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By Email

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Re: ISPs' Submission to Innovation, Science and Economic Development Canada regarding the Consultation on a Modern Copyright Framework for Online Intermediaries

Introduction and Executive Summary

We are pleased to provide these comments on behalf of Bell Canada, Rogers Communications, Shaw Communications, TELUS Communications, Cogeco Communications, Quebecor Media, SaskTel, Eastlink, and the Canadian Communication Systems Alliance (collectively the "Internet Service Providers" or "ISPs"). We use the terms "Internet Service Providers" or "ISPs" to refer to all intermediaries that provide residential and commercial subscribers with access to the internet via wireline or wireless network. Combined, these ISPs provide internet access and other telecommunications services to the vast majority of Canadian households. The ISPs appreciate this opportunity to present their views on the Consultation on a Modern Copyright Framework for Online Intermediaries.

As a general comment, the ISPs agree with the statement in the Consultation Paper that the existing model of intermediary liability is a cornerstone of the Canadian copyright framework that the Government has carefully maintained and does not need significant reform. As explained in the Consultation Paper: "[s]ignificant changes to Canada's basic model of intermediary liability (e.g., explicit liability for services provided primarily for the purpose of enabling infringement and appropriately limited safe harbour protections without "notice and stay-down" or "notice and takedown" obligations)" should not be considered at this time."

The existing intermediary framework for passive infrastructure or "mere conduits" is working well and is the foundation for a vibrant online marketplace and digital services sector in Canada. At the same time, the ISPs recognize the vital importance that a modern approach to copyright enforcement plays in the integrity of digital markets and the development of innovative online business models and content. In this context, we believe that the Government should only consider certain targeted reforms if they increase the protection of copyrighted content online, safeguard individual rights and freedoms in an open internet and the role of ISPs as passive carriers, and facilitate a flourishing digital market.



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The majority of the comments made in this submission reflect the role played by Canadian telecommunications services providers as passive carriers.

The ISPs recommend the following improvements to the existing framework in Canada to improve the clarity and efficiency of the existing regime:

- Clarify the conditions required to benefit from safe harbour protection;
- Do not impose a knowledge standard for safe harbour eligibility on ISPs;
- Do not unreasonably limit the activities pursuant to which an ISP may rely on safe harbours;
- Clarify that safe harbour protection for ISPs also applies to their forwarding of notices under the notice-and-notice regime; and
- Clarify the procedure for copyright owners to obtain injunctive relief in response to online infringement.

The ISPs are also broadcast distribution undertakings (BDUs) and in that capacity comment on the proposals regarding remuneration through collective licensing. It is important to recognize that there is a wide disparity in the sizes of the various companies that provide internet access services in Canada. Working within the statutory framework, ISPs need to be able to adopt the measures in response to copyright enforcement that are best suited to their particular circumstances. The Government should not impose onerous, burdensome, and impractical obligations on ISPs or subject them to increased risk of liability.

Clarifying intermediaries' safe harbour protections

Any review of the copyright framework for online intermediaries, including ISPs, has to reflect the absolute necessity of maintaining a robust telecommunications sector in Canada that is able to provide Canadian households and businesses with the communication tools that drive our modern, technologically-focused economy. Accelerated by the COVID-19 pandemic, substantial portions of economic activity have moved online as millions of Canadians work from home and e-commerce has expanded significantly—increasing their need for and reliance on robust, high-speed internet service dramatically. Even once Canada comes out of the pandemic, telecommunications technology will remain crucial to Canada's economy. The Government should accordingly avoid adopting any measures that would impair the ability of ISPs to fulfill their critical function for Canadian households and businesses.

Indeed, even prior to the pandemic, the Federal Government committed itself to the objective of providing reliable high speed internet access to all Canadians through its Connectivity Strategy, including by means of the Universal Broadband Fund to help bring high-speed Internet to more rural and remote communities. Such initiatives, combined with ISPs' provision of robust network services to as many Canadians as possible, are vital to a modern digital economy and society. The



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Government should not make any changes to the *Copyright Act* (the “Act”) that would compromise this vital infrastructure or interfere with the broader policy imperative of a fully connected Canada.

