SUBMISSION OF THE CANADIAN PRIVATE COPYING COLLECTIVE WITH RESPECT TO

Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act

Filed with

THE HOUSE OF COMMONS STANDING COMMITTEE ON CANADIAN HERITAGE

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SUMMARY OF CPCC'S SUBMISSION: SECTION 92 REVIEW

In response to the specific issues raised in the Section 92 Report the CPCC submits that:

- the *Act* should continue to define private copying in a technology neutral manner, allowing the Copyright Board to reflect technological change in its decisions;
- CPCC's zero-rating scheme makes it unnecessary to change the *Act* to allow the Government or the Copyright Board to exempt classes of buyers from levy payment;
- National treatment for performers and makers is not required under the WPPT;
- The private copying provisions of the *Act* do not authorize the theft of the source material from which a copy is made; in particular peer-to-peer file trading on the Internet remains an infringement of copyright;
- All importers, including those importing for their own use, should pay the levy;
- Retailers should be liable for payment of the levy when they knowingly or negligently sell blank media for which their supplier has not paid the levy; and
- No change is required to exclude copy protected sound recordings from the levy, since to the extent such technology is successful, copies will not be made.

The volume of private copying increased to a 12-month total of 1.1 billion tracks of recorded music in 2001/2002. An estimated 3% of tracks copied were authorized by music rights owners; while for over 1 billion tracks (97%) the only remuneration came from the private copying levy created by Parliament in 1997. Since 1999, music industry revenues from sales of pre-recorded CDs have declined by 20%. Digital rights management (DRM) and copy protection technologies (CPT) create the potential to control on-line access to recorded music and to copy-protect pre-recorded CDs. However, such technology is in the very early stages of implementation. There are tens of millions of unauthorized, unprotected tracks available on the Internet and hundreds of millions of unprotected, pre-recorded CDs.

In 2002, the $28 million collected from the levy represented 2.8¢ for each of the 1 billion tracks copied. The music industry has a strong incentive to implement DRM and CPT technologies since, where a legitimate, on-line market is beginning to emerge, in the United States the typical rate per track is 99¢ U.S..

The private copying levies for 2000 to 2002 covered audiocassettes, MiniDiscs, CD-R/RW Audio and CD-R/RWs. CPCC has proposed extending the levy to recordable DVDs, MP3 players, and removable electronic memory ordinarily used in MP3 players. Devices such as cellular telephones, digital cameras, PDAs, or personal computers would be explicitly excluded even if they had as a secondary function copying and playing recorded music.

From 2000 to 2002 the private copying levy generated $59.3 million, of which $54.4 million was available for distribution to music copyright owners. A combined distribution for 2000 and 2001 was undertaken, with annual distributions planned for 2002 and 2003. The first distribution of $7 million was made in January 2003. By the end of 2003 it is expected that the $28 million in royalties available from 2000 and 2001 will be largely distributed and a good start made on distributing the $26 million available from 2002.

In response to the concerns of churches, high technology companies and other institutions and businesses, CPCC administers a voluntary "zero-rating" program which now permits institutions and businesses to purchase blank media without paying the levy.

SUBMISSION OF THE CANADIAN PRIVATE COPYING COLLECTIVE: SECTION 92 REVIEW

Introduction

On June 18, 2003 the House of Commons Standing Committee on Canadian Heritage initiated its statutory review of the *Copyright Act*, as mandated by section 92 of that *Act*. At that time, the Committee requested that individuals and organizations with an interest in presenting briefs and appearing before the Committee should provide submissions by September 15, 2003.

This submission, filed on behalf of the Canadian Private Copying Collective (CPCC), was approved by and presents the views of the CPCC's Board of Directors. The members of the Board of Directors are listed in Appendix A. The submission has two principal purposes. The first is to provide the Committee with factual information in summary form concerning the implementation of the private copying legislation passed in 1997, including an assessment of its impact. The second is to respond to issues specific to private copying that are raised in the October, 2002 report to Parliament entitled *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act.*

The Importance of the Private Copying Tariff

The volume of private copying in Canada increased to an estimated annual total of 1.1 billion tracks of recorded music during the year that began in July 2001 and ended in June 2002.[1] Only 3% of the tracks copied during this period were authorized by the rights holders who created this recorded music and involved a payment by the copier. For the remaining 97%, or over one billion tracks, the only payment the rights holders received was through the private copying levy created by Parliament in 1997.

Not only was the volume of private copying increasing during this period but, in a way that could not have been foreseen in 1997, the revenues the music industry receives from the sale of physical copies of pre-recorded CDs began to decline in 2000. According to the Canadian Recording Industry Association's annual survey, the number of pre-recorded CDs sold in Canada declined by 2% in 2000, followed by a further decline of 6% in 2001 and an additional 6% drop in 2002. That decline has continued into 2003. The revenue received from the sale of pre-recorded CDs during the first six months of 2003 was 19.5% lower than in the corresponding period in 1999. For individual Canadian songwriters, composers, performers, music publishers and the makers of Canadian sound recordings this has resulted in a corresponding decline in revenue.

In this context, there is particular appreciation in the Canadian music industry of the initiative the Government and Parliament took in 1997 to implement private copying legislation. The fact that more than 40 other countries have implemented similar legislation is an indication that there is a widely recognized need to make legislative provision for a private copying levy. A list of those countries is attached as Appendix B.

Changes in technology have created a hope in the music industry that its reliance on private copying legislation in order to receive remuneration when recorded performances of musical works are copied will decline. Specifically, digital rights management (DRM) creates the potential in the future to control online access to recorded music, authorizing its use and establishing a market rate that must be paid by copiers to have access to the music and to make a copy. Common DRM techniques are encryption, digital watermarking, and copy protection technology (CPT), which involves encoding the terms and conditions under which works can be used and embedding them in the file. CPT makes it possible to release pre-recorded CDs that cannot be copied.

However, as the 3% figure noted above indicates, such technology is in the very early stages of implementation. At the present time tens of millions of tracks are available through the Internet on an unauthorized and unprotected basis. Similarly, there are hundreds of millions of pre-recorded CDs available that are not protected and that, as a result, can be copied directly or uploaded to the Internet and made available for downloading and copying without authorization. In the absence of the private copying legislation, they would be copied with absolutely no payment to those who create the recorded music. It should be noted, as discussed later in this report, that there is nothing in the private copying legislation that makes unauthorized peer to peer trading of music files on the Internet a legal activity.

The main point to be made is that these technological developments are very far from having altered the need that led Parliament to pass the private copying legislation in 1997. At the same time, the increasing volume of private copying activity and the declining revenues of authors, performers, and makers of sound recordings from the sale of pre-recorded CDs have significantly increased the importance of this legislative initiative. Its importance is unlikely to decline substantially in the short to medium term at least.

Tariff Implementation: 1999 to 2002

The CPCC was created in 1998 as a vehicle for efficiently administering the new private copying right established by act of Parliament the previous year. The CPCC has provided the five collectives that are its members with an efficient and unified means of pursuing the new right granted to authors, performers, and makers of sound recordings. The members of the CPCC are the following collectives:

- Canadian Musical Reproduction Rights Agency (CMRRA)
- Neighbouring Rights Collective of Canada; (NRCC)
- Société de gestion des droits des artistes-musiciens (SOGEDAM)
- Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC)
- Society of Composers, Authors and Music Publishers of Canada (SOCAN)

Authors and publishers of musical works are represented by CMRRA, SOCAN and SODRAC. Recording artists and musicians are represented by NRCC and SOGEDAM. The makers of sound recordings are represented by the NRCC

The First Tariff

In 1998 each of the five collectives had filed separately tariffs that would have applied to both 1999 and 2000. However, the process of combining the five collectives into the CPCC and developing a unified case to present to the Copyright Board delayed the first private copying hearing until part way through 1999. In order to avoid having the tariff apply retroactively, the CPCC decided that it would voluntarily forego collecting the levy until the Board's decision came into effect. The decision was announced on December 17, 1999, following a hearing that ended on September 24, 1999. As a result, for almost all of 1999 no royalties were collected.

In its case to the Copyright Board in the 1999 hearing, the CPCC asked the Board to approve a levy on the basis of a set amount for each 15 minutes of available recording time. The 15-minute rate requested by CPCC was 20 cents for analogue audiocassettes, 39 cents for MiniDiscs, digital audiotapes, CD-R Audio, and CD-RW Audio, and 9 cents for CD-Rs and CD-RWs. (See Appendix C for a glossary of blank audio recording media.) After listening to the arguments of the objectors, the Board, in its decision, concluded that the rates should instead be set as a flat amount for each unit sold, rather than on a 15 minute basis, since this would be easier for importers and manufacturers to administer. Further, the rates set by the Board were considerably lower than those proposed by CPCC: 23.3 cents per unit for audio cassettes of 40 minutes or more, 60.8 cents for MiniDiscs, CD-RW and CD-RW Audio, and 5.2 cents for CD-Rs and CD-RWs. The Board also determined that digital audiotapes did not qualify as a leviable medium under the provisions of the *Act*.

The private copying provisions of the *Act* also require that the Board establish the percentages of the royalties collected that should go to each category of rights holder in recorded music. The Board determined that authors were entitled to 60.8%, performers to 21.5%, and makers of sound recordings to 17.7% of the royalties to be

distributed by CPCC. The principal reason for the lower proportions payable to performers and makers is that only Canadian performers and Canadian makers qualified for payment, whereas in the case of the authors, payments are made on the basis of national treatment.

The Second Tariff

When the CPCC filed its second proposed tariff to cover the period 2001 and 2002, it did not propose that the Board identify as leviable media any media additional to those approved in the Board's initial decision. However, this was a period that saw a dramatic increase in the purchase of CD-Rs and CD-RWs by individuals and an increase in their use to copy recorded music. In its decision the Board acknowledged this change, noting that "Digital private copying is no longer reserved for techies, and is now becoming a commonplace activity. CD burners are being sold in numbers that were not even imaginable last year". [2]

In its submissions to the Copyright Board the CPCC asked the Board to increase the rate for MiniDiscs, CD-R Audio and CD-RW Audio to $1.39 and the rate for CD-Rs and CD-RWs to 49 cents. The CPCC also proposed a three-tiered rate structure for audiocassettes: 47 cents for cassettes 40 to 60 minutes in length; 70 cents for cassettes over 60 minutes up to and including 90 minutes; and 86 cents for cassettes over 90 minutes. After hearing the arguments and evidence of the CPCC in support of its proposed rates and listening to the arguments of objectors to the tariff, the Board set the rate for MiniDiscs, CD-R Audio and CD-RW Audio at 77 cents and the rate for CD-Rs and CD-RWs at 21 cents. A single rate of 29 cents was approved for all audiocassettes of 40 minutes or more.

In its decision, the Board determined that there should be a change in the apportionment of the levy. The portion established for eligible authors was set at 66%, with the portion for eligible performers at 18.9% and for eligible makers of sound recordings at 15.1%. As noted above, only Canadian performers and makers at present qualify to receive royalties from private copying.

The Tariff for 2003 and 2004

As this submission is being drafted, the Copyright Board has not yet announced its decision on the CPCC's proposed tariff for 2003 and 2004. Until the Board's decision on this proposed third tariff comes into effect, all of the provisions of the previous tariff remain in effect. This reflects a decision of the CPCC's Board of Directors not to seek the retroactive application of the new tariff.

In its proposals to the Copyright Board the CPCC asked that the tariff be extended to recordable DVDs, the electronic storage memory embodied in MP3 players and similar devices used to copy and play back recorded music, as well as to flash memory

cards or micro-hard drives of a kind used in MP3 players. In each case the CPCC presented evidence to the Board that it believes demonstrates the increasing use of these media to copy music and, therefore, the fact that they are blank audio recording media as defined in the *Copyright Act*.

Although there are devices other than MP3 players that have as a secondary function the copying and playing of recorded music, the CPCC has not proposed that there be a levy on the internal storage memory of such devices. For greater clarity, the CPCC proposed that the internal memory of devices such as cellular phones, digital still cameras, digital video camcorders, notebook computers, personal computers, personal digital assistants and pocket PCs be explicitly excluded from the tariff. The CPCC also asked that the tariff not apply to removable electronic memory sold bundled with devices whose primary purpose is something other than copying and playing recorded music. For example, flash memory cards sold bundled with a digital camera would not be leviable.

