

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Watch List in 2022.¹

Executive Summary: Canada's legitimate digital marketplace remains hampered by widespread infringement, including: stream-ripping services that undermine legitimate music streaming and download offerings; subscription piracy services (infringing paid Internet Protocol Television (IPTV) and video-on-demand (VOD) services) and the ever-increasing Canadian re-sellers of these services; streaming sites and other online sources for unauthorized movies and TV shows; Piracy Devices (PDs) and apps, readily available both online and in the retail market that suppress demand for legitimate digital streaming and VOD services; and the sale of devices and software for circumventing access controls on video game consoles. Canadian upstream piracy providers are also actively engaged in the theft of telecommunication signals that provide content to other subscription piracy services. 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 insufficient. Government at all levels continues to allocate insufficient resources and strategic priority to enforcement of copyright laws, especially online, and significant market access barriers continue to impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada's Copyright Act should have been a vehicle for addressing many of these problems, as many of the recommendations of the Parliament's Standing Committees on Canadian Heritage (Heritage Committee) and Industry, Science, and Technology (Industry Committee) would have improved copyright protection and enforcement in the country. However, since the dissolution of Parliament in advance of the October 2019 federal election and through yet another federal election in September 2021, the Government of Canada has not acted upon these recommendations, including the recommendation by the Heritage Committee to amend the Copyright Act to clarify that the fair dealing exception for education should not apply to educational institutions when the work is commercially available. Instead, the government initiated further consultations on copyright reform on a discrete set of issues. Meanwhile, the shortcomings in Canada's current copyright regime remain unaddressed.

IIPA hopes that the government's stated priority in mandate letters to the Heritage and Industry Ministers following the September 2020 election to "amend the Copyright Act to further protect artists, creators and copyright holders" will produce concrete action. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market as a result of an overbroad interpretation of the education as fair dealing exception, lack of effective remedies and legal incentives to combat growing online piracy, an unjustified radio royalty exemption, a wholly ineffective "notice-and-notice" system, a globally anomalous exception for user-generated content (UGC), inadequate duration of copyright protection, and weak enforcement. Many of the parliamentary committee recommendations address these concerns, and IIPA urges the Government of Canada to swiftly implement those recommendations to improve both the law and enforcement.

IIPA is encouraged that despite the absence of legislation, some Canadian courts have issued and upheld injunctive relief against intermediaries whose services are used to infringe copyright. In addition, IIPA is hopeful that the reforms to Canada's Copyright Board will bring Canada's tariff-setting process into closer alignment with international norms, including by setting tariffs that reflect the economic value of the use of the rights concerned (i.e., willing buyer/willing seller standard). While Canada adopted U.S.-Mexico-Canada Agreement (USMCA) implementing

¹For more details on Canada's Special 301 history, see previous years' reports, at <https://www.iipa.org/reports/special-301-reports/>. For the history of Canada's Special 301 placement, see <https://www.iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



legislation in March 2020, the legislation did not fulfill Canada's obligation to extend the general term of protection for works, because Canada continues to rely on a 30-month window from the date of entry into force to meet this specific obligation (i.e., until December 31, 2022). As a result, a Copyright Act amendment remains required for Canada to meet this outstanding USMCA obligation. The Government of Canada initiated a consultation on February 11, 2021, on copyright term extension implementation under the USMCA. Canada should ensure any such amendments or legislation extend the term of protection for copyrighted works in a manner that has a direct benefit to creators and consumers and encourage investment in new creative works. In addition, Canada should meet its USMCA commitments and address pressing concerns, including remedying its deficient online copyright liability regime, which lags behind global norms. IIPA asks the U.S. government to remain extensively engaged with Canada on these and other issues in 2022.

PRIORITY ACTIONS REQUESTED IN 2022

- Amend the Copyright Act to fully implement Canada's obligations under the USMCA by extending the general term of protection for works from life of the author plus 50 years to life of the author plus 70 years *without* additional impediments, such as a registration requirement on the additional 20-year period or other limitations.
- Address the crisis in the educational publishing market, by clarifying that the fair dealing exception for "education" does not apply to educational institutions when the work is commercially available.
- Harmonize remedies for collective management organizations (CMOs) under the Copyright Act.
- Counter online piracy in Canada by strengthening legal incentives for Internet service providers (ISPs), hosting providers, and other intermediaries to cooperate with copyright owners, in accordance with international norms, including by: clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that take effective action against infringing content, including removing or disabling access to infringing content expeditiously upon obtaining knowledge or awareness by whatever means, including through a notification sent by a rights holder; introducing measures that have been demonstrated effective in preventing or restraining infringement; and following through on parliamentary recommendations to provide injunctive relief for deliberate online copyright infringement.
- Avoid introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.
- Ensure that recorded music producers and performers are fully compensated for all forms of radio broadcasting of their recordings, including by elimination of the radio royalty exemption.
- Eliminate or at least clarify the UGC exception, in accordance with parliamentary recommendations and Canada's international obligations.
- Ensure that the making available right is fully implemented in Canada in line with its international counterparts and treaty obligations.
- Prioritize enforcement against online piracy (including stream-ripping), the operation and sale of subscription piracy services, and the trafficking in PDs and apps and other circumvention software tools and modification services.
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement the resources and training required to implement the foregoing priority.
- Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's USMCA commitments.

