Written Submission of

SHAW COMMUNICATIONS

To the

Legislative Committee on Bill C-11

March 5, 2012

Introduction

1. Shaw Communications is pleased to submit these comments to the Legislative Committee on Bill C-11 ("the Committee") to assist the Committee members in their consideration of the proposed amendments to the *Copyright Act* ("the Act").

2. Shaw Communications is a diversified company that offers a broad range of communications services including satellite and cable television, high-speed internet access, home phone and broadcasting. Through its various undertakings, Shaw creates, acquires and distributes copyright protected content to Canadians in all parts of the country.

3. From its perspective as both a creator and a distributor of high-value creative content, Shaw understands the importance of effective copyright legislation and also understands that copyright rules must be carefully balanced to protect consumer interests and to foster innovation.

4. Shaw agrees that Canada's copyright legislation needs to be updated in order to better reflect the challenges and opportunities presented by the rapid pace of technological development. We think that Bill C-11 represents an important step in modernizing the Act to give creators the tools they need to securely deliver content to their audiences while giving consumers the ability to lawfully take advantage of the convenience and flexibility of the digital age.

5. While Shaw does not necessarily agree with every change to the Act proposed in Bill C-11, we understand that striking the right balance in copyright legislation involves making challenging policy choices in the face of competing demands from stakeholders. We congratulate the Government on developing a modern copyright framework that addresses the fundamental needs of creators, intermediaries and consumers.

6. While Shaw supports the passage of Bill C-11, we are proposing a number of amendments that we submit would provide greater clarity and certainty to the legislation. Our proposals, which will be fully explained below, can be summarized as follows:

   (a) Clarify the provisions that are intended to make it clear that internet service providers ("ISPs") should not be held liable when their facilities are used by others in a way that infringes copyright.

   (b) Amend the "hosting exception" so that it clearly and unambiguously reflects the Government's intention to cover network personal video recorders (NPVRs) and other cloud computing services. This will avoid frivolous litigation and unintended limitations on Canadians' rights to use new technology.

   (c) Modify the "notice and notice" regime to ensure that the necessary regulations to establish the requirements of the notices and the maximum fees that may be charged are enacted before the obligations imposed on ISPs come into force.

(d) When applying rights to online activities, the Act should distinguish between the sale of goods online, which is an act of reproduction, from online broadcasting, which is an act of communication to the public by telecommunication.

7. Shaw firmly believes that these amendments to Bill C-11 will improve the legislative framework and will provide stakeholders with greater clarity and certainty as they continue to develop and launch innovative new products and services in the digital marketplace.

Provide Greater Clarity in the Provisions Relating to Network Services Providers

8. Jurisdictions around the world, including Canada's closest trading partners the United States and Europe recognize that internet intermediaries, such as ISPs and hosting services, should not be held liable for any infringing activity that occurs using their networks or other facilities.

9. Bill C-11 recognizes this essential feature of modern copyright legislation by providing a number of specific "safe harbours" or exemptions from liability with respect to the undertakings that provide these critical intermediary functions.

10. These provisions are clearly intended to provide ISPs with explicit blanket immunity from liability with respect to their role as passive intermediaries in internet transmissions.

11. However, as currently worded, the provision only deals with potential liability for copyright infringement and leaves open the possibility that an ISP could face claims arising from other provisions in the Act, including those related to moral rights, technological protection measures, or digital rights management.

12. For greater certainly, Shaw recommends that the provisions be revised to clearly apply to any potential claim arising from the Act:

> 31.1(1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter or contravene any other provision of this Act.

Make it clear that the Hosting Exception Applies to Transmissions from the Host Server

13. The Government has been very clear that it intends the hosting exemption in Bill C-11 to permit cloud computing services, network personal video recorders and other remote storage services to operate without incurring liability for copyright infringement.

14. The Government has clearly expressed its intention that the exception will facilitate the use of NPVRs and other remote storage services by consumers. This will allow consumers to lawfully save a television program on a host server with no liability and retrieve that copy from the remote server for viewing. While the exemption clearly applies to the reproductions that are stored on the host server, greater clarity would be beneficial with respect to the transmissions made from the host server to the individual who stores the work.

