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# Canada's Private Copying Regime



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## Why Do We Have A Private Copying Regime?

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- Regime part of 1997 copyright amendments in response to growing problem of widespread, unauthorised copying of music by consumers
  - Initially, copying largely from vinyl records and radio onto blank cassettes
  - P2P file-sharing not anticipated
- Regime represents a trade-off
  - Eligible rights holders given compensation through a levy on blank recording media
    - Set by the Copyright Board and paid by media importers and manufacturers (but embedded in retail price)
    - Canadian Private Copying Collective (CPCC) collects levy on behalf of rights holders
    - Levy distributed to Canadian and foreign songwriters/publishers, but only to Canadian performers and record labels
  - In exchange, consumers allowed to copy music onto media “ordinarily used” for that purpose
    - Given the compensation, copying need not be from “authorized” or legitimate sources

## Existing Challenges For Regime

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- Certain issues acknowledged even prior to implementation
  - Cross subsidization by those who do not engage in private copying – a “necessary evil”
    - e.g., businesses who use CDs for data backup, and consumers who use them for storing photos still pay levy
      - CPCC operates a voluntary “zero-rating” scheme: businesses can apply for reimbursement if they have paid at least \$60 in levies.
      - However, Federal Court of Appeal has ruled that Board cannot take it into account when levy-setting
  - Grey/black markets for recording media
    - Significance disputed, but there is clear evidence that it occurs
    - Several successful court cases against importer/manufacturers who sell media without paying the levy
- Growing Challenge
  - More and more multi-purpose media available for storing music: DVDs, Digital Audio Recorders (MP3 Players such as iPods), Computers

## **Amounts Collected Under The Regime**

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- Copyright Board fixes levies after considering the representations from all interested stakeholders, i.e., rights holders, importers and manufacturers of media, retailers, consumers
- Consumers face gradual increase in levy amounts and range of levied media
- CPCC collected over \$162 million in levies between 1999 and 2005 (\$35 million in 2005)
  - \$145 million was available for distribution to rights holders (net of administrative costs of \$17 million or about 12% monies collected).
  - Total remuneration distributed as of January 2006: \$93 million
    - There is an administrative lag in distributions of monies to artists, but some complain that it is too slow

## Key Decisions Of The Copyright Board

- Board has certified 3 private copying tariffs, and has received a new proposal from CPCC this month

	Private Copying I (Dec. 1999) \$	Private Copying II (Dec. 2000) \$	Private Copying III (Dec. 2003) \$	CPCC Proposal (Feb. 2007) \$	Current retail price per unit** \$	Existing Levy as % of Price	Projected retail price per unit*** \$	Proposed Levy as % of projected price***
Cassettes	0.23	0.29	0.29	0.29	1.43	20.3	1.43	20.3
CD-R, CD-RW	0.05	0.21	0.21	0.29	.30	70.0	0.38	76.3
CD-R (Audio)	0.61	0.77	0.77	0.85	4.00	19.3	4.08	20.8
DAR: <1 GB	N/A	N/A	2.00*	5.00	60.00	N/A	65.00	7.7
DAR: >1 GB, <10GB	N/A	N/A	15.00*	10.00	229.00	N/A	239.00	4.2
DAR: >10 GB, < 30 GB	N/A	N/A	25.00*	50.00	299.00	N/A	349.00	14.3
DAR: >30 GB	N/A	N/A	25.00*	75.00	400.00	N/A	475.00	15.8
Memory Stick <1 GB	N/A	N/A	N/A	2.00	50.00	N/A	52.00	3.8
Memory Stick >1 GB, <4 GB	N/A	N/A	N/A	5.00	70.00	N/A	75.00	6.7
Memory Stick >4 GB	N/A	N/A	N/A	10.00	170.00	N/A	180.00	5.6

"DAR" = Digital Audio Recorder, i.e., iPod, MP3 player

\* indicates that levy was reversed on appeal with by Federal Court of Appeal in Dec. 2004)

\*\* actual or mid-range price taken from www.futureshop.ca - March 7, 2007. For CDs and Cassettes this is based on bulk rate per unit.

