

[15] RCC did not file evidence that it served the notice of constitutional challenge mandated by section 57 of the *Federal Courts Act.*[3] Consequently, the issue was not addressed.

ii. Is a CD an Audio Recording Medium?

[16] Testifying for CPCC, Stephen Stohn, of Stohn Hay Cafazzo Dembroski Richmond LLP, and Paul Audley, of Paul Audley and Associates, presented a report[4] which updated the valuation approach ("the Stohn/Audley model") the witnesses first proposed and that the Board has used repeatedly to set the levy on blank audio recording media. Relying on the data filed with their report, the witnesses concluded that in 2010-2011: (a) 15 per cent (373.5 million) of the 2.29 billion music tracks copied onto any medium or device were copied onto blank CDs;[5] (b)

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[3] R.S.C., c. F-7.
[4] Exhibit CPCC-4.
[5] Exhibit CPCC-4 at para. 127. Table 4.10 of Appendix D puts the total number of tracks copied at 1,811,600,000. For the reasons set out in footnote 3 to the table, this figure underestimates the actual number of tracks copied.

Canadian consumers purchased 33.4 million blank CDs,[6] of which 14.3 million were used to copy music,[7] and (c); 29 per cent of those who used CDs did so exclusively to copy music.[8]

[17] Forecasts contained in the latest version of the *Santa Clara Report*[9] on which the Board has relied in the past to assess trends in the sales of blank CDs tend to show that this market is continuing to contract, as the Board anticipated two years ago.[10] Based on these forecasts, RCC argued that blank CDs are no longer ordinarily used by consumers to copy music and, as such, should no longer attract a levy.

[18] We conclude that we can rely on the *Report*'s forecasts for 2011, but not for 2012 to 2014. The version available to us reports actual sales for 2010. As Messrs. Stohn and Audley noted in reply, Santa Clara's projections of future sales are reliable for the first year of each five-year projection presented but tend to overstate the rate of decline of sales in subsequent years.[11]

[19] The record clearly shows that blank CDs will continue to meet the threshold of "ordinary use" until the tariff ends with the year 2014. In 2011-2012, Canadians copied 373.5 million music tracks onto 14.3 million CDs. These numbers will fall. However, even if they were to fall by 70 per cent over the life of the tariff (meaning that in 2014, Canadians would copy 112 million music tracks onto 4.3 million CDs), CDs would still meet the required threshold. Two reference points suffice to support this conclusion.

[20] Having heard evidence that Canadians had copied 26.1 million music tracks onto audio cassettes in 2006-2007, the Board concluded that audio cassettes should continue to attract a levy in 2008-2009.[12] The copying of 112 million music tracks onto blank CDs in 2014 would be more than four times as much.

[21] Furthermore, in *PC VI*, the Board noted that the panel dealing with the first Private Copying decision had found that "the sale of 1.05 million, 2.3 million and 4.3 million units [to copy

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[6] Exhibit CPCC-4 at para. 116.
[7] Exhibit CPCC-4 at para. 128.
[8] Exhibit CPCC-4, Appendix D, Table 5.2.
[9] Exhibit RCC-2A, Santa Clara Consulting Group, *Flexible Media Industry for Data Recording, Canadian Market (2011)*, Table 16. [*Santa Clara Report*]
[10] *Private Copying, 2011* (17 December 2010) Copyright Board Decision at para. 7, quoted below. [*PC VII*]
[11] Exhibit CPCC-4A at paras. 10 to 12.
[12] *Private Copying Tariff, 2008-2009* (5 December 2008) Copyright Board Decision at para. 20. [*PC V*] See also *Private Copying Tariff, 2010* (2 November 2010) Copyright Board Decision at para. 72. [*PC VI*]
In *PC VI*, when informed that Canadians would copy eight million tracks onto audio cassettes, the Board concluded that cassettes were no longer ordinarily used to copy music and as such, no longer qualified for a levy: *PC VI* at paras. 72 to 74.

music] satisfied the threshold of 'ordinary use'."[13] Using 4.3 million blank CDs to copy music in 2014 would be as much if not more.