THE DIGITAL MARKETPLACE IN CANADA TODAY

Canada remains one of the leading markets for online commerce of U.S. copyrighted works. The Canadian Internet Registration Authority (CIRA) reports that 72% of Canadians say they spend at least one hour per day watching TV or movies or listening to audio online. About four in 10 Canadians spend more than three hours per day

watching TV or movies or listening to audio online.² A 2021 study found that two-thirds of the time that Internet users in Canada listen to music is spent listening online through streaming services.³ Canadian recorded music revenues grew by 8.1% in 2020.⁴ Streaming was the key to growth, and revenues rose by 17.8% with subscription streaming income up by 18.2% from US\$249.5 million in 2019 to US\$294.8 in 2020.⁵ Streaming's share of total music industry revenues continues to grow, increasing from 69.1% in 2019 to 74.3% in 2020, and digital consumption methods overall are now nearly 81% of all recorded industry revenues.⁶ The legitimate online video market is growing in Canada, with studios and other producers continuing to work with multiple partners and platforms. In 2020, Canadians subscribed to a wide variety of services offering movies, TV programming, or both, online, with 37% of Canadians subscribing to Amazon Prime Video and 60% of all Canadians reporting that they subscribe to Netflix.⁷ In 2021, 937 active video game companies were identified in Canada, a 35% increase since 2019.⁸ In 2021, video game companies in Canada generated an estimated CAD\$4.3 billion in revenue from all sources, demonstrating a growth of 20% since 2019.⁹ The video game industry in Canada spent an estimated CAD\$3.7 billion in 2021, an increase of 17% in the last two years.¹⁰

Evidence persists, however, that the digital marketplace for copyrighted content in Canada continues to face challenges in realizing its full potential due to competition from illicit online sources. Stream-ripping services, now the leading form of music piracy in Canada, are a major contributor to this problem.¹¹ Stream-ripping enables users of licensed streaming services, like YouTube, to convert streams into unauthorized audio downloads that can be stored and replayed at will, with no royalty payment to rights holders.¹² According to International Federation of the Phonographic Industry's (IFPI) Music Consumer Study 2021, 17% of Canadian respondents reported downloading music from YouTube or other sites using stream-ripping websites, browser extensions, or apps, a figure that rose to 32% for 16-to-19 year olds. By circumventing the technological protection measures (TPMs) employed by most legitimate music streaming services to prevent copying and redistribution of streamed recordings, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads. Canadian operated stream-ripping services include *Loudtronix.co*, *Anything2mp3.cc*, and *YTMP3.net*. *Ytmp3.cc* was a major stream-ripping target with 47 million visits from Canada in 2021. Five percent of Canadian respondents to IFPI's 2021 Music Consumer Study said they had used *Ytmp3.cc* in the last month to download music. Dozens of websites, software programs, and apps offering stream-ripping services find an eager marketplace in Canada. Use of peer-to-peer (P2P) sites remains high, with BitTorrent indexing sites including *Rarbg*, *The Pirate Bay*, and *1337x* popular in Canada.¹³ Cyberlocker sites, such as *Mega*, *Uptobox*, *Mixdrop*, and *Rapidgator*, are also a common way to access recorded music.¹⁴

In recent years, Canada has made progress rectifying its long-standing reputation as a safe haven for some of the world's most massive and flagrant Internet sites dedicated to the online theft of copyrighted material. However, Canada remains home to various intermediaries that are popular with unlicensed services. As with music piracy, online movie and television piracy remains a formidable challenge in Canada, inflicting major financial harm. Research by Carnegie Mellon University found that if pre-release piracy could be eliminated from the theatrical window, U.S.

²CIRA Internet Factbook 2021, available at <https://www.cira.ca/resources/factbook/canadas-internet-factbook-2021>.

³International Federation of the Phonographic Industry (IFPI), *Music Consumer Study 2021*.

⁴IFPI Global Music Report 2021 at 106.

⁵*Id.*

⁶*Id.*

⁷CIRA Internet Factbook 2021, *supra* note 2.

⁸Entertainment Software Association of Canada, *Essential Facts*, p. 9, available at <https://theesa.ca/resources/essential-facts/>.

⁹*Id.* at p. 3.

¹⁰*Id.* at p. 5.

¹¹Stream-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>.

¹²The music industry reports that some 93% of Canadians who visited YouTube used the site to access music in 2021.

¹³During 2021, according to SimilarWeb, *Rarbg* received over 78.5 million visits from Canada, *1337x* received 36.7 million visits, and *The Pirate Bay* received 28.3 million visits.

¹⁴During 2021, according to SimilarWeb, *Mega* received over 35.2m visits from Canada, *Mixdrop* received over 15.2 million visits, *Uptobox* received 9.8 million visits, and *Rapidgator* received 8.2 million visits.

and Canada box office revenue would increase by 14-15% (equivalent to approximately US\$1.5 billion per year).¹⁵ It is nearly impossible to overstate the magnitude of the piracy problem in Canada. According to the Government of Canada's own study published in May 2018, more than one-quarter (26%) of content consumers reported having "consumed" (downloaded or streamed or accessed) pirated content online in the previous three-months, and movies (36%) and television shows (34%) were among the forms of content most likely to be illegally "consumed."¹⁶ Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.¹⁷ In 2020, 76% of Canadians' visits to sites used for online piracy were to non-P2P sites, including streaming sites and cyberlocker (host) sites, up from 39% in 2015.¹⁸ Mimicking the look and feel of legitimate streaming services, infringing streaming websites continue to overtake P2P sites as a highly popular destination for Canadians seeking premium content in both English and French.

