

CONSUMER TECHNOLOGY ASSOCIATION

A Brief to The Standing Committee on Industry, Science and Technology

The Five Year Review of The Copyright Act

July 26, 2018

The Consumer Technology Association (CTA) is pleased to make this written submission to the House of Commons Standing Committee on Industry, Science and Technology as part of its five-year statutory review of the *Copyright Act*.

CTA urges that this Committee recommend steps to enhance Canada's cultural and technological standing, encourage creativity by new artists and technologists, and maintain national access to the internet, new technologies, and useful devices. The outcome of this review should be one that better integrates citizens' and businesses' cultural and technological contributions by making Canadian and international works, services, and technologies more accessible for productive use and elaboration to Canadians and to the world.

As the largest technological association in North America, CTA is concerned over recent proposals submitted to the Committee that would move in the opposite direction, through impositions on the technologies, devices, and local and international service providers, that have enabled Canadians to participate in and contribute to the world economy. This review, aimed at assuring the Copyright Act promotes creativity in an online world, should not be diverted into a withdrawal from that world. Accordingly, CTA urges the Committee to consider the following recommendations:

- Maintain and enhance the limitations and exceptions that allow today's creators to contribute to and build on the culture and technology of previous generations;
- Avoid unique impositions on Online Service Providers (OSPs) that would hobble Canada's contribution to international discourse and result in loss of services in Canada;
- Reject attempts to oversee the design of technologies and devices, or to define classes of technology or device to be subject to a levy. Where tried, such attempts are quickly overtaken by technology, have proven counter-productive, and satisfy neither the expectations nor demands of vested content owners; and
- Reject proposals to extend copyright terms. The focus should be on new creation and on availability of works as a basis for new directions, rather than walling old works off from use and enjoyment by Canadians and the rest of the world.

Copyright Limitations and Exceptions Preserve
Opportunities For New Cultural Contributions

Canada took constructive, but limited steps in 2012 to recognize best practices and fair dealing so as to encourage reasonable and creative uses of copyrighted material. In addition to promoting research, study, and criticism, these measures recognized satire, parody, and user-generated

content, and moved to align Canada with the Marrakech Treaty.¹ These provisions failed, however, to reach necessary user exemptions for dealing with technical measures, where circumvention is necessary to make uses or repairs to devices with embedded software, and where the objective does not include exploiting any copy of creative expression.² No obstacle to the personal enjoyment or business use of everyday devices was intended when technical measure provisions were adopted. But as mechanical and analog functions are overtaken by computer control, and everyday devices now have online features, such provisions, without necessary limitations and exceptions, become obstacles to daily life and commerce. These unintended impositions on the public, if allowed to persist, will undermine any steps taken to promote small-scale creativity by start-ups and by consumers, and will generate grievances and lawsuits among major actors.

CTA urges that to the extent protection for “technical measures” has been included Canadian law to harmonize with jurisdictions (e.g., the U.S. Digital Millennium Copyright Act [“DMCA”]), a process for considering equivalent to or more effective exceptions and limitations should also be enacted in this review. Given the pace of technology, neither the measures that have imposed such quasi-copyright protections nor their accompanying limitations and exceptions have been perfect. But time and experience have shown that particularly *because* digital technology has replaced mechanical function in so many respects, these limitations and exceptions are increasingly vital.³

Avoid Imposing Content Recognition And Other Unique Requirements On Online Service Providers (OSPs)

The internet and its utility to creators are threatened by measures aimed at hobbling local and international OSPs. Canada is far from unique in considering or being urged to consider such measures, but the temptation should be resisted. Smaller OSPs are threatened far more gravely by such provisions than are larger ones, which are better able to automate and hire personnel to

¹ See Victoria Owen, *Librarians will propose improvements to the Copyright Act, including better representation of the public interest at the Copyright Board*, IRPP, <http://policyoptions.irpp.org/magazines/june-2017/libraries-and-the-copyright-balancing-act/>, June 14, 2017.

