Consultation on a Modern Copyright Framework for Online Intermediaries
May 2021

Introduction

The Association of Canadian Publishers (ACP) represents 115 independent English-language book publishers. Our members are Canadian-owned and they operate in communities across Canada. Along with our francophone counterparts, we publish 80% of the new books published by Canadian writers each year. These books cross all genres in both print and digital formats. Copyright is essential to the work that we do and is a key pillar of the creative economy. Copyright supports the continued creation and publication of written works in all genres and for a variety of markets.

The online environment continues to evolve, influencing the ways that users consume content and how rightsholders are remunerated for that use. As the consultation paper points out, the internet is dominated by intermediaries—the "web giants"—that provide the basic tools needed to participate in the online sphere through web hosting, data storage, and internet service. Some also aggregate, curate, and disseminate content, including copyright-protected works.

ACP supports the stated policy objective of this consultation, that is, to ensure that Canada's copyright framework for online intermediaries reflects the evolving digital world. For ACP, this framework must be strengthened to better ensure that rightsholders are fairly compensated for use of their content online, and to ensure their rights can be enforced efficiently and effectively in cases of infringement.

A. Safe harbour protections and online intermediaries' liability

Though ACP recognizes that the consultation paper indicates that the government is not currently considering reform of Canada's "notice and notice" regime, we note that ACP and other rightsholder groups foresaw the challenges and limitations of this model during successive rounds of consultation leading up to the implementation of the *Copyright Modernization Act* in 2012. Our concerns that rightsholders would be left pursuing an endless and losing game of "whack-a-mole" have come to pass, with small- and medium-sized publishers being left to police the illegal dissemination of their intellectual property online, pursue enforcement, and repeat the cycle when their content inevitably appears online again. This exercise requires human and financial resources far beyond those available to independent businesses, and litigation is an impractical route for most independent publishers to pursue in these cases. Meanwhile, the

availability of pirated books online continues to undercut the commercial market for this content, limiting the potential for future investment in new works.

Prior to 2012, ACP advocated for a "notice and takedown" regime, though in the last decade other jurisdictions have identified this model as being ineffective to meet the reality of today's online infringement. A shift has begun to "notice and stay down" regimes, notably in the European Union where the 2019 *European Single Market Directive* requires this of some intermediaries. We strongly encourage the government to reconsider its position on maintaining the "notice and notice" regime, in order to bring Canada into step with our international trading partners. Canadian rightsholders currently have stronger tools for enforcement outside of our borders than within. A "notice and stay down" regime would reduce the burden on rightsholders to enforce their copyright and deter future infringement, with the burden of copyright enforcement being shared with online intermediaries. This would also serve to encourage greater collaboration between intermediaries and rightsholders.

The consultation paper identifies several possible measures that are intended to strengthen Canada's existing "notice and notice" regime. ACP supports the Government of Canada's intentions, particularly for those intermediaries whose activities are not technical, automatic and passive. We note the suggestion that safe harbour provisions only apply in cases where an intermediary lacks a financial stake in the infringing activity. We believe that this approach would be ineffective in addressing the role some intermediaries play in facilitating infringement or damaging the market for published works, even if they do not profit directly from this activity. We recommend that limitation of liability only be invoked by those intermediaries that are truly technical, automatic, and passive, and which have adopted measures to ensure that infringing content stays down upon notice from rightsholders.

The high-profile Internet Archive case in the United States offers an example of why an exclusion based on financial benefit alone is ineffective. Though the Internet Archive claims that its repository of ebooks is shared to advance scholarship and public access to knowledge, in practice it undermines the market for sale of these books, both directly to consumers and also to libraries. The now defunct Vancouver-based Ebook Bike file sharing site is another example of a self-described non-commercial platform that damaged the market for copyright protected works. As described in the consultation paper, presumably both the web host and developer of this site could escape liability because they had not profited directly from use of the copyright-protected works, while leaving rightsholders to compete with free copies of their own books and to pursue expensive and time-consuming litigation through the courts.

ACP also supports the consultation paper's suggestion that intermediaries be required to implement mechanisms to address the behaviour of users who have been identified as repeat alleged infringers, as part of the existing notice and notice regime. Such measures would

discourage infringement and reduce the burden currently placed on rightsholders to enforce their copyrights, helping to limit the "whack-a-mole" phenomenon described above.

Recommendations:

- Introduce a "notice and stay down" regime to ensure Canada conforms with international best practices with respect to safe harbour obligations.
- If the existing "notice and notice" regime remains in place, strengthen it by removing safe harbour provisions for online intermediaries with a financial stake in the infringing activity, and for online intermediaries that actively engage in content aggregation, curation, dissemination, and similar activities; and introduce measures that require intermediaries to address repeat alleged infringers.

B. Remuneration of rightsholders through collective licensing

Publishers depend on a strong copyright framework in order to maximize the return on their investment in the creation of new books, and rely on a mix of revenue streams in order to do so. The market framework that supports this work must facilitate this commercial activity and not limit a rightsholder's ability to earn revenue and a return on that investment. Secondary licensing can be an important part of a fair marketplace for copyright-protected works, but it must not replace the market for primary sales. We have seen this in the context of the education system, where non-exclusive collective licences offered by Access Copyright and Copibec ensure that users have easy and legal access to the content they need and also that rightsholders are compensated for use of that content. These licensing regimes also serve to encourage a healthy marketplace for primary sales of published works.

