Coalition for the Diversity of Cultural Expressions

**CDCE's brief in the context of the**

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

May 31, 2021

## Presentation of the CDCE

The Coalition for the Diversity of Cultural Expressions (CDCE) brings together the main Anglophone and Francophone professional organizations in the cultural sector in Canada. It is made up of some 40 organizations that collectively represent the interests of more than 200,000 professionals and 2,000 organizations and businesses in the book, film, television, new media, music, performing arts and visual arts sectors. The CDCE intervenes primarily to ensure that cultural goods and services are excluded from trade negotiations and that the diversity of cultural expressions is present in the digital environment.

## Introduction

In October 2020, the CDCE published its recommendations for the revision of the *Copyright Act*[1]. This exceptional convergence of organizations in the sector demonstrates the urgency of revising this legislation, which is vital for the entire cultural ecosystem. Beyond their particular priorities, the CDCE members have rigorously taken up the challenge of identifying the recommendations needed to close the growing gap between what rights holders can legitimately expect and what the *Copyright Act* now offers.

Copyright has been far too badly abused with the 2012 revision and, even before the pandemic, it no longer allows for fair remuneration for the use of the work of artists and creators, nor did it ensure the long-term diversity of cultural expressions. The cultural sector was already severely affected by the inability to put in place a system that adequately compensates rights holders, particularly to take into account the growing supply of online content, and is now collapsing. It was recently reported that one in four people working in the sector lost their jobs in 2020[2].

The revision of the *Copyright Act* presents itself as a fair and relevant market solution to ensure the continued creation of rich, innovative and diverse cultural expressions. This is no doubt why the Standing Committee on Finance (FINA) recommended in its report last February that the government "Complete the review of the *Copyright Act* during the year by making the necessary amendments to the Act to ensure that rights holders receive fair compensation for the use of their works."[3] We can only support this recommendation.

Government sends a positive signal to the industry by making the protection of copyrighted content one of the key objectives of its proposed changes to the liability of online intermediaries. We are pleased to see in

[1] CDCE (2020), Recommendations for the revision of the *Copyright Act*.
[2] CAPACOA (2021), 2020: The Year One in Four Arts Worker Lost Their Job.
[3] Report of the Standing Committee on Finance, Hon. Wayne Easter, Chair (2021), Investing in Tomorrow: Canadian Priorities for Economic Growth and Recovery, p. 37.

the consultation document some of the proposals we have made in the past, as well as references to the new European legislation.

We believe that Canada could be even more ambitious in the changes it could implement, including adopting many of the provisions that are currently being transposed into legislation at the Member State level in Europe[4] and indeed in other jurisdictions.

In the following sections, we will address the main comments that CDCE members collectively wish to make. Our 12 recommendations are included in Appendix 1.

## 1- Limit liability exemptions of online intermediaries according to their activities

In 2012, an exception was introduced in Article 31.1 for network services. Referred to as safe harbours, the provisions in this article establish that providers of "services related to the operation of the Internet or another digital network" are not responsible for the content that passes through their services "solely by reason of providing those means"[5], are therefore not required to obtain licences, and thus remunerate the rights holders of the works that transit through their services, nor are they required to assume responsibility when copyright infringements occur. A variety of services have been considered to be covered by this exception: Internet service providers, mobility services, content sharing sites such as YouTube, search engines, hosting, data storage, social networks, etc.

Some of these services now occupy a central position in access and distribution of contents. And the dumb pipe argument no longer holds as these services develop algorithms to recommend content to users based on corporate interests[6], as is the case with online content sharing services.

For example, Youtube is the platform most used in Canada to access music in recent years[7]. This company benefits from the safe harbour provisions and can pretend that it has no obligation to negotiate with rights holders to obtain a licence.

Indeed, YouTube has deigned to pay some compensation to rights holders, while emphasizing over and over again that it remains subject to the exceptions provided for in the *Act*. In this context, it is difficult for rights holders to obtain fair compensation for their contribution. As the study commissioned by PCH from Wall Communications reveals, YouTube comprised 49% of the volume of music streaming in 2019, for a compensation share of only 7%[8]. We note, moreover, that globally, according to ICMP data, YouTube paid 20 times less compensation, per user per year, than Spotify did in 2019[9]. These are proven facts that speak clearly for themselves.