² See Matthew Marinett, *If Canada is to become a major centre of high-tech business and AI development, it must remove the copyright-related impediments to innovation*, IRPP, <http://policyoptions.irpp.org/magazines/july-2017/copyright-and-innovation/>, July 5, 2017.

³ See Howard Knopf, *Once More Into The Copyright Breach*, IRPP, <http://policyoptions.irpp.org/magazines/june-2017/once-more-into-the-copyright-breach/>, June 19, 2017 (“Knopf”)

deal with such impositions. The result for Canada would be the opposite of promoting local creativity, entrepreneurship, and investment. As was observed in the most exhaustive study to date:⁴

“We are potentially in a moment of change, in which some OSPs have become powerful incumbents, equipped to satisfy rightsholders’ concerns, but at the potential cost of moving norms or rules to a place where smaller OSPs cannot follow. The concern is that the safe harbor’s availability could become limited to those with resources for DMCA Plus measures, in turn raising barriers to entry and limiting the robust competition that gave rise the vibrant landscape of online services that currently exists.”

Despite the relatively greater burden on smaller OSPs and the consequences for user-generated content, a move toward the imposition of such burdens has been advocated by the Coalition for Culture and Media.⁵ CTA believes that such steps would be the wrong remedy. Rather, measures should be taken to address the “spamming” activity under the current notice-and-notice regime. As is the case with technical measures also imported from the DMCA, both the impositions of constraints and the necessary provision of relief from them have been moving targets that need to be aimed at in tandem.

Another proposal that has emerged has been for site-blocking within Canada.⁶ When proposed as part of the “SOPA / PIPA” legislation in the U.S., such proposals collapsed under expert and public scrutiny.⁷ In the Canadian context, such measures would have the additional drawback of depriving entrepreneurs and users of access to sites available

⁴ Urban, Jennifer M. and Karaganis, Joe and Schofield, Brianna, Notice and Takedown in Everyday Practice (March 22, 2017), at 134. UC Berkeley Public Law Research Paper No. 2755628. Available at SSRN: <https://ssrn.com/abstract=2755628> or <http://dx.doi.org/10.2139/ssrn.2755628>.

⁵ See Brief of Coalition for Culture and Media, <http://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR9840779/br-external/CoalitionPourLaCultureEtLesMedias-e.pdf>.

⁶ See Michael Geist, *Canadian Internet Providers Warn of Site Blocking Consequences: Threat to Affordable Internet Access and Market Competition*, April 6, 2018, <http://www.michaelgeist.ca/2018/04/canadian-internet-providers-warn-of-site-blocking-consequences-threat-to-affordable-internet-access-and-market-competition/>.

⁷ See Mark Stanley and David Sohn, *Why Filtering Is Not The Solution*, Center for Democracy and Technology, Feb. 14, 2012, <https://cdt.org/blog/why-filtering-is-not-the-solution/>; and David G. Post, *SOPA and the Future of Internet Governance*, Verdict, Feb. 13, 2012, <https://verdict.justia.com/2012/02/13/sopa-and-the-future-of-internet-governance>.

in other portions of North America and beyond. Hence, while the main criticism is that site-blocking is both overly broad and ineffective against its targets,⁸ it also, as “collateral damage,” deprives citizens of potentially important information from the rest of the world.⁹

Levies and Design Impositions On Devices Or Technologies Would Be Destined To Fail

The Coalition for Culture and Media submission also suggests some scheme to impose levies, and perhaps design constraints, on an undefined class of devices or technologies.¹⁰ Experience teaches that such measures become distortive of technologies, hence markets, and eventually are made irrelevant by technological change, except for lingering lawsuits in which old enactments must be applied to newer technologies. A prime example is the U.S. Audio Home Recording Act of 1992,¹¹ which attempted to define a class of “Digital Audio Recording Devices” for purposes of levy and technical constraint. As devices and services that were clearly exempted from the Act took over the market for audio recording, a lawsuit persists with respect to devices not even contemplated by private or public sector drafters at the time of the Act.¹²

In addition to distorting technologies and markets, device levies neither supplant nor satisfy rightsholders' desires to influence the operation of technologies and devices on an ongoing basis. No rightsholder has pledged, or will pledge, to refrain from seeking technical measures or content takedowns, or otherwise withdraw from copyright debates or suits, once levy funds have become available. (It would also remain to be seen whether any mechanism would ensure that the funds would go to support the creation of new content, rather than the trading in or merging of rights already established.)

