

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Special 301 Watch List in 2018.¹

Executive Summary: While the legitimate digital marketplace for copyright materials continues to grow in Canada, the market remains hampered by widespread infringement, including stream-ripping services that undermine legitimate music streaming and download offerings; link sites and other online sources for unauthorized movies and TV shows; and illicit streaming devices and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and Video on Demand. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet players allow their services to be abused by pirates, and inter-industry cooperation remains suboptimal. Government at all levels accords insufficient resources and strategic priority to enforcement of copyright laws, and significant market access barriers impede U.S. film and TV producers and distributors. The full parliamentary review of Canada's Copyright Act, mandated by the 2012 Copyright Modernization Act and launched at the end of 2017, should be a vehicle for addressing many of these problems. The review provides a critical opportunity to assess both the strengths and shortcomings of Canada's current copyright regime on a host of issues, and to adopt needed measures to improve both the law and its enforcement. Among the most urgent problems to be addressed is the continued decimation of the educational publishing market and the climate of copyright impunity still permeating the country's educational institutions. In addition, the law should provide more effective incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement, including through effective takedown procedures, and the internationally unprecedented copyright exception for user-generated content should be repealed. Statutory discrimination against U.S. recorded music producers, and the unjustified radio royalty exemption for broadcast of recorded music, require correction. Canada's Copyright Board needs immediate reform to incorporate best practices in other developed markets, especially in cases where negotiated settlements have already been achieved. Making copyright enforcement a priority for police, prosecutors, and courts, and completing the task of harmonizing duration of Canadian copyright protection with that of its major trading partners, are other major pieces of unfinished business. IIPA urges Canada to employ the statutory review to recalibrate the course set by the Copyright Modernization Act, and to respond to concerns left unaddressed in 2012, in order to better confront the challenges of today's digital networked marketplace, and asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2018.

PRIORITY ACTIONS REQUESTED IN 2018

The statutory review of the Copyright Act should take a comprehensive approach, including:

- Addressing the crisis in the educational publishing market, including by clarifying the fair dealing amendments in the Copyright Modernization Act;
- Making further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with international best practices.
- Identifying and implementing regulatory reforms and (where necessary) statutory amendments to make Copyright Board proceedings more efficient, predictable, and respectful of market solutions.

¹For more details on Canada's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Canada's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



- Ensuring that recorded music producers and performers are fully compensated for all forms of communication of their products to the public, including by elimination of the radio royalty exemption;
- Completing the process of bringing the duration of protection for copyright into conformance with evolving global norms.

In addition, Canada should be urged to:

- Prioritize enforcement against online piracy and the trafficking in illicit streaming devices/apps and other circumvention tools;
- Provide the Royal Canadian Mounted Police (RCMP), Crown prosecutors, and local law enforcement the resources and training required to implement this priority;'
- Make progress on easing long-standing market access barriers for U.S. movies and TV programming.

THE DIGITAL MARKETPLACE IN CANADA TODAY

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. The Canadian Internet Registration Authority (CIRA) reports that 90% of Canadians use the Internet, with 87% of Canadians having broadband Internet connections at home.² More than three-fifths of the population spends at least one hour a day watching TV or movies online.³ The growth of legitimate digital distribution of creative content remains robust. While the overall music market in Canada grew 12.8% from 2015 to 2016 (the latest year for which complete statistics are available), total revenues from online streaming of music burgeoned by over 150%, and its share of the total Canadian market more than doubled, to 34.7%.⁴ Similarly, the legitimate online video market is also growing in Canada, with studios and producers continuing to work with a multitude of partners and platforms. Currently, more than 50 licensed services offer movies, TV programming, or both, online to Canadians.⁵ Notably, nearly half of all Canadians report they subscribe to Netflix.⁶

However, evidence persists that the digital marketplace for copyright content in Canada is still underperforming, and that the pressure on legitimate services from illicit online sources is part of the reason.⁷ For instance, the uptake on legitimate subscription music services, while climbing to 39% of all Canadian music consumers in a 2017 survey, still lags well behind the levels in comparable countries surveyed.⁸ Part of the explanation lies in the growing popularity of “stream ripping” services, now the leading form of music piracy in Canada⁹. Stream ripping allows users of streaming services like YouTube¹⁰ to convert a stream into an unauthorized download that can be stored and replayed at will, with no royalty payment to right holders. By circumventing the technological measures employed by legitimate music streaming services to prevent copying and redistribution of the recordings streamed, stream-rippers undermine the legitimate markets both for streaming and for licensed music downloads, such as subscription services offering offline listening to music for a monthly fee. Dozens of websites, software programs and apps offer stream ripping services, and they find an eager marketplace in Canada, with 27%

²CIRA *Internet Factbook 2017*, available at <https://cira.ca/factbook/the-state-of-canadas-internet>.

³Id. at <https://cira.ca/factbook/Canadians-online-behaviour/music-movies-and-tv-online>.

⁴IFPI, *Global Music Report 2017*, p. 80, available at <http://www.ifpi.org/resources-and-reports.php#recording-industry-in-numbers.php>.

