

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Because, as described in this report, IIPA continues to have significant concerns in Canada, IIPA again recommends that Canada be placed on the Watch List in 2019.¹

Executive Summary: The legitimate digital marketplace for copyright materials continues to grow in Canada, but the market remains hampered by widespread infringement, including stream-ripping services that undermine legitimate music streaming and download offerings; infringing paid subscription Internet Protocol Television (IPTV) and Video-on-Demand (VOD) services; streaming sites and other online sources for unauthorized movies and TV shows; and Piracy 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 businesses allow their services to be abused by pirate operators, 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 ongoing full parliamentary review of Canada's Copyright Act, mandated by the 2012 Copyright Modernization Act (CMA), should be a vehicle for addressing many of these problems. The review presents 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 state of the educational publishing market, which continues to decline as a result of the overbroad interpretation of the education as fair dealing exception embraced by the country's educational institutions. In addition, Canada should improve its law to combat growing online piracy by making available effective injunctive relief to stop infringement by flagrantly infringing websites, and providing more effective incentives for legitimate Internet intermediaries to cooperate with rights holders, including by limiting the scope of the safe harbor provisions to apply only to passive and neutral intermediaries that take effective action against infringing content. Furthermore, 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. 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 welcomes recent reforms to Canada's Copyright Board and is hopeful that the reforms will bring Canada's tariff-setting process into closer alignment with international norms in other developed markets, especially in cases where negotiated settlements have already been achieved. The recently-concluded U.S.-Mexico-Canada Agreement (USMCA) could bring some positive benefits, particularly regarding Canada's commitments to bring its term of protection into alignment with evolving global norms and to provide full national treatment for U.S. sound recordings. In other respects, however, the USMCA appears to have been a missed opportunity to address many of Canada's most pressing concerns, including its deficient online liability legal regime. Moreover, the USMCA's "cultural carve-out" potentially threatens commitments that would otherwise help to open Canada's marketplace for the U.S. copyright industries. IIPA urges Canada to employ the statutory review to recalibrate the course set by the CMA, and to respond to concerns left unaddressed in 2012, in order to better confront the challenges of today's digital networked

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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



marketplace, and asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2019.

PRIORITY ACTIONS REQUESTED IN 2019

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 CMA;
- 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, including by narrowing the scope of safe harbors to apply only to passive and neutral intermediaries that take effective action against infringing content, and by making available effective injunctive relief to stop infringement by flagrantly infringing websites;
- Ensuring that recorded music producers and performers are fully compensated for all forms of radio and TV broadcasting and communication to the public of their recordings, including by elimination of the radio royalty exemption; and
- In accordance with Canada's USMCA commitments, 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 Piracy 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; and
- In accordance with Canada's USMCA commitments, 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 nearly 90% of Canadians use the Internet, with 86% of Canadians having broadband Internet connections at home.² Two-thirds 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 recorded music market in Canada grew 14.4% from 2016 to 2017 (the latest year for which complete statistics are available), total revenues from online streaming of music burgeoned by over 50%, and its share of the total Canadian market increased over 30%, to 45.7% of the market.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. Canadians subscribe to a wide variety of services offering movies, TV programming, or both, online.⁵ Notably, more than half of all Canadians report they subscribe to Netflix.⁶

²CIRA *Internet Factbook 2018*, available at <https://cira.ca/factbook/the-state-of-canadas-internet>.

³Id.

⁴IFPI, *Global Music Report 2018*, p. 87, available at <http://www.ifpi.org/resources-and-reports.php#/recording-industry-in-numbers.php>.

⁵CIRA *Internet Factbook 2018*, supra 2.

⁶Id.

Evidence persists, however, 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 “Stream-ripping” services, now the leading form of music piracy in Canada, are a major contributor to this problem.⁸ Stream-ripping allows users of streaming services like YouTube to convert a stream into an unauthorized download that can be stored and replayed at will, with no royalty payment to rights holders.⁹ By circumventing the technological measures employed by most legitimate music streaming services to prevent copying and redistribution of the recordings streamed, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads, such as legitimate 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% 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.¹⁰

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.¹¹ 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*,¹² *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, and *Monova.org* and *Vibeclouds.net* by easyDNS Technologies), and all five sites employ Canadian proxy registration services (Contact Privacy, Inc. for the Tucows sites, and 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 rights holders.

