CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Special 301 Watch List in 2017.[1]

Executive Summary: Canada's Copyright Act mandates a full parliamentary review, to commence no later than November 2017, five years after enactment of the Copyright Modernization Act. From the perspective of the copyright industries, the report card on Canadian copyright modernization is decidedly mixed. While the country's legal environment has become somewhat less attractive to the operators of massive multinational online piracy operations, online infringement remains widespread in Canada, hampering the growth of the legitimate digital marketplace. Circumvention devices and services (and, increasingly, illicit streaming devices and apps) remain readily available, especially online. The new law clearly provides insufficient incentives for legitimate Internet intermediaries to cooperate with right holders to combat online infringement; nor has its "notice and notice" system changed consumer behavior with regards to infringement. Meanwhile, the greatly expanded exceptions to copyright protection that were the hallmark of the Copyright Modernization Act have already caused serious damage to Canada's educational publishing market; and their ill-defined boundaries, in combination with unfavorable decisions of Canadian courts and the Copyright Board, further ratchet up the level of market uncertainty for creative industries in Canada. Making copyright enforcement a priority for police, prosecutors, and courts, and completing the task of harmonizing duration of Canadian copyright protection with that of its major trading partners, are other major pieces of unfinished business. IIPA urges Canada to employ the statutory review to recalibrate the course set by the Copyright Modernization Act in order to better confront the challenges of today's digital networked marketplace, and asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2017.

PRIORITY ACTIONS REQUESTED IN 2017

- In the statutory review of the Copyright Act, make it a priority to address the crisis in the educational publishing market, including by clarifying the fair dealing amendments in the Copyright Modernization Act that have contributed fundamentally to the crisis.
- Seek to make further progress against 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 best practices.
- Closely monitor the implementation and application of new or expanded copyright exceptions, including the globally unprecedented user-generated content exception, with regard to market impact and conformity with Canada's international obligations.
- Direct the Royal Canadian Mounted Police (RCMP) and Crown prosecutors to give high priority to intellectual property rights enforcement, particularly online piracy and the trafficking in illicit streaming devices and other circumvention tools; and provide police, prosecutors and courts with the resources and training required to implement this priority and impose deterrent penalties on major violators.
- Complete the process of bringing the duration of protection for copyright into conformance with evolving global norms.
- Reform the Copyright Board's extremely slow and unpredictable tariff-setting process.
- Remove the cap on radio revenue.

[1]For more details on Canada's Special 301 history, see previous years' reports at http://www.iipawebsite.com/countryreports.html. For the history of Canada's Special 301 placement, see http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF.

KEY TOPICS FOR THE COPYRIGHT REVIEW

After years of consideration, Canada enacted its Copyright Modernization Act in 2012, and finally completed the task of bringing all the legislation's provisions into force in January 2015. This year brings the next significant milestone: section 92 of the Copyright Act requires that a parliamentary review of Canadian copyright law begin by November, 2017. A host of issues deserve full consideration in that review, as outlined below.

1. The Digital Environment

A. The Digital Marketplace in Canada Today

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. The Canadian Internet Registration Authority (CIRA) reports that 89% of Canadians use the Internet.[2] More than two-thirds of Canadians listen to some sort of online audio daily, while 78% stream online video,[3] and 72% play games on cell phones, tablets, or other mobile devices.[4] Legitimate digital distribution of creative content in Canada continues to grow. Nearly 30 music services now offer Canadians licensed downloads, streaming, or both,[5] with revenues from digital delivery of music predominating and continuing to grow, though the pace of that growth has slackened.[6] Similarly, the legitimate online video market is also growing in Canada, with studios and producers continuing to work with a multitude of partners and platforms. Currently, more than 50 licensed services now offer movies, TV programming, or both, online to Canadians.[7]

However, there is also evidence that the digital marketplace for copyright content in Canada is still underperforming, and that the pressure on legitimate services from illicit online sources is part of the reason.[8] For instance, the uptake on legitimate subscription music services lags well behind the levels in comparable countries. Only 11% of Canadian consumers paid for audio streaming services in 2015, far fewer than their counterparts in almost any other developed market surveyed.[9] While studies documenting the unusually great propensity of Canadian consumers to patronize illegal online sources of copyright material may by now be somewhat dated,[10] an examination of the Canadian legal landscape for online infringement indicates why the exciting potential of this market has not been fully realized.

