Canadian Internet Policy and Public Interest Clinic
Clinique d'intérêt public et de politique d'internet du Canada

David Fewer, Director
(613) 562-5800 (x2558)
dfewer@uottawa.ca

November 8, 2013

BY ELECTRONIC MAIL (notice-avisConsultations@ic.gc.ca)

Ministers of Industry and Canadian Heritage,
Government of Canada

Dear Sirs and Mesdames,

Re: Consultations for Implementation of Notice and Notice Regime

This letter is in response to your call for submissions regarding implementation of the so-called "Notice and Notice" provisions of the *Copyright Modernization Act* (the "Act")[1] in respect of intermediary liability. Thank you for your invitation to participate.

The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) is a law and technology clinic based at the Centre for Law, Technology & Society at the University of Ottawa. CIPPIC's mandate is to advocate in the public interest on diverse issues arising at the intersection of law and technology. Copyright reform has been a key focus of CIPPIC's work since the clinic opened in 2003.

CIPPIC has been an active participant in the consultations and policy debates that led up to the passing of the Act and is very familiar with the policy goals underlying the Notice and Notice provisions. To successfully implement the provisions, CIPPIC believes statutory regulations are required. CIPPIC has six recommendations regarding regulations:

1. The notice form contents should:
    - come from the copyright owner, exclusive licensee, or their authorized agent;
    - include contact information of the sender;
    - explicitly state that receipt of notice does not necessarily mean the recipient is engaged in unlawful activities; and
    - mention the potential applicability of exceptions and defences to copyright infringement (*e.g.*, fair dealing).
2. Penalties should be available for intentionally misrepresenting an infringement.
3. The Minister should fix a maximum tariff and request that the CRTC oversee the tariff.
4. Network service providers should be mandated to destroy records after the expiration of the retention period.
5. Network service providers should be prohibited from tracking notice recipients.
6. Notice recipients should have access to an anonymous counter-notice process.

[1] *Copyright Modernization Act,* SC 2012, c 20.

Most importantly, CIPPIC encourages a speedy implementation of the scheme.

Before delving into specific recommendations, an overview of the goals of Notice and Notice regime may be helpful. The regime should take into account the interests of all copyright stakeholders: network service providers, content owners, users, and authors.

Stakeholder Interests

Implementation of the Notice and Notice regime should offer an effective means of addressing online copyright infringement. However, the government should avoid creating an overly strict regulatory scheme whose "chilling effects" will deter downstream creativity and innovation, or deter lawful use of content. The scheme must discourage abusive notices that restrict free speech.

As intermediaries, network service providers want to avoid liability for the illegal use of their services by third parties. Providing a safe harbour for service providers is the driving rationale behind the new provisions, as well as other Notice and Notice or Notice and Takedown regimes worldwide. Network service providers will play a key role in delivering notices as part of the new scheme; however, this will require significant time and resources on their part. Thus, a fair Notice and Notice regime should minimize the burden and costs placed on network service providers.

Finally, as the recipients of infringement notices, copyright users have an interest in ensuring the Notice and Notice regime is not abused. A notice recipient may cease doing what he or she was doing that triggered the notice, whether or not the behaviour is actually illegal. Moreover, consumers have privacy concerns related to ISP collection and retention of personal data, which is required under the Act.

In balancing these interests, Canada's Notice and Notice regime should provide an efficient and effective way for content owners to enforce online copyright that places a minimal burden on network service providers, discourages notice abuse, and does not create chilling effects on Internet use.

POLICY CONSIDERATIONS DRIVING REGULATION

Curbing Infringement Online

For years, Canadian network service providers have voluntarily forwarded notices from copyright holders to owners of websites hosting copyright infringing material.[2] This has proven an effective means of addressing infringement online. Citing a 2007 Canadian study, the Centre for Democracy and Technology in Washington noted the deterrent effect of sending copyright notices to infringers. "When ISPs forward warnings from copyright holders to users, this informs the users that their behaviour carries more legal risk than they may have realized."[3]

---

[2] Michael Geist, "The Effectiveness of Notice and Notice," (15 February 2007) Online: < http://www.michaelgeist.ca/content/view/1705/125/>

[3] Center for Democracy & Technology, "Shielding the Messenger: Protecting Platforms for Expression and Innovation," v 2, December 2012 at 25. Online: <https://www.cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf>

Giving notice of illegal activity will deter further infringement. The notice form should clearly outline those activities of the recipient which constitute infringement to further the goal of infringement deterrence.

