



Government  
of Canada

Gouvernement  
du Canada



# **Consultation on a Modern Copyright Framework for Online Intermediaries**

This publication is available online at <https://www.ic.gc.ca/eic/site/693.nsf/eng/00191.html>

To obtain a copy of this publication, or to receive it in an alternate format (Braille, large print, etc.), please fill out the Publication Request Form at [www.ic.gc.ca/publication-request](http://www.ic.gc.ca/publication-request) or contact:

ISED Citizen Services Centre  
Innovation, Science and Economic Development Canada  
C.D. Howe Building  
235 Queen Street  
Ottawa, ON K1A 0H5  
Canada

Telephone (toll-free in Canada): 1-800-328-6189  
Telephone (international): 613-954-5031  
TTY (for hearing impaired): 1-866-694-8389  
Business hours: 8:30 a.m. to 5:00 p.m. (Eastern Time)  
Email: [ISED@canada.ca](mailto:ISED@canada.ca)

#### **Permission to Reproduce**

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from the Department of Industry, provided that due diligence is exercised in ensuring the accuracy of the information reproduced; that the Department of Industry is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced or as having been made in affiliation with, or with the endorsement of, the Department of Industry.

For permission to reproduce the information in this publication for commercial purposes, please fill out the Application for Crown Copyright Clearance at [www.ic.gc.ca/copyright-request](http://www.ic.gc.ca/copyright-request) or contact the ISED Citizen Services Centre mentioned above.

© Her Majesty the Queen in Right of Canada, as represented by the Minister of Industry, 2021.

Cat. No. lu4-400/2021E-PDF  
ISBN 978-0-660-38443-6

Aussi offert en français sous le titre *Document de Consultation sur un cadre moderne du droit d'auteur pour les intermédiaires en ligne*.

# Executive Summary

The dissemination and use of copyright-protected content on the Internet has expanded in recent years. Online intermediaries – the entities that facilitate access to such content – have also proliferated and diversified. In some cases, they now play more active roles in user activities involving copyright-protected content. These developments have increasingly brought into focus the liability and obligations of online intermediaries, which is an evolving area of law around the world. In Canada, questions have emerged regarding the extent to which the copyright framework for online intermediaries still achieves its underlying objectives, including protecting and encouraging the use of copyright-protected content online, safeguarding individual rights and freedoms in an open Internet and facilitating a flourishing digital market. The goal of this consultation is to help the Government ensure that Canada's copyright framework for online intermediaries reflects this evolving digital world.

Canada's copyright framework establishes liability for intermediaries that infringe copyright or serve primarily to enable infringement by others. This liability is counterbalanced by certain protections, including "safe harbours" where intermediaries merely provide the technical means by which others infringe copyright by using the intermediaries' services. Some intermediaries are also subject to obligations to forward notices of claimed infringement received from copyright owners to the intermediaries' users. Recently, certain intermediaries have also been ordered by courts to disable access facilitated by the intermediaries' services to potentially infringing content or activities.

This framework is the subject of mounting debate and study. Many rights holders have argued that it effectively diminishes their remuneration for uses of their content online and impairs their enforcement efforts. They have therefore argued in favour of modifying the safe harbour protections to incentivize public content-sharing services to pay rights holders equitably for uses of their content on those services' platforms. They have also advocated for imposing greater obligations on intermediaries to prevent or stop infringement. By contrast, many intermediaries and others have argued that Canada's laws sufficiently protect copyright online and intermediaries' current protections from liability and enforcement obligations promote an open Internet, advancements in online services and economic growth in Canada. Examples from other jurisdictions, committee observations and recommendations arising from the 2019 Parliamentary Review of the Copyright Act and additional research previously conducted or commissioned by the Government all shed further light on these issues.

The Government is considering how best to respond to these trends and perspectives. Possible Government actions could be to:

- (a) clarify intermediaries' safe harbour protections against liability for copyright infringement, including how intermediaries' knowledge of infringement and content-related activities affect their liability as well as their attendant obligations;
- (b) compel remuneration of rights holders through collective licensing of their copyright-protected content on certain platforms;
- (c) increase transparency in rights holders' remuneration and online uses of their content; and
- (d) clarify or strengthen rights holders' enforcement tools against intermediaries, including by way of a statutory "website-blocking" and "de-indexing" regime.

The Government welcomes all comments providing additional perspectives or evidence concerning these issues and potential options. Comments may be e-mailed to [copyright-consultation-droitdauteur@canada.ca](mailto:copyright-consultation-droitdauteur@canada.ca) until May 31, 2021. Comments received will be made publicly available following the close of the consultation.



# 1. Introduction

Since the last comprehensive modernization of the *Copyright Act* (the “Act”) in 2012, the dissemination and use of copyright-protected content on the Internet has expanded dramatically. Where both availability and speed of streaming were once limited, it has since become the dominant mode of content consumption around the world. This shift has yielded new opportunities and challenges for stakeholders in cultural industries and the copyright ecosystem more broadly, including creators, rights holders, consumers and online intermediaries. Online intermediaries – the entities that facilitate access to the immense and growing volume of content online, including copyright-protected content – have largely made this shift possible by providing the means for such dissemination and use of content. Intermediary services have also diversified in recent years, which in some cases now include more active roles in user activities involving copyright-protected content. As these services have proliferated, their business models and practices as well as their legal liability and obligations have inspired debate in light of concerns that creators and rights holders have not received their fair share of the benefits.

In the 2020 Speech from the Throne, the Government acknowledged the power of “web giants” and announced it will ensure their revenues are more fairly shared with Canadian creators and media, in addition to strengthening Canada’s middle class more generally.<sup>1</sup> This priority builds on Canada’s Digital Charter, through which the Government committed to building Canada’s digital and data-driven economy by, among other things, protecting Canadians’ rights online and ensuring the accountability of Internet players while also enabling the online marketplace to flourish.<sup>2</sup> The Government has already begun to follow through on these commitments through various initiatives.<sup>3</sup> This consultation seeks to advance these priorities with respect to Canada’s copyright framework for online intermediaries, as part of the Government’s focus on ensuring levels of intermediary responsibility that best serve Canadians and the national economy.

## 2. Goal of this Consultation

The goal of this consultation is to help the Government ensure that Canada’s copyright framework for online intermediaries reflects the evolving digital world.

Government action will be informed by the extent to which potential options for reform could help the framework to better achieve its underlying policy objectives, including the following:

- (a) To protect and encourage the use of copyright-protected content online: In a modern framework, rights holders are able to obtain fair remuneration for protected uses of their content online. To that

---

<sup>1</sup> “Speech from the Throne”, online: Privy Council Office <<https://www.canada.ca/en/privy-council/campaigns/speech-throne/2020/speech-from-the-throne.html>>. See also “Minister of Innovation, Science and Industry Supplementary Mandate Letter”, online: Office of the Prime Minister <<https://pm.gc.ca/en/mandate-letters/2021/01/15/minister-innovation-science-and-industry-supplementary-mandate-letter>> & “Minister of Canadian Heritage Supplementary Mandate Letter”, online: Office of the Prime Minister <<https://pm.gc.ca/en/mandate-letters/2021/01/15/minister-canadian-heritage-supplementary-mandate-letter>>.

<sup>2</sup> “Canada’s Digital Charter: Trust in a Digital World”, online: Innovation, Science and Economic Development Canada <[https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00108.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html)>.

