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**Written Submissions of Rogers Communications
on section 92 *Copyright Act* Review**

Standing Committee on Industry, Science and Technology

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I. Introduction

1. Rogers Communications Inc. (“Rogers”) is pleased to provide our submission for the section 92 *Copyright Act* (the “Act”) review.¹ We are a diversified Canadian communications and media company engaged in wireless, high speed Internet, cable television, radio and television broadcasting, and as such have a vested interest in the results of this review. Our comments focus primarily on improving the toolkit of rightsholders to enforce against infringers online and propose improvements to Canada’s Notice and Notice regime.

II. The Problem of Streaming Piracy

2. For the last several years, Rogers has been actively involved in the fight against online content theft, as we have increasingly seen Canadians migrate away from downloading piracy – which was a material problem when the *Copyright Modernization Act* was considered – to streaming piracy which, in our experience, the current iteration of the Act is ineffective in preventing.

3. According to ISED’s recent report *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada*, streaming, and not downloading, is increasingly becoming the means by which Canadians are viewing content online.² Of the 13.4 million Canadians who consumed television programs online, 44% streamed this content, while only 18% downloaded TV shows.³ Rates of viewing infringing television content were also significant: 34% of Canadians admitted to viewing pirated television programming within the relevant timeframe.⁴ Notably, 5% of Canadians surveyed admitted that all of the media they accessed online was infringing.⁵

4. Similar trends are reflected in recent whitepapers by network intelligence company Sandvine, which reported that 7% of Canadian households streamed copyrighted content using KODI platforms last year.⁶ Moreover, 8.3% of Canadian households used subscription IPTV

¹ As a member of other industry consortia including the Canadian Association of Broadcasters (“CAB”) and the Business Coalition for Balanced Copyright (the “BCBC”), Rogers wishes to affirm our ongoing support for the legislative changes put forth by the written submissions of these groups.

² Prepared for Innovation, Science and Economic Development Canada by Kantar TNS, March 30, 2018; See also: <https://www.ic.gc.ca/eic/site/112.nsf/eng/07648.html>

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ KODI refers to a free and open-source media player software application. KODI media players have many legitimate uses and, in and of themselves, are not infringing. However where certain “unofficial” KODI add-ons are loaded onto KODI devices, they become “preloaded set top boxes” capable of communicating copyrighted content; <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf>

services to stream copyrighted content.⁷ Sandvine has even assessed the annual harm occurring to the North American broadcasting distribution industry at \$4.2 billion, or approximately **\$500 million of lost revenues to Canadian distributors as a group**.⁸ Of this annual \$500 million loss, zero copyright royalties are being paid to rightsholders for programming in distant signals, zero contributions are being made to the Canadian Media Fund and zero affiliation payments are made to Canadian programmers.⁹

5. Rogers is concerned that the continued proliferation and wide-scale adoption of preloaded set-top boxes, which include unlicensed linear IPTV services, will lead to the gradual – and then sudden – erosion of the Canadian broadcasting system.¹⁰ Our proposed amendments provide broader and more responsive tools to Canadian rightsholders to address streaming piracy.

A. Introduce criminal prohibitions against pirates who communicate exclusive content to the public on a commercial scale

6. Since 2016 Rogers, along with our industry counterparts, has used the civil prohibitions in the Act to sue over 150 defendants who continue to make our exclusive content available through preloaded set-top boxes. On June 1, 2016, an interlocutory injunction was awarded by the Federal Court restraining the sale and distribution of these devices until a trial occurs, likely in 2020 – four years after the injunction award.¹¹

7. In spite of these actions, new vendors continue to enter the market to sell preloaded set top boxes and existing vendors, many of whom have already been restrained by the injunction, ignore the order and continue with their sales. Even contempt proceedings have not been sufficient to dissuade those set on profiting from content theft.¹²

8. We have seen that a bare civil prohibition on communicating exclusive content to the public is not an adequate deterrent to IPTV pirates. To this day, bad actors continue to operate

⁷ <https://www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>

⁸ <https://www.sandvine.com/hubfs/downloads/archive/2017-global-internet-phenomena-spotlight-subscription-television-piracy.pdf> at 4; See also *Application Pursuant to Sections 24, 24.1, 36, and 70(1)(a) of the Telecommunications Act, 1993 to Disable On-line access to Piracy Sites*, FairPlay Canada Coalition, January 29, 2018 at para. 45 [*FairPlay*].