The Canadian government is now proposing to revisit the criteria that online intermediaries shall meet to benefit from Safe Harbour provisions.

Thus, we propose that Canada implement a regime aimed at regulating activities of "online content sharing service provider" as adopted by the European Union in 2019 in the *Copyright Act*, that is:

---

[4] The deadline for transposition is June 7, 2021, as stipulated in DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, article 29

[5] Copyright Act, 31.1 (1)

[6] See, for example, this analysis of the YouTube algorithm, which shows that the goal is to retain users as long as possible by offering them longer and more popular videos: Pew Research Center (2018), Many Turn to YouTube for Children's Content, News, How-To Lessons, By Aaron Smith, Skye Toor and Patrick Van Kessel, 28 p.

[7] Innovation, Science and Economic Development (2018), Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada – Infographic, p. 3

[8] Wall Communications (2019), Study on the Economic Impacts of Music Streaming Platforms on Canadian Creators

[9] ICMP (2019), Article 17, EU Copyright Directive – An Overview

> "online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes"[10].

This definition targets services playing an active, not passive, role in making copyrighted works available to the public. Thus, the definition establishes, in the European context, that the Directive's safe harbours do not apply to these services, which must now obtain a license, like any other services also rightly subjected to normal copyright rules.

The Government seems open to identifying criteria for distinguishing between active and passive roles for intermediaries. It considers, in the Consultation Paper, to make clearer that the safe harbours do not apply to intermediaries who play an active role. This clarification is welcome and needs to be made more explicit in the *Act*. The Government proposes in the Consultation Paper that the following activities be used as examples of situations where an intermediary is taking an active role

- optimizing the presentation of content or promoting it (e.g., categorizing content by genre or style, creating and recommending playlists, or including "autoplay" or "autofill" features);
- having control over the content or activity, including editorial responsibility;
- remuneration of the primary infringer for this purpose[11].

It is our understanding that the last example is not intended to exonerate Intermediaries when they do not act for profits, but instead to *add* a further situation when Intermediaries are also deemed to play an active role, which is when *they pay the person acting as a primary infringer.* Copyright infringement, even without profit prospects, can have significant impacts on the revenues of rights holders and cultural ecosystems.

**Recommendation 1**

That Canada implements in the *Copyright Act* a regime similar to the one adopted by the European Union in 2019 to regulate "online content sharing service providers", that is:

> "online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes"[12].

**Recommendation 2**

Clarify in the *Act* that the safe harbours should not apply to intermediaries who do not act in a purely neutral and passive manner in respect of works and other protected subject-matters. Specify that an intermediary is in an active role if it engages in activities such as "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)" or "having control over the content or activity, including editorial responsibility"[13].

[10] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, article 2, paragraph 6.
[11] Consultation document, section 4.1.2, p. 12
[12] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, article 2, paragraph 6.
[13] Consultation document, section 4.1.2, p.12

### 2- Confirm the mandatory nature of tariffs approved by the Copyright Board

The CDCE is not in a position to support the establishment of a specific collective licensing regime. In any case, it is imperative that the government amend the *Act* to confirm the mandatory nature of tariffs approved by the Copyright Board[14].

**Recommendation 3**

That the government amend the *Act* to confirm the mandatory nature of tariffs set by the Copyright Board.

### 3- New obligations for online intermediaries

In Canada, a copyright owner may report copyright infringement to a network or storage service provider. The provider must then forward the notice to the alleged infringer and keep her or his name in a record. This system is called "notice and notice". Unless the alleged infringer voluntarily complies with the rights holders' demand, the latter will have to initiate a lawsuit against the alleged infringer in order to have the infringing content removed from the service provider's system. In addition, even if the infringer removes voluntarily the infringing content, nothing in this system would prevent the same infringing content from reappearing again on the service provider's system at the initiative of the same or of any other infringer. Whatever the alleged infringer may or may not do following receipt of the right holder's notice, the intermediary, on the other hand, continues to benefit from the safe harbour even if it does not follow the rules of this system. In fact, compliance, by Intermediaries, with the notice and notice process is not even a condition in order to benefit from their safe harbours.