<sup>3</sup> See for example Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 2<sup>nd</sup> Session, 43<sup>rd</sup> Parliament, 2020, online: Parliament of Canada <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10926636>>.

end, rights holders are able to negotiate such remuneration without any undue imbalance in bargaining power and determine for themselves whether the remuneration received is fair. There are also appropriate safeguards against online infringement, including sufficient accountability for all players as well as enforcement mechanisms that are efficient and not cost-prohibitive. Together, these features encourage the creation and wide distribution of works of the arts and intellect, widening the audiences for such content and thereby supporting the sustainability of Canada's creative industries as well as broad public access to content for consumption and permitted use.

- (b) To safeguard individual rights and freedoms in an open Internet: Individuals operating within a modern framework are able to use the Internet to access information efficiently as well as communicate and share with each other as freely as reasonably possible. Individuals' freedom of expression and privacy interests are not unduly limited, such as through erroneous or misguided copyright enforcement efforts. Individuals also remain free to create and share "user-generated content" as permitted by the Act. A modern framework also upholds the principle of net neutrality, by which intermediaries must treat all online communications equally within the boundaries of the law.
- (c) To facilitate a flourishing digital market: A modern framework also encourages investment, innovation and competition in online services. Online service providers have the legal certainty needed to operate and innovate confidently and cost-effectively, such as being able to avoid resource- and time-consuming litigation, having liabilities and obligations tailored to their widely varying activities and resources and being allowed to engage in mutually beneficial private arrangements. A modern framework also minimizes service providers' compliance costs to limit barriers to market entry and thereby support entrepreneurship and robust consumer choice. These features help Canada to develop a strong online market that fuels economic growth.

## 3. Context of this Consultation

### 3.1 Online Intermediaries

Online intermediaries play a central role in how the vast amounts of content online are communicated, collected and consumed, as well as a growing role in how such content is produced. Intermediaries perform these functions in many different ways. Some play a relatively passive role by merely providing the technical means for communicating or storing content. These entities generally include Internet service providers ("ISPs"), private data storage services (e.g., "cloud" services), web hosting and related services and web-based messaging, calling or mail services, among others. Others play a relatively active role in the dissemination and use of content, such as by curating it (e.g., recommending particular content to users) or supporting its production (e.g., remunerating content creators). These entities generally include public content-sharing services, including social media and free streaming platforms. Some entities straddle both groups due to the diversity of their services or, as in the case of search engines, because their services fall somewhere in the middle of this continuum.

### 3.2 Canadian Copyright Law

Canada's copyright framework for online intermediaries<sup>4</sup> was largely created as part of the extensive

---

<sup>4</sup> In addition to the provisions described in this section, other provisions of the Act further delineate intermediaries' liability: *Copyright Act*, RSC 1985, c C-42, ss 2.4(1)(b) & 2.4(1.1) (further specifying what does and does not constitute copyright-protected activities in the online context), 27(2.3) (further specifying what constitutes infringement in the online context) & 38.1(1)-38.1(1.11) (specifying what remedies are available for infringement under s. 27(2.3)) [*Copyright Act*]. Somewhat relatedly, individual liability for "user-generated

changes to the Act in 2012. The liability and obligations for intermediaries reflect the risk of their services being used to infringe copyright by way of unauthorized communications or reproductions of protected content, among other activities. The Act's provisions establish liability for anyone, including individuals or intermediaries, who uses these services to infringe.<sup>5</sup> The Act further establishes liability for anyone who provides a service primarily for the purpose of enabling infringement.<sup>6</sup> All the usual monetary and non-monetary remedies for copyright infringement are available against most types of intermediaries found to engage in such activity, with the exception of information location tools (e.g., search engines), against which remedies are limited to injunctions.<sup>7</sup>

The Act also provides numerous exceptions to copyright infringement that could apply to certain intermediary activities. Some of these exceptions, like fair dealing, are of general application.<sup>8</sup> Others apply specifically to intermediaries. For instance, where intermediaries do not engage in or enable infringement, and only provide the technical means by which others infringe, the Act provides several explicit protections from liability. These provisions are known as the Act's "safe harbours". There are three such types of protection:

- (a) a "mere conduit" safe harbour shields from liability anyone who merely provides the means for the telecommunication or reproduction of copyright-protected content by way of the Internet or other digital network;<sup>9</sup>
- (b) a "caching" safe harbour shields anyone who merely stores such content as data so future commands drawing upon that data can be performed faster to make the telecommunication more efficient;<sup>10</sup> and
- (c) a "hosting" safe harbour shields anyone who merely provides digital memory in which another person stores copyright-protected content for the purpose of allowing its telecommunication through the Internet or other digital network.<sup>11</sup>

As discussed below, certain further limitations apply to the "caching" and "hosting" protections.

Notwithstanding these protections, intermediaries may also be subject to certain positive obligations in respect of third-party uses of their services that infringe copyright. By the Act's "notice and notice" regime, certain intermediaries are required to forward notices of claimed infringement received from copyright owners to third parties alleged to have used the intermediaries' services to infringe. These intermediaries are also required to retain information related to such alleged infringements and could be required by court order to disclose the information to copyright owners.<sup>12</sup> Further, although the Act does not require intermediaries to disable access to infringing content, remove it or otherwise prevent or stop infringement where the intermediaries are protected by the safe harbours, they may nevertheless be required to do so by court order. Indeed, Canadian courts have recently begun to issue injunctions forcing ISPs and search engines to disable access to potentially infringing content.<sup>13</sup> These orders have been awarded even

---

content" that is often hosted by public content-sharing services is delineated by another provision of the Act: *ibid*, s 29.21.

<sup>5</sup> *Ibid*, ss 27(1)-27(2).

<sup>6</sup> *Ibid*, s 27(2.3).

<sup>7</sup> *Ibid*, s 41.27.

<sup>8</sup> *Ibid*, ss 29-29.2.

<sup>9</sup> *Ibid*, s 31.1(1).

<sup>10</sup> *Ibid*, s 31.1(2).

<sup>11</sup> *Ibid*, s 31.1(4).

<sup>12</sup> *Ibid*, ss 41.25-41.26.

<sup>13</sup> See *Google v Equustek Solutions*, 2017 SCC 34, Abella J, online: Supreme Court of Canada <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do>> [*Equustek*] & *Bell Media v GoldTV.biz*, 2019 FC 1432,

though the intermediaries were not subject to the underlying litigation against the alleged infringers.

### 3.3 Approaches in Other Jurisdictions

Legal frameworks establishing intermediary liability and obligations are common throughout the world. For instance, both the E.U. and the U.S. have legislative regimes including safe harbours from copyright infringement for similar activities as found in the Canadian framework, albeit with different conditions, limitations and exceptions. One such proviso in each of these regimes is an obligation for certain intermediaries to expeditiously remove or disable access to allegedly infringing content facilitated by their services upon learning of it (a “notice and takedown” obligation).<sup>14</sup> Notwithstanding their limitations of liability, intermediaries in the E.U. and the U.S. can also be subject to court-ordered injunctions requiring similar or related actions in respect of such content.<sup>15</sup> The U.K. regime is based on the E.U. model and has recently led to court decisions enumerating certain case-specific factors for determining when website-blocking orders may be justified.<sup>16</sup> Likewise, the Australian regime is based on the U.S. model, although its safe harbours generally apply only to certain ISPs and its scheme for injunctive relief against intermediaries is generally limited to website-blocking by ISPs and de-indexing by search engines in certain cases.<sup>17</sup> The Australian scheme also stipulates a comprehensive procedure for obtaining such orders, including a list of criteria that courts may consider, building on the examples of the U.K. jurisprudence.<sup>18</sup>

Like Canada, other jurisdictions have been reconsidering their systems in recent years as the importance and influence of intermediaries have grown. In 2019, the E.U. changed its framework by excluding activities of certain “online content-sharing service providers” from the “hosting” safe harbour and requiring such providers to obtain authorization from rights holders or face liability unless the providers comply with certain conditions. These conditions include a “notice and takedown” obligation as well as an obligation to ensure the unavailability of specific content at rights holder request (a “notice and stay-down” obligation). Certain intermediaries are exempted from these obligations depending on their size and purpose.<sup>19</sup> In 2020, the

---

Gleeson J, online: Federal Court <<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/424753/index.do>> [GoldTV]. At the time of publication, GoldTV had been granted leave to appeal to the Federal Court of Appeal and the appeal had been heard.