Preventing Abuse

The most pressing concern with a Notice and Notice regime is the potential for abuse of the system – *i.e.*, use of notices to censor online content. As noted by the Centre for Democracy and Technology, "overaggressive warnings could discourage recipients from engaging in fair use or other legitimate activities."[4] While Canada's Notice and Notice regime will be less susceptible to abuse than takedown regimes – which mandate ISP removal of content in the absence of any determination of infringement and on the basis of bare allegation – research and case studies related to abuse of notices illustrate the potential for abuse of notices and the potential for a chilling effect.

The United States takedown regime under the *Digital Millennium Copyright Act* has been abused by content owners and as well as "anti-piracy firms." A 2006 study published by the Chilling Effects[5] project examined takedown notices under the American Act and researchers observed "a surprisingly high incidence of flawed takedown notices."[6] The authors noted that copyright infringement is very complicated question of fact. "Our data reveal an unfortunately high incidence of questionable uses of the process. Copyright analysis depends on the particular facts and details of the situation. Even a sophisticated and careful sender may send a notice with claims that should be reviewed by a court before the target's material is removed."[7] In Canada, a notice will not amount to content removal by a network service provider or search engine. However, recipients of notices may remove content upon receiving notice.

Intentional abuse of the notice system is plausible as well. In 2012, links to technology blog TechDirt were removed from Google search results following a *DMCA* notice. The posting openly criticised the *DMCA.* The blog author looked up the sender of the notice, Armovore,[8] a firm noted as likely an "impostor or someone else abusing the process" according to Google.[9] The search engine does not comply with invalid requests and has noted several types of fraudulent notices, such as:

---

[4] *Ibid* at 26.

[5] Jennifer M. Urban and Laura Quilter, Symposium Review, *Efficient Process or Chilling Effects - Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Computer & High Tech. L.J. 621 (2006). Available at: http://digitalcommons.law.scu.edu/chtlj/vol22/iss4/1; Google has cited the study as "an independent, third-party analysis of how frequently improper and abusive removal requests are submitted was conducted in 2006," see Google Transparency Report, *Frequently Asked Questions*, accessed 5 November 2013. Available online: <http://www.google.com/transparencyreport/removals/copyright/faq/>

[6] As noted in the report summary, see Jennifer M. Urban and Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, Summary Report* at 2. Available online: <http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf>

[7] *Supra* note 5 at 681.

[8] Mike Masnick, "Key Techdirt SOPA/PIPA Post Censored By Bogus DMCA Takedown Notice," Techdirt (26 Feb 2012). Available online: <http://www.techdirt.com/articles/20120223/15102217856/key-techdirt-sopapipa-post-censored-bogus-dmca-takedown-notice.shtml>

[9] Google, *Google Transparency Report* < http://www.google.com/transparencyreport/removals/copyright/>

- "A major U.S. motion picture studio requested removal of the IMDb page for a movie released by the studio, as well as the official trailer posted on a major authorized online media service." [10]
- "A U.S. reporting organization working on behalf of a major movie studio requested removal of a movie review on a major newspaper website twice.. Generally, Google has noted a sharp uptick in requests for URL removal since it started publishing statistics on removal requests on its transparency blog."[11]

Moreover, the CDT points to the Electronic Frontier Foundation's "Takedown Hall of Shame," which publishes cases of "bogus copyright and trademark complaints" that threaten free speech.[12]

Similar abuse has also been documented in India, which also employs a Notice and Takedown approach. According to the CDT, the Centre for the Internet and Society in India tested the efficacy of the takedown regime by submitting false complaints to seven intermediaries. "None of the content at the heart of these complaints was illegal or 'prohibited,' but six out of seven intermediaries removed the content anyway."[13]

Even though network service providers are not required to remove content, recipients of notices may self-censor due to the threat of legal action. This is problematic because not all recipients will necessarily be infringing copyright. Malicious parties seeking to have legal content removed will be able to abuse notice use and regulations are required to minimize such abuse.

The Notice and Notice regime will also be deployed against patently lawful dealings. This is so because of the prevalence of automated services[14] to identify particular content and invoke the notice regime. Automated services are incapable of recognizing lawful dealings based on nuanced exceptions such as fair dealing. One of the more notorious and ironic examples involved an automated takedown notice sent on behalf of the National Football League to a law professor who had posted a clip of the Superbowl's copyright claim for the purposes of criticizing the over-reaching and inaccurate nature of the claim, which made no allowances for the application of copyright exceptions.[15]

Avoiding Excessive Burdens on Network Service Providers

Network service providers are responsible for forwarding notices under the Act. Network service providers will accordingly bear transmission and administration costs. Small service providers will be especially burdened by the new obligations under the Act. Inevitably, the costs will be passed along to subscribers. Customers of Canadian telecommunications services should not be burdened with these costs.