⁵www.wheretowatchincanada.com.

⁶CIRA *Internet Factbook 2017* at <https://cira.ca/factbook/Canadians-online-behaviour/music-movies-and-tv-online>.

⁷As CIRA notes, “Canadians are willing to tread on some legal grey areas to access the online content they want.” CIRA *Internet Factbook 2016*, available at <https://cira.ca/factbook/domain-industry-data-and-canadian-internet-trends/internet-use-canada>.

⁸IFPI, *Connecting with Music: Music Consumer Insight Report 2017*, September 2017, p. 7, available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf> (“Insight Report 2017”).

⁹Stream ripping provided the special “Issue Focus” for the 2016 USTR Notorious Markets report, which called it “an emerging trend in digital copyright infringement that is increasingly causing substantial economic harm to music creators and undermining legitimate services.” USTR, 2016 Out-of-Cycle Review of Notorious Markets (December 2016) (“2016 USTR NM”), at p. 5, available at <https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf>.

¹⁰Some 84% of Canadians who visited YouTube used the site to access music in 2017. See Insight Report 2017, *supra* n. 8., at p. 17.

of surveyed Canadians engaging in this form of piracy in 2017. Another 22% of Canadians used peer-to-peer (P2P) or cyberlocker sites to obtain unauthorized access to recorded music.¹¹

As noted in last year's IIPA Special 301 submission, in recent years Canada has made progress in rectifying its previous long-standing reputation as a safe haven for some of the most massive and flagrant Internet sites dedicated to the online theft of copyright material.¹² However, sites associated with Canada still play a leading role in facilitating such theft. Examples include the stream ripping site *peggo.tv*, the BitTorrent site *Monova.org*, and the cyberlockers *Zippyshare.com*¹³, *Vibeclouds.net* and *Openload.co*. While the true location of the hosting services for some of these sites is obscured through the use of reverse proxy services, all are registered by Canadian domain name registrars (*Peggo.tv*, *Openload.co*, and *Zippyshare.com* by Tucows, *Monova.org* and *Vibeclouds.net* by easyDNS Technologies), and all five sites employ Canadian proxy registration services (Contact Privacy, Inc. for the Tucows sites, MyPrivacy.net for the easyDNS sites). While these Canadian intermediaries have been notified many times about multiple customers who use their services to carry out massive online piracy, they have never provided any effective assistance to right holders.

Because so many of the sites dedicated to piracy, not only of music but of movies and TV programming, depend wholly or in great part on advertising to support their illegal activities, it is particularly concerning that Toronto-based WWWPromoter is the fastest-growing advertising network serving infringing sites. Among its clients are some of the most popular sites for Canadians seeking links to infringing audiovisual materials, such as *123movies.to* and *primewire.ag*. Such link sites have surpassed hosted sites and P2P download sites as the largest single category of websites dedicated to infringement of movies and TV programming, according to research commissioned by the motion picture industry. At a time when legitimate advertising networks are growing increasingly vigilant about abuse of their services by sites dedicated to copyright theft, it is discouraging to see a Canadian enterprise rushing to fill the void, or at best turn a blind eye.

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Carnegie Mellon University studies found that pre-release piracy of motion pictures decreases U.S. box office revenue by 19%, and that elimination of such theft during the window when films are available exclusively in theaters would increase box office take by 14-15%, or about US\$1.5 billion; there is no reason to think Canadian results would be significantly different.¹⁴ Even though P2P download sites accounted for a slightly decreased share of the Canadian online audiovisual piracy problem in 2016, an estimated 168 million movies and 207 million TV shows were illicitly downloaded by Canadians that year using the BitTorrent application alone, according to MovieLabs data. A growing concern is the presence of deceptively marketed illegal online streaming sites, which offer a Netflix-like interface that enables users to stream and download movies and TV programs with a single click.

Both online and offline, the legitimate market is challenged by trafficking in set-top boxes (STBs) sold pre-loaded with infringing applications that enable cord-cutting Canadians to obtain unauthorized access to high-quality digital streaming and video on demand (VOD) content. These illicit streaming devices are readily available in large fairs and expositions, and in kiosks in reputable shopping malls, at prices as low as C\$100 (US\$80). Of course these pre-loaded devices are also sold on dedicated Canadian-owned and -operated websites, and in well-known third-party online marketplaces; but their presence in legitimate retail spaces, where they are deceptively marketed with high quality promotional materials, sows even greater confusion among consumers. To make matters worse, Canadians appear to be increasingly involved in the coding and development of illegal add-ons that enable mass-

¹¹Music Canada, "The Value Gap: Its Origins and Impacts", at p. 23, available at <https://musiccanada.com/wp-content/uploads/2017/10/The-Value-Gap-Its-Origins-Impacts-and-a-Made-in-Canada-Approach.pdf>.

¹²See IIPA's 2017 Special 301 country survey on Canada, at pp. 94-95, available at <https://iipa.org/files/uploads/2017/12/2017SPECIAL301CANADA.pdf> ("IIPA 2017").