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Frontier Economics estimated the commercial value of digital piracy of film in 2015 was US\$160 billion worldwide, and found that the displacement of legitimate economic activity by counterfeiting and piracy has a negative effect on economic growth.¹³ Research by Carnegie Mellon University further found that if pre-release piracy could be eliminated from the theatrical window, U.S. and Canada box office revenue would increase by 14-15% (equivalent to approximately US\$1.5 billion per year).¹⁴ Even though P2P download sites only accounted for 30% of visits to sites used for online piracy in Canada in 2017 (down from 44% in 2014), an estimated 314 million movies and TV shows were still illicitly downloaded using BitTorrent sites in Canada in 2017, according to data from SimilarWeb and MovieLabs. As of the second half of 2017, 70% of visits to sites used for online piracy in Canada are web-based sites (up from 56% in 2014), including host sites (24% of visits) and link sites (46% of visits). Another 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. According to the Government of Canada’s own study published in May 2018, more than one-quarter (26%) of content consumers reported having “consumed”

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>.

⁸Stream-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>.

⁹The music industry reports that some 87% of Canadians who visited YouTube used the site to access music in 2018.

¹⁰Music 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>.

¹¹See IIPA’s 2018 Special 301 country survey on Canada, at <https://iipa.org/files/uploads/2018/02/2018SPEC301CANADA.pdf> (“IIPA 2018”).

¹²This 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.

¹³Frontier Economics, *The Economic Impacts of Counterfeiting and Piracy* (February 2017), at pp. 23-58, http://www.inta.org/Communications/Documents/2017_Frontier_Report.pdf.

¹⁴Carnegie 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.

(downloaded or streamed or accessed) at least one illegal file online in the past three-months, and movies (36%) and TV shows (34%) were among the forms of content most likely to be illegally “consumed.”¹⁵

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 VOD content. These Piracy 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-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. These Piracy Devices and illegal add-ons enable users to access unauthorized IPTV and VOD services. Canada has seen an influx of sellers and resellers of infringing paid subscription IPTV and VOD services. These services, which have become widely marketed and widely available, steal legitimate signals through circumvention of technological protection measures (TPMs) and other means to provide their users with unauthorized streaming of motion picture and television content, as well as live television programming.¹⁶ Canadians are also increasingly involved in the illegal theft of telecommunication signals that ultimately feed and provide content to these IPTV and VOD services. Although, as discussed below, legal actions against these abuses are beginning to bear fruit, these problems remain 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 *SwitchHack.com*, *Cavideogames.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* and *Digimartz.com* rely on Canadian ISPs such as Crocweb for hosting, thus evading enforcement action under U.S. law. In 2018, multiple notices to Crocweb regarding these websites, which were violating the ISP’s own policies and terms of service, were ignored. 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. 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 video game products sold via e-commerce sites that are managed through Canadian e-commerce service providers like *Shopify.com* or *Browse.com*. Video game companies see many local sites registered and created with Shopify but, through cooperation with Shopify, have been able to remove infringing pages. In addition, offerings for installation services (free games and hacking services) through online marketplaces such as *kijiji.com* continue to rise.

¹⁵See Government of Canada, *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada, Final Report* (March 2018), p. 27, [https://www.ic.gc.ca/eic/site/112.nsf/vwapi/07648-eng.pdf/\\$file/07648-eng.pdf](https://www.ic.gc.ca/eic/site/112.nsf/vwapi/07648-eng.pdf/$file/07648-eng.pdf).

¹⁶According to Sandvine, emergent forms of piracy such as the “Fully-Loaded” Kodi ecosystem and subscription television piracy represent a real threat to the revenue streams of network operators: 10% of Canadian households have at least one set-top box, computer, smartphone or tablet running the Kodi software, a higher proportion than in the U.S. (6%); 70.9% of these households in Canada with Kodi devices have unofficial add-ons configured to access unlicensed content; and 8.3% of Canadian households are using known subscription TV piracy services. See Sandvine, *Video Piracy in Canada* (2017), <https://www.sandvine.com/video-piracy-in-canada>.

