STATUTORY REVIEW OF THE COPYRIGHT ACT BY THE STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Written Submissions of Shaw Communications Inc.

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Introduction

Shaw is a leading Canadian connectivity company, serving 7 million Canadian subscribers with cable, satellite, and home phone services; high-speed internet; and, through Freedom Mobile, wireless voice and LTE-Advanced data services.

Shaw is well acquainted with the balance that Canada's copyright regime must strike to achieve the objectives of "promoting the public interest in the encouragement and dissemination of works" and "obtaining a just reward for the creator."[1] We are engaged with the *Copyright Act* as a creator, intermediary, and user,[2] and pay almost $1 billion annually in connection with the acquisition of content used and/or distributed by our services.

Generally, the *Copyright Act* already strikes the right balance among users' and rightsholders' rights, and the appropriate role of intermediaries, one that would be undermined by amendments proposed by rightsholders. We oppose changes that would create new rights or limit existing exceptions. These would increase the cost of digital products and services to consumers, and undermine investment, innovation, and the drive for network efficiency which are critical to Canada's success in the digital economy.

Remuneration issues raised by creators have resulted from disruptions to traditional markets by new technologies and commercial-grade piracy, rather than insufficiency of current rights or excessive exceptions. Similar disruptions have been experienced in many sectors in the face of new digital business models. Businesses have responded by investing, innovating, and improving consumer experiences, not by seeking new statutory entitlements at the expense of consumers and Canadian competitiveness.

Moreover, the *Copyright Act* – while seeking the fair remuneration of creators – is not itself an instrument of cultural policy. As Canada's Supreme Court observed, the *Copyright Act* is part of an interrelated scheme that includes the *Broadcasting Act* (which is, to a significant extent, a cultural policy tool), the *Telecommunications Act* and the *Radiocommunication Act*. Those statutes are the subject of a current review by a government-appointed expert panel.[3] Each statute within this framework has particular objectives and a change to one act can negatively impact the realization of another's objectives. Therefore, a cautious approach to amending the *Copyright Act* is critical.

Furthermore, the *Copyright Act* is an inappropriate vehicle to address the health of Canadian cultural industries because it generally affords rights on a non-discriminatory basis to nationals of all countries that accede to governing international treaties, to the full extent required by those treaties.

Finally, certain amendments sought are the subject of the pending Canada, US, Mexico Agreement (**CUSMA**) – which is signed but unratified, and suspended portions of the Comprehensive

[1] *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 SCR 336, para. 30.
[2] For an overview of Shaw's copyright-related activities, see Appendix A.
[3] Innovation, Science and Economic Development Canada and Canadian Heritage, News Release: "*Government of Canada launches review of Telecommunications and Broadcasting Acts"* (5 June 2018)

Progressive Trans-Pacific Partnership. Care must be taken to ensure that any recommendations do not undermine Canada's commitments or negotiating positions.

Retransmission Consent

Shaw urges the Committee to dismiss demands by US broadcasters for Canadian broadcast distributors to negotiate consent and payment to distribute freely available over-the-air (**OTA**) signals. Despite the same demands by the United States in the CUSMA negotiations, Canada secured the ability to maintain its existing retransmission regime in the agreement.[4]

Retransmission consent rights would up-end over 50 years of carefully-calibrated Canadian copyright and broadcasting policy, to the detriment of consumers and our broadcasting system. It would force cable, satellite and IPTV subscribers to pay significant new fees for the same signals they have received for decades, lose access to these signals, or both, while creating no new value. As US cable industry stakeholders stated during NAFTA negotiations:

> Over the past decade, the retransmission consent regime enacted in the United States has driven up the price consumers pay for cable service and been the source of hundreds of service interruptions impacting millions of American television viewers without any countervailing improvement in broadcast programming.[5]

Canada's current regime reflects Parliament's intention to prevent such harms, in recognition of the importance of the retransmission of local and distant signals to Canada's communication system.[6] Retransmission consent would seriously impact the cost structures of regulated Canadian broadcast distributors and undermine their ability to support Canada's broadcasting system. Indeed, signal retransmission in Canada occurs in a regulatory context that affords Canadian broadcasters many protections and entitlements under the *Broadcasting Act*, such as priority carriage; simultaneous substitution; and, subsidization of Canadian programming obligations – including local news.

Broadcasting distributors already pay over $100 million annually to retransmit programming carried on distant US and Canadian OTA signals,[7] pursuant to a compulsory licence set by the Copyright Board by which they compensate Canadian and US program producers, broadcasters and professional sports leagues for the retransmission of content.

For all of these reasons, demands for a retransmission consent regime must be rejected.