¹³This major cyberlocker service remains, after more than a decade of operation, one of the world's leading sources of illicit recorded music files available before authorized release.

¹⁴Information Systems Research, An Empirical Analysis of the Impact of Pre-Release Movie Piracy on Box Office Revenue, September 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782924; Carnegie Mellon University, The Dual Impact of Movie Piracy on Box-office Revenue: Cannibalization and Promotion, February 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

market set-top boxes to access streaming services without authorization, as well as in the hosting of online repositories that make the illegal add-ons available to the public. As of the end of 2016, nearly 9% of all households in North America had at least one media player device (such as a “Kodi box”), and in more than two-thirds of these households, the device was configured to access unlicensed audiovisual content.¹⁵ Although, as discussed below, legal actions against these abuses are beginning to bear fruit, the problem remains serious and widespread.

Other sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, and recent court decisions enforcing these statutes, as discussed below. The video game industry reports that sites operated and hosted in Canada, such as *R4cardmontreal.com*, *gamersection.ca*, and *r4dscanada.com*, continue to offer circumvention devices and game copiers for sale. Computer software that effects a “soft modification” of the security technology of game consoles, and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S., such as *Digitopz.com*, *Digitartz.com* and *Gamezway.com*, rely on Canadian ISPs such as Crocweb for hosting, thus evading enforcement action under U.S. law. This trend breathes new life into Canada’s problematic “safe haven” reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. For example, *3roms.com*, a direct download site for multiple game platforms, is registered and operated out of Chilliwack, British Columbia. Even those sites that have been terminated from payment processing services can generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content. A disturbing trend is the sale of counterfeits or infringing videogame products sold via ecommerce sites that are managed through Canadian e-commerce service providers like Shopify.com or Browze.com. In addition, offerings for installation services (free games and hacking services) through online marketplaces such as kijiji.com have been on the rise in 2017.

KEY TOPICS FOR THE COPYRIGHT REVIEW

In December, 2017, Canada’s House of Commons launched a comprehensive review of the country’s Copyright Act. This process has its roots in Canada’s Copyright Modernization Act, adopted in 2012, and fully brought into force in January 2015. Section 92 of the Copyright Act mandated that a parliamentary review of Canadian copyright law begin in 2017. The mandated parliamentary review provides an invaluable opportunity for Canada to assess whether its laws have kept pace with rapid changes in technology and markets, and to upgrade and improve them where they fall short of being fit for purpose for today’s digital environment. IIPA urges Canada to seize this opportunity and to review comprehensively, not only the significant changes made in the Copyright Modernization Act, but the legislative and regulatory environment as a whole, including issues that went unaddressed in the 2012 amendment process. We offer the following evaluations of the strengths and weaknesses of Canada’s current copyright law and enforcement regime, and urge the U.S. Government to encourage Canadian officials to take these issues fully into account in carrying out the copyright review. We encourage the Canadian Government to ensure that this review is carried out in a timely manner so that substantive reform is effectively achieved.

1. Strengths of the Canadian Regime—Recent Positive Developments

Several recent decisions from Canadian courts reflect positive trends that the copyright review should affirm and seek to build upon. Some directly involve provisions of the Copyright Modernization Act.

¹⁵See Sandvine Intelligent Broadband Networks, Spotlight: Subscription Television Piracy (2017), at p. 2, available at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2017/global-internet-phenomena-spotlight-subscription-television-piracy.pdf> (6.5% of North American households accessing known subscription television piracy services).

A. New legal tools against TPMs circumvention

In March 2017, Canada's Federal Court issued its first substantive decision on the provisions of the Modernization Act that codified (in Section 41.1 of the Copyright Act) meaningful prohibitions against trafficking in tools and service to circumvent technological protection measures (TPMs) used to control access to copyright works. In *Nintendo v. King*¹⁶, the court found an Ontario-based provider of game copiers, mod chips and modding services (both online and through a retail location) liable for trafficking in circumvention devices and services (as well as the act of circumvention) in violation of Section 41.1, and made important interpretations of several provisions of the new law. Notably, the court gave robust effect to the remedial provisions of the statute, deciding that statutory damages for the violation should be calculated on a per-work basis, and imposing the maximum C\$20,000 (US\$15,972) damages for each of the 585 Nintendo videogames protected by the circumvented TPMs. It also imposed C\$1 million (US\$798,665) in punitive damages, based on the violator's deliberate and recidivist sale of circumvention devices. IIPA hopes that this strong precedent will be followed in future cases, and urges that any efforts to weaken existing TPMs provisions in the law be firmly resisted.

B. Injunctions against retailers of illicit streaming devices

Also in March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of "plug and play" set-top boxes preloaded with applications that allow consumers to access TV programs and movies without authorization or subscription.¹⁷ The appellate court specifically affirmed the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue to sell the pre-loaded boxes. While this decision, and orders subsequently issued in cases against repositories offering the public illegal add-ons enabling set-top boxes to access streaming video without authorization, indicate that effective remedies against such illicit streaming devices are available under current law, the copyright review should consider whether further enhancements are desirable to disrupt this growing illicit marketplace.

