Internet Association

Submission to the Standing Committee on Industry, Science and Technology

October 31, 2018

Internet Association (IA) represents over 40 of the world's leading internet companies.[1] IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

IA's goal in this submission is to promote balanced copyright policies that enable creators to receive fair compensation while ensuring that private copyright interests do not subsume other critically important public interests, such as supporting innovation and economic growth, enabling access to information, preserving freedom of expression, and protecting individual privacy.

Our submission focuses on three main topics:

- The need to remove copyright barriers to the development of artificial intelligence technologies;
- The importance of safe harbors [and fair dealing] to intermediaries, businesses, and individual users; and
- Concerns about the extension of levies to devices and broadband service.

Each of these is discussed below.

1) The need to remove barriers to development and use of artificial intelligence technologies.

Artificial intelligence (AI) has been described by technology, business, and political leaders as the most important technological development of our time. And, due in part to forward-looking policies adopted by the government, Canada has been a leader in AI. As described by one source: "A strong research capacity, thriving start-up scene, significant investment by multinationals, and Canadian government initiatives that encourage innovation have placed Canada at the forefront of artificial intelligence (AI)."[2]

Unfortunately, copyright has emerged as one of the most significant potential impediments to AI. In machine learning – the most prominent branch of AI – a computer is typically "trained" using massive amounts of data. To train an AI to recognize pictures of cats, one would start with a large set of photos of cats. By comparing the pictures of cats to pictures of other things (*i.e.,* things that are not cats) the AI will slowly "learn" the difference and be able to recognize cats. Similarly, to train an AI to translate from English to French, one would start with a large set of English-language documents that have already been translated into French (or vice versa).

Achieving accurate results may require starting with a data set of millions (or even hundreds of millions) of examples. Often, these examples will be in the form of photos, videos, audio files, or documents that are subject to copyright protection. This is not a problem with respect to the computer analysis itself because copyright protects only expression and not the underlying idea, concepts, or principles. Thus, just as it is not infringement for a human to read a document or look at a picture, it is not an infringement for a computer to analyze a copyrighted work. However, compiling data sets and training an artificial intelligence almost always requires making one or more incidental copies of the data and may also

[1] A complete list of IA's membership can be found at: https://internetassociation.org/our-members/.
[2] https://aibusiness.com/canada-pioneer-ai-innovation/

require some manipulation or alteration, which can subject AI researchers to copyright liability under current law.

In IA's view, just as copyright law does not allow owners to sue a person for reading a book in a library or for remembering the plot of a movie after seeing it, it should not enable owners to bring an infringement suit based on a computer having analyzed and extracted underlying data or concepts from that same book or movie. So long as access to the works has been lawfully obtained, it should be possible to use them freely to train an AI so long as this use does not displace sales in their traditional markets.

To accomplish this, an explicit exception should be adopted in Canadian law to clarify that copyright protection does not extend to this type of use. A number of major jurisdictions – including Japan and the EU – have already adopted exceptions, and several more – such as Singapore and Australia – are considering similar provisions.

Recommendation: Canada should adopt an explicit statutory limitation clarifying:

i) that the Copyright Act does not prohibit machine learning by any entity for any lawful purpose; and

ii) that any entity is permitted to practice techniques of machine learning involving the copying, analysis, or other use of lawfully-acquired works to develop new knowledge, and that such use does not require authorization of the copyright owner.

2) The importance of safe harbors to intermediaries, businesses, and individual users.

Canada has developed one of the most effective and balanced copyright regimes in the world. An essential part of this has been the adoption of safe harbors that ensure Canada's copyright system fairly balances the interests of creators, consumers, and intermediaries.

These safe harbors are critical to the availability of internet services and to the growth of cloud computing, enabling a multitude of low-cost (or free) internet services to be offered in Canada. These include not only internet search, but services like email, navigation, cloud storage, user-generated content sites, online retail, and social media. Without the safe harbor or fair dealing limitations, many of these services would be at risk of substantial – and potentially crippling – liability.

Currently, takedown notices received by IA members range up to 2-3 million *per day*. Without safe harbors, some of these claims would be litigated. The countries with the most infringement litigation only handle a few thousand infringement cases per year. If even a tiny fraction of these were litigated, it would overwhelm courts and threaten to bankrupt companies. For many free and low-cost services, any significant additional legal risk could threaten their viability.

Repeal of safe harbors would harm businesses and individual users across Canada. Many individuals and small businesses rely on free or low-cost services such as email, webhosting, cloud storage, and social media, many of which would likely be forced to either withdraw from the market or raise their prices substantially. As a result, without the safe harbors, individuals and small businesses would face higher costs and fewer choices for services ranging from broadband connectivity to email to cloud storage.