The ISPs fully agree with the Government’s starting assumption that significant changes to Canada’s basic model of internet liability are not required. It is imperative for the Act to retain the elements that have worked well, including providing unconditional exemption from copyright liability for ISPs, and obligations related to copyright issues that recognize the role of ISPs as passive carriers. ISPs cannot, and should not, be forced into the role of adjudicating copyright issues.

The ISPs do, however, have some suggestions to clarify the conditions associated with safe harbour protection. In considering the role of intermediaries in Canada, it is vital to distinguish between intermediaries that provide Internet access and other types of intermediaries. ISPs are “passive” intermediaries that merely provide the technical means for communicating and storing content. ISPs should not and cannot be required to monitor the activities of their subscribers to enforce private rights, regardless of whether those subscribers’ activities incur liability under the Act. Indeed, it is completely inappropriate for such requirements to be imposed upon ISPs as a condition of safe harbour protection or otherwise mandated under the Act.

Accordingly, the Government should clarify that the safe harbour provided for in the Act is unconditional as it pertains to ISPs. Requiring ISPs to actively monitor or investigate copyright issues will interfere with their obligation to act as impartial and passive intermediaries consistent with the well-established principle of net neutrality. As the Supreme Court of Canada explained in *SOCAN v. CAIP*, there is a distinction between those who use the Internet to supply or obtain content and those who are part of the infrastructure of the Internet itself: “Parliament decided that there is a public interest in encouraging intermediaries that make telecommunications possible to expand and improve their operations without the threat of copyright infringement.”¹ Further, Internet intermediaries are not “users” for the purposes of the Act² and so should not be held vicariously liable for the activities of their subscribers.

Maintaining the passive role of ISPs is of the utmost importance to the ISPs. We will continue to discuss this issue in various contexts throughout this submission.

The knowledge standard for eligibility to rely on safe harbours

In keeping with their role as passive intermediaries, the ISPs caution against implementing a knowledge standard on ISPs that would be impractical and unreasonable to implement and enforce. ISPs should not be required to actively monitor their subscribers’ online activities to look for potentially infringing behavior.

Implementing a legislative requirement to monitor subscribers’ activities on the Internet to qualify for safe harbour protections would be impractical and, depending on the nature of the mandate,

¹ *SOCAN v. CAIP*, 2004 SCC 45 at para. 114.

² *SOCAN v. CAIP* at para. 132.



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would contradict many ISP privacy policies and would be prohibitively expensive. From a technical perspective, it would be nearly impossible to store any resulting data for any meaningful amount of time. Implementing this type of system would significantly increase the cost of providing and obtaining Internet access for ISPs and Canadians as well as undermine the Government's connectivity objectives by reducing revenues available for ISPs' network investments.

Further, the ISPs caution against any amendments to the Act that would require them to terminate subscriber accounts on the basis of unproven allegations. It takes significant time and resources to undertake the kind of scrutiny that would be required to monitor, analyze, and determine whether a customer may have committed copyright infringement. This analysis would necessarily be fact-specific and could not be reliably automated as with the notice-and-notice system. Beyond the fact that a mere notice of alleged copyright infringement in no way conclusively establishes liability, in many cases, Internet account holders may not be the ones infringing copyright. It is possible that someone who has been granted access to a local access network has committed the infringement. In those cases, it would be unreasonable and inappropriate to require termination of the account.

The activities permitted to qualify for safe harbours

Similarly, the ISPs submit that it is inappropriate for the Government to limit the safe harbours available to ISPs. If the Government were to impose such limitations, then the Government would have to clearly define in the Act the range of factors that would take an ISP beyond its passive role as a "mere conduit" and constitute an active role in infringing behavior.