<sup>14</sup> See *European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, [2000] OJ, L 178/1, arts 13(1)(e) & 14(1)(b), online: EUR-Lex <<https://eur-lex.europa.eu/eli/dir/2000/31/oj>> [EU E-Commerce Directive], *European Parliament and Council Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, [2019] OJ, L 130/92, art 17(4)(c), online: EUR-Lex <<https://eur-lex.europa.eu/eli/dir/2019/790/oj>> [EU Digital Single Market Directive] & 17 USC § 512(b)(2)(E), 512(c)(1)(A)(iii), 512(c)(1)(C), 512(d)(1)(B) & 512(d)(3), online: US Copyright Office <<https://www.copyright.gov/title17>> [US Copyright Law].

<sup>15</sup> See *European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, [2001] OJ, L 167/10, art 8(3), online: EUR-Lex <<https://eur-lex.europa.eu/eli/dir/2001/29/oj>> [EU Information Society Directive] & *European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights*, [2004] OJ, L 195/16, arts 9(1)(a) & 11, online: EUR-Lex <<https://eur-lex.europa.eu/eli/dir/2004/48/corrigendum/2004-06-02/oj>> [EU Enforcement Directive].

<sup>16</sup> See *Cartier International AG v British Sky Broadcasting Ltd*, [2016] EWCA Civ 658 [Cartier (2016)] & *Cartier International AG v British Telecommunications plc*, [2018] UKSC 28 [Cartier (2018)], each applying *Copyright, Designs and Patents Act 1988* (UK), c 48, s 97A, online: Legislation.gov.uk <<https://www.legislation.gov.uk/ukpga/1988/48/contents>> [UK Copyright Law].

<sup>17</sup> See *Copyright Act 1968* (Commonwealth), s 116AA-116AI, online: Federal Register of Legislation <<https://www.legislation.gov.au/Details/C2019C00042>> [Australian Copyright Law].

<sup>18</sup> *Ibid*, s 115A.

<sup>19</sup> See generally *EU Digital Single Market Directive*, *supra* FN14, art 17.

European Commission sought to modify the E.U. framework again by proposing a law that would, among other things, replace and supplement the E.U. safe harbours and impose greater obligations on certain intermediaries, depending on their size and purpose.<sup>20</sup> The ultimate impact of these measures and proposals are not yet clear.

Similarly, the U.S. Copyright Office released a report in 2020 examining the functioning of the country's copyright framework for intermediaries, which concluded that it had become "unbalanced" against rights holders and recommended certain clarifications.<sup>21</sup> The U.S. Government's reaction to this report is not yet known.

### 3.4 Stakeholder and Parliamentary Committee Perspectives

Various perspectives on Canada's copyright framework for online intermediaries were put forward during the Parliamentary Review of the Act conducted by the Standing Committee on Industry, Science and Technology ("INDU") and the Standing Committee on Canadian Heritage ("CHPC"). Many rights holders and their advocates submitted that the framework effectively diminishes their remuneration for uses of their content online and impairs their enforcement efforts. With respect to remuneration, these stakeholders argued that the safe harbours should be modified to incentivize public content-sharing services to pay rights holders equitably for the uses of their content on those services' platforms. With respect to enforcement, these stakeholders also argued that it would be more effective, efficient and fair to impose greater obligations on intermediaries to prevent or stop infringement. By contrast, many intermediaries and others argued that Canada's laws sufficiently protect copyright online, although certain intermediaries seemed willing to assist with enforcement efforts so long as they did not incur liability themselves. These stakeholders also submitted that intermediaries' current protections from liability and enforcement obligations serve Canadians by promoting individuals' access to information and freedom of expression online as well as driving entrepreneurship, innovation and access to intermediary services in Canada. These concerns and related considerations are described in greater detail in Appendix A.<sup>22</sup>

The two Parliamentary committees made several observations and recommendations in light of these perspectives. Both committees emphasized the importance of intermediary accountability. INDU observed that intermediaries' content management systems should respect rights holders, such as by ensuring fair remuneration for uses of their content. INDU nevertheless advised against amending the safe harbours at present given the apparent lack of consensus among stakeholders and the ongoing developments internationally, which the Committee believed the Government should take the time to study.<sup>23</sup> INDU further emphasized the need for balance in this area, such as by ensuring that intermediary content

---

<sup>20</sup> See generally *Proposal for a European Parliament and Council Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC* (Brussels: European Commission, 2020), online: EUR-Lex <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>> [*Proposed EU Digital Services Act*].

<sup>21</sup> US Copyright Office, *Section 512 of Title 17* (May 2020), online: US Copyright Office <<https://www.copyright.gov/policy/section512>>.

<sup>22</sup> See also the committees' summaries of stakeholder submissions: House of Commons, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act* (June 2019) (Chair: Dan Ruimy), online: House of Commons <<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16>> at 74-81, 92-97 & 117-119 [*INDU Report*] & House of Commons, Standing Committee on Canadian Heritage, *Shifting Paradigms* (May 2019) (Chair: Julie Dabrusin), online: House of Commons <<https://www.ourcommons.ca/DocumentViewer/en/42-1/CHPC/report-19>> at 16-19 [*CHPC Report*]. See also the stakeholder briefs and witness testimony themselves: Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act*, online: House of Commons <<https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>> & Standing Committee on Canadian Heritage, *Remuneration Models for Artists and Creative Industries*, online: House of Commons <<https://www.ourcommons.ca/Committees/en/CHPC/StudyActivity?studyActivityId=10045359>>.

<sup>23</sup> *INDU Report*, *supra* FN22 at 82-83 (recommendation 21).

management systems account for lawful exceptions to infringement and allow uploaders to respond to allegations of infringement before action is taken against them.<sup>24</sup> CHPC recommended that the Government review the safe harbours to ensure intermediaries are accountable for their role in the distribution of content.<sup>25</sup> INDU also noted the need for transparency in the calculation and distribution of royalties by intermediaries and other brokers (e.g., collective societies) for uses of rights holders' content online as a means of ensuring fairness in their remuneration.<sup>26</sup> The committees also noted the need for effective tools to combat infringement.<sup>27</sup> In particular, INDU recommended consideration of tools to provide for court-ordered injunctive relief for online infringement, within the bounds of net neutrality.<sup>28</sup>

### 3.5 Additional Research

Previous research conducted or commissioned by the Government has also contributed to consideration of these issues. For instance, a 2019 study commissioned by the Department of Canadian Heritage<sup>29</sup> and a 2018 study commissioned by the Department of Innovation, Science and Economic Development<sup>30</sup> each confirmed the issues' importance by finding that online streaming is now the primary way by which Canadians consume media. The 2019 study and a 2017 study by Statistics Canada<sup>31</sup> also indicated that streaming has driven growth in the Canadian music industry in recent years. Nevertheless, the 2019 study seemed to support many rights holder submissions that they are struggling to make a living from their streaming revenues. The study seemed to indicate as one potential cause the apparent discrepancy in remuneration paid by different streaming services. For instance, during the period studied the study found that whereas Spotify and Apple Music accounted for 39% of streams in Canada and 74% of rights holder payments, YouTube accounted for 49% of streams but only 7% of rights holder payments. The study also indicated that rights holder payments per stream were more than 12 times lower for YouTube compared to its closest paid-service comparator.

