

**BRIEF TO THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND
TECHNOLOGY**

STATUTORY REVIEW OF THE *COPYRIGHT ACT*

CANADIAN NETWORK OPERATORS CONSORTIUM INC.

AUGUST 20, 2018

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1.0 INTRODUCTION

1. Canadian Network Operators Consortium Inc. (“CNOOC”) is pleased to submit this brief in relation to the statutory review of the *Copyright Act*¹ (the “*Act*”) conducted by the Standing Committee on Industry, Science and Technology (“Committee”).

2. CNOOC is a not-for-profit industry association comprised of over thirty small, medium and large sized competitive Internet service providers (“ISPs”) and telecommunications service providers. CNOOC members have amassed experience with certain provisions of the *Act*. CNOOC submits that this experience constitutes important input to the Committee’s review of the *Act*.

3. In particular, CNOOC members have become well acquainted with Sections 41.25 and 41.26 of the *Act*. These two sections set out requirements pertaining to the forwarding of notices of claimed copyright infringement, thereby constituting the “notice-and-notice” framework. The main notice-and-notice obligations for ISPs are three-fold: (1) “as soon as feasible”, forward a valid notice electronically to the person associated with the electronic location (IP address) specified in the notice;² (2) inform the claimant (i.e., the sender of notice) that the notice has been forwarded or, if applicable, the reasons why the notice could not be forwarded;³ and (3) retain records on the identity of persons subject to notices for 6 months (or 12 months if the claimant initiates a claim and notifies the ISP).⁴

4. At this junction, CNOOC supports the continuation of a “notice-and-notice” approach. However, the current notice-and-notice framework suffers from certain shortcomings that have been exploited by certain parties to the detriment of both Canadian consumers and ISPs. Fortunately, these deficiencies can be easily remedied in the context of the current statutory review of the *Act*.

5. All of the above is more fully addressed in the balance of this brief, which is structured as follows:

¹ R.S.C., 1985, c. C-42

² *Act*, at Subsection 41.26(1)(a).

³ *Ibid.*

⁴ *Id.*, at Subsection 41.26(1)(b).

- Section 2.0 explains why it is appropriate to preserve the notice-and-notice model going forward;
- Section 3.0 outlines the various problems that CNOC and its members have encountered with notice-and-notice and proposed solutions;
- Section 4.0 sets out CNOC’s conclusions.

2.0 NOTICE-AND-NOTICE: THE CORRECT MODEL

6. The notice-and-notice framework has a simple and worthwhile purpose: to educate Canadians about their uses of the Internet which may infringe copyright. In turn, education serves as a deterrent for future engagement in copyright infringing activities.

7. CNOC strongly supports the continuation of this framework. The model strikes an appropriate balance between the interests of copyright holders on one hand and the interests of Canadian users of the Internet on the other. Notice-and-notice provides copyright holders with a mechanism that allows them to protect their intellectual property rights without going so far as to impinge on the freedoms of Internet users.

8. In contrast, alternative models such as “notice-and-takedown”, which requires removal of content from the Internet following receipt of a notice of infringement, heavily favor the interests of copyright holders at the expense of Internet users. Indeed, notice-and-takedown style models⁵ encourage wide scale censoring of the Internet and Internet users without judicial oversight. Such an intrusive and unchecked model for managing digital copyright infringement is fundamentally incompatible with the Canadian free and democratic society which constitutionally protects freedoms of expression.

9. For these reasons, notice-and-notice is the most balanced approach for deterring online copyright infringement. However, the success of the regime depends on fixing a small number of implementation issues. These issues and proposed solutions are discussed in the next section.

⁵ For another example of a “takedown” style model, see the Part 1 Application of the “FairPlay Coalition” to the CRTC requesting the creation of an agency tasked with blocking websites associated with copyright infringement (<https://services.crtc.gc.ca/pub/TransferToWeb/2018/8663-A182-201800467.zip>).

3.0 PROBLEMS AND SOLUTIONS

3.1 Content of Notices

Settlement Demands

10. Many of the issues surrounding notice-and-notice are attributable to the limited scope of Sections 41.25 and 41.26. These sections succinctly outline the three basic requirements summarized in the introduction of this brief, criteria for a valid notice and a few other matters. While the minimal requirements for a valid notice are explicit, the *Act* provides no controls over other extraneous content that a party may wish to include in notices. Certain parties have exploited this omission and utilized the notice-and-notice regime for purposes that are self-serving and harmful to consumers.

11. Most notably, a practice of including “settlement demands” in the body of infringement notices has emerged. These demands claim that the end-user receiving the notice must pay a specified amount of money to the copyright holder or its agent as a settlement for damages relating to copyright infringement.

12. The settlement demands are aggressive in tone and tend to mislead end-users about their exposure to liability and / or their involvement in legal proceedings. Most Canadians receiving these demands are unfamiliar with the party issuing the notice, the requirements of the *Act* or the mechanics of the notice-and-notice regime. The settlement demands are clearly designed to scare and pressure a vulnerable population of Canadian end-users to out themselves and pay the specified amounts to avoid litigation.

13. The *Act* does not contemplate settlement demands. Such practices are at odds with the underlying intent of the framework, which is to deter copyright infringement via education, not by extorting money from Canadians.