In the case it presented to the Copyright Board the CPCC also presented evidence and arguments for increases in the tariff rates applicable to media already subject to a levy. The proposed rate for audiocassettes was 51 cents, $1.15 for MiniDiscs, CD-R Audio and CD-RW Audio, and 59 cents for CD-Rs. For the first time a separate rate for CD-RWs was proposed – a rate of 49 cents. For the additional media on which the CPCC requested a levy, a rate of 65 cents was proposed for each recordable DVD sold, with variable rates proposed for the internal memory of MP3 players and removable memory used with such players, with the specific amount varying depending upon capacity. The need for a variable rate in the latter cases reflects the enormous differences in the recording capacity of such media, with the internal capacity of MP3 players, for example, varying from 128 megabytes to 40 gigabytes.

As in earlier proceedings, the Copyright Board has heard both the proposals, arguments and evidence of the CPCC and the alternative proposals, arguments and evidence of all parties who objected to the CPCC's proposals. As this submission is being drafted, the Board's decisions are not known either as to the media that will be covered or the rates that will be paid.

Private Copying Revenues: 2000 to 2002

Over the three years from 2000 to 2002, the private copying levy generated $59.3 million in revenue. As is evident in the summary table below, the amounts generated increased from $7.2 million in 2000 to $27.8 million in 2002. In order to collect these revenues it has been necessary for the CPCC to devote sustained attention to ensuring that those who are subject to the levy report and remit levies to the CPCC as required under the provisions of the *Copyright Act*. The success of these efforts has benefited to an important degree from the cooperation received from the members of the Canadian Storage Media Alliance, which represents the major importers of the

blank audio recording media that are subject to the levy, as well as from the assistance of a number of smaller companies that report and remit levies to CPCC. The CPCC's enforcement activities are directed by a specialized staff which includes in-house lawyers, and, where necessary, benefits from the assistance of private investigators and external counsel.

Table 1

Revenue and Expense Summary
Canadian Private Copying Collective: 2000 to 2002
(In thousands of dollars)

	2000	2001	2002
Revenue	$7,245	$24,258	$27,809
Expenses	$414	$1,073	$1,533
Expense as % of Revenue	5.72%	4.42%	5.51%
Deficit at Start of Year	($1,934)		
Available for Distribution	$4,897	$23,185	$26,276

Distribution of Royalties to Rights Holders

The private copying legislation passed in 1997 provides criteria that must be considered by the CPCC in its distribution of royalties. Subsection 83 (11) requires that the CPCC provide remuneration to eligible authors, performers, and makers who have not authorized a collective society to act on their behalf. Further, the *Act* requires that CPCC treat such persons in exactly the same way it treats persons who have affiliated themselves with a collective. This requirement of equal treatment of all eligible authors, performers and makers has to be reflected in the distribution policies and methodology of the CPCC.

One of the first things the CPCC must do is to determine the period for which distributions will be made. At the present time, the CPCC's policy is to carry out a distribution for each calendar year. Because of the more limited revenues available for distribution in 2000, the CPCC carried out a combined distribution for 2000 and 2001 together. Separate distributions will be carried out for 2002 and 2003. The key factor in choosing the periods for which distribution will be carried out is to ensure that the costs of making the distribution remain relatively low as a percentage of the amount available for distribution. Frequent distributions would increase the associated administrative expense.

At the end of each period for which a distribution is to be carried out, the CPCC must determine on what basis the available royalties are to be allocated. Since

information is not available concerning exactly what tracks of recorded music are copied, the CPCC has used the two most comprehensive available sources of information – data indicating the recorded music that is sold in retail outlets in Canada and data concerning the recorded music that is broadcast by commercial radio stations and the CBC. Fifty percent of the available money is distributed based on sales information and 50% based on radio airplay.

The information necessary to make a distribution, of course, becomes available only after the end of the year. Moreover, significant work is necessary to put the available information into a form in which it can be used as a basis for determining how much should go to each claimant. For example, all that is available initially for the 10,191 record albums in the sample in 2002 is the title of the album. However, before this information can be used, it is necessary to develop a list of each individual track of music that is on each album. Since there are on average 14 tracks on each album, the result is over 140,000 individual tracks or songs. While this is a time-consuming task, after the initial year it becomes progressively easier since many albums continue to sell year after year and it is only new titles that need to be researched. It is in fact generally true that each successive distribution becomes easier and quicker during the initial years.

In the case of radio airplay there is also a substantial amount of work to be done before the information provided by radio stations is in a form in which it can be used. In 2001, the sample being used to carry out the distribution based on radio data included 2,136,864 individual plays, representing 104,825 different songs. Different stations will report the same title using different spellings or slightly different titles and work must be done to standardize the information provided.

Once the lists of what has been sold and what has been broadcast on the radio are completed in an appropriate form, all of the musical works, performances, and sound recordings created by eligible authors, performers and makers must be identified. In the case of the performers in particular, this may involve many performers on a single track of music who will all qualify to receive a share of the remuneration, including both feature performers and backup singers or session musicians. Similarly, although there are usually fewer authors than performers involved, it is a relatively common occurrence for more than one author to be involved in the creation of a single musical work. For example, the lyrics may be written by one person and the instrumental composition by another, or there may be co-writers for a song. If one combines the claims of authors, performers and makers there are usually many individual claimants who are entitled to receive remuneration with respect to a single title. The end result is that payments are owing to tens of thousands of claimants for each distribution period.

The first distribution of funds from the combined 2000 and 2001 distribution occurred in January of 2003, with approximately $7 million distributed. The CPCC

anticipates that during the remainder of 2003 it will largely complete the distribution of the $28 million collected in 2000 and 2001. However, as noted above, each successive distribution becomes easier, particularly in the early years, and it is expected that, prior to the end of 2003, a good start will also have been made on distributing the $26 million available for distribution for 2002.

Once the CPCC's expenditures for any particular year have been deducted, any interest that is earned on the undistributed royalties held by the CPCC is added to the amount to be distributed to the rights holders. As a result, even if there is some delay in the early years in getting the money into the hands of the rights holders, when the funds are distributed they include any income that money has earned while it remained with the CPCC.

No distribution for any period can occur until the Board of Directors of the CPCC is satisfied that it has complied fully with the requirement in the *Copyright Act* that the funds are being allocated on an equitable basis among all of the eligible authors, performers, and makers, including those not represented at present by a collective society. This means, with respect to the latter, that the CPCC has an obligation to retain reserves sufficient to make equitable payment to unrepresented or "orphan" potential claimants.

The Basis on which the Amount of the Levy is Calculated

While there are details and refinements that apply to the calculation of the individual rates, the basic principles the Copyright Board has applied in each of its earlier decisions can be described relatively simply. Clearly there are points of disagreement between the CPCC and the Board which resulted in the Board establishing rates substantially lower than those proposed by the CPCC. However, with one important exception, the CPCC is in agreement with the Board's methodology, even where there is disagreement as to the specific figures that should be used in making the calculations.

The approach that has been used to establish an appropriate levy begins with what the consumer would pay at a retail store to purchase a pre-recorded CD, or more precisely the Suggested Retail List Price which, at the time of the Board's decision on the 2001-2002 tariff, was $20. Of this amount, what is deemed relevant to setting the private copying levy is only those payments that are made to authors, performers and makers of sound recordings. For authors this amount is easy to determine**.** In 2000, a payment of 7.55 cents was required for each track of music on each copy of a pre-recorded CD that is sold. With an average of 14 tracks on a pre-recorded CD that calculation is straightforward.

In the case of payments to the performers, a typical artist royalty payment is at the rate of 12% of the Suggested Retail List Price. As far as the payment to the maker of

the sound recording is concerned the calculation excludes most of the costs that are incurred by a record label in the course of putting a pre-recorded CD into the market and into retail stores. These excluded costs include marketing, administration, distribution and manufacturing, as well as the retailers' markup, all of which go into the retail price for a pre-recorded CD. The methodology used focuses instead on the payments made to whoever was responsible for financing the making of the original master tape. As an indicator of the appropriate amount the Copyright Board has taken the typical payment made when an independent recording company, rather than releasing a recording itself, licenses the release of the recording to another company, usually one of the major international record labels. This amount, which provides for payment both to the performers and the maker, is typically 18% of the Suggested Retail List Price.

The result of this calculation is to reduce the amount of the $20 Suggested Retail List Price to a little less than 15% of the amount, or $2.86. Again, this is the amount determined in the Board's decision on the 2001-2002 tariff. The specific calculations that resulted in this figure are affected by lower payments to rights holders in the case of sales by record clubs and sales of budget-line pre-recorded CDs, as well as by a number of specific contractual provisions.

The Copyright Board made two further, global reductions to this amount. The term global reductions refers to adjustments made to the base amount before calculating the appropriate rate for any individual medium that is leviable. First, the amount is reduced to reflect the fact that not all musical works, performers' performances, or sound recordings are eligible for payment. In the Board's decision concerning the 2001-2002 tariff this repertoire use factor reduced the base amount further to $1.38.

The second global reduction made by the Board – one the CPCC did not agree with – reduced the basic rate to reflect what the Board referred to as the ancillary or secondary nature of private copying. Where the copier was copying a pre-recorded CD he or she already owned, the amount was reduced by 50%. Where the copy made was the only copy owned by the person who made it, the value was reduced by 25%. Since half the copies made were of recordings owned by the copier, while half were not, the resulting reduction was 37.5%. This adjustment reduced the base amount to 87 cents.

During the 2003 hearing on the next CPCC tariff, a third global reduction was proposed by the CPCC. This proposed adjustment, referred to as the digital rights management (DRM) reduction is discussed later in this submission.

Using the base amount calculated above, a number of adjustments are made in order to arrive at a rate appropriate to each specific medium. First, the Board looks at the percentage of all units of the medium sold that are purchased by individuals. If 70% are purchased by individuals, the amount is reduced by 30%. Second, the Board looks

at how much of the copying done by individuals is of recorded music. This adjustment is made based on survey evidence, taking into account both research carried out for the CPCC and any consumer research filed by objectors to the tariff. If two-thirds of the copying being done by individuals is of recorded music and one-third of something else, the rate is reduced by a further one-third. The third factor considered by the Board is the recording capacity of the medium onto which the copy is being made. Since the methodology begins with an amount calculated based on a typical pre-recorded CD which has 14 tracks, or about 58 minutes of recording time, an adjustment is made to take into account whether more or less recorded music is likely to have been copied onto a particular medium. The amount that can be copied onto a medium takes account of both its full recording capacity and of how much of this capacity the average consumer reports having left unused. A fourth factor is also taken into account for some specific media – the factor of spoilage. With some media, for example CD-Rs, survey evidence shows that mistakes in copying are sometimes made and a CD-R is thrown away. The rate is reduced to reflect this factor as well.

It is the above process that leads to the rates established by the Copyright Board. While the CPCC continues to believe that the rates it proposes to the Board represent fair and equitable remuneration, the CPCC recognizes the Board's obligation to listen to objections to the tariffs proposed as attentively as to the proposals made on behalf of rights holders. The CPCC believes that the Board's decisions have been rational and coherent and that, however disappointed it may be when its arguments are not accepted, the Board's decisions are made in good faith reflecting the intent of the legislation. The CPCC believes that the current process for establishing private copying rates is the best alternative available.

The Levy Rates in Context

While the importance of the private copying levy is widely recognized within the music industry, the significance of the levy nevertheless needs to be kept in context. In the year 2002, when $28 million was collected through the private copying levy, approximately one billion tracks of recorded music were copied onto the media covered by the levy. As a result, the amount collected represented 2.8 cents for each track of music. For 14 tracks of privately copied music, the equivalent of a pre-recorded CD with a Suggested Retail List Price of $21, the payment made was 39.2 cents.

The difficult reality for authors, performers and makers of sound recordings is that the alternatives at present are that they will receive either nothing at all in return for the one billion tracks of music that are privately copied, or they will receive revenue from the private copying levy. At the present time, the industry cannot control the vast majority of the copying activity that is occurring. The rights holders do not

authorize the making of copies from the vast majority of Internet downloads, nor do they authorize the copying of pre-recorded CDs.

It is important here to stress that one must not confuse "copying" with "gaining access" to the material to be copied. These are two very different activities and the fact that one is allowed to copy musical sound recordings does not and cannot mean that the original sound recordings themselves suddenly become free. If the right to copy automatically authorized access to material that one wanted to copy, among other things, music retailers would be out of business, because consumers would be free to plunder retailers' stock of pre-recorded CDs with the defence that copying is now legal.

As a result, the levy paid in respect of private copying does not replace the need to obtain licitly (e.g. by buying it) the material to be copied. The private copying levy is not a passport to steal the source material.