For a number of years, extending well into the current decade, Canada had a well-deserved reputation as a safe haven for some of the most massive and flagrant Internet sites dedicated to the online theft of copyright material. Over the past few years, however, progress has been made toward rectifying this reputation. This trend continued in 2016 with the successful takedown of the "Kick Ass Torrents" (KAT) operation that included the biggest BitTorrent[11] site in the world in terms of visitors and popularity, *Kat.cr,* which was hosted in Canada among other jurisdictions.[12] Although the KAT investigation was U.S.-led, and culminated in the arrest of a Ukrainian national in Poland as the mastermind, Canadian authorities cooperated in the effort. Unlike in some previous cases, it does not

[2] *CIRA Internet Factbook 2016*, available at https://cira.ca/factbook/domain-industry-data-and-canadian-Internet-trends/canada%E2%80%99s-internet

[3] *Id*., available at https://cira.ca/factbook/domain-industry-data-and-canadian-Internet-trends/internet-use-canada. Industry research cited by CIRA asserts that "Canadians on average watch 5.1 more hours of [online] video per month than their American counterparts."

[4] Entertainment Software Association of Canada, *Essential Facts 2016*, available at http://theesa.ca/wp-content/uploads/2016/11/2016_booklet_Web.compressed2.pdf.

[5] http://www.pro-music.org/legal-music-services-north-america.php.

[6] IFPI, *Global Music Report* (April 2016), at p. 71, available at http://www.ifpi.org/recording-industry-in-numbers.php ("GMR 2016") (showing 13% digital revenue growth 2012-2015).

[7] www.wheretowatchincanada.com.

[8] As CIRA notes, "Canadians are willing to tread on some legal grey areas to access the online content they want." *CIRA Internet Factbook 2016*, supra n. 3.

[9] Ipsos Connect, *Music Consumer Insight Report 2016*, at p. 16, available at http://www.ifpi.org/news/IFPI-and-Ipsos-publish-Music-Consumer-Insight-Report-2016.

[10] See http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html for a 2012 study finding that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country.

[11] BitTorrent is by far the leading protocol used by unlicensed Peer-to-Peer (P2P) file sharing networks.

[12] For more details on *kat.cr*, see USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), at 14, available at https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf, as well as IIPA 2016 at 80.

appear that the KAT investigation directly involved the Copyright Modernization Act provision (section 27(2.3)) establishing civil liability for providing services primarily for the purpose of enabling acts of copyright infringement. But the enactment of this so-called "enablement" prohibition continues to provide a helpful new tool for copyright industry efforts to shut down Canadian-connected sites dedicated to piracy, and to help purge the Canadian online environment of these outlaw services that undermine legitimate digital markets for copyright materials worldwide. For example, the enablement prohibition was cited in a consent order filed in the British Columbia Supreme Court in July 2016, which ended longstanding litigation by music companies against *isoHunt*, once among the largest unauthorized BitTorrent sites in the world.[13]

Nonetheless, major online piracy operations still find a home in Canada. These include leading BitTorrent sites such as *Sumotorrent.sx* and *Seedpeer.eu,* and hybrid cloud storage services untilizing BitTorrents, such as *cloudload.com*. A disturbing recent trend is the emergence of stand-alone BitTorrent applications that employ an attractive, user-friendly interface that enables users to illegally stream and download infringing movies and TV programs; these applications are available in Canada both online and pre-loaded onto set-top boxes.