Additionally, the subscription piracy ecosystem has continued to grow in Canada, where widely marketed sellers and resellers of subscription piracy services enable Canadians, as well as global audiences, to obtain unauthorized access to high-quality digital streaming and VOD content. Many of these illegal services in Canada have generated millions of dollars in revenue, oftentimes laundering the money through seemingly legitimate businesses set up solely for this purpose. The lucrative financial return of an infringing business model encourages a large ecosystem of players, including the operator of the service itself, individuals supplying the infringing content, and resellers of the service, supported by payment processors, and advertisers. The subscription piracy services offer various forms of subscriptions, ranging from CAD \$10 per month to over CAD \$130 per year, and are accessible through numerous devices, such as computers, mobile devices, and smart televisions. Canadian upstream piracy services are also actively involved in the circumvention of TPMs and other means of stealing legitimate signals for the purposes of: (i) making available unauthorized streaming of live television and motion pictures on their own for-profit subscription Internet protocol television (IPTV) service, or (ii) selling the content to other infringing subscription IPTV services available inside and outside of Canada. Sandvine reported in April 2018 that: (1) 10% of Canadian households now have at least one set-top box (STB), computer, smartphone, or tablet running Kodi software, a higher proportion than in the United States in 2018 (6%); (2) 71% of these households with devices running Kodi software have unofficial add-ons configured to access unlicensed content; and (3) 8% of Canadian households are using known subscription piracy services.¹⁹

Both online and offline, the legitimate market is challenged by trafficking in PDs or STBs, sold pre-loaded with infringing applications or as part of illegal IPTV subscription packages. Easily and widely available, STBs are sold online on dedicated Canadian-owned-and-operated websites, on third-party marketplace sites, and in traditional retail locations throughout Canada. The prices of these pre-loaded STBs range from CAD \$100-CAD \$600. The sale of paid subscription piracy services and STBs in otherwise legitimate retail spaces, combined with the deceptive marketing and high-quality promotional materials produced by those selling these products and services, has led to consumer confusion regarding their legality. Canadian piracy operators remain involved in the coding and development of infringing add-ons and Android application packages (APKs) that enable subscription piracy services and mass-market STBs to access streaming services without authorization. As discussed below, enforcement actions against these abuses are beginning to bear fruit, but the problem remains serious and widespread.

Sites dedicated to distributing tools to circumvent access or copy controls used by copyright owners remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, as well as subsequent court decisions enforcing these statutes. The video game industry reports that sites operated and

¹⁵Carnegie 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.

¹⁶Shifting Paradigms Report of the Standing Committee on Canadian Heritage" ("Heritage Report"), available at https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67.

¹⁷*Id.*

¹⁸MPA, *2020 Movie & TV Piracy Trends in Canada*, p. 1, available at https://www.mpa-canada.org/wp-content/uploads/2021/08/Canada-WDVK-2020_ENG.pdf.

¹⁹Sandvine, *Video Piracy in Canada*, April 2018, available at <https://www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>.

hosted in Canada, such as *gamersection.ca* continue to offer circumvention devices and game copiers for sale. eBay Canada also provides for modded and hacked games 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, such as *kijiji.ca*. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the United States, such as *Digimartzs.com*, rely on Canadian ISPs for hosting, thus evading enforcement action under U.S. law. Many of these Canadian ISPs continue to ignore the multiple notices regarding these websites, which are violating the ISPs’ own policies and terms of service.²⁰ This trend breathes new life into Canada’s problematic piracy “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*, as well as growth in the use of paid social media ads to target specific demographics to market and sell counterfeit products online. Video game companies see many local sites registered and created with Shopify, but through cooperation with Shopify are able to remove infringing pages. In addition, offerings for installation services (free games and hacking services) through online marketplaces, such as *askijiji.ca* and eBay Canada, continue to rise.

KEY TOPICS FOR COPYRIGHT REFORM LEGISLATION

In December 2017, Canada’s Parliament launched the copyright law review mandated by the 2012 Copyright Modernization Act (CMA).²¹ The review provided an invaluable opportunity for Canada to assess whether the Copyright Act has kept pace with rapid technological and market changes and to upgrade, improve, or correct the Copyright Act where it falls short in today’s digital environment, including correcting deficiencies in the CMA. As IIPA previously reported, the review concluded with the May 2019 release of the Heritage Committee Report called “Shifting Paradigms” (Heritage Report)²² and the June 2019 Industry Committee Report (Industry Report).²³

The Heritage Report recognized the negative impact the 2012 amendments, which introduced an undefined “education” as fair-dealing exception, have had on the publishing industry, as well as the “disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries” (known as the “value gap”). The Heritage Report included several positive recommendations intended to address these concerns, as well as other significant shortcomings of Canada’s legal framework. Among other things, the Heritage Report recommended that the Government of Canada:

- clarify that fair dealing should not apply to educational institutions when the work is commercially available;
- increase efforts to combat piracy and enforce copyright;
- review the safe harbor exceptions and laws to ensure that ISPs are accountable for their role in the distribution of infringing content;
- harmonize remedies for collecting societies under the Copyright Act;
- narrow the radio royalty exemption so that it applies only to “independent and/or community-based radio stations”;
- extend the term of copyright for works;
- increase support for creators and creative industries in adapting to new digital markets;
- create educational materials to raise awareness of copyright provisions and artist remuneration for consumers;
- review, clarify and/or remove exceptions contained in the Copyright Act, ensuring that any exception respects

²⁰The video game industry reports that in 2021, Canada was 29th for all game-related P2P piracy, 12th for console game piracy, 13th for mobile game piracy, and 30th for PC/Mac game piracy.