There is probably no one in the music industry who does not wish that the private copying levy was unnecessary. However, there are hundreds of millions of pre-recorded CDs available in Canada from which copies can be made. These same pre-recorded CDs can be uploaded illegally to the Internet and made available for copying, in fact, there are already many millions of tracks available on the Internet, with copying from the Internet accounting for close to half of all copying.

The necessary ingredients for establishing a legitimate, on-line market through which access to sound recordings could be obtained and copying could be controlled are just beginning to emerge. The most widely publicized recent initiative exploiting the necessary new digital rights management technology is that initiated by Apple Computers earlier this year, with their iTunes music download service. Such services have yet to be launched in Canada, although that is expected to happen in the next few months. In the United States, where a small number of such services already exists, the typical rate charged to have access to and copy a single track of pre-recorded music is 99 cents U.S., or the equivalent of about $1.40 Canadian.

For the authors, performers and makers of sound recordings there is no doubt whatever that they must receive payment when they grant access to their music. Eventually, this will be done through legitimate, on-line download services. However, a very lengthy and difficult transition will have to occur before such services are well established as an alternative to current illicit download activity.

Meanwhile, it is only fair that rights holders should at least be remunerated when further copies of their music are made. It is that activity of private copying (as opposed to downloading) that the private copying regime is concerned with.

The Zero-Rating Program

One of the concerns that have been raised with respect to the private copying legislation is that the resulting levies are payable by users such as companies in the high technology sector who do not use them to copy music but for purposes such as storing data, computer programs or other digital products. This is a concern to which the CPCC has been sensitive in its administration of the private copying levy.

The private copying provisions of the *Act* require that the levy be paid by manufacturers and importers of blank media, rather than by the ultimate consumers. This approach was taken for practical reasons and is consistent with the private copying legislation in place in other countries. Imposing the levy at the retail level would have placed the responsibility for reporting and paying the levy on many thousands of individual outlets. Even so, this vastly more complex method of collecting the levy would have done nothing to address the concerns that businesses and institutions making purchases would be subject to the levy despite the fact that they do not copy recorded music.

The approach taken in the 1997 legislation, that of collecting from the manufacturers and importers, has proved efficient and practical. There are only about 100 companies that are required to report to and make royalty payments to the CPCC. This facilitates enforcement and is of great assistance to CPCC in ensuring that the legislation is respected by those required to make such payments.

However, the fact that the levy must be paid by the importers and manufacturers has had the further benefit of making it possible for the CPCC to implement its "zero-rating" program. This zero-rating program allows those manufacturers or importers who wish to participate in the program to sell leviable media to businesses and institutions certified by CPCC as qualified to make purchases without payment of the levy. While the only exemption from payment of the levy provided in the *Copyright Act* is for societies, associations or corporations that represent persons with a perceptual disability, the zero-rating program implemented by CPCC with the cooperation and assistance of manufacturers and importers has permitted a substantial extension of levy-free access.

During the first hearing before the Copyright Board in 1999, concerns regarding the application of the levy were expressed primarily by churches, and related particularly to the use of analogue audiocassettes. In response, the CPCC exercised its discretion by creating a program that permitted such organizations to purchase analogue cassettes without payment of the levy. Although the issue had been raised primarily by churches, there were also other organizations that expressed concern, including for example, conference organizers who copied conference proceedings onto cassettes, court reporters, and police departments. In response, the program was made available to a very wide range of businesses and other institutions. The

significance of this program is evident in the fact that in 2002 4.6 million audio cassettes were sold at a zero rate, representing one-third of the 14.0 million cassettes sold in Canada last year.

During the most recent proceeding before the Copyright Board that led up to the hearing in January 2003, equally strong concerns were expressed about the application of the levy to recordable CDs. Among the businesses most actively expressing these concerns were companies in the technology sector, as represented by The Canadian Advanced Technology Association (CATA) and the Information Technology Association of Canada (ITAC). Early in 2002 the Board of Directors of the CPCC decided to initiate a review of its zero-rating policy. This review led to a decision in the Fall of 2002 that the program should be extended to recordable CDs, which had not previously been included in the zero-rating program. Further, since the CPCC was proposing that the levy be applied as well to recordable DVDs, it was agreed that, if the Copyright Board were to extend the application of the levy to DVDs, they would also qualify for zero-rating.

Before implementing the expanded program, the CPCC met with CATA to discuss implementation details. CATA has expressed its satisfaction with the decision to expand the program to include media purchased by high-technology companies. Similarly, ITAC has indicated that the revised program is a welcome initiative that takes care of the main problem that had been brought to its attention by makers and distributors of software. The implementation plans were also discussed with a representative of primary, secondary and post-secondary educational institutions, and with distributors who specialize in supplying the business and institutional market for such media.

The revised program is open to a very wide range of businesses and institutions. Those eligible to purchase at a zero rate include educational institutions, broadcasters, law enforcement agencies, advertising agencies, the music, film and video industries, court tribunals and court reporters, religious organizations, telemarketing firms, software companies, duplication facilities, medical institutions, technology companies, conference and training companies, and governments, and any other firms duplicating audio and data for business or institutional use. The program has been designed so that it will be open to smaller businesses and organizations that make significant use of blank media subject to the levy. The requirement in the original program, implemented in 2000, that participants in the zero-rating program purchase a minimum of 1,000 units annually in order to qualify has been dropped. Further, there is no requirement that participating businesses should be incorporated. They need only to be registered as businesses.

For the convenience of applicants to the program the application is available on-line. The details can be seen by visiting the web site of the CPCC (www.cpcc.ca).

It is anticipated that the result of the decision to extend the zero-rating program to recordable CDs and to recordable DVDs, if the latter are included as leviable media, may be to reduce revenues from the levy by between $4 million and $6 million annually. In addition, the CPCC will incur significant administrative costs to establish and operate the program. As a result, a modest fee will be charged each year to register or renew an organization's registration. The initial fee will be $60 for commercial applicants and $15 for non-commercial applicants. No fee will be charged to organizations such as churches that wish to purchase only analogue cassettes. These fees will be adjusted in future to ensure that the resulting revenue does not exceed the cost of administering the zero-rating program.

The extended program came into effect on September 1st. Most of the major manufacturers and importers of blank audio recording media, as well as many of the small and mid-sized firms, have already agreed to participate in the expanded program. This will provide businesses and institutions certified by the CPCC with a competitive choice of sources from which to make their purchases. The participation and co-operation of importers and manufacturers has been since 1999, and will continue to be, essential to the success of the program.

The CPCC believes that the zero-rating program is a reasonable and responsible initiative that is consistent with the existing private copying legislation and justified as a way of more effectively targeting the levy to purchases by individuals.

The Continuing Need for and Fairness of the Private Copying Levy

The private copying levy has sometimes been wrongly characterized as a subsidy to the music industry. A number of participants in the January 2003 hearing before the Copyright Board made this claim. However, this suggestion is false both in law and in fact.

Obviously, section 81 of the *Copyright Act* makes provision for authors, performers and makers of sound recordings to receive **remuneration** for the copying of their property. The levy is not a subsidy to the music industry, but a means of providing remuneration for the reproduction for private use of the intellectual property of music creators. It also makes no sense on any objective, factual basis to try to characterize these royalty payments as a subsidy, since the copiers end up in possession of the rights holders' intellectual property, just as they would if they had gone to a store to purchase a copy. In fact, the one billion tracks of music copied in fiscal 2001-2002 represented the equivalent for those who made these copies of more than 70 million pre-recorded CDs.

During the hearing earlier this year the retailers never questioned the fact that almost none of the copying activity was paid for. In fact, independent survey research commissioned jointly by the importers and manufacturers and the retailers,

confirmed that, apart from the levy, virtually no payment was made for private copying.

The argument now being made by some interested parties to fundamentally change or rescind the private copying legislation raises a fundamental issue of fairness. When a manufacturer, importer, distributor or retailer sells the CD burners or CD-Rs used to copy music, its customers pay the full market price for CD burners and CD-R's. No one expects them to subsidize their customers' private copying of music. However, the CD burner and the CD-R's are only two of the three inputs consumers require for private copying. They also require the recorded music itself. The market for CD burners, CD-Rs and for all of the other types of equipment or media using private copying would be dramatically reduced if the equipment and media were not being used to copy music.

At present, only those who create the recorded music do not receive market value for the contribution they make to private copying. Instead, they receive royalties based on the levy set by the Copyright Board after hearing arguments from both music rights holders and objectors to the tariff. The position some parties are taking and encouraging their customers to take, is that the law should be changed so that copyright owners in recorded music would receive absolutely nothing in return for the copying of one billion tracks of recorded music annually. In contrast, however, they would continue to receive full payment for the CD burners and CD-R's they sell. The same argument applies to other blank media used to copy music, including analogue cassettes, MiniDiscs, MP3 players with internal memory, electronic memory cards and recordable DVDs. This cannot be considered fair.

One of the principal arguments advanced as a justification for getting rid of the levy is that music rights holders have an alternative means of getting paid. The argument is that digital rights management technology and copy protection technology create the potential for authors, performers, and producers of sound recordings to prevent consumers from making copies of music without their permission and to require payment when copies are made. In fact, as stated above, this technology is developing and rights owners would greatly prefer to have such control and to be able to establish a market price for making copies of recorded music. However, at the present time these technologies cannot retroactively be used to make unavailable for copying the vast array of recorded music from which copies can be made. As a result, these technologies are clearly not an alternative means of payment to music rights holders for the vast majority of copying activity.

The second concern that is sometimes raised is that, as digital rights management technology is implemented with payments being made to download recorded music onto one's computer and to make a copy of the downloaded music, the music industry will benefit from "double dipping". At page 9 of this submission reference was made to the proposal CPCC has made to the Copyright Board for addressing this

concern. In principle, the CPCC is in agreement that the amount received by rights holders from the levy should be reduced to reflect the percentage of all copying activity that is authorized by rights holders and involves a payment to them. In order to achieve this purpose the CPCC proposed to the Copyright Board that the levy be reduced to reflect what it referred to as a DRM discount. Specifically, in the recent Copyright Board hearing, the CPCC proposed that the amount of the levy be reduced by 3% to reflect the fact that 3% of the music tracks copied were authorized and paid for. As this figure increases the levy would be further reduced.

In the report to Parliament entitled *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* reference is made to the legislation in the United States with respect to private copying. The American legislation is referred to as a possible means of better targeting the scope of application of the legislation. However, the CPCC submits that the American legislation is in fact badly targeted, deeply flawed and has failed to accomplish the intended purpose of the U.S. Congress.

The American legislation is badly targeted in that it continues to apply a levy to digital audio tape, which once appeared likely to be a major consumer medium but which the Copyright Board in Canada has determined to be almost entirely sold for professional use at the present time. However, at the same time the legislation imposes no levy on CD-Rs and CD-RWs, which now account for the vast majority of copying by individuals, nor on MP3 players with internal memory, despite the fact that they are used almost exclusively to copy recorded music. The mistake made in the United States was that of thinking that the legislators could predict the way in which technology would develop, and specifically identify those media and technologies that would be used by the public to make copies of music.

The full scope of this error in the United States is evident from reading congressional documents from 1992, the year in which the American law was adopted. Based on an obvious misunderstanding of the way private copying would evolve, Congress concluded that "Royalty payments into the funds are estimated to be $73 million in fiscal year 1993, $105 million in 1994, and larger amounts in subsequent years." Just how wildly wrong these predictions were is evident in the fact that only $520,162 U.S. were collected in 1993, $521,999 U.S. in 1994, and it was 1997 before the total amount collected exceeded $1 million U.S.. (See Appendix D.)

It would obviously make no sense to copy such badly flawed, failed legislation. In fact, the American legislation provides a good illustration of the wisdom of the Canadian government's decision in 1997 to leave the identification of those media that should be subject to the levy to the discretion of the Copyright Board, with such decisions to be based upon the evolution of technology and the markets for technology. Had the United States implemented legislation using the same approach as Canada, its legislation would have succeeded in achieving its intended objective of

providing for a significant flow of remuneration to rights holders in recorded music in return for private copying.

Alleged Impact of WPPT Ratification

In its Report to Parliament on the provisions and operations of the *Copyright Act*, the government points out that there is an international context to the current reform environment. That international context includes the fact that, in 1997, Canada signed the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and signaled that it would not derogate from the principles embodied in those treaties. Canada has yet to ratify the treaties by incorporating their principles in the domestic law.