[22] We find therefore that a CD remains an audio recording medium as defined in section 79 of the *Act*.

iii. What Should the Levy on Blank CDs Be?

[23] Since 1999, the Board has used the Stohn/Audley model intermittently to help determine the levy. The specification of the model is somewhat different today than it was in 1999, as it was adapted to reflect changes in the marketplace. Overall, however, its underlying assumptions, structure and approach remain the same.

[24] The model relies mostly on three sets of data. The first are what is paid to authors, record labels and performers to copy a musical work, a sound recording or a performance. The second and third are information about sales and uses made of CDs from two sources: the *Santa Clara Report*[14] and a monthly Music Monitor Survey CPCC has conducted on a continuing basis.[15]

[25] The model first requires calculating the per-track compensation to authors, performers and makers. For this purpose, Messrs. Stohn and Audley identified two proxies – one based on the compensation inherent in the making of a prerecorded CD ("CD proxy"), and one based on the compensation inherent in a digital download ("digital proxy"). The digital proxy was examined but set aside in earlier decisions of the Board; the witnesses argue that the reservations expressed by the Board have been addressed and that, as a result, the digital proxy has become usable.

[26] For our purposes, it is sufficient to characterize this part of the model as involving the following steps, when a prerecorded CD is used as proxy. First, the total compensation paid to authors, performers and makers on the sale of a prerecorded CD is calculated. Second, that amount is adjusted to account for the fact that not all authors, performers and makers are entitled to share in the levy. Third, a discount is applied because a private copy is worth less than a prerecorded CD. Fourth, a premium is applied because consumers select each track copied onto a blank CD; consumers play no role in the selection of tracks copied onto a prerecorded CD. Fifth, the resulting amount is divided by the average number of music tracks per prerecorded CD. The steps involved when the digital proxy is used are only slightly different.

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[13] *PC VI* at para. 61.
[14] *Supra* note 9.
[15] Exhibit CPCC-4, Appendix D presents the most recent set of data available from this Survey at the time of the hearing.

[27] Messrs. Stohn and Audley calculated the per-track compensation to authors, performers and makers at $0.11895 for the CD proxy and $0.0782 for the digital proxy. Differences in the two figures are attributable to factors that are not relevant here. The witnesses proposed using the weighted average of both proxies: $0.1030.

[28] In the Stohn/Audley model, further adjustments are made to the selected proxy to reflect the average number of tracks copied on a blank CD, the percentage of CDs actually used by consumers to copy music (including spoilage) and the fact that some copies (authorized downloads, promotional copies) are already authorized. Based on the usual data, the model yielded 75¢ using the CD proxy, 49¢ using the digital proxy and 65¢ using the blended proxy. These amounts are much more than the 29¢ CPCC is asking for.

[29] The Stohn/Audley model contains several assumptions that have been untested for the last several years. For example, in calculating the compensation per track as part of the CD proxy, adjustments are made to account for budget-line CD sales; that information has not been updated since 2006. Also, repertoire adjustments (required because not all authors, performers and makers are entitled to share in the levy) are based on surveys conducted in 2007; it is not clear whether the use of the qualifying repertoire has changed substantially since.

[30] Another problematic variable in the model is the number of tracks copied onto a blank CD. Messrs. Stohn and Audley suggest that this number jumped from 18 in 2010 to 26 in 2011 and remained there in 2012. They explain this by noting that the number of tracks copied onto CDs grew while the number of CDs purchased by individuals remained roughly constant. This mechanistic conclusion does not explain such a change in behaviour. The reasons driving private copiers to use blank CDs more efficiently than before remain unexplained.

[31] A significant change in the number of tracks copied on each blank CD raises other issues, as was noted in *PC VII*:

> [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.[16]

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[16] *Supra* note 10.

[32] In addition, if 26 music tracks are copied onto a blank CD on average, then some files are being copied in a compressed format. Compression implies a loss of frequency. A further adjustment may be needed to take this into account. In the absence of any evidence on this value however, we are unable to assess the importance of this adjustment.[17]

[33] There is a more fundamental problem with the Stohn/Audley model. Its usefulness depends on the appropriateness of the data it uses to generate results. As long as the data are reliable and reflect, with some level of permanency, trends that are clear, stable and measurable, the model is useful.

