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Re: *Private Copying Tariff, 2008-2009*

The new and evolving technologies to which we have access have become an interesting challenge to copyright law and its enforcement. The proposed Private Copying Tariff for 2008-2009 is well-intended but fails in three regards: the source from which the tariff has been derived; the understanding of how individuals are accessing, copying and storing musical works; and the method by which creators of musical works are compensated for their works.

The Canadian Private Copying Collective commissioned Environics Research Group to conduct a study in 2006 among Canadians aged 18 and older. This survey was conducted among what amounted to less than 0.005% of Canadians aged 20 and older, based on the 2001 census. The majority of questions requested a response of *opinion*, not of informed decisions regarding application of the Copyright Act. The enactment of a tariff affecting all Canadians should surely be based on the collective endeavor of individuals who are familiar with Canadian copyright law and the current practices of private copying—not on the opinion of 993 individuals participating in a survey, 81% of which were unaware of the current levy of \$0.21 on blank CDs.

The first item addressed in the report provided by Environics is whether the respondents *feel* “that people who create music recording should be paid when private copies of their sound recording are made or that the individual consumers should be free to make private copies of prerecorded music without paying any money to the people who created the music”. Other questions posed to the participants included ones to gauge their support of various levies on blank CDs and mp3-players. Although the responses serve well for the reviewers to understand that more than half (60%) of the respondents feel creators of musical works should be compensated for private copies, it should not have any bearing on the legitimacy of the tariff itself. The current Copyright Act, although in need of being updated (as recently attempted through Bill C-60), extends private copying as a right to copyright users. The tariff is possibly taxing Canadians for a right which is inherent in the current copyright law system. The fact that 81% of the respondents were unaware of the current levy on blank CDs suggests that they may also be unaware of their rights as copyright users in Canada (and of other aspects of the Copyright Act).

Even if the Copyright Board finds the levy to be a legitimate extension of the Copyright Act, the amounts proposed by the CPCC are questionable.

A little over half (54%) of the survey's participants responded that the current price of \$0.50 for a single blank CD is "very reasonable". The study, however accurately, concludes that "an overwhelming majority of Canadians think the current price of blank CDs is reasonable", despite the fact that 33% of the respondents thought the current price is merely "somewhat reasonable" and 7% thought it is "not reasonable" (6% did not respond). Their study did *not* ask how reasonable the respondents felt it was for a private-copying levy to account for 42% of the pretax price of a blank CD.

The survey also found that 34% of respondents "have purchased any blank CDs for their own personal use, as opposed to business use, over the past six months". The survey does not define "personal use", which could extend to such uses as the storage of photos taken by the individuals, or the archiving of personal data from their computers. Of the respondents, 29% had copied prerecorded music onto a blank or reusable CD. If one juxtaposes these responses, it seems that the majority of respondents who purchased blank CDs for personal use had copied prerecorded music onto them. The survey does not take into account the purchases of blank CDs for business use, nor does it account for the *volume* of blank CDs purchased for personal use, business use or the specific use of blank CDs for private copying of musical works.

The report provided by Environics does not include any questions of the participants' opinions on levies for removable electronic memory cards, but this category of digital storage media is in the CPCC's proposed tariff. In the CPCC's *Backgrounder on the Proposed Private Copying Tariff 2008-2009*, they indicate that these media were not included in the 2003-2004 levy because:

...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.

The CPCC claims that "[n]ow almost all MP3 players and music cell phones that use memory cards use only Secure Digital or MultiMedia cards, or Sony Memory Sticks". It, however, fails to address the fact that these same memory cards are in fact primarily used as the high-capacity successor of 3.5 floppy diskettes and as expandable media for devices such as digital cameras and PDAs. The majority of mp3-players include non-removable storage and few offer expandable media via memory cards¹

The CPCC further fails to address the amount of music which is privately copied *and* represented by CPCC. Their website indicates that "only Canadian recording artists and record

1 On March 25, 2007, cnet.com had a total database of 624 portable mp3-players. A search for "mp3 player expandable" resulted in 10 non-sponsored results in the category of mp3-players. A more official review of mp3-players which use memory cards and of the use of memory cards in general should be made before they are included in a tariff for musical works.

companies may receive payments under current law” and “[s]ince no inventory of privately copied tracks exists, distribution is based on representative samples of radio airplay and album sales, which are given equal weight in the distribution”. Their backgrounder is silent to whether the proposed levies have accounted for the actual amount of music which benefit from the levies, as opposed to the amount of music which is privately copied and is neither from a Canadian recording artist/record company nor enjoys radio airplay or album sales through retail outlets. Their website states that in 2002 the CPCC collected \$26 million from private copying royalties, which were presumably only distributed to Canadian recording artists and record companies which enjoyed radio airplay and album sales in 2002.

The Copyright Board is urged to ensure that the proposed Private Copying Tariff is legitimate and reasonable based not merely on the data provided by the CPCC but by a more thorough investigation of the current private-copying practices of Canadians. The Copyright Act allows creators of musical works to be compensated for unauthorized non-private copying, and also grants copyright users permission to create copies for private use. Does the proposed tariff truly serve the interests of both the copyright holders *and* users?

A larger and more obviously offending problem which has not been addressed by the tariff is the popularity of file-sharing through the internet, particularly of musical works. Rather than imposing a levy for something the current Copyright Act allows Canadians to do, we should be working towards updating the Copyright Act to incorporate new technologies and find new and reasonable sources of compensation for copyright holders. Initiatives such as Creative Commons licensing are a response to the need for countries to revisit their copyright laws so they cover not merely new media but the new ways in which creative works are released, accessed and used. Web-based stores such as iTunes, PureTracks and eMusic are examples of commercial endeavors which serve both the consumer and the artist.

Creators of musical works should be compensated for unauthorized non-private copying of their work, but a levy on digital media is not the way to do it.

Sincerely,

Julianna Yau