²¹The Copyright Modernization Act (CMA), adopted in 2012, was 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.

²²See Heritage Report, *supra* note 16.

²³See Statutory Review of the Copyright Act (“Industry Report”), available at <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>.

Section 9 of the Berne Convention for the Protection of Literary and Artistic Works;

- ensure that the Copyright Board reviews tariffs for online music services to ensure that royalty payments provide fair compensation for artists; and
- meet international treaty obligations (including Berne Convention for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement, and World Intellectual Property Organization Copyright Treaty).

The Industry Report also included some notable recommendations, including that the Government of Canada should: consider evaluating tools to provide injunctive relief against intermediaries in a court of law for deliberate online copyright infringement; monitor the implementation, in other jurisdictions, of legislation making safe harbor exceptions available to online service providers conditional on measures taken against copyright infringement on their platforms; and narrow the radio royalty exemption so it is available to only “small, independent broadcasters.” Unfortunately, in preparing its report, the Industry Committee did not consult the Heritage Committee, which was tasked with examining the specific issue of artist and creative sector remuneration. This lack of consultation created inconsistencies with the Industry Committee’s analysis, resulting in certain recommendations (often on those overlapping issues) that lack an evidentiary basis.

IIPA urges the Government of Canada to swiftly take up the recommendations identified above and adopt needed reforms. Consideration of copyright reform legislation has been delayed since the dissolution of Parliament in advance of the October 2019 federal election through yet another federal election in September 2021. Moreover, any amendments to the Copyright Act should not diminish the extended term of copyright protection agreed to under the USMCA, such as subjecting the additional 20-year period to a registration requirement or imposing other limitations. To the extent that the Government of Canada considers reform pertaining to the issues raised in the consultation on “online intermediaries,” amendments to the Copyright Act should: (1) expressly allow rights holders to obtain injunctive relief, including site-blocking and delisting orders, against intermediaries whose services are used to infringe copyright when the intermediary has actual or constructive knowledge of infringing content or links on their services or networks; (2) clarify that safe harbors should apply only to passive and neutral intermediaries that do not contribute to infringing activities; and (3) avoid introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.

Consultations on Copyright Reform: In 2021, the Government of Canada issued three consultations on copyright reform: (1) a consultation on how to implement copyright term extension under the USMCA, including whether accompanying measures should be adopted; (2) a consultation on potential options for copyright reform related to intermediaries’ protections against liability for copyright infringement, rights holder remuneration models, transparency obligations, and the effective enforcement of copyright; and (3) a consultation on a modern copyright framework for artificial intelligence (AI) and the Internet of Things (IoT), including text and data mining, authorship and ownership of works created by AI, infringement and liability regarding AI, and repair and interoperability issues related to TPMs. While consultations are an important component of the legislative process, they should not distract from the importance of implementing reforms agreed to by the government, such as Canada’s obligation to implement copyright term extension for works.

1. Strengths of the Canadian Regime—Recent Positive Developments

Several Canadian court decisions reflect positive trends that legislation implementing the copyright review recommendations should affirm and build upon. Some directly involve provisions of the CMA. In addition, in 2020, Canada took important steps to provide full national treatment for U.S. sound recordings, and IIPA remains hopeful that reforms of the Copyright Board will bring Canada into closer alignment with comparable developed markets regarding its tariff-setting process.

A. Injunctions Against Distributors of STBs and Enabling Apps

Several recent decisions provide effective remedies against subscription piracy services and STBs and their enabling apps. In August 2019, the Federal Court issued a final judgement and permanent injunction against an operator of the Vader Streams IPTV service.²⁴ In February 2018, the Federal Court of Appeal upheld orders to shut down and seize piracy websites that made available illegal add-ons enabling STBs to access streaming video without authorization.²⁵ In March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of “plug and play” STBs pre-loaded with applications that allow consumers to access TV programs and movies without authorization or subscription.²⁶

The Heritage and Industry Reports recommend that the Government of Canada “increase its efforts to combat piracy and enforce copyright,” provide injunctive relief for deliberate online copyright infringement, and narrow the scope of safe harbor exceptions available to online service providers. Such legislative enhancements are needed to disrupt this growing illicit marketplace, especially in light of the alarming growth of Subscription Piracy services.

B. Injunctions Against Intermediaries to Block Access to and De-Index Sites Dedicated to Intellectual Property Infringement

On May 26, 2021, the Federal Court of Appeal (FCA) in *Teksavvy Solutions Inc. v. Bell Media Inc.* unanimously upheld the interlocutory order issued in the underlying copyright infringement action that required several Canadian ISPs, including the appellant, Teksavvy Solutions Inc. (Teksavvy), to block subscriber access to certain websites (i.e., a site-blocking order). The FCA held: (1) the Federal Court was correct in finding that it had the power to grant the site-blocking order, including on the basis of the remedial provisions in the Copyright Act, the net neutrality provisions in the Telecommunications Act, and on the basis of the 2017 decision of the Supreme Court of Canada (SCC) in *Google Inc. v. Equustek Solutions Inc.*; (2) a detailed constitutional analysis concerning whether freedom of expression is engaged by a site-blocking order that is separate from the analysis conducted under the test for injunctive relief is not necessary; and (3) in applying the injunctive relief test and considering international jurisprudence, the FCA noted: “it was entirely appropriate for the Judge to look abroad for inspiration when faced with a motion for an order that was unprecedented in Canada.” The SCC is currently considering Teksavvy’s leave to appeal application. If the SCC dismisses the application for leave to appeal or upholds the decision of the FCA in *Teksavvy Solutions Inc. v. Bell Media Inc.*, the continued ability of rights holders to be able to obtain injunctive relief, including site-blocking and delisting orders, against intermediaries whose services are used to infringe copyright, would be a welcome development that could lead to improvements in enforcement efforts. Regardless of the outcome of the SCC’s decision, the Copyright Act should be amended to add measures demonstrated effective in preventing or restraining infringement in other jurisdictions (e.g. the EU, United Kingdom, Australia, etc.), which would help clarify and strengthen the online enforcement tools available to rights holders in Canada while protecting consumers from the harms associated with infringing sites, including serious privacy, hacking, identity theft, and malware risks.