Currently, Canadian educational institutions outside of Quebec are unlicensed, and publishers compete not only among themselves but also with free copies of their own works, which the institutions believe can be copied without compensation. The collective licence not only provides remuneration for copying, but also offers an incentive for users to purchase the book or obtain a licence when the content they need to copy exceeds the terms offered by the collective licence.

Though collective licensing is an effective solution to the secondary licensing of works for educational use, with respect to the licensing of digital content online, and in the context of text-based works, ACP does not support the consultation paper's recommendations surrounding compulsory licensing. The imposition of a compulsory licensing regime for digital platforms would limit publishers' commercial opportunities, both through primary sales and direct licensing. In theory, extended collective licensing (ECL) could be useful and effective in monetizing secondary uses in some parts of the marketplace, but overall, it would cause significant damage to rightsholders' income from primary markets if it were imposed in this arena.

It is currently difficult to identify uses or types of intermediaries that could be subject to ECL without also undermining the primary market for text-based works. For example, the market for ebooks and audiobooks is still growing in Canada and publishers seek every possible opportunity to sell and license this content through a range of channels and platforms. Reproduction rights organizations (RROs) could introduce new licensing opportunities for rightsholders, but only if rightsholders give the RRO a mandate to act collectively on their behalf. ACP needs a better understanding of the licensing activities the government is considering introducing ECL to support, particularly as they apply to text-based works, before being able to form a position on this proposal. Any licensing mechanism being considered must have the full support of rightsholders before being implemented; in short, further consultation is needed.

Despite our opposition to the licensing schemes for text-based works proposed in the consultation paper, in general we are encouraged by the government's consideration of collective licensing as a desirable tool to support the fair remuneration of rightsholders. ACP and other writing and publishing associations have long-held positions around the importance of non-exclusive collective licensing in the education sector and urge the government to address the current uncertainty around collective rights management in Canada, which has resulted from the Federal Court of Appeal's decision in the Access Copyright/York University case. In this 2020 decision, the FCA ruled that tariffs approved by the Copyright Board are not enforceable against users who make unauthorized use of works in a copyright collective's repertoire. Enforceable, effective Copyright Board decisions are essential to the functioning of any collective licensing regime; our current system is broken and must be addressed before the government considers expanding collective licensing.

Recommendations:

- Withdraw the obligation to license text-based works from the options currently being considered for reform of the *Copyright Act*.
- Confirm tariffs set by the Copyright Board are mandatory to ensure a framework exists to support existing or future collective licensing regimes.

C. Transparency in rightsholders' remuneration and online uses of their content

ACP welcomes the consultation paper's recommendations around increasing the transparency with respect to remuneration and use online of publishers' content. The "value gap" between the income realized by online platforms and the portion shared with rightsholders is now well known as it relates to the music industry, but it is important to recognize that all rightsholders face similar problems in some online uses. Improvements in rightsholders' ability to negotiate with intermediaries and to determine whether remuneration offered is fair are welcome, and would also serve to better inform the process of regulating online intermediaries.

D. Rightsholders' enforcement tools against intermediaries, including by way of a statutory "website blocking" and "de-indexing" regime.

ACP is fully supportive of the consultation paper's proposed mechanisms to strengthen enforcement tools against online infringement, specifically by introducing measures that would compel online intermediaries to disable access to or remove infringing content. Ebook piracy damages the market for published works and enforcement is an ongoing battle for small- and medium-sized publishers with limited financial or human resources to pursue enforcement.

We believe that introducing remedies such as website blocking and de-indexing in law is necessary and has already been confirmed by Canadian courts. Clarifying the law in this area would remove legal uncertainty and streamline processes around website blocking and de-indexing, encourage greater cooperation between ISPs and rightsholders, and decrease the need for expensive and time-consuming litigation.

Recommendation:

- Implement statutory measures to support website blocking and de-indexing regimes to discourage copyright infringement and ease enforcement.

E. Other recommendations

The consultation paper highlights ways that Canada's *Copyright Act* could be strengthened through greater regulation of online intermediaries, and increased responsibility on the part of those entities to share in the responsibility for addressing infringement. For the Canadian publishing sector, however, ACP stresses that these tools will only be effective if the Government of Canada takes action to correct the damage that has resulted from the 2012 *Copyright Modernization Act*'s overly broad fair dealing exception for education.

Over the last decade we have presented factual evidence and made the case that changes to the *Copyright Act* in 2012 have resulted in significant economic damage to our sector. During this time, Canadian creators and publishers have lost more than $150M in direct licensing revenue alone, along with an unknown amount in primary book sales. Sufficient remedies to enforce copyrights and ensure fair remuneration for use of published works are required to ensure Canadian remain competitive in an era where the influence of online intermediaries continues to grow.

ACP calls on the Government of Canada to restore fair compensation to creators and publishers for the educational use of their works. We join colleagues across our sector in urging the government to implement measures that are consistent with recommendations 18, 20, and 21 from the Standing Committee on Canadian Heritage's *Shifting Paradigms* report:

1. Fair dealing for education must only apply to educational institutions where a work is not commercially available under licence by the owner or a collective.
2. Tariffs set by the Copyright Board must be enforceable.
3. Statutory damages must be available to all collectives.

For more information:

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