

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

INTERMEDIARY COPYRIGHT ENFORCEMENT

STATUTORY REVIEW OF THE *COPYRIGHT ACT*

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Background

On January 2nd, 2015, Canada's *Copyright Act* was amended to include a "notice-and-notice" regime, enabling copyright holders to send notices of claimed infringements to Internet Service Providers (ISPs), who are required to both forward the notice electronically to internet users, and to "retain records that will allow the identity of the person to whom the electronic location belongs to be determined" for six months.¹ The penalty for not doing so is at least \$5,000 and up to \$10,000 per notice not forwarded.²

Canada's notice-and-notice approach to copyright enforcement varies significantly from the United States' "notice and takedown" approach. In the United States, once an ISP is provided with a notice of copyright infringement, "the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing."³ ISPs operating under Canada's notice-and-notice regime do not take content down, pass over unnecessary personal information, or cancel subscriber service upon the receipt of a notice.

Canada's notice-and-notice approach is superior to the American notice and takedown system because it prevents wrongful takedowns of internet content. In this way, the notice-and-notice system upholds fundamental Canadian values such as freedom of expression and freedom of speech. Research has shown that wrongful takedowns are a significant problem under the American regime.⁴ Wrongful takedowns could include the takedown of material that is user-generated content, or material that fits under Canada's fair dealing provisions as a work of parody or a satire. Therefore, we argue that the notice-and-notice system is the superior way to regulate copyright infringements.

RECOMMENDATION 1: Retain the notice-and-notice regime.

Problems

Threatening Notices

Though the notice-and-notice regime is believed to be the correct approach to regulating copyright infringement, it is not without flaws. Some argue that the notice-and-notice regime has been abused by "copyright trolls" to coerce susceptible customers into making unjust and unnecessary payments.⁵ This occurs through the threats these notices often convey, some of which are illegitimate. Canada's Intellectual Property Strategy states that it will move to protect consumers from threats contained in notices:

While most rights holders have used the notice and notice regime responsibly, a small number of bad actors have leveraged it to send threatening demands to make settlement payments. We will make it explicit that notices that include such demands do not comply with the regime.

¹ Canada. *Copyright Act* (R.S.C., 1985, c. C-42), s. 41.26(1).

² Canada. *Copyright Act* (R.S.C., 1985, c. C-42), s. 41.26(3).

³ United States. *17 U.S.C. § 512*.

⁴ Jennifer M. Urban, Joe Karaganis and Brianna Schofield, *Notice and Takedown in Everyday Practice* (March 22, 2017). 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 Michael Geist, *Why has the Government Failed to Act on on Copyright Notice-and-Notice when Internal Docs Raise Abuse and Fraud Concerns?* Sept. 13, 2017. Available at: <http://www.michaelgeist.ca/2017/09/government-failed-act-copyright-notice-notice-internal-docs-raise-abuse-fraud-concerns/>.

This would protect consumers while ensuring that the Notice and Notice regime remains effective in discouraging infringement.⁶

RECOMMENDATION 2: We encourage the Canadian government to proceed to enact this promise, excluding settlement demands from the copyright notice-and-notice regime.

Further steps could also be taken. Permitting ISPs to charge a fee to forward notices is one potential solution. This may act as a deterrent to frivolous or fraudulent notices, but greater transparency about notices is also required to ensure that fraudulent or misleading notices are not used. The [Lumen Project](#) (formerly known as Chilling Effects), based at the Berkman Klein Center for Internet & Society at Harvard University, houses an archive of redacted notice-and-takedown notices, with personal information removed. This database has been used to uncover various forms of abuse and to monitor the notice and takedown system.⁷ While the Lumen database contains notices with connection to Canada,⁸ it is dedicated to takedown notices rather than notice-and-notice notices. A database of notice-and-notice requests, conducted in partnership between Canadian ISPs and academics, could help to monitor the use of the Canadian notice-and-notice system. Such a partnership could be funded by ISPs and an academic granting organization such as the Social Sciences and Humanities Research Foundation.