With respect to the private copying regime, the Report asks whether the regime is consistent with the requirements of the WPPT. In this respect, the Report considers the exception contained at S. 80(1) of the *Copyright Act*, which exception provides that it is not an infringement of copyright to reproduce a music sound recording onto an audio recording medium for the private use of the person who makes the copy. The Report notes that the exception applies to sound recordings regardless of their country of origin and to performances whatever their origin. However, only Canadian sound recording makers and performers (or makers and performers from other countries on a reciprocal basis) are entitled to receive payment from the levies collected in the private copying regime. The Report therefore wonders whether Canada's eventual obligations under the WPPT would necessitate an amendment to the *Act* that would extend the regime to sound recording makers and performers from all WPPT countries, on a "national treatment basis", which is to say that there would be no difference in treatment between Canadians and foreign rights holders.

The CPCC asked Dr. Silke von Lewinski to consider this issue. Dr. von Lewinski, of the Max-Planck-Institut, is the co-author (with Dr. Jörg Reinbothe) of an authoritative treatise on the WIPO Treaties of 1996. [3] She was a member of the European Community delegation at the Diplomatic Conference that led to those treaties. Dr. von Lewinski prepared two separate papers, attached here as Appendix E.

In the first of these papers, titled "National Treatment for Private Copying Levies Under the WPPT", Dr. von Lewinski concludes that the WPPT does not require that national treatment be extended to private copying regimes.

She first stresses that Article 4 of the WPPT extends "national treatment" only to "the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty". The private copying regime is founded on a right that is not an "exclusive right" but rather a mere right to equitable remuneration. For national treatment to be extended to this right to equitable remuneration, the right under the private copying regime would therefore have to be

the "right to equitable remuneration provided for in Article 15 of this Treaty". But such is not the case. The right mentioned in Article 15 is the right to equitable remuneration for communication to the public and not the right to equitable remuneration for private copying.

According to Dr. von Lewinski, all methods of interpretation of the WPPT (the literal interpretation, the systematic context, the purpose of the provision and the historical interpretation) lead to the same result, namely that the obligation to grant national treatment under Article 4 (1) of the WPPT does not extend to any statutory remuneration right granted under national law for performers and phonogram producers in respect of the private reproduction of phonograms.

It has also been argued that private copying regimes are exceptions to the right of reproduction and that Article 16(2) of the WPPT provides that limitations or exceptions to rights granted under the Treaty must be confined to 1) "certain special cases", 2) "which do not conflict with a normal exploitation of the performance or phonogram" and 3) "which do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram". This is known as the "three-step test" of the validity of an exception under the WPPT. If Canada were to ratify the WPPT, would its private copying regime then have to satisfy the "three-step test"? If so, under that test, could Canada "deprive" foreign makers and performers of the benefit of its private copying regime?

In her second paper, titled "The Private Copying Levy: A Minimum Right under the WPPT?", Dr. von Lewinski looks into this issue and concludes that the right to equitable remuneration for private copying is not a "minimum right" granted by the WPPT.

In that second paper, Dr. von Lewinski writes that the language of the three-step test is inconclusive and open to interpretation, and that the consequential treaty obligations must be determined by each Contracting Party. She stresses that, in practice, Contracting Parties that have ratified the WPPT (as well as other treaties dealing with intellectual property and having a similar three-step test) have decided for themselves whether they have an obligation to implement a right to equitable remuneration for private copying and that a substantial number of such Contracting Parties do not provide for this remuneration right. She goes on to explain that, even if one were to accept that the WPPT creates an obligation to provide for this right to remuneration, such a conclusion would seem to nullify the results obtained under Article 4 that national treatment does not extend to a right to remuneration for private copying. Dr. von Lewinski points out that any interpretation of an international agreement "must not take away the effect of, or render obsolete, a different provision of the same agreement." In the end, the extension to other Contracting Parties of a right to remuneration for private copying is better left to bilateral negotiations that can take into account and balance many varied interests, and may indeed negate the need for extending the right.

It is CPCC's position, then, that the WPPT clearly does not impose "national treatment" for the right to remuneration under national private copying regimes. Furthermore, such a right is not a "minimum right" under the WPPT. Finally, WPPT obligations pursuant to the three-step test are open to interpretation by the ratifying country and do not create, nor have they created empirically, an obligation to extend to other Contracting Parties a right to equitable remuneration for private copying.

Revisions to Legislation Proposed by CPCC and CSMA

In a letter to the Department of Canadian Heritage and Industry Canada dated January 25, 2002, CPCC and the Canadian Storage Media Alliance ("CSMA"), an association of manufacturers and importers of blank audio recording media, made a joint proposal for amendments to the private copying provisions of the *Copyright Act*. Although CPCC and CSMA recognized that the private copying levies generally operated well, they nevertheless recognized that the legislation creates difficulties in levy enforcement, and that it disadvantages Canadian manufacturers of blank audio recording media and produces inequalities amongst importers of those media. Accordingly, CPCC and CSMA jointly requested legislative amendments to sections 82 and 88 of the *Copyright Act* in order to address those concerns.

1. Section 82 of the Act

Section 82 of the *Copyright Act* imposes liability for payment of the levy on persons who manufacture blank audio recording media in Canada or who import such media into Canada for the purpose of trade, subject to the exceptions regarding export sales or sales to perceptually disabled persons. Pursuant to section 82, liability to pay the levy is triggered when a manufacturer or importer sells or otherwise disposes of the blank media in Canada.

Section 82 of the *Act* does not impose liability on persons who import blank media into Canada for their commercial use or for duplication prior to resale, since these persons do not sell or dispose of "blank media" after they are imported into Canada. These importers are effectively exempt from paying the levy, an advantage that is presumably unintended, since there is no evident policy objective for doing so. On the contrary, Parliament appears to have intended that all importers and manufacturers of blank media in Canada be subject to the levy, except for those who export their products from Canada, who are specifically exempted (see, in this regard, sections 81(1) and 82 of the *Act*).

The opportunity to benefit from an exemption from levy payment creates an incentive for commercial users and duplicators of blank media to purchase such media outside Canada, rather than from Canadian importers and manufacturers who are subject to the levy. If such buyers purchase blank media from Canadian suppliers, including the CSMA members, the levy is included in the price, except in

the case of buyers certified under CPCC's zero-rating program. The recent expansion of the zero-rating program to apply to CD-Rs, CD-RWs and to recordable DVDs, assuming that the latter become leviable when the Copyright Board's tariff decision is announced, will improve the chances of this institutional business being retained by Canadian suppliers. Nevertheless, it will continue to be the case that if they buy from foreign suppliers the levy does not have to be paid, as long as they are buying for their own use or for duplication. They have no need to participate in the zero-rating program in order to make zero-rated purchases. This creates a bias against purchasing from Canadian suppliers. CSMA member companies believe that, as a result, they are losing significant business opportunities to foreign vendors of blank media.

Experience shows that the private copying levy would be enforced with greater efficiency, and more fairly, if all importers of blank media were subject to the levy, subject to the specific statutory exceptions mentioned above. The result would be to level the playing field – eliminating the unintended bias the current provisions of the *Act* create against purchasing from Canadian suppliers.

Section 82 of the *Copyright Act* presently states:

> Liability to pay levy
>
> 82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada
>
> *(a)* is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body on selling or otherwise disposing of those blank audio recording media in Canada; and
>
> *(b)* shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraph (a), as well as of exports of those blank audio recording media, and shall furnish those statements to the collecting body.
>
> No levy for exports
>
> (2) No levy is payable where it is a term of the sale or other disposition of the blank audio recording medium that the medium is to be exported from Canada, and it is exported from Canada.

CPCC and CSMA have proposed that the section be amended as follows:

Liability to pay levy

82. (1) Every person who, for the purpose of trade, manufactures a blank audio recording medium in Canada or imports a blank audio recording medium into Canada is liable, subject to subsection (2) and section 86, to pay a levy to the collecting body:

(a) upon selling or otherwise disposing of those blank audio recording media in Canada;

(b) upon importing the blank audio recording media into Canada, when the blank audio recording media are acquired by the importer for its own use, and;

(c) every manufacturer and importer of blank audio recording media shall, in accordance with subsection 83(8), keep statements of account of the activities referred to in paragraphs (a) and (b), as well as of exports of those audio recording media, and shall furnish those statements to the collecting body.

No levy for exports

(2) No levy is payable where it is a term of the sale or other disposition of the audio recording medium referred to in paragraph (a) above that the medium is to be exported from Canada, and it is exported from Canada.

2. Section 88 of the Act

Although CPCC has been quite successful in collecting the levy from importers and manufacturers, experience shows that there are still a number of importers of blank media who are failing to pay the private copying levy. For example, parallel imports of CSMA members' own brands are sometimes offered for sale in Canada at prices so low as to indicate that no levy has been paid. It has proven difficult for CPCC to identify and, moreover, collect from certain levy evading importers. While CPCC can identify, for example, most major Canadian-based importers (suppliers), it is more difficult to identify foreign-based suppliers or the often small importers to whom they may sell for distribution purposes.

Purchasers of the media sold by these suppliers, including retailers in Canada, have no obligation to ensure that the levy has been paid by their supplier or to report any information to the CPCC. They are also under no obligation to pay any levies, unless they themselves are the importer of record. As such, they have no incentive to purchase or to attempt to purchase levy-paid media. In fact, in cases where CPCC has

discovered blank media sold at retail prices which indicate that no levy has been paid, the retailers have sometimes been unwilling to provide any information to CPCC.

Absent an incentive for re-sellers to purchase levy-paid media or even to provide information in respect of their purchases of media subject to Part VIII of the *Act*, Canadian artists are deprived of levies owed them under the *Act* and law-respecting importers and manufacturers are deprived of a level playing field. Moreover, purchasers of levy-paid media are placed at a competitive disadvantage to those who purchase non-levy-paid media, further increasing the incentive for purchasers - in an effort to remain competitive - to disregard the issue of whether the levy has been paid on the blank media they are purchasing. In the end, all parties respecting the letter and spirit of Part VIII of the *Act* are disadvantaged.

Consequently, a second proposed amendment to the *Copyright Act* would extend liability to persons who knowingly or negligently deal in non-levy-paid media. The objective here is to discourage purchasers for resale from purchasing non-levy-paid goods from levy-evading importers and manufacturers and to encourage such purchasers' co-operation in CPCC's efforts to enforce payment of the levies.

Sections 88(2) and 88(4) of the *Act* presently state:

> "88(2) The court may order a person who fails to pay any levy due under this Part to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in Section 84."
> […]
> "88(4) Before making an order under sub-section (2), the court must take into account (a) whether the person who failed to pay the levy acted in good faith or bad faith; (b) the conduct of the parties before and during the proceedings; and (c) the need to deter persons from failing to pay the levies."

CPCC and CSMA propose that the sections be amended as follows:

> "88(2) The court may order a person who fails to pay any levy due under this part or a person who purchases, for purposes of trade, blank audio recording media without exercising due diligence to ensure that levies have been, or will be, paid on such media in accordance with Part VIII herein, to pay an amount not exceeding five times the amount of the levy to the collecting body. The collecting body must distribute the payment in the manner set out in section 84."
> […]

> "88(4) Before making an order under Sub-section (2), the court must take into account (a) whether the person acted in good faith or bad faith; (b) the conduct of the parties before and during the proceedings; and (c) the need to deter persons from failing to pay the levies or failing to exercise due diligence to ensure that the levies have been, or will be, paid on blank audio recording media the person purchases."

Summary of CPCC's Conclusions Regarding Section 92 Issues

The Report frames the issue with respect to private copying as follows:

Issue: *Whether sections 79 to 88 of the Act should be amended to address adverse effects on stakeholders from the application of the private copying regime in a digital environment.*

Under this broad heading a series of more specific issues are identified. While these have been addressed substantively in the previous sections of this submission, to assist the Committee the position of CPCC on these issues is summarized below.

First, the Report raises the question of what constitutes private copying in the current digital environment. The CPCC position is that the private copying provisions of the *Act* should continue to be technology neutral. The way the *Act* works at the present time is that the Copyright Board has the responsibility to determine, based on the facts at any given time, whether the media on which CPCC has requested a levy constitute blank audio recording media and should, therefore, be subject to a levy. This permits the Copyright Board to take into account changes in the technology used for copying purposes. The Report refers to the alternative example of the United States where Congress passed copying legislation in 1992 that defined the application of the legislation, the *Audio Home Recording Act*, based on current technologies and predictions as to the way they would develop in future. As noted earlier in this submission, failure to predict the course of technological change resulted in legislation that failed to achieve its purpose, generating a tiny fraction of the revenues projected by Congress. In this respect, the CPCC believes that it would be a mistake to make any change in the process the *Act* establishes for defining private copying.