## 4. Potential Options for Reform

Given the diversity of these issues, coordinated changes to different aspects of Canada's copyright framework may be necessary to have a meaningful impact. Accordingly, the Government has developed several potential options for stakeholder and public consideration. These options are independent but could be combined in various ways.

Significant changes to Canada's basic model of intermediary liability (e.g., explicit liability for services provided primarily for the purpose of enabling infringement and appropriately limited safe harbour protections without "notice and stay-down" or "notice and takedown" obligations) are not presently being contemplated. Indeed, this model is a cornerstone of the Canadian framework that the Government has

---

<sup>24</sup> *INDU Report, supra* FN22 at 82-83 (recommendation 22).

<sup>25</sup> *CHPC Report, supra* FN22 at 19 (recommendation 5).

<sup>26</sup> *INDU Report, supra* FN22 at 118-120 (recommendations 34-36)

<sup>27</sup> *CHPC Report, supra* FN22 at 19 (recommendation 6).

<sup>28</sup> *INDU Report, supra* FN22 at 97-98 (recommendation 27).

<sup>29</sup> Wall Communications, "Study on the Economic Impacts of Music Streaming Platforms on Canadian Creators", online: Government of Canada <<https://www.canada.ca/en/canadian-heritage/services/copyright-policy-publications/economic-impacts-music-streaming.html>>.

<sup>30</sup> Kantar TNS, "Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada", online: Innovation, Science and Economic Development Canada <<https://www.ic.gc.ca/eic/site/112.nsf/eng/07648.html>>.

<sup>31</sup> Statistics Canada, "Sound Recording and Music Publishing, 2017", online: Statistics Canada <<https://www150.statcan.gc.ca/n1/daily-quotidien/190329/dq190329d-eng.htm>>.

carefully maintained to date, including in its international commitments.<sup>32</sup> Maintaining this basic model is also consistent with the committees' recommendations during the Parliamentary Review of the Act.

## 4.1 Clarify Intermediaries' Safe Harbour Protections

One set of options could be to clarify the conditions or obligations of safe harbour protection. Such clarifications could better protect and encourage the use of copyright-protected content online by compelling greater vigilance of intermediaries against potential infringements facilitated by their services. The clarifications could also provide a clearer incentive for intermediaries falling outside of the safe harbours to enter into equitable licensing agreements with rights holders for uses of their content through the intermediaries' services. Many of the clarifications considered below exist in other jurisdictions, so certain larger intermediaries may have already adjusted their practices accordingly. Nevertheless, it could help to clarify these matters in the Canadian context and synchronize these aspects of Canada's framework with international peers to the extent appropriate. These clarifications could also support other potential changes as further described below.

### 4.1.1 Recalibrate the Knowledge Standard for Eligibility

The Government may wish to consider adjusting the degree to which an intermediary must know that its services are being used for infringement to be excluded from safe harbour protection. Presently, such a knowledge standard exists only for the "hosting" safe harbour and not the "mere conduit" or "caching" safe harbours. Specifically, the "hosting" safe harbour does not apply where a host knows of a court decision to the effect that a person who has stored content in the host's digital memory infringes copyright by storing the copy or by the way in which the person uses the content.<sup>33</sup> Alternatively, this standard could be changed to encompass broader grounds of knowledge, which could prompt greater attention by intermediaries to potential infringements facilitated by their services, including infringements that may not be subject to court proceedings. For instance, it could be specified that the safe harbour would not apply in respect of an infringement using a host's digital memory where the host has actual knowledge of the infringement or, in the absence thereof, is aware of facts or circumstances from which the infringement would be apparent.<sup>34</sup> It could also be clarified that actual knowledge could be deemed from receipt of a notice of claimed infringement (e.g., pursuant to the "notice and notice" regime or as otherwise described further below<sup>35</sup>) or the intermediary's own investigations.<sup>36</sup> It could moreover be clarified that constructive knowledge would be deemed where the intermediary should reasonably have known of the infringement in the circumstances. As a safeguard for intermediaries, it could further be clarified that there would be no

---

<sup>32</sup> See for example *Consolidated Trans-Pacific Partnership*, art 18.82, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>>, which is incorporated into the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>> & *Canada-United States-Mexico Agreement*, art 20.88, online: Global Affairs Canada <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>>.

<sup>33</sup> *Copyright Act*, *supra* FN4, s 31.1(5).

<sup>34</sup> Such a standard would be consistent with the corresponding E.U., U.S. and Australian provisions: see *E.U. Commerce Directive*, *supra* FN14, art 14(1)(a), *US Copyright Law*, *supra* FN14, §§ 512(c)(1)(A)(i)-512(c)(1)(A)(ii) & *Australian Copyright Law*, *supra* FN17, s 116AH(1). See also *Proposed EU Digital Services Act*, *supra* FN20, art 5(1)(a).

<sup>35</sup> See Section 4.1.3: 4.1.3 Enact New Obligations for Qualifying Intermediaries.

<sup>36</sup> Such a clarification would be similar to the corresponding U.S. provision and recent E.U. proposal: see *US Copyright Law*, *supra* FN14, §§ 512(c)(1)(C) & 512(c)(3) & *Proposed EU Digital Services Act*, *supra* FN20, art 14(3).

general obligation of hosts to monitor all or almost all of the data relating to their users to prevent or stop any future infringement.<sup>37</sup> However, this safeguard would not hinder the ability of courts to impose injunctions on intermediaries to prevent or stop specific infringements. These various refinements could be limited to the “hosting” safe harbour, similar to the Act’s current arrangement, or extended to the “mere conduit” or “caching” safe harbours as well.

#### 4.1.2 Clarify the Permitted Involvement of Qualifying Intermediaries

The Government could clarify that one or more of the safe harbours apply only where an intermediary acts in a neutral manner with respect to the copyright-protected content concerned. The safe harbours seem consistent with this principle at present: they provide that one does not infringe in the case of providing “mere conduit” services “solely by reason of providing those means” or in the case of providing “caching” or “hosting” services “by virtue of that act alone”.<sup>38</sup> Nevertheless, the principle could be clarified by codifying that, to be protected, an intermediary’s involvement must be limited to the provision of merely technical, automated services and must not amount to an active role in the infringing activity. Such a clarification could ensure that intermediary liability is commensurate with intermediary activities, and thereby prompt intermediaries playing such active roles to enter into equitable licences with rights holders for uses of their content through the intermediaries’ services. Clearer factors indicating such an active role could also be specified. For instance, they could include optimizing the presentation of the content at issue or otherwise promoting it (e.g., categorizing content by genre or style, creating recommended playlists or providing “auto-play” or “auto-complete” functions). However, these factors would need to be carefully selected so as not to encompass basic efforts to optimize user experience. Factors could also include having control over the content or activity, including editorial responsibility or remunerating the primary infringer for it.<sup>39</sup>

Relatedly, it could also be clarified for one or more of the safe harbours that they apply only where an intermediary lacks a financial stake in the infringing activity at issue. At present, there is no such requirement. While another provision of the Act establishes liability for an intermediary that “provide[s] a service *primarily* for the purpose of enabling acts of copyright infringement” (emphasis added),<sup>40</sup> even that standard might not capture all intermediaries that nevertheless receive financial benefit attributable to the infringement. One option could be to clarify that, to be protected, an intermediary could not receive a financial benefit directly attributable to the infringing activity.<sup>41</sup> This change could further clarify the link between intermediary liability and activities, which could induce intermediaries having such business models to enter into agreements that share these benefits equitably with rights holders.

#### 4.1.3 Enact New Obligations for Qualifying Intermediaries

Additional obligations for intermediaries could be enacted to combat and deter infringement through their services, either as conditions on their safe harbour protections or standalone measures. These obligations could also save parties from unnecessary litigation by facilitating private solutions appropriate for individual cases. Such obligations could include the following mechanisms, which could be required to be

---

<sup>37</sup> This safeguard would also be consistent with E.U., U.S. and Australian law: see *EU E-Commerce Directive*, *supra* FN14, art 15(1), *EU Digital Single Market Directive*, *supra* FN14, art 17(8), *US Copyright Law*, *supra* FN14, § 512(m)(1) & *Australian Copyright Law*, *supra* FN17, s 116AH(2). See also *Proposed EU Digital Services Act*, *supra* FN20, art 7.

<sup>38</sup> *Copyright Act*, *supra* FN4, s 31.1(1)-31.1(2) & 31.1(4).

<sup>39</sup> These various clarifications would be similar to both current and proposed E.U. law: see *EU E-Commerce Directive*, *supra* FN14, art 14(2) & *Proposed EU Digital Services Act*, *supra* FN20, art 5(2).

<sup>40</sup> *Copyright Act*, *supra* FN4, s 27(2.3), discussed above in Section 3.2: 3.2 Canadian Copyright Law.

<sup>41</sup> Such a clarification would be similar to the law in the U.S. and Australia: see *US Copyright Law*, *supra* FN14, § 512(c)(1)(B) & *Australian Copyright Law*, *supra* FN17, ss 116AH(1) & 116AH(3).

documented as well as easily accessible and understandable:

- (a) Notification and action mechanisms: Intermediaries could be required to implement mechanisms allowing persons to notify them of specific instances of claimed infringement being facilitated by the intermediaries' services and requiring them to take some action in response, where they believe it would be justified. Possible actions could include: disabling access to the content at issue, removing it or otherwise preventing or stopping the allegedly infringing activity; offering to remunerate the complainant for the use at issue; or limiting, suspending or terminating the intermediary's services to the alleged infringer. The specific decision in a given case would be made according to the intermediary's judgment rather than required by the Act, unlike in a "notice and takedown" or "notice and stay-down" system. The decision would also not limit the complainant's options concerning further legal action, including possible legal arguments or court orders compelling intermediary action. Notices leading to such actions could be the same as those issued under the "notice and notice" regime or otherwise follow similar format and content requirements. Upon receiving such a notice, an intermediary could be required to notify the complainant of the intermediary's decision concerning the issue along with a clear statement of reasons. The intermediary could be required to make and communicate this decision without delay, within certain service standards or in any event in an accelerated manner for certain complainants identified through a transparent process as trusted sources. The intermediary could also be required to inform the alleged infringer of the notice and provide each party an opportunity to rebut the other's claims. The intermediary could also be required to inform the parties of their possible means of further redress.<sup>42</sup>
- (b) Mechanisms for dealing with repeated alleged infringers: Intermediaries could be required to implement mechanisms for action to be taken in respect of their users who have been identified as repeat alleged infringers through the mechanism noted above or the "notice and notice" regime. Possible consequences could include limitation, suspension or termination of an intermediary's services to the alleged infringer.<sup>43</sup> However, once again, the specific decision in a case would be made according to the intermediary's judgment rather than required by the Act and would not limit the complainant's options concerning further legal action, including possible legal arguments or court orders compelling intermediary action. Such mechanisms could also include a dispute resolution process as described above.

Notwithstanding the anticipated benefits of these mechanisms, they could also present challenges for certain intermediaries given the potential volume of notifications they could receive and actions they may take in response. Additional safeguards could be enacted to limit the burden on intermediaries and thereby continue to support investment, innovation and competition in online services. For instance, it could be clarified that these obligations would not require intermediaries to take proactive measures to prevent or stop infringement, such as the monitoring of all or almost all of the data relating to the intermediaries' users. It could also be clarified that the mere fact that an intermediary undertakes such measures to comply with the law does not alone exclude the intermediary from any otherwise applicable safe harbour protection. Such a clarification would provide further legal certainty and avoid discouraging

---

<sup>42</sup> Such a scheme would be broadly consistent with both current and proposed E.U. law: see *EU Digital Single Market Directive*, *supra* FN14, art 17(9) & *Proposed EU Digital Services Act*, *supra* FN20, arts 14-15 & 17-20. See also *US Copyright Law*, *supra* FN14, § 512(c)(3) (necessary elements of a notification of claimed infringement pursuant to which a service provider must expeditiously remove or disable access to the material at issue).

<sup>43</sup> Such a scheme would be generally consistent with U.S., Australian and proposed E.U. law: see *US Copyright Law*, *supra* FN14, § 512(i)(1)(A), *Australian Copyright Law*, *supra* FN17, s 116AH(1) & *Proposed EU Digital Services Act*, *supra* FN20, art 20.

voluntary, good faith anti-infringement efforts.<sup>44</sup> Relatedly, it could further be clarified that an intermediary would not be liable for any damages resulting from good faith disabling of access to or removal of content pursuant to these schemes.<sup>45</sup> Lastly, these obligations could be limited to certain intermediaries only, such as entities beyond a certain size, based on revenues or user volumes, or entities providing their services for profit-making purposes.

Other safeguards could also be considered to prevent abuse of these schemes. For instance, it could be provided that anyone who knowingly materially misrepresents that certain content or activity facilitated by an intermediary is infringing could be subject to certain penalties. Similarly, it could be provided that anyone who knowingly materially misrepresents that certain content or a certain activity has been acted upon by an intermediary by mistake could also be subject to penalties. Such penalties could include damages incurred by anyone who is injured by such misrepresentation as a result of the intermediary's reliance upon it. In addition or alternatively, penalties could include the limitation, suspension or termination of services to the person who made the misrepresentation, including as appropriate the intermediary's primary service offerings or the ability to submit notices of claimed infringement. The standard of knowledge required in making such material misrepresentations could be actual knowledge that the representation was false or, in the absence of such knowledge, a determination that it would have been reasonably evident to a layperson that the representation was false.<sup>46</sup>

## 4.2 Compel Remuneration Through Collective Licensing

Another option could be to capitalize on Canada's framework for collective rights management by enacting a new collective licensing scheme for rights holders and intermediaries, such as one of the following:

- (a) Compulsory licensing scheme: Certain intermediaries could be permitted to host uploads incorporating rights holders' content without requiring their authorization in exchange for payment of royalties. Specifically, these intermediaries would be required to pay rights holders for uses of their content hosted on the intermediaries' platforms that are subject to copyright and do not qualify for any defences to infringement that would preclude the obligation to pay (e.g., exceptions). This scheme could be limited to certain categories of content only (e.g., music or audio-visual content). The determination, collection and distribution of royalties could be administered by one or more collective societies, either as rights holders choose to organize or designated by the Act or regulations.
- (b) Extended collective licensing scheme: In a field where a given threshold of rights holders is represented by a collective society (e.g., in respect of the reproduction of such rights holders' musical works), certain intermediaries could be required to obtain the authorization of those rights holders for hosting uses of their content (e.g., uploads incorporating copies of the rights holders' musical works). In fields where this threshold is not met, intermediaries would have no such obligations. In this way, the scheme would automatically determine which fields it would encompass. The collective society for a given field could be chosen by rights holders or designated by the Act or regulations and certified by the Copyright Board (the "Board"). The threshold of rights holder representation of such a collective society could also be designated by the Act or regulations or determined by the Board. All rights holders in a field that meets this threshold would be deemed to be represented by the relevant collective society. They would be

---

<sup>44</sup> Such a clarification would be consistent with proposed E.U. law: see *Proposed EU Digital Services Act, supra* FN20, art 6.

<sup>45</sup> This clarification would be consistent with U.S. law: see *US Copyright Law, supra* FN14, § 512(g).

<sup>46</sup> In these ways, such a scheme would be similar to certain aspects of U.S. and proposed E.U. law: see *US Copyright Law, supra* FN14, § 512(f) & *Proposed EU Digital Services Act, supra* FN20, art 20.

allowed to opt out of it but upon doing so would not be able to sue the relevant intermediaries for infringement in respect of the types of uses administered by the collective society.

Certain features could be common to either scheme. Each scheme could require some limitation of applicable intermediaries' safe harbour protections in order to create a clear legal basis for the intermediaries' obligations to pay royalties in respect of the relevant uses.<sup>47</sup> Also, royalties and related terms and conditions could be negotiated directly between such collectives and intermediaries or established by the Board by way of tariffs or individual licences where negotiations are unsuccessful. It could also be stipulated that the intermediaries' limitation of liability under either scheme would extend to their users actually performing the activities at issue. This extension of protection could be limited to certain types of users only, such as users not performing the activities for commercial purposes.<sup>48</sup>

This option could be limited to only certain types of hosting intermediaries to ensure it is targeted in a way that would not impose unfair burdens or limit economic growth. For instance, it could be applied only to entities that store and give the public access to copyright-protected content uploaded by their users. It could also apply only to intermediaries that provide these services for profit-making purposes or otherwise exclude intermediaries that provide these services for not-for-profit purposes. It could moreover apply only to intermediaries providing these services that are beyond a certain size, based on revenues or user volumes.<sup>49</sup>

This option could have several advantages. First, it could ensure fair remuneration for rights holders in respect of the copyright-protected uses of their content on applicable intermediaries' platforms and thereby also overcome certain issues with online enforcement in that context. Second, it could extend the benefits of Canada's collective management system in the online environment where more and more copyright-protected content is being created and disseminated, including greater efficiency for both intermediaries and rights holders. On one side, intermediaries could avoid the need to negotiate directly with individual rights holders or deal with large volumes of individual claims of infringement. On the other side, rights holders could avoid the need to seek remuneration from or attempt enforcement against individual uploaders of potentially infringing content as well as the need to negotiate with every applicable intermediary separately. Third, this option could limit the compliance costs of smaller or upstart intermediaries, whose royalty payments would be proportionally lower or zero depending on the further potential limitations. All applicable intermediaries would also be able to avoid employing "stay-down" or "takedown" processes, which pose several inherent challenges.<sup>50</sup> While this option could increase the operating costs for at least some of these intermediaries, such a change could be justified in the circumstances and in any event provide the intermediaries with the legal certainty needed to operate and innovate in Canada confidently and cost-effectively. Intermediaries and their users could particularly benefit from greater legal certainty under either collective licensing scheme. Extended collective licensing in particular could provide legal certainty given its inherently broader scope of application in a given field,

---

<sup>47</sup> The issue of whether such obligations exist in the current wording of the Act is presently before the courts: see *York University v Copyright Licensing Agency*, 2020 FCA 77, Pelletier JA, online: Federal Court of Appeal <<https://decisions.fca-cf.gc.ca/fca-cf/decisions/en/item/469654/index.do?q=York+Access+copyright>>, leave to appeal to the Supreme Court of Canada granted, [2020] 1 SCR 39222, online: Supreme Court of Canada <[https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/18507/index.do?site\\_preference=normal](https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/18507/index.do?site_preference=normal)>. The Supreme Court is scheduled to hear the appeal in May 2021.

<sup>48</sup> Such protection would reflect a similar safeguard in E.U. law: see *EU Digital Single Market Directive*, *supra* FN14, art 17(2).

<sup>49</sup> These limitations would reflect various aspects of both current and proposed E.U. law: see *EU Digital Single Market Directive*, *supra* FN14, arts 2(6) (definition of "online content-sharing service provider") & 17(5)-17(6) & *Proposed EU Digital Services Act*, *supra* FN20, arts 16 & 25.

<sup>50</sup> For a description of these challenges, see Annex A: Stakeholder Perspectives.

as such models allow in other jurisdictions that have them.

### 4.3 Increase Transparency in Remuneration Processes

Another set of potential reforms could aim to improve the transparency regarding the uses of rights holders' content online and the remuneration they receive for those uses. Such transparency could improve the fairness of rights holders' remuneration by providing them with the information necessary to bargain effectively with relevant intermediaries and to determine for themselves whether the remuneration they receive is fair. In this respect, there are at least two potential focuses: intermediaries and rights management organizations (e.g., collective societies). It would also be important to consider how such options could affect the ability of these entities to protect their business information to remain competitive in their respective markets and to respect relevant privacy interests.

#### 4.3.1 Greater Transparency from Intermediaries

Obligations of transparency in the uses of rights holders' content facilitated by intermediaries' services, as well as the remuneration intermediaries pay or actions they take in respect of those uses, could be clarified or strengthened in several ways. For instance, it could be helpful to require at least certain intermediaries to track and disclose information such as:

- (a) uses of rights holders' content on intermediaries' platforms, such as the number of uploads incorporating such content and the number of user views or listens thereof;
- (b) the methods of calculation and allocation of any remuneration paid to rights holders in respect of the uses of their content on intermediaries' platforms;
- (c) how certain content is promoted to users of intermediaries' services, including the roles of automated and human decision-making in those processes;
- (d) the procedures, measures and tools used by intermediaries in the identification and action against potentially infringing content facilitated by their services, as well as the policies guiding how such mechanisms are employed, including the roles of automated and human decision-making in those mechanisms; or
- (e) details of intermediaries' actions concerning potentially infringing content facilitated by their services, such as the number, nature and outcomes of actions taken as a result of court orders, potential "notice and action" or "repeat alleged infringer" mechanisms, the "notice and notice" regime or intermediaries' own initiative.<sup>51</sup>

As noted, it may be appropriate to limit these obligations to certain intermediaries, such as certain public content-sharing services. These obligations could be limited to a certain subset of these intermediaries, such as entities beyond a certain size, based on revenues or user volumes, entities providing their services for profit-making purposes or entities that have concluded licensing or other remuneration agreements with rights holders.

The means by which such information would be disclosed could also be specified. For instance, information specific to certain rights holders could be limited to those rights holders or their representatives, either through regular reports or upon request. More general information could be submitted by regular reports or updates to a third-party body, such as the Board. Significantly, responsibility for such general oversight by the Board could depart from its current role and necessitate further changes to its statutory and

---

<sup>51</sup> These measures would align with certain aspects of both current and proposed E.U. law as well as U.S. law: see *EU Digital Single Market Directive*, *supra* FN14, art 17(8), *Proposed EU Digital Services Act*, *supra* FN20, arts 12(1), 13, 23 & 29 & *US Copyright Law*, *supra* FN14, § 115(d)(4)(A)(ii).

operational frameworks.

### 4.3.2 Greater Transparency from Rights Management Organizations

Certain reporting requirements for rights management organizations could also be considered, generally or in relation to the options presented in section 4.2. For instance, these entities could be required to provide rights holders with specific information concerning the uses of content generating royalties and their methods of calculation and allocation. These entities could also be required to provide more general information, such as details of their repertoires or licences for use of rights holders' content with intermediaries. Importantly, some of these organizations could already be providing such information to their members. As with the potential transparency obligations for intermediaries, this information could be required to be transmitted directly to the rights holders concerned through regular reports or upon request or to a third-party body, such as the Board, through regular reports or updates.<sup>52</sup> Once again, such an option involving the Board could necessitate changes to its frameworks.

## 4.4 Clarify or Strengthen Enforcement Tools Against Online Infringement

Another set of options could be to clarify or strengthen the tools available to rights holders in their online enforcement efforts and thereby better protect and encourage the use of copyright-protected content online. These potential changes could offset possible gaps in the surrounding framework, including the other potential changes described herein, thus further supporting rights holder remuneration and deterrence of infringement. The Government's focus is primarily commercial-scale infringement rather than infringement by individuals who may not appreciate they are engaged in such activities.

### 4.4.1 Establish a Statutory Basis and Procedure for Injunctions Against Intermediaries

The Act could be amended to provide expressly for injunctions against intermediaries to prevent or stop online copyright infringement facilitated by their services even where they are not themselves liable for it, such as where they may be protected by the safe harbours. These injunctions could be available through a court process to ensure the highest standards of procedural fairness. The specific relief possible through such injunctions could include orders to disable access to infringing content (e.g., "website-blocking" or "de-indexing" orders), remove such content (e.g., "takedown" orders), otherwise prevent or stop infringing activity (e.g., "stay-down" orders) or limit, suspend or terminate access to an intermediary's service.<sup>53</sup> Such orders would only apply in respect of specific instances of infringement and would not impose obligations to monitor for potential infringement writ large.

It could be specified that such orders be available in at least certain cases without the need first to obtain judgment directly against the alleged infringer or include the alleged infringer as a party to the proceedings. Obtaining judgment against such commercial-scale online infringers can raise a host of unique challenges. Many such entities' anonymity and presence outside of Canada exacerbate the usual issues of time, cost and uncertainty in infringement proceedings, even considering the possibility of default judgment or expedited proceedings. Nevertheless, an alleged infringer could be permitted to join the proceedings as a party on application. As an additional safeguard, it could also be clarified that a rights

---

<sup>52</sup> In these ways, such an option could draw general inspiration from U.S. law: see *US Copyright Law*, *supra* FN14, § 115(d)(2)(D)(vii).

<sup>53</sup> At least some of such a scheme would be broadly consistent with legislation in the E.U., the U.S., the U.K. and Australia: see *EU Information Society Directive*, *supra* FN15, art 8(3), *EU Enforcement Directive*, *supra* FN15, arts 9(1)(a) & 11, *US Copyright Law*, *supra* FN14, § 502(a) & 512(j), *UK Copyright Law*, *supra* FN16, s 97A & *Australian Copyright Law*, *supra* FN17, ss 115A & 116AG(3)-116AG(5). See also *Proposed EU Digital Services Act*, *supra* FN20, arts 8(1)-8(2).

holder would only be able to forego obtaining judgment directly against an alleged infringer first where the rights holder has made a good faith but unsuccessful effort to identify the alleged infringer and stop the alleged infringement.

Courts' discretion in granting such injunctions could be subject to certain further conditions set out in legislation or regulation. These conditions would require balancing of the rights and interests of the rights holder, intermediary and alleged infringer as well as the public. In this way, the scheme would balance the policy objectives and related priorities of the copyright framework for online intermediaries more generally. For instance, a rights holder could be required to demonstrate the following, based on Canadian jurisprudence and models of other jurisdictions:<sup>54</sup>

- (a) prima facie infringement – there appears at first instance to be a strong case of the rights holder's copyright having been infringed;
- (b) prior notice – the intermediary has been notified of the infringement;
- (c) technical feasibility – the intermediary would be able to perform the relief sought;
- (d) irreparable harm – the rights holder would suffer irreparable harm if the injunction is not granted (e.g., because the rights holder would suffer losses that would not be readily quantifiable or compensable in the circumstances or potentially alternative, less onerous methods available that the rights holder might pursue to target the infringement would be significantly less effective or ineffective);
- (e) effectiveness – the injunction would be likely to prevent or stop the infringement or at least make the infringing activity more difficult to achieve or infringing content more difficult to access, in view of the likely effects of the injunction on the behaviour of both the alleged infringer and users;
- (f) complexity and cost – the complexity and cost of implementing the relief sought on the intermediary would not unduly burden the intermediary or its lawful services;
- (g) effect on users – the relief sought would not unduly affect the ability of users to access or make use of content lawfully or the exercise of their freedom of expression; and
- (h) safeguards – the relief sought would include measures protecting against potential abuse, such as measures to ensure lawful content would not be affected.

This scheme could allow for additional limits on the scope of such injunctions in light of certain intermediary arguments. For instance, a court could limit the proposed application of such an injunction where an intermediary has established that compliance would violate the laws of another jurisdiction given the extra-territorial nature of the Internet.

Establishing such a remedy in legislation could be warranted. To begin with, there is already a legal basis for such orders. As noted above, Canadian courts have recently issued such orders in the case of "website-blocking" by ISPs and "de-indexing" by search engines through the courts' equitable jurisdictions. Further, as the courts noted in those cases, there is also precedent for the enlistment of third parties in the enforcement of one's rights.<sup>55</sup> Nevertheless, setting out this remedy in legislation could save parties from unnecessary litigation by proactively specifying the various other types of cases in which such remedies would be available, the procedures vis-à-vis alleged infringers and appropriate safeguards. This legislative

---

<sup>54</sup> For Canadian jurisprudence, see *GoldTV and Equustek*, *supra* FN13. For relevant international models, see FN53, above, as well as *Cartier* (2016) and *Cartier* (2018), *supra* FN16.

<sup>55</sup> For instance, "Norwich" injunctions are court orders that can compel information from third parties and "Mareva" injunctions are court orders that can require third parties to freeze defendants' assets. Courts can issue each type of injunction at their discretion in legal proceedings.

scheme could moreover deter litigation by encouraging intermediaries, rights holders and others to work together to establish a suitable framework for dealing with alleged infringements facilitated by the intermediaries' services. Risk of litigation could be further offset by combination with other options described herein.

#### 4.4.2 Clarify or Strengthen Other Enforcement Tools Against Online Infringement

Other tools to combat online copyright infringement could be clarified or strengthened as well. One option could be to reduce the burden of proof on a plaintiff seeking to establish that a person has provided online or other network services primarily for the purpose of enabling infringement. The Act presently sets out a number of factors for determining whether a person has infringed copyright in this way, including whether the person knew that the service was used to enable a significant number of infringements. The level of knowledge that the person must have that the person's service is being used in this way could be clarified or changed in ways as described above with respect to the safe harbours.<sup>56</sup> Another option could be to update certain criminal offences under the Act to ensure they are technologically neutral in a way that would encompass the operation of streaming services for commercial purposes but would not unduly criminalize users.<sup>57</sup> Other options could include measures to provide individual or less well-resourced rights holders with more accessible paths for enforcing their rights.<sup>58</sup>

## Conclusion

The Government welcomes all comments providing additional perspectives or evidence concerning these issues and potential options. Input could include reactions to the proposed options for reform, suggestions of other options or further evidence regarding underlying policy issues (e.g., the apparent disparity between the growth of the Canadian music industry and Canadian rights holder remuneration). Comments may be e-mailed to [copyright-consultation-droitdauteur@canada.ca](mailto:copyright-consultation-droitdauteur@canada.ca) until May 31, 2021. Comments received will be made publicly available following the close of the consultation.

