

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Watch List in 2024.¹

Executive Summary: Canada's legitimate digital marketplace for copyright materials remains hampered by widespread infringement, including: stream-ripping services that undermine legitimate music streaming, video-on-demand (VOD), and download offerings; subscription piracy services (infringing paid Internet Protocol Television (IPTV) and 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, highlighting the fact that inter-industry cooperation must be a priority. Government at all levels continues to allocate insufficient resources and strategic priority to the 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 that was initiated in 2017 should have been a vehicle for addressing many of these problems. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market because of the fair-dealing exception for education, 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), and weak enforcement. However, the shortcomings in Canada's current copyright regime remain unaddressed. IIPA is encouraged that despite the absence of specific legislation, Canadian courts have issued and upheld injunctive relief against intermediaries whose services are used to infringe copyright. In addition, Canada should remedy its deficient online copyright liability regime, which lags behind global norms. IIPA urges the U.S. government to remain extensively engaged with Canada on this and other important intellectual property (IP) issues in 2024, including on market access issues, such as Canada's implementation of the Online Streaming Act, to ensure Canada does not impose undue burdens or obligations on non-Canadian digital services.

PRIORITY ACTIONS REQUESTED IN 2024

Enforcement

- Prioritize enforcement against online piracy (including stream ripping), the operation and sale of subscription piracy services, and the trafficking in PDs, apps, and circumvention software tools and modification services.
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement with the resources and training required to implement enforcement priorities.

Legal Reforms

- 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.

¹ For 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 Special301 placement, see <https://www.iipa.org/files/uploads/2024/01/Appendix-B-2024.pdf>.

- Counter 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.
- Ensure that recorded music producers and performers are fully compensated for all forms of radio broadcasting of their recordings, including by eliminating the radio royalty exemption.
- Eliminate, or at least clarify, the UGC exception, in accordance with parliamentary recommendations and Canada's international obligations.
- Swiftly take up recommendations IIPA has noted in several submissions, including avoiding introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.
- Reject Bills C-244 and C-294 that allow circumvention of a technological protection measure (TPM) in certain circumstances.
- Provide full rights for communication to the public and public performance of sound recordings.

Market Access

- Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's United States-Mexico-Canada Agreement (USMCA) commitments.
- Ensure that the CRTC's implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.

ENFORCEMENT

- **Prioritize enforcement against online piracy (including stream ripping), the operation and sale of subscription piracy services, and the trafficking in PDs, apps, and circumvention software tools and modification services.**

The digital marketplace for copyrighted content in Canada continues to face challenges in realizing its full potential due to competition from illicit online sources. In 2022, 22.4% of Canadians accessed pirate music services.² Stream-ripping services, now the leading form of music piracy in Canada, are a major contributor to this problem.³ 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.⁴ Stream-ripping services undermine the legitimate markets both for streaming and licensed music downloads.

As with music piracy, online movie and television piracy remains a formidable challenge in Canada, inflicting major financial harm. NERA Economic Consulting and the Global Innovation Policy Center (GIPC) estimates the commercial value of pirated digital film content at US\$285.7 billion and the commercial value of pirated digital television content globally in 2017 at US\$280.5 billion, and notes how the displacement of legitimate economic activity by piracy has a negative impact on economic growth.⁵ Research by Carnegie Mellon University 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).⁶ 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) illegal online content in the previous three-month period, and movies (36%) and TV shows

² IFPI, 2022 Music Consumer Study.

³ Stream 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>.

⁴ The music industry reports that some 93% of Canadians who visited YouTube used the site to access music in 2021.

⁵ NERA Economic Consulting and Global Innovation Policy Center (GIPC), "Impacts of Digital Video Piracy on the U.S. Economy," June 2019, available at <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>

⁶ Carnegie Mellon University, The Dual Impact of Movie Piracy on Box-office Revenue: Cannibalization and Promotion, February 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946.

(34%) were among the forms of content most likely to be illegally “consumed.”⁷ Canadians made 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.⁸ In 2020, 76% of Canadians’ visits to sites used for online piracy were to non-peer-to-peer (P2P) sites, including streaming sites and cyberlocker (host) sites, up from 39% in 2015.⁹ 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.