The current *Act* is not effective in fighting online piracy. In a study for which data was collected in 2017, just over one-quarter of all people who accessed online content accessed at least one piece of content in contravention of Canadian law[15]. The study also estimates that the volume of illegal content use per year in Canada amounts to 124 million music tracks, 48 million movies, 64 million television shows and 4 million e-books[16].

In many other countries, service providers who receive a notice must ensure that the copyrighted content is removed to retain the benefit of their exoneration of liability. This is known as the "notice and takedown" system. The consultation paper seems, at least initially, to dismiss the idea of implementing such a regime and instead proposes changes to the notice and notice regime.

However, since the 2018's consultations, the European Union has adopted a new copyright directive in 2019 that introduces a new "notice and staydown" system:

> 4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:
> (a) made best efforts to obtain an authorisation, and

[14] A leave to appeal has been granted by the Supreme Court of Canada to Access Copyright in *York University, et al. v Canadian Copyright Licensing Agency* SCC 76224 : https://www.canlii.org/en/ca/scc-l/doc/2020/2020canlii76224/2020canlii76224.pdf
[15] Innovation, Science and Economic Development (2018), Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada – Final Report, p. 7
[16] Idem, p. 41.

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event
(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and
(b) the availability of suitable and effective means and their cost for service providers[17].

This system will be implemented in all European countries as of June 7, 2021[18]. It is CDCE's position that the government shall promptly follow the example of the European Union insofar as all services providers subject to this process and doing business in any of the 27 countries of the European Union will have to comply with this process as of June 7 2021 and thus be also able to comply with similar requirements anywhere else in the world, including Canada.

On the other hand, it appears according to our analysis that the provisions of the Canada-U.S.-Mexico Agreement do not limit the ability of Canada to adopt a more stringent regime for online intermediaries.

That being said, for certain forms of piracy, the Canadian Federation of Musicians considers that, while adopting a better system, it would be important to also maintain the "notice and notice" system, because blocking sites or the "notice and takedown" system is not effective against peer-to-peer applications[19]. In these cases, and regarding certain hacking strategies that increasingly use stream extraction, virtual private networks and digital boxes, online intermediaries should still be required to forward the notice to the infringer, and maintain records of information regarding the infringer that would permit the rights holder to commence enforcement proceedings within a specified period of time. Anti-piracy mechanisms should adapt to all these new practices.

In any case, the receipt of notice, regardless of the system that is to be applied, should have the effect of lifting the safe harbour for the receiving intermediary so that it be liable for any infringement of the work or other protected subject-matter referred to in the notice continuing or occurring after receipt of the notice.

The government also suggests reviewing the knowledge criterion for exemption in the case of storage services, and possibly even in exemptions for the "mere conduit" or that relating to "caching":

> "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. [… ] It could moreover be clarified that constructive knowledge would be deemed where the intermediary should reasonably have known of the infringement in the circumstances. [… ] 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"[20].

[17] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, article 17, paragraphs 4-5.
[18] Section 29 (Transposition) of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[19] Canadian Federation of Musicians (2016), Canadian Content in a Digital World, p. 19.
[20] Consultation document, section 4.1.1

This is indeed a necessary correction to the Copyright Act which shall apply as a condition applicable to all Intermediaries in order to retain the benefit of the safe harbours protection, and would thus be a significant improvement over the current situation, which applies only to Intermediaries providing hosting services and is limited to situation where the provider knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter[21].

In addition, the consultation paper suggests adding a new condition for safe harbour that would apply only to an Intermediary to the extent the latter "lacks a financial stake in the infringing activity at issue"[22]. No Intermediary should obviously benefit from any exoneration of liability if it receives any benefit, financial or otherwise, attributable to an infringing activity.