C. De-indexation of sites dedicated to intellectual property infringement

The landmark June 2017 decision of the Supreme Court of Canada in *Google v. Equustek Inc.*¹⁸ affirmed that Canadian court can issue global de-indexing orders against search engines to stem illegal activities on the Internet. The injunction required Google to de-index from search results (both in Canada and worldwide) the websites infringing Equustek's trade secrets. The court's conclusions—that "the only way to ensure that the injunction attained its objective was to have it apply where Google operates—globally" and that the search engine was "the determinative player in allowing the harm to occur"—set a favorable precedent for using Canadian courts to combat sites dedicated to copyright infringement as well. Google subsequently applied to the provincial court to vary the decision based on a U.S. court ruling it obtained, but as it stands, the injunction sets a positive precedent.

D. The "enablement" prohibition

The Copyright Modernization Act provision (Section 27(2.3)) establishing civil liability for providing online services primarily for the purpose of enabling acts of copyright infringement was an important step forward. It continues to provide a useful tool for copyright industry efforts to shut down Canadian-connected sites dedicate to piracy, and to help purge the Canadian online environment of outlaw services that undermine legitimate digital markets for copyright materials worldwide. But, as will be discussed below, its scope is limited, and it falls well short of providing the cornerstone for an effective legal regime to confront the challenge of digital copyright theft.

¹⁶2017 FC 246, available at <https://www.ippractice.ca/files/2017FC246.pdf>.

¹⁷Wesley dba MTLFreeTV.com v. Bell Canada, 2017 FCA 55, affirming Bell Canada v. 1326030 Ontario Inc dba ITVBox.net, 2016 FC 612.

¹⁸2017 SCC 34.

2. How Canada's Legal Regime Falls Short

Experience in the Canadian market reveals significant deficiencies in its overall copyright regime, and unintended adverse consequences from the Copyright Modernization Act, whose correction should be the main focus of the copyright review.

A. The Educational Publishing Crisis, and Other Fallout of New/Expanded Copyright Exceptions

Although much of the public attention to Canada's copyright modernization project was focused on issues of response to online piracy in particular, in fact the bulk of the legislation consisted of a score of new or significantly expanded exceptions to copyright protection. To date, none has had a more concrete and negative impact than the addition of the word "education" to the list of purposes (such as research and private study) that qualify for the fair dealing exception.

Previous IIPA submissions have extensively analyzed how the CMA amendments, in combination with extreme judicial interpretations of the pre-CMA fair dealing provisions, led to the destruction of the well-established collective licensing regime to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada.¹⁹ This system generated millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.-Canadian border. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled new investments in innovative means to deliver textual materials to students. A detailed study released by Pricewaterhouse Coopers (PwC) in June 2015 documents and quantifies the damage.²⁰ The annual loss from the demise of licensing to copy parts of works was estimated at C\$30 million (US\$22.9 million). And the damage spills over to the full textbook sales market as well, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.²¹ A significant share of those losses accrue to U.S. publishers, which have always been major participants in the Canadian educational market.

How did this happen? Lawyers for primary and secondary school systems across Canada, giving both the new fair dealing amendment and recent judicial decisions under the old law²² the "large and liberal" reading that the latter encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from the collecting society for authors and publishers (Access Copyright), including for uses such as copying of primary textbooks or of newspaper articles, course packs, digital copying (including digital storage and distribution through learning management systems), and copying for uses outside the classroom. The PwC study encapsulated the situation: in Canada, "[t]he education sector now takes the position that its members are effectively not required to pay for the copying of this content by virtue of the 'fair dealing' exception in the Copyright Act."²³ In other words, the Canadian educational establishment across Canada, at the primary, secondary and post-secondary levels, has concluded that the risk of liability for copyright infringement is now so minimal that it should take that risk by refusing to pay for any copying.²⁴

¹⁹See IIPA 2017 at 97-100;

²⁰Pricewaterhouse Coopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at http://accesscopyright.ca/media/94983/access_copyright_report.pdf (hereafter "PwC").

²¹PwC at 6, 7.

²²See especially *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>. Their impacts are detailed in IIPA's 2015 Special 301 submission on Canada, at pages 85-86.

²³PwC at 6.

²⁴Disturbingly, government actions at the provincial level are among the immediate causes of this national anti-copyright policy—specifically, the adoption by the Council of Ministers of Education, Canada, of the sweeping "fair dealing guidelines" that provide the legal justification for the cessation of licensing royalty payments. This council is an intergovernmental body consisting of ministers of education of all 13 Canadian provinces and territories. See https://cmec.ca/11/About_Us.html.

No doubt Canadian educational institutions are buttressed in their sense of impunity from copyright liability by another objectionable feature of the Copyright Modernization Act. The Act's extremely low C\$5,000 (US\$3,800) cap on statutory damages for all infringements carried out by any defendant for "non-commercial purposes"—an undefined phrase sure to be interpreted expansively by advocates for educational institutions—renders that remedy virtually insignificant in any copyright dispute with a school or university, further discouraging enforcement of rights.²⁵ Given the difficulty of detecting and documenting infringement, the high costs of litigation, and the low likelihood of recovering any meaningful and deterrent damages, a nationwide education sector policy of boldly and deliberately copying protected material without permission, license or compensation is hardly surprising.

