

**Bens, Amanda: SPS**

**From:** Peets, Gerard: SPS  
**Sent:** Thursday, June 24, 2010 16:21  
**To:** Malota, Edward: SPS; Dynes, Nancy: SPS  
**Subject:** FW: Response to your question on statutory damages and new "enabling" of copyright provision

For our binder.

-----Original Message-----

From: drew.olsen@pch.gc.ca [mailto:drew.olsen@pch.gc.ca]  
 Sent: Thursday, June 24, 2010 3:05 PM  
 To: [REDACTED]@socan.ca  
 Cc: barbara.motzney@pch.gc.ca; Peets, Gerard: SPS  
 Subject: Response to your question on statutory damages and new "enabling" of copyright provision

I understand that, at the CCC meeting in Toronto this week, you asked my Director-General, Barbara Motzney, why in Bill C-32 would the election of statutory damages not be available to someone suing a person under the new enabling provision (new Subsection 27(2.3)). She has asked me to respond to your question.

The reason for this is that the type of acts targeted by the enabling provision would often be of a commercial nature (as evidenced by the nature of the service itself and the factors for the court's considerations listed under the new Subsection 27(2.4)). As a result, the scale of statutory damages for infringement for commercial purposes would apply in many cases. This scale, as defined under the new Subsection 38.1(1) is applied on a "per work infringed" basis.

However, in establishing copyright infringement under Subsection 27(2.3), there is no requirement to prove specific infringements, but rather only requires that some infringement(s) occurred as a result of the act of enabling copyright infringement. As such, there is no specific number of infringed works that needs to be established. Consequently, it would create serious difficulties for the application of the enabling provision if a remedy based on a "per work infringed" basis was available.

It should be remembered that actual damages, accounting of profits and injunctions are available for a violation of the new enabling provision. Furthermore, where the actions of a person are particularly reprehensible, punitive damages may also be awarded by the courts.

Regards,

Drew Olsen  
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