[34] When a technology reaches the end of its life cycle, the information that can be obtained, especially from surveys, will tend to be sufficiently unstable to become unreliable. This will make the Stohn/Audley model unusable. The Board alluded to this in in *PC VII*:

> [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 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.[18]

[35] The record of these proceedings confirms that the blank CD is in decline and will almost certainly have reached the end of its technology life cycle by the end of 2014.[19] CD sales in 2010-2011 were at a third or less of their peak both in value and in number of units sold. Though we doubt that the decline in 2012 and beyond will be as steep as the *Santa Clara Report* predicts, we do not doubt that it will continue.

[36] The proportion of blank CDs sold to consumers was 54 per cent in 2006-2007, 39 per cent in 2008-2009, 59 per cent in 2009-2010 and almost 65 per cent in 2010-2011. These fluctuations are mentioned in the passage from *PC VII* just quoted. They accord with life cycle theory. Technology adopters are generally classified as innovators, early adopters, early majority, late majority, and laggards.[20] Innovators and early adopters who first purchased blank CDs have long

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[17] Compression was alluded to, but not addressed, in *PC V* at para. 38.
[18] *PC VII* at para. 7.
[19] Whether a medium that reaches the end of its technology life cycle also ceases to be ordinarily used to copy music is a matter better left undecided for the time being.
[20] Everett M. Rogers. (2003) *Diffusion of Innovations*, Fifth Edition. (New York: Free Press). Laggards are, by construction, the last 16 per cent of individuals to adopt a product. Heterogeneous rates of technology abandonment

moved on to other storage media. So have businesses, since they must adapt to newer, better technologies to remain competitive. Those who remain are essentially consumers who continue to use blank CDs either by choice (laggards) or by necessity (the owner of a car equipped with a sound system which can play a CD but not an iPod). As that core number of consumers resists transitioning to a new technology while firms are forced to transition, the fraction of CDs purchased by individuals will rise.

[37] The number of CDs bought by consumers continues to decrease; the number of CDs bought for business and commercial use decreases more rapidly. This leads to an increase in the percentage of CDs bought by individuals. This trend will probably continue until the total market itself becomes insignificant, at which point CDs will cease to be ordinarily used by individual consumers to copy music in any event.

[38] As fewer Canadians use blank CDs to copy music, the data required to apply the model will become less stable, less reliable and more difficult to collect.

[39] The application of the Stohn/Audley model to a technology nearing the end of its life cycle also raises an issue of fairness and common sense. In this model, an increase in the proportion of blank CDs bought by individuals, everything else being equal, leads to an increase in the amount of the levy. To some, this is normal in a regime that requires the total amount of the levy to be spread equally among all units of a blank media of a given type. They may even argue that this is both expected and desirable: the burden of the activity for which the levy is collected is falling more and more on those who perform the activity.

[40] Yet this result, though apparently logical, seems perverse and may be unfair. Blank CDs are low-price, low-margin goods. Increasing the per-unit levy on them probably leads to an increase in price. Triggering an increase in the price of a good close to or at the end of its life cycle through an external factor such as a levy imposed by a government agency seems absurd.

[41] Just as CDs are reaching the end of their cycle, we conclude that the usefulness of the Stohn/Audley model has run its course. Consequently, we will therefore no longer use this model.

[42] No objector proposed a particular figure for the CD levy. RCC referred to a report[21] documenting levies imposed on blank CDs, other recording media and recording devices in 26 countries, including Canada. Levies expressed as set amounts were converted to Euros; those

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have not been modeled extensively in the life cycle literature; however, technology abandonment can be viewed as adopting the next (presumably better) technology. In the homogenous context, Cox (1967) describes the decline phase as beginning when total revenues pass below 20 per cent of maximum revenues: William E. Cox, Jr. (1967) *Product Life Cycles as Marketing Models*, Journal of Business, Vol. 40, no. 4 at pp. 375-84.

