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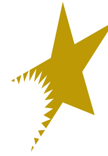

EXPECT THE BEST

Canadian Internet Users to Begin Receiving Notices of Claimed Infringement from their ISPs

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The *Copyright Modernization Act*[1] (the "CMA"), which amended Canada's *Copyright Act*[2], received Royal Assent on June 29, 2012. However, the mandatory "Notice and Notice" regime imposed by the CMA did not become effective until January 2, 2015. As a result, Canadians Internet users began receiving Notices of Claimed Infringement from their Internet Service Providers ("ISPs") at the beginning of this year.

A Notice and Notice system provides a means for copyright owners to indirectly communicate with individuals who are alleged to have infringed their copyright but whose identities have not been determined. When a copyright owner identifies the IP address of an individual user who has allegedly infringed its copyright (typically by downloading a file from a BitTorrent site), it won't know the identity of that individual user but it will be able to identify the ISP responsible for that particular IP address. Under the Notice and Notice system, the copyright owner can require the ISP to forward a Notice of Claimed Infringement to the individual user to whom that IP address has been assigned, without actually disclosing the identity of that individual user to the copyright owner.

Although many Canadian ISPs had already implemented a voluntary Notice and Notice system prior to January 2, 2015, it is now considered mandatory. ISPs that fail to forward notices of claimed infringement to their customers will be subject to statutory damages not less than $5,000 CAD and not more than $10,000 CAD.

The CMA also requires ISPs to retain records that will allow the identity of the individual user to be determined for 6 months, beginning on the date that the Notice of Claimed Infringement is received. In addition, if the copyright owner commences proceedings relating to the claimed infringement and so notifies the individual user before the end of the initial 6-month period, the ISP must retain those records for an additional period of 12 months following the date that the individual user receives the notice.

As previously discussed, there is a significant risk that "copyright trolls" will seek to engage in "speculative invoicing," a strategy that involves intimidating individuals into making small settlements by way of demand letters and threats of litigation. These demand letters often include false or misleading statements regarding an individual user's legal rights and/or potential liability for the infringement. Under the mandatory Notice and Notice System, ISPs will still be required to forward these notices, even if they clearly contain false or misleading information.

[1] S.C. 2012, c. 20.
[2] R.S.C., 1985, c. C-42.

According to Subsection 41.25(2) of the *Copyright Act* (as amended by the CMA), a Notice of Claimed Infringement must be in writing, in the form (if any) prescribed by regulation, and must include the following minimum information:

1) It must state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;
2) It must identify the work or other subject-matter to which the claimed infringement relates;
3) It must state the claimant's interest or right with respect to the copyright in the work or other subject-matter;
4) It must specify the IP address to which the claimed infringement relates;
5) It must specify the infringement that is claimed;
6) It must specify the date and time of the commission of the claimed infringement; and
7) It must contain any other information that may be prescribed by regulation.

Unfortunately, the *Copyright Act* does not specifically limit what additional information a copyright owner can include in a Notice of Claimed Infringement. Although the Act allows additional restrictions to be imposed by regulation, no regulations have been published yet.

If a copyright owner falsely claims in a Notice of Claimed Infringement that a formal finding of infringement has already been made or exaggerates the maximum potential damages, the ISP would still be obliged to forward it to their customer. There is also no penalty under the Act for copyright owners who include false or misleading claims in their Notice of Claimed Infringement.

Hopefully the Government of Canada will quickly publish regulations to close this loophole. In the interim, ISPs are not prohibited from providing additional information to their customers when forwarding a copyright owner's Notice of Claimed Infringement:

a) In the Teksaavy decision, the Federal Court of Canada ordered the copyright owner to include a statement in its demand letter stating that that no court had yet found the recipient liable for infringement and advising the recipient to seek legal assistance. ISPs should include a similar warning when forwarding a copyright owner's Notice of Claimed Infringement to its customers.
b) ISPs should also clarify the maximum penalty that its customer could face under Canadian law. In the case of non-commercial infringement, a copyright owner would need to seek statutory damages. According to Clause 38.1(1)(b) of the *Copyright Act*, statutory damages in non-commercial cases cannot exceed $5,000 CAD with respect to all infringements (rather than each individual infringement) involved in the proceedings for all works or other subject-matter. ■