CARL Statement in Opposition to the Bell Coalition's Proposal to Disable Online Access to Piracy Sites

The Canadian Association of Research Libraries (CARL) urges the Canadian Radio-television and Telecommunications Commission (CRTC) to reject the website blocking proposal submitted by the Bell Coalition. The proposal conflicts with several of the values and principles upheld by our member libraries including net neutrality, fair dealing, freedom of expression, and equitable access to online information and services.

The FairPlay Coalition ("Bell Coalition"), which includes Bell, Rogers, Québecor, the Directors Guild of Canada, and CBC/Radio Canada, is proposing that the CRTC create an anti-piracy website blocking plan through the establishment of the Independent Piracy Review Agency (IPRA). This agency would be responsible for reviewing complaints, identifying websites engaged in piracy activities, and reporting them to the CRTC for approval. Once approved, internet service providers would be required to blacklist these sites without prior judicial scrutiny or other oversight of any kind. The result would be the wholesale blocking of entire sites that are considered by IRPA to be "blatantly, overwhelmingly, or structurally engaged in piracy."

The Bell Coalition's proposal relies heavily on broad claims that piracy threatens the economic and cultural contributions of Canada's entertainment industries and that several of Canada's international peers have adopted similar plans with a positive market effect.[1] However, sources indicate that Canada's film, television, and music industries are achieving record growth and the Canadian market is currently outperforming many site blocking countries.[2] The recently implemented notice and notice regime, which enables creators to provide notices to copyright infringers, and the move from outdated cable packages to subscription based services such as Netflix as well as convenient and reasonably priced music streaming services, have helped to reduce infringement activities in Canada.

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[1] Bell Coalition Canada. "Application Pursuant to Sections 24, 24.1, 36, And 70(1)(A) Of the Telecommunications Act, 1993, To Disable On-Line Access to Piracy Sites" (January 29, 2018).

[2] In his blog, Michael Geist provides a number of other sources which demonstrate that Canada's film, television, and music industries are achieving record growth. http://www.michaelgeist.ca/2018/02/no-panic-canadian-tv-film-production-posts-biggest-year-ever-raising-doubts-need-site-blocking-netflix-regulation/

It is also important to note that other countries that have adopted website blocking plans include more rigorous judicial involvement throughout the process and that some of the most aggressive copyright enforcers, such as the United States, do not rely on site blocking systems. Indeed, this Bell Coalition proposal would go nowhere in the United States (where many, if not most, of the corporate interests behind the Bell Coalition proposal are ultimately domiciled). Far less drastic proposals, such as SOPA and PIPA, have been defeated in the USA in past years, and it is regrettable that these interests and their Canadian proxies and allies would think that such a proposal might be acceptable in Canada.

From the perspective of research libraries, the most troubling aspects of the proposal are the lack of judicial involvement prior to blacklisting sites, as well as the broad definition of piracy sites being used:

> "websites, applications, and services that make available, reproduce, communicate, distribute, decrypt, or decode copyrighted material (e.g., TV shows, movies, music, and video games) without the authorization of the copyright holder, or that are provided for the purpose of enabling, inducing, or facilitating such actions."[3]

The definition of piracy in the Coalition's application is so broad that it does not even require copyright infringement to have occurred. There are many ways to make copyrighted works available without permission of the copyright owner that are not infringing – such as fair dealing. Of course, all fair dealing involves the reproduction of copyrighted material without permission of the copyright holder. There is no mention of the fair dealing exceptions to copyright law in the proposal.

Therefore, this broad definition encompasses legitimate sites, such as many used for educational purposes. Copies of excerpts from books and journals that meet fair dealing requirements and that are made available through university-sanctioned Learning Management Systems ("LMSs") could be interpreted as copyright infringement and blocked under the proposed definition of piracy sites. This would have a seriously detrimental impact to both students and instructors in the post-secondary education sector.

The controversial York trial decision, unless it is overturned on appeal, puts the LMS system at risk of becoming a target for website blocking by organizations such as Access Copyright, given that LMSs make available copyrighted material, and without permission of the copyright owner when

[3] Bell Coalition Canada. "Application Pursuant to Sections 24, 24.1, 36, And 70(1)(A) Of the Telecommunications Act, 1993, To Disable On-Line Access to Piracy Sites" (January 29, 2018).

the amount is not substantial or the use involves fair dealing.[4] The LMS system further enables the distribution of such materials by students and staff. The LMS appears to meet both Bell Coalition proposed definitions of piracy, and there is a real risk that the IRPA will also find the typical LMS to be a piracy site.

As proposed, the IPRA could serve as a tool for rightsholders to blacklist sites even in cases where all of the site's activity was fair dealing, since fair dealing is not mentioned in the Application. The fact that the proposed definition of piracy drafted by the entertainment industry disregards fair dealing rights is probably not a matter of serendipity, or exceptional coincidence. The word "copyright" is mentioned 220 times in the document, including in the attached legal opinion. The term "fair dealing" is not mentioned once.

Enabling service providers to block access to specific sites without a court order would subject legitimate sites to the possibility of being blocked as a result of potential conflicts of interest with, for example, media distributors, leaving them with no recourse other than to submit an appeal for judicial review in the Federal Court of Appeal, after the fact.