[21] Exhibit RCC-5A, International Survey of Private Copying Law and Practice (2011) at 5.

expressed as a percentage of a rate base (import price, value, etc.) were left as is. Euro rates varied from 1 to 34 cents; only four were higher than Canada's. RCC wants us to rely on this information to conclude that a levy of 29¢ is too high.

[43] The Board will continue its practice of viewing foreign rates with caution.[22] This example demonstrates why. We do not know how these rates were set. We know that only four are higher than the current Canadian rate. We also know that the rates vary by a factor of as much as 34 to 1. We do not know whether prices at the lower end were influenced by market or other (political) considerations that do not exist in Canada: for example, the imposition of levies on media (e.g. DVDs) that are not levied in Canada or on devices, which are not subject to the Canadian regime, may result in the overall burden of the levy being distributed more widely. It would be imprudent to take those prices into account in setting the levy without knowing considerably more about them.

[44] Having rejected the proposals of both parties, we are left with the filing of CPCC. CPCC has filed for a levy of 29¢, as it has done continuously since 2010. In *PC VI* and *PC VII*, the Board found that 29¢ was a reasonable levy and indeed, that any other reasonable levy probably would be higher. If our end of life analysis is correct, then a reasonable levy could be even higher still, subject to our comments in paragraph 40 about the possible unfairness of increasing the price of a good close to or at the end of its life cycle through a levy imposed by a government agency.

[45] The current levy is a reality in the marketplace. Leaving it unchanged both provides rights holders with some compensation until none is payable any longer, while avoiding some of the perverse effects that too rigid a calculation based on actual consumption may have on the pricing of a good at the end of its life cycle.

[46] Accordingly, we certify a levy of 29¢ per blank CD.

iv. Reporting Requirements

[47] The Objectors provided no evidence or argument that could lead us to conclude that the existing reporting obligations are unduly burdensome; these will remain as in the past.

v. Is a microSD Card an Audio Recording Medium?

[48] In 2003, the Board refused to certify a private copying levy on removable memory cards based on a lack of supporting evidence that all removable cards as a group were "audio recording

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[22] *SOCAN Tariff 24 (Ringtones), 2003-2005* (18 August 2006) Copyright Board Decision at para. 86.

media."[23] Such is not the case here. CPCC limited its proposed tariff to microSD cards and adduced evidence that these cards are "audio recording media." Based on the record as it now stands, and without the benefit of evidence the Objectors might have filed in Phase II of these proceedings, we would conclude that a microSD card is an audio recording medium as defined in section 79 of the *Act*.

[49] Consequently, barring exceptional circumstances, and (again) subject to any evidence the Objectors might have filed in Phase II, CPCC would be entitled to collect royalties on microSD cards from January 1 to October 17, 2012. We examine below whether such exceptional circumstances exist in this instance.

C. POSITIONS OF THE PARTIES ON THE ISSUES RAISED IN THE BOARD'S NOTICE OF NOVEMBER 29, 2012

[50] Shortly after the *Regulations* came into force, the parties were asked to answer four questions, on the assumption that microSD cards would qualify as audio recording media and that any levy on them would be retroactive to January 1, 2012:

a. would it be intrinsically unfair to establish a tariff given that past experience has demonstrated that in the Private Copying Regime retroactive collection of royalties is either difficult or impossible?
b. would the costs of the establishment of the accounting and reporting structures for the parties for a period of less than ten months be disproportionate to the proposed or potential royalties?
c. would the cost of deciding the issue of whether microSD cards are audio recording media be disproportionate to the proposed or potential royalties?
d. would it be intrinsically unfair to establish a tariff for any other reason?

[51] The Objectors have answered the questions in the affirmative. CPCC has answered the questions in the negative.

[52] RCC alone contends that the Board could not certify a tariff on microSD cards once the *Regulations* came into force. It argues that the ministerial announcement and the Regulatory Impact Analysis Statement are clear: by enacting the *Regulations*, the government wished to prevent the Board from deciding whether a microSD card is an audio recording medium. In RCC's opinion, this is not only practical but fair: no right vests in CCPC unless and until the Board certifies a tariff in accordance with the law.

