

Canada's New Notice And Notice Regime For Internet Copyright Infringement

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Canada's new "notice and notice" regime for Internet copyright infringement will come into effect on January 2, 2015. The regime provides a mechanism for copyright owners to give notice of Internet-related copyright infringement claims to Internet intermediaries, who are required to respond to a notice in a specified manner or face liability.

Background - Copyright Modernization Act

The notice and notice regime is the final step in implementing the Canadian Copyright Modernization Act, which was enacted to, among other things, address the challenges and opportunities presented by the Internet, align Canadian copyright law with international standards, and clarify Internet service providers' liability for copyright infringement.

Most of the Copyright Modernization Act came into effect in November 2012, including amendments to the Copyright Act (sections 31.1 and 41.27) that provide certain Internet intermediaries with the following safe harbours against copyright infringement liability:

- **Internet Service Providers:** An Internet service provider does not infringe copyright in a work solely by providing the means (including by caching the work for the purposes of efficiency) for the telecommunication or reproduction of the work, subject to various restrictions, requirements and exceptions.
- **Internet Storage Service Providers:** A person who, for the purpose of facilitating Internet use, provides digital memory (e.g. Internet storage services) in which another person stores a work does not, by virtue of that act alone, infringe copyright in the work. This safe harbour does not apply if the Internet storage service provider knows of a court decision that the person storing the work is infringing copyright in the work.
- **Internet Search Engine Providers:** A provider of an information location tool (e.g. an Internet search engine) who is found to have infringed copyright by reproducing a work or by communicating the reproduction to the public by telecommunication may be subject to an injunction to restrain further infringement, but the provider is not liable for other kinds of copyright infringement remedies (e.g. monetary damages) if the provider acts solely for the

purpose of providing the information location tool, subject to other restrictions and requirements.

These safe harbours apply only if and to the extent that an Internet intermediary is acting purely as a neutral intermediary (e.g. not itself posting infringing materials), an approach consistent with the principle established by the Supreme Court of Canada's 2004 decision in the *Tariff 22* case. Further, the safe harbour provisions expressly provide that they do not apply to an Internet intermediary who is providing its service primarily for the purpose of enabling acts of copyright infringement.

The Notice and Notice Regime

The notice and notice regime (Copyright Act sections 41.25, 41.26 and 41.27(3)) is described by the Canadian government as a “made-in-Canada” solution that is “intended to discourage online copyright infringement by providing copyright owners with a tool to enforce their rights, while also respecting the interests and freedoms of users”. The regime imposes obligations and potential liabilities on Internet intermediaries who receive a prescribed form of notice that they are facilitating Internet-related copyright infringement.

The notice and notice regime was not proclaimed in force in 2012, to allow the government time to enact required regulations. The government eventually decided that regulations were not necessary, and announced that the notice and notice regime will come into force on January 2, 2015. Following is a summary of the regime:

- Internet Intermediaries

An owner of copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides any of the following: (1) internet access to the electronic location that is the subject of the infringement claim (i.e. an Internet service provider); (2) digital memory that is used for the electronic location that is the subject of the infringement claim (i.e. an Internet storage service provider); or (3) an information location tool (i.e. a search engine provider).

- Notice Form/Content

A notice of claimed copyright infringement must be in writing and contain the following information: (a) the claimant's name and address; (b) the work or other subject-matter to which the claimed infringement relates; (c) the claimant's interest or right with respect to copyright in the work or other subject- matter; (d) location data for the electronic location to which the claimed infringement relates; (e) the infringement that is claimed; and (f) the date and time of the claimed infringement.

- Internet Service Providers and Internet Storage Service Providers

An Internet service provider or Internet storage service provider who receives a proper notice of claimed copyright infringement is obligated to: (a) as soon as feasible forward the notice electronically to the person to whom the electronic

location identified in the notice belongs; (b) inform the claimant of the forwarding of the notice or, if applicable, of the reason why it was not possible to forward the notice; and (c) retain records that will allow for identification of the person to whom the electronic location identified in the notice belongs, for either: (i) six months from the day on which the infringement notice is received; or (ii) if the claimant gives notice of commencement of infringement proceedings regarding the claimed infringement within that six month period, then for one year from the day on which the infringement notice is received.

An Internet service provider or Internet storage service provider is not entitled to **charge a fee for complying with the notice and notice regime**. A claimant's only remedy against an Internet service provider or Internet storage service provider who fails to properly respond to a notice of claimed infringement is statutory damages in an amount of no less than \$5,000 and no more than \$10,000.

- Search Engine Providers

If a claimant gives proper notice of claimed copyright infringement of a work or other subject-matter to a search engine provider after the work or subject-matter has been removed from the electronic location specified in the notice, then the safe harbour protections that apply to search engine providers will only provide **protection in respect of the search engine providers' reproduction of the work** for the purpose of operating the search engine for thirty days after the notice is received. Search engine providers are not obligated to forward a notice of claimed copyright infringement to the alleged infringer.

Comments

The Canadian notice and notice regime is significantly different from the "notice and take down" regime established by the United States Digital Millennium Copyright Act, which requires an Internet intermediary who receives notice of alleged infringing material to expeditiously remove or disable access to the material or face possible liability for copyright infringement. Under the Canadian regime, Internet service providers and Internet storage service providers are not required to remove or disable infringing content, although they may do so voluntarily, and a copyright owner will still be required to invoke other legal remedies (e.g. commencing copyright infringement proceedings) against the infringer.

Internet intermediaries should now be preparing to comply with the notice and notice regime, including: (a) implementing policies and procedures for processing infringement notices, forwarding infringement notices to alleged infringers, retaining relevant records for the prescribed period (for Internet service providers and Internet storage service providers) and deleting unauthorized reproductions (cached copies) of works (for Internet search engine providers); and (b) making appropriate amendments to their customer agreements and terms of use.

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