15. We have suggested minor adjustments to make the language of the exception unambiguous to ensure that the Government's intention and consumers' ability to use innovative technologies are not challenged.

16. The need for clarity is particularly important, given the amendments to section 2.4 of the Act. The new language that will be added at 2.4(1.1) will deem every single transmission over the internet to any individual to be a "communication to the public by the telecommunication" which is a separate act from the provision of digital memory referred to in the hosting exception.

17. Since it is clearly the Government's intention that the proposed exemption operate to shield host services from any copyright liability, Shaw submits that an amendment is required to remove any doubt in this regard. Any potential risk will act as a deterrent to the development of innovative new services in Canada.

18. We propose that the exception refer to both the provision of digital memory and the transmission of works from that digital memory:

31.1(5) Subject to subsection (6), a person who provides digital memory in which another person stores a work or other subject matter~~,~~ for the purpose of allowing the telecommunication of the work or other subject matter does not, solely by reason of providing digital memory and transmitting the work or other subject matter, ~~through the Internet or another digital network, provides digital memory in which another person stores the work or other subject matter does not, by virtue of that act alone~~, infringe copyright in the work or other subject-matter or contravene any other provision of the Act.

ISPs Must be given Adequate Time to Implement Notice and Notice Systems

19. Shaw supports the Government's decision to impose "notice and notice" requirements on ISPs, rather than more extreme measures such as notice and takedown or graduated response. We believe that the proposed notice and notice system represents a uniquely Canadian approach which effectively addresses the issue of online infringement while respecting Canadians' privacy rights and due process.

20. However, Shaw is concerned that as drafted, the provisions in Bill C-11 that establish the notice and notice regulations suffer from two significant short-comings:

(a) First, ISPs are not given any time to design and implement the automated notice processing systems that will be required in order to comply with the requirements of the Bill; and

(b) Second, the key regulations establishing the conditions for the notices and setting the maximum fees that may be charged will not be enacted when the notice and notice obligations come into force.

21. Large ISPs in Canada receive hundreds of thousand of copyright notices each year. In order to forward these notices to subscribers in a timely fashion, ISPs will be forced to acquire sophisticated technological solutions capable of automatically identifying the relevant subscriber and forwarding the notice to that subscriber.

22. It will take time for these solutions to be designed, built, tested and fully implemented by broadband network providers, yet the Bill, as drafted, gives ISPs absolutely no time to accomplish this task. As it stands, every ISP, from the largest to the smallest, will be required to have a fully functioning notice processing system in place on the same day that the Bill comes into force.

23. This is not only unreasonable, it is simply unrealistic.

24. Shaw proposes a more measured approach to implement notice and notice obligation in Canada which takes into account that while some of the larger ISPs have been voluntarily sending notices for a number of years, a great number of smaller ISPs, including those that serve rural communities, will not have adopted any measures in this regard and will only take the necessary steps once the Bill is passed.

25. We suggest that the Bill require the Minister to enact the Regulations no later than 12 months after the date on which the Act is proclaimed into force. This will give the Minister sufficient time to consult with stakeholders and develop a regulatory approach to notice and notice that makes sense. Under this approach, there is nothing to prevent the Minister to bringing forth the regulations much earlier than 12 months.

26. Second, the obligations related to the notices will only come into force six months after the regulations have been enacted. This should give ISPs sufficient time to develop and implement the automated systems they require. Shaw recognizes that six months may not be sufficient time to deal with the challenges posed by wireless network services and that a longer phase-in period may be required:

47 (2) The regulations referred to in subsections 41.25(2) and 41.26(2) of the *Copyright Act*, as enacted by subsection (1), shall be promulgated on a day that is no later than twelve months after the date on which this Act is proclaimed in force.

(3) Subsections 41.26(1) and (3) of the *Copyright Act*, as enacted by subsection (1), shall come into force on the day that is six months after the date on which the regulations referred to in subsection (2) are published in the *Canada Gazette*.

