Statutory Review of the *Copyright Act*

Written Brief of TELUS Communications Inc.

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INTRODUCTION

1. TELUS Communications Inc. ["TELUS"] is Canada's largest independent[1] communications company, providing Canadians with a broad range of communications products and services such as high-speed Internet access, television distribution, mobile services, and healthcare IT services. Many of TELUS' products and services, including all of those listed above, are affected by the *Copyright Act* ["Act"], illustrating the reach and importance of copyright policy in today's economy.

2. Copyright laws play a key role in creating the marketplaces of the digital economy, and the right policies are essential to maximizing Canada's potential in those marketplaces. In TELUS' view, successful copyright policy must balance rights for creators against the public interest in providing access to works, in order to promote innovation that creates new technology and business possibilities for the benefit of all Canadians.

3. In practice, this requires removing obstacles to efficiency and innovation from the Act, and ensuring that economic rights for creators are balanced against the need to accommodate and sustain innovation in the face of constant disruption. Doing so is essential to making the Act resilient to technological change, and allowing Canadians to compete effectively on the global stage.

4. In this brief, TELUS' comments and recommendations will be focused on ways in which the Act can be amended to foster innovation, by promoting efficiency and by increasing the resiliency of the Act to technological disruption.

5. In particular, TELUS recommends that Parliament make the following reasonable and focused amendments to the Act:

    - facilitate the efficient operation of network personal video recorder ["NPVR"] services, by giving network operators the flexibility to manage time-shifted recordings on their network efficiently, such as by sharing a single recording among multiple end-users;

    - bring balance to the statutory damages regime by requiring proportional damage awards in all cases, absent evidence of bad faith; and

    - amend the Notice & Notice regime to facilitate automation and limit misuse.

FACILITATING EFFICIENCY AND INNOVATION IN NETWORK PVR SERVICES

[1] Unlike its major competitors, TELUS does not own commercial programming undertakings, and is not a vertically integrated distributor of content services.

6. Government has recognized that efficiency in our copyright laws is key to realizing the economic benefits of creativity and innovation, for both creators and users. TELUS agrees.

7. Innovation continues to create more efficient methods for the storage and delivery of works, allowing greater dissemination at lower cost, and benefitting both creators and users. The provision of network services, in particular, is an area where efficiency is important, but where the Act creates unnecessary barriers to innovative advances that would enhance efficient delivery of works.

8. A good example is the NPVR – a network service that allows individuals to store time-shifted recordings to a network (a.k.a. "the cloud"). In 2012, Parliament enacted section 29.23 to provide individuals with the right to record programs for later viewing, and also provided network services with exceptions enabling them to provide the means for individuals to make and store recordings on their networks.[2]

9. As a result of these exceptions, individuals are permitted to time-shift either to a personal device (such as an in-home PVR) or to a network. However, section 29.23 [the "time-shifting exception"] contains limitations that require each user to create and access their own unique recording of a program – regardless of where it is stored.

10. Requiring an NPVR service provider to store hundreds of thousands of copies of the same recording – one for each user initiating a recording – creates excessive duplication that is unnecessarily costly, creates no value for rightsholders, and is highly inefficient. TELUS submits that so long as a network service provider is facilitating a non-infringing use, such as the exercise by an individual of their right to time-shift, it is counterproductive and harmful to innovation to impose limitations that prevent the service from operating efficiently.

11. Parliament can facilitate that efficiency by updating the Act's existing exceptions to ensure that when recordings are made and stored on a network, the network service provider has the flexibility to manage the creation and storage of such recordings efficiently. This would be consistent with the user's existing right to record onto a network, and does not diminish the existing rights of content owners. It would also avoid a counter-intuitive result, where using *fewer* copies to achieve a permitted outcome might lead to *greater* liability under copyright law.

12. Allowing network operators to operate efficiently would not impact rightsholders by undermining other business models, directly or indirectly. In particular, an NPVR service does not present new competition to video-on-demand ["VOD"] services. Consumers already have the right to time-shift, and have been doing so since the days of the VCR, long before the capability for VOD was a reality. Yet, the ability to time-shift has had no material impact on the consumer demand for VOD services in Canada, as evidenced by the creation and growth of VOD services both by incumbent broadcast distribution undertakings ["BDUs"], including TELUS itself, and by newer over-the-top services, such as Netflix.

[2] *Copyright Act* (R.S.C., 1985, c. C-42), sections 31.1(1) and 31.1(4)

13. Both personal recording capabilities and the ability to access on-demand content that the consumer has not pre-recorded are services which can help combat cord-cutting trends by providing Canadian consumers with added value for their television subscriptions. Those subscriptions are a significant source of funding for Canada's creative industries, and their accelerating decline over the past 5 years has had a significant impact on BDUs and on the creative industry in Canada.

INSTILLING RESILIENCY IN THE ACT BY EQUITABLY DISTRIBUTING THE RISKS OF STATUTORY AMBIGUITY

14. The problem described above in connection with NPVR illustrates a broader concern, which is that rapid advances in technology can often overtake statutory language. This exacerbates an existing difficulty with copyright laws, namely, that even under the best of circumstances their application can be uncertain, particularly in cases where exceptions may apply. The result is legal uncertainty for innovative businesses, and a statute that is not resilient to technological change.