Second, there is no need to change the legislation to grant either to the Government of Canada or to the Copyright Board the power to exempt particular classes of users from the payment of the levies. As the Report recognizes, the zero-rating scheme operated voluntarily by the CPCC since the private copying tariff came into effect effectively provides an exemption for institutions and businesses that acquire leviable media for purposes other than copying music.

Third, the Report raises the question of whether the private copying exception allows private copying from all sources, including unauthorized sources. As indicated earlier in this report, the position of the CPCC is that no one should confuse "copying" with "gaining access" to the material to be copied. Whether or not the material to be copied has been obtained legally or illegally is a separate matter from whether or not it can be copied. The private copying levy is not a passport to steal the source material.

Fourth, the Report raises the question of whether the *Act* would need to be changed when Canada ratifies the WPPT to provide for national treatment with respect to the payment of royalties to makers and performers. The expert legal advice provided to the CPCC indicates that national treatment is not required under the provisions of the WPPT.

Fifth, the Report raises the issue of whether all importers, regardless of whether they are importing for distribution or sale or for their own use, should be subject to the levy. The CPCC believes that they should be and, together with the CSMA, which represents the major importers of blank audio recording media, has presented a proposal to accomplish this purpose to the Government of Canada. That proposal has been incorporated into this submission.

Sixth, the Report asks whether retailers should be liable for payment of the levy when they knowingly or negligently sell blank media for which their respective supplier or importer has not paid the levy. It is the CPCC's position that they should and, together with the CSMA, the CPCC has proposed a legislative change to government, which has been incorporated into this submission.

The final issue raised in the Report is whether recordings that incorporate copy protection technology (CPT) ought to be excluded from the private copying regime. The CPCC submits that there is no change required in the legislation. To the extent that copying is prevented through technological means there will simply be a decline in copying activity, which will be reflected in the collection of less revenue from the private copying levy. If, hypothetically, it were possible to copy protect all of the tracks of recorded music now available, then the only copying that would occur would be copying that was authorized by rights holders.

In conclusion, CPCC recommends legislative changes to require that:

(a) the levy be paid by all importers, including those who are importing for their own use rather than for sale or distribution; and
(b) to make retailers and other resellers liable when they knowingly or negligently sell blank media on which the levy has not been paid.

ENDNOTES:

[1] Réseau Circum Inc. , *Étude de marché sur la copie privée d'enregistrements musicaux au Canada, 2001-2002*, 27 août, 2002, page 35, tableau 4.5.

[2] Copyright Board Canada, *Decision of the Board*, (Decision, December 15, 2000; Reasons for Decision, January 22, 2001), page 4.

[3] von Lewinski, Silke and Reinbothe, Jörg: *The WIPO Treaties 1996, Commentary and Legal Analysis,* Butterworths Lexis Nexis, reprinted 2002; 581 pages.

List of Appendices

Appendix A

Members of the CPCC Board of Directors

Claudette Fortier, Chair

Lucie Beauchemin, Vice-Chair

Diana Barry, NRCC

David Basskin, CMRRA

Brian Robertson, NRCC

Paul Spurgeon, SOCAN

Appendix B

Countries Which Have Implemented Private Copying Legislation

Austria
Belgium
Bulgaria
Cameroon
Congo
Côte-d'Ivoire
Czech Republic
Denmark
Ecuador
Estonia
Finland
France
Gabon
Germany
Greece
Hungary
Iceland
Israel
Italy
Japan
Kazakstan
Kenya
Latvia
Netherlands
Niger
Nigeria
Norway
Poland
Portugal
Republic of Moldova
Romania
Russian Federation
Slovenia
Slovakia
Spain
Sweden
Switzerland
Turkey
Ukraine
United States

Source: Department of Canadian Heritage, 1999

Appendix C

Glossary of Blank Audio Recording Media

Analogue Audiocassettes:
1/8-inch recording tape mounted on reels in a plastic shell, recorded and played back at 1 and 7/8 inches per second in analogue mode on a transverse head. Analogue audio information can be recorded, played back and erased in a standard cassette recorder or played back in a play-only device.

MiniDisc (MD):
An erasable format that uses a 2-½ inch disc housed in a protective caddy that resembles a small computer diskette. Its small size is made possible by a data-compression system that eliminates portions of the music that are deemed inaudible. The MD typically stores up to 80 minutes of music, however, the new MDLP Long Play feature now permits 320 minutes of compressed music files to be recorded onto an 80-minute blank MiniDisc.

Recordable Compact Discs (Recordable CDs)
Polycarbonate discs coated with material which can be "burned" (i.e., recorded) with a series of short and long "pits" representing the ones and zeros of digitally encoded information. Typically sold in a configuration capable of recording 700 megabytes of information, which is equivalent to 80 minutes of recording time in CD audio format.

Compact Disc-Recordable (CD-R):
Information can be recorded only once and cannot be erased. Digitally recorded audio information can be recovered in a CD-ROM drive or, in most cases, a standard CD or DVD player.

Compact Disc-Rewritable (CD-RW):
Identical to a CD-R, but capable, when used in an appropriately equipped drive, of not only recording information but erasing it.

Compact Disc-Recordable Audio (CD-RA):
Identical to a CD-R, but electronically marked as being authorized for use in certain consumer audio recording equipment. Digitally recorded audio information can be recovered in a CD-ROM drive or any standard CD player.

Compact Disc-Rewritable Audio (CD-RWA):
Identical to a CD-RW, but electronically marked as being authorized for use in certain consumer audio recording equipment. Digitally recorded audio information can be played on a CD-ROM drive or any standard CD player

Removable flash or electronic memory (flash-memory cards and removable micro-hard drives)

Flash memory, sometimes referred to as flash RAM is non-volatile, in that the contents of the memory are maintained with or without power, and it is solid state, meaning that it has no moving parts. "Flash-memory cards" include SmartMedia™, CompactFlash™ and the like, but not products such as IBM's Microdrive™, which is not solid-state. IBM's Microdrive™ and similar products ("micro-hard drives") are intended to be used in place of flash-memory cards, but are actually tiny hard drives, allowing them to store far more data.

Non-removable memory in MP3 Players:

Non-removable memory of any type (flash memory or hard drive) incorporated into a device used primarily to record and play music.

Recordable Digital Versatile Disc (Recordable DVD):

An optical storage medium which has greater capacity and bandwidth than a CD and can be used for multimedia (movies and audio) and data storage. A DVD typically stores 4.7 GB on one of its two sides. With two layers on both sides, it will likely be able to store up to 17 GB. There are many different formats of DVD, some of them erasable and rewritable (DVD-RW, DVD+RW, DVD-RAM), and others only capable of being written to once (DVD-R, DVD+R). So-called "mini" DVDs with a smaller form-factor and lower data capacity are also available in some formats.

Appendix D

Extract of September 17, 1992 from the Congressional Record in the United States Concerning the *Audio Home Recording Act*
and
Report of Royalties Collected in the United States Under the *Audio Home Recording Act*, 1992 to 2000

Royalties Collected in the United States Under the *Audio Home Recording Act*, 1992 to 2000

Year	Royalties Collected
1992	$118,227.42
1993	$520,162.84
1994	$521,999.64
1995	$481,608.53
1996	$426,243.62
1997	$1,004,382.25
1998	$1,988,343.76
1999	$3,488,623.79
2000	$5,279,089.56

Source: Library of Congress, United States

102D CONGRESS
2d Session } HOUS

EPT. 102-873
Part 1

CPCC-41

AUDIO HOME RECORDING ACT OF 1992

SEPTEMBER 17, 1992.—Ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 3204 which on August 2, 1991, was referred jointly to the Committee on the Judiciary, the Committee on Energy and Commerce, and the Committee on Ways and Means]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3204) to amend title 17, United States Code, to implement a royalty payment system and a serial copy management system for digital audio recording, to prohibit certain copyright infringement actions, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Audio Home Recording Act of 1992".

SEC. 2. IMPORTATION, MANUFACTURE, AND DISTRIBUTION OF DIGITAL AUDIO RECORDING DEVICES AND MEDIA.

Title 17, United States Code, is amended by adding at the end the following:

"CHAPTER 10—DIGITAL AUDIO RECORDING DEVICES AND MEDIA

59-006

H.R. 3204 would designate those entitled to a share of the funds. The bill would establish a formula for dividing the royalty payments between the funds and for distributing the amounts in the funds. It also would establish a schedule of damages to be paid by those who violate requirements of the act. Finally, H.R. 3204 would direct the Copyright Office to oversee payments into the funds and the Copyright Royalty Tribunal (CRT) to administer their distribution.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995	1996	1997
Net direct spending:						
Estimated budget authority	0	−50	−2	−2	−1	−1
Estimated outlays	0	−50	−2	−2	−1	−1
Spending subject to appropriation action: [1]						
Estimated authorization level	0	(2)	(2)	(2)	(2)	(2)
Estimated outlays	0	(2)	(2)	(2)	(2)	(2)
Net increase or decrease (−) in the deficit	0	−50	−2	−2	−1	−1

[1] Approximately $115,000 over the 1993–1997 period.
[2] Less than $500,000.

The budgetary impact of this bill falls within function 370.

Basis of estimate

Estimates of royalty payments are based on information provided by the Copyright Office and on an assumed enactment date early in fiscal year 1993. Payments for each quarter would be deposited into the funds within 45 days of the end of the quarter, would be recorded as offsetting receipts (that is, negative budget authority and outlays), and would accrue interest until disbursed. (Under the reported bill, royalty, collections by the government would be categorized as federal revenues; the committee's floor amendments would specify that they be deposited as offsetting receipts to the Treasury.) Royalty payments into the funds are estimated to be $73 million in fiscal year 1993, $105 million in 1994, and larger amounts in subsequent years. Disbursements to interested parties would be mandatory and would count as direct spending, as would amounts paid to the Copyright Office and the CRT to cover costs associated with administration of the funds.

We assume that distributors would begin marketing digital audio recording devices and tapes in the first quarters of fiscal year 1993; therefore, we expect the Treasury to begin receiving royalty payments in February 1993. Disbursements to interested parties would be based on royalties accrued over the previous calendar year. Thus, while receipts would accrue over the entire 1993 fiscal year, disbursements in that year would include only the $23 million in copyright payments accrued in calendar year 1992 (i.e., the first quarter of fiscal year 1993). As a result, receipts in fiscal year 1993 would exceed disbursements by about $50 million. In later years, receipts and disbursements would both include amounts for an entire year.

Based on information from the CRT and the Copyright Office, CBO estimates that implementing H.R. 3204 would cost the federal government $1.15 million over the next five years. Of this amount, $115,000 would not be recovered from payments to the funds. While the bill would provide that the Copyright Office and the CRT can recover costs associated with administering the funds, the Copyright Office would incur some unrecoverable costs in establishing the funds. As specified in appropriation bills, the CRT recovers only costs associated with fund distribution, which in 1992 are approximately 85 percent of total costs.

CBO assumes that the Congress will appropriate the full amounts authorized. We estimate accrued interest consistent with CBO baseline assumptions. Outlay estimates are based on historical spending patterns for similar activities.

6. Pay-as-you-go considerations: The Budget Enforcement Act of 1990 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1995. Enacting H.R. 3204 would affect direct spending, and the bill would therefore be subject to pay-as-you-go procedures. The following table summarizes the estimated pay-as-you-go impact of this bill.

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995
Change in outlays	0	−50	−2	−2
Change in receipts	(1)	(1)	(1)	(1)

[1] Not applicable.

As specified in the committee amendments, royalty payments paid into the funds would be counted as offsetting receipts, which are shown as negative outlays. Payments to interested parties would be mandatory and would count as direct spending, as would amounts paid to the Copyright Office and the CRT to cover costs associated with administration of the funds. CBO estimates that the impact of this bill for pay-as-you-go purposes would be a net decrease in the deficit of $50 million in 1993 and smaller amounts in subsequent years.

7. Estimated cost to State and local governments: None.

8. Estimate comparison: None.

9. Previous CBO estimate: On June 9, 1992, the Congressional Budget Office prepared a cost estimate for S. 1623, a similar bill reported by the Senate Committee on the Judiciary on November 27, 1991, and reflecting floor amendments proposed by that committee. The estimated budgetary impact of H.R. 3204 is the same as that for S. 1623.