Sites associated with Canada play a leading role in facilitating online theft of recorded music, including through "stream-ripping" technologies, which USTR has recognized as a global challenge to the growth of digital markets.[14] Stream-rippers defeat the technological measures employed by legitimate music streaming services to prevent copying and redistribution of the recordings streamed; they thus undermine the legitimate markets both for streaming and for licensed music downloads. Well-trafficked stream-ripping sites whose domain names are registered in Canada inflict considerable damage worldwide both on music performers and on record labels. Three leading sites in this category, *mp3juices.cc, youtubemp3.cc*, and *aiomp3.com,* together accounted for almost 900 million visits in the past year. In addition, *zippyshare.com*, one of the world's leading sources of illicit recorded music files available before authorized release, is a major cyberlocker service whose domain name is registered by a Canadian company to a Canadian proxy registration service.[15] This advertising-supported site, which has been in operation for more than a decade, responds to take down notifications, usually within 24 hours, but the same infringing content that is taken down is regularly re-uploaded to the site. The motion picture industry reports an increase in deceptively marketed illegal streaming sites, along with the prevalence of illicit streaming devices and mobile applications discussed below.

Other sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform. The video game industry reports that sites operated and hosted in Canada, such as *R4cardmontreal.com*, *gamersection.ca*, and r4ds*canada.com,* continue to offer circumvention devices and game copiers for sale. Computer software that effects a "soft modification" of the security technology of game consoles, and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada. In a growing and problematic trend, sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S. are moving to Canadian ISPs for hosting, to evade enforcement action under U.S. law. Canadian hosting services such as Hawk Host and Crocweb are particularly popular with such sites. This trend breathes new life into Canada's problematic "safe haven" reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. For example, *3roms.com*, a direct download site for multiple game platforms, is registered and operated out of Chilliwack, British Columbia. Even those sites that have been terminated from payment processing services can

[13]Under the order, isoHunt was found liable for CAD$55 million in damages and CAD$10 million in punitive damages, and isoHunt and its principal were prohibited from associating in the future with any service that makes music companies' recordings available without authorization. For more background on isoHunt, see IIPA 2014 Report, at p. 103, available at http://www.iipawebsite.com/rbc/2014/2014SPEC301CANADA.PDF.

[14]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) ("USTR NM"), at p. 5, available at https://ustr.gov/sites/default/files/2016-Out-of-Cycle-Review-Notorious-Markets.pdf.

[15]easyDNS is another Canadian domain name registrar that provides similar services to sites dedicated to piracy.

generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content.

B. Canada's legal regime falls short

Beyond enactment of the "enablement" provision, which targets the sites that clearly are dedicated to promoting copyright theft, the challenge of online infringement is a much broader one, to which Canada's Copyright Act simply fails to respond adequately.[16] The statute still lacks important tools that world-class copyright laws now routinely provide for dealing with infringement that takes place in connection with more legitimate online services. And the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law provides inadequate incentives for cooperation by a range of other legitimate players, such as advertisers, payment processors, and domain name registrars, whose services are all too often abused to facilitate online copyright theft. For example, data sourced from International Federation of the Phonographic Industry (IFPI) investigations suggest that Toronto-based WWWPromoter is the fastest growing advertising network enabling the monetization of infringing music sites in Canada and worldwide through revenue-generating advertisements.

There is no evidence that Canada's "notice and notice" system, which came into force in January 2015, is contributing to any significant change in consumer behavior with regard to infringement. IIPA endorses the concept of ISPs sending notices to their users to alert them that their accounts are being used for infringing purposes. However, simply notifying ISP subscribers that their infringing activity has been detected is ineffective in deterring illegal activity, because receiving the notices lacks any meaningful consequences under the Canadian system. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system. Even where notices are sent, there are reports that multiple repeat infringers will be delivered the same notice, and service providers have indicated that they do not track the number of notices sent to particular subscribers.[17] Some right holders have further reported that some ISPs have arbitrarily decided to limit the number of notices sent to repeat infringers within a certain window of time, and thus deem notices outside these limits to be erroneous. Moreover, there are insufficient incentives for ISPs to respect the legislated "notice and notice" system, because their failure to forward notices from right holders does not affect their exposure to copyright infringement liability.[18] Better data from Canadian ISPs could be useful in assessing the overall effectiveness of the "notice and notice" regime, and in encouraging cooperation for enhancements to the program.