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[23] *Private Copying Tariff, 2003-2004* (12 December 2003) Copyright Board Decision at 44.

[53] All of the Objectors contend that, under the circumstances, putting a levy on microSD cards would be operationally unfeasible, disproportionately costly and intrinsically unfair. Among the many arguments offered in support of this proposition, the following are relevant.

[54] First, past experience shows the retroactive collection of private copying royalties is either difficult or impossible. CPCC itself has recognized how difficult it is to retroactively collect a new levy for an unspecified amount on an item sold in massive quantities and through countless channels.[24]

[55] Second, the costs of setting up the reporting structures necessary to account for the levy, for a period of less than ten months, would be disproportionate to any proposed or potential royalties. Nothing compelled importers or distributors to set up a reserve, to keep records or to otherwise anticipate the results of a Board ruling. It is unlikely that any of them did so. A letter CPCC circulated in late 2011, suggesting that this be done, is of no legal effect. Developing systems to track past sales after the fact is likely even more difficult and costly than establishing reporting structures in advance of future sales. Any such structures would fail to generate accurate, relevant information. Reporting systems would be entirely new, would require substantial time and expense and could not be amortized over an extended tariff period.

[56] Third, the legal, expert and other costs and disbursements that would be incurred if the Board proceeded with Phase II also would be disproportionate to the proposed or potential royalties and as such, inherently unfair. Phase II would require deciding both whether a microSD card is an audio recording medium and if so, what is the appropriate royalty. Each would require detailed evidence, analysis and submissions. Assessing ordinary use would require knowing who uses microSD cards, why and how much. Quantitative evidence would have to be commissioned, gathered, presented, analysed and tested. The costs would amount to hundreds of thousands of dollars.

[57] Fourth, requiring the Objectors to incur the expenses involved in proceeding with Phase II simply because CPCC expended resources on preparing for Phase I is neither justified nor rationally sound.

[58] CPCC's response to the Objectors' relevant arguments can be outlined as follows.

[59] First, to argue that the Board lost the power to certify a tariff for the period before the *Regulations* once they came into force makes no sense. The retroactive effect of a tariff cannot be dependent on the actions of an agent who is a third party to the decision maker. Furthermore, the chronology of events shows that the government, far from wishing to prevent the Board from

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[24] See *PC V* at para. 41. See also CPCC's letter of August 30, 2007 informing the Board of its decision not to collect levies on digital audio recorders retroactively.

certifying a tariff for the period to October 17, 2012, choose to address future situations only and consciously left untouched the period before the *Regulations* took effect.

[60] Second, subsection 83(7) of the *Act* supports the proposition that the Board's discretion to certify or not a tariff arises only once the Board has considered a proposed tariff. Refusing to hear is not the same as deciding not to certify after having heard. The Board would be in default of its statutory obligations if it should conclude that inconveniences to the Objectors trump the right that existed for copyright owners until the *Regulations* came into effect.

[61] Third, the Board's questions, by focussing on inconveniences to the Objectors, miss the fundamental issue: should copyright owners be denied the right to receive remuneration for copies of music made onto microSD cards during a period when the *Regulations* were not in effect? Copyright owners have a right, now limited in time but fundamental nonetheless, to collect levies if microSD cards were audio recording media up to October 17, 2012. The Board's duty is to decide whether they were and, if so, what the levy should be. Whether this creates inconveniences or costs to the Objectors is irrelevant. The Board routinely goes through its full inquiry process to certify tariffs that result in much less royalties. The real unfairness would be to allow for the expropriation without compensation of a right that copyright owners have begun to enforce, by filing a proposed statement of royalties, without even hearing the case.

[62] The unfairness that would result from denying copyright owners the right to collect the levy on microSD cards before the *Regulations* came into force would be compounded if such denial was based on possible inconveniences and costs to the Objectors after CPCC has spent considerable amounts to prepare its case. CPCC invested substantial funds on the understanding that their proposed tariff for microSD cards would be heard and that a levy could be established. It would be unfair for the Board to decline to even hear the case that CPCC has already prepared while excusing the Objectors from the requirement to commit corresponding resources to bring forward their own evidence and arguments.

