

Copyright Board
Canada



Commission du droit d'auteur
Canada

[CB-CDA 2024-029]

NOTICE OF THE BOARD

Proceeding: Private Copying Tariff (2025-2027)

April 29, 2024

[1] The Board is ready to proceed with the examination of the above-mentioned proposed tariff through written hearing. Lara Taylor has been appointed as Case Manager to facilitate an efficient and cost-effective proceeding.

[2] In past decisions, the Board expressed concerns about the quality of the data and the robustness of the economic evidence submitted by the Canadian Private Copying Collective (CPCC). In the last Private Copying 2022-2024 proceeding, the Board requested the CPCC respond to a number of issues and questions to improve the reliability of its economic evidence to support its case. The Board's direction was only partially followed.

[3] In the current proceeding, the Board draws the CPCC's attention to its preliminary views based on several data sources, including the trends in the private copying market. The Board expects the CPCC to address these views, related issues and questions, as set out in the Appendix to the present notice.

[4] The Board also points the CPCC to the [Practice Notice on Submitting Economic Evidence \[PN 2023-009\]](#) in preparing its case.

[5] To provide an opportunity for exchange and clarification, Lara Taylor would like to hold a Case Management Conference (CMC) to discuss the views and details set out in the Appendix. Board staff, as technical specialists, will also be on-hand to answer questions.

[6] The Case Manager and Board staff are available for a 90 minute CMC at the following dates and times:

- Wednesday, May 15, 2024 at 10:30 a.m.
- Thursday, May 16, 2024 at 1:30 p.m.

[7] CPCC is asked to confirm its availability as well as representative for the CMC by **Friday, May 3, 2024**. An agenda and Zoom link will be sent in the days leading up to the CMC.

[8] A schedule for this proceeding will be set after the CMC, including the date for the CPCC to file its statement of case.

[9] Please note that a final decision may not be issued before the end of December 2024. As such, the Board reminds the CPCC that the continuation of rights related to the current approved Tariff would apply until the conclusion of this proceeding.

Luc Martineau
Chair, Copyright Board

Appendix

Issues and questions related to the consideration of the Private Copying Tariff (2025-2027)

[1] The Board's assessment of the private copying proposed tariff relies on Part VIII of the Copyright Act (the Act), which first requires the determination of whether the audio recording medium is "ordinarily used" by individual consumers to copy music during the proposed period, before considering a fair and equitable levy if deemed appropriate in the given circumstances. Both the Federal Court¹ and Federal Court of Appeal² have confirmed that an audio recording medium "will be subject to a levy as long as a non-marginal number of consumers use the product for private copying in a fashion that is not marginal".

[2] The Board is of the preliminary view that the market for blank CDs utilized for copying musical works has shrunk substantially, now occupying a minimal representation compared to the expanding share of newer formats for recording music for personal use. Multiple factors contribute to this Board's view:

- The emergence within the last 25 years of a wide range of medium to record music, including cellphones, tablets, computers, cloud, etc.;
- The significant changes in consumers' attitude and preferences, particularly towards listening to digital media broadcasts³;
- The systematic decline of importation of [optical media, magnetic, unrecorded for recording sound](#);⁴ and
- A CPCC's publication which highlights blank CDs as a "virtually obsolete" audio recording medium, indicating a recent estimate of all private copies made by Canadian totalling 5.95 billion⁵ stored on Canadians' phones and tablets.

How the Board intends to form an impression of "ordinarily used"

[3] In light of the above and the challenge of gathering probative evidence on trends relevant to the sole audio medium covered by Part VIII the Board now deems it necessary to assess the music copying behaviour of Canadian consumers more broadly, beyond the confines of leviably audio recording medium.

[4] Building upon the precedent set by the [AVS Technologies Inc.](#)⁶ decision, the Board as affirmed in [CPCC – Tariff for Private Copying 2003-2004](#) and reiterated at paragraph 21 of [CPCC – Tariff](#)

¹ [Canadian Private Copying Collective v. Z.E.I. Media Plus Inc.](#), 2006 FC 1546 (CanLII) at para 44.

² [Avs Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency](#), 2000 CanLII 15571 (FCA) at paras 3-4. [[Avs Technologies Inc.](#)]

³ [The CRTC research on listening trends per type of broadcasting services](#) and [the 2022 IFPI research and results](#).

⁴ [Statistics Canada data on Sound recording and music publishing based on format of musical recordings](#).

⁵ Given market trends, this figure is likely higher in 2024.

⁶ *Supra* note 2 at para 8.

[for Private Copying, 2017](#), that the phrase “ordinarily used” cannot be solely interpreted in quantitative terms. Instead, a combined qualitative and quantitative approach aligns more closely with the purpose of Part VIII. This enables the levy to more easily adapt to market realities and the private copying habits of Canadians. As a general rule the Board holds the view that a tariff ought to reflect trends observed in the markets to which it applies⁷.

