



CANADIAN PRIVATE COPYING COLLECTIVE
SOCIÉTÉ CANADIENNE DE PERCEPTION DE LA COPIE PRIVÉE
150 Eglinton Ave. East, Suite 403
Toronto, Ontario M4P 1E8
416 486 6832
1 800 892 7235
416 486 3064 [FAX]
www.cpcc.ca

CPCC C-32 Submission

Background

The Canadian Private Copying Collective (CPCC) is the non-profit organization responsible for collecting private copying royalties and distributing them to songwriters, performers, music publishers and record companies, as well as promoting the interests of rights holders as they pertain to private copying. For over a decade, the CPCC has represented copyright holders before the Copyright Board of Canada. The Board establishes the levies that may be collected after trial-like hearings where experts, representing music rights holders and organizations that represent consumers and businesses that sell leviabile blank media, present evidence and are cross-examined.

The private copying levy has been an important part of the Canadian copyright regime since 1999, when the first private copying tariff was certified by the Copyright Board, following amendments made to the *Copyright Act* (the “Act”) in 1997 to allow for a levy to be placed on blank audio recording media. Currently, the levy only applies to blank CDs and MiniDiscs, at a rate of 29 cents per unit, and is paid by manufacturers and importers of these blank media to the CPCC for distribution to rights holders.

The private copying levy has provided an effective mechanism whereby consumers are allowed to make copies of music for their personal use without infringing copyright and, in exchange, music creators receive royalties that recognize the value of private copies of their work. This solution, which addresses the widespread and unstoppable illegal copying of music, has been very successful, with the CPCC distributing close to \$200 million to music rights holders since 2003.

The New Reality: Digital Audio Recorders

Music creators currently face a problem that is both straightforward and urgent. The revenue from the levy on blank CDs and MiniDiscs is declining rapidly, as these media become obsolete as a means for copying music. As a result, the compensation that music rights holders receive for the private copying of their work is drying up, even as copying increases. In 2008, the amount available for distribution to rights holders was \$27.6 million. By 2009, that amount had dropped to \$19.8 million. For 2010, the forecast is a further drop, to \$10.8 million. In the past three years, revenue to rights holders from the private copying levy on CDs and MiniDiscs has declined 60%, and this decline has not been offset by revenue from the devices currently used most to copy

music for the simple reason that the law, as it has been unfortunately interpreted, does not allow for it.

Currently, the levy cannot be applied to digital audio recorders (DARs) because the Federal Court of Appeal ruled that they are not covered by the definition of blank audio recording media as contained in the *Act*, even though the *Act* defines “audio recording medium” as “*a recording medium regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose(...)*”. DARs, more commonly known as MP3 players, such as the iPod, are now the device of choice for copying music. In Canada, these devices are used to copy 70% - and climbing - of the 1.3 billion songs copied annually. With no levy applicable, rights holders receive no compensation for the vast majority of private copies of their work.

Canadians support the idea of fair compensation for music creators. A survey undertaken on behalf of the CPCC in 2010 by Praxicus Polling showed that two-thirds of respondents believe that those who create music recordings should be paid when private copies of their music are made.

The primary purpose of DARs is to copy and store music (90% of what is copied onto DARs is music). Music copying is what gives DARs their value to consumers and, from the point of view of those who sell them, is by far the most significant driver of the price that can be charged for them. Given these circumstances, it is unfair that music creators do not receive any compensation for the use of their work, while the businesses producing and selling the DARs that are used to copy music receive market value for their product.

C-32 Does Not Solve the Problem

Extending the levy to MP3 players can be easily accomplished by a simple amendment to the *Act*, ensuring that the definition of blank audio recording media includes devices. The amendment required to section 79, Part VIII of the *Act* would replace the existing definition of “an audio recording medium” with a definition of “an audio recording medium or device”. Unfortunately, Bill C-32 does not include such an amendment or any other amendment which would have the same effect.

Instead, the format shifting provisions proposed in Bill C-32 would allow individuals to copy music without authorization, subject to limitations, and in particular that the source copy must have been legally obtained. However, most music copying onto DARs would remain illegal since the majority of copies are made from source copies that were not legally obtained. Only 15% of music copied onto DARs comes from legal (paid or promotional) downloads and 28% from other legally obtained source copies.

The CPCC understands the importance that music consumers place on being able to shift their music from one platform to another, and agrees they should be able to do so in a seamless manner. However, Bill C-32 should address music creators' interests as well as those of consumers. The economic value of reproducing music in order to make it portable must be recognized. Rights holders deserve to be compensated for all private copies made of their work, regardless of how a copy is made.

By extending the application of the levy as described above, private copying using DARs would be legal and rights holders would be compensated. As it is now, the format shifting provisions of Bill C-32 create a situation where the value of copies made onto blank CDs or MiniDiscs would continue to be recognized, but the value of making private copies for precisely the same purpose onto DARs would not. This creates an inconsistent and unfair two-tier private copying regime.

