

INTERNET INTERMEDIARIES AND COPYRIGHT OWNERS TAKE NOTICE: CANADA'S NOTICE-AND-NOTICE REGIME COMES INTO FORCE

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Canada's new Notice-and-Notice regime is now in force.^[1] New sections of the *Copyright Act* (the "Act") govern this regime which is of interest to the following groups:

- a. Internet service providers (ISPs) & Internet storage providers / hosts (i.e., those who provide services related to the operation of the Internet or another digital network or who provide digital memory for third parties to store and communicate works);
- b. search engine providers (i.e., those who provide information location tools);^[2]
- c. copyright owners (sometimes referred to as "claimants" in the legislation); and
- d. alleged infringers.

As more fully discussed below, the system requires Internet intermediaries to receive and deliver notices of alleged copyright infringement to their users. It is a uniquely "made in Canada" approach; unlike in the U.S., there is no obligation on the intermediary to remove allegedly infringing material following receipt of proper notice.^[3]

Overview of the new Regime

The legislation treats ISPs and hosts differently from search engine providers.

When an ISP or host receives a notice from a copyright owner that contains the requisite information (see below), they must forward the notice "as soon as feasible" to the user who is associated with the alleged infringement.^[4]

The "notice" must meet the following requirements: it must be in writing and contain the claimant's name and address, the identity of the work to which the alleged infringement relates, the claimant's interest or rights in respect of the work, the type of infringement claimed, the electronic location data for which the claimed infringement relates and the date and time of the alleged infringing activity.^[5]

The ISP or host is required to store the subscriber's Internet protocol information for six months or a year if a court action stems from the alleged infringement.^[6] Failure to maintain such information could make the ISP or host liable for statutory damages ranging from \$5,000 to \$10,000.^[7] An ISP or host may not charge a fee for performing their obligations under the regime.^[8]

For search engine providers, once they receive a notice from the copyright owner containing the prescribed information, the search engine provider is not obligated to communicate or forward the notice. Their liability is limited to injunctive relief for automated and passive reproductions.^[9] However, once the infringing work has been taken down, then further to a proper notice alleging infringement, the search engine provider must remove reproductions of the work (e.g. cached images) within 30 days, or lose the limitation on relief.^[10]

Comparisons with the U.S. Notice-and-Takedown Regime

Since 1998, the U.S. has mandated a "notice-and-takedown" regime under the *Digital Millennium Copyright Act* which requires certain online services to block access to material upon receipt of a notice from a rights holder that alleges such material to be infringing. The obligation to block access rests with the party whose facilities are being used to host the allegedly infringing material. A service provider is liable for monetary or equitable relief for infringement of copyright unless upon receipt of the notice claiming infringement, the service provider "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity".^[11]

In contrast with the U.S. regime discussed above, this new "made in Canada" approach leaves authority over copyright infringement claims with the courts, as Internet intermediaries are under no obligation to remove the content upon receiving the notice.^[12] Copyright owners must seek relief from the Courts where the alleged infringer does not remove the content.

Compliance

In light of this recent addition to Canada's copyright landscape, Internet intermediaries should consider putting into place the following practices: (i) implement policies and procedures for processing infringement notices and forwarding infringement notices to alleged infringers; (ii) for ISPs and Internet storage service providers, be prepared to retain relevant records for the prescribed period; (iii) be able to delete unauthorized reproductions of works (for search engine providers); and (iv) make appropriate amendments to terms of use and agreements with subscribers or users.

by Sarah Kilpatrick and Ryan Black

¹ The Notice-and-Notice Regime is included as a part of The Copyright Modernization Act, which provides for amendments to Canada's Copyright Act.^[ps2id id='1' target='']

2 Information location tools are defined as any tool that makes it possible to locate information that is available through the Internet or another digital network (section 41.27(5) of the Act).[ps2id id='2' target='']

3 Save for an exception relating to search engine providers, as more fully discussed herein.[ps2id id='3' target='']

4 Section 41.26(1)(a) of the Act.[ps2id id='4' target='']

5 Section 41.25(2) of the Act.[ps2id id='5' target='']

6 Section 41.26(1)(b) of the Act.[ps2id id='6' target='']

7 Section 41.26(3) of the Act.[ps2id id='7' target='']

8 Sections 41.26(1) and (2) of the Act (and as no regulations fixing a maximum fee have been set).[ps2id id='8' target='']

9 Sections 41.27(1) and (3) of the Act. Section 41.27(2) sets out further requirements which must be met in order for the remedy to be limited to an injunction.[ps2id id='9' target='']

10 Section 41.27(3) of the Act.[ps2id id='10' target='']

11 [§512\(c\)\(1\)\(C\)](#), Title 17, US Code.[ps2id id='11' target='']

12 Save for the requirements relating to a search engine provider (per sections 41.27(2) and (3) of the Act).[ps2id id='12' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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