

# CANADA

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Canada remain on the Watch List in 2020.<sup>1</sup>

**Executive Summary:** The legitimate digital marketplace for copyright materials continues to grow in Canada, but the market remains hampered by widespread infringement, including stream-ripping services that undermine legitimate music streaming and download offerings; Subscription Piracy services (infringing paid Internet Protocol Television (IPTV) and Video-on-Demand (VOD) services) and the ever-increasing Canadian re-sellers of these services; streaming sites and other online sources for unauthorized movies and TV shows; and Piracy Devices and apps, readily available both online and in the retail market, that suppress demand for legitimate digital streaming and VOD services. The country has made some progress in shedding its reputation as an online piracy haven, but too many Canadian Internet businesses allow their services to be abused by pirate operators, and inter-industry cooperation remains insufficient. Government at all levels accords insufficient resources and strategic priority to enforcement of copyright laws, especially online, and significant market access barriers impede U.S. film and TV producers and distributors.

The mandated parliamentary review of Canada's Copyright Act should have been a vehicle for addressing many of these problems. However, due to the suspension of Parliament in advance of the October 2019 federal election, the Government of Canada did not act upon the recommendations of the Parliament's Standing Committee on Canadian Heritage (Heritage Committee), which was responsible for reviewing matters regarding remuneration of creators. As a result, the shortcomings in Canada's current copyright regime remain unaddressed. Prior IIPA submissions have detailed the many urgent problems, including the decline of the educational publishing market as a result of an overbroad interpretation of the education as fair dealing exception, lack of effective remedies and legal incentives to combat growing online piracy, statutory discrimination against producers of U.S. recorded music, an unjustified radio royalty exemption, an unprecedented exception for user-generated content, inadequate duration of copyright protection, and weak enforcement. The Heritage Committee's recommendations address many of these concerns, and IIPA urges the Government of Canada to swiftly implement the recommendations to improve both the law and enforcement.

IIPA is encouraged that in the absence of legislation, Canada's courts have issued injunctive relief against intermediaries whose services are used to infringe copyright. In addition, IIPA is hopeful that the reforms to Canada's Copyright Board will bring Canada's tariff-setting process into closer alignment with international norms in other developed markets, especially in cases where negotiated settlements have already been achieved. Implementation of the U.S.-Mexico-Canada Agreement (USMCA), which the U.S. has recently done, could bring some positive benefits, particularly regarding Canada's commitments to bring its term of protection into alignment with evolving global norms and to provide full national treatment for U.S. sound recordings. Canada should meet its USMCA commitments and address pressing concerns, including Canada's deficient online copyright liability legal regime that lags behind global best practices. IIPA asks the U.S. Government to remain extensively engaged with Canada on these and other issues in 2020.

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<sup>1</sup>For more details on Canada's Special 301 history, see previous years' reports, at <https://iipa.org/reports/reports-by-country/>. For the history of Canada's Special 301 placement, see <https://iipa.org/files/uploads/2020/02/2020SPEC301HISTORICALCHART.pdf>.



## **PRIORITY ACTIONS REQUESTED IN 2020**

Implement recommended reforms of the Copyright Act and achieve USMCA objectives, including by:

- Addressing the crisis in the educational publishing market, by clarifying that fair dealing should not apply to educational institutions when the work is commercially available; harmonizing remedies for collecting societies under the Copyright Act; clarifying that a tariff approved by the Copyright Board of Canada is mandatory in nature and its enforceability is not dependent upon a person's assent to or agreement with its terms;
- Making further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and all other intermediaries to cooperate with copyright owners, in accordance with international best practices, including by: introducing measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content, and following through on parliamentary recommendations to consider providing injunctive relief for deliberate online copyright infringement and narrowing the scope of safe harbor exceptions available to online service providers;
- Ensuring that recorded music producers and performers are fully compensated for all forms of radio and TV broadcasting and communication to the public of their recordings, including by elimination of the radio royalty exemption; and
- Completing the process of bringing the duration of protection for copyright into conformance with evolving global norms.

In addition, Canada should be urged to:

- Prioritize enforcement against online piracy and the trafficking in Piracy Devices, the operation and sale of Subscription Piracy services, apps and other circumvention tools;
- Provide the Royal Canadian Mounted Police (RCMP), Crown Prosecutors, and local law enforcement the resources and training required to implement this priority; and
- Make progress on easing long-standing market access barriers for U.S. movies and TV programming, in accordance with Canada's USMCA commitments.