[5] As also confirmed by the Federal Court of Appeal in [AVS Technologies Inc](#)⁸, individual consumers are key in the analysis to establish if a levy is payable on a specific blank audio media. The Board’s focus on individual consumers must not only include considerations of the extent to which the media is used by consumers for copying sound recordings in contrast to other uses, but it must also include the extent to which consumers, when copying sound recordings, use that medium in contrast to other media.

[6] To form an impression about the ordinary use of blank CDs by individual consumers, the Board will require not only data about the use of blank CDs for private copying by Canadian consumers, but also information about the private copying market in general and the current trends to which these consumers are subject, regardless of the recording medium used.

[7] In order to confirm that a non-marginal number of consumers currently use and will continue to use blank CDs for private copying in a fashion that is not marginal, the Board requests that the CPCC provides data akin to that presented in the Table at paragraph 71 of [CPCC - Tariff for Private Copying, 2010](#). Specifically, the Board seeks the following data for the last approved tariff period (2022-2024) and the forecast for the proposed tariff period 2025-2027:

- **The number of tracks copied by Canadians onto all types of medium.** CPCC must provide the exhaustive list of medium considered.
- **The number of tracks copied by Canadians onto blank CDs**
- **The number of blank CDs purchased by Canadians**
- **The number of blank CDs used by Canadians to copy music**

[8] CPCC must give a detailed explanation of how the figures were obtained and the methodology used, as applicable. Furthermore, in CPCC’s recent application for the Board to proceed without a hearing, CPCC has referenced the following estimates:

Evidence filed by CPCC in Private Copying, 2022-2024

	2022	2023	2024
1. Millions of tracks copied onto CDs	227.7	224.5	221.3
2. Millions of CDs purchased	1.96	1.58	1.28
3. Percentage of CDs used to copy music of all purchased CDs	26%	25%	24%

⁷ [CPCC - Tariff for Private Copying 2011 \(reasons\) \(December 17, 2010\)](#) at para 6.

⁸ *Supra* note 2 at paras 3-4, 6.

4. Number of CDs used to copy music (1/3) *	510,000 CDs	400,000 CDs	310,000 CDs
5. Number of tracks copied per CD used to copy music (1/4)*	447 Tracks	561 Tracks	714 Tracks

source: forecasts by Circum Network Inc.

*Board calculations based on these forecasts

[9] The data provided indicates a notable increase in the number of tracks being copied per CD used to copy to music, rising from 447 in 2022 to 714 for 2024. Based on those figures, CPCC is requested to explain:

- **What is the source of this increase;**
- **To its knowledge, whether the storage capacity of blank CDs has changed in recent years; if so, when, and by how much?**
- **To its knowledge, what are the format(s) and the bit rate(s) of the tracks copied for private copying?**

Reviewing the appropriateness of the levy

[10] The levy rate was set at \$0.29 in Private Copying (2008-2009) and has not changed since then. The Board seeks submissions on whether the current rate is commensurate to the current value of music copied onto CDs. More specifically, based on the fact that 29 cents was approved as a fair and equitable levy in 2008, the Board requests that the CPCC:

- Identify what changes have occurred since 2008 in the variables previously used to determine the levy and explain how those changes could impact the rate of the currently proposed levy.
- Explain why the market changes, including the decline of copying music onto CDs and the substitution effect created by the availability of other means to copy or access music should not translate into a lower levy.

Adjustments to the methodology for data collection and estimation

[11] Should the CPCC decide to conduct a survey similar to the ones submitted in past proceedings, the Board is of the preliminary view that the methodology of the survey should mimic the reports submitted in proceedings up to the early 2010s. The CPCC shall provide detailed explanation for any departure from this methodology.

[12] Specifically, the following adjustments would be important to increase the Board's confidence in the economic evidence submitted:

- Significantly increasing the sampling size to increase the accuracy of the results;
- Select respondents randomly (considering relevant representativeness markers such as geographic location and age group);
- Provide information about the level of confidence in the survey results and its representativeness when compared to the Canadian population;
- Consider whether rural vs. urban consumers exhibit different behaviours in terms of

- copying music onto blank CDs;
- Increasing the number of stores surveyed should the CPCC conduct a survey of retail sales of Blank CDs. This survey should also include information about CDs sold online;
 - Survey questions could:
 - Investigate respondents' willingness to copy music on CDs;
 - Collect information about the source of the music copied;
 - Ask whether respondent who copy music onto CDs do so on blank CDs or on used ones (rewritable CD);
 - Provide demographic information about all respondents aged 12 years old and over that copy music onto blank CDs;
 - Avoid circular reasoning (as previously identified in past Board reasons).