For example, the Consultation Paper suggests that safe harbours only apply where an intermediary lacks a financial stake in the infringing activity at issue. However, it would be completely illogical and unacceptable for ISPs to lose the benefit of safe harbours in circumstances where they receive payment for the provision of internet access services but are not otherwise involved in the infringing activities of their subscribers. The payment that an ISP receives from a subscriber is not connected to any specific use that a subscriber might make of those services and should not be considered a "financial benefit" related to any infringing activity in which a subscriber might engage. This example illustrates how an overly broad description of potential conditions for safe harbour protection might have unintended or illogical consequences and underscores the need for very clear, well defined statutory language concerning any such conditions.

The ISPs support the suggestion in the Consultation Paper that it be clarified that ISPs continue to benefit from the safe harbour provisions and cannot be subject to damages for undertaking voluntary good-faith efforts to investigate, detect, identify, remove, or disable access to illegal or infringing content or take necessary measures to comply with other laws. This would provide additional certainty for ISPs and could help protect the integrity of digital markets without imposing costs or undue burdens on ISPs.



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Clarifications, not new obligations, are required for intermediaries operating under safe harbours

The ISPs do not support imposing additional obligations for ISPs although they do suggest some clarifications that would help them to fulfill their current obligations more efficiently. We will first comment on specific proposed obligations that we oppose and then address our proposed improvements that can be made to the notice-and-notice regime in sections 41.25 and 41.26 of the Act.

Generally, ISPs should not be compelled by the Act to examine and limit their customers' speech or expression except where required by law or in egregious and exceptional circumstances that exceed mere commercial interests (such as internet child exploitation). Requiring ISPs to monitor subscriber activity would take ISPs far beyond their role as passive carriers and would force them to intervene in the online lives of their customers in a way that is completely inappropriate and contrary to well established principles of telecommunications policy. Such a regime is inconsistent with the Consultation Paper's stated objective to safeguard individual rights and freedoms in an open internet and to ensure that individuals' freedom of expression and privacy interests are not unduly limited.

Further, the ISPs caution against any amendments to the Act that would require them to terminate subscriber accounts on the basis of unproven allegations. ISPs should not be forced to make determinations regarding a customer's culpability, with potentially drastic consequences for entire households. Given the impact of terminating a subscriber's access to ISP services, it would be more appropriate to require that third parties seek an injunction through the court process if they want to compel an ISP to terminate a subscriber account.

Were the Government to adopt a regime to address "repeat infringers", which we do not support, ISPs must not be liable for any damages that result from the termination or suspension of accounts or other actions that may occur pursuant to this regime. Moreover, given the immense impact of terminating a subscriber's access to ISP services, it would only be appropriate to require an ISP to suspend or terminate such access in connection with copyright infringement claims pursuant to a court-ordered injunction.

Regarding the notice-and-notice regime specifically, ISPs should not be required to exercise their judgement and discretion in deciding whether to take action against allegedly infringing subscribers following receipt of an unproven allegation of claimed infringement from a copyright owner. Indeed, there is no guarantee that a given notice is not false, malicious, or erroneous. The regime was intentionally designed to ensure that ISPs do not play an active role in monitoring and enforcement but rather act as simple conduits consistent with their role as passive carriers. Changing ISPs' obligations under this regime would fundamentally change its nature.

Indeed, the volume of notices received by ISPs means that they must be able to automate the response and forwarding functions. The human resources that would be needed to process copyright infringement notices manually would be prohibitive and the possibility of non-standardized notices that cannot be processed through an automated system creates a loophole for



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the subset of nefarious claimants to pursue non-compliance actions against ISPs as a business strategy.

ISPs do not have the necessary expertise, resources, or authority to assume these burdens. Many ISPs receive hundreds of thousands of copyright notices each month. The notice-and-notice regime was meant to be primarily an educational tool with ISPs acting as a conduit, not an enforcement regime on their part. The ISPs also take the privacy rights of their subscribers very seriously. Any requirement to monitor and adjudicate the activities of their customers to ensure that there is no copyright infringement occurring on the network is not plausible, let alone appropriate.