Copyright Term Extension Only Inhibits Creativity

⁸ See Statement of the Center for Democracy & Technology before United States Senate Committee on the Judiciary, Feb. 16, 2011, at 2, https://cdt.org/files/pdfs/20110216_rogue_sites_statement.pdf.

⁹ *Id.* at 3 – 5.

¹⁰ Coalition for Culture and Media, *id.* See also, Michael Geist, *Broken Record: Why the Music Industry's Secret Plan for iPhone Taxes, Internet Tracking and Content Blocking is Off-Key*, April 11, 2018, <http://www.michaelgeist.ca/2018/04/broken-record-why-the-music-industrys-secret-plan-for-iphone-taxes-internet-tracking-and-content-blocking-is-off-key/>.

¹¹ 17 U.S.C. § 1001 et seq. (1992).

¹² See Memorandum Opinion, *Alliance of Artists and Recording Companies, Inc. v. General Motors Company*, No. 14-cv-1271 (KBJ) (D. DC), Feb. 19, 2016, <https://dlbjbjzgnk95t.cloudfront.net/0761000/761657/https-ecf-dcd-uscourts-gov-doc1-04515494442.pdf>.

Studies show that entry into the Public Domain tends to make culturally important work more, rather than less, valuable as a source for future creativity.¹³ There is simply no sound cultural or economic basis for any further extension atop the improvident 2015 sound recording term extension.¹⁴ A paper¹⁵ by the Electronic Frontier Foundation succinctly summarizes the loss of value and creativity when copyright terms are extended after the fact:

“Examples: How Excessive Copyright Terms Affect the Public

- Locked down culture:
 - Millions of audio recordings, music compositions, works of art, etc., remain inaccessible or lost due to copyright terms that extend beyond the lifespan of creators.
 - Countless copyrighted books that are out of print are hard to find, but if found, it would be illegal for unauthorized publishers to reprint them to make them available to the public once again.
 - Orphan works: One of the most troubling effects of the exceptionally long copyright term has been the increasing number of “orphan works,” also known as “hostage works.” These are works that are presumably still protected by copyright but the copyright owner cannot be found.

 - Downstream users—such as libraries that wish to make their collections available online, or documentary filmmakers who wish to use photographs and letters found in an attic—will hesitate to do so for fear the copyright owner will emerge and sue them for damages. ***
 - Overseas royalty payments: *** Each year of copyright extension may represent a huge transfer of funds from developing countries to the developed countries that serve as home bases for the big entertainment industries.”

Conclusion

The pace of technology is fast, whereas the enactment and revision of copyright legislation must be slow. Even the pace of a five-year review cannot anticipate or even keep up with the changes

¹³ See, e.g., Kristofer Erickson, *A healthy public domain generates millions in economic value – not bad for ‘free’*, The Conversation, March 25, 2015, <http://theconversation.com/a-healthy-public-domain-generates-millions-in-economic-value-not-bad-for-free-39290>.

¹⁴ See Knopf.

¹⁵ Electronic Frontier Foundation, *Copyright Term Extensions and the Public Domain*, https://www.eff.org/files/filenode/copyrightterms_fnl.pdf. (internal fns. excluded)

that have replaced mechanical devices with digital ones, then with services that are received on digital devices. In this interim, it is necessary for the law to encourage or at least tolerate new creativity that is built on the old. Accordingly, this Committee should treat with deliberate circumspection any proposals for new impositions on digital devices and on online services. CTA thanks the committee for the opportunity to provide this written submission.

About CTA

Consumer Technology Association (CTA)TM is the trade association representing the \$377 billion U.S. and Canadian consumer technology industry, which supports more than 15 million jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best-known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES® – the world’s gathering place for all who thrive on the business of consumer technologies. Profits from CES are reinvested into CTA’s industry services.