Proposed Amendment to C-32

The CPCC cannot support legislation which would strip creators of their right to be compensated for the use of their work. Ideally, Part VIII of the *Act* would be modified to restore the originally intended purpose of the private copying regime. But Bill C-32 does not propose any amendment to Part VIII and so, at this stage, an amendment to Part VIII can only come from government. As a result, the CPCC is proposing to amend subsection (3) of the new section 29.22 which would be introduced into the *Act* by section 22 of Bill C-32 under the heading *Reproduction for private purposes*. The proposed amendment is the underlined sentence in the following excerpt:

29.22 (1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if

(a) (...)

(b) the individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the **medium or device** on which it is reproduced;

(c) (...)

(d) (...)

(e) (...)

Meaning of “medium or device”

(2) For the purposes of paragraph (1)(b), a **“medium or device”** includes digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject-matter through the Internet or other digital network.

Limitation - audio recording medium

(3) In the case of a work or other subject-matter that is a musical work embodied in a sound recording, a performer’s performance of a musical work embodied in a sound recording or a sound recording in which a musical work or a performer’s performance of a musical work is embodied, subsection (1) does not apply if the reproduction is made onto an audio recording medium as defined in section 79. For greater certainty, it is deemed always to have been the law that “recording medium” referred to in the definition of “audio recording medium” in section 79 includes a “medium or device” as used in this section 29.22.

Passage of this amendment would make it possible for the CPCC to ask the Copyright Board to approve a levy that would apply to MP3 players such as the iPod.

No Basis for Fear of Excessive Rates

An amendment allowing the private copying levy to be extended to DARs will provide fair compensation to rights holders but does not mean that there will be an undue financial burden on consumers. In 2003, before the Federal Court ruled that the current wording of the legislation did not allow for a levy on devices, the Copyright Board set the levy on DARs at a range between \$2 and \$25, depending on the memory capacity of the device. The CPCC believes that this range is still valid today, but that determination would be up to the Copyright Board, based on the evidence and representations of interested parties in a public hearing process.

If legislators remain concerned, however, with the lack of certainty as to what the amount of the levy would be, the *Act* makes effective provision for the issue to be resolved by way of a regulation. The regulation could provide for a transitional cap on the amount of the levy.

The *Act*, as it currently reads, provides that in exercising its power under Part VIII, the Copyright Board *"shall satisfy itself that the levies are fair and equitable, having regard to any prescribed criteria"* (subsection 83(9)). Section 87 provides that *"The Governor in Council may make regulations (...) (b) prescribing anything that by this Part is to be prescribed..."*. **There is, therefore, no legitimate basis for fear that levy rates would be set at an excessive level.**

No Basis for Fear of a Levy on All Devices with a Hard Drive or on Any Inappropriate Device

The *Act* also makes provision for the Governor in Council to limit the scope of qualifying “devices” by regulation. Specifically, the definition of "audio recording medium" at section 79 of the *Act* permits the Governor in Council to prescribe by regulation that a particular type of "recording medium" is not an "audio recording medium".

The process set out in the *Act* is one that would provide advance notice of any medium or device on which the CPCC wished to collect a levy. The CPCC must file a proposed tariff by March 31st of the year prior to the year in which the levy would come into effect. If the CPCC sought a tariff on a device deemed inappropriate, the Governor in Council could issue a regulation that prevented the Copyright Board from considering such a request. **There is, therefore, no legitimate basis for fear that a levy would be imposed on all devices with a hard drive or on any device to which a levy should not apply.**

Fairness for Creators and Consumers

The private copying levy has answered an important need for both consumers and music artists in Canada, but it now needs to be brought up-to-date to ensure that it reflects how copies of music are actually made today. Without an amendment like the one the CPCC now proposes, Canadians’ private copying activity will increasingly be illegal, and royalties to music creators to compensate for the massive private copying of their work will continue the decline which began three years ago. An important – and often vital – source of revenue for creators will soon disappear.

The private copying levy is not a tax, nor is it charity or a subsidy program. The revenue does not go to the government, nor does it support the provision of public services. This is *earned* income, not a handout, for music creators. This income can make the financial difference between continuing to create and abandoning music altogether.

The extension of the private copying levy has strong support across the stakeholder spectrum. Attached are letters of support from 19 organizations, 357 English language and 117 French language artists, who are all strongly in favour of the CPCC’s position that the private copying levy should be extended to DARs to provide compensation to songwriters, music publishers, artists and record labels.

One of the stated goals of the government when introducing Bill C-32 was to strike a balance between the interests of consumers and rights holders. That balance requires that the levy be updated, taking into account the new technologies being used by consumers to copy music. This means allowing the levy to apply to DARs and permitting consumers to copy music onto such devices without infringing copyright. The result would be fair for both rights holders and consumers.