⁹ In 2017, Rogers remitted approximately \$20 million in copyright royalty payments to creators for programming in distant signals; remitted up to 5% of its cable revenues to the Canada Media Fund; and remitted 35% of its cable revenues to Canadian programmers in the form of affiliation payments (of which 44% was directed to the creation of Canadian content).

¹⁰ Canada's newest recent piracy-fighting tool, Notice and Notice found at sections 41.25 and 41.26 of the *Copyright Act*, does nothing to prevent unlicensed IPTV streaming piracy.

¹¹ 2016 FC 612.

¹² 2018 FC 66.

with impunity in selling access to pirate IPTV services featuring stolen Rogers content in an organized and sophisticated fashion, and on a commercial scale.

Requested Amendment

9. Rogers submits that section 42 of the Act be made technologically neutral to reflect the real and substantial threats posed by online piracy, instead of only targeting less common sources of commercial scale piracy. By removing reference to the words “copy of” within section 42, the provision will cease to be limited to just those who commercially sell copies of infringing works, but will apply to pirates who communicate to the public even when – as is the case with streamed content – the unauthorized distribution of a pirate stream does not result in a permanent download remaining with an end user.¹³

B. Permit injunctive relief against ISPs and other intermediaries

10. As more users access stolen content through online streaming, it is important to understand how intermediaries are used to facilitate the consumption of unlicensed content. At a minimum, pirates who engage in content theft must rely on different types of online infrastructure to redistribute, and provide access to, stolen content. These intermediaries include domain name registrars, search engines, ISPs, webhosts and cyberlockers.

11. Rogers has availed ourselves of existing tools to combat content theft, including leveraging our ability to issue *Digital Millennium Copyright Act* (“DMCA”) takedown notices in compliant jurisdictions when we see our exclusive content hosted online without consent.¹⁴ Yet, in spite of our best DMCA takedown efforts, we observed no discernable interruption to the unlawful services targeted. Based on this experience, we remain increasingly convinced that new tools in the Act are needed to combat the threat posed by pirates who often operate anonymously and in foreign jurisdictions.

12. Intermediaries must do more to prevent the distribution of infringing materials online. In many parts of the world (notably in the Commonwealth nations of UK and Australia), we have seen the success of legislative regimes which allow for injunctive relief against ISPs and other intermediaries.

13. The Act should allow rightsholders to apply for a court order requiring intermediaries to take steps to prevent infringing activities online. For instance, such a provision would allow a

¹³ In addition to mandating the RCMP and other law enforcement bodies to bring investigations, criminal prohibitions carry with them a gravity which communicates the seriousness of this problem, and which will also serve a better deterrence function.

¹⁴ In particular, Rogers engaged a third party to trace the IP addresses of the content being distributed on preloaded set top boxes. For six months, Rogers issued takedown notices through this proxy to those webhosts implicated in the transmission of the content.

court to order an ISP to disable access to IP addresses and other electronic locations online in order to prevent the unauthorized distribution of copyrighted content, especially where it relates to unlicensed IPTV services. To be clear, we fully support net neutrality and the free flow of legal content on the Internet, and such a step would not violate Canada's net neutrality framework, as net neutrality is not a defence to accessing unlawful content online.¹⁵ Rather, this remedy constitutes a tool that is both expedient and effective; and takes into account the fact that this stolen content is often hosted in locations outside of Canada.