However, some "non-commercial" intermediaries may still inflict significant damage on the market for creative works, and should be ineligible for safe harbour provisions if they engage with copyright-protected works in ways that are not merely technical, passive or automatic.

**Recommendation 4**

Implement a notice and staydown regime.

**Recommendation 5**

- That receipt of notice be a sufficient condition for lifting the safe harbour for the receiving intermediary so that it be liable for any infringement of the work or other protected subject-matter referred to in the notice continuing or occurring after receipt of the notice;
- That any Intermediary ceases to benefit from any safe harbours as soon as it have actual knowledge of the infringing material on, or infringing activity occurring through its services, or as soon as it become aware of facts or circumstances from which such infringing material or activity is apparent.

**Recommendation 6**

Add a new condition for safe harbour, limiting it to cases where the intermediary lacks any benefit, financial or otherwise, attributable to the infringing material or activity at issue.

## 4- Enforcement tools

We welcome the options considered by the government in section 4.4. of the consultation paper, particularly the option of allowing injunctions against intermediaries even if they are not responsible for copyright infringement. Such injunctions would, as in the European Union, the United States, the United Kingdom and Australia, force online intermediaries to " 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"[23].

[21] Copyright Act, Section 31.1 (5)
[22] Consultation document, section 4.1.2, p. 12.
[23] Consultation document, section 4.4.1, p. 17

The government should also be able to facilitate the use of orders without previous judgment against the primary infringer in certain circumstances, such as against a person located in a foreign jurisdiction who is responsible for infringements occurring in Canada. We believe the proposed conditions are reasonable.

We also encourage the government to move forward with the measures contemplated in section 4.4.2 of the consultation document, including the reduction of the burden of proof and measures to facilitate the use by rights holders of tools (such as small claims) to protect their rights.

**Recommendation 7**

Allow injunctions to force online intermediaries "to disable access to infringing content, remove such content, otherwise prevent or stop infringing activity or limit, suspend or terminate access to an intermediary's service"[24].

**Recommendation 8**

The government should be able to facilitate the use of orders without previous judgment against the primary infringer in certain circumstances, such as against a person located in a foreign jurisdiction who is responsible for infringements occurring in Canada.

**Recommendation 9**

The government should consider reducing the burden of proof on plaintiffs.

**Recommendation 10**

Other measures to facilitate the use by rights holders of tools to protect their rights should be considered.

## 5- Transparency of certain intermediaries

Some online intermediaries are under no obligation to report on their activities or on the cultural content that transitions every hour on their network.

Once again, the European directive points to interesting ways to promote greater transparency:

"Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements"[25].

The *Act* could be amended to provide this legal basis.

**Recommendation 11**

[24] Consultation document, section 4.4.1, p. 17

[25] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, article 17, paragraph 8.

The *Act* should be amended to make online intermediaries provide rightsholders, at their request, with adequate information.

## 6- Improving the private copy regime

The principle of private copying allows for a compromise between the rights of users and the creators' right to remuneration. It allows users to multiply the opportunities for access to cultural expressions and to let their creativity run wild by arranging the tracks as they wish while ensuring that creators are compensated for the copies thus created.

There are two problems with the Canadian private copy regime: it is not technologically neutral and it applies only to the music sector.

Logic would dictate that the system should be technologically neutral in order to adapt to new and constantly evolving user practices. Today, the private copy levy is only applied to recordable CDs, a product that is practically no longer sold. This is why royalties are declining: from a peak of $38 million in 2004, they only reached $1.1 million in 2019[26]. Meanwhile, royalties from the various private copying regimes around the world increased by 6% between 2007 and 2015[27].

Technical reasons and differences between the French and English versions of the Act have prevented the application of a levy in the case of MP3 players[28]. Rather than remedy the situation, new exceptions were introduced in 2012 for reproduction for private purposes (section 29.22) and for listening or viewing on a deferred basis (29.23).