KEY TOPICS FOR THE COPYRIGHT REVIEW

In December 2017, Canada's Parliament launched the comprehensive review of the CMA.¹⁷ Hearings before the Parliament's Standing Committee on Industry, Science and Technology were held from April to December 2018. The review is not expected to conclude until after the 2019 federal election. The mandated parliamentary review provides an invaluable opportunity for Canada to assess whether the CMA has kept pace with rapid changes in technology and markets, and to upgrade, improve, or correct the Copyright Act where it falls short of being fit for purpose for today's digital environment, including issues that went unaddressed in the 2012 amendment process and commitments Canada made in the USMCA. 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 Government of Canada 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 CMA. In addition, IIPA applauds recent reforms of the Copyright Board, which should bring Canada into closer alignment with comparable developed markets regarding its tariff-setting process.

A. Legal Tools Against TPMs Circumvention

As previously reported, in March 2017, Canada's Federal Court issued its first substantive decision on the provisions of the CMA that codified (in Section 41.1 of the Copyright Act) meaningful prohibitions against trafficking in tools and services to circumvent TPMs used to control access to copyright works. In *Nintendo v. King*¹⁸, 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 remains hopeful that this strong precedent will be followed in future cases, and, particularly in light of Canada's commitment to strong TPMs protections in the USMCA, urges that any efforts to weaken existing TPMs provisions in the law be firmly resisted.

B. Injunctions Against Websites Hosting Add-ons for Set-top Boxes and Against Set-top Box Retailers

In February 2018, the Federal Court of Appeal upheld an interim injunction, as well as a related order, authorizing the shutdown and seizure of piracy websites that made available illegal add-ons enabling set-top boxes to access streaming video without authorization.¹⁹ The Court also granted an interlocutory injunction until the trial against the owner and operator of the websites. The Court noted that the add-ons were "clearly designed to facilitate access to infringing material" and that the exception to infringement "where one merely serves as a 'conduit'" should not apply.

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

¹⁷This process has its roots in Canada's Copyright Modernization Act (CMA), 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.

¹⁸2017 FC 246, available at <https://www.ippractice.ca/files/2017FC246.pdf>.

¹⁹*Bell Canada v. Lackman*, 2018 FCA 42.

without authorization or subscription.²⁰ 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 these decisions indicate that effective remedies against these Piracy Devices and their enabling apps are available under current law, the copyright review should consider whether further enhancements are desirable to disrupt this growing illicit marketplace, especially in light of the alarming growth of infringing IPTV and VOD services.

C. De-indexation of Sites Dedicated to Intellectual Property Infringement

The landmark June 2017 decision of the Supreme Court of Canada (SCC) in *Google v. Equustek Inc.*²¹ affirmed that Canadian courts 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 SCC'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's attempt to vary the SCC's decision based on a U.S. court ruling it obtained was rejected in 2018 by a lower court, which concluded that “there is no suggestion that any U.S. law prohibits Google from de-indexing.”²²

D. The “Enablement” Prohibition

The CMA 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 dedicated 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.

E. Copyright Board Reform

In a positive development, Bill C-86²³ includes amendments to overhaul the legislative framework governing tariff-setting proceedings before the Copyright Board, which should improve the timeliness, clarity, and efficacy of the proceedings. The amendments substantially revise the timelines for proposing and objecting to the tariffs, and allow tariffs to be filed earlier and remain effective longer. This should help to avoid the extreme delays that currently make economic forecasting nearly impossible for stakeholders (including users as well as rights holders) and have made it very difficult for Collective Management Organizations (CMOs) to collect and distribute license fees by forcing them to apply tariffs retrospectively. The amendments will also streamline procedures and formalize case management to allow the Board to operate more efficiently, and to focus its resources on contested tariffs in cases in which negotiated agreements are not possible. IIPA is hopeful that forthcoming regulations will specify time frames for stages of the Board proceedings, such as delineating when the Board must issue a decision.

Importantly, the amendments will introduce statutory rate-setting criteria that requires the Board to consider, among other things, the willing buyer/willing seller principle in determining the royalty rates. While the proposed amendments permit the Board to consider other factors, including “any other criterion that the Board considers appropriate,” if implemented properly, the proposed criteria should be a welcome improvement over the current system. Currently, the Board's assertion of unlimited discretion to set tariff rates leads to results that are not only unpredictable,

²⁰Wesley dba MTLFreeTV.com v. Bell Canada, 2017 FCA 55, affirming Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net, 2016 FC 612.

²¹2017 SCC 34.

²²2018 BCSC 610.