Recommendation: Parliament should not consider weakening or repealing safe harbors.

3) Concerns with extension of private copying levies.

Various parties have proposed extending levies to multi-use devices (such as smartphones and computers), to broadband connectivity, or to cloud storage. In defending such extensions, rightsholders have repeatedly claimed that the levies were always intended to cover devices and have suggested levies should be non-controversial because the levy would only be about $3 and would only apply to smartphones and tablets. None of these claims are accurate.

First, the statute intentionally excluded devices. It explicitly limits levies to "blank audio recording media."[3] This language is not ambiguous. It was clearly intended to limit levies to products typically used to record potentially-copyrighted audio files, so that – to the extent possible – the impact of the levies would be limited to those who actually benefited from the making of private copies (*i.e.,* the providers and consumers of audio recording media).

Second, the actual amendment proposed by rightsholders would appear to authorize levies not just on smartphones and tablets but on *any* type of device that can record or store audio files. In fact, one proposal seemed to be intended to extend levies to cloud storage services as well as multi-purpose devices. Another would extend levies to broadband connectivity.

Third, nothing in the proposals available to Internet Association would actually limit levies to $3 (or to any dollar amount). Levies in Europe have been set as high as $72 for some devices. Additionally, when the Canadian Private Copying Collective previously proposed levies on digital audio players, the Copyright Board of Canada (CBC) approved a levy of $75 for devices with a storage capacity of 30 gigabytes or more.

Rightsholders have also suggested that device levies have worked well and been non-controversial in other countries (and particularly in Europe). In truth, private copying levies on devices have been intensely controversial, have spawned significant litigation, and have been described as "one of the most hotly debated topics in EU copyright law and policy."[4] In many countries, devices levies have proliferated quickly, extending to all sorts of consumer electronics devices from memory sticks and external hard drives, and from personal computers to DVD recorders. Manufacturers of these devices, who object to the significant expense of the levies as well as onerous reporting requirements, have brought repeated legal challenges.

Perhaps the most fundamental objection to extending levies to multi-purpose devices (as opposed to dedicated audio devices) is that they will no longer be paid by those who engage in or benefit from private copying. Apart from young children, most Canadians today have a smartphone or a computer. But only a relatively small portion of the population engages in any significant copying of music and many do not engage in these activities at all. However, every consumer who buys a smartphone or computer will end up paying significantly more for their devices (as part or all of the levy is passed on to consumers in the form of higher prices). Additionally, some amount of private copying is generally priced into the license agreements with digital music distributors, which means that consumers will often pay twice for copying the same content.

Private copying levies have also raised controversy in Europe because, in some countries, little or no money from the levies has been paid to artists. In some countries that collect levies, there is no distribution mechanism at all. In others, only a small fraction of levy revenues ever reaches the artists they were supposed to help due to high administrative costs and the large percentage paid to record labels.

This is not to say that artists and culture are unimportant or that artists do not deserve to be compensated for use of their works. While IA does not believe a subsidy to artists is necessary, it would

[3] Subsection 82(1), Copyright Act (R.S.C., 1985, c. C-42).

[4] Joost Poort and João Pedro Quintais, *The Levy Runs Dry: A Legal and Economic Analysis of EU Private Copying Levies*, 4 (2013) JIPITEC 3, 205.

be understandable if Parliament makes the judgment that the cultural contribution of artists should receive additional financial support because of its substantial benefit to the public. However, if this is the case, Parliament should adopt something similar to the rightsholders' proposal to create a fund paid for with general revenues and phase out private copying levies altogether.

This approach would spread the costs among essentially the same group of consumers – given the high penetration rates of smartphones, computers, and broadband among Canadian adults – and would be a much more efficient mechanism for supporting artists. Not only would it avoid imposing onerous reporting requirements on businesses, it would also avoid the substantial administrative costs associated with setting and collecting levies, leaving more money to be distributed to artists. Additionally, under this model, Parliament could avoid subsidizing record labels – which appear to be doing quite well financially – ensuring that the money went to those who need it the most.

Proposal: Parliament should not extend levies to devices, cloud storage, or broadband service. If it chooses to provide additional financial support to artists, it should do so by means of a cultural fund paid for by government revenues that is distributed directly (and only) to individual artists.

Conclusion

IA is grateful for the hard work the Committee has done in its review and appreciates the opportunity to submit this brief. We believe that the current copyright regime – especially the safe harbors – works well and that only incremental changes would be justified. As discussed above, our specific recommendations are that:

1. Parliament should adopt an explicit limitation on copyright infringement to enable artificial intelligence research and development;
2. Parliament should *not* consider weakening or repealing safe harbors; and
3. Parliament should *not* extend levies to devices, cloud storage, or broadband service.