With regards to the first exception, according to the Société des auteurs et compositeurs dramatiques and the Société civile des auteurs multimédia (SACD and SCAM), "...Canada would not have met its international obligations since this new exception does not meet the requirements of the Berne Convention's three-step test, which provides that limitations or restrictions on the exclusive rights of authors must be subject to conditions which limit their application to certain special cases where they do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author"[29].

Despite the increase in streaming, users are still using private copies in Canada. The Canadian Private Copying Collective conducted a survey in 2019 that estimated that there are 5.95 billion copies of songs on telephones and tablets in Canada, and that half of those copies are unlicensed . Interestingly, half of these copies were made in the past year[30].

If the regime were technologically neutral, the private copying levy could be collected on a wide range of physical media and devices (telephones, USB keys, hard drives, computers, tablets, etc.), as is the case in many countries around the world, or services (cloud computing space).

In the majority of countries (80%) where a private copying regime is in place, it also generates royalties for the audiovisual sector, while other countries are also beginning to remit royalties to the literary and visual arts sectors[31].

---

[26] Canadian Private Copying Collective (2020), Written Submission for the Pre-Budget Consultations in Advance of the Upcoming Federal Budget (2021)

[27] WIPO & Stichting de Thuiskopie (2017), *International Survey on Private Copying, Law & Practice 2016*, p. 15.

[28] Testimony of Lyette Bouchard, INDU, June 14, 2018

[29] Société des Auteurs et Compositeurs Dramatiques et Société Civile des Auteurs Multimédia - SACD-SCAM (2018), Mémoire Présenté dans le cadre de l'examen prévu par la loi de la Loi sur le droit d'auteur au Comité permanent de l'industrie, des sciences et de la technologie, pp.8-9. The text refers the reader to Article 9(2) of the Berne Convention. Our translation.

[30] Canadian Private Copying Collective (2020), Letter to Minister Guilbeault and Bains

[31] WIPO & Stichting de Thuiskopie (2017), *International Survey on Private Copying, Law & Practice 2016*, p. 15.

It would be up to the Copyright Board to determine the levies according to media and devices. For example, the average royalty in Europe on the sale of a smart phone is $3 CDN (for private copying of music). It is difficult to assess the financial impact of our recommendations, but they should logically generate at least 40 million dollars in royalties annually.

**Recommendation 12: improve the private copying regime by**

- Clarifying the Act to make the private copying regime truly technology-neutral;
- Allowing the payment of royalties for rights holders in the audiovisual, literary and visual arts sectors
- Eliminating the exceptions introduced in 2012 to sections 29.22 and 29.23 for private copying and time-shifted listening and viewing.

## 7- The revision of the *Copyright Act* must include issues other than those that will be addressed in the technical consultations.

The CDCE made other recommendations to improve the *Copyright Act*, which are reproduced in the appendix 2. We assess the impact of our recommendations to amend the Act at a minimum of $136 million in own-source revenues, paid by businesses for the use of content, which could be reinvested annually in cultural ecosystems and the Canadian economy. And this does not even include the implementation of certain measures such as extending the term of copyright, the benefits of which are certain but could not be evaluated.

We insist that the next reform also include the other CDCE recommendations, even if they are not the subject of technical consultations.

The addition of more than 30 exceptions in as many years, some of which are in contravention of international law, has completely unbalanced cultural ecosystems. As noted by the Société des auteurs de radio, télévision et cinéma (SARTEC), the exceptions now occupy 40% of the text of the Act, a striking picture[32]. It would be absolutely deplorable if the next revision made the situation even worse.

**Recommendation 13**

Include in the upcoming revision the other recommendations made by the CDCE, as reproduced in the appendix 2, even if they are not the subject of technical consultations.

[32] Société des auteurs de radio, télévision et cinéma (2018), Mémoire de la SARTEC au Comité permanent du Patrimoine canadien dans le cadre de son Étude du modèle de rémunération pour les artistes et les créateurs à l'occasion de l'examen quinquennal de la Loi sur le droit d'auteur, p. 4.

**Appendix 1 : List of Recommendations**

**Recommendation 1**

That Canada implements in the *Copyright Act* a regime similar to the one adopted by the European Union in 2019 to regulate "online content sharing service providers", that is:

> "online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes"[33].