More fundamentally, "notice and notice" was never even intended to address a different and very serious problem: hosting service providers who fail to disable access to infringing materials that they are hosting, even after it is brought to their attention. So long as known infringing content remains readily accessible online, the battle against online piracy is seriously compromised. Canada's steadfast refusal to adopt any impactful legislative requirements as a condition for limiting the liability of hosting providers leaves it an outlier in the global environment, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights owners and stakeholders impacted by widespread infringement online. The "notice-and-takedown" remedy that most other modern copyright laws provide is far from a panacea for online piracy, but it does, at a minimum, provide some incentives for cooperation, incentives that Canada's laws simply lack. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft completes the picture of a system that is still not up to the challenge.

Taken as a whole, these deficiencies in Canada's online liability legal regime still tilt the field of competition against licensed services, and also continue to send the wrong signals to consumers about whether infringing activities are tolerated. In the upcoming Copyright Act review, Canada should look for ways to make its current

[16]The shortcomings of the legislation are detailed in past more extensive analyses of the Copyright Modernization Act by IIPA. See e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013 ("IIPA 2013"), *available at* http://www.iipawebsite.com/rbc/2013/2013SPEC301CANADA.PDF, at 127-131, and other sources referenced therein.

[17]Cf. the data retention obligation contained in section 41.26(1)(b) of the Copyright Act.

[18]See section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

regime more effective, and to provide meaningful incentives to stimulate full inter-industry cooperation against online piracy.

C. Copyright Board needs reform

Another factor contributing to continued underperformance in the digital music space arises from the inefficient and unpredictable tariff-setting process before the Copyright Board, where on average it takes three-and-one-half years, and in significant cases five years or more, to complete hearings, and another two years or more to render a decision. These extreme delays make economic forecasting nearly impossible for stakeholders, and have become a barrier to some copyright industries doing business in Canada. Furthermore, the Board's process is unpredictable and lacks any specific rate-setting criteria, other than an overarching requirement that royalty rates be "fair." Unlike comparable tribunals in the U.S. and around the world, the Board is not required to use the willing buyer/willing seller principle as a benchmark for determining the commercial value of the rights in question. These problems should be addressed in the upcoming parliamentary review.[19]

The Board's recent decision in the "Tariff 8" proceeding highlights these challenges. The 2014 decision, rendered six years after the tariff was proposed, set rates for webcasting at a small fraction of the rates negotiated in the marketplace or those applicable in neighboring markets. The rates fall far short of establishing conditions for healthy growth of the legitimate marketplace in digital music delivery. The Board's decision was appealed to the federal courts, with a decision expected in 2017.

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

Although much of the public attention to Canada's copyright modernization project was focused on issues of response to online piracy in particular, in fact the bulk of the legislation consisted of a score of new or significantly expanded exceptions to copyright protection. IIPA has previously sounded warnings about potential problems with several of these changes.[20] To date, none has had a more concrete and negative impact than the addition of the word "education" to the list of purposes (such as research and private study) that qualify for the fair dealing exception.

Prior to 2012, a well-established collective licensing regime was in place to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada. This system generated millions of dollars in licensing revenues for authors and publishers on both sides of the U.S.-Canadian border. Authors relied upon it for a considerable part of their livelihoods, and it provided publishers with a return on investment that enabled new investments in innovative means to deliver textual materials to students.

Today, as IIPA has previously reported, that system has been all but destroyed. A detailed study released by Pricewaterhouse Coopers (PwC) in June 2015 documents and quantifies the damage.[21] The annual loss from the demise of licensing to copy parts of works was estimated at C$30 million (US$22.9 million). And the damage spills over to the full textbook sales market as well, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.[22] A significant share of those losses accrue to U.S. publishers, which have always been major participants in the Canadian educational market.

[19]A Canadian Senate committee has "strongly recommend[ed]" that the Copyright Board be examined in the context of the Section 92 copyright review. See http://www.parl.gc.ca/content/sen/committee/421/BANC/Reports/2016-11-25BANCFINALVERSIONCopyright_e.pdf

[20]For detailed analysis of the concerns raised by some of these new exceptions, see e.g., IIPA 2013, at pp. 130-31.

