



British Columbia Library Association Submission to the Government of Canada Consultation on a Modern Copyright Framework for Online Intermediaries

Thank you for the opportunity to respond to the options and issues identified in *A Consultation on a Modern Copyright Framework for Online Intermediaries* released in April by Innovation, Science and Economic Development Canada and Heritage Canada.

The British Columbia Library Association (BCLA) leads and supports the BC library community in advocacy, professional development, and on issues concerning intellectual freedom. The Association works to ensure that all British Columbians have equitable access to information, ideas and works of the imagination. BCLA builds partnerships and relationships with libraries, with all levels of government and with provincial and national organizations that share similar goals and values. BCLA advances the values of the association and promotes a widespread understanding of the benefits of library and information services.

Introduction

BC libraries are supporters and promoters of Canadian creators. BC libraries buy Canadian content; promote local creators and their work through all kinds of public events; preserve and showcase Canadian content in our special collections; provide support to budding and established creators through research services, writing and promotion workshops, and access to creative technologies in maker commons. These examples demonstrate the present and long standing history of mutual support and collaboration between Canadian creators and libraries.

The BC library community is aware of the declining revenues to creators due to the two decades' long shift to the digital environment. The causes of this decline are multi-faceted and due in part to the myriad factors at play in the digital environment and to the power dynamics at play between those who create works and the organizations that distribute and commercially exploit those works. There are many ways to reward creation other than directly imposing constraints through copyright legislation. It has been recognized for years that creators receive little remuneration for their work¹. Without the creator there is no creative work, yet the creators' share of the profits realized from the exploitation of their works is declining². Consequently, BCLA encourages the Government of Canada, as part of their investigation into reforms to remedy this situation, to undertake non-copyright related studies and implement measures to ensure that Canadian creators are receiving just and appropriate compensation from those businesses that hold and exploit the copyright in creators' creative works.

Summary of Recommendations

¹ Standing Committee on Industry, Science and Technology. *Statutory Review of the Copyright Act*. June 2019. p. 38. <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>

² Wall Communications. *Study on the Economic Impacts of Music Streaming Platforms on Canadian Creators* commissioned by Heritage Canada. 2019. <https://www.canada.ca/en/canadian-heritage/services/copyright-policy-publications/economic-impacts-music-streaming.html>



- Ensure that legitimate exercise of Copyright Act exceptions and freedom of expression are not suppressed.
- Maintain current safe harbour applications for libraries.
- Exclude libraries, archives, museums and educational institutions from the definition of online intermediaries, and exclude libraries, archives and museums and educational institutions from any increased responsibility or liability being considered for repositories and information location tools that they manage or host.
- Retain Canada’s notice and notice system.
- Ensure that any move to a more active N&A system does not suppress freedom of expression.
- Do not introduce extended collective licensing for online intermediaries.
- Ensure that any collective licensing system for online intermediaries is limited to commercial undertakings and does not limit the application of copyright exceptions in Canada’s Copyright Act.
- Exclude non-commercial intermediaries such as libraries and educational institutions from the application of new obligations.
- Protect libraries and similar non-profits from being subject to additional enforcement tools since the aim of the tools is against commercial scale infringement on commercial online content-sharing service providers.

BCLA Responses to Potential Options for Reform in the Consultation Paper

BCLA is pleased that the Consultation Paper states clearly that “significant changes to Canada’s basic model of internet liability...are not being contemplated.”³

4.1.1 Recalibrate the Knowledge Standard for Eligibility

Any adjustments to the knowledge standard for “hosting”, “mere conduit”, or “caching” safe harbours need to be undertaken with caution and done in such a way that does not ensnare innocent parties nor become a method of limiting legitimate exercises of exceptions in the Copyright Act or suppressing freedom of expression. Changes to the safe harbours could lead to these results and to over-blocking of content by online intermediaries.

Invalid claims of copyright infringement can also be problematic for online intermediaries as intermediaries have no way of verifying the validity of a claim. Encouraging rights holders to register their copyright would assist intermediaries and administrative bodies in ensuring that a rights holder claimant is in fact the proper and correct rights holder.

Many public libraries in BC provide public internet access as they offer use of computers connected to the internet and offer free wireless access. Additionally, post-secondary libraries, certain public libraries and related civic organization maintain repositories or websites that allow patrons to upload content or to post comments. It is essential that the safe harbours that

³ Innovation, Science and Economic Development Canada. *Consultation on a Modern Copyright Framework for Online Intermediaries*. April 2021. p. 10. <https://www.ic.gc.ca/eic/site/693.nsf/eng/00191.html>



currently apply to libraries and their equivalents as mere conduits⁴ or as mere providers of services related to the operation of a digital network⁵ are maintained.

Recommendations:

1. Ensure that legitimate exercise of Copyright Act exceptions and freedom of expression are not suppressed.
2. Maintain current safe harbour applications for libraries.

4.1.2 Clarify the Permitted Involvement of Qualifying Intermediaries

The existing safe harbours that apply to online intermediaries as internet content providers also apply to libraries. As well, the role of libraries in operating repositories or information location tools⁶ is a separate role from their provision of access to the internet or other digital networks. Section 4.1.2 of the Consultation Paper appears to have as its default the view that all online intermediaries are commercial online content-sharing service providers such as YouTube, TikTok, Facebook and the like. However, many non-profit library and educational services are also online intermediaries and could get ensnared in any changes to the safe harbours afforded to online intermediaries. Therefore, any changes to the current intermediary liability and obligations system in Canada should include an exemption of library, archives, museums, and educational repositories and sites from the definition of online intermediary. Such a measure has already been implemented in the European Union.⁷

Recommendation:

1. Exclude libraries, archives, museums and educational institutions from the definition of online intermediaries, and exclude libraries, archives and museums and educational institutions from any increased responsibility or liability being considered for repositories and information location tools that they manage or host.