The IRPA is also subject to an inherent conflict of interest, as seed funding would be provided by members of the Coalition. As well, the limitations of current blocking technologies, as demonstrated in numerous cases of over-blocking of legitimate sites around the world, further suggest that legitimate online content and speech would be blocked without due process. This would violate the principles of net neutrality and Canadians' right to freedom of expression.[5]

In fact, Canadian law has dealt quite effectively with arguably piratical practices.[6] Canada's copyright laws are among the toughest in the world. There is no need to drastically increase copyright owners' powers by

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[4] Decision in Canadian Copyright Licensing Agency v. York University, 2017 FC 669 (CanLII), http://canlii.ca/t/h4s07 The decision makes 46 references to LMSs. York, like many educational institutions, relies on fair dealing rights in addition to licenses. Access Copyright and the Bell Coalition will likely try to say that York's LMS is a piracy site. Indeed, the Justice Phelan, the learned trial Judge in the York case said:
[94] Discounting permissions and licences, both parties' experts concluded that approximately 11% of documents in the LMS sample exceeded the Guidelines. Not only is this a significant amount of unauthorized copying even if the Guidelines are assumed to be a valid response to copyright claims, but if the Guidelines are not valid (as found by this Court), then the amount of unauthorized copying is significantly higher.

[5] Working with a team of law students at the University of Ottawa, Michael Geist identified numerous more recent cases of over-blocking of legitimate sites around the world. http://www.michaelgeist.ca/2018/02/case-bell-coalitions-website-blocking-plan-part-6-blocking-legitimate-websites/

[6] For example, IsoHunt was put out of business and KODI type of set top boxes are being driven out of business through normal litigation processes.

bypassing the *Copyright Act,* with its balanced protections for both content owners and users.

We also note that the Bell Coalition has attached to its Application an extensive legal opinion supposedly confirming the Commission's jurisdiction to implement the proposed regime, that the regime does not raise free speech issues under the Charter, and that it complies with the Commission's common law duties of procedural fairness. CARL disagrees with this Opinion in key respects. First, it ignores or glosses over key aspects of the Supreme Court of Canada ("SCC") in Cogeco, the "value for signal" case decided in 2012.[7] In that decision, a proposal to impose a cost on retransmission of local signals was found to be in an untenable conflict with the *Copyright Act* for many reasons, including that it provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions.[8]

Secondly, Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions. The Opinion completely eliminates the detailed mechanisms to establish rights and remedies, limitations, exceptions and defenses found throughout the *Copyright Act* in favour of the simplistic, untested and vague notion of wholesale blocking without due process of entire sites that are "blatantly, overwhelmingly, or structurally engaged in piracy." It eliminates the role of superior courts – which include courts of the provinces and the Federal Court – in adjudicating infringement cases. This is guaranteed by s. 96 of the Constitution Act and has recently been confirmed by the SCC.[9]

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[7] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168,* [2012] 3 SCR 489, 2012 SCC 68 (CanLII), <http://canlii.ca/t/fv76k>

[8] We note the lengthy discussion of the majority in paras. 34-83 of the decision and we quote key excerpts as follows:

[36] The Copyright Act is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner's consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., Théberge v. Galerie d'Art du Petit Champlain inc., 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336, at paras. 11-12 and 30; Mattel, Inc. v. 3894207 Canada Inc., 2006 SCC 22 (CanLII), [2006] 1 S.C.R. 772, at para. 21; D. Vaver, Intellectual Property Law: Copyright, Patents, Trade-marks (2nd ed. 2011), at pp. 34 and 56.) ….

[9] [30] Section 96 therefore restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: MacMillan Bloedel, at para. 37; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 ("Provincial Judges Reference"), at para. 88. We note that this decision dated December 13, 2012 was delivered after the landmark "Pentalogy" decisions dated July 12,

Thirdly, we also disagree with Opinion's Charter analysis. The Bell Coalition proposal enables the *de facto* exercise of prior restraint without judicial process (other than theoretically after the fact on unspecified grounds) to be determined by an incorporated IRPA tribunal whose members are paid by the Bell consortium. This runs counter to the very concept of the "rule of law". Why should members of the Bell Coalition and potential applicants of IRPA not be required to go through the same processes and be subject to the same copyright laws as other copyright owners?

Conclusion:

It is worth recalling that previous attempts to halt or block new technologies have been ineffective, blocked by courts, and proven short sighted. These attempts have included the player piano, the VCR, iPod taxes, YouTube, etc.

CARL does not condone copyright infringement activities. However, there is no evidence that there is any piracy crisis in Canada, much less one that would suggest that Canada should consider such an extreme proposal as that of the Bell Coalition. We do support the balanced enforcement of intellectual property rights, net neutrality, fair dealing, and freedom of expression. Canada should not consider any regime that offends the rule of law, the principle of net neutrality, freedom of expression and flouts clear and well-established Supreme Court of Canada jurisprudence.

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2018, two of which confirmed and extended fair dealing rights for users that are completely ignored in the Bell proposal, not to mention the landmark SCC decision that dealt with users' rights in CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 SCR 339, 2004 SCC 13 (CanLII), <http://canlii.ca/t/1glp0>
[80] There is one final point to be made. Section 89 of the Copyright Act provides:
89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.The deliberate use of the words "this Act or any other Act of Parliament" rather than "this Act or any other enactment" means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body. "Act" and "enactment" are defined in s. 2 of the Interpretation Act, R.S.C. 1985, c. I-21, where
"Act" means an Act of Parliament; And "enactment" means an Act or regulation or any portion of an Act or regulation;
The definitions confirm that Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions.