CANADIAN COPYRIGHT INSTITUTE
Established to promote a better understanding of copyright and to encourage its use in the public interest

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Response to the Consultation paper on a Modern Copyright Framework for Online Intermediaries

We appreciate the opportunity to respond to the Government's Consultation paper on a Modern Copyright Framework for Online Intermediaries. The creators, publishers and distributors who participate in the work of the Canadian Copyright Institute support implementation of new measures in the *Copyright Act* that will both encourage and protect the use of copyright work in the evolving and expanding digital environment. We acknowledge the critical role of online intermediaries in this and call for their increased accountability and liability with respect to both the communicating and infringing of copyright works.

In general we support the Government's underlying objectives to protect and encourage use of copyright content online and facilitate a flourishing digital market, while not interfering with individual freedom on the Internet. We do however have additional concerns that Canadian content is not being adequately supported and that the income of rights holders in our sector has substantially declined.

Canada's copyright framework for online intermediaries includes "safe harbours" for "hosting", "caching" or being a "mere conduit". Safe harbours may support or encourage licensing, but also need further restrictions to lessen the likelihood that they will facilitate copyright infringements. For example, there is an opportunity for a "hosting" intermediary to be licensed by a collective society when the intermediary disseminates new works comprising "user-generated content", although the creator of a new work using an existing work has no commercial purpose and otherwise complies with the exception for user-generated works in section 29.21 of the *Act*. We would support broadening the sorts of knowledge that would make a hosting intermediary ineligible for safe harbour protection to include, for example, awareness or deemed awareness of facts or circumstances it should reasonably know or discover from its own investigations following receipt of a notice of claimed infringement. It should be clarified that no safe harbour is available to an intermediary involved in an infringing activity in a way that is more than a passive and technically automatic service. For example, there should be no safe harbour protection where the intermediary has editorial responsibility, pays remuneration to the infringer or receives a commercial benefit itself, including from its collection or sale of personal data.

We do not support remedies that would be solely within the discretion of an intermediary in substitution for remedies required by the *Act*.

We would oppose any compulsory licensing scheme that would permit intermediaries to host content without authorization in exchange for payment. A scheme such as proposed in the Consultation paper clearly breaches the 3-step test of the Berne Convention and other international treaties to which Canada adheres – it is not a "certain special case" and it would be "conflicting with a normal exploitation of the work" and "unreasonably prejudicing the legitimate interests" of the rights holder. It is important to remember that Canada previously repealed such enforced access and remuneration for rights holders' exclusive rights. However, it is likely that an extended collective licensing scheme will not breach the Berne 3-step test as it would be available only where an overwhelming number of

rightsholders authorize collective administration of particular uses because of what in future turns out to be the impracticality or impossibility of a particular use being licensed by individual rights holders. Rights holders must remain entitled to opt out of the collective licensing of any use. The collective society must be required to maintain complete and easily accessible lists of such opt outs and, contrary to the assumption in the Consultation paper, rights holders who have opted out must not be disentitled to sue the relevant licensed intermediary for infringement.

We would support obligations for greater transparency concerning the remuneration received from intermediaries. We are not aware of complaints concerning lack of transparency with respect to royalty calculation by collective societies.

Whether or not a breach of the right to communicate to the public by telecommunication, we are concerned by the diversion of advertising from the publications of news media and the dramatically decreased advertising revenues received by news media because of links to their stories displayed on the sites of online intermediaries. We support legislation to force negotiation for fair remuneration to news media by those intermediaries, particularly the "web giants".

We particularly ask the Government to strengthen enforcement tools for both rights holders and their collective management societies, including meaningful statutory damages, whether infringement is for commercial or non-commercial purposes, and not only if on a "primarily commercial scale". We support making it easier to obtain injunctions to prevent or stop online infringement facilitated by intermediaries and providing "individual or less well-resourced rightsholders" with easier ways to enforce their rights. But looking generally, beyond intermediaries, at the need for effective enforcement to support collective management, we point to the urgent need to clarify that tariffs approved by the Copyright Board are mandatory. If such tariffs are not enforceable, the collective licensing regime of the *Act* will, for our sector, approach evisceration – a serious a loss for users as well as rights holders.

We additionally mention the failure of the *Act* to put parameters on overly broad exceptions to copyright infringement, including "fair dealing" for the purpose of "education", the damage from which has multiplied in the online environment. The *Act* also has a problematic definition of "publication" in section 2.2 of the *Act*, which does not include "the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work…." Many digital works that rights holders clearly intend to make generally available to the public are "published" in the ordinary sense of "publication", and this should be indicated by an amendment to the *Act* that would "deem" them to be "published" (for example, user-generated works posted on a website such as Yahoo).

CONCLUSION

We call on the Government to proceed immediately and expeditiously with copyright revision including increased accountability and liability for online intermediaries and more restrictions on their safe harbours.

Marian Hebb, Chair

Canadian Copyright INSTITUTE