The legislation provides for the ability of network providers to charge a fee for transmission to

---

[10] *Ibid*.
[11] *Ibid*.
[12] CDT at page 10, Electronic Frontier Foundation, "Takedown Hall of Shame," http://www.eff.org/takedowns
[13] *Supra* note 3 at 32.
[14] See, e.g., "XDMCA, #1 DMCA Takedown Tool", Online, XDMCA: < http://xdmca.com/ >.
[15] Jacqui Cheng, "NFL fumbles DMCA takedown battle, could face sanctions", Ars Technica (20 March, 2007). Online, Ars Technica: < http://arstechnica.com/business/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions/ >.

recover costs. Allowing network service providers to charge a fee will deter abuse of the notice system. Moreover, notices should be limited to situations where illegality is straightforward.[16] Network service providers should not be put in the position of having to scrutinize the merits of an allegation, or, worse, forced to harass their own customers with obviously baseless notices.

RECOMMENDATIONS

Recommended Content of Notice Form

For the reasons outlined below, CIPPIC recommends that the statutory regulations require notices to:

- be requested by the copyright owner or exclusive licensee, or its authorized agent;
- include contact information of the sender;
- explicitly state that receipt of the notice does not necessarily mean the recipient is engaged in unlawful activities; and
- advise of the potential applicability of exceptions and defences to copyright infringement.

Only a rights holder (a copyright owner, an exclusive licensee, or authorized agents such as legal counsel) should have the right to compel an ISP to send a notice pursuant to this regime. Intermeddlers should not have the right to trigger the provisions of the regime

CIPPIC believes it is imperative that recipients of a formal notice understand that the notice is not a determination of copyright infringement, a commencement of litigation or a conclusion that the recipient has engaged in what may be described as illegal conduct. A notice is a communication of a good faith allegation that the sender believes that the recipient if infringing the sender's economic rights under the *Copyright Act*. This should be plainly stated in all notices. Further, notices should indicate the nature of the potential infringing behaviour. Finally, notices should state that the identified behaviour may not infringe copyright at all, as exceptions, limitations and defences such as fair dealing may apply.

Notices should be accurate and contain only the information necessary to identify the party making the allegation (and provide contract information), the allegedly infringing behaviour (by URL and title of allegedly infringing content), and the specifics of the copyright owner: what work is alleged to have been infringed, and who is the owner or exclusive licensee). Notice requests omitting such information should not be considered valid. Network service providers should only be required to forward valid notices.

Penalties for knowingly misrepresenting infringement

CIPPIC believes the regulations should include penalties for improperly sent notice requests. As noted above, notices of infringement can be abused. Penalties should be applicable where the demander has good reason to believe:

- that a defense, exception or limitation may apply,
- that the sender is not authorized to send the notice, or
- that the sender does not have an interest in the copyright of the alleged infringed work.

[16] *Supra* note 3 at 12.

Similarly, penalties should be available where a claimant knowingly or fraudulently misrepresents the contents of a notice.

The penalties should be on a scale equivalent to the award of statutory damages that the copyright owner could have expected, had a court ruled the allegation of infringement well-founded.

Tariff for transmissions

While the call for submissions for this comment process excluded submissions on the cost of processing 41.26(1) notices to telecommunications providers and, ultimately, to their customers, CIPPIC notes that the Act prevents providers from ever recovering such processing fees from rights holders unless a 'maximum' fee threshold is set by regulation by the Minister under sub-section 41.26(2) of the Act.

While establishing the quanta of such a maximum fee should not delay the coming into force of the Notice and Notice regime, the costs of this rights enforcement regime should not be borne by customers of telecommunications services. Preventing service providers from recovering such fees will not only have a detrimental impact on the price of telecommunications services in Canada, but will also undermine the overall competitiveness of this market, as the cost of processing notices falls heavier on smaller competitors than on incumbents.[17]

When bringing the Notice and Notice regime into force, therefore, the Minister should, at the same time, establish a process for determining the proper amount for a determination under 41.26(2). This can be done simply. The Governor in Council could, for example, exercise its power under section 14 of the *Telecommunications Act* to issue, concurrently with the bringing into force of the Notice and Notice regime, a direction to the Canadian Radio-television and Telecommunications Commission (CRTC) to investigate and make a report on the costing of notice processing to various telecommunications service providers in Canada.[18] The Minister should commit to promptly setting an amount under 41.26(2) upon receipt of this report or upon the conclusion of an alternative mechanism for determining the appropriate amount for such a fee.