[63] Fourth, statements that the Objectors' costs would be disproportionate are unsupported. The Board's questions have only elicited subjective responses from which no useful information can be adduced to help the Board conclude even on the very questions it asked. There is no hard information, no quantification of the costs that would be incurred in pursuing the hearings or conforming to the regime with respect to microSD cards, only subjective conclusions and self-serving statements.

[64] In any event, it is impossible to believe that the costs the Objectors would incur, to be shared among many large companies, would either be excessive in the absolute or that they would represent more than a fraction of the amounts CPCC might reasonably collect if it is successful in making its case to the Board: the amounts generated for the period to October 17, 2012 under the rates CPCC proposed would be greater than $8 million.

[65] Furthermore, it is difficult to imagine that the accounting and reporting structures necessary to comply with the proposed tariff are not already in place. Reporting requirements are minimal and simple. They only require information the Objectors should already have.

[66] Fifth, past situations in which CPCC agreed not to collect levies retroactively differ from the current one. It cannot be concluded from these past events that it is impossible to collect levies retroactively under the private copying regime.

[67] Issues relating to the retroactive nature of the tariff must be viewed against the following. The proposed tariff was filed on March 31, 2011. Initially, the hearing date was set for May 15, 2012. At the insistence of the Objectors, that date was moved to October 9, 2012. The Board agreed to this postponement, on September 13, 2011, "with considerable reluctance," noting that the schedule proposed by CPCC was "realistic, as long as the Objectors avoided procrastinating" and "strongly urged" the Objectors "to ensure that the information required to calculate an eventual levy on memory cards is compiled starting January 1, 2012." On November 18, 2011, CPCC announced its firm intention to collect levies retroactively; it then notified all current and past reporting companies. Proper notice was given and hence, there should be no difficulty in effecting such retroactive collection.

[68] In any event, it is for CPCC alone to waive the right to collect the levy retroactively, and is not bound by its past actions.

[69] In reply, the Objectors reiterated their initial pleadings in all but one respect. They argued that the inference CPCC drew from the chronology of events (i.e. that the government did not intend the *Regulations* to be retroactive) was incorrect. The stated intention is that no royalties should be paid.

D. ANALYSIS

[70] We disagree with RCC on the issue of jurisdiction, for the reasons CPCC offered. The Board remains seized of the current matter as it relates to microSD cards for the period from January 1 to October 17, 2012. We must now decide the matter.

[71] Whether the right to collect a levy vests only once a tariff is certified is irrelevant. This is not the right in issue here. What is at play is CPCC's right to request that the Board decide whether or not it is entitled to a tariff. That right vested when CPCC filed a timely proposed statement of royalties.

[72] Pursuant to subsection 83(8) of the *Act*, the Board is required, upon concluding its consideration of a proposed private copying tariff, to set a levy and its related terms and conditions, to vary the tariff accordingly and to certify the tariff as the approved tariff.

Subsection 83(9) also provides that, in exercising this function within the private copying regime, the Board "shall satisfy itself that the levies are fair and equitable."

[73] In this instance, dealing with microSD cards raises unique issues. These issues stem not from the content of the tariff proposal. They arise as a result of a single event triggered not by the Board or by any party, but by an agent external to this process: the authority that made the *Regulations*. In saying this, we look at the *Regulations* not as a legal instrument, but as a fact or event. This single event amplifies the relative importance and practical repercussions of both the process the Board would be required to follow before it could certify a tariff and the measures necessary to implement such a tariff.

[74] In 2008, the Board declined to certify a tariff for some activities based on the lack of evidence, even though a right to be compensated existed for the targeted activities.[25] The Federal Court of Appeal agreed with the Board.[26] Both decisions were largely based on a complete lack of evidence. Such is not the case here.