In order to clarify and improve the efficiency of the existing notice-and-notice regime, the ISPs propose five amendments to the regime:

- (1) the technical format of the notices sent to ISPs should be prescribed by regulations that recognize the investments that many ISPs and rightsholders have already made in their notice-and-notice systems;
- (2) the Act should enable ISPs to collect a nominal fee for every notice that they forward;
- (3) the Act should be amended to permit ISPs to charge claimants a cost-based fee for preserving information relevant to proceedings commenced by a claimant;
- (4) the Act should be clarified so that the statutory damages that can be awarded for a breach of the notice-and-notice obligations is per claimant; and
- (4) the Act should clarify the availability of a due diligence defence in connection with failure to forward a notice.

First, the ISPs renew their request made during the recent review of the Act that the Governor in Council enact regulations to prescribe the technical form of notices to be sent under the notice-and-notice regime. The ISPs suggest that these regulations adopt the Canadian version of the Automated Copyright Notice System (“ACNS”) developed by the Motion Picture Association of America. The ACNS has already been widely adopted by rights owners and ISPs. Furthermore, a standardized technical form was recommended by the INDU Committee as part of their review of the *Copyright Act*.³ It promotes efficient automation of the notice process system that is in the interest of copyright owners, ISPs, as well as internet users and provides a consistent standard that complies with Canadian legislative requirements. Requiring the use of ACNS by regulation would significantly reduce the burden on ISPs and copyright owners as well as leverage an existing standard that has already been widely accepted.

This prescribed model would be particularly useful in that it would significantly reduce or eliminate the inclusion of prohibited content in a notice such as settlement offers. To further

³ *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology*, 42nd Parliament, 1st Session, June 2019: Committee Report No. 16 - INDU (42-1) - House of Commons of Canada (ourcommons.ca) at pages 90-91.

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diminish this practice, the ISPs suggest that the Act should also be amended to impose substantial penalties on those copyright owners that send non-compliant notices in breach of the statutory prohibition against such notices. ISPs continue to receive settlement notices notwithstanding the prohibition and currently some parties appear to be acting as if there is no risk to them in continuing to send these notices.

For the notice-and-notice system to function in an efficient and balanced manner in which the majority of notices are compliant with the statutory requirements, ISPs require protection for all notices transmitted in the discharge of their statutory obligations, regardless of whether the notices comply with the Act. As an example, there has been some concern that ISPs could face liability under Canada's Anti-Spam Legislation (CASL) should they forward non-compliant notices. The ISPs maintain that forwarding such a notice is not a breach of CASL but suggest that the Act should clarify that their safe harbour applies in these circumstances to avoid any uncertainty.

Second, the ISPs propose that the Minister should enact regulations setting the maximum fee that an ISP can charge for the notices that they forward. This can be done by regulation pursuant to subsection 41.26(2) of the Act. Enabling ISPs to charge even a nominal fee per notice will achieve two important policy objectives. Most importantly, it will discourage abuse by those copyright owners and their agents that send very large numbers of duplicative notices. It will also partially compensate ISPs for the significant investments they have to make to acquire, implement, maintain, and upgrade the systems required to process and forward notices and retain subscriber information. Courts currently require plaintiffs in infringement proceedings to reimburse ISPs for the time that it takes to look up subscriber information pursuant to a Norwich Order. A similar principle should be implemented in the Act to compensate for the significant time and resources required to forward the hundreds of thousands of notices sent every year.

Third, the ISPs submit that they should be entitled to charge a fee for the work that they do to preserve their subscriber contact information after receipt of a preservation request or order from a claimant but before the Court issues a Norwich Order. The work that goes into preserving records is almost the same in quality and quantity as ultimately disclosing the subscriber information pursuant to a Norwich Order and ISPs should also be compensated for this work. This could be achieved if the regulations establish two separate fees: (1) a nominal fee for forwarding notices of claimed infringement and (2) a cost-based fee for preserving subscriber records pursuant to a notice that proceedings have been commenced or the issuance of a preservation order.

