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## Backgrounder on the Proposed Private Copying Tariff 2008-2009

### What are the proposed levy rates?

	2008-9 Proposed Rates	Current Rates
<b>Audio cassettes of 40 minutes or more</b>	29¢	29¢
<b>CD-R or CD-RW</b>	29¢	21¢
<b>CD-R Audio, CD-RW Audio or MiniDisc</b>	85¢	77¢
<b>Secure Digital, MultiMedia, and Memory Stick removable electronic memory cards over 256 MB</b>		
• no more than 1 GB	\$2	n/a
• more than 1 GB and no more than 4 GB	\$5	
• more than 4 GB	\$10	
<b>Digital Audio Recorders</b>		
• No more than 1 GB	\$5	n/a
• more than 1 GB and no more than 10 GB	\$25	
• more than 10 GB and no more than 30 GB	\$50	
• more than 30 GB	\$75	

### Why does the 2008-2009 proposal include an increase in the CD-R and CD-RW levy?

During the October 2006 Copyright Board hearing for the 2005-2007 tariffs, the CPCC presented up-to-date research on the various factors that the Copyright Board usually takes into account in setting the rates.

The existing levy rate of 21¢ for CD-Rs and CD-RWs was set by the Copyright Board on December 15, 2000. Key factors considered by the Board in reaching its decision on the levy rates are the amounts rights holders receive when a pre-recorded CD is sold, the percentage of all recordable CDs sold that are purchased by individuals, and the percentage of all copying onto recordable CDs that is accounted for by recorded music. All of these factors have changed since 2000 and these changes provide the basis for the CPCC's request that the levy rate be increased to 29¢. The proposed rate factors in a reduction of 6% to account for copying already authorized by legal online music services, such as Puretracks and iTunes.

Some of the research the CPCC presented on CD-R/RWs showed that between July 1, 2005 and June 30, 2006, 50% of all CD-R/RWs sold were purchased by individual Canadian consumers, and 60% of everything that they copied onto their CD-R/RWs was music.

## **Why is a rate increase proposed for CD-R Audio, CD-RW Audio, and MiniDiscs?**

As with CD-R/RW, when the CPCC applied the Copyright Board's usual methodology to the latest research on how these media are used for private copying, we found that an increase from 77¢ to 85¢ was also appropriate.

## **Why does the 2008-2009 tariff proposal include electronic memory cards?**

The CPCC first requested a levy on removable electronic memory in its 2003-2004 tariff proposal. However, the Copyright Board concluded that "insufficient evidence was placed before the Board to demonstrate that any particular type of removable memory qualifies under the *Act*." The Board noted that there were multiple formats of memory cards available and that the evidence was not clear enough on which formats were ordinarily used for private copying.

There have been important changes in the market for memory cards over the past few years. When the CPCC applied for a levy in 2003-2004, there were five different formats of cards that could be used with various MP3 players. Now almost all MP3 players and music cell phones that use memory cards use only Secure Digital or MultiMedia cards, or Sony Memory Sticks. Those are the only memory cards on which the CPCC now proposes a levy. The proposed levy is also limited to higher capacity cards (over 256 MB) since they are more likely to be used for music files.

The CPCC's ongoing survey research clearly indicates that memory cards are ordinarily used by individual Canadians to copy music. During the period from July 1, 2005 to June 30, 2006, 25% of all the content copied onto electronic memory cards, *including cards of all formats and capacities*, was music, and 14% of respondents copied only music. Twenty percent of those surveyed also reported that the last time they had copied onto an electronic memory card, the content they had copied was music.

## **What are Digital Audio Recorders and why does the CPCC propose a levy on them?**

In its decision on the 2003-2004 Private Copying Tariff, the Copyright Board referred to iPods and other MP3 players as Digital Audio Recorders. According to the CPCC's ongoing research, more than 90% of all copying onto Digital Audio Recorders is of pre-recorded music (96% of copying for the most recent six-month period, which ended December 31, 2006). Canadians are also using Digital Audio Recorders more and more for private copying of music, as compared with other blank audio recording media. In 2003/2004, 1% of their most recent music copying used Digital Audio Recorders, but in 2006/2007 this has increased to 29%.