[75] Yet *SOCAN v. Bell* does provide helpful guidance in these proceedings:

> That the Board's obligation in considering a demand for the certification of a proposed tariff is to approve and certify a fair and reasonable tariff is not disputed. This is inherent in its obligation to balance the competing interests of copyright holders, service providers and the public.[27]

[76] The Federal Court of Appeal made this statement in a context where the *Act* does not specify that the Board must act fairly. Here, the *Act* does provide that the Board "shall satisfy itself that the levies are fair and equitable." Consequently, it is as important or more that we avoid setting levies that are not fair and equitable. We interpret the Court's statement as meaning that if we conclude that it is possible to certify a fair and equitable tariff for certain media and impossible for others, we should certify a tariff for the first and decline to do so for the second even if the second otherwise qualify as audio recording media.

[77] In deciding whether it is possible to certify a fair and equitable tariff for microSD cards, we find the following to be relevant.

[78] First, microSD cards are not and have never been subject to a private copying levy. As of October 18, 2012, these cards cannot be subject to such a levy.

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[25] *SOCAN 22.B to 22.G (Internet – Other Uses of Music) 1996-2006* (24 October 2008) Copyright Board Decision at paras. 108-117.
[26] *SOCAN v. Bell Canada*, 2010 FCA 139 at paras. 19-30. [*SOCAN v. Bell*]
[27] *Ibid* at para. 25.

[79] Second, any levy we certify will apply only from January 1 to October 17, 2012.

[80] Third, the additional costs to the Objectors and to CPCC of creating the additional record required to decide whether a microSD card is an audio recording medium and if so, what should be the appropriate royalty, would be in the hundreds of thousands of dollars or more. Deciding whether microSD cards are ordinarily used to copy music can be done based on well-established principles.[28] Still, the decision would require determining who uses such memory cards, for what purpose and to what extent. Experience shows that the evidence needed to decide such issues is complex and costly to commission, gather, present, analyse and test.

[81] These costs would not be less by reason that the period during which the levy would apply would be both short and finite. Also, since we do not have the power to award costs, each side would be required to bear their own expenses irrespective of how successful (or unsuccessful) each would be.

[82] The fact that CPCC has already expended time and money to prepare and present its case up to now cannot justify requiring the Objectors to do the same if we conclude that the resulting tariff will inevitably be unfair and inequitable.

[83] Fourth, the royalties generated would most likely be relatively modest, and certainly less than what CPCC proposed for the following reasons. CPCC's proposed rates rely on the Stohn/Audley model which determines royalty rates as the product of a price per track and the number of tracks copied onto the blank media. The price per track is the same for both microSD cards and blank CDs: one cannot expect it to be higher for the former than the latter. But because of its reliance on the number of tracks copied, the model tends to generate high royalty rates for microSD cards. Having decided to abandon the model for blank CDs, we would not use it either to set a levy on microSD cards. As a result, a strong possibility exists that the amounts to distribute would be less than the costs entailed in collecting and distributing the levy.

[84] Fifth, the time, effort and money associated with creating reporting systems, reporting, auditing and anything else that may be required to comply with the tariff and to assess such compliance would also be non-recoupable. Normally, this would simply be a cost of doing business, to be amortized over time. Here, the *Regulations* remove that option.

[85] Dealing with the costs and disruptions linked to establishing accounting and reporting mechanisms and structures is an inherent reality to all tariffs. However, in the case at hand, this reality is exacerbated by many factors. This is a tariff of first impression. The period over which

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[28] Contrary to what some objectors argued: *AVS Technologies Inc. v. CMRRA* (2000), 7 CPR (4th) 68 (FCA) at paras. 5-9.

to amortize associated costs is both very short and already past. It is very difficult to justify such disruptions when the tariff is short-lived, likely relatively modest and entirely retroactive.

[86] Private parties are free to litigate even when this makes no economic sense. An application before the Board is not a civil cause of action. We must balance competing interests, some of which are not represented. As an economic regulator, we must heed economic considerations. Any "friction" that may result from the retroactive collection of royalties is a relevant consideration in deciding whether it is possible to certify a fair and equitable tariff in the first place. A new tariff (or a rate increase) can be phased in to make it more acceptable. A completely retroactive tariff cannot be phased in.