15. What transforms legal uncertainty into a potential barrier to innovation is the threat of high statutory damages, which can create open-ended and indeterminate liability that is completely detached from the actual harm suffered by rightsholders, or the profits that might have been derived from an infringement. As a result, the risk associated with statutory ambiguity is distributed unevenly and inequitably between rightsholders and innovators.

16. Parliament already has a roadmap to address this imbalance, in the form of section 38.1(5)(d). This section, enacted in 2012, requires courts to consider proportionality when assessing statutory damages awards, and empowers them to lower awards below the statutory minimum where appropriate. However, in cases of commercial infringement, similar discretion may only be exercised by the courts in limited and ill-defined circumstances.[3] As a result, the statutory damages regime fails to distinguish between legitimate businesses trying to act within the bounds of the law, and illegitimate businesses acting in bad faith (*e.g.,* commercial piracy).

17. In TELUS' view, it would be better public policy to create a baseline requirement of proportionality in statutory damage awards, but suspend it for those who infringe in bad faith. This ensures that the punitive aspect of statutory damages is applied only in cases where it is actually appropriate and desirable to do so. It also incents greater co-operation between rightsholders and legitimate businesses to find reasonable ways to bring innovative solutions in content delivery to market, when uncertainty due to statutory ambiguity might otherwise stifle them.

18. The digital marketplace is a global one, and to keep pace with global competitors, innovative businesses need to be empowered to deploy new technologies and business models without

[3] *Ibid.* at section 38.1(3)

being subject to undue risk. Addressing the negative effects of statutory damages on desirable risk-taking is one of the best ways that Parliament can support Canadian competitiveness, and instill greater resiliency to change into the Act.

FACILITATING EFFICIENCY AND INNOVATION WITHIN THE NOTICE & NOTICE REGIME

19. Since it was enacted in 2012,[4] the Notice and Notice regime ["N&N"] has seen tremendous growth in usage by rightsholders, such that in 2017, TELUS received hundreds of thousands of notices of claimed infringement per month. These high volumes have led to significantly higher compliance costs, all of which are borne entirely by internet service providers ["ISPs"] for the benefit of rightsholders.

20. Finding ways to process these large volumes of notices efficiently is essential to enabling ISPs to control their compliance costs. In practice, that efficiency comes through automation, but N&N does not require rightsholders to provide notices in automation-friendly form. Accordingly, as a first step to reforming the N&N regime, TELUS recommends that regulations are needed to standardize the form and content of notices. Mandating a standard machine-readable format will allow ISPs to better harness the benefits of automation as they process increasingly high volumes of notices. Further, mandating the content of notices can help curb misuse of the regime, by ensuring that notices do not contain extraneous content such as settlement demands, or advertising.

21. TELUS also recommends that ISPs be allowed to charge a reasonable fee for fulfilling their obligations under N&N. The mechanism for doing so is already part of the Act but has not to date been put into effect.[5] Imposing an economic cost to accessing the regime would go a long way towards protecting consumers from misuse such as fraudulent notices, or notices that include malicious content such as phishing links.

22. This is also a matter of fairness to ISPs, who are innocent third parties in copyright disputes, yet bear significant (and growing) costs to help rightsholders enforce their rights. A reasonable fee, even if falls short of full cost-recovery, would help alleviate the financial burden to ISPs. It is also reasonable to ask those who benefit from the regime to contribute towards its cost.

23. Finally, from an innovation standpoint, the statutory damages scheme specific to N&N once again creates a significant barrier to innovation, by mandating a highly risk-averse approach to compliance. Unlike the more general statutory damages regime discussed above, the provision specific to N&N[6] does not provide the courts with any discretion to lower awards that are grossly disproportionate. Instead, statutory damages under N&N impose strict liability

[4] *Ibid.* at ss. 41.25 and 41.26

[5] *Ibid.* at section 41.26(2)

[6] *Ibid.* at section 41.26(3)

of between $5,000 and $10,000 for each instance of non-compliance, creating disproportionate risk due to the millions of notices that an ISP like TELUS receives per year.

24. This framework is highly problematic, as even in a perfect world automation does not work perfectly 100% of the time. Every system has an error rate, however small. Unintentional non-compliance as a result of automation errors can nevertheless bear punitively high costs, despite the fact that automation is the only realistic way to deal with the volumes of notices ISPs receive.

25. These risks are further exacerbated by the asymmetry between the statutory damages associated with non-compliance by ISPs, and those associated with infringement by the ISPs' subscribers. Non-commercial infringement by a subscriber can provide a rightsholder with an aggregate total of $5,000 of statutory damages, whereas a finding of systemic non-compliance against an ISP allows a rightsholder to seek far greater damage awards. Presumably, Parliament did not intend to create such perverse incentives.

26. Accordingly, TELUS recommends that the statutory damages provision under N&N be amended to provide the courts with discretion to lower a minimum award to ensure proportionality to any actual harm to rightsholders, and that evidence of bad faith on the part of a non-compliant ISP be required to justify a disproportionate and punitive level of damages. Such an amendment would go a long way towards helping ISPs deal with the significant and increasing costs they are required to incur to help rightsholders enforce their rights.