The film and television industry in Canada continues to battle an influx of operators, sellers, and resellers of infringing paid subscription IPTV/VOD services. Canadian individuals are also actively involved in the ripping and theft of on-demand streams and telecommunication signals for the purposes of: (1) making unauthorized streaming of live television and motion pictures programming available to their own for-profit IPTV service or for sale as a “source” for other infringing IPTV services; and (2) for release on P2P sites. Many of these illegal services in Canada have generated millions of dollars in revenue, often 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, resellers of the service, payment processors, advertisers, and networks that facilitate electronic transfers. Recidivists often have no other comparable source of lucrative income.

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 IPTV service, or (ii) selling the content to other infringing subscription IPTV services available inside and outside of Canada is damaging and pervasive. 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.

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 devices and software that enable circumvention of TPMs, particularly following the Heritage Report’s recommendation to increase enforcement efforts.¹⁰ 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 piracy services (and of PDs or 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 TPM circumvention cases and should be provided with the training and other support that is needed. IIPA members remain 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.

- **Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement with the resources and training required to implement enforcement priorities.**

For Canada’s main federal law enforcement agency, the RCMP, 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, often lack the human and financial resources, as well as the strategic mandate, to properly investigate IP crimes

⁷ Shifting Paradigms Report of the Standing Committee on Canadian Heritage” (“Heritage Report”), available at https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67.

⁸ Ibid.

⁹ Sandvine, Video Piracy in Canada, April 2018, available at <https://www.sandvine.com/hubfs/downloads/reports/internet-phenomena/sandvine-spotlight-video-piracy-in-canada.pdf>; Sandvine, The State of Affairs: A Spotlight on Video and Television Piracy Worldwide, available at <https://www.sandvine.com/blog/the-state-of-affairs-a-spotlight-on-video-and-television-piracy-worldwide>.

¹⁰ See Julie Dabrusen, Chair, Standing Committee on Canadian Heritage, *Shifting Paradigms: Report of the Standing Committee on Canadian Heritage* (Heritage Report), 42nd Parliament, 1st Session, May 2019, Recommendation 6, p. 19, available at https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67.

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 unable to effectively deal with organized copyright piracy, and thus, increasingly fail to pursue even well-documented referrals from industry. 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.¹¹

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 by stakeholders 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.

LEGAL REFORMS

- **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.**

The bulk of the 2012 Copyright Modernization Act (CMA) consisted of several 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. 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 weakening of the well-established collective licensing regime to license and administer permissions to copy excerpts of books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada.¹² This pre-CMA structure 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 displayed by Canada’s educational establishment not only has significantly reduced copyright owners’ licensing revenue, leading to the Canadian CMO Access Copyright’s total distributions to rights holders dropping by 79%,¹³ but also has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada.

¹¹ Standing Committee on Industry, Science and Technology, *Counterfeiting and Piracy Are Theft*, June 2007, available at https://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf (called for a higher priority for enforcement at the retail level). See also, Standing Committee on Public Safety and National Security, *Counterfeit Goods in Canada – A Threat to Public Safety*, May 2007, available at <https://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/ securp10/securp10-e.pdf> (raised similar concerns about law enforcement priorities and funding).

¹² See IIPA’s 2018 Special 301 Submission, available at https://www.iipa.org/files/uploads/2018/02/2018_SPECIAL_301.pdf.

¹³ Access Copyright, *Canadian writers, visual artists and publishers lose the ability to have their rights and interests protected as federal government fails to deliver on its promise to fix Canada’s publishing marketplace*, July 13, 2023, available at <https://www.accesscopyright.ca/media/announcements/canadian-writers-visual->