14. In recognition of the effectiveness of such a remedy, Rogers signed on to the FairPlay Canada application which petitioned the CRTC to create an agency for the expedient adjudication of online piracy disputes where electronic locations hosting content are “blatantly, overwhelmingly, or structurally engaged in piracy”.¹⁶ In denying the FairPlay application, the Commission specifically pointed to the Copyright Act Review as the right venue for considering this issue.¹⁷ In our view it is now incumbent on this Committee to seriously consider that request of rightsholders, in order to preserve the healthy operation of the Canadian broadcasting system.¹⁸

Requested Amendment

15. A proposed amendment, modelled on section 115A of Australia's *Copyright Act* is recommended for inclusion in the Act. Factors that must be taken into account when a court is deliberating on injunctive relief ought to include, among other criteria, the flagrancy of the infringement, the proportionality of the blocking order and the public interest. Furthermore, Parliament must make clear that where injunctions are sought using this section, resultant orders are binding on the CRTC so as to stay the application of section 36 of the *Telecommunications Act*.¹⁹ To this end, an override clause must be added to the Act to negate the application of section 36.

¹⁵ E.g. child pornography, copyrighted content, illegal drug marketplaces; Net neutrality cannot be invoked as a defence to justify unfettered access to all illegal online content for free. Rogers' position on net neutrality aligns with Innovation, Science and Economic Development Minister Navdeep Bains' definition, who earlier this year noted that Canada's net neutrality framework required that “all legal content must be treated equally by internet service providers”.

¹⁶ *FairPlay*, *supra* note 8; The FairPlay Canada coalition includes more than 25 organizations representing every aspect of Canada's film, TV, radio, sports entertainment, and music industries.

¹⁷ Telecom Decision CRTC 2018-384, October 2, 2018 at para. 73; <https://crtc.gc.ca/eng/archive/2018/2018-384.htm>

¹⁸ For clarity, our proposed legislative change would be broader than what was requested by FairPlay in that it could provide remedies vis-a-vis all relevant intermediaries, including delisting orders against a domain name registrar, or a takedown order against a data storage company.

¹⁹ Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public. *Telecommunications Act*, S.C. 1993, c. 38, section 36.

III. Improving Notice and Notice

16. While fighting online content theft, Rogers has also been protecting the rights of the user community by clarifying intermediary obligations under the Notice and Notice regime – an educational tool initially conceived of to direct users away from copyrighted content online.²⁰

A. Settlement demands should be prohibited from notices

17. Since the Notice and Notice regime’s formalization in 2012, it has drawn recent attention for its settlement practices: both for the inclusion of links demanding payments within notices, and because of the significant number of settlement payments Canadians have been making to rightsholders to settle claims of copyright infringement.²¹

18. In April 2018, ISED announced Canada’s IP Strategy and confirmed that in future copyright notices would exclude settlement demands, as these “do not comply with the regime”.²² In October 2018, this intention was fulfilled through the introduction of Bill C-86 – an omnibus budget bill which, *inter alia*, sought to remedy flaws in the Notice and Notice regime by making it clear that no copyright infringement notice shall contain any requests for payment or for personal information.²³

19. Though a move in the right direction, in our view, the current wording of Bill C-86 does not go far enough. Specifically, Bill C-86 contains no deterrent provisions to dissuade rightsholders or claimants from including settlement demands in their copyright notices. In other words, there is no enforcement mechanism by which a party could deter a claimant from including a settlement demand within a notice. Equally worrisome is the idea that by unwittingly forwarding a notice that does indeed contain a settlement demand, ISPs could be implicated in the sending of a non-CASL compliant commercial electronic message.²⁴

²⁰ Specifically, based on the Supreme Court of Canada appeal initiated by Rogers on behalf of consumers accused of illegal file sharing, we have credible insights on how to improve Canada’s Notice and Notice system, all with a view to ensuring greater consumer protections; See 2018 SCC 38.