[87] We agree with CPCC that the decision not to collect royalties retroactively should rest with CPCC *once a tariff is certified*. This does not affect what we can or should do if we conclude that any tariff we may certify would be not fair and equitable. In this instance, the tariff would be short-lived and totally retroactive. The difficulties and disruptions resulting from such a measure would not be simply greater than as in any past occurrence in the private copying market; they would be of a different order and nature.

[88] We disagree that stopping the process now would be unfair to CPCC. CPCC filed all its evidence in chief in relation to Phase I. Absent opposing evidence or argument, there is nothing that CPCC could add that fairness requires.

[89] When taken as a whole, the circumstances of this case make any attempt at certifying a fair and equitable tariff for microSD cards impossible. The determination, implementation and enforcement of any potential tariff will almost inevitably be largely futile, certainly unfair and considerably disruptive. This is an exceptional situation, one that lends itself to the proper exercise of our discretion to refuse to certify a tariff not because of a lack of evidence, but because any tariff we would set would be, under these very special circumstances, manifestly unfair and inequitable.

[90] For the above reasons, we conclude that we cannot certify a levy on microSD cards and fulfil the statutory requirement that we be satisfied that the levy is fair and equitable. For that reason, we will not certify a rate for microSD cards. Consequently, it is unnecessary to proceed with Phase II.

[91] We wish to add the following.

[92] A case could be made that, in these proceedings, CPCC's conduct was highly diligent, while the Objectors' was far less so. This is not relevant. The only critical temporal element in these proceedings is the date on which the *Regulations* came into force.

[93] We did not address a number of arguments raised by the Objectors because it was not necessary. These include:

- whether manufacturers and importers could set up reserves;
- whether importers and manufacturers or consumers should bear the burden of the private copying regime;
- the potential detrimental impact of a retroactive tariff on the competitive market for the technology in issue in Canada;
- the possible confusion the certification of a retroactive, short-lived levy may cause consumers;
- the relevance of the so-called technological neutrality principle to setting a levy on a medium that is widely used for things other than to copy music.

[94] We did not address other arguments or points raised by the Objectors because they are irrelevant. These include:

- whether the *Regulations* could have been made retroactive or whether Parliament could have amended the *Act* to ensure that the private copying regime never applied to microSD cards;
- the likelihood that the Federal Court of Appeal would strike down any tariff certified by the Board;
- the government's statement that it "cannot allow" a microSD cards tariff or that certifying a tariff would run counter to the spirit of the *Regulations*;
- the enactment of the *Regulations* as government statement that any levy on microSD cards would be viewed as unfair;
- statements contained in the Board's Report on Plans and Priorities and Departmental Performance Report.

E. APPORTIONING THE LEVY AMONG RIGHTS HOLDERS

[95] Section 84 of the *Act* requires that we apportion the levy among authors, performers and makers. We were not asked to change the existing apportionment and see no reason to do so. Accordingly, authors are entitled to 58.2 per cent of royalties, performers to 23.8 per cent and makers to 18.0 per cent.

F. CERTIFICATION OF SEPARATE ANNUAL TARIFFS

[96] On June 25, 2013, pursuant to paragraph 83(13)(*b*) of the *Act*, the Board made the Regulations Establishing the Periods Within Which Eligible Authors, Eligible Performers and Eligible Makers not Represented by Collective Societies Can Claim Private Copying Remuneration.[29] As required by this paragraph, the period within which an eligible rights holder

[29] SOR/2013-143, *Canada Gazette* Part II, Vol. 147, No. 15 at p. 1998.

who has not authorized a collective to file a proposed tariff is entitled to be paid a share of private copying royalties begins when a tariff ceases to be effective. For reasons outlined in the Regulatory Impact Analysis Statement (RIAS) published with the Regulations,[30] CPCC is of the view that this requirement unduly complicates the allocation of royalties collected pursuant to a multi-year tariff. To avoid such complications, and as the Board had indicated in the RIAS, we certify for 2012, 2013 and 2014 tariffs that are separate, though identical in all respects except for their effective period.

Gilles McDougall
Secretary General

[30] *Ibid*. at pp. 2000-2001.