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

[22]PwC at 6, 7.

The 2012 "education" amendment to fair dealing is one of the root causes of this market decimation. Even before the fair dealing amendment came into force, some of the decisions in the "pentalogy" of copyright decisions issued by Canada's Supreme Court in July 2012 posed a direct threat to the educational licensing market.[23] Although the *Alberta Education v. Access Copyright* case in the Supreme Court's pentalogy directly affected only a marginal aspect of the educational copying collective licenses, the subsequent statutory amendment poured gasoline on a smoldering fire.

Lawyers for primary and secondary school systems across Canada, giving both the precedents and the new fair dealing amendment the "large and liberal" reading that the pentalogy decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from the collecting society for authors and publishers (Access Copyright), including for uses such as copying of primary textbooks or of newspaper articles, course packs, digital copying (including digital storage and distribution through learning management systems), and copying for uses outside the classroom. Consequently, as soon as the new Act came into force, virtually all K-12 school boards across Canada (excluding Quebec) cancelled their licenses with Access Copyright. In February 2016, a decision of Canada's Copyright Board, setting retrospective royalty rates for copying in K-12 schools across the nation, codified the crisis in the market. The Board concluded that the copyright exceptions were so broad that 87% of the copying undertaken by schools each year—some 179 million pages annually, equivalent to 879,000 books—deserved no compensation at all. It cut the per student royalty rate for 2010-15 almost in half, by comparison to the 2005-09 rate.[24] This decision was upheld by the Federal Court of Appeal in January 2017. However, all of Canada's provincial ministries of education (except in Quebec) find even these meager royalty rates intolerable, and have refused to pay anything for copying during 2013-2015, not even the rate certified by the Copyright Board. As the PwC study concluded, "[l]icensing income from the K-12 sector has been all but eliminated."

The damage in the post-secondary market may be even worse. After university licensing agreements with Access Copyright expired at the end of 2015, 80% of the covered institutions refused to renew. When the Copyright Board convened to set royalty rates for copying by post-secondary institutions for 2011-17, colleges and universities simply refused to participate. Like the K-12 sector, post-secondary institutions appear to have concluded that their exposure to copyright liability is so low that it is uneconomic to pay for any license. Access Copyright royalty collections from this sector are projected to decline from C$11.1 million (US$8.5 million) in 2015 to C$1 million (US$764,000) in 2017.

The PwC study encapsulated the situation: in Canada, "[t]he education sector now takes the position that its members are effectively not required to pay for the copying of this content by virtue of the 'fair dealing' exception in the Copyright Act."[25] In other words, the Canadian educational establishment across Canada, at the primary, secondary and post-secondary levels, has concluded that the risk of liability for copyright infringement is now so minimal that it should take that risk by refusing to pay for any copying. Pending copyright litigation against York University may serve as a test case in the post-secondary sphere; a decision is expected in 2017. But no doubt Canadian educational institutions are buttressed in their sense of impunity from copyright liability by another objectionable feature of the Copyright Modernization Act. The Act's extremely low C$5000 (US$3,800) cap on statutory damages for all infringements carried out by any defendant for "non-commercial purposes"—an undefined phrase sure to be interpreted expansively by advocates for educational institutions—renders that remedy virtually

[23]Of the five copyright decisions announced on July 12, 2012, the most impactful rulings for these purposes were *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAAAB, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36*, available at http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAAAB. Their impacts are discussed in IIPA's 2015 Special 301 submission on Canada, at pages 85-86.

[24]Access Copyright, "*Copyright Board certifies 2010-2015 K-12 tariff*," at https://accesscopyright.ca/media/announcements/copyright-board-certifies-2010-2015-k-12-tariff/

[25]PwC at 6.

insignificant in any copyright dispute with a school or university, further discouraging enforcement of rights.[26] Given the difficulty of detecting and documenting infringement, the high costs of litigation, and the low likelihood of recovering any meaningful and deterrent damages, a nationwide education sector policy of boldly and deliberately copying protected material without permission, license or compensation is hardly surprising.