10. Estimate prepared by: John Webb.

11. Estimate approved by: Paul Van de Water for C.G. Nuckols, Assistant Director for Budget Analysis.

Appendix E

Papers by Dr. Silke von Lewinski

National Treatment for Private Copying Levies Under the WPPT, Dr. Silke von Lewinski, May 2003

The Private Copying Levy: A Minimum Right under the WPPT?, Dr. Silke von Lewinski, May 2003

National Treatment for Private Copying Levies Under the WPPT

Prepared by Dr. Silke von Lewinski
for the
Canadian Private Copying Collective

May 2003

National Treatment for Private Copying Levies under the WPPT

Dr. Silke von Lewinski [1]

Many countries, such as Canada, that provide under their national laws a remuneration right for private reproduction for the benefit of performers and phonogram producers will consider the question of whether or not such a remuneration right is covered by the obligation to grant national treatment under Article 4 WPPT. This question alone will be analyzed hereunder. It is independent of the separate question of whether or not a remuneration right for private reproduction must be granted to beneficiaries under the WPPT on the basis of the minimum right of reproduction under Articles 7 and 11 WPPT in combination with the permitted limitations and exceptions under Article 16 of the WPPT; the latter question is not dealt with in this study.

Under international public law, treaties are interpreted according to the particular rules of interpretation that are laid down in Articles 31 et seq. of the Vienna Convention on the Law of Treaties of 22 May 1969.[2] These rules of interpretation, representing general principles of international law and reflecting customary international law,[3] are binding even upon those countries which have not become parties to the Vienna Convention. The following methods of interpretation have been placed on the same priority level: (a) the ordinary meaning of the terms (literal interpretation); (b) the meaning of the terms in the context in which they occur (systematic interpretation); (c) the object and purpose of the Treaty (teleological interpretation); (d) "((a)) any subsequent agreement between the parties regarding the interpretation of the Treaty or the application of its provisions; ((b)) any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation; [and] ((c)) any relevant rules of international law applicable in their relations between the parties" (Article 31 (3) of the Vienna Convention). In addition, the historical interpretation may be relied upon as a supplementary means of interpretation for the following two purposes: "… In order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: ((a)) leaves the meaning ambiguous or obscure; or ((b)) leads to a result which is manifestly absurd or unreasonable" (Article 32 of the Vienna Convention).[4]

The "Literal Interpretation"; The Wording of Article 4 WPPT

This part of the analysis is restricted to the question of whether or not the remuneration right for performers and phonogram producers under the national law of a Contracting Party is covered by the wording of Article 4 WPPT. Accordingly, one only needs to look at the rights to which this

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1 Head of Department on International Law, Max-Planck-Institute for Intellectual Property, Competition and Tax Law, Munich; Adjunct Professor, Franklin Pierce Law Center, Concord, New Hampshire, U.S.A. This paper reflects the personal views of the author and not necessarily those of either the Max Planck Institute or the Franklin Pierce Law Center.

2 UN Doc. A/CONF 39/27 (1969); 8 ILM 679 (1969). The Vienna Convention came into force upon deposit of 35 documents of ratification or adherence, on 27 January 1980.

3 Shaw, International Law, 4th ed. Cambridge 1997, p. 633.

4 See for more details Bernhardt, Interpretation in International Law, in: Bernhardt (ed.), Encyclopaedia of Public International Law, Amsterdam 1995, vol. II, pp. 1416, 1418 et seq. and, specifically in the context of the WCT and the WPPT, Reinbothe and von Lewinski, The WIPO Treaties 1996, London 2002, pp. 17 et seq.

article applies, namely: "..to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty." The literal interpretation of these words does not leave any doubt. The ordinary meaning of the term "exclusive right" is the following: the exclusive right is a right to authorize or prohibit the relevant uses and enables the right holder to exclude third parties from such uses. In the case of the right of remuneration for private reproduction, the right holder cannot exclude third parties from private reproduction. Consequently, it does not represent an exclusive right, whether or not specifically granted in the WPPT.

In addition to exclusive rights, Article 4 (1) WPPT covers "the right to equitable remuneration provided for in Article 15 of this Treaty." Article 15 of the WPPT, according to its title and its wording, exclusively covers the right of remuneration for the use of certain phonograms "for broadcasting or for any communication to the public." The acts of broadcasting and communication to the public are clearly distinct from the act of reproduction. Consequently this aspect of Article 4 of the WPPT does not cover the remuneration right for private reproduction.[5]

The Systematic Context

The specific wording "the exclusive rights specifically granted in this Treaty" and "the right to equitable remuneration provided for in Article 15 of this Treaty" has to be read in its context. Firstly, the context of Article 4 (1) of the WPPT shows that this provision lays down the obligation of national treatment in a comprehensive way; any other rights which are not exclusive rights, or the specific remuneration right under Article 15 of the WPPT, are not covered. The comprehensive nature of Article 4 (1) of the WPPT in combination with the specific reference only to the statutory remuneration right under Article 15 of the WPPT does not leave any room to argue that, in addition, any further statutory right of remuneration would also be covered by this provision.

In addition, the context between Article 4 (1) of the WPPT and the exclusive right of reproduction in Articles 7 and 11 of the WPPT in combination with the permitted limitations and exceptions in Article 16 of the WPPT has to be looked at. It has been argued that such context must be considered with the consequence that "not granting such a right to remuneration – transformed from an exclusive right specifically provided for in the Treaty – is not likely to be allowed on the basis of Article 4 of the Treaty."[6] According to this argument, an exclusive right of reproduction which is limited to a right of remuneration, for example in respect of private copying, "is still a right provided for in the Treaty, but limited just in the given case."[7] Even if one may argue that such a remuneration right would still be "a right provided for in the Treaty", it is certainly neither an "exclusive" right specifically granted in the WPPT (as required by Article 4 thereof), nor a remuneration right under Article 15 thereof. Accordingly, this argument would go against the clear wording of Article 4 (1) of the WPPT and, in addition, would deny the fact

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5 See for the same result in context with the TRIPS Agreement, which is even less clear in its wording than Article 4 of the WPPT, Gervais, The TRIPS Agreement – Drafting History and Analysis, London 1989, note 2.25. National Treatment under the TRIPS Agreement is limited to the "rights" granted in the TRIPS Agreement, see Article 3 (1) phrase 2 of the TRIPS Agreement.

6 Ficsor, The Law of Copyright and the Internet, New York 2002, p. 614.

7 Ficsor, The Law of Copyright and the Internet, New York 2002, p. 614.

that the principle of national treatment is distinct from that of minimum rights. Indeed, the words chosen by the proponent of this opinion seem to show some degree of hesitance or caution: "*It could hardly be said* that by such a limitation it also becomes possible to exclude the right *not just from 'national treatment', but from the minimum protection* to be granted … ."[8] This phrase, in addition, seems to focus on the minimum protection rather than on national treatment. Also, the language of the following sentence reveals a similar caution: "*We submit*, therefore, that not granting such a right to remuneration … *is not likely to be allowed on the basis of Article 4 of the Treaty*."[9]

Indeed, the principle of national treatment is distinct from the principle of minimum rights. Both principles are cornerstones of the existing system of protection in international copyright and neighbouring rights law. In principle, national treatment refers to the level of protection under the national law of a party to a treaty to be accorded also to the nationals (or other beneficiaries) of the other parties (subject to possible limitations of the scope of national treatment as defined in Art. 4 (1) of the WPPT). On the contrary, the principle of minimum rights shall supplement that of national treatment by referring to a specific level of protection laid down in the relevant treaty, irrespective of whether or not such level is laid down in the national law of the parties. Consequently, both principles are distinct and have to be interpreted separately; in general, an argument based on the minimum rights in combination with the permitted exceptions and limitations cannot be used for the interpretation of the principle of national treatment.

In conclusion, the systematic interpretation also leads to the result that the remuneration right for private copying is not covered by Article 4 (1) of the WPPT.

The Purpose of the Provision

In general, the principle of national treatment represents one cornerstone of international copyright law and also, though in a different way, of international neighbouring rights law. In the field of copyright, this principle was laid down at the multilateral level for the first time in the Berne Convention for the Protection of Literary and Artistic Works of 1886. At that time, the economic importance of copyright was far from being as strong as it is today, so that the Members could easily agree on a very broad scope of national treatment. Accordingly, Article 5 (1) of the Berne Convention obliges its Members to grant national treatment in respect of all existing and future rights laid down in the respective laws – hence, any copyright protection granted to their own authors. Yet, the explicit exceptions to national treatment as provided under the Berne Convention reflect the underlying idea that national treatment should not be provided where the national levels of protection in the Members are highly diverse.[10]

In the area of neighbouring rights, the purpose of national treatment is likewise, in principle, to protect foreigners like nationals (subject to specific criteria of eligibility). However, the standards of protection under national laws in this field have always been quite diverse, so that countries negotiating international treaties in this field, and at a time when the economic importance of

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8 See fn. 7; emphasis by the author.

9 See fn. 7; emphasis by the author.

10 See thereon von Lewinski, Intellectual Property, Nationality and Non-Discrimination, in: WIPO (ed.), Intellectual Property and Human Rights, Geneva 1999, pp. 175, 190.

neighbouring rights had been recognised as being strong, were not ready to grant the same unlimited scope of national treatment as is provided under the Berne Convention. Indeed, after economic studies on the percentage of the gross national products represented by the copyright and neighbouring rights industries had been issued in the 70s and 80s, governments became even more attentive to the possible economic impact of any international provision such as national treatment. Consequently, Article 3 (1) phrase 2 of the TRIPS Agreement explicitly reduces the scope of national treatment for the relevant neighbouring rights to the (minimum) rights provided under the TRIPS Agreement itself.[11]

This purpose of limiting the scope of national treatment for economic reasons is even more specifically expressed in Article 4 (1) of the WPPT. The purpose of the specific wording limiting the scope of national treatment under Article 4 (1) of the WPPT, hence, is to reduce the outflow of money to be paid on the basis of national treatment. This is confirmed by the fact that the overall majority of countries that voted for the adopted, limited scope of national treatment are importers of music, whereas the USA which, being an exporter of music, would have largely benefited from broad national treatment, voted in favour of an unlimited scope of national treatment.

Historical Interpretation

The result found on the basis of the wording, the context, and the purpose of Article 4 (1) of the WPPT is confirmed strongly by the historical interpretation. Firstly, the development of discussions in the Committee of Experts preparing the Diplomatic Conference 1996 that adopted the WPPT sheds light on the background of the provision on national treatment under the WPPT. The initial proposal made by the Secretariat of WIPO in 1993 followed the concept of broad national treatment under Article 5 of the Berne Convention. Whereas some delegations, in particular one which is a music exporter and which considered comprehensive national treatment a precondition for accepting the future international treaty, were in favour of this proposal, a large number of delegations objected to such broad national treatment on a number of grounds, including the economic one: they were motivated by the expected consequences of broad national treatment for those countries which considered themselves net importers of music. Therefore, many delegations preferred to limit the scope of national treatment under the future treaty. In particular, they expressed clear opposition to another provision which had been proposed by the WIPO Secretariat, namely the explicit obligation to grant unconditional national treatment in the case of collective management of rights. In particular, the application of national treatment to rights of remuneration, such as the private copying levy, was felt to be a highly sensitive issue.[12]

The WIPO Secretariat took account of such opposition and included in its Memorandum for the Third Session a reference to the limited scope of national treatment as adopted, in the meantime, in the framework of the TRIPS Agreement[13] and proposed to postpone the discussions on the

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11 See on the considerations in respect of the TRIPS Agreement Reinbothe and von Lewinski, op. cit., pp. 285-286. See also for the historical background hereunder.

12 See the Report on the Second Session of the Committee of Experts, Copyright 1994, pp. 44, 54 et seq./para. 68-78. See also Reinbothe and von Lewinski, op. cit., pp. 279, 280.

13 Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Third Session, Copyright 1994, 241 et seq., para. 104.

scope of national treatment to a later stage. Instead of such discussions, only some documents were subsequently submitted by governments. They continued to reflect the two diverging positions on this issue: the EC and its Member States endorsed the approach to limit the scope of national treatment as referred to by the WIPO Memorandum for the Third Session, while the USA reaffirmed its preference for a broad national treatment obligation.