²³Bill C-86 included amendments to the Copyright Act regarding the Copyright Board of Canada and Canada's “notice and notice” system for online infringement. The bill was introduced in the House of Commons in October 2018, received Royal Assent in December 2018, and will enter into force in April 2019.

but often wildly out of step with the evidence presented at hearings, including rates agreed to in freely negotiated agreements and in comparable markets.

The amendments broaden enforcement prohibitions to cover users who have offered to pay proposed tariffs in addition to (under current law) users who have paid or offered to pay tariffs that have been approved. It is critical that, in implementation, this broadened enforcement prohibition does not delay or undermine the ability of CMOs to collect royalties from active users.

IIPA applauds Canada's commitment to reforming its tariff-setting process, and hopes that the amendments will be implemented to bring Canada's system into closer alignment with comparable rate-setting and dispute resolution entities in major developed markets by improving timeliness, ensuring greater predictability, and yielding tariffs that more accurately reflect the economic value of the rights.

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 adoption of the CMA. Correcting these issues should be the primary focus of the copyright review.

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

The bulk of the 2012 CMA consisted of a number of new or significantly expanded exceptions to copyright protection. 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 broad judicial interpretations of the pre-CMA fair dealing provisions, led to the dismantling 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.²⁴ 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 and facilitate access to textual materials. A detailed study released by PricewaterhouseCoopers (PwC) in June 2015 documents and quantifies the damage stemming from severe reductions in licensing royalties as educational institutions across English-speaking Canada stopped paying remuneration for their use of copyrighted materials.²⁵ The PwC study summarized the situation in Canada as follows: "[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."²⁶ At the time, the PwC study estimated the annual loss from the demise of revenue from licensing to copy parts of works at C\$30 million (US\$22.9 million). In its 2017 Annual Report, Access Copyright reported that the income it distributed to authors and publishers had declined "a full 46% from 2016."²⁷ In addition to declines in licensing revenue, the educational publishing industry also saw significant declines in full textbook sales, 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.²⁸

USTR's 2018 Special 301 Report noted the U.S. Government's continuing concerns with "the ambiguous education-related exception to copyright that has significantly damaged the market for educational publishers and authors."²⁹ Unfortunately, there has so far been little progress in rectifying the current situation in the ongoing CMA

²⁴See IIPA 2017 at 97-100;

²⁵PricewaterhouseCoopers, *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").

²⁶ PwC at 6.

²⁷ Access Copyright Annual Report 2017 at 7, https://www.accesscopyright.ca/media/1289/access_2017ar.pdf.

²⁸PwC at 6, 7.

²⁹See USTR, 2018 Special 301 Report at 60, <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>.

review. The July 12, 2017 decision in the long-running case brought by Access Copyright against York University provided a 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.”³⁰ 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 the 2015 PwC study provided examples of potential revenue loss,³¹ 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.³² Although Canadian publishers and authors are the most profoundly impacted, the fallout has reverberated in the U.S. creative sector, 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.

Until the legal framework is clarified, the crisis in the educational publishing sector will worsen. 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 CMA provision for educational publishers. 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 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 to address this crisis expeditiously. Thus far, Canada has not acted with the necessary urgency to clarify the scope of the education fair dealing exception. The goal must be an appropriate balance under which educational 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 CMA 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 should be a top priority for the parliamentary review of copyright law mandated by Section 92 of the Copyright Act.

IIPA’s oft-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, 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 to provide under the WTO TRIPS

³⁰Canadian Copyright Licensing Agency (“Access Canada”) v. York University, 2017 FC 669.

³¹See 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/>.

³²Kate 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/>.

Agreement (TRIPS) and the Berne Convention, and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.³³ 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 would-be 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 Lacking for Necessary Players to Cooperate Against Online Infringement

Despite the narrow "enablement" provision in Section 27(2.3), Canada's Copyright Act fails to respond adequately to the broader challenge of online infringement.³⁴ The statute lacks important tools that many copyright legal regimes now routinely provide for dealing with infringement that takes place in connection with legitimate online services; and the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law lacks adequate incentives for cooperation by a range of essential 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 a far less 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 trafficking in such software tools, may fall outside the scope of the "enablement" provision. 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 actors 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 infringing consumer behavior. 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 unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.³⁵ ISPs have insufficient incentive to respect the legislated "notice and notice" system, because their failure to forward notices from rights holders does not affect their exposure to copyright infringement liability.³⁶

Fundamentally, the "notice and notice" regime was never even intended to address a different and very serious problem: hosting service providers that 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

³³See, e.g., Article 13 of the WTO TRIPS Agreement. In the U.S.-Mexico-Canada Agreement (USMCA), Canada reinforced its commitment to confine copyright exceptions and limitations to the three-step test. See USMCA Article 20.65.

