



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

**Submission from The Writers' Union of Canada**

**May 31, 2021**

### **Recommendation**

The Writers' Union of Canada (TWUC) recommends that Canada revise copyright law and regulation to demand increased accountability and liability for online hosting platforms and intermediaries. We believe the broad safe harbours currently in use by these intermediaries de-incentivize responsible stewardship of hosted content that is entirely within the means of the underlying technology and business practice.

### **The Writers' Union of Canada**

Founded in 1973, TWUC is the national organization representing and advocating for professionally published writers. It is dedicated to enhancing writers' working conditions; advocating for their rights; providing professional development tools and opportunities; promoting authors and their writing; and enabling writers to network and share information with their colleagues. Union membership has steadily expanded with the growth of the Canadian writing and publishing sector. Beginning with just 43 members, TWUC now represents 2,300 cultural professionals. Since 2014, TWUC has chaired the International Authors Forum (IAF), representing over 750,000 authors worldwide.

TWUC has engaged multiple times in government inquiry affecting copyright law. It took part in the consultative process preceding amendment of the Copyright Act in 1988. That amendment authorized the collective licensing of copyright works in Canada by collectives like Access Copyright. TWUC was also an active advocate on behalf of writers prior to the 1997 amendment of the Copyright Act. It has previously made representations to the federal government on issues of copyright reform, intervened in and supported many court cases related to the protection of creator rights, and appeared before parliamentary committees struck to review amendments to the Copyright Act, including submission prior to the 2012 amendments and recent presentations to the Statutory Review of the Copyright Act<sup>i</sup>. In its role with the IAF, TWUC monitors meetings of the Standing Committee on Copyright and Related Rights (SCCRR) at the World Intellectual Property Organization (WIPO) in Geneva.

In March of this year, TWUC submitted recommendations to the Consultation on How to Implement an Extended General Term of Copyright Protection in Canada.<sup>ii</sup>

### **Shift the Weight of Responsible Action**

As TWUC interprets the policy paper for this consultation, Canada's current approach places the weight of policing infringement, notifying of infringement, and tracking the responsible actions of intermediaries (to make sure infringement has been properly flagged and/or removed) entirely upon the rightsholder. For Canada's authors and other professional creators this means endless rounds of notifying websites that they do not have permission to use our content, following all the various and non-uniform notification procedures of each offending site, and then checking

back to make sure some action has been taken. More often than not, if the offending content is removed from a specific site, it will re-appear on that same site very soon after removal, or somehow be shared behind the scenes and appear on an entirely new hosting site (at which point the entire process must begin again).

The Union has over many years tracked this same repetitious and ineffectual process on behalf of many members, and can say from that experience the most common outcome is that the rightsholder simply gives up on the process and accepts that there will always be some level of illegal copying and sharing online, and that their income will suffer as a result. That is hardly a positive outcome for the cultural economy, or a responsible policy goal.

Because of this ongoing policy failure, TWUC agrees the government should:

- **Clarify safe harbours, and compel greater vigilance of intermediaries against potential infringements:**
  - Clarification of recourse to safe harbours is necessary. The claim of being a “mere conduit” cannot be used to excuse active hosting and discoverability on offending sites through indexing and/or algorithmic adjustment. Such clarification has been done by many of Canada’s trading partners, including the UK, USA, and Australia.
  - The idea of neutral intermediaries has been clarified somewhat by the Supreme Court of Canada<sup>iii</sup>, and Parliament should take that as a starting point for new definitions. Intermediaries must lose recourse to safe harbours if they provide curation of the content in any manner, including through algorithms.
  - Having a financial motive for content hosting must also be disqualifying from safe harbours, and Parliament should take the broadest possible interpretation of “financial motive.” Cost and budgetary savings, even for those claiming non-profit status, should be considered a financial motive. For instance, educational institutions claiming they have no financial motive for unlicensed hosting and copying must not be permitted, as there is an established market for educational content unreasonably disrupted by such claims.
- **Enact new obligations for qualifying intermediaries:**
  - “Notice and notice” (Canada) is a failed policy and should be replaced with a more active responsibility for platforms, such as “notice and takedown” (USA), or better yet “notice and stay down” (Germany). It is not lost on the creator community that behind-the-scenes sharing of illicit content between platforms must be happening, as previously removed content from one platform pops back up on another platform with great speed and regularity. Instructive discussion of notice systems can be found in US Copyright Office Report, *Section 512 of Title 17*.<sup>iv</sup>

- Because of the illicit sharing described above, TWUC believes identified repeat offenders should lose access to platform services, and platforms should be required to do all in their power to ensure the loss. TWUC disagrees with the idea that identification of repeat offenders can be left to the discretion of the intermediary. An objective standard must be put in place, and adherence to it expected under the law.
- **Compel Remuneration Through Collective Licensing:**
  - Collective licensing is the preferred policy for Canada's authors, and was working for decades with greater and greater efficiency, providing greater and greater access to Canada's published content, until 2012's disastrous amendment to the Copyright Act and the subsequent intransigence of the educational sector on licensing. Parliament must clarify its intent around the mandatory nature of Copyright Board tariffs before any new consideration of collective licensing of intermediaries. We have seen how the system breaks down without such clarity.
  - TWUC does not favour a compulsory licensing scheme as we believe it would undermine the primary market for published works in Canada. That market has been carefully built and encouraged over decades of government policy and professional labour, and is too important to Canadian culture. TWUC further believes such a scheme would violate the 3-Step Test in our international treaties.
  - We do believe an extended collective licence scheme could work, but only with an opt-out provision that would allow rightsholder recourse to legal action against intermediaries.
  - TWUC supports the idea of obliging transparency concerning the remuneration received from intermediaries.

## **Conclusion**

The Writers' Union of Canada (TWUC) recommends that Canada revise copyright law and regulation to demand increased accountability and liability for online hosting platforms and intermediaries. We believe the broad safe harbours currently in use by these intermediaries de-incentivize responsible stewardship of hosted content that is entirely within the means of the underlying technology and business practice.

As with our previous submission to the Term Extension consultation, TWUC is concerned that pressing issues pertaining to Canada's Copyright Act must be included in these considerations. While Canada's education sector may not be considered an intermediary on the scale of a YouTube or Facebook, it does indeed copy and host copyright-protected content using online course management systems. In fact, educational intermediary systems are much harder to monitor for content than user-generated and social media sites, as they are generally password protected for a contained population of students.

Since 2012, because of ill-defined provisions inserted into the Act, Canada's writing and publishing sector has suffered a loss of earned educational copying income in the hundreds of millions of dollars. The fact that large-scale, unpermitted educational copying is a problem for the cultural economy was recognized by both Standing Committees engaged with the recent Statutory Review of the Copyright Act. There are recommendations before Parliament for immediate repair.

TWUC once again urges government to act immediately on recommendations 18, 19, 20 and 21 from the CHPC *Shifting Paradigms* report<sup>v</sup>, and to restore a working educational market for Canadian cultural work.

Respectfully submitted by,



Anita Daher, Chair, The Writers' Union of Canada

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<sup>i</sup> TWUC briefs to the [CHPC](#) and [INDU](#) Committees

<sup>ii</sup> [TWUC Submission](#) to the Consultation on How to Implement an Extended General Term of Copyright Protection in Canada

<sup>iii</sup> [SOCAN v. Canadian Assn. of Internet Providers](#), 2004 SCC

<sup>iv</sup> US Copyright Office Report, [Section 512 of Title 17](#).

<sup>v</sup> [Shifting Paradigms](#), May 2019