---

<sup>56</sup> See Section 4.1.1 Recalibrate the Knowledge Standard for Eligibility.

<sup>57</sup> In this respect, inspiration could be drawn from similar changes made recently to U.S. criminal law: see *Consolidated Appropriations Act of 2021*, Pub L No 116-260, Division Q, Title II, § 211 (codified as amended at 18 USC § 2319C), online: US Congress <<https://www.congress.gov/bill/116th-congress/house-bill/133/text>> [*US Consolidated Appropriations Act of 2021*].

<sup>58</sup> For instance, although generally beyond the scope of this consultation, inspiration might be drawn from the example of the recently established, streamlined adjudication process of the U.S. Copyright Office to consider copyright infringement matters for claims that do not exceed \$30,000: see generally *US Consolidated Appropriations Act of 2021*, *supra* FN57, Division Q, Title II, § 212 & US Copyright Office, "Remedies for Copyright Small Claims", online: US Copyright Office <<https://www.copyright.gov/docs/smallclaims>>.

# Annex A: Stakeholder Perspectives

## Rights Holder Remuneration Issues

The remuneration schemes for rights holders for the use of their content through intermediaries' services are varied and complex. Where intermediaries engage in copyright-protected activities beyond the activities protected by the safe harbours or the Act's other exceptions to infringement (e.g., in the case of paid music streaming services), they must obtain rights holder authorization. This authorization is typically granted by way of licences involving payment of royalties, which may be negotiated directly or fixed by the Board. However, the line between such active and passive roles, and thus the scope of legal protection, may seem unclear in certain cases, most prominently in the case of public content-sharing services. Perhaps owing to this uncertainty, several of these platforms have, while claiming safe harbour protection, nevertheless entered into remuneration agreements with some rights holders in respect of user uploads incorporating their content.<sup>59</sup>

Both the availability and amount of remuneration from public content-sharing services are controversial. Many rights holders have argued that these services have capitalized on their safe harbour protections or the uncertainty thereof to avoid paying adequate remuneration for the use of rights holders' content on those services' platforms. Many music rights holders in particular have argued that this state of affairs has disincentivized these services from entering into licences, let alone for royalties comparable to those paid by services without such protections.<sup>60</sup> Music rights holders have moreover argued that they lack the bargaining power to increase these amounts because of a lack of transparency in their calculation. By contrast, intermediaries and certain others have noted evidence indicating that the Canadian music industry has grown considerably in recent years despite claims of inadequate remuneration. They have also countered that the amounts paid in respect of user uploads reflect the fair market value of content in the context of free, ad-supported platforms that serve promotional purposes and generate little if any profit for the services. They have also suggested that any shortfalls in rights holder remuneration are mostly due to other forces, including issues with royalty allocation from rights management organizations or market trends away from more lucrative revenue streams. In any event, it is also noteworthy that these types of remuneration agreements do not presently exist for every public content-sharing service and seem to be limited to music.

## Online Enforcement Issues

The model of copyright enforcement in Canada generally relies upon rights holder monitoring and action. As explained above,<sup>61</sup> the role of intermediaries in such enforcement is limited to obligations to forward notices of claimed infringement, retain certain information and comply with court orders, as well as intermediaries' own vigilance in view of their limited protections from liability. Several public content-sharing

---

<sup>59</sup> See for example Google Canada's briefs during the 2019 Parliamentary Review of the Act to INDU, online: House of Commons <<https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10276810/br-external/GoogleCanada-e.pdf>> & CHPC, online: House of Commons <https://www.ourcommons.ca/Content/Committee/421/CHPC/Brief/BR10277099/br-external/GoogleCanada-e.pdf> as well as Facebook Canada's testimony to INDU, online: House of Commons <<https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/meeting-139/evidence#Int-10396618>>.

<sup>60</sup> Specifically, these rights holders have argued that where such agreements do exist, the amounts paid pursuant thereto do not reflect the full value of the rights holders' content to these services, given the ad revenue or user traffic they help to generate, or to users, given their enjoyment and use thereof. This shortfall is commonly referred to by these stakeholders as the "value gap".

<sup>61</sup> See Section 3.2 Canadian Copyright Law.

services have nevertheless implemented anti-infringement processes by which they may remove allegedly infringing content, disable access to it or otherwise stop allegedly infringing activities upon notice from rights holders.<sup>62</sup> Several of these services also employ technologies to detect potentially infringing content on their platforms to trigger such processes. These intermediaries have presumably put these measures in place to comply with the laws of other jurisdictions, as reviewed above.<sup>63</sup>

This model of enforcement in the online context is a matter of some debate. Many rights holders and their advocates have argued that it would be more effective, efficient and fair to impose greater obligations on intermediaries to prevent or stop infringement facilitated by their services. They have argued that such an arrangement would be warranted given the mass use of content online, the relative control intermediaries have as gatekeepers, the considerable resources that many intermediaries have compared to rights holders and the active roles of many intermediaries in the dissemination and use of content online. These rights holders and advocates have moreover argued that the anti-infringement measures that certain services have in place are ineffective and in any event not consistently available across all platforms or to rights holders who are less prominent or outside the music industry. Conversely, many intermediaries have noted their efforts to apply and improve these measures as well as the technical and resource challenges in applying them more broadly. Nevertheless, a number of ISPs have expressed support for stronger, clearer injunctive remedies whereby they could be compelled by court order to prevent or stop infringement without incurring liability themselves.

### **Broader Policy Issues**

In addition to the views noted above, many intermediaries as well as Internet user advocates have argued that limiting intermediaries' protections from liability or otherwise adding to their enforcement obligations could have significant unintended consequences for Canadians. Specifically, these stakeholders have argued that such measures could force intermediaries to engage in stricter monitoring of and action against content or activities using their services that they consider to be infringing. The stakeholders have argued that such changes in approach could have two related types of effects:

- (a) Impacts on individuals and the open Internet: These stakeholders have argued that greater risk of liability could compel intermediaries to err on the side of caution and disable access to content, remove it or otherwise limit user activities that might not actually infringe copyright. The stakeholders have also argued that such actions could limit individuals' access to information, privacy interests and ability to communicate and express themselves freely. Indeed, given the volume of content at issue, intermediaries' monitoring and action measures may need to be automated (e.g., through the use of "content filters"). Unfortunately, it has been noted that such automated measures could and do misidentify or fail to identify certain content, resulting both in infringing content being overlooked and non-infringing content being acted upon. In particular, such measures seem unable to evaluate the potential applicability of fact-specific exceptions to copyright infringement, further resulting in non-infringing content being acted upon.
- (b) Broader market impacts: These stakeholders have also argued that given the volume of content online, the technical measures necessary for intermediaries to monitor for and take action against potentially infringing content could be costly to implement. The stakeholders have expressed concern that these costs could pose a barrier for innovators and would-be entrants to the market for online services, thereby concentrating the power of larger incumbents and limiting economic growth as well as consumer choice. The stakeholders have moreover argued that limiting intermediaries' protections from liability could result in loss of services because they might no longer

---

<sup>62</sup> See FN59, above.

<sup>63</sup> See Section 3.3 Approaches in Other Jurisdictions.



have the confidence to operate and innovate in Canada or the ability to do so cost-effectively. The stakeholders have argued that the many businesses and other endeavours relying upon such services might be harmed as a result, thereby limiting economic growth. Rights holders, particularly emerging creators, could also be harmed for the loss of opportunities to promote and monetize their content.