³⁴The shortcomings of the legislation are detailed in past more extensive analyses of the CMA 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.

³⁵See IIPA 2017 at p. 96 for a summary of concerns.

³⁶See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

owners and stakeholders impacted by widespread infringement online. The law simply lacks effective incentives for legitimate Internet intermediaries to cooperate with rights holders to combat online infringement. For example, the law's conditioning of liability for hosting infringing material on obtaining a judgment against an end user³⁷ is unworkable in practice, particularly regarding valuable, time-sensitive material such as pre-releases, and creates a disincentive for hosting providers to cooperate or take any effective action in the case of material they know or ought to know is infringing. Canada should revise its law to introduce incentives for intermediary cooperation, including by limiting the scope of the safe harbor provisions to apply only to passive and neutral intermediaries that take effective action against infringing content. It is unfortunate that the USMCA exempted Canada's flawed system and will not require Canada, at an absolute minimum, to require takedown of infringing content in response to a proper notice (or upon the service having knowledge or awareness of the infringement).

The amendments in Bill C-86 are another missed opportunity. While they further clarify the content to be included in notices of claimed infringement issued to ISPs, the amendments fail to include any meaningful incentives for intermediaries to cooperate with rights holders. 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 regime significantly disadvantage licensed services, and continue to send the wrong signals to consumers about whether infringing activities are tolerated. In the current copyright law review, Canada should look for ways to make its current regime more effective, and to provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

C. Injunctive Relief Needed Against Online Infringement

Against the backdrop of Canada's inadequate legal regime for online enforcement, in 2018, FairPlay Canada, a coalition of communications and media companies, creative and production organizations, and unions, filed an application with the Canadian Radio-television and Telecommunications Commission (CRTC) to create an independent agency to administer a website-blocking system to address online piracy. A growing list of countries around the world have taken such effective action to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. This is necessary because of the failure of the host country for services based there to take effective action against its own "homegrown" notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed back against this "offshoring" of enforcement responsibility, by developing means and processes for blocking access to these foreign pirate sites from within their borders. In October, the CRTC denied FairPlay Canada's application without considering the merits of the proposal, ruling that the CRTC does not have jurisdiction under Canada's Telecommunications Act. While CRTC acknowledged the harm caused by piracy, it held that copyright enforcement falls solely within the statutory scheme of the Copyright Act. As part of its Copyright Act review, Canada should look at incorporating tools to effectively address with the problem of flagrantly infringing online marketplaces that are hosted outside of Canada, including providing effective injunctive relief to disable access to such infringing content.

D. 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 denial of protection to producers of U.S. sound recordings for communication of their recordings by commercial radio broadcasters. 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).

³⁷See Section 31.1 of the Copyright Act.

Performers on all these sound recordings suffer similar denials. This discrimination applies only to sound recordings; musical works are fully protected.

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, and Canada committed in the USMCA to provide full national treatment regarding protection of intellectual property. Moreover, any pretext for discrimination against pre-1972 U.S. sound recordings has been eliminated by the enactment of the 2018 Music Modernization Act (MMA), which ensures full compensation for uses of these recordings in the United States. 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, Canada's discriminatory practices should end.

ii. The Radio Royalty Exemption Should be Removed

Another key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada. Each of Canada's nearly 700 commercial radio stations, regardless of their size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on their first C\$1.25 million (US\$951,000) of annual advertising revenue.³⁸ Other than a nominal C\$100 (US\$176) payment, radio stations pay the Copyright Board-approved tariff only for revenues in excess of the C\$1.25 million threshold. 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."³⁹ As with the discrimination against U.S. repertoire detailed above, this royalty exemption applies only to sound recordings; musical works are fully protected. Furthermore, this exemption discriminates against other Canadian businesses that publicly perform or communicate recorded music (such as satellite radio, restaurants or background music suppliers), none of which is subject to such an exemption from paying royalties to sound recording producers and performers. Canada is the only country in the world that grants such a subsidy to 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) and that Canada committed to provide under the USMCA.⁴⁰ The C\$1.25 million commercial radio royalty exemption should be removed, whether as part of the ongoing copyright law review, or otherwise.

