March 6, 2015

The Honourable James Moore,
Minister of Industry
House of Commons
Ottawa, Ontario K1A 0A6

Dear Minister Moore,

Re: Abuse of Notice and Notice regime

We write on behalf of a group of organizations and experts concerned about abuse of the "Notice and Notice" provisions of the *Copyright Modernization Act* (the "Act") with respect to intermediary liability.

We encompass public interest advocates, experts, consumer groups, businesses and other organizations. Canadians have spoken out over their concerns with the manner in which the Notice and Notice provisions have been implemented, and, inevitably, are being abused by rights-holders. This abuse has included threatening Canadians with legal penalties impossible under Canadian law, and asking for settlements without proof of infringing behaviour.

A petition organized by coalition member OpenMedia calling for government action to end abuse of the Notice and Notice system has attracted over 11,000 signatures, and sees individuals and groups endorsing the statement: "Tell James Moore to close the loophole in his copyright law and protect Canadians from abusive shakedown notices now."

It is clear from the support received by this petition, and from other principled objections by copyright experts in Canada, that Canadians are calling upon Industry Canada to implement common-sense rules to protect them from abusive copyright notices. Those rules must, at minimum: include broad acknowledgement that a letter is sent on the basis of *alleged infringement* and that nothing has been proven in a court of law, include accurate information about the limits of Canadian penalties for non-commercial infringement, and exclude any demand for settlement.

The undersigned groups are also calling on the government to take a long view of the issue of balanced copyright in Canada, and undertake the work of amending the *Copyright Modernization Act* to include a misuse provision that would prevent widespread abuse of this legislation in the future.

Please see the following recommendations detailing how these changes can be brought about quickly and effectively. The coalition appreciates your attention to our concerns. We remain willing to engage with you on the continuing implementation challenges of the Notice and Notice system under Canada's *Copyright Act*.

Yours truly,

David Fewer
Director
CIPPIC

On behalf of the following signatories to this letter:

- CIPPIC, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, University of Ottawa
- OpenMedia
- Project Gutenberg
- Electronic Frontier Foundation (EFF)
- Union des Consommateurs
- British Columbia Library Association
- Public Interest Advocacy Centre (PIAC)
- Michael Geist, Canada Research Chair in Internet and E-Commerce Law at the University of Ottawa
- British Columbia Freedom of Information and Privacy Association (BCFIPA)
- Canadian Civil Liberties Association (CCLA)
- Michael Markwick, PhD, School of Communications, Capilano University
- Privacy and Access Council of Canada
- Connie Fournier, Free Dominion
- Tannis Braithwaite, Executive Director of BC PIAC

Encl. Fixing Notice and Notice

Fixing Notice and Notice

The coalition supports, in principle, the balance that Canada's Notice and Notice system is attempting to strike between the rights of artists and creators, and those of Internet users. The government of Canada in legislating this system has wisely chosen to aim for an evenhanded approach to the question of online infringement. The Notice and Notice system provides a stable mechanism for rights-holders to communicate concerns over online infringement while respecting the freedom of expression and privacy of notice recipients, and at the same time permitting intermediaries to facilitate the communications of infringement notices while focusing on the business of providing excellent internet services to Canadians. In this respect, the *Copyright Modernization Act* strikes just the right balance. It is a model for other nations to emulate.

However, regardless of the merits of the system, Notice and Notice remains subject to abuse. Copyright trolls have been active in North America for a long time, and the presence of these abusive business models has recently increased in Canada. Copyright trolls embrace the business model of speculative invoicing: trolls identify a potential infringement, target the source of the allegedly infringing online activity and demand settlement payments in excess of what they would likely enjoy should they successfully sue in court, but carefully calibrated to be less than the cost to the target of actually defending such a claim. They play an arbitrage game that leverages Canada's taxpayer-funded judicial system to profit from allegations of non-commercial infringement.

As we feared, copyright trolls have in fact taken advantage of the Notice and Notice system to ramp up their abusive practices in Canada. We have seen notices claiming infringement of foreign law, misrepresenting the scope of damages recipients potentially face, omitting mention of defences, and failing to identify the notice as a mere allegation of infringement. These misleading and abusive notices undermine Canadians' trust and confidence in the internet as a vehicle for safe and secure communications, and undermine Canadians' faith in Canada's copyright laws.

We take heart in your office's recent statement acknowledging these problems ("Stop threats to Canada's online pirates, rights holders told", Reuters (9 January 2015), online: http://www.reuters.com/article/2015/01/10/canada-media-copyright-idUSL1N0UO27H20150110. We are pleased to see the advisory published by Industry Canada's Office of Consumer Affairs
("Notice and Notice Regime", (20 January 2015)", online: http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html).