Fourth, the Act should be amended to make it clear that the maximum statutory damages that can be awarded to a copyright owner for an ISP's breach of notice and notice obligations should be \$10,000 per claimant regardless of the number of notices the copyright owner has sent to the ISP with respect to the same work. While subsection 41.26(3) of the Act limits the award of statutory damages to "a claimant", there are plaintiffs that take the position that they are entitled to statutory damages of \$5,000 to \$10,000 "per notice" thereby creating legal uncertainty and risk for ISPs and the potential for excessive statutory damages.

It would be incongruous for Parliament to shield ISPs from liability for their subscribers' acts of copyright infringement, and then subject those same ISPs to exponentially greater damage awards



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for breaches of the notice obligations. Under such plaintiffs' interpretation of the provision, ISPs that receive hundreds of thousands of notices per month would face potentially millions of dollars in statutory damage claims arising from problems that arise in connection with fewer than 1 per cent of notices. Unfortunately, some copyright owners see ISPs as a more lucrative source of potential damages than the actual infringers, given the cap on statutory damages (i.e. no more than \$5,000 in aggregate) for non-commercial infringements under paragraph 38.1(b) of the Act.

Finally, the ISPs suggest clarifying that a due diligence defence is available for alleged breaches of the notice-and-notice obligations. The ISPs receive so many notices—hundreds of thousands per year—that there will inevitably be a few notices that are not forwarded because of technical glitches or odd situations due to subscribers moving or variations in ISPs' internal network structures. The ISPs suggest specifying in the Act that (1) no damages are available where the ISP was unable to forward the notice, as long as the ISP informed the claimant of the reason it was not forwarded, as permitted by s. 41.26(1)(a), and (2) a due diligence defence is available to ISPs and that it applies to any failure to either forward the notice or to fulfill other requirements set out in s. 41.26(1) where an ISP has taken reasonable steps to comply with its obligations.

Establish a procedure for applying for injunctive relief

The ISPs support specifying a procedure by which plaintiffs may apply for injunctive relief against intermediaries where there is an allegation of copyright infringement. The ISPs stress that this process should apply not just to ISPs but also to other intermediaries including hosting providers, search engines, social media platforms, advertising networks, online payment processors, and others. This injunctive relief should be broad enough to allow plaintiffs to seek “dynamic” or “live” site-blocking orders. The ISPs propose that this be a clearly defined procedure for Court-issued injunctions such as site blocking orders. Any such procedure, however, needs to balance due process with cost and expediency and should ensure that ISPs are appropriately reimbursed for the costs they incur to comply with site-blocking orders.

Where Courts are involved in issuing orders restricting the activities of intermediaries, ISPs benefit from efficient processes that do not force ISPs to become a party or to take a position on the merits of an application.

This is already the case for Norwich motions where plaintiff copyright owners request an order requiring an ISP to disclose the identities of subscribers suspected of copyright infringement. ISPs have complied and will continue to comply with Court Orders ordering them to block a website but they should not be required to participate in any proceeding if they do not intend to oppose the Order. Ideally, ISPs would be able to comment on the draft Order to ensure that the relief requested can be implemented in a reasonable fashion.

Similarly, the ISPs request confirmation that a Court order alone is sufficient to block a website and that they do not have to also apply to the CRTC for authorization under section 36 of the *Telecommunications Act*. While that is the position that has been taken by the Federal Court and



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Federal Court of Appeal,⁴ the ISPs seek statutory clarity because of a previous suggestion that section 36 of the *Telecommunications Act* could grant the CRTC the authority to approve the blocking of a website—even where a Court has already granted a similar Order.

Before the Federal Court of Appeal’s recent judgment to the contrary, the CRTC had stated that an ISP could require the CRTC’s approval to block access to an internet service, even in circumstances where a Court has ordered the ISP to block access to that site. Furthermore, the CRTC has stated that it will evaluate any request to block access on the basis of whether the request will further telecommunications policy objectives. These objectives may not reflect whether the content infringes copyright or if there is a Court order requiring access to be blocked and it cannot be expected that Courts will issue orders on the basis of telecommunications policy objectives only to the exclusion of all of the other important objectives set out in all of the other laws of Canada.