Nor is the damage confined to licensing revenue for copying. As part of an overall attrition of revenues from the sale of educational works in Canada, textbook publishers report significant drop-offs in book orders from university bookstores, presumably because more of the demand is being met by uncompensated copying under the current fair dealing interpretation. The PwC study found that "[f]ewer publishers are responding to requests for proposals to produce [new] textbooks,"[27] and that sales of digital content, as well as publisher investment in digital resources, will be adversely affected.[28] One publisher reported last year that high schools that used to buy 20 to 30 copies "started buying just a single copy of the same book… They then scanned or photocopied portions to distribute to students." When this publisher's revenue from high school sales plummeted by 90%, it had no choice but to terminate its high school program as "unsustainable."[29]

While Canadian publishers and authors are most profoundly impacted, the fallout has reverberated in the U.S. creative sector as well, because U.S. authors and publishers have always accounted for a significant share of the textbooks, supplementary materials, and other texts used in the Canadian educational sector. All expectations are for the problems to worsen unless promptly addressed. Access Copyright was just beginning the process of implementing new licenses for digital copying in Canadian schools when the "double whammy" of the 2012 Supreme Court decisions and the copyright modernization legislation hit them. The prospects for achieving any licensing revenue for digital copying, which is already becoming more pervasive than photocopying throughout Canadian educational institutions, now appear extremely bleak, because of what the PwC characterized as "an atmosphere where unlimited copying has become commonplace, while content producers are unable to assert their intellectual property rights in any meaningful way."[30] And this atmosphere is at risk of spreading to other sectors. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing favored by Canadian courts, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions).

Nor is the educational fair dealing amendment the only Copyright Modernization Act provision that may be contributing to the sense of impunity from copyright responsibility that Canada's educational establishment increasingly displays. Besides the statutory damages cap discussed above, the broad new exception in section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done "for educational or training purposes" by an educational institution or its agent with respect to "a work or other subject matter that is available through the Internet," so long as the Internet site or the work is not protected by a technological protection measure (TPM).

Canada's central government is well aware of the dire state of its educational publishing market, and of the fact that government actions at the provincial level are among its immediate causes—specifically, the adoption by the Council of Ministers of Education, Canada[31], of the sweeping "fair dealing guidelines" that provide the legal justification for the cessation of licensing royalty payments. Canadian federal authorities should be encouraged, as a matter of urgency, to clarify the scope of the education fair dealing exception. Their goal must be an appropriate balance under which educational publishers and authors are once again compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials. Because the amendments made by

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

[27]PwC at 9.

[28]PwC at 71.

[29]"*This is What Falling Off a Cliff Looks Like*," available at http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/.

[30]PwC at 94.

[31]Council of Ministers of Education, Canada is an intergovernmental body founded in 1967 by ministers of education of all 13 Canadian provinces and territories. See http://www.cmec.ca/11/About/index.html

the Copyright Modernization Act have played such a central role in creating the instability and sense of impunity from copyright responsibilities that now prevails in Canada, advancing this goal must be a top priority for the parliamentary review of copyright law mandated by Section 92 of the Copyright Act, followed by swift action to amend the statute.

IIPA's frequently-stated concerns about the breadth of the new exceptions in Canadian law are by no means limited to those impacting the educational sector. In particular, new section 29.21, entitled "Non-commercial User-generated Content," allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary (including a commercial intermediary), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is "solely for non-commercial purposes" and does not have a "substantial adverse effect" on the market for the underlying work. The provision could substantially undermine the exclusive adaptation right that Canada is obligated under the WTO TRIPS Agreement (TRIPS) and the Berne Convention to provide, and its breadth raises serious questions of compliance with the 3-step test for permissible limitations and exceptions.[32] Although enactment of the exception is globally unprecedented, it has spawned imitators, such as the proposal for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of close monitoring of how the Canadian user-generated content (UGC) exception is applied in practice, including whether it leads to abandonment of established licensing arrangements, as has already occurred with regard to educational publishing.