Mandatory destruction of records

CIPPIC recommends the Minister create a regulation mandating that network service providers destroy records once the statutory retention period has expired to protect the privacy rights of consumers. Canadian privacy laws protect consumers by limiting the collection, use and retention of personal information to the purposes for which they are initially collect, used or

[17] In 2006, Industry Canada estimated the cost of notices to be $11.73 for large network service providers and up to $32.73 CAN for smaller network service providers, meaning that the competitive impact on smaller network service providers or other network service providers can be significant and, moreover, the overall cost to Canadians of bearing this regime quite substantial: M. Geist, "The Liberal Roundtable on the Digital Economy: My Comments", February 11, 2010, <http://www.michaelgeist.ca/content/view/4787/125/>.

[18] *Telecommunications Act*, S.C. 1993, c. 38, section 14. For an example of the exercise this investigating and reporting power, see: Order Varying Telecom Decision CRTC 95-14 and Requiring the CRTC to Report on the Matter of Directory Subscriber Listings, SOR/96-322, <http://laws-lois.justice.gc.ca/eng/regulations/sor-96-322/FullText.html>.

retained.[19] The record retention provision allows for data collection and retention so that owners of copyright works have a means of identifying potential infringers that the owner can then sue. However, courts are the only authority that can order identification of a notice recipient by network service provider records. The six-month retention period is reasonable in the circumstances.

The new Act requires network service providers to retain records related to notice recipient regardless of whether the recipient engaged in copyright infringement or not. The provision states that network service providers:

> … retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received, or in the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.[20]

Records of all notice recipients will be kept. Even recipients of a notice who are engaged in lawful activities will be captured under this provision. Data collection and retention should be minimized; thus, network service providers should be required to destroy the statutory notice-related records upon expiration of the retention period. Moreover, as PIPEDA lacks meaningful enforcement,[21] the obligation to destroy information retained under paragraph 41.26(1)(b) must be reinforced in the regulations.

Prohibitions on tracking notices

CIPPIC recommends the creation of a regulation that bars network service providers from tracking the notices and, in particular, the number of notices forwarded to a specific recipient. Under the legislation, the role of an ISP is limited to forwarding notices. A regulation prohibiting the tracking of notices by network service providers would protect consumers from excessive data collection.

Anonymous counter-notice or response mechanism

CIPPIC recommends that regulations provide for an anonymous counter-notice procedure to allow recipients the opportunity to respond to notices. Recipients engaged in lawful use of content may wish to explain their actions to the copyright owner to prevent further notices or legal action. For example, consider the situation where a website owner is using copyright works for educational purposes and is engaged in fair dealing. The copyright owner submits a notice to the user wrongfully accusing the recipient of infringement, not knowing that the use falls under the fair dealing exception. The recipient should be able to respond to stop the content owner

---

[19] *Personal Information Protection and Electronic Documents Act*, SC 2000, ch 5, Schedule A, Principle 4.5: "Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal Information shall be retained only as long as necessary for the fulfilment of those purposes."

[20] Supra note 1, s 41.26 (1)(b).

[21] Office of the Privacy Commissioner of Canada, "The Case for Reforming the Personal Information Protection and Electronic Documents Act", May 2013, <http://www.priv.gc.ca/parl/2013/pipeda_r_201305_e.pdf>. Indeed, companies appear to so disregard the risk of any privacy enforcement action so as to ignore judicial proceedings that seek to enforce privacy rights against them. See *Chitrakar v. Bell TV*, 2013 FC 1103, paras. 18 and 28.

from sending notices and prevent a potential lawsuit.

The process must allow the notice recipient to remain anonymous. Only the courts can order an ISP to reveal the identity of a subscriber targeted by a notice. If a copyright owner seeks to sue an anonymous individual, it must invoke the proper legal tools to do so.

A regulation could provide for the network service providers to forward an anonymous response from the recipient. The network service provider may choose to charge a transmission fee, per the regulated tariff.

Conclusion

It is possible to efficiently address online infringement through the Notice and Notice regime under the Act. However, the new system may be susceptible to abuse. It should not over burden service providers with costs. As discussed above, CIPPIC recommends the passing of statutory regulations to ensure the process is not abused in such a way that creates a chilling effect on online speech.

* * *

CIPPIC appreciates the opportunity to participate in this consultation. Thank you for your time and consideration of our submissions.

Yours truly,

David Fewer
Director
CIPPIC