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. 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.¹⁴ 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 remains unredressed. Because "education" is not defined in the statute and is 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 Supreme Court of Canada (SCC) decision in the *York University v. Canadian Copyright Licensing Agency*, the problematic environment for education publishers can now be remedied only through action by parliament, which to date has not taken any actions since the 2021 ruling to address this issue. The SCC ruled that certified tariffs are not mandatory, and as such, "not enforceable against York," but 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 well aware of the dire state of its educational publishing market. Even the flawed Industry Report acknowledged a problem with the current state of affairs, although it stopped short of recommending an adequate solution and instead took a wait-and-see approach.¹⁵ The Government of Canada's Budget 2022 underlined the government's commitment to ensuring that the Copyright Act "protects all creators and copyright holders," and noted that "the government will work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users."¹⁶ Yet, rights holders appear to be waiting in vain for any meaningful change.¹⁷

Canadian federal authorities and the country's Parliament should be encouraged to act with speed to redress this crisis by implementing the corrective measures recommended in the Heritage Report,¹⁸ including clarifying the scope of the fair-dealing exception for education. 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 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.

[artists-and-publishers-lose-the-ability-to-have-their-rights-and-interests-protected-as-federal-government-fails-to-deliver-on-its-promise-to-fix-canada-s-publishing-marketplace/](#).

¹⁴ See Heritage Report, Recommendation 18, p. 43.

¹⁵ Dan Ruimy, Chair, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act: Report of the Standing Committee on Industry, Science and Technology* (Industry Report), 42nd Parliament, 1st Session, June 2019, Recommendation 16, p. 65, available at <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf>.

¹⁶ Government of Canada, 2023 Budget, available at <https://budget.canada.ca/2023/report-rapport/toc-tdm-en.html>.

¹⁷ Id. at 7.

¹⁸ See Heritage Report, Recommendation 18, p. 43.

- **Harmonize remedies for collective management organizations (CMOs) under the Copyright Act.**

Amendments to the Copyright Board took effect in April 2019.¹⁹ The amendments introduced statutory rate-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.²⁰ 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.²¹

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 CMOs’ ability to collect royalties from active users. Unfortunately, the July 2021 SCC decision upheld the April 2020 decision by the Federal Court of Appeals (FCA) in *York University v. Access Copyright* that the Copyright Board approved tariff issued by Access Copyright is not mandatory and, therefore, not enforceable against York University or other non-licensees.²² 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.

- **Counter 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.**

Canada’s Copyright Act fails to respond adequately to the broader challenge of online infringement. The statute lacks important standard tools that leading copyright regimes now routinely provide to incentivize intermediaries, including advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services, to address copyright infringement, and the tools it does provide fall demonstrably short. As described above, such services, including those offered in Canada, are all too often abused to facilitate online copyright theft. IIPA urges the Government of Canada to counter online piracy in Canada by strengthening legal incentives for ISPs, hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with best practices, including by: reforming the currently inadequate and globally anomalous “notice-and-notice” regime in favor of measures demonstrated effective in preventing or restraining infringement; and clarifying and limiting the scope of the safe harbor provisions to ensure they apply only to passive and neutral intermediaries that do not contribute to infringing activities.

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 PDs 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

¹⁹ These 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, 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 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.

²⁰ Under 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.

²¹ See, Industry Report, Recommendation 11, pp. 45-46.

²² *York v. Access Copyright*, 2020 FCA 77.

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 2015.²³ The system creates little meaningful incentive for service providers to rid their services of infringing 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. 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.

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 user 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 do not contribute to infringing activities. Such amendments and avoiding broad exceptions that are inconsistent with these principles would help ensure that Canada's copyright framework for online intermediaries better achieves its underlying policy objectives in an evolving digital world. However, in updating Canada's safe harbor provisions, regard must be had to the lessons learned in other jurisdictions to avoid importing formulations that have led to “unbalanced” results.²⁴ Canada's 2020 USMCA implementation legislation did not address these deficiencies. 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 Heritage²⁵ and Industry²⁶ 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 to make its current regime more effective and provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

While the introduction of the “enablement” provision has been a helpful tool for addressing online piracy in terms of piracy sites and services themselves, the lack of adequate tools in the Copyright Act concerning Canadian intermediaries continues to hamper enforcement against rogue sites or services in Canada. The Government of Canada must strengthen legal incentives for hosting providers, payment processors, advertising networks, domain registries and registrars along with other intermediaries, to stand by their terms of service, which often clearly outline

²³ The 2021 consultation on a modern copyright framework for online intermediaries explored changes to the “notice-and-notice” system. However, nothing came of the consultation, which is a significant missed opportunity. No evidence exists that the “notice-and-notice” system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so. The system is merely 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 such notices do not lead to any meaningful consequences under the Canadian system.