3. Discrimination and Duration

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

An additional concern for the music industry is the cap on radio revenue in Canada. The C$100 (US$76) statutory royalty on sound recording broadcast royalties is applied to all commercial radio stations with a turnover not exceeding C$1.25 million (US$951,000). Radio stations pay the approved percentage tariff only for revenues in excess of that limit. The rule has led to widespread abuses, through establishment of chains of small stations that are in practice however syndicated and under the same ownership, etc. As a result of this issue among others, industry broadcast revenues are significantly lower than in other similar economies. The Canadian system does not guarantee "equitable" remuneration as per the WIPO Performances and Phonograms Treaty (WPPT).

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

[32]See, e.g., Article 13 of the WTO TRIPS Agreement.

COPYRIGHT ENFORCEMENT

The entry into force in 2015 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). But that legislation did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the Royal Canadian Mounted Police (RCMP), intellectual property crimes in general and copyright crimes in particular are neither a strategic nor an operational priority. Indeed, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not in a position to deal effectively with organized copyright piracy, and thus increasingly fail to pursue even well-documented referrals from industry. On the whole, because the Canadian law enforcement commitment to act against copyright piracy remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back a decade or more, remain basically unchanged.[33]

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. Crown Counsel are now declining training offered by right holders; since police are no longer referring files to the Department of Justice, there are no cases to prosecute. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.[34] The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism.

The continued deterioration of Canadian enforcement efforts comes at a singularly inopportune time, just as the nature of the criminal enterprise involved in physical goods piracy is becoming more sophisticated and complex. Instead of low volume production and sales of counterfeit optical discs, the threat increasingly involves trafficking in set-top boxes sold pre-loaded with infringing applications that enable cord-cutting Canadians to obtain unauthorized access to high-quality digital streaming and video on demand (VOD) content. These illicit streaming devices are readily available in kiosks in reputable shopping malls for as little as C$100 (US$76). Of course they are also sold on dedicated Canadian-owned and –operated websites, and in well-known third-party online marketplaces; but their presence in legitimate retail spaces, where they are deceptively marketed with high quality promotional materials, sows even greater confusion among consumers. This is by no means solely a physical piracy problem—as noted above, illegal streaming sites are also proliferating, and applications for mobile devices that achieve the same unauthorized access are also widely available. The problem extends to the sale of devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention. But since Canadian law enforcement authorities are almost completely unengaged in criminal

[33]For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level, see http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp298508f1/securp10/securp10-e.pdf.

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

enforcement against online piracy of any kind, their inability to deal with the sale of physical goods such as these illicit streaming devices is even more discouraging.[35]

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

Finally, the Canadian Government should consider establishing an industry/government task force on intellectual property, to ensure that relevant, real-time information flows to government officials in all relevant departments (including but not limited to Public Safety, Trade, Industry, and Heritage). Improved current information awareness should contribute to improved decision making, both at the political level and among the civil servants with responsibility for these issues.

COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES

Canada's international agreements involving the U.S. that are most relevant to copyright obligations include the WTO TRIPS Agreement and the North American Free Trade Agreement (NAFTA).[36] As noted above, some aspects of Canada's current copyright regime may raise significant issues regarding compliance with these agreements (for example, whether the breadth of some of Canada's copyright exceptions, as applied, comply with the well-established "three-step test")[37]. But the broader problem is that the copyright law and enforcement norms in these agreements, both negotiated more than a quarter-century ago, are extremely outdated, and lack modern copyright protection and enforcement standards for the digital marketplace.

[35]On a more positive note, in civil litigation, at least one Canadian federal court has issued an interlocutory injunction against retailers of "plug-and-play" set-top boxes pre-loaded with applications to allow consumers to access TV programs and movies without cable or other subscriptions. See *Bell Canada v. 1326030 Ontario Inc (iTVBox.net)*, 2016 FC 612.

[36]IIPA commends Canada's accession to the WIPO Internet Treaties (WCT and WPPT), which were enabled by bringing the Copyright Modernization Act into force.

[37]See TRIPS Art. 13.