**Recommendation 2**

Clarify in the *Act* that the safe harbours should not apply to intermediaries who do not act in a purely neutral and passive manner in respect of works and other protected subject-matters. Specify that an intermediary is in an active role if it engages in activities such as "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)" or "having control over the content or activity, including editorial responsibility"[34].

**Recommendation 3**

That the government amend the *Act* to confirm the mandatory nature of tariffs set by the Copyright Board.

**Recommendation 4**

Implement a notice and staydown regime.

**Recommendation 5**

- That receipt of notice be a sufficient condition for lifting the safe harbour for the receiving intermediary so that it be liable for any infringement of the work or other protected subject-matter referred to in the notice continuing or occurring after receipt of the notice;
- That any Intermediary ceases to benefit from any safe harbours as soon as it have actual knowledge of the infringing material on, or infringing activity occurring through its services, or as soon as it become aware of facts or circumstances from which such infringing material or activity is apparent.

**Recommendation 6**

Add a new condition for safe harbour, limiting it to cases where the intermediary lacks any benefit, financial or otherwise, attributable to the infringing material or activity at issue.

**Recommendation 7**

Allow injunctions to force online intermediaries "to disable access to infringing content, remove such content, otherwise prevent or stop infringing activity or limit, suspend or terminate access to an intermediary's service"[35].

---

[33] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, article 2, paragraph 6.

[34] Consultation document, section 4.1.2, p.12

[35] Consultation document, section 4.4.1, p. 17

**Recommendation 8**

The government should be able to facilitate the use of orders without previous judgment against the primary infringer in certain circumstances, such as against a person located in a foreign jurisdiction who is responsible for infringements occurring in Canada.

**Recommendation 9**

The government should consider reducing the burden of proof on plaintiffs.

**Recommendation 10**

Other measures to facilitate the use by rights holders of tools to protect their rights should be considered.

**Recommendation 11**

The *Act* should be amended to make online intermediaries provide rightsholders, at their request, with adequate information.

**Recommendation 12: improve the private copying regime by**

- Clarifying the Act to make the private copying regime truly technology-neutral;
- Allowing the payment of royalties for rights holders in the audiovisual, literary and visual arts sectors
- Eliminating the exceptions introduced in 2012 to sections 29.22 and 29.23 for private copying and time-shifted listening and viewing.

**Recommendation 13**

Include in the upcoming revision the other recommendations made by the CDCE, as reproduced in the appendix 2, even if they are not the subject of technical consultations.

**Appendix 2: List of other recommendations made by the CDCE in September 2020 that are not addressed in the current and previous consultation[36]**

***Organizations that benefit from culture need to deliver a greater share of the value generated by copyrighted content***

Recommendation 3: Abolish the public performance royalty exemption for performers and producers for commercial radio stations.

***Restore the balance so that Canadian law allows creators and rights holders to recover royalties on their works***

Recommendation 5: Amend the fair dealing provisions in the context of education so that they only apply where a work is not commercially available under a licence by the rightsholder or a collective society.

Recommendation 7: Amend the definition of sound recording to include sound recordings that accompany audiovisual works.

Recommendation 8: That Canada ratify the Beijing Treaty and grant rights to performing artists on audiovisual medias in the Act.

Recommendation 9: That resale right be incorporated into the *Copyright Act*.

Recommendation 10: Introduce a neighbouring right for newspaper publishers.

***Strengthening the collective management system***

Recommendation 11: Amend the Act to confirm the binding nature of tariffs set by the Copyright Board.

Recommendation 12: Ensure that right holders in the various sectors have the same tools by ensuring that all collecting societies can claim statutory damages of three to ten times the value of the tariff that has not been paid.

Recommendation 13 : Raise the upper and lower limits of statutory damages for non-commercial violations and allow the establishment of higher damages in case of systematic and massive use.

***Take into account the needs and realities of Indigenous artists, creators and organizations***

[36] CDCE (2020), Recommendations for the revision of the *Copyright Act*.