A Canadian Federal Court decision issued on July 12, 2017 in the long-running case brought by Access Copyright against York University provided one glimmer of hope for ameliorating the disastrous impact on licensing in the educational publishing market. The main issue in the case was whether the university could copy materials within the limits of its "fair dealing guidelines" without regard to the tariff issued by Access Copyright for post-secondary institutions and approved by the Copyright Board. The court's answer was no, marking a clear rejection of the very expansive interpretation of the statutory exception favored by Canada's educational establishment. The court concluded the university's guidelines were "arbitrary and not soundly based in principle," and that Access Copyright had proved "that the market for the works (and physical copying thereof) has decreased because of the Guidelines, along with other factors."²⁶ York University has announced that it is appealing the decision.

The sense of impunity from copyright responsibility that Canada's educational establishment increasingly displays has decimated not only copyright owners' licensing revenue for copying, but has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. While this was well documented in the 2015 PwC study,²⁷ a fresh example emerged in 2017, when it was revealed that Concordia University's Center for Expanded Poetics was creating high-quality scans of the entire contents of current books by at least a dozen contemporary Canadian and U.S. poets and making them available for free download, rather than purchasing them for use by students.²⁸ While Canadian publishers and authors are most profoundly impacted, the fallout has reverberated in the U.S. creative sector as well, because U.S. authors and publishers have always accounted for a significant share of the textbooks, supplementary materials, and other texts used in the Canadian educational sector.

All expectations are for the problems to worsen unless promptly addressed. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing favored by Canadian courts, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Nor is the educational fair dealing amendment the only problematic Copyright Modernization Act provision for educational publishers. Besides the statutory damages cap discussed above, the broad exception in Section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done "for educational or training purposes" by an educational institution or its agent with respect to "a work or other subject matter that is available through the Internet," so long as the Internet site or the work is not protected by a technological protection measure (TPM).

Canada's government is well aware of the dire state of its educational publishing market. Canadian federal authorities, and its Parliament, should be encouraged, as a matter of urgency, to address this crisis, and to clarify the scope of the education fair dealing exception. The goal must be an appropriate balance under which educational

²⁶See Section 38.1(1)(b). Indeed, there is a pressing need to clarify and narrow the overall scope of the new statutory damage limitation, lest it act as a *de facto* compulsory license in which only the first copyright owner to sue can enjoy any meaningful monetary relief, no matter how widespread the defendant's "non-commercial" infringements may be.

²⁶Canadian Copyright Licensing Agency ("Access Canada") v. York University, 2017 FC 669.

²⁷See PwC at 9, 71; see also *This is What Falling Off a Cliff Looks Like*, available at <http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/>.

²⁸Kate Taylor, "Concordia University caught on the wrong side of copyright," <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.

publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials. Because the amendments made by the Copyright Modernization Act have played such a central role in creating the instability and sense of impunity from copyright responsibilities that now prevails in this sector in Canada, advancing this goal must be a top priority for the parliamentary review of copyright law mandated by Section 92 of the Copyright Act.

IIPA's frequently-stated concerns about the breadth of the new exceptions in Canadian law are by no means limited to those impacting the educational sector. In particular, new section 29.21, entitled "Non-commercial User-generated Content," allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary (including a commercial intermediary), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is "solely for non-commercial purposes" and does not have a "substantial adverse effect" on the market for the underlying work. The provision could substantially undermine the exclusive adaptation right that Canada is obligated under the WTO TRIPS Agreement (TRIPS) and the Berne Convention to provide, and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.²⁹ This provision compounds the problem (discussed below) of Canada's inadequate online liability regime, by giving incentives to digital services to make protected content available without licenses or on terms that do not reflect market value of the content. Its application threatens to lead to abandonment of established licensing arrangements, as has already occurred with regard to educational publishing. Although enactment of the exception was globally unprecedented, it has spawned imitators, such as the proposal for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of re-examining the Canadian user-generated content (UGC) exception in the context of the copyright review.

B. Incentives are Still Lacking for All Players to Cooperate Against Online Infringement

Beyond enactment of the "enablement" provision in Section 27(2.3), the challenge of online infringement is a much broader one, to which Canada's Copyright Act simply fails to respond adequately.³⁰ The statute still lacks important tools that world-class copyright laws now routinely provide for dealing with infringement that takes place in connection with more legitimate online services. And the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law provides inadequate incentives for cooperation by a range of other legitimate players, such as advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services. As described above, these services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision itself is unduly limited. For example, because it applies only to the provision of services, it is far less than an optimal tool for distributors of goods used primarily for infringing purposes. Thus, trafficking in set-top boxes pre-loaded with software applications designed to enable unauthorized access to online streaming services, or even in such software tools on their own, may fall outside the scope of the "enablement" prohibition. Section 27(2.3) also does not apply to those who provide offline services for the purpose of enabling copyright infringement. The enablement provision's significant gaps should be corrected to address all those in the value chain who enable acts of infringement.