\*\*\* assumes that full increase in levy is added to current price

## International Comparison – Civil Law Jurisdictions

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- In the 1980s and 1990s, most European countries and Japan implemented a private copying regime for music broadly similar to Canada's
  - On blank CD-Rs, levy in 2005 ranged from 0.04 Euros (Switzerland) to 0.35 Euros (France)
- However, most have also extended their regimes to audio visual works (movies, TV programs)
- Eligible devices/media
  - Belgium, France, Germany, the Netherlands, Spain, Portugal and others cover blank DVDs
    - Levy in 2005 ranged from 0.14 Euros (Portugal) to 1.34 Euros (Denmark)
  - Some cover digital devices, although direct comparisons with Canada are difficult depending on how “audio recording medium” is defined.
    - France, Germany, Spain and others cover MP3 players (but not Japan)
      - For a 40GB iPod, levy ranges from 2.56 Euros (Germany) to 15 Euros (France)
    - Many, including Germany & Spain cover computers, either hard drives or CD/DVD burners for certain purposes (e.g., audiovisual works)

## International Comparison – Common Law Countries

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- The US has a limited levy regime covering only specialized audio recording media & equipment, e.g., Digital Audio Tapes (DAT) and DAT recorders
  - Provides specific exception for private copying on this media
  - At its peak, approx 5.3 million USD was collected in 2000
  - In 2006, regime generated approx \$1.8 million USD (vs. our \$35 million CAD)
    - will likely decline further due to the decrease in use in DAT technology
- Rather than levy-based regime, some countries have or are contemplating “format shifting” exceptions (e.g., allow copying of music from legit sources onto Digital Audio Recorders)
  - Australia recently enacted such an exception - *Copyright Amendment Bill 2006*
  - New Zealand has introduced a bill proposing a limited format shifting right – *The New Technologies and Performers’ Rights Amendment Bill*
  - UK is considering it – Gowers Report calls for recognition & Prime Minister Blair has expressed his support

## Developments Relevant To The Regime

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1. Cross-subsidization – is it becoming a bigger problem?
  - Though subject to the levy, not everyone who purchases blank recording media uses it for copying music, e.g., CDs often used for data back up, photos
  - New media (e.g., memory sticks and cards) likely entail even higher rates of cross-subsidization, given their wider range of uses
    - On the other hand, regime does not even cover Digital Audio Recorders which are primarily used for music – now 29% of music copying, according to CPCC
2. New Sources – should the regime continue to allow copying from any source or be restricted to authorized sources?
  - Internet is now the primary source for private copying – 48% according to CPCC
    - Most Internet material is not authorized (e.g., P2P file-sharing)
  - If source must be authorized, amounts collected through the regime will go down
    - Contrary to the basic rationale of the regime (i.e., lack of practical control over copying justified levy-based compensation scheme – source is irrelevant);
    - BUT, technological measures may help rights holders regain lost control



## Developments Relevant To The Regime

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3. Technological protection measures – will consumers be able to continue to copy?
  - If effective, TPMs reduce the amount of music available for private copying
    - If Board works well, levies will reflect adoption/effectiveness of TPMs
    - So far, however, levies have not decreased on “old technology” (e.g., cassettes and CD-Rs) and are only revisited every 2-3 years
4. WIPO Treaty Ratification – Justice advises that amendments to the regime are required to ensure Canada’s compliance with the 1996 WIPO treaties:
  - Compensation to foreign record companies and performers
    - levies could double in amount (e.g., from \$35 million to \$70 million) and most of the increase would leave the country (Hirschhorn study prepared for IC)
    - at the other extreme, levies could remain constant, such that Canadian rights holders would get less
  - Restrict source to “authorised” sources (e.g., no P2P file-sharing)
    - will reduce the amount collected

## **Stakeholder Positions – Revisiting Regime Will Create Anxiety**

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- Songwriters/publishers and performers
  - Most vocal proponents of private copying system – an important source of revenue to compensate for “large volume of unauthorized and uncontrollable copying onto these media”
- Record labels (e.g. Sony BMG, EMI, Warner, Universal)
  - Original demandeurs of regime in 1980s but no longer strongly support it
  - Now seek different models to prevent music piracy, i.e., WIPO treaty implementation
- Retailers
  - Oppose regime due to administrative requirement to collect the levy; existence of black and grey markets for blank CDs; and disclosure of financial data to CPCC
- Consumer/public interest – mixed
  - Some argue for legitimizing Internet file-sharing through a levy scheme
  - Others argue against regime in favour of format shifting exceptions that would allow uncompensated private copying.

## Discussion

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1. Copyright Reform needs to review issues related to private copying
  - Cabinet, MPs, rights holders, key trading partners expect that the next copyright amendments will put Canada in a position to ratify the 1996 WIPO treaties
  - Copying technology is changing rapidly, and the regime is not keeping up
    - Many consumers are infringing or left in a legal limbo
  - Regime underscores a broader public policy issue – how to adjust the copyright framework in the face of technologies which allow widespread copying and distribution?
    - In lieu of a private copying regime, should rights holders be provided with stronger legal tools to control the use of their material (e.g., TPM protection)
    - If so, should consumers nonetheless be allowed to engage in “format-shifting”, i.e., to play their lawfully-acquired material on all platforms (e.g., copying a CD to an iPod)
    - Alternatively, should the private copying regime be expanded to cover other types of material (e.g., audio-visual) and a broader range of recording media and equipment (e.g. computer hard drives)?
  - Any re-opening of the regime will be contentious