However, it is not the place of government to assert the truth about copyright notices where rights-holders prefer to offer deliberate misrepresentations, particularly where notice recipients are unlikely to encounter these assurances. In any event, these statements are no substitute for a Notice and Notice system that properly anticipates and discourages abuse.

Fortunately, the means to protect Canadians against misleading allegations lies within your hands. In the short term, the *Copyright Act* grants you the power to impose by regulation conditions on the validity of notices that wish to take advantage of the Notice and Notice system. Abuses of the Notice and Notice system may be curtailed by adding a regulatory requirement that admonishes rights-holders to be truthful and holds them to account when they are not. It can include the obligation to itemize information regarding the nature of the claim in question, as well as direct reference to the specific limitations on liability and damages contained in Canada's *Copyright Act*. In the long term, the problem of copyright abuse - within and without the Notice and Notice system - will be addressed by amending the *Copyright Act* to prohibit and sanction misuse of copyright.

Short Term Action: Correct Abuses by Enacting Regulations

By operation of paragraph 62(1)(c) of the *Copyright Act*, Industry Canada can impose regulations that specify the format relating to what should and, importantly, what **should not** go into notices sent under the Act. In response to your government's consultations on the coming into force of the Notice and Notice system coalition member CIPPIC, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), of the University of Ottawa, provided a number of proposals that, if adopted, would have deterred the emergence of the abuses Canadians now face. CIPPIC's submission may be found at https://cippic.ca/sites/default/files/copyright-law-reform/CIPPIC_LT_Ministers_re_Notice_and_Notice_Regs-FINAL-8Nov2013.pdf.

We advocate for a light-handed regulatory approach that seeks compliance rather than coercion. Notices under the system should, under penalty of perjury:

- properly identify the notice as a mere allegation of infringement, and not a determination of infringement, a commencement of litigation or a conclusion that the recipient is in fact liable for unlawful conduct;
- accurately identify the rights-holder on whose behalf the notice is sent;

- provide details informing the allegation of infringement (including the work involved, the date and time);
- include no settlement demand or offer;
- make no mention of damages or other remedies under the *Copyright Act*, or, alternatively, require accurate reference to such remedies, including limitations applicable to non-commercial infringement under the law;
- explicitly state that receipt of a notice does not necessarily mean the recipient is engaged in infringing activities; and
- mention the potential applicability of exceptions and defences to copyright infringement such as fair dealing.

We note that in *Voltage v. Doe*, 2014 FC 161, in a similar context, the Federal Court of Canada recognized that many of these elements are required in copyright demand letters to forestall abuse.

Requiring truthful characterization of the circumstances of the notice and the rights and liabilities of notice recipients should go far towards stemming abuses of the Notice and Notice system. However, the willingness of rights-holders to misrepresent and mislead recipients as to their rights and liabilities under the law demonstrates that requiring the truth may be insufficient. The regulations will also have to prohibit and penalize rights-holders for unscrupulous activity. We recommend that the regulations:

- create penalties applicable where the sender fails to observe the regulation's notice content requirements (as described above);
- create penalties for rights-holders that send notices with false or misleading information. Representations subject to such penalties should include:
    - representations that the sender has the right to send the notice when the sender is neither the rights-holder nor its licensee or authorized agent,
    - inaccurate allegations that foreign laws apply to the activity in question,
    - inaccurate representations as to the nature or quantum of penalties, fines or damages; and
    - representations as to royalty or licensing fee amounts that the sender knows, or ought to know, have no basis in actual royalties and fees prevalent in the marketplace;
- create enhanced penalties for intentionally or knowingly misrepresenting a material fact contained in a Notice;
- fix a minimum and maximum tariff that ISPs may charge a notice sender to shift the financial burden of copyright enforcement off of internet intermediaries and back onto the shoulders of rights-holders. Tariffs should be set with public and objective oversight by an independent third party;
- standardize the language and content of valid notices;

In addition to these simple reforms, we urge the Minister in revisiting the Notice and Notice regime to consider other values important to Canadians. Canadians have privacy concerns related to ISP collection and retention of personal data, which is required under the Act. Regulations should prohibit retention of subscriber information beyond the periods required by the law, and prohibit ISP tracking of individuals' online behaviour beyond the minimal retention periods required by law.

Coalition members encourage the speedy implementation of these reforms following a short notice and comment period.

Long term, Canada requires a legislative response to the abusive and deceitful tactics of a minority of copyright owners and their agents. The emergence of a cottage industry of copyright trolls and their migration to Canada is just one example of how copyright can be abused. But copyright misuse has long been a tool of copyright owners intent on suppressing criticism and exposure of ill deeds. Similarly, copyright and anti-circumvention laws can be misused for anticompetitive purposes. The variety of ways in which the rights in the *Copyright Act* may be used to undermine the public policy objectives in the Act calls for a general prohibition on such abuses. The next round of copyright reform must include a copyright misuse provision to curb such wrong-doing.