Beyond enablement, the Canadian legal regime against online infringement relies heavily on the "notice and notice" system, which came into force in January 2015. There is no evidence that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so: it was intended merely as an educational tool aimed at end-users, but there is no evidence that it is contributing to any significant change in consumer behavior with regard to infringement. IIPA endorses the concept of ISPs sending notices to their users to

²⁹See, e.g., Article 13 of the WTO TRIPS Agreement.

³⁰The shortcomings of the legislation are detailed in past more extensive analyses of the Copyright Modernization Act by IIPA. See e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013 ("IIPA 2013"), available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CANADA.pdf>, at 127-131, and other sources referenced therein.

alert them that their accounts are being used for infringing purposes. However, simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because receiving the notices lacks any meaningful consequences under the Canadian system. Indeed, it creates little meaningful incentive for service providers to try to rid their service of illicit material, in effect providing free rein to build services on the back of such unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.³¹ ISPs have insufficient incentive to respect the legislated “notice and notice” system, because their failure to forward notices from right holders does not affect their exposure to copyright infringement liability.³²

More fundamentally, “notice and notice” was never even intended to address a different and very serious problem: hosting service providers who fail to disable access to infringing materials that they are hosting, even after it is brought to their attention. So long as known infringing content remains readily accessible online, the battle against online piracy is seriously compromised. Canada’s steadfast refusal to adopt any impactful legislative requirements as a condition for limiting the liability of hosting providers leaves it an outlier in the global environment, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights owners and stakeholders impacted by widespread infringement online. The law simply lacks effective incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement, including by implementing effective takedown procedures. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft completes the picture of a system that is still not up to the challenge.

Taken as a whole, these deficiencies in Canada’s online liability legal regime still tilt the field of competition against licensed services, and also continue to send the wrong signals to consumers about whether infringing activities are tolerated. In the upcoming Copyright Act review, Canada should look for ways to make its current regime more effective, and to provide meaningful incentives to stimulate full inter-industry cooperation against online piracy.

C. Discrimination and Duration

Other issues require attention as part of Canada’s statutory review.

i. Recorded Music Royalties Should be Extended to U.S. Repertoire

The Canadian music marketplace suffers from Canada’s decision, at the time it brought into force the provisions of the Modernization Act, to deny all protection to producers of U.S. sound recordings for any form of broadcasting in Canada. Canada also refuses any compensation for online simulcasting, webcasting, or other forms of communication to the public by telecommunication, of virtually all pre-1972 U.S. sound recordings (those first or simultaneously first published in the United States). Performers on all these sound recordings suffered similar denials. Canada’s unfair and discriminatory policy does not befit its status as our neighbor and major trading partner. IIPA highlights that U.S. law provides for full national treatment, regardless of whether the country of origin provides reciprocal rights. While we applaud Canada’s long-delayed entrance into the community of nations that accord sound recording producers the broad scope of exclusive rights needed to manage digital dissemination of their products, this discriminatory stance should be reconsidered, whether in the context of the Copyright Act review or otherwise.

ii. The Radio Royalty Exemption Should be Removed

An additional concern for the music industry is the cap on radio revenue in Canada. Canada’s nearly 700 commercial radio stations, regardless of their size, revenues, or profitability, pay only a nominal C\$100 (US\$76) statutory royalty for sound recording broadcasts on the first C\$1.25 million (US\$951,000) of annual advertising

³¹See IIPA 2017 at p. 96 for a summary of concerns.

³²See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

revenue.³³ Radio stations pay the Copyright Board-approved tariff only for revenues in excess of that limit. Even the Copyright Board concluded that there is no economic rationale for this provision, which it called a “thinly veiled subsidy” to “large, profitable broadcasters.”³⁴ No other Canadian businesses that publicly perform or communicate recorded music (such as satellite radio, restaurants or background music suppliers) benefit from such an exemption from paying royalties to sound recording producers or performers, and Canada is the only country in the world that grants such a subsidy to all its commercial radio stations. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of nearly C\$140 million (US\$111,649 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the “equitable” remuneration that Canada is obligated to provide by Article 15 of the WIPO Performances and Phonograms Treaty (WPPT).

iii. Term of Protection

A notable example of a needed modernization of Canadian copyright law that simply was not addressed by the 2012 amendments is the disparity in duration of copyright protection between Canada and its largest trading partner (the U.S.), and indeed with the vast majority of OECD economies. While Canada extended the term of protection for sound recordings in 2015, it should also join the growing international consensus by extending the term of protection for all works measured by the life of the author to life plus 70 years. Its willingness to do so in the context of the Trans-Pacific Partnership (TPP) Agreement is commendable; but the demise of that accord has not changed the merits of the argument for Canada to bring its law into line with this de facto global norm.