²⁴ United States Copyright Office, *Section 512 of Title 17 – A Report of the Register of Copyrights*, May 2020, available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

²⁵ See Heritage Report, Recommendation 5, p. 19.

²⁶ See Industry Report, Recommendation 21, p. 83.

an intolerance for copyright infringing activities, and to cooperate with rights holders, thereby deterring piracy from taking place via their services.

Moreover, recent case law in Canada underscores the ability of rights holders to obtain site-blocking orders in Canada on the basis of the courts' equitable jurisdiction to grant injunctive relief. On July 18, 2023, on the basis of the decisions of the Federal Court of Appeals (FCA) in *Teksavvy Solutions Inc. v. Bell Media Inc.* (“GoldTV”)²⁷ and of the Federal Court in *Rogers Media Inc. v. John Doe 1*,²⁸ courts have granted both static and dynamic site-blocking orders for the “live” blocking of NHL games (“NHL Case”) and Major League Baseball (MLB) games in Canada.²⁹ 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.

- **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.**

A key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada. The Copyright Board concluded that there is no economic rationale for this provision, which it called a “thinly veiled subsidy” to “large, profitable broadcasters.” 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 CAD\$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 under Article 15 of the WPPT and that Canada committed to provide under the USMCA. Unfortunately, the 2020 USMCA implementation legislation did not address this problem. Both the Heritage Report³⁰ and the Industry Report³¹ called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. IIPA urges the Government of Canada to eliminate the radio royalty exemption.

- **Eliminate or at least clarify the UGC exception, in accordance with parliamentary recommendations and Canada’s international obligations.**

The copyright exception for “non-commercial user-generated content” 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. Although the exception has no precedent in global norms, it has spawned would-be imitators. This underscores the importance of removing, or at least clarifying, the UGC exception, in accordance with recommendations in the Heritage Report.³²

²⁷ *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100, May 26, 2021, available at <https://decisions.fca-cf.gc.ca/fca-caf/decisions/en/item/497659/index.do> (appeal dismissed by Supreme Court of Canada, available at <https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/19257/index.do>).

²⁸ *Rogers Media Inc. v. John Doe 1*, May 27, 2022, available at <https://www.canlii.org/en/ca/fct/doc/2022/2022fc775/2022fc775.html?resultIndex=1>.

²⁹ *Rogers Media Inc. v. John Doe 1*, July 18, 2023, available at <https://torrentfreak.com/images/MLB-Blocking-Order.pdf>.

³⁰ See Heritage Report, Recommendation 10, p. 26.

³¹ Industry Report, Recommendation 31, p. 109.

³² See Heritage Report, Recommendation 12, p. 30.

- **Swiftly take up recommendations IIPA has noted in several submissions, including avoiding introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing.**

In December 2017, Canada’s Parliament launched the copyright law review mandated by the 2012 CMA.³³ 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) and the June 2019 Industry Committee Report (Industry Report).

The Heritage Report recognized the negative impact the 2012 amendments have had on the publishing industry from the introduction of an undefined “education” as fair-dealing exception,, 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”).³⁴ 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 Report³⁵ 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”;
- 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 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 (TRIPS), and WIPO Copyright Treaty (WCT)).

The Industry Report also included some notable recommendations.³⁶ 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 IIPA has noted in several submissions and adopt needed reforms that have been delayed for too long, including: (1) ensure that ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites or when the intermediary has actual or constructive knowledge of infringing content or links on their services or networks, on a no-fault basis, upon rights holders’ applications to appropriate authorities (as reflected in the recent positive case law in this area (see above)); (2) reform the currently inadequate and globally anomalous “notice-and-notice” regime in favor of a more effective mechanism; (3) clarify that safe harbors should apply only to passive and neutral

³³ The 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.

³⁴ See Heritage Report, p. 6.