## **How can the CPCC request a levy on Digital Audio Recorders, when the Federal Court of Appeal ruled that such a levy is unacceptable without a change to the *Copyright Act*?**

The CPCC applied to the Copyright Board in its proposed 2003-2004 Private Copying Tariff for a levy on *the memory embedded in* a Digital Audio Recorder. This approach assumed that the hard drive or flash memory incorporated into Digital Audio Recorder was something separate from the Digital Audio Recorder itself and, therefore, that the levy could apply to the embedded memory. The Copyright Board agreed with the CPCC and approved a levy on that basis.

Some of the parties affected by the new levy challenged the Board's decision. They argued to the Federal Court of Appeal that the embedded memory in a Digital Audio Recorder is no longer something separate when it is incorporated into a Digital Audio Recorder. As the Court itself noted, it was asked to decide "whether a permanently embedded or non-removable memory, incorporated into a digital audio recorder (MP3 player), retains its identity as an "audio recording medium" and can be levied as such under Part VIII" (Federal Court of Appeal Decision, paragraph 133). The Court ruled that "The Board erred when it held that it could certify a levy on *the memory integrated into* a digital audio recorder" (Federal Court of Appeal Decision, paragraph 160, emphasis added).

The Federal Court of Appeal was not asked to decide, and did not hear argument, as to whether a Digital Audio Recorder is itself an audio recording medium as defined in the *Copyright Act*, that is, a medium onto which sound recordings may be reproduced and that is of a kind ordinarily used by consumers for that purpose. The CPCC believes that this is clearly the case. Advice from the CPCC's legal counsel, Ogilvy Renault, confirms that there is a sound basis for requesting a levy on Digital Audio Recorders.

The CPCC's current proposal is consistent with the decision of the Federal Court of Appeal. The 2008-2009 proposed levy applies not to internal memory, but to Digital Audio Recorders themselves.

### **What is and what is not a Digital Audio Recorder?**

The proposed tariff includes a definition of what constitutes a Digital Audio Recorder, which is intended to *exclude* cellular phones, PDAs (such as Palm Pilots), or personal computers that also have embedded memory and can record and play music. However, the definition is intended to *include* Digital Audio Recorders that may also have secondary uses, such as calendar or address book functions, radio reception, data storage, etc.

For example, iPods would be subject to the Tariff because they are designed, manufactured, advertised and primarily used for copying music and are capable of being used to play music, even though they may also be used to store digital images and to copy and play audio-visual files.

### **Aren't Digital Audio Recorders a *device* rather than a *medium*, and therefore not leviable under the *Copyright Act*?**

Technology has changed significantly since Parliament created the private copying regime in the *Copyright Act*. At that time, all of the existing equipment used to copy music was separate from the media onto which the music was copied. The most typical examples then were analogue audio cassettes (tapes) and the analogue recorder and playback equipment used to record onto tapes (tape recorders). It was obvious that no one could copy music onto a tape recorder itself, only onto a tape.

In contrast, with Digital Audio Recorders, such as the iPod, the recording, storage and playback functions are no longer separate. Recorded music is copied onto the Digital Audio Recorder itself, rather than onto any separate medium that must be inserted into a separate device. The question the Copyright Board must now decide is whether a Digital Audio Recorder itself is an "audio recording medium" as defined in the private copying provisions of the *Copyright Act*, which includes Parliament's direction that an "audio recording medium" should be defined "regardless of its material form".

## **Does the CPCC believe Canadians will support this proposal?**

A June 2006 nation-wide survey conducted by the Environics Research Group confirmed that 60% of Canadians believe that music creators should be compensated when copies of their music are made without their authorization.

The same survey found that, among those Canadians who make private copies of recorded music, 80% said they would consider a levy of 30¢ on CD-Rs and CD-RWs to be fair and reasonable. Similarly, 79% of Canadians who copy music said that a levy of \$40 on an iPod or other Digital Audio Recorder with a capacity of 30 GB would be fair and reasonable.

The proposed tariff will make it possible for the public to contribute to rights holders' ability to continue to create. The private copying levy is an increasingly important source of revenue for all music rights holders.

To view the Environics survey, please go to <http://cpcc.ca/english/pdf/FC62-CPCC-Omnibus-Report-FINAL-English.pdf>.