The Basic Proposal for the Substantive Provisions of the Treaty for the Protection of Rights of Performers and Producers of Phonograms to be considered by the Diplomatic Conference,[14] which was the basis for the negotiations at the Diplomatic Conference 1996, proposed that every Contracting Party be under the obligation to accord "the treatment it accords to its own nationals with regard to the protection provided for in this Treaty". The accompanying notes to the Basic Proposal explained that "national treatment is *confined* to the protection provided for in the proposed Treaty".[15] Against the background of the reference to the limited scope of national treatment under the TRIPS Agreement by the above mentioned WIPO Memorandum, the view of a large number of delegations at the WIPO Committee of Experts described above, and the similarity of the texts of Article 3 (1) phrase 2 of the TRIPS Agreement and the Basic Proposal, one has to conclude that Article 4 (1) of the Basic Proposal was designed to limit the scope of national treatment to the minimum protection provided for in the proposed Treaty.[16]

The opinion expressed elsewhere according to which this wording and the statement in the notes to the Basic Proposal would mean that national treatment would be limited to the subject matter of protection under the future treaty and, for example, would not cover broadcasting organisations (which in any event were not proposed to be covered at all),[17] is not convincing, all the more since any obligation (such as that to grant national treatment) under a treaty is always and implicitly limited to the subject matter covered by such treaty, unless otherwise explicitly stated. Accordingly, the aim of the wording of Article 4 (1) of the Basic Proposal was to limit the actual scope of the national treatment obligation.

The clash between the two opposing views expressed at the sessions of the Committee of Experts was expressed even more clearly during the Diplomatic Conference: some delegations preferred a broad scope of national treatment, while many others advocated a limited one. In particular, the USA proposed the following, broad wording:

> "(1) Each Contracting Party shall accord to nationals of other Contracting Parties, in respect of the subject matter protected under this Treaty, the treatment it accords to its own nationals as well as the rights specially granted by this Treaty.
>
> (2) The obligation provided for in para. (1) shall not apply to the extent to which the other Contracting Party makes use of the reservations allowed under Articles 12 (2) and 19 (3) of this Treaty."[18]

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14 WIPO doc. CRNR/DC/5 of 30 August 1996.

15 See Basic Proposal (fn. 12), note 4.02; emphasis by the author.

16 See also Reinbothe and von Lewinski, op. cit., p. 281/note 5.

17 Ficsor, op. cit., p. 606.

18 WIPO doc. CRNR/DC/34.

On the other hand, the EC and its Member States as well as many other delegations tried to limit the scope of the national treatment obligation as clearly and widely as possible. Firstly, the proposal of the EC and its Member States not only endorsed Article 4 of the Basic Proposal, but also added a paragraph according to which national treatment would not apply to the extent to which the other Contracting Party makes use of the reservations for audio-visual performances and secondary uses.[19] However, the first paragraph of Article 4 of the Basic Proposal was not satisfactory for many of those delegations which were in favour of a limited scope of national treatment. In particular, the proposal made by Canada clearly shows the main concern of the proponents of a limited scope of national treatment. According to its proposed, additional para. 3, national treatment should "not apply to any regime under which a Contracting Party provides remuneration to performers or producers of phonograms for the private copying of phonograms or the performance embodied therein."[20] This very specific clarification, however, seemed to be too limitative in the view of the EC and its Member States.

Therefore, the latter delegation followed up on the Canadian proposal and proposed, on top of an exemption from national treatment for statutory rights of remuneration for private copying, the exemption of any other remuneration rights not explicitly mentioned. This was expressed by the following wording of an additional para. 4 of Article 4, according to which an exemption from national treatment would apply to "rights which do not derive from express provisions of this Treaty or which may be recognised by national legislation in the context of limitations and exceptions under Articles 13 and 20 of this Treaty."[21] By using this wording, the EC and its Member States wanted to exempt from the national treatment obligation not only the statutory rights of remuneration for private copying, but any similar statutory remuneration rights provided under national law in the context of limitations of, and exceptions to, minimum rights.[22] In addition, the EC and its Member States proposed, *inter alia*, to replace the word "protection" of the Basic Proposal by the word "rights", so that the scope of national treatment would be limited even more precisely.

This proposal was then made even clearer by the delegation of Switzerland which suggested that national treatment should be limited to "the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 20 (a) of this Treaty."[23] As a compromise, the USA then proposed two amendments to the Swiss proposal, namely to delete the word "specifically" in para. 1 of the provision and to insert a new, second paragraph, which would read: "The obligation of paragraph (1) shall extend to remuneration systems for private copying of phonograms in digital form, except that Contracting Parties shall only be required to extend protection to nationals of another Contracting Party to the degree that the other

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19 WIPO doc. CRNR/DC/32, p. 2, referring to Articles 25 (1), 12 (3) and 19 (3) of the proposal.

20 WIPO doc. CRNR/DC/44.

21 WIPO doc. CRNR/DC/59; Articles 13 and 20 eventually became Article 16 WPPT on limitations and exceptions.

22 Reinbothe and von Lewinski, op. cit., p. 282, also regarding further limitations of the scope of national treatment proposed in this document.

23 Article 20 (a) later became Article 15 of the WPPT; the Swiss proposal was tabled only orally in Main Committee I of the Diplomatic Conference, see Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions Geneva 1996, Geneva 1999, pp. 771, 772/para. 950.

Contracting Party has established such a remuneration system."[24] In other words, the USA proposed material reciprocity[25] in respect of the remuneration for private copying. However, even this compromise proposal did not satisfy the majority of countries; material reciprocity would still have meant for them that the outflow of money would be larger than its income. After numerous, unsuccessful attempts to agree on a concrete wording of this article, a vote had to be taken. First, the above U.S. proposal including the paragraph on material reciprocity regarding the remuneration for private reproduction was put to vote and rejected by a broad majority. Subsequently, the Swiss proposal which later became Article 4 of the WPPT (subject to technical adaptations) was adopted with the following result: 88 in favour, 2 against (the U.S. and Thailand) and 4 abstentions.[26] Accordingly, the development of this provision clearly shows that the remuneration right for private reproduction, as well as other statutory remuneration rights except those under Article 15 of the WPPT, were deliberately excluded from the obligation to grant national treatment.

Conclusion

All methods of interpretation have shown the same result, namely: the obligation to grant national treatment under Article 4 (1) of the WPPT does not extend to any statutory remuneration right granted under national law for performers and phonogram producers in respect of the private reproduction of phonograms. This result is supported by the analysis made in the first "authoritative" commentary on the WIPO Treaties, by Reinbothe and von Lewinski.[27]

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24 Records of the Diplomatic Conference, op. cit., p. 775/para. 977.

25 There is a distinction between formal and material reciprocity in international law (see Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886 - 1986, London 1987, para. 1.27). Formal reciprocity means the same as national treatment (country A protects authors of country B if B protects those of A as their own authors). Material reciprocity refers to the level of protection; protection is granted if the other country grants substantially equivalent protection. For ex., if A has a levy for analog and digital private copying, B only for digital, A applies material reciprocity if it decides to grant protection for works of B only for digital private copying. Usually, "reciprocity" is used in the meaning of material reciprocity without further specification.

26 See for further details Reinbothe and von Lewinski, op. cit., pp. 283, 284.

27 Op. cit.; it was written by a Head and Member respectively of the Delegation of the European Communities at the Diplomatic Conference and, hence, by persons who were most closely involved in the drafting and negotiation of proposals leading to the final result. At the same time, it needs to be stated that any piece of literature written on the WIPO Treaties by individual persons involved in the deliberations at the Diplomatic Conference, including also the above quoted commentary by Ficsor, can never be considered an "authentic interpretation" in the meaning of international law, namely an interpretation which is binding the parties to a treaty (see on the different kinds of interpretation including the authentic interpretation, Reinbothe and von Lewinski, p. 17 et seq.).

The Private Copying Levy

A Minimum Right under the WPPT?

Prepared by Dr. Silke von Lewinski
for the
Canadian Private Copying Collective

May 2003

The Private Copying Levy – A Minimum Right under the WPPT?

By Dr. Silke von Lewinski[1]

The issue of this analysis, in its first part, is the question whether or not the minimum right of reproduction under Articles 7 and 11 of the WPPT, in conjunction with the permitted limitations and exceptions under Article 16 of the WPPT, constitutes a legal basis for Contracting Parties of the WPPT to require of the other Contracting Parties that they grant performers and phonogram producers a right to remuneration for private reproduction. The second part of the analysis will deal with the consequences of a supposed positive result of the first part.

The private copying levy as a minimum right under the WPPT?

Private reproduction certainly is a form of reproduction covered in principle by the exclusive right of reproduction to be granted as a minimum right under Articles 7 and 11 of the WPPT. However, exceptions and limitations may be provided in respect of this exclusive right under Article 16 of the WPPT. Its first paragraph allows Contracting Parties to provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. Indeed, most countries do provide for the same kinds of limitations or exceptions in respect of author's rights and of neighbouring rights. Article 16 (2) of the WPPT establishes the conditions under which any such limitations or exceptions are permitted, namely: such limitations or exceptions must be confined to (1) "certain special cases", (2) "which do not conflict with a normal exploitation of the performance or phonogram and (3) do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram". If these three conditions for a limitation or exception are not fulfilled, the respective Contracting Party does not grant the minimum right of reproduction as required by the WPPT.

Accordingly, one has to consider the minimum right of reproduction under Articles 7 and 11 of the WPPT together with the permitted exceptions and limitations under Article 16 of the WPPT in order to determine the level of protection which has to be granted as a minimum standard under the WPPT in respect of the particular kinds of reproduction. Where, for example, an exception from the exclusive reproduction right in cases of private reproduction is compatible with Article 16 (2) of the WPPT only under the condition that the resulting unreasonable prejudice for performers and phonogram producers is eliminated by means of a statutory right to remuneration for private copying, one may conclude from the combined application of Articles 7, 11 and 16 (2) of the WPPT that an obligation exists to provide for such a remuneration right.

Before this study follows up with this concrete analysis, it should be noted that the situation under the WPPT is different from that under the previous international conventions, the Rome Convention[2] and the TRIPS Agreement.[3] In particular, Article 15 (1) of the Rome Convention

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[1] Head of Department on International Law, Max-Planck-Institute for Intellectual Property, Competition and Tax Law, Munich; Adjunct Professor, Franklin Pierce Law Center, Concord, New Hampshire, U.S.A. This paper reflects the personal views of the author and not necessarily those of either the Max Planck Institute or the Franklin Pierce Law Center.

[2] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961.

allows Contracting States to provide for exceptions as regards "private use" without establishing any further conditions. Article 14 (6) phrase 1 of the TRIPS Agreement refers back to the Rome Convention as regards the permitted limitations and exceptions; Article 13 of the TRIPS Agreement which establishes the same three conditions for permitted limitations and exceptions as set out in Article 16 (2) of the WPPT applies only to the preceding provisions on copyright.[4] Consequently, any country considering the ratification of the WPPT will have to be aware of this particular context of the above mentioned three conditions as regards the international protection of performers' and phonogram producers' rights.

The three conditions, which are commonly called the "three-step-test", have been an element of international copyright protection since the 1967 Revision of the Berne Convention for the Protection of Literary and Artistic Works. In Article 9 (2) of the Berne Convention, these three conditions are laid down only in respect of the permitted limitations and exceptions regarding the exclusive reproduction right, whereas the three-step-test was later reintroduced in the TRIPS Agreement regarding the permitted exceptions and limitations in respect of all exclusive rights in the field of copyright. The re-appearance of the three-step-test both in the WCT and in the WPPT seems to confirm that the formulation of these conditions represents a proper basis for compromise in an area with strongly diverging views, as is the often disputed and delicate area of exceptions and limitations. Indeed, such wording seems flexible enough to have yielded, at the WIPO Diplomatic Conference 1996, the consensus of 127 countries having quite diverse legislation regarding exceptions and limitations; hence, it does leave some room for interpretation.

The first condition: Certain special cases

Firstly, any permitted exception or limitation must concern a "certain special case". This means that the exception or limitation must be well-defined and specific rather than broad, and that it must have specific and sound policy reasons.[5] This first condition does not seem to be problematic in respect of most exceptions or limitations regarding private reproduction in general, nor in respect of the Canadian legislation.

The second condition: No conflict with the normal exploitation

The exploitation of a right is the creation of benefits flowing from the right by way of licensing.[6] It is more difficult to determine what is a "normal" exploitation. In particular, this element could

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3 Agreement on Trade-Related Aspects of Intellectual Property Rights, which is part of the WTO Agreement of 1994.

4 See, for example, Ficsor, The Law of Copyright and the Internet, New York 2002, p. 642/note PP 16.02.

5 See Reinbothe and von Lewinski, The WIPO Treaties 1996, London 2002, Article 16 WPPT note 19; Ficsor, op. cit., notes PP 16.04, C 10.01 et seq. and note 5.55; see also Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, London 1987, paras. 9.6, 9.9. The fact that the WTO Panel in the case WT-DS 160 did not apply the criterion of sound policy reasons is rightly subject to criticism (see also Ficsor, How much of what? The "three-step-test" and its application in two reasoned WTO Dispute Settlement Cases, RIDA no. 192, April 2002, pp. 111 et seq., 219 et seq.); in any case, this question of interpretation does not need to be further discussed here, since it would not change the outcome.

