

Letter to Stakeholders: Consultations on the Notice and Notice Regime

Industry Canada and Canadian Heritage officials are seeking views on the implementation of the Notice and Notice regime. Although the focus of this consultation is on potential regulations, the Departments consider it to be a critical first step in an on-going dialogue with affected stakeholders over the months to come on Notice and Notice implementation.

Internet service providers (ISPs), hosts and search engines enable the exchange of ideas, disseminate creative content and connect people across Canada and the world. In the digital environment, it is vital that these intermediaries are not held liable for the copyright infringements of their subscribers, to the extent that they are acting as neutral intermediaries. At the same time, they are in a unique position to facilitate the enforcement of copyright on the Internet.

The *Copyright Modernization Act* formalizes existing voluntary notice and notice practices currently in place in Canada. Once in force, the notice and notice provisions will legally require internet intermediaries, such as ISPs, hosts and search engines, to take action upon receiving a notice of alleged infringement from a copyright owner.

Specifically, ISPs and hosts will be required to forward the notice electronically to the person to whom the electronic location identified in the notice belongs, thereby notifying their customers when a copyright owner suspects them of having infringed copyright. For more information on the notice and notice regime, please consult the Background document attached to this letter.

The notice and notice regime is intended to discourage online infringement by providing copyright owners with a tool to enforce their rights, while also respecting the interests and freedoms of users. As such, it is important that the system be balanced and functional for both copyright owners and internet intermediaries.

21(1)(a).21(1)(b)

BACKGROUNDER FOR CONSULTATIONS ON NOTICE AND NOTICE

The *Copyright Modernization Act* formalizes the voluntary notice and notice regime currently administered by Canadian internet service providers (ISPs).

Under the notice and notice regime, when an ISP or host receives a notice from a copyright owner that one of its subscribers might be hosting or sharing infringing material, it forwards that notice electronically to that subscriber, and informs the copyright holder once this has been done.

If the ISP or host is unable to forward the notice, it must inform the copyright holder as to the reasons why. Additionally, ISPs and hosts will be required to retain a record allowing the identity of the alleged infringer to be determined for a period of 6 months, or longer if court proceedings are initiated. The identity of the subscriber may be released to the copyright owner with a court order.

ISPs or hosts that fail to retain such records or to forward notices may be liable for statutory damages ranging from \$5,000 to \$10,000.

A copyright owner can also send a notice to a search engine. If the notice refers to material that has already been removed from the specified electronic location in the notice, the search engine is expected to remove any copies it may have generated in the course of its business (for caching purposes, for example) within 30 days. During this period, a copyright owner may only seek an injunction against the search engine. Any copies not removed after 30 days will not benefit from the limitation of liability, and the copyright owner will be in a position to pursue other remedies (e.g., damages) against the search engine for infringement of copyright.

REGULATORY POWERS

The *Copyright Modernization Act* provides certain regulation-making powers related to the notice and notice regime, including:

- to prescribe the form and/or content of the notice;
- to fix a maximum fee that can be charged by ISPs and hosts for performing his or his obligations under the regime (without such a regulation, no fee can be charged);
- to increase or decrease the amount of statutory damages for failing to meet notice-and-notice obligations; and
- to modify the duration of the 30-day period during which the only remedy available against a search engine is an injunction.

FORM AND CONTENT REGULATION

In order to be considered valid, notices must:

- a) be in writing;
- b) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;
- c) identify the work or other subject-matter to which the claimed infringement relates;
- d) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;
- e) specify the location data for the electronic location to which the claimed infringement relates;
- f) specify the infringement that is claimed;
- g) specify the date and time of the commission of the claimed infringement; and
- h) contain any other information that may be prescribed by regulation.

MAXIMUM FEE REGULATION

Without a regulation prescribing a maximum fee, no fee may be charged by an ISP or host for performing their obligations under the notice and notice regime.

For additional details on the notice and notice provisions, please consult the text of the *Copyright Modernization Act*, available at www.parl.gc.ca/content/hoc/Bills/411/Government/C-11/C-11_4/C-11_4.PDF.