D. Copyright Board Needs Reform

Another factor contributing to continued underperformance in the digital music space arises from the inefficient and unpredictable tariff-setting process before the Copyright Board. Tariffs currently pending before the Board have, on average, been outstanding for 5.3 years since filing.³⁵ These extreme delays make economic forecasting nearly impossible for stakeholders (including users as well as right holders), and have become a barrier to some copyright industries doing business in Canada. Because of these delays, collective management organizations (CMOs) often have to apply tariffs retrospectively, which makes it more difficult both to collect and to distribute license fees. A large part of the problem may be the broad jurisdiction of the Board, which mandates that even tariffs which have been negotiated among the parties involved must undergo a protracted and detailed analysis.

Furthermore, the Board’s process is unpredictable and lacks any specific rate-setting criteria, other than an overarching requirement that royalty rates be “fair and equitable.” Unlike comparable tribunals in the U.S. and around the world, the Board is not required to apply, or even to consider, the willing buyer/willing seller principle as a benchmark for determining the commercial value of the rights in question. Instead, the Board’s assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable, but often wildly out of step with the evidence presented at hearings, and with corresponding decisions in comparable markets.

The “Tariff 8” proceeding regarding royalty rates for webcasting highlights both these challenges. The Board’s 2014 decision was rendered six years after the tariff (to cover the years 2009-2012) was proposed; and it set rates at a small fraction—one-tenth or less—of the rates negotiated in the marketplace or those applicable in neighboring markets. On June 28, 2017, the Federal Court of Appeal (FCA) upheld the Board’s decision, ruling that

³³See Section 68.1(1) of the Copyright Act.

³⁴Copyright Board, *Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007*, October 14, 2005, p. 32, 37-38.

³⁵A Canadian Senate Committee found that “on average, the Board may take between 3.5 and 7 years to make a final decision,” and concluded that “the Board is dated, dysfunctional, and in dire need of reform.” Report of the Standing Senate Committee on Banking, Trade and Commerce, “Copyright Board: A Rationale for Urgent Review” at pp. iii, 7; available at : https://sencanada.ca/content/sen/committee/421/BANC/Reports/FINALVERSIONCopyright_e.pdf

the Board is not obligated even to consider market rates in setting royalties.³⁶ The approved rates fall far short of establishing conditions for healthy growth of the legitimate marketplace in digital music delivery.

A few key reforms could address these issues. The tariff-setting process should be streamlined to focus on contested tariffs. Tariffs that are agreed upon and uncontested should not be reviewed by the Board; this would respect freedom of contract and free up the Board's resources, enabling it to act as an efficient tribunal of last resort in those cases in which negotiated agreements are not possible. Specific decision-making criteria for the Board should also be adopted, notably that the Board must certify tariffs that most clearly represent the rates that would have been voluntarily negotiated in the marketplace between a willing buyer and willing seller for the rights in issue, considering the best evidence available from such negotiations for those or similar rights. Fixed timelines for completing hearings and issuing decisions should also be adopted. Both reforms would reflect best practices among comparable rate-setting and dispute resolution entities in major developed markets, and should yield tariffs that more accurately reflect the economic value of the rights in trade.

It may be possible to address some of these issues relatively quickly through regulatory reforms pursuant to Section 66.91 of the Copyright Act, which gives the Governor in Council authority to give "policy directions to the Board and establish general criteria to be applied by the Board or to which the Board must have regard." For example, the Governor in Council could issue regulations establishing that tariffs must reflect the terms that a willing buyer and seller would have agreed to. These regulatory reforms should be promulgated as promptly as possible, followed by any improvements that require the more protracted and uncertain legislative process

COPYRIGHT ENFORCEMENT

The 2015 entry into force of Bill C-8 (the Combating Counterfeit Products Act) addressed many of the legal insufficiencies that hampered Canada's copyright and trademark enforcement regime over the previous decade or more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).³⁷ But Bill C-8 did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the Royal Canadian Mounted Police (RCMP), intellectual property crimes in general and copyright crimes in particular are neither a strategic nor an operational priority. Indeed, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not in a position to deal effectively with organized copyright piracy, and thus increasingly fail to pursue even well-documented referrals from industry. On the whole, because the Canadian law enforcement commitment to act against copyright piracy remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged.³⁸

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. Crown counsel are now declining training offered by right

³⁶Re:Sound v. Canadian Association of Broadcasters, 2017 FCA 138.

³⁷In practice, the impact of the legislation has been minimal. Its central feature, giving border agents *ex officio* power to intercept counterfeit and pirated goods at the border, has been invoked only 46 times in the first two years under the legislation, and in only 33 such cases were rights holders even contacted to assist in interdicting the infringing imports.

³⁸For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp298508f1/securep10/securep10-e.pdf>.

holders; since police are no longer referring files to the Department of Justice, there are no cases to prosecute. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.³⁹ The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism. And in too many cases, law enforcement action never materializes, even when notified of a sale of a physical product that threatens public safety (such as an illicit streaming device that fails to comply with electrical safety standards).