6 Similar: Ficsor, The Law of Copyright (above, fn. 3), p. 284/note 5.56; Reinbothe and von Lewinski, op. cit., Article 16 WPPT note 20.

be interpreted empirically and, hence, refer only to the factual situation in a relevant country. On the other hand, it has to be understood in a normative sense, namely as referring to what should be reserved to the right holder as his prerogative. When looking in particular at the purpose of the three-step-test, its background is to find a proper balance between the right of the right holder and the interests of the public at large, while still guaranteeing the exploitation right in principle. If one interpreted the word "normal" only by reference to the empirical fact of normal exploitation, one would diminish the potential of the right and possibly even largely take away its value. This would contradict the very purpose of any international convention protecting copyright or neighbouring rights. Therefore, one must understand the "normal" exploitation as meaning the exploitation which is intended to be reserved to the right holder; this may be understood as any exploitation of a "considerable economic or practical importance."[7]

The historical interpretation confirms the normative interpretation; the main idea behind the three-step-test as formulated first in Article 9 (2) of the Berne Convention and later adopted also in the framework of the WPPT was that the purposes of the limitation or exception "should not enter into economic competition with these works."[8] Also the WTO Panel in the above mentioned case has taken account of the normative interpretation.[9]

In addition, the "normal exploitation" must be addressed only in relation to the particular right in question. Consequently, whether or not there is a possible conflict in the case of a limitation or exception regarding private reproduction can be ascertained only in comparison with the exclusive right of reproduction.[10] Accordingly, the answer to the question whether or not such conflict exists in a particular country at a particular point in time depends on whether the extent and quality of private reproduction which is exempted from the exclusive right has a considerable economic or practical importance and considerably interferes with the market based on the exercise of the right holders' exclusive reproduction right. It has been suggested that private copying does not interfere with the normal exploitation by reproduction, since the authors could not ordinarily expect to receive a fee.[11] At the Main Committee I of the Stockholm Revision Conference of the Berne Convention, even the example of making "a larger number of copies for use in individual undertakings" was considered not to be in conflict with the normal exploitation.[12]

The third condition: No unreasonable prejudice to the legitimate interests of performers and phonogram producers

This third condition again raises some doubts as to the meaning to be applied to its wording. In particular, the word "legitimate" could be interpreted either in the meaning of "legal", or in the

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7 See Ficsor, op. cit. (fn. 3), p. 284/note 5.56 with reference to the report of a Study Group in the context of the Stockholm Conference of the Berne Convention.

8 Part of the text proposed by the above mentioned Study Group as reproduced in the annotations to the Basic Proposal discussed at the Diplomatic Conference at Stockholm 1967. See also in favour of the normative interpretation Ficsor, The Law of Copyright (fn. 3), p. 285/note 5.56, with more detail.

9 See the relevant analysis with respect to the Panel Report WT/DS 160, Ficsor, How much (fn 4), p. 233.

10 See Reinbothe and von Lewinski, op. cit., Article 16 WPPT note 21.

11 Ricketson, op. cit. para. 9.7.

12 As quoted by Rickeston, op. cit., para. 9.7.

meaning of "justifiable" by social norms or public policies. The context of the three-step-test with the minimum rights to be granted, as well as the purpose of the test, namely to "confine" the permitted limitations of and exceptions to such minimum rights, rather speak in favour of the first alternative, namely that the word "legitimate" is to be interpreted to mean "legal". This is supported by the historical interpretation leading back to the relevant deliberations in the context of preparations for the Stockholm Conference of the Berne Convention as regards the introduction of the three-step-test in Article 9 (2) thereof. This has been described in more detail in the relevant literature.[13] Also the WTO Panel, in the above-mentioned case, considered the "legitimate interests" "from a legal positivist perspective".[14]

Consequently, the legitimate interests must be considered as the "legal" interests of those who would benefit from the exclusive reproduction right. The third condition requires that these interests must not be unreasonably prejudiced. Extensive private copying which is exempted from the exclusive reproduction right prejudices the right holders' legitimate interests.[15] The only question is whether or not such exempted private reproduction would make the prejudice an "unreasonable" one. The latter word gives room for interpretation and evaluation by the Contracting Parties who, in the end, will be the only ones to offer a so-called "authentic", binding interpretation of the WPPT.

Accordingly, the wording, context and purpose of Article 16 (2) of the WPPT do not give a clear cut answer to the question of whether the relevant exception for private reproduction would be compatible with Article 16 (2) of the WPPT only on the condition that a remuneration right for private reproduction was established. If the answer is "yes", this would mean that a remuneration right, which would have the effect of eliminating the unreasonable prejudice, would constitute a minimum protection to be provided under the WPPT.

This view has been expressed with regard to the Berne Convention by the International Bureau of WIPO in the framework of a document submitted to the Committee of Governmental Experts on Audio-visual Works and Phonograms in June 1986. In particular, it stated that certain practices regarding private reproduction "cannot be allowed without at least some compensation according to … Article 9 (2) of the Berne Convention".[16] In addition, it submitted to the Committee a number of principles, according to which the private reproduction of phonograms prejudiced the legitimate interests of the authors; the elimination of such prejudice was considered to be an "obligation" of the Berne Union members, the most appropriate way of eliminating such prejudice being a remuneration right for private reproduction.[17] It has to be stressed, however, that the views of the secretariat of an international organisation – in this case, the International Bureau of the WIPO – irrespective of its expertise may not, as such, be taken to represent a valid means of interpretation. It is rather only the Contracting Parties themselves who would be able to provide an authentic, binding interpretation of any treaty such as the WPPT, by way of an explicit

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13 See Ficsor, The Law of Copyright (fn. 4), p. 286 et. seq./note 5.57, with further references.

14 Panel Report WT/DS 160.

15 See also a similar statement of the Chairman of Main Committee I at the Stockholm Diplomatic Conference 1967 of the Berne Convention, as quoted in Ficsor, The Law of Copyright (fn. 4), p. 288/note 5.57 at the end.

16 Copyright 1986, 226.

17 See these and further principles submitted by the International Bureau, Copyright 1986, 243.

or implicit agreement, as set out in Article 31 (3) of the Vienna Convention on the Law of Treaties.[18]

Since, according to the above analysis, there is room for interpretation as to the question of whether or not Articles 7, 11 and 16 (2) of the WPPT require Contracting Parties to provide for a remuneration right for private reproduction (unless they provide for an exclusive right), one has to proceed with the means of interpretation under Article 31 (3) of the Vienna Convention, ranking at the same level the literal, systematic and teleological interpretation.[19] If one considers the interpretation of the three-step-test in the context of the Berne Convention, mention must be made of the following occurrence: at its meeting in summer 1988, the Committee of Experts on the Evaluation and Synthesis of Principles on Various Categories of Works discussed the question of "whether or not it is an obligation, in certain cases, to introduce a right to remuneration" in respect of private reproduction. The delegations did not agree upon a positive answer to this question. While certain delegations considered the widespread private reproduction as constituting an unreasonable prejudice to the legitimate interests of authors and, hence, were of the view that Article 9 (2) of the Berne Convention included the obligation of the member countries to eliminate such prejudice by establishing a private copying levy, others disagreed with such interpretation or, at least, hesitated to admit to such an obligation and argued rather that the issue of private reproduction was to be left to interpretation by Berne member countries.[20]

Accordingly, even if one may not draw any concrete conclusions concerning the interpretation of the WPPT from this event which occurred in the context of the Berne Convention, there is no reason to presume that the Contracting Parties to the WPPT would reflect a substantially different picture. So far, an agreement on an obligation to provide for a remuneration right for private reproduction can not be ascertained. Therefore, a look at the subsequent practice in the application of the three-step-test of the WPPT (as well as of other treaties) establishing the agreement of the parties regarding its interpretation[21] becomes important as a means of interpretation and may indeed provide some guidance. If all parties to the relevant treaties – in respect of authors' rights, the Berne Convention and the TRIPS Agreement, and in respect of performers' and phonogram producers' rights, the WPPT – were of the opinion that the three-step-test in combination with the exclusive reproduction right leads to the obligation of the parties to establish a remuneration right for private reproduction (unless they provide for the exclusive right), such opinion would have to be reflected in the relevant legislation. Accordingly, the laws of all countries being parties to the above treaties would have to establish such a remuneration right for authors and performers/phonogram producers respectively. However, this is not the case: a substantial number of such countries do not provide for a private copying levy. This result is another indication that there is no agreement between the parties regarding the interpretation of the three-step test (neither in the relevant copyright treaties, nor under the WPPT) according to which an obligation would exist to provide for a private copying levy.

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18 See Reinbothe and von Lewinski, op. cit., p. 17/note 2.

19 See thereon Reinbothe and von Lewinski, op. cit., p. 18/notes 3, 4.

20 See the report of the Committee, Copyright 1988, 510/paras. 45 et seq.

21 Article 31 (3) b of the Vienna Convention. The text of Article 31 (3) a) and b) reads:
"((a)) any subsequent agreement between the parties regarding the interpretation of the Treaty or the application of its provisions; ((b)) any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation;"

Accordingly, although there may be reasons to claim, under the literal, systematic and teleological interpretation, that an obligation to provide for a private copying levy is established on the basis of Articles 7, 11 and 16 (2) of the WPPT, major doubts as to such interpretation prevail, in particular under Art. 31 (3) b) of the Vienna Convention.

Consequences of the supposed view that an obligation to provide for a private copying levy exists under the WPPT

Even if one were to admit the view that Articles 7, 11 and 16 (2) of the WPPT are a sufficient basis for an obligation of Contracting Parties to provide for a remuneration right for private reproduction (unless a full exclusive right is provided), the consequences for a country which intends to ratify the WPPT do not seem to be very important or threatening. Firstly, from a practical point of view, one has to admit that no efficient dispute settlement mechanism exists in respect of questions to be dealt with under the WPPT; the only efficient dispute settlement mechanisms in respect of performers' and phonogram producers' rights exist under the WTO/TRIPS Agreement and the NAFTA, neither of which provides for the three-step-test in respect of neighbouring rights. If another Contracting Party claims payments for private reproduction on the basis of the minimum protection under the WPPT, a party could counter with its own, diverging interpretation of the three-step-test by using the above mentioned room for interpretation. Accordingly, it could state that it introduced the private copying levy voluntarily and not on the basis of any purported international obligation. More importantly, where a country claiming such payments does not itself provide a full right of remuneration for private copying, its position would not seem very credible, and the other country could answer by its own claim to receive such remuneration. In this context, it may be important to mention that one important country, the U.S.A., which is known often to put pressure on other countries for payments to be made, does not itself provide for a full-fledged private copying levy.[22] In practice, reciprocal agreements between collecting societies often include payment models which are based on the balancing of the relevant amounts to be paid mutually rather than on the actual exchange of money. The choice of such a model could be another means of avoiding payments to countries which themselves do not provide for a corresponding levy.

To these rather practical considerations, the following legal ones should be added. Firstly, it has been argued (though in the context of Article 4 of the WPPT) that, on the basis of a "retaliation theory", a "Contracting Party which provides for a private copying levy should not be obliged to accept a unilateral burden by paying remuneration to the other Contracting Party".[23] Secondly, any interpretation of one provision of an agreement must not take away the effect of, or render obsolete, a different provision of the same agreement (*effet utile*). Since the interpretation of Article 4 of the WPPT has clearly shown that national treatment shall not cover any remuneration right for private reproduction, and even material reciprocity was rejected as an option, the

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22 The levy on digital audio-tapes, DCC, MiniDiscs, CD-R Audio and CD-RW Audio represents a very small part of what would be a levy scheme for all kinds of media, including analogue media and CD-Rs and CD-RWs.

23 Ficsor, The Law on Copyright (fn. 4), p. 615/note PP 4.14 at the end.

establishment of a minimum obligation in this same respect would seem to nullify the result of negotiations obtained in Article 4 of the WPPT.

Conclusion

There are major doubts as to the view that Articles 7, 11 and 16 (2) of the WPPT constitute a legal basis for a required minimum right of remuneration for private reproduction in favour of performers and phonogram producers (in the case where a Contracting Party provides for an exception from the exclusive reproduction right in respect of private reproduction). Even if one supposes that such an obligation exists, the fact that many Contracting Parties do not provide for such remuneration right seems to indicate that there is no agreement among the Contracting Parties as to such interpretation. In any case, a Contracting Party which does not itself provide for such a remuneration right cannot convincingly claim such right from other Contracting Parties.