²¹ <http://www.nationalpost.com/pirates+your+neighbourhood+online+copyright+infringement+laws+affecting+canadians+year+later/11716330/story.html>; <https://business.financialpost.com/telecom/media/massive-infringement-movie-rights-holders-are-suing-illegal-downloaders-and-winning>

²² <https://www.ic.gc.ca/eic/site/108.nsf/eng/home>

²³ Bill C-68 *Budget Implementation Act, 2018, No. 2*; Introduction and First Reading October 29, 2018, Sections 243-247.

²⁴ Canada’s Anti-Spam Legislation (CASL) formally known as *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* (S.C. 2010, c. 23), prohibits the sending of commercial electronic messages at section 6; exceptions for notices required by law would no longer apply to provide a safe harbour for ISPs.

20. Rogers believes the onus for excluding settlement demands from copyright notices must rest solely with rightsholders. We are concerned that upon receiving a copyright notice, *innocent* subscribers sometimes comply with the settlement demands therein, merely to avoid the distress caused by notices which threaten litigation. Simply put, this was never the intent behind the regime.

21. Finally, based on the sheer volume of notices ISPs are responsible for processing each year, any solution that relies on ISPs filtering out threatening language or the inclusion of settlement links is untenable, and likely to result in threats still being passed on to consumers.²⁵

Requested Amendment

22. Parliament must explicitly ban rightsholders from engaging in this practice (rather than make ISPs liable for inadvertently processing notices containing settlement demands, or expose them to liability under *CASL*) and include damages provisions for non-compliance by rightsholders as a penalty. One way of achieving this would be to create a webform for the submission of copyright notices. By requiring limited fields of input for rightsholders to convey only the essential form and content requirements of a notice (as required in section 41.25 of the Act) – and nothing more – one can more effectively prevent opportunities for bad actors to make extortionist demands of Canadians.

B. Full cost recovery for Norwich Orders must be permitted

23. Rogers has long maintained that sections 41.25 and 41.26 of the Act did nothing to alter the common law practice around Norwich Orders when the *Copyright Modernization Act* came into effect, and which was the norm when Notice and Notice was carried out on a voluntary basis, prior to 2012. On September 14, 2018, Canada’s highest Court unanimously sided with Rogers in finding that the Notice and Notice provisions did not supplant the common law principles around Norwich Orders.

24. Yet, in its written reasons, a majority of the Supreme Court found that in addition to the three explicit obligations required by ISPs in discharging their duties under Notice and Notice, there were also implicit ISP obligations inherent in the regime. Moreover, the Court accepted the position that, where “implicit statutory obligations overlap with the steps that an ISP says it would have to take in order to comply with a Norwich order, an ISP is not entitled to recover costs of such steps”.²⁶

²⁵ In 2016, Rogers processed over 2 million notices; See evidence of Pam Dinsmore, *Standing Committee on International Trade*, No. 76, 1st session, 42nd Parliament; September 20, 2017 at 1605. See also:

<http://www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-76/evidence>

²⁶ 2018 SCC 38 at paras. 50 and 51.

25. The costs of complying with the Notice and Notice regime are not insignificant.²⁷ Although we are pleased with the overall result of the Supreme Court decision, we remain concerned that these implied statutory obligations could prevent ISPs from recouping 100% of their reasonable costs to comply with Norwich Order requests, where some Norwich steps are construed to overlap with the work performed to process and send out the notices.

Requested Amendment

26. The Minister should mandate the costs of recovery for ISPs when complying with Norwich Orders. Rogers suggests mandating the costs of recovery by ISPs at \$100 per IP address.

27. Rogers appreciates the opportunity to submit our views to the Committee and to offer our recommended amendments to the Act.

²⁷ Rogers processes all notices without reimbursement. In 2018, Rogers completed over 1600 Norwich lookups also without reimbursement, before the Supreme Court clarified that ISPs are entitled to their reasonable costs in 2018 SCC 38.