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[4] Chapter 15 – Cross-Border Trade in Services, Annex 15-D Programming Services, ss.2-3, online: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/15_Cross-Border_Trade_in_Services.pdf.

[5] Cable Industry Stakeholders' Response to USTR Request for Comments on Negotiating Objectives Regarding Modernization of the NAFTA with Canada and Mexico (82 F.R. 98 23699-23700, Docket No. USTR-2017-0006) (13 October 2017).

[6] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, paras. 71-73.

[7] Copyright Board of Canada Annual Report 2016-2017 at page 11, online: http://cb-cda.gc.ca/about-apropos/performance-rendement/2016-2017/cop00-eng.html

Exceptions

Some stakeholders recommend repealing or narrowing copyright exceptions,[8] many of which were introduced to accommodate technological innovation, promote efficiency, and balance copyright protection with users' needs in the digital age. Notably, permitted uses under these exceptions are subject to the user's acquisition of a legal copy of the work and a prohibition against circumventing technological protection measures.

Such recommendations, if adopted, would harm Canadian consumers, legitimate businesses and Canada's competitiveness. Canadians rely on exceptions to lawfully store and access legitimately acquired works, and Canadian businesses have invested extensively in innovative and efficient technologies that enhance the market for legitimate sources of content to the benefit of users and rightsholders alike.

Shaw is also concerned with rightsholders' attacks on the Network Services exceptions,[9] which exempt services from copyright liability for merely providing the means for telecommunication or reproduction of works over the internet or other networks, including caching and unknowingly hosting infringing content. These exceptions are consistent with the World Intellectual Property Organization (**WIPO**) Copyright Treaty[10] and WIPO Performances and Phonograms Treaty,[11] and the laws of the US, UK and EU countries.

The *Copyright Act* strikes the correct balance between incenting investment in advanced and efficient network services while ensuring that services covered by the Network Services exceptions have appropriate obligations. Internet service providers (**ISPs**), while benefiting from a safe harbour, are subject to the notice-and-notice regime, as discussed below. Additionally, an intermediary will not be exempt from liability if its service is "primarily for the purpose of enabling infringement".[12] Further, the hosting exception[13] does not apply if the service provider has knowledge of a court decision that a person storing the work infringes copyright.[14]

Certain stakeholders' attempts to characterize these exceptions as creating "what is in effect a system of state-sponsored, direct subsidies"[15] for network services underscore the radical nature of their proposals and their efforts to ignore copyright's fundamental purpose: namely, to balance incentives for the creation of works with the public interest in their dissemination. It also ignores the important role that network services play for Canadian creators and performers. The internet has reduced barriers to entry, with an increasing number of Canadian artists being "discovered"

[8] Including the time-shifting exception (s.29.23), the technological processes exception (s.30.71), the transfer of format and hosting exceptions (s.31.1).
[9] *Copyright Act*, s.31.1(1)-(4).
[10] WIPO (World Intellectual Property Organization Copyright) Treaty (**WCT**) (1996), online: http://www.wipo.int/treaties/en/ip/wct/.
[11] WIPO Performances and Phonograms Treaty (WPPT) (1996), online: http://www.wipo.int./wipolex/en/details.jsp?id=12743.
[12] *Copyright Act*, ss.27(2.3).
[13] *Copyright Act*, ss.31.1(4).
[14] *Copyright Act*, ss.31.1(5).
[15] Music Canada, "The Value Gap: Its Origins, Impacts and a Made-in-Canada Approach", at p. 11

on the Internet,[16] and is an important vehicle for the promotion and distribution works in the digital age. While the assertion that "not so long ago, singing a recording contract with a record label (big or small) offered a realistic chance to become a full-time, professional musician, and enter the middle class" implies the copyright regime is deficient, it highlights the fact that far fewer individuals were able to record and distribute their works in the pre-digital age. The shifting economics of creators' businesses has resulted from complex, global marketplace developments, not deficiencies in Canadian copyright law.

Network services are the foundation of a robust digital economy. The protection of intermediaries from liability relating to the information they store and/or transmit is consistent with the principle net neutrality and the interests of rightsholders and consumers: it is essential for freedom of expression and the operation of efficient and affordable digital networks.

Notice-and-Notice

Under Canada's notice-and-notice regime,[17] Canadian ISPs must forward notices of alleged infringement received from rightsholders to the person to whom the electronic location in the notice relates, while retaining information relating to the alleged infringer. The regime has successfully raised awareness of and mitigated infringement;[18] however, certain abuses need to be remedied by minor amendments to protect consumers.