C. Copyright Board Reform

Amendments to the Copyright Board took effect in April 2019.²⁷ The amendments introduced statutory rate-

²⁴*Disney Enterprises, Inc. et al v. Vader Streams*, Federal Court File No. T-329-19.

²⁵*Bell Canada v. Lackman*, 2018 FCA 42. 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.

²⁶*Wesley dba MTLFreeTV.com v. Bell Canada*, 2017 FCA 55, affirming *Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net*, 2016 FC 612. 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.

²⁷These reforms included: an overhaul of the legislative framework governing tariff-setting proceedings before the Copyright Board, which should improve the timeliness, clarity, and efficacy of the proceedings; substantial revisions to the timelines for proposing and objecting to the tariffs, which allow tariffs to be filed earlier and remain effective longer, that should help to avoid the extreme delays that have made economic forecasting nearly impossible for stakeholders (both users and 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; and streamlined procedures and formalized case management to allow the Board to operate more efficiently, and to focus its

setting criteria that require the Board to consider, among other things, the willing buyer/willing seller principle in determining the royalty rates. While the Board may consider other factors, including “any other criterion that the Board considers appropriate,” if implemented properly, the new criteria should be a welcome improvement.²⁸ It will be very important to ensure that the Board applies the willing buyer/willing seller criterion properly, and that it is not undermined by other amorphous and undefined criteria, such as the “public interest.” The “public interest” criterion, which the Industry Report notes could cause unpredictable results prompting costly, lengthy appeals and significant effects or other tariffs, is unclear and does not have a basis in economics.

The amendments also broaden enforcement prohibitions to cover users who have offered to pay proposed tariffs in addition to 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. Unfortunately, as discussed below, the July 2021 SCC decision upheld the April 2020 decision by the FCA in *York University v. Access Copyright* that the approved tariff issued by Access Copyright is not mandatory and, therefore, not enforceable against York University or other non-licensees.²⁹ This presents a significant obstacle to a well-functioning market for the collective management of rights. To operate in that market, CMOs require the ability to enforce the rights they represent, in accordance with their mandates from rights holders.

IIPA applauds Canada’s commitment to reforming its tariff-setting process and is hopeful that the implementing measures 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.

D. Full National Treatment for Sound Recordings

Canada committed in the USMCA to provide full national treatment for U.S. sound recordings. IIPA applauds the steps Canada has taken to extend full national treatment to all U.S. repertoire on July 1, 2020, without exceptions, limitations, or reservations. In addition, in response to the United States’ adoption of the Music Modernization Act on April 29, 2020, Canada amended the Ministerial Statement of Limitations, removing restrictions on eligibility, making pre-1972 U.S. recordings immediately eligible for Canadian royalties.

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. The main goal of any amendments to the Copyright Act should be to correct these issues.

A. The Education 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 “education,” undefined and unlimited in application, to the list of purposes (such as research and private study) that qualify for the fair-dealing exception.³⁰ Previous IIPA submissions have analyzed extensively how the CMA amendments, in combination with broad judicial interpretations of the pre-CMA fair dealing provisions, led to the weakening of the well-established collective licensing regime to license and administer permissions to copy excerpts of books and other textual works

resources on contested tariffs in cases in which negotiated agreements are not possible. The government has also implemented regulations requiring the Copyright Board to issue its decisions within 12 months following the close of hearings, which is a positive development.

²⁸Under the old framework, 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, including rates agreed to in freely negotiated agreements and in comparable markets.

²⁹*York v. Access Copyright*, 2020 FCA 77.

³⁰See USTR, 2021 Special 301 Report at 66, available at [https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf). (USTR’s 2020 Special 301 Report noted the U.S. government’s continuing concerns with “the ambiguous education-related exception added to the copyright law in 2012, which has significantly damaged the market for educational publishers and authors.”)

for educational uses, both at the K-12 and post-secondary levels across Canada.³¹ 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 the development of new content and innovative means to deliver that content to consumers. Unfortunately, there has been little progress in rectifying the current situation, despite the CMA review.

The sense of impunity from copyright responsibility that Canada's educational establishment displays not only has significantly reduced copyright owners' licensing revenue for copying, but also has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. In 2017, it was revealed that Concordia University's Center for Expanded Poetics was creating high-quality scans of entire 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.