4.1.3 Enact New Obligations for Qualifying Intermediaries

Although the Consultation Paper states that significant changes to Canada's model of internet liability are not being contemplated,⁸ section 4.1.3 of the Consultation Paper appears to contemplate a move away from the current notice and notice to a more active notice and action (N&A) mechanism. Active N&A mechanisms place intermediaries in a situation where they have to decide between competing rights and interests regarding copyrighted works. For example, online intermediaries are asked to decide if the use of the copyrighted work is allowed

⁴ *Copyright Act*, RSC 1985, c C-42, s 2.4(1)(b).

⁵ *Copyright Act*, RSC 1985, c C-42, s 31.1(1).

⁶ *Copyright Act*, RSC 1985, c C-42, s 41.27(5) defines it as "any tool that makes it possible to locate information that is available through the Internet of another digital network."

⁷ *European Parliament and Council Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market*. [2019] OJ, L 130/92, art 2(6). <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

⁸ Innovation, Science and Economic Development Canada. *Consultation on a Modern Copyright Framework for Online Intermediaries*. April 2021. p. 10. <https://www.ic.gc.ca/eic/site/693.nsf/eng/00191.html>



under an exception, or if it is infringement. This is problematic as it requires the online intermediary to take on near juridical authority.⁹

An online intermediary could also be held liable for copyright infringement if they do not remove material under a more active N&A regime. This situation easily leads to over-blocking of content, the disregard of legitimate user rights in the Copyright Act such as fair dealing (s 29) or non-commercial user generated content (s 29.21) and the subsequent direct effect on the Charter guaranteed right to freedom of expression¹⁰ as content is removed from the internet or has its visibility reduced as it is removed from major online intermediaries.¹¹

Recommendations:

1. Retain Canada's notice and notice system.
2. Ensure that any move to a more active N&A system does not suppress freedom of expression.

4.2 Compel Remuneration Through Collective Licensing

Any proposed collective licensing scheme must be crafted and implemented in such a way that fair and legitimate dealings with copyrighted works are not caught in the net of compensable copies for which royalties are due. The proper and legal application of copyright exceptions should not be sacrificed for the sake of ease of operation of any proposed collective licensing system. If considered at all, collective licensing should only be considered for commercial online content-sharing service providers and not for library and educational organizations.

Extended collective licensing is a system where a collective society collects royalties for copyright holders who are not members of the collective. A broad nature of copyrighted works (artistic, musical, literary, and neighbouring rights) from a diverse group of copyright holders could be available via those online intermediaries that are commercial online content-sharing service providers. This situation will make remuneration to non-members of the collective society much more difficult than in the traditionally narrow sectors, such as commercial broadcasting, where extended collective licensing is usually practiced. As well, what happens to royalties collected for orphan works where the rights holder cannot be located? Due to the complexity of these issues, extended collective licensing may not operate as effectively in practice as in theory with online intermediaries.

Recommendations:

⁹ Kuczerawy, Aleksandra, *From 'Notice and Take Down' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*. Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online*, 2019. Available at SSRN: <https://ssrn.com/abstract=3305153>

¹⁰ *Canadian Charter of Rights and Freedoms*, s 2, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹¹ Kuczerawy, Aleksandra, *From 'Notice and Take Down' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression*. Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online*, 2019. Available at SSRN: <https://ssrn.com/abstract=3305153>



**British Columbia
Library Association**

1. Do not introduce extended collective licensing for online intermediaries.
2. Ensure that any collective licensing system for online intermediaries is limited to commercial undertakings and does not limit the application of copyright exceptions in Canada's Copyright Act.

4.3 Increase Transparency in Remuneration Processes

BCLA welcomes calls for increased transparency on the part of intermediaries and collective societies. Collective societies are created and governed by statute and should be required to publicly disclose the funds they receive for distribution to Canadian rights holders, to foreign rights holders, and to rights holders who cannot be located. Greater transparency on the part of online intermediaries should assist efforts of Canadian creators to be justly remunerated for the use of their works. At the same time, any proposal should limit the application of these obligations on libraries and similar non-profit organizations so that such measures do not create an undue burden on these clearly non-commercial entities.

Recommendation:

1. Exclude non-commercial intermediaries such as libraries and educational institutions from the application of new obligations.

4.4 Clarify or Strengthen Enforcement Tools Against Online Infringement

The focus in the Consultation Paper regarding strengthened enforcement tools is on commercial scale infringement taking place on commercial online content-sharing service providers. The focus is not on the single instance of infringement that could occur on networks and hosting services maintained by libraries. Consequently, any proposed measures should recognize the significant differences between the sophisticated commercial online intermediaries and the libraries and schools who act as intermediaries, and thus protect libraries and similar non-profits from being subject to these additional enforcement tools. As well, a scheme to establish a statutory basis and procedure for injunctions as proposed in section 4.4.1 of the Consultation Paper must be designed to ensure that injunctions against intermediaries are not a proxy for suppressing freedom of expression. BCLA strongly supports the suggestion in 4.4.1 that injunctions only be obtained through the courts as providing an administrative body the power to issue injunctions would be a mistake.

Recommendation:

1. Protect libraries and similar non-profits from being subject to additional enforcement tools since the aim of the tools is against commercial scale infringement on commercial online content-sharing service providers.



Thank you for the opportunity to respond to the options and issues identified in *A Consultation on a Modern Copyright Framework for Online Intermediaries*.

Sincerely,

A handwritten signature in black ink that reads "Christine Middlemass". The signature is fluid and cursive, with a large loop at the end.

Christine Middlemass
BCLA President

Cc: Todd Mundle
BCLA Incoming President