Certain claimants include "settlement demands" in notices, attempting to extract payments from ISP subscribers ranging from $200-$10,000, with threat of legal action.[19] The Government has attempted to address this mischief in the *Budget Implementation Act* (**BIA**),[20] which proposes to add: i) a prohibition against including settlement demands in notices and ii) a qualification that ISPs' obligations related to notices only apply where the notice complies with this prohibition. While Shaw supports the objectives of this proposal, its current form creates an expectation that ISPs will vet notices to prevent the communication of illegal settlement demands. Such vetting is impracticable and would impose a disproportionate burden on ISPs, significantly increasing ISPs' costs and, ultimately, impacting the costs of internet services. Instead of creating an unrealistic expectation that ISPs can and will vet notices, we urge the Committee to recommend a monetary penalty payable by rightsholders for sending abusive notices. This would more effectively achieve the *BIA*'s intended objectives while maintaining appropriate roles and responsibilities of rightsholders and intermediaries.

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[16] See Globerman (2014) at page 31 for a discussion of some examples, online: https://www.fraserinstitute.org/sites/default/files/entertainment-industries-government-policies-and-canadas-national-identity_0.pdf.

[17] *Copyright Act*, ss. 41.25-41.26.

[18] Kantar TNS (Commissioned by the Government of Canada), "Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyrgith Infringement in Canada – Executive Summary" (30 March 2018), at s.1.2.9, https://www.ic.gc.ca/eic/site/112.nsf/eng/07649.html.

[19] N. Bogart, "No, you do not have to pay a 'settlement fee' if you get an illegal download notice", Global News, 01/13/2017: https://globalnews.ca/news/3179760/no-you-do-not-have-to-pay-a-settlement-fee-if-you-get-an-illegal-download-notice/.

[20] Bill C-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, online: http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10127729.

Shaw also urges the Committee to recommend that the form of rightsholders' notices be prescribed by regulation and to require that notices be submitted using the Automated Copyright Notice System (**ACNS**)format.[21] Certain large-scale rightsholders have demanded the dissemination of thousands of unformatted, manual notices, imposing significant costs on ISPs to fulfill their notice obligations which, left unaddressed, will increase consumer costs. Moreover, because rightsholders may claim statutory damages from $5,000-$10,000 for each notice that is not processed,[22] these practices could be a business strategy to trigger technical non-compliance. Any such abuse is inconsistent with the intention of the regime, negatively impacts internet users, and should be prevented by the proposed amendment.

Collective Management

Finally, Shaw is concerned with several of the BIA's proposed amendments to collective management. First, the BIA proposes to eliminate mandatory Copyright Board tariff-setting for public performance rights by giving collectives the option to file a proposed tariff or enter into agreements with users.

Shaw strongly submits that the current regime requiring proposed tariffs is a more appropriate and efficient approach to establishing public performance royalties. We are concerned that the amendments proposed in the BIA could enable collectives to operate as near-monopolies to the detriment, in particular, of small and medium-sized users and their customers. While negotiations with collectives by a group of users would not be contrary to Canadian competition law, if the BIA's proposed amendments are brought into force, we recommend that the *Copyright Act* be amended to expressly confirm that users are entitled to negotiate as a group when negotiating with a collective, as well as when applying to the Board for arbitration when a collective and users are unable to agree on royalty rates or related terms and conditions. Jointly negotiating with collectives and participating in Board proceedings will permit users to partially offset the imbalance of power that would otherwise be enjoyed by the near-monopoly collectives. If users were constrained to negotiate individually with collectives, significant inefficiencies would result from the duplication of related transaction costs and, as noted, users would find themselves at an unjustifiable negotiating disadvantage.

Shaw is also concerned with the BIA's proposal to enable an owner of an unrepresented work or sound recording to commence infringement proceedings, given that a collective can never guarantee definitively the scope of its repertoire. Shaw accordingly requests that the Committee recommend a form of extended collective licensing for musical works and sound recordings, to provide that where a use is covered by a collective's licence, the licence covers all performed repertoire while allowing a non-member to recover its share of royalties from the collective.

[21] For more information, see www.acns.net. ISPs have worked with large and small rightsholders alike, and their representatives, to facilitate simplified ACNS-formatted submissions and are willing to do so with any copyright owner.
[22] *Copyright Act*, s.41.26(2).

Conclusion

Canada's *Copyright Act* has achieved an appropriate balance between creators, users and intermediaries. Justifications for new entitlements or limitations on exceptions ignore changes to the consumption and valuation of copyright driven by the realities of market access, supply and demand in the global digital economy, and the need for creators – like other economic actors– to evolve their approach to doing business in the digital era. Rightsholder proposals would impose new costs on Canadians; undermine investment and innovation in the digital economy; and disrupt the delicate balance of policy objectives established within the overall legislative framework governing copyright, broadcasting, telecommunications and radiocommunication.