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, 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. It is commendable that Canada made this commitment in the USMCA, as well as committing to extend its term of protection for sound recordings an extra five years to 75 years. Notwithstanding uncertainty surrounding ratification of the USMCA and the two-year grace period for Canada to meet this commitment, Canada should not delay bringing its law into line with this de facto global norm.

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

³⁸See Section 68.1(1) of the Copyright Act.

³⁹Copyright Board, Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007, October 14, 2005, p. 32, 37-38.

⁴⁰See USMCA Article 20.62.

more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).⁴¹ 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. Recently, local law enforcement has engaged with rights holders regarding a few illegal subscription IPTV cases that involved the more traditional or real-world criminal act of signal theft. More resources are needed to address this growing problem. 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.⁴²

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 rights 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.⁴³ 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 law enforcement is notified of a sale of a physical product that threatens public safety (such as a Piracy 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 Piracy 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 Piracy Devices is even more discouraging.⁴⁴

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 Piracy Devices and other products that enable circumvention of TPMs. Since the availability of pirated products (and of Piracy

⁴¹In 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 72 times in the first two years under the legislation, and in only 59 such cases were rights holders even contacted to assist in interdicting the infringing imports. IIPA is encouraged, however, that Canada has committed in the USMCA to provide *ex officio* authority for its customs authorities, including regarding goods in transit. See USMCA Article 20.84(5).

⁴²For 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://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/securp10/securp10-e.pdf>.

⁴³This 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.

⁴⁴As noted in text above, the affirmance of an interlocutory injunction against retailers of “plug-and-play” Piracy Devices strikes a more positive note for enforcement through civil litigation.

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. Rights 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. Ratification and then implementation of the USMCA could have a positive impact on the following issues, as long as Canada does not rely on the exception to its obligations regarding the “cultural industries” under Article 32.6.⁴⁵ These longstanding issues include:

- *Television Content Quotas*—The 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*—Large English-language private broadcaster groups have a standardized CPE obligation equal to 30% of each group’s gross revenues from its conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. As their licenses are being renewed, CPE obligations are being assigned to independent signals and to discretionary services that have over 200,000 subscribers. These quotas became effective September 1, 2018 and are based on historical levels of actual expenditure.
 - *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. These protectionist measures inhibit the export of U.S. media and entertainment services.
 - BDUs must offer an all-Canadian basic tier for not more than \$25 per month. This basic tier may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) signals from the same time zone as the BDU’s headend, where available, or, if not available, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may only offer a second set of U.S. 4+1 signals to its subscribers if it receives authorization by the CRTC pursuant to a condition of license. Unless otherwise authorized by condition of license, the 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.
 - Except as permitted by a BDU’s license from the CRTC, all other 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.

⁴⁵IIPA expects that if Canada does resort to this “cultural carve out” to avoid implementing any of its obligations under the agreement, USTR will use the robust retaliation provision under Article 32.6 to ensure that Canada meets its commitments.

- *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. In addition, the parent corporation or its directors cannot exercise control or influence over programming decisions of its licensee subsidiary where Canadians own and control less than 80% of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80% of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” must be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on the independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.
- *Simultaneous Substitution for the Super Bowl*—Since Super Bowl LI in 2017, simultaneous substitution is no longer permitted for Canadian broadcasts of the Super Bowl. This is the result of a 2015 CRTC decision, which is currently on an appeal at the SCC. If the CRTC’s decision is upheld, the simultaneous substitution ban will continue to be applied to only one program, with significant prejudicial impact on the ability of the National Football League (NFL) and the existing Canadian licensee to monetize the Super Bowl in Canada. IIPA is pleased that the USMCA includes a provision directly addressing this concern and, importantly, the “cultural carve-out” explicitly does not apply to that provision.⁴⁶
- *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, the Motion Picture Association of America (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 TRIPS and the North American Free Trade Agreement (NAFTA).⁴⁷ Canada recently made further commitments regarding copyright in the USMCA, as discussed above, although that agreement has yet to enter into force. As noted above, some aspects of Canada’s current copyright regime may raise significant issues of 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”),⁴⁸ and with Canada’s commitments under the USMCA.

⁴⁶See USMCA Annex 15-D.

⁴⁷IIPA commends Canada’s accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WPPT), which were enabled by bringing the CMA into force.

⁴⁸See TRIPS Article 13.