The ISPs would find it untenable if an ISP could be ordered by a Court to block access to an infringing internet service and prohibited by the CRTC from complying with that Court Order. While the CRTC has not taken this position since the relevant determination of the Federal Court and Federal Court of Appeal, any uncertainty should be resolved by statute as a telecommunications services provider should never have to choose between complying with a lawful Court Order and complying with the *Telecommunications Act*. This conflict must be resolved in favor of the Court Order as recently held by the Federal Courts.

The ISPs recommend two amendments to strengthen and clarify the legal remedies available to copyright owners and licensees.

First, amend the Act to explicitly include in the list of remedies the authority of Courts to order ISPs to block access to a specified infringing service, search engines to de-index the service, hosts and social media platforms to take down the service and to not direct users to it, advertising networks to not place advertisements on the service, and financial institutions not to process payments to the service.

Second, if the Act is amended to allow injunctive relief against intermediaries, make it clear that the CRTC cannot use its authority under section 36 of the *Telecommunications Act* to prohibit a telecommunications service provider from blocking access to an internet service in compliance with a court order.

The ISPs note that the Federal Court decision in *Bell Media Inc. et al. v. GOLDTV.BIZ*⁵, which was upheld by the Federal Court of Appeal,⁶ ordered certain ISPs to block access to a pirate subscription streaming service. Regardless, the ISPs propose clarifying the relevant legislation to resolve any jurisdictional uncertainty.

⁴ *Bell Media Inc. et al. v. GOLDTV.BIZ*, 2019 FC 1432; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100. .

⁵ See Telecom Decision CRTC 2016-479, 9 December 2016.

⁶ *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100.



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Remuneration through collective licensing

The ISPs' previous comments have been made in their capacity as telecommunications service providers. The ISPs are also broadcast distribution undertakings (BDUs) and offer comments on remuneration through collective licensing in that capacity.

Compulsory Licensing

The proposal of a compulsory licensing regime presented in the Consultation Paper does not contain enough information for us to comment on this proposal. We would be interested to see a more detailed proposal regarding this possible regime, however, would be opposed to any regime that would require ISPs or BDUs to pay a mandatory tariff or tax for any content that flows over our networks.

Extended collective licensing

As BDUs, we are very pleased to see that the Government is considering implementing an extended collective licensing regime. The BDUs have been actively engaged in discussions with a large number of stakeholders about adopting this type of regime in Canada and agree that the Government should move forward with this proposal.

Under an Extended Collective Licensing (ECL) regime, a person using a copyright protected work could rely on a tariff or other collective licence to clear the rights to use works not represented by the collective. The goal is to minimize the risk for both users and intermediaries when using a copyright-protected work. The benefit for rightsholders is that their works would also be included in the licensing regime although they would have an opportunity to opt out with notice if they prefer.

Under an extended collective licensing regime, a user or a collective may apply to the Copyright Board to establish a license that covers the same rights and subject-matter as administered by the collective. Users, however, should never be required to rely on the ECL. An ECL should not be required for uses that are covered by any of the exceptions established in the Act and any user that prefers to operate under a negotiated licence or a tariff should be free to continue to do so. Owners may opt their works out of the ECL by giving notice to the Copyright Board. This regime would be of benefit to, and mitigate risk for, all groups involved in the licensing process—rightsholders, collectives, intermediaries, and users.

We have appended two documents outlining this proposal in more detail for your consideration: (1) a summary of the proposal, and (2) draft statutory language for discussion purposes.



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Conclusion

The ISPs appreciate this opportunity to comment on the Consultation and look forward to continuing discussion on these issues.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

A handwritten signature in black ink, appearing to read "Jay Kerr-Wilson". The signature is written in a cursive, flowing style.

Jay Kerr-Wilson

JKW/ss

cc *Stacey Smydo*