14. The solution to this problem, and indeed to most of the problems undermining the notice-and-notice regime, is to prescribe a unique and exclusive form of copyright infringement in the *Act*. That form of notice would set out only the information fields that are necessary to achieve the purposes of the notice-and-notice regime. Extraneous and inappropriate content like settlement demands would be prohibited. Finally, the *Act* should be amended to place an onus on content

owners to only send the prescribed form of notice to ISPs for the purpose of subsequent forwarding to end-users. Breaches of the provision would lead to monetary penalties.

Other Inappropriate Content

15. CNOC members have also encountered instances where copyright holders were compelled to forward notices that included advertisements. Worse, some of the advertisements promoted the services of the ISPs' competitors!

16. This conduct is clearly an abuse of the notice-and-notice framework. The regime was not intended as a distribution system for marketing materials. Again, the remedy for this problem is for the *Act* to prescribe one unique and exclusive form of notice that is permissible and prohibit any other additions.

3.2 Form and Processing of Notices

17. A large ISP can receive up to thousands of copyright infringement notices per day, depending on the size of its subscriber base. Even small to medium sized ISPs can receive a very high volume of notices for processing. Based on their size, ISPs deal with these challenges by, in the case of smaller ISPs, streamlining their manual processes as much as possible or, in the case of larger ISPs, adopting a form of automated notice forwarding system like the Canadian version of the Automated Copyright Notice System or "ACNS".

18. Implementing automated notice forwarding systems can be a resource intensive process that is difficult to justify for smaller ISPs. Moreover, without getting into technical details, not all copyright holders send infringement notices that are compatible with ACNS or other automation solutions. For this reason, ISPs must typically process notices using both automated and manual systems in tandem, which compounds expenses.

19. Some copyright holders or their agents take liberties with their chosen method of packaging and delivering copyright notices. CNOC members have received stockpiles of outdated notices all at once from certain entities. This puts an extreme strain on notice processing resources.

20. Other content owners have attempted to deliver information in various file formats with the expectation that ISPs must then assemble notices based on the information contained therein. Such expectations simply do not align with the requirements of the *Act*.

21. Whenever issues relating to the form of notices arise, CNOC and its members have attempted to contact the parties issuing notices to resolve the problems collaboratively. These efforts are not always successful and new issues relating to the form of notices constantly arise.

22. Not surprisingly, nearly all issues relating to the form of notices can be resolved by the solution that CNOC has thus far advocated throughout this brief. That is, a unique and exclusive form of notice prescribed by the *Act*. Moreover, a prescribed form of notice with defined and predictable field formats/contents is much easier for ISPs to integrate into their systems and processes than today's situation. However, in order to ensure compatibility with Canadian ACNS and other automated notice forwarding systems, the *Act* should specify that such notices can be provided as both text and machine-readable code. This means that the onus for compliance with form of notice requirements must necessarily be on the originator of the notice given that ISPs with automated tools can only scan for essential notice criteria and will not have the capability to screen out notices with extraneous content that should be excluded from copyright infringement notices.

23. Finally, a prescribed form from which content owners and their agents cannot deviate will also help reduce the likelihood that notices of alleged copyright infringement could be used by other parties for phishing or other fraudulent activity.

3.3 Other Notice-and-Notice Issues

24. CNOC members have encountered two additional problems with the notice-and-notice regime.

25. The first issue relates to the reception of notices using email. Many originators of notices will communicate with ISPs to discover which ISP email address should be used for sending notices. This ensures that all notices are directed to the correct email address for timely processing by the ISP. Unfortunately, other originators of notices obtain unconfirmed email addresses from various sources and use them for distributing notices. Due to such practices some CNOC members

have discovered notices that were sent to inactive company email addresses long after the notices were received.

26. This issue can be resolved relatively easily by requiring ISPs to send notice-and-notice emails exclusively to the “Abuse Point of Contact” email addresses that ISPs register with American Registry for Internet Numbers (“ARIN”). These email addresses are readily searchable using the Search WHOIS function on the ARIN website.

27. The second issue experienced by CNOC members relates to the frequency with which ISPs receive multiple copies of the same notice. ISPs sometimes receive identical copies of the same notice reflecting the same date stamp and all other information. ISPs also sometimes receive copies of the same notice with only minor divergences in time stamps and all other information remaining the same. In all cases, regardless of duplication, the notices satisfy the criteria of Subsection 41.25(2) of the *Act* and must therefore be forwarded by the ISP.

28. Forwarding multiples of identical or nearly identical copies of a notice is inefficient for ISPs and notice originators. Worse, duplicate notices confuse and frustrate Canadian Internet users who receive them. For these reasons, CNOC recommends an amendment to the *Act* which puts a limit on the number of notices that can be issued within a set time period (e.g., 48 hours) for infringement of copyright of a specific work.

4.0 CONCLUSION

29. Notice-and-notice is the correct statutory model for addressing digital copyright infringement in Canada. The statutory review of the *Act* is an opportunity to renew Canada’s commitment to this model and make significant improvements to the current iteration of the regime via simple and straightforward statutory amendments that include: (1) a requirement that originators of notices must utilize the a unique and exclusive form of notice (in both text and machine readable form) that is prescribed by the *Act*; (2) a requirement for notices to be sent to ISPs at their “Abuse Point of Contact” email addresses registered with ARIN; and (3) a limit on the number of notices that can be issued within a set time period for a specific act of infringement.

30. CNOC is grateful for the opportunity to present this brief and would be pleased to answer any questions and participate in any stage of the Committee’s statutory review of the *Act*.

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