The Heritage Report made recommendations to address this problem, most importantly that the Government of Canada should clarify that the fair dealing exception should not apply to educational institutions when the work is commercially available.³³ This would bring needed clarity to Canada's law regarding the circumstances under which the use of certain works may not require a license. Until the legal framework is clarified, the crisis in the educational publishing sector will continue. Because "education" is not defined in the statute and given the expansive interpretation of fair dealing articulated by Canadian courts, the exception continues to present a risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Unfortunately, with the 2021 SCC decision in the *York University v. Canadian Copyright Licensing Agency* (Access Copyright),³⁴ the problematic environment for education publishers can now be remedied only through action by parliament. The SCC ruled that certified tariffs are not mandatory, and as such, "not enforceable against York." Importantly, the SCC did not opine on the fair dealing question, stating there was no "genuine dispute between the proper parties" about the (fair dealing) Guidelines.

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 aware of the dire state of its educational publishing market. Even the flawed Industry Report acknowledged a problem, although it stopped short of recommending an adequate solution and instead took a wait-and-see approach. Canadian federal authorities, and its Parliament, should be encouraged to address this crisis by expeditiously implementing the recommendations in the Heritage Report intended to address this crisis, including clarifying the scope of the education as fair dealing exception. In addition, to prevent educational institutions from circumventing the tariff system, the Copyright Act should be amended to confirm that an approved tariff by the Copyright Board is mandatory in nature, and its enforceability is not dependent upon a person's assent to, or agreement

³¹See IIPA's 2017 Special 301 country survey on Canada ("IIPA 2017"), pp. 97-100, available at <http://www.iipa.org/files/uploads/2017/12/2017SPEC301CANADA.pdf>.

³²Kate Taylor, "Concordia University caught on the wrong side of copyright," The Globe and Mail, available at <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.

³³Other helpful recommendations in the Heritage Report include that the Government of Canada: review Canada's exceptions to ensure they meet its international obligations; promote a return to licensing through collecting societies; review, harmonize and improve the enforcement of statutory damages for infringement for non-commercial use in section 38.1(1) of the Copyright Act; and harmonize remedies for collective societies under the Copyright Act.

³⁴*York University v. Canadian Copyright Licensing Agency*, 2021 SCC 32 (July 30, 2021), available at <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>. On July 30, 2021, the Supreme Court of Canada (SCC) issued its decision in *York University v. Canadian Copyright Licensing Agency* (Access Copyright) that: (1) upheld the decision of the FCA that York University is entitled to opt out of Access Copyright's certified reproduction tariff and that the tariff is not mandatory on users who did not wish it to apply; (2) the FCA decision should not have ruled on the "fair dealing" point as the matter was moot given its mandatory tariff ruling; and (3) expressly disavowed certain approaches to "fair dealing" applied by the FCA while stating more appropriate approaches to be followed in the future. See also the history of this case in IIPA's 2020 Special 301 country survey on Canada ("IIPA 2020"), pp. 135-36, available at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301REPORT.pdf>.

with, its terms. 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.

B. Non-Commercial User-Generated Content Exception

The copyright exception for “non-commercial user-generated content,”³⁵ also merits close scrutiny. This provision 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 (commercial or otherwise), 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 exclusive rights that Canada is obligated to provide under international agreements and treaties, including the TRIPS Agreement, the Berne Convention, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.³⁶ Although the exception has no precedent in global norms, it has spawned would-be imitators, such as a similar proposed exception to the Hong Kong Copyright Ordinance. This underscores the importance of removing, or at least clarifying, the UGC exception, in accordance with recommendations in the Heritage Report.³⁷

C. Incentives are Lacking for Necessary Players to Cooperate Against Online Infringement

Canada’s Copyright Act fails to respond adequately to the broader challenge of online infringement.³⁸ The statute lacks important standard tools that leading copyright regimes now routinely provide to incentivize intermediaries to address copyright infringement, and the tools it does provide fall demonstrably short. On the whole, Canadian law lacks incentives for cooperation among 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, such services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision in Section 27(2.3) establishing civil liability for providing online services primarily for the purposes of enabling acts of copyright infringement was an important step forward, but it 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 STBs 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 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 that enable acts of infringement.

Beyond enablement, the Canadian online enforcement regime relies heavily on the “notice-and-notice” system, in effect since January 2015. No evidence exists that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so. The system was intended merely as an educational tool aimed at end-users, but no evidence exists that it contributes to mitigation of infringing activity by consumers. Simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because receiving such notices lacks any meaningful consequences under the Canadian system.

³⁵The Canadian Copyright Act, s. 29.21.

³⁶See, 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 20.64.

³⁷A key recommendation in the Heritage Report is that the Canadian government review, clarify, and/or remove broad exceptions to ensure that exceptions in Canada’s law are consistent with its obligations under the TRIPS Agreement and the Berne Convention.

³⁸The 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://www.iipa.org/files/uploads/2018/01/2013_Special_301.pdf, at 127-131, and other sources referenced therein.

Furthermore, it creates little meaningful incentive for service providers to attempt to rid their services 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.³⁹ ISPs have insufficient incentive to respect the legislated “notice-and-notice” system, because their failure to forward notices from rights holders is without significant consequence.⁴⁰

Moreover, the law lacks incentives necessary 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 user⁴¹ is unworkable in practice, particularly regarding valuable, time-sensitive pre-release content, and creates a disincentive for hosting providers to cooperate or take any effective action in the case of content they know or ought to know is infringing. 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.