RECOMMENDATION 3: ISPs should be permitted to charge a small fee for forwarding notice-and-notice notices.

RECOMMENDATION 4: Government should encourage and facilitate the construction of a public archive of redacted notice-and-notice notices via a partnership between Canadian ISPs and academics.

Automated Enforcement

Copyright is increasingly regulated using software, algorithms, and “artificial intelligence” that play a role in copyright enforcement. Such technologies can be used:

- to filter content before it is uploaded to a platform, preventing the upload of material that may infringe copyright (or the upload of material that, in actual fact, does not infringe copyright)
- to locate copyright material on a platform; or
- to remove material that may infringe copyright, whether by individual file or site-wide; and/or
- to prevent the re-upload of material that may be subject to copyright.⁹

⁶ Innovation, Science and Economic Development Canada. *Intellectual Property Strategy* (Ottawa: Innovation, Science and Economic Development Canada, 2018). Available at <http://www.ic.gc.ca/eic/site/108.nsf/eng/home>.

⁷ See the Lumen blog at https://lumendatabase.org/blog_entries.

⁸ An advanced search on jurisdiction “Canada” and topic “copyright” reveals about 116 results: https://lumendatabase.org/notices/search?utf8=%E2%9C%93&topic_facet=Copyright&jurisdictions=canada.

⁹ Urban, Karaganis and Schofield, *Notice and Takedown in Everyday Practice*: 52-55; Maayan Perel and Niva Elkin-Koren. "Accountability in Algorithmic Copyright Enforcement." *Stanford Technology Law Review* 19 (2015): 473.

Backroom Deals

Some intermediaries enter into back room deals with rightsholders to enforce copyright and content restrictions.¹⁰ In some cases, rightsholders are permitted to remove content directly; “trusted” senders of copyright notices under the American regime are sometimes permitted to remove content directly from hosting services. Such procedures lack transparency and due process.¹¹ This type of automated enforcement may infringe the freedom of expression of Canadians. As well, in affecting Canadian users of such services, such procedures limit the freedoms that Canadian law affords, impinging on Canadian sovereignty in online platforms.

RECOMMENDATION 5: Canadian copyright institutions should institute oversight mechanisms to ensure that material that does not infringe copyright, or that is fair dealing or falls under other exceptions or limitations to copyright, is not inappropriately removed to ensure that freedom of expression is protected. Oversight should include:

- a) transparency and reporting requirements about the use of such technologies and instances of pre-upload filtering or takedowns;**
- b) auditing such technologies’ use by large platforms; and**
- c) proactive disclosure of private agreements between large platforms and copyright owners regarding the use of such technologies.**

Tertiary Actor Enforcement

In some cases, tertiary players beyond online intermediaries (such as payment providers, advertisers, etc.) also enter into back room agreements with copyright holders to limit online activities associated with copyright infringement and the monetization thereof.¹² Such procedures also lack due process.¹³ By involving these powerful economic actors, the copyright regime has created a realm that lacks checks and balances, effectively evading democratic oversight.¹⁴

RECOMMENDATION 6: Canadian copyright institutions should institute oversight mechanisms to ensure that copyright enforcement agreements between copyright owners and tertiary players are transparent and appropriate. Oversight should include proactive transparency and reporting requirements about the existence and contents of such agreements, and about instances of the withdrawal of services (such as payment services or advertising services) as a part of a copyright enforcement agreement.

¹⁰ Natasha Tusikov, *Chokepoints: Global Private Regulation on the Internet*. (University of California Press, 2016).

¹¹ Urban, Karaganis and Schofield, *Notice and Takedown in Everyday Practice*: 52-55.

¹² Natasha Tusikov, *Chokepoints: Global Private Regulation on the Internet*. (University of California Press, 2016).

¹³ Urban, Karaganis and Schofield, *Notice and Takedown in Everyday Practice*: 63.

¹⁴ Natasha Tusikov, *Chokepoints: Global Private Regulation on the Internet*. (University of California Press, 2016).