The continued deterioration of Canadian enforcement efforts comes at a singularly inopportune time, just as the nature of the criminal enterprise involved in physical goods piracy is becoming more sophisticated and complex. Instead of low volume production and sales of counterfeit optical discs, the threat, as noted above, increasingly involves widespread sale of illicit streaming devices, such as set top boxes pre-loaded with applications that enable significant infringement. The problem extends to the sale of devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention including through sites on Canadian e-commerce services. But since Canadian law enforcement authorities are almost completely unengaged in criminal enforcement against online piracy of any kind, their inability to deal with the sale of physical goods such as these illicit streaming devices is even more discouraging.⁴⁰

Thus it is more important than ever for the U.S. Government to press Canada to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy, including specialized training regarding illicit streaming devices and other products that enable circumvention of TPMs. Since the availability of pirated products (and of illicit streaming devices or other circumvention tools) will not be reduced without criminal prosecutions against traffickers and the imposition of deterrent sentences, particularly jail time, Crown Counsel must take on and fully prosecute more copyright infringement and TPMs circumvention cases, and should be provided with the training and other support needed. Right holders remain at the ready to assist and have extended offers to provide such training. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases.

MARKET ACCESS

Significant market access issues continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. These longstanding issues include:

- *Television Content Quotas*—The Canadian Radio-television and Telecommunications Commission (CRTC) imposes quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming.
- *CPE Quotas*—In May 2017 the CRTC ruled that large English-language private broadcaster groups have a standardized CPE obligation equal to 30% of the group's gross revenues from their conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. This standardization reduced the CPE quotas within some of the groups. In August 2017, in response to pressure from the Canadian production industry, the Federal Cabinet directed the CRTC to review this decision. The result of the review is anticipated in 2018. As their licenses are renewed, CPE obligations will be assigned to independent signals and to discretionary services that have over 200,000 subscribers. These quotas will be effective September 1, 2018 and will be based on historical levels of actual expenditure.

³⁹This is another long-standing deficiency. The Industry, Science and Technology Committee of the House of Commons opined as long ago as 2007 that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so. There is no evidence that this has been done.

⁴⁰As noted in text above, the affirmation of an interlocutory injunction against retailers of "plug-and-play" illicit streaming devices strikes a more positive note for enforcement through civil litigation.

- *Exhibition Quotas*—Private conventional broadcasters must exhibit not less than 50% Canadian programming from 6PM to midnight. The overall 55% exhibition quota was removed in 2017. Private English-language discretionary services (specialty and pay-TV), that are not part of a large private broadcasting group must exhibit not less than 35% Canadian programming overall.
- *Non-Canadian Signal and Service Restrictions*—Canadian broadcasting distribution undertakings (BDUs), such as cable and direct-to-home satellite, must offer more Canadian than non-Canadian services.

BDUs must offer an all-Canadian basic tier for not more than \$25 per month, but may also offer an alternative basic tier that includes one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) signals. All other U.S. signals and services must be offered on a discretionary basis. A second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.

Otherwise, except as permitted in a BDU’s license from the CRTC, non-Canadian signals and services may only be carried on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. A service may be removed from the Authorized Lists if it changes formats and thereby becomes competitive with a Canadian pay or specialty service; if it solicits advertising in Canada; or if it does not conduct its negotiations and enter into agreements with BDUs in a manner that is “consistent with the intent and spirit of the Wholesale Code”. A principal purpose of the Wholesale Code is to prohibit contractual terms that discourage or penalize the offering of services on a stand-alone basis.

- *Broadcasting Investment Limitations*—The Broadcasting Act provides that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” Pursuant to a 1997 Order in Council, all broadcasting licensees, which are both programming undertakings (conventional, pay and specialty television) and distribution undertakings (cable operators and satellite television distributors), must meet certain tests of Canadian ownership and control: (1) a licensee’s CEO must be Canadian; (2) at least 80% of a licensee’s Directors must be Canadian; and, (3) at least 80% of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the subsidiary must be beneficially owned and controlled by Canadians.
- *Québec Distribution Restrictions*—The Québec Cinema Act severely restricts the ability of film distributors not based in Quebec to do business directly in the province. Since 1986, MPAA member companies may apply for a Special License for any film produced in English that meets the less-restrictive requirements set out in an Agreement between the MPAA and the Québec Minister of Culture. The Agreement was revisited in 2015 and was extended for seven years.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Canada’s international agreements involving the U.S. that are most relevant to copyright obligations include the WTO TRIPS Agreement and the North American Free Trade Agreement (NAFTA).⁴¹ As noted above, some aspects of Canada’s current copyright regime may raise significant issues regarding compliance with these agreements (for example, whether the breadth of some of Canada’s copyright exceptions, as applied, comply with the well-established “three-step test”)⁴². But the broader problem is that the copyright law and enforcement norms in these agreements, both negotiated more than a quarter-century ago, are extremely outdated, and lack modern copyright protection and enforcement standards for the digital marketplace.

⁴¹IIPA commends Canada’s accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WPPT), which were enabled by bringing the Copyright Modernization Act into force.

⁴²See TRIPS Article 13.