Canada should revise its law to introduce incentives for intermediary cooperation by clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that take effective action against infringing content. Effective action should include removing or disabling access to infringing content expeditiously upon obtaining knowledge or awareness by whatever means, including through a notification sent by a rights holder, and without the requirement for rights holders to first sue and obtain a successful judgement against the infringer; other measures that have been demonstrated effective in preventing or restraining infringement; and maintaining and effectively implementing a policy that provides for termination of accounts of repeat infringers in appropriate circumstances. Canada’s 2020 USMCA implementation legislation did not address these deficiencies.⁴² The amendments of Bill C-86 were another missed opportunity. While they further clarified the information to be included in notices of claimed infringement issued to ISPs, the amendments failed to include any meaningful incentives for intermediaries to cooperate with rights holders.

Taken as a whole, the 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. The Heritage and Industry Reports recommend that Canada’s government review the current law to ensure ISPs are accountable for their role in the distribution of infringing content, and that the government monitor the implementation of safe harbor legislation in other jurisdictions as well as other international developments, a clear acknowledgement of Canada’s status as a global outlier on this issue. Canada should follow through on these parliamentary recommendations and look for ways to make its current regime more effective and to provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

D. Injunctive Relief Needed Against Online Infringement

In accordance with recent case law, Canada should provide tools to effectively address the problem of infringing online content, particularly content hosted outside of Canada, including providing effective injunctive relief against intermediaries whose services are used in connection with infringements of copyright to disable access to such infringing content. A growing list of countries around the world have adopted such a framework to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. As previously noted, in response to a 2018 proposal to create a website-blocking mechanism, the Canadian Radio-Television and Telecommunications Commission (CRTC) acknowledged the harm caused by piracy, but declined to consider the merits of the proposal, holding that copyright enforcement falls solely within the statutory scheme of the Copyright Act.

³⁹See IIPA 2017, *supra* note 33 at p. 96 for a summary of concerns.

⁴⁰See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

⁴¹See Section 31.1 of the Copyright Act.

⁴²It is unfortunate that the USMCA exempted Canada’s flawed system and does not even obligate 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).

In granting the website blocking order, the Court in *Bell Media* (discussed above) cited this decision to reject the argument that disabling access to infringing websites will interfere with the CRTC's regulatory role. The Industry Report recommended that the Government of Canada evaluate tools to expressly provide injunctive relief in a court of law for deliberate online copyright infringement. In accordance with the recommendation, the Canadian government should revise the Copyright Act to provide express injunctive relief to effectively disable access to infringing content in line with recent case law.

E. Discrimination and Duration

Other deficiencies in Canada's legal framework that should be addressed:

i. The Radio Royalty Exemption Should be Removed

A key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada.⁴³ The Copyright Board concluded that there is no economic rationale for this provision, which it called a "thinly veiled subsidy" to "large, profitable broadcasters."⁴⁴ 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 online music services, satellite radio, restaurants, or background music suppliers), none of which are subject to such an exemption from paying royalties to sound recording producers and performers. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of over C\$160 million (US\$121 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 WPPT and that Canada committed to provide under the USMCA.⁴⁵ Unfortunately, the 2020 USMCA implementation legislation did not address this problem. Both the Heritage Report and the Industry Report called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. The C\$1.25 million commercial radio royalty exemption should be eliminated.

ii. Provide Full Rights for Communication to the Public of Sound Recordings, Including Retransmissions

The Copyright Act should be amended to provide full rights for communication to the public of sound recordings, which includes the retransmission of sound recordings. This is a major gap in protection for sound recording producers.

iii. Provide Full Rights for Public Performance of Sound Recordings, Including Indirect Uses

Although Article 15 of the WPPT is clear that the right to remuneration for public performances encompasses both direct and indirect uses of phonograms, the Canadian Copyright Act (s.72.1) prohibits rights holders from directly licensing "indirect" uses, where commercial businesses like shops or bars play music as part of their business operations/ambiance, but the music comes from the radio rather than from a CD player or a background music provider service (for example). By prohibiting rights holders from licensing the users who actually use and benefit from their music, this provision fundamentally undervalues the right. Canada should amend the Copyright Act to ensure that the right allows the direct licensing of such uses in accordance with Article 15 of the WPPT.

⁴³See Section 68.1(1) of the Copyright Act. As previously reported, each of Canada's nearly 700 commercial radio stations, regardless of its size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on its first C\$1.25 million (US\$951,000) of annual advertising revenue.

⁴⁴See Copyright Board, *Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007*, October 14, 2005, p. 32, 37-38.

⁴⁵See USMCA Article 20.62.

iv. Term of Protection

A needed modernization of Canadian copyright law not addressed by the 2012 amendments is the disparity in duration of copyright protection between Canada and its largest trading partner (the United States), and indeed, most Organisation for Economic Co-operation and Development (OECD) economies. Although Canada extended the term of protection for sound recordings in 2015, Canada should 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, but it negotiated a 30-month window to implement this extension. While the 2020 USMCA implementation legislation extended copyright term of protection to USMCA-required minimums for sound recordings and certain other works for an extra five years to 75 years, it did not extend the term of protection for all works measured by the life of the author, as Canada is obligated to do under USMCA Art. 20.62(a). Canada should not delay bringing its law into line with this global norm, particularly considering the Heritage Report's recommendation to do so. Bringing its term of protection in line with evolving global norms is long overdue. Furthermore, any extension of the term of copyright protection should not be accompanied by Berne-prohibited formalities, such as by requiring registration for the additional period of protection or other provisions that undermine term extension and contractual certainty.