## **THE DIGITAL MARKETPLACE IN CANADA TODAY**

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. The Canadian Internet Registration Authority (CIRA) reports that almost three-quarters of Canadians spend three to four hours a day online, and two-thirds of the population spends at least one hour a day watching TV or movies online.<sup>2</sup> A 2019 study found that half the time Internet users in Canada listen to music is spent listening online through streaming services.<sup>3</sup> The growth of legitimate digital distribution of creative content remains robust. At the end of 2018, the total recorded music market stood 44% higher than in 2014, while revenue from licensed music streaming services had increased more than tenfold, from US\$26 million in 2014 to US\$265 million in 2018.<sup>4</sup> Streaming's share of total music industry revenues increased from just 8.6% in 2014 to 60% in 2018, and, digital consumption methods overall are now three-quarters of all recorded industry revenues.<sup>5</sup> The legitimate online video market is growing in Canada, with studios and producers continuing to work with multiple partners and platforms. Canadians subscribe to a wide variety of

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<sup>2</sup>Canadian Internet Registration Authority (CIRA) *Internet Factbook 2019*, available at <https://cira.ca/factbook/the-state-of-canadas-internet>.

<sup>3</sup>IFPI Music Listening 2019, available at <https://www.ifpi.org/downloads/Music-Listening-2019.pdf>.

<sup>4</sup>IFPI *Global Music Report 2019*, p. 89, available at <http://www.ifpi.org/resources-and-reports.php#recording-industry-in-numbers.php>.

<sup>5</sup>Id.

services offering movies, TV programming, or both, online.<sup>6</sup> Almost 60% of all Canadians report they subscribe to Netflix.<sup>7</sup>

Evidence persists, however, that the digital marketplace for copyright content in Canada continues to underperform, and that the competition from illicit online sources is a key reason.<sup>8</sup> “Stream-ripping” services, now the leading form of music piracy in Canada, are a major contributor to this problem.<sup>9</sup> Stream-ripping enables users of 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.<sup>10</sup> By circumventing the technological measures employed by most legitimate music streaming services to prevent copying and redistribution of streamed recordings, stream-ripping services undermine the legitimate markets both for streaming and for licensed music downloads. Dozens of websites, software programs, and apps offering stream-ripping services find an eager marketplace in Canada, with 28% of surveyed Canadians engaging in this form of piracy in the past month. Use of peer-to-peer (P2P) remains high with BitTorrent indexing sites including *Rarbg*, *ThePirateBay*, and *1337x* popular in Canada. Cyberlocker sites, such as *Uptobox*, *1fichier*, and *Rapidgator*, are also a common way to access recorded music.<sup>11</sup>

As noted in last year’s IIPA Special 301 submission, Canada has made progress in recent years rectifying its long-standing reputation as a safe haven for some of the world’s most massive and flagrant Internet sites dedicated to the online theft of copyright material.<sup>12</sup> However, sites and intermediaries associated with Canada still play a leading role in facilitating such theft. Examples include the BitTorrent site *Monova.org* and the cyberlocker *Zippyshare.com*.<sup>13</sup> Canada is also home to various intermediaries that are popular with unlicensed services. For example, while the true location of *Monova.org* is obscured through the use of a reverse proxy service, both sites referenced above are registered by Canadian domain name registrars (*Zippyshare.com* by Tucows, and *Monova.org* by easyDNS Technologies), and these sites employ Canadian proxy registration services (Contact Privacy, Inc. for the Tucows sites, and MyPrivacy.net for the easyDNS sites).

As with music piracy, online movie and TV piracy remains a formidable challenge in Canada, inflicting major financial harm. Frontier Economics estimates the commercial value of digital piracy alone is US\$160 billion worldwide, and the displacement of legitimate economic activity by counterfeiting and piracy has a negative impact on economic growth.<sup>14</sup> 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).<sup>15</sup> It is nearly impossible to overstate the magnitude of the piracy problem in Canada. According to the Government of Canada’s own study published in May 2018, more than one-quarter (26%) of content consumers reported having “consumed” (downloaded or streamed or accessed) illegal online content in the previous three-months, and movies (36%) and TV shows (34%) were among the forms of content most likely to be illegally “consumed.”<sup>16</sup> Canadians made a total of 2.6 billion visits to piracy sites in 2018, and the nature of this piracy continues to evolve.<sup>17</sup>

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<sup>6</sup>CIRA *Internet Factbook 2019*, supra 2.

<sup>7</sup>Id.

<sup>8</sup>As CIRA notes, “Canadians are willing to tread on some legal grey areas to access the online content they want.” CIRA *Internet Factbook 2016*, available at <https://cira.ca/factbook/domain-industry-data-and-canadian-internet-trends/internet-use-canada>.

<sup>9</sup>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>.

