

May 31, 2021

By Email
copyright-consultation-droitdauteur@canada.ca

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

1. The Canadian Communication Systems Alliance (“CCSA”) speaks for independent communications distributors – smaller broadcasting distribution companies, telephone companies and ISPs – across Canada. CCSA represents more than 100 companies operating from sea to sea to sea, including across the North.
2. CCSA has joined in a submission of comments filed in response to the subject Notice of Consultation by Fasken on behalf of Bell Canada, Rogers Communications, Shaw Communications, TELUS Communications, Cogeco Communications, Quebecor Media, SaskTel, Eastlink and CCSA.
3. CCSA hereby submits these additional comments on behalf of the smaller, independent BDUs and ISPs which it represents.
4. CCSA’s comments focus, first, on the matter of the potential administrative burden place on smaller, independent ISPs by possible amendments discussed in the Notice of Consultation and the possibility for exemption of such smaller ISPs from the effects of those amendments.
5. We note that, with respect to changes to the regime to introduce new obligations for qualifying intermediaries, the Notice suggests new obligations for dealing with infringements and notices thereof “could be limited to certain intermediaries, such as entities beyond a

certain size based on revenues or user volumes”.¹

6. Similarly, in its discussion of collective licensing, the Notice again suggests that such a regime could “apply only to intermediaries providing these services that are beyond a certain size” and, thereby, “limit the compliance cost of smaller or upstart intermediaries”.²
7. CCSA appreciates the recognition, in the Notice of Consultation, of the disproportionate burden new obligations can place on smaller intermediaries.
8. For CCSA members, the potential impact of such new obligations is especially relevant with respect to obligations for dealing with notices of infringement and any required intermediary interventions in relation to copyright infringement.
9. It is especially important that smaller BDUs and ISPs should not be placed in a position of having either to inspect infringement notices or to make judgements or decisions regarding such notices.
10. Even the smallest intermediaries receive many thousands of infringement notices each year. The smaller intermediaries which CCSA represents rely entirely upon automated systems to forward infringement notices to alleged infringers as required by the existing “Notice and Notice” regime. They have neither the staff nor the expertise to make determinations as to the validity of the infringement claims those notices contain.
11. Those smaller intermediaries would be exposed to severe and disproportionate harm to the extent they are exposed to statutory or civil liability for failure to discharge any new obligation to exercise judgement or make decisions regarding the validity of an infringement claim.
12. The situation with respect to collective licensing is different. As BDUs, the smaller

¹ Notice of Consultation at s. 4.1.3, p. 14.

² Notice of Consultation at s. 4.2, p. 15.

companies which CCSA represents already pay royalties to collective societies, under a number of established tariffs, in relation to their retransmission of works to their customers. Under several such tariffs, great majority of CCSA members qualify, as “small retransmitters”, to pay small annual flat-fee royalties for that use of works.

13. CCSA supports an Extended Collective Licensing regime whereby users of works are able to rely on an Extended Collective Licence, subject to a positive obligation on copyright owners who wish to opt out of the regime to provide notice of that “opt out” to users of their works. That regime would reduce the smaller ISPs’ exposure to infringement claims from unrepresented copyright owners. Smaller ISPs need such protection.
14. With respect, then, to new obligations for intermediaries in dealing with infringement notices and claims, CCSA proposes that there should, as the notice suggests, be an exemption for a class of intermediaries below a certain size.
15. We note that, per the CRTC’s *2020 Communications Monitoring Report*, “total Canadian telecommunications revenues reached \$54.1 billion in 2019”.³ Of that total revenue amount, “Small Incumbent TSPs” had a 1.0% share.⁴
16. Roughly the same proportions would apply to the smaller ISPs’ share of total retail Internet revenues.
17. That is, the smaller ISPs represent a tiny portion of the overall business of content distribution over the Internet in Canada and, by extension, have a minimal role in the overall matter of copyright infringement in the marketplace.
18. For that reason, given the disproportionate burden that new obligations could impose on the smaller intermediaries, CCSA submits that an exemption of smaller TSPs/ISPs from any new

³ CRTC, *2020 Communications Monitoring Report*, “Highlights of the Telecommunications Sector, s. i, “Market composition”, accessed at <https://crtc.gc.ca/eng/publications/reports/policyMonitoring/2020/cmr2.htm#a2> on 21 May, 2021.

⁴ *Ibid.* at Table 2.1. Unfortunately, the CMR does not provide a similar break-out of total retail Internet revenues.

obligations beyond the existing “Notice and Notice” regime would appropriate and, as the Notice of Consultation suggests, would promote competition in the marketplace by smaller and “upstart” players.

19. ISPs are, by definition, TSPs. As such, they are accustomed to regulation by the CRTC and operation in accordance with CRTC regulations and policies.
20. An established and recognized exemption threshold in the regulated telecommunications environment is the one which exempts TSPs with less than \$10 million in annual telecommunications revenues. That is the basis, for example, of the existing exemption of smaller TSPs from the general obligation on TSPs to contribute a portion of their annual revenues to the National Contribution Fund which is used to support delivery of telecommunications services in High Cost Serving Areas.
21. CCSA submits that, to the extent amendments to the *Copyright Act* impose new obligations or liabilities on intermediaries, ISPs/TSPs with less than \$10 million in annual telecommunications should be exempted from such obligations and liabilities.
22. CCSA wishes to raise one additional concern regarding the role of BDUs and ISPs as “passive intermediaries” or “mere conduits” in the delivery of works to end users.
23. Even the smallest intermediaries, acting as either or both BDUs and ISPs, present content to their customers using “Interactive Program Guides” which, increasingly, include recommendation engines. As television and Internet delivery technologies evolve, almost all available program guides now incorporate features which assist end users in their navigation through available content.
24. Smaller BDUs and ISPs essentially buy those guides and navigational tools “off-the shelf” from a variety of suppliers and rely on those systems to facilitate their customers’ use of the content those companies retransmit.

25. CCSA would be very concerned if, as a result of amendments to the *Act*, the use of such industry-standard guides and navigation tools somehow elevated BDUs and ISPs from their current status as “passive intermediaries” or “mere conduits” in the delivery of works so as to result in those companies losing the benefit of safe harbours that apply to such activity.
26. CCSA urges the Department to ensure that such a result does not become an “unintended result” of any legislative amendments to be adopted.
27. CCSA thanks the Department for the opportunity to provide these comments.

Sincerely,



Vice-President, Regulatory Affairs

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