The Penalties for Failing to Forward Notices must be Fair

27. The Bill proposes to impose monetary penalties on ISPs that fail to meet their obligations with respect to the notice requirements. As drafted the penalties would be between $5,000 and $10,000. The Bill is not clear whether these penalties are intended to apply per notice, per obligation, or some other measure.

28. While Shaw supports the need for appropriate penalties to make sure that ISPs comply with the requirements of the Act, it is concerned that the Bill does not distinguish between an ISP that simply refuses to comply with the notice requirements and an ISP that has taken every reasonable measure to comply with the law but suffers a technical failure that results in notices not being processed as required.

29. We would propose that Courts be given greater flexibility in assessing the amount of penalties that are appropriate in any given case, and be provided with factors that can be used to determine the appropriate amount:

(3) A claimant's only remedy against a person who fails to perform any of his or her obligations under subsection (1) with respect to a notice sent by the claimant is statutory damages in an amount that the court considers just, but not ~~less than $5,000 and not~~ more than $10,000.

(4) In assessing the amount of statutory damages under subsection (3), the court shall consider

(a) whether the person has implemented measures in good faith to perform the person's obligations under subsection (1);

(b) the nature and scope of the failure;

(c) whether the failure was within the person's reasonable ability to control;

(d) the person's history with respect to any other failures to perform the person's obligations under subsection (1); and

(e) the need to deter other failures to perform the obligations under subsection (1).

~~(4)~~ (5) The Governor in Council may, by regulation, increase or decrease the ~~minimum or~~ maximum amount of statutory damages set out in subsection (3).

30. Shaw submits that it is in everyone's best interest to ensure that the proposed notice and notice regime is able to provide an effective response to the challenges posed by online copyright infringement.

31. Establishing a process that has unworkable timeframes and unfair penalty provisions will create significant obstacles to the success of the notice and notice system.

The Bill should Distinguish between Online Sales and Internet Broadcasting

32. One of the requirements of the WIPO Internet treaties is that the Copyright Act must apply when works or other subject-matter are "made available" on the internet. It is left up to the legislature of each WIPO member state to determine whether "making available" should be covered by a new right or an existing right.

33. The approach taken in Bill C-11 is to deem that whenever a work is made available on the internet the work has been communicated to the public by telecommunication.

34. Shaw is extremely concerned that this approach ignores the reality of how the internet is used to distribute goods, and risks interfering with the development of a functioning market for digital content.

35. The internet is used to both deliver copies of works and to broadcast works. Offline, these two activities are governed by completely separate rights and economic frameworks. The sale of copies of works is an exercise of the reproduction right, which can be freely negotiated between rights owners and content developers.

36. Broadcasting is an exercise of the right to communicate to the public by telecommunication and, in the case of music, cannot be freely negotiated but must be subject to tariffs certified by the Copyright Board.

37. Bill C-11 would force all internet transactions to be treated as both an act of reproduction and an act of communication to the public, unnecessarily complicating the operation of the market and forcing the intervention of a government agency in the form of the Copyright Board where music is involved.

38. Shaw submits that this approach is completely at odds with the Government's stated policy objective of establishing a framework that would allow markets to develop and operate based on free negotiations.

39. Shaw proposes a straightforward amendment that would simply distinguish the sale of goods online, which would be treated as reproductions just as they are in the offline market, from internet broadcasting, which would be treated as communications to the public just as other forms of broadcasting:

2.4(1.1) For the purposes of this Act,

(i) a reproduction of a work or other subject-matter includes making it available to the public by telecommunication in a way that allows a member of the public to access and reproduce it from a place and at a time individually chosen by that member of the public, and any transmissions of the reproduction to a member of the public;

(ii) a communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows ~~a~~ members of the public to have access to it from a place and at a time individually chosen by ~~that member~~

~~of the public~~ them, other than in the circumstances described in paragraph (i); and

(iii) a work or other subject matter is not communicated to the public by telecommunication where a reproduction of the work or other subject matter is communicated to a member of the public by telecommunication.

Conclusion

40. Shaw appreciates the opportunity to provide its views to the Committee and to offer its suggested amendments that we believe will bring the Bill in line with the Government's stated objectives.