<sup>10</sup>The music industry reports that some 87% of Canadians who visited YouTube used the site to access music in 2018.

<sup>11</sup>2018 IFPI Music Consumer Insight Report Study, at <https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf>.

<sup>12</sup>See IIPA’s 2019 Special 301 country survey on Canada, at <https://www.iipa.org/files/uploads/2019/02/2019SPEC301CANADA.pdf> (“IIPA 2019”).

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

<sup>14</sup>Frontier Economics, *The Economic Impact of Counterfeiting and Piracy*, February 2017, available at [https://www.inta.org/Communications/Documents/2017\\_Frontier\\_Report.pdf](https://www.inta.org/Communications/Documents/2017_Frontier_Report.pdf).

<sup>15</sup>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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736946).

<sup>16</sup>See Government of Canada, *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada, Final Report* (March 2018), p. 27, [https://www.ic.gc.ca/eic/site/112.nsf/vwapi/07648-eng.pdf/\\$file/07648-eng.pdf](https://www.ic.gc.ca/eic/site/112.nsf/vwapi/07648-eng.pdf/$file/07648-eng.pdf).

<sup>17</sup>Id.

In 2018, 74% of Canadians' visits to sites used for online piracy were to non-P2P sites, including streaming sites and cyberlocker (host) sites, up from 49% in 2015; while, conversely, 26% of these visits were to P2P sites in 2018, down from 51% in 2015.<sup>18</sup> In addition, Canada has seen an influx of sellers and resellers of infringing paid Subscription Piracy services. These services, which have become widely marketed and widely available, steal legitimate signals through circumvention of technological protection measures (TPMs) and other means. Sandvine reported in April 2018 that: (1) 10% of Canadian households now have at least one set-top box, computer, smartphone or tablet running Kodi software, a higher proportion than in the U.S. (6%); (2) 71% of these households with devices running Kodi software have unofficial add-ons configured to access unlicensed content; and (3) 8% of Canadian households are using known Subscription Piracy services.<sup>19</sup>

Both online and offline, the legitimate market is challenged by trafficking in set-top boxes (STBs) sold pre-loaded with infringing applications that enable cord-cutting Canadians to obtain unauthorized access to high-quality digital streaming and VOD content. These Piracy Devices are readily available in large fairs and expositions, and in kiosks in reputable shopping malls, at prices as low as C\$100 (US\$80). Of course these pre-loaded devices are also sold on dedicated Canadian-owned-and-operated websites, and in well-known third-party online marketplaces; but their presence in legitimate retail spaces, where they are deceptively marketed with high quality promotional materials, sows even greater confusion among consumers. Canadians remain involved in the coding and development of illegal add-ons that enable mass-market set-top boxes to access streaming services without authorization, as well as in the hosting of online repositories that make the illegal add-ons available to the public. These Piracy Devices, including computers, mobile devices, and smart televisions, with illegal add-ons, enable users to access unauthorized Subscription Piracy services. Canadians are also increasingly involved in the illegal theft of telecommunication signals that ultimately feed and provide content to these Subscription Piracy services for the benefit of infringing services available inside and outside of Canada. Although, as discussed below, legal actions against these abuses are beginning to bear fruit, these problems remain serious and widespread.

Other sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works remain active in Canada, despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, and recent court decisions enforcing these statutes, as discussed below. The video game industry reports that sites operated and hosted in Canada, such as *Ca.sky3ds.plus*, *gamersection.ca*, *r4dscanada.com*, and *flashcarda.com*, continue to offer circumvention devices and game copiers for sale. Computer software that effects a "soft modification" of the security technology of game consoles, and that thereby facilitates the play of pirated video games, remains available on sites hosted in Canada. Significant sites selling circumvention devices that have been subject to DMCA takedown notices from right holders in the U.S., such as *Digitopz.com* and *Digimartz.com*, rely on Canadian ISPs for hosting, thus evading enforcement action under U.S. law. Many of these Canadian ISPs continue to ignore the multiple notices regarding these websites, which are violating the ISP's own policies and terms of service.<sup>20</sup> This trend breathes new life into Canada's problematic "safe haven" reputation. Additionally, direct download sites offering hundreds of infringing video game titles for classic and new video game platforms are operated and/or hosted in Canada. Even those sites that have been terminated from payment processing services can generate significant revenue, including from advertisements on the websites, while offering global users unauthorized free content. A disturbing trend is the sale of counterfeits or infringing video game products sold via e-commerce sites that are managed through Canadian e-commerce service providers like *Shopify.com* or *Browze.com*. Video game companies see many local sites registered and created with Shopify but, through cooperation with Shopify, have been able to remove infringing pages. In addition, offerings for installation services (free games and hacking services) through online marketplaces, such as *kijiji.com* and *eBay Canada*, continue to rise.