³⁵ See Heritage Report, List of Recommendations, pp. 1-3.

³⁶ See, Industry Report, pp. 3-10.

intermediaries that do not contribute to infringing activities; and (4) avoid introducing inappropriate licensing tools for the audiovisual sector, such as compulsory licensing and extended collective licensing (ECL).

- **Reject Bills C-244 and C-294 that allow circumvention of a technological protection measure (TPM) in certain circumstances.**

Bill C-244, an Act to amend the Copyright Act (diagnosis, maintenance, or repair), proposes to amend the Copyright Act to allow the circumvention of a TPM in a computer program if the circumvention is solely for the purpose of the diagnosis, maintenance, or repair of a product in which the program is embedded. Bill C-244 would also allow the manufacture, importation, distribution, sale, renting, and provision of technologies, devices, or components used for the diagnosis, maintenance, or repair of such products. Bill C-244 completed Third Reading in the House of Commons on October 6, 2023, and completed First Reading in the Senate on October 19, 2023.

Bill C-294, an Act to amend the Copyright Act (interoperability), proposes to amend the Copyright Act to allow a person, in certain circumstances, to circumvent a TPM to make a computer program or a device in which it is embedded interoperable with any other computer program, device, or component. Bill C-294 completed Third Reading in the House of Commons on June 14, 2023, and completed First Reading in the Senate on June 15, 2023.

IIPA urges the Government of Canada to reject these bills, but at the very least, each bill should be narrowed to prevent abuses that could undermine digital platforms and services. Any such exceptions should be narrowly tailored for specific, necessary purposes that do not open a backdoor to infringing devices or services that could undermine legitimate digital services and devices.

- **Provide full rights for communication to the public and public performance of sound recordings.**

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. 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 or for 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.

MARKET ACCESS

- **Ease long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada’s United States-Mexico-Canada Agreement (USMCA) commitments.**

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,³⁷ including:

³⁷ IIPA 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.

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% 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 not less than 50% Canadian programming from 6 p.m. to midnight. Private English-language discretionary services (specialty and Pay-TV) must exhibit not less than 35% 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 protectionist measures inhibit the export of U.S. media and entertainment services.

First, BDUs must offer a “skinny basic” tier for not more than \$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.

Second, except as permitted in a BDU's license from the CRTC, all other non-Canadian signals and services may be carried only 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. 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% 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 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% 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” 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 theatrical film distributors to do business directly in Québec. Since 1986, legacy MPA member companies have been permitted to 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 2022 and was extended for seven years.

Online Harmful Content: From April to June 2022, an expert advisory group on online safety held eight sessions to advise on developing a legislative and regulatory framework to address harmful online content. This followed a July through September 2021 consultation on “*The Government’s proposed approach to address harmful content online.*” The government then held 19 roundtables from July to November 2022 and released a summary report of what was discussed in January 2023. While the government has discussed this potential legislation for some time, the policy has proven difficult because of its relationship to public protection, censorship, freedom of speech, and misinformation, with parties holding conflicting positions on many of those topics. IIPA urges the U.S. government to continue to monitor the government’s work and any effects it may have on the broader online ecosystem.

- **Ensure that the CRTC’s implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.**

With the Online Streaming Act receiving Royal Assent on April 27, 2023, the CRTC now has the explicit power to regulate non-Canadian digital media services, including the power to prescribe regulations for streaming services regarding discoverability, contribution, and other measures intended to support Canadian cultural industries and to make regulations that would impose financial, discoverability, and reporting obligations to support the Canadian broadcasting system. On May 8, 2023, the CRTC launched a series of public consultations over three phases to implement the Online Streaming Act as part of its regulatory plan that targets late 2024 as the timeframe for implementing its policy decisions stemming from the public consultations. The Government of Canada should ensure that the CRTC’s implementation of the Online Streaming Act does not impose undue burdens or obligations on non-Canadian digital services.

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.³⁸ 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”),³⁹ and Canada’s market access restrictions raise issues regarding the country’s commitments under the USMCA.

³⁸ United States-Mexico-Canada Free Trade Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

³⁹ See TRIPS Article 13 and USMCA Article 20.64.