GOVERNMENT ACTIONS ON 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).⁴⁶ Unfortunately, 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 prioritize addressing the problem. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the RCMP, intellectual property (IP) crimes 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 able to deal effectively with organized copyright piracy, and thus, increasingly fail to pursue even well-documented referrals from industry. However, there has been some recent progress. For example, recently, local law enforcement has engaged positively with rights holders in two separate cases involving infringing subscription IPTV services, including a Nova Scotia case with multiple criminal charges. As both matters are ongoing, the ultimate outcome—and the resulting deterrent impact—remain to be determined. The non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged because Canadian law enforcement remains under-resourced, and too few agencies consider it a priority. Given the widespread availability of hundreds of subscription piracy services, more resources are needed to address this growing problem.⁴⁷

Similar problems arise with Canadian prosecutors and courts. Historically, Crown Prosecutors have been reluctant to seek the breadth of remedies for IP crimes. This issue often arises due to a knowledge gap concerning the prosecution of IP crimes, a problem that is amplified when dealing with emerging piracy models, such as infringing IPTV or VOD services. While there have been some recent prosecutions, ongoing education of Crown Prosecutors

⁴⁶In practice, however, 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).

⁴⁷For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level. See https://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 https://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/391_SECU_Rpt10/391_SECU_Rpt10-e.pdf.

is key to ensuring Canada stays ahead of emerging piracy business models.

While IIPA has seen positive engagement by law enforcement, a lack of law enforcement resources and Crown counsel awareness of the applicable laws remain significant challenges for rights holders. 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. In addition, Canadian customs procedures place a legal compliance burden on rights holders (who must file a claim and track down importers of counterfeit goods) rather than on importers. The Canadian government should change these procedures so that this burden falls on the importer, as is the case in the United States.

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 subscription piracy services, PDs, and other devices and software that enable circumvention of TPMs, particularly in light of the Heritage Report's recommendation to increase enforcement efforts. IIPA encourages RCMP, which is a member of the National Intellectual Property Rights Coordination Center (IPR Center), to work collaboratively with U.S. enforcement officials on online piracy cases. Since the availability of pirated products (and of PDs 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 that is needed. Rights holders remain at the ready to assist and have extended offers to provide such training. In addition, Canadian courts should more consistently issue 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. Unfortunately, Canada has not made progress on certain long-standing market access issues as part of its USMCA implementation efforts, and as noted below, is considering additional measures that would discriminate against foreign online digital service providers. In accordance with its market access commitments in the USMCA, Canada should change course and eliminate the following measures that restrict access by U.S. film and TV producers to Canada's market:⁴⁸

Television Content Quotas: The CRTC imposes two types of 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. First, large English-language private broadcaster groups have a CPE obligation equal to 30 percent of the group's previous year'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. CPE obligations have also been assigned to independent signals and to independent discretionary services that have over 200,000 subscribers upon renewal of their licenses and are based on historical levels of actual expenditures on Canadian programming. Second, per the Exhibition Quota, private conventional broadcasters must exhibit no less than 50 percent Canadian programming from 6 p.m. to midnight. Private English-language discretionary services (specialty and pay-TV) must exhibit no less than 35 percent Canadian programming overall.

Non-Canadian Signal and Service Restrictions: Canadian broadcasting distribution undertakings (BDUs), such as cable, IPTV, and direct-to-home satellite, must offer more Canadian than non-Canadian services. These

⁴⁸IIPA expects that if Canada resorts to the "cultural carve out" under Article 32.6 to avoid implementing any of its obligations under the USMCA, USTR will use the robust retaliation provision under that provision to ensure that Canada meets its commitments.

protectionist measures inhibit the export of U.S. media and entertainment services. BDUs must offer a “skinny basic” tier for not more than CAD\$25 per month that may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) from the same time zone as the BDU’s headend, where available, if not, 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 offer a second set of U.S. 4+1 signals to its subscribers only 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 in a BDU’s license from the CRTC, all other non-Canadian signals and services may be carried on only 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. Further, a service may be removed from the Authorized List 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 and IPTV 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 percent of a licensee’s Directors must be Canadian; and, (3) at least 80 percent 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 parent must be beneficially owned and controlled by Canadians. The parent corporation or its directors cannot exercise control or influence over the programming decisions of its licensee subsidiary where Canadians own and control less than 80 percent of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80 percent of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on such independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.

Québec Distribution Restrictions: The Québec Cinema Act severely restricts the ability of non-Québec-based film distributors to do business directly in Québec. Since 1986, grandfathered MPA 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 MPA and the Québec Minister of Culture and Communications. The Agreement was revisited in 2021 and was extended for seven years.

Proposed Obligations on Non-Canadian Digital Services: Non-Canadian digital services delivered over the Internet are currently exempt from most requirements under the Broadcasting Act. However, Parliament is considering legislation that would provide the CRTC with the explicit power to regulate non-Canadian digital media services, including regarding financial, discoverability, and reporting obligations to support the Canadian broadcasting system and contribute to the creation and promotion of Canadian culture. Parliament will likely pick up this effort again in 2022.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Canada’s international agreements with the United States most relevant to copyright obligations include

TRIPS and the USMCA.⁴⁹ As noted above, some aspects of Canada's current copyright regime may raise significant issues of compliance with these agreements (for example, whether Canada's copyright exceptions, as applied, comply with the well-established "three-step test"),⁵⁰ and Canada's market access restrictions raise issues regarding its commitments under the USMCA.

⁴⁹United States-Mexico-Canada Free Trade Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

⁵⁰See TRIPS Article 13 and USMCA Article 20.64.