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<sup>18</sup>Id.

<sup>19</sup>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>.

<sup>20</sup>The video game industry reports that Canada is ranked 8th globally for illegal file sharing of video game content.

## **KEY TOPICS FOR COPYRIGHT REFORM LEGISLATION**

In December 2017, Canada's Parliament launched the copyright law review mandated by the 2012 Copyright Modernization Act (CMA).<sup>21</sup> The review provided an invaluable opportunity for Canada to assess whether the Copyright Act has kept pace with rapid changes in technology and markets, and to upgrade, improve, or correct the Copyright Act where it falls short of being fit for purpose for today's digital environment, including correcting deficiencies in the CMA.

### **Parliamentary Reports**

The review concluded with the release of reports from the two parliamentary committees responsible for the review. In May 2019, the Standing Committee on Canadian Heritage presented its Report ("Shifting Paradigms") to Parliament on "remuneration models for artists and creative industries" (Heritage Report).<sup>22</sup> Importantly, the Heritage Report recognized the negative impacts the 2012 amendments to the fair dealing exception have had on the publishing industry, and the "disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries" (known as the "value gap"). The Heritage Report included a number of positive recommendations intended to address these concerns as well as other significant shortcomings of Canada's legal framework. Among other things, the Heritage Report recommended that the Government of Canada:

- clarify that fair dealing should not apply to educational institutions when the work is commercially available;
- increase its 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 content;
- harmonize remedies for collecting societies under the Copyright Act;
- narrow the radio royalty exemption so that it applies only to "independent and/or community-based radio stations";
- extend the term of copyright for works;
- increase support for creators and creative industries in adapting to new digital markets;
- create educational materials to raise awareness of copyright provisions and artist remuneration for consumers;
- review, clarify and/or remove exceptions contained in the Copyright Act, ensuring that any exception respects section 9 of the Berne Convention for the Protection of Literary and Artistic Works;
- limit Copyright Board rate setting criteria to marketplace-based criteria; and
- meet international treaty obligations (including Berne Convention for the Protection of Literary and Artistic Works, the Trade-Related Aspects of Intellectual Property Rights Agreement, and World Intellectual Property Organization Copyright Treaty).

In June 2019, the Parliament's Standing Committee on Industry, Science and Technology presented its Report on the Statutory Review of the Copyright Act (Industry Report).<sup>23</sup> The Industry Report also included some notable recommendations, including that the Government of Canada should: consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement; monitor the implementation, in other jurisdictions, of legislation making safe harbor exceptions available to online service providers conditional on measures taken against copyright infringement on their platforms; and narrow the radio royalty exemption so it is available to only "small, independent broadcasters." Unfortunately, in preparing its report, the Industry Committee did not consult the Heritage Committee, which was tasked with examining the specific issue of artist and creative sector remuneration. This lack of

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<sup>21</sup>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.

<sup>22</sup>See "Shifting Paradigms: Report of the Standing Committee on Canadian Heritage," [https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc\\_cid=d88779154e&mc\\_eid=0183856a67](https://www.ourcommons.ca/Content/Committee/421/CHPC/Reports/RP10481650/chpcrp19/chpcrp19-e.pdf?mc_cid=d88779154e&mc_eid=0183856a67).

<sup>23</sup>See Statutory Review of the Copyright Act, <https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/>.

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 these recommendations, and adopt needed reforms. In May 2019, a bill was introduced in Parliament intended to implement Canada’s USMCA commitments (2019 USMCA Bill), but as discussed below, it left many key commitments unaddressed. The October federal election pushed consideration of the 2019 USMCA Bill and copyright reform legislation until 2020. We encourage the Government of Canada to implement the parliamentary recommendations as well as its USMCA commitments in a timely manner so that substantive reform is effectively achieved. We offer the following evaluations of the strengths and weaknesses of Canada’s current copyright law and enforcement regime, and urge the U.S. Government to encourage Canadian officials to take these issues fully into account in drafting legislation to reform the Copyright Act and implement Canada’s USMCA commitments.

## **1. Strengths of the Canadian Regime—Recent Positive Developments**

Several recent decisions from Canadian courts reflect positive trends that legislation implementing the copyright review recommendations should affirm and build upon. Some directly involve provisions of the CMA. In addition, IIPA remains hopeful that reforms of the Copyright Board will bring Canada into closer alignment with comparable developed markets regarding its tariff-setting process.

### **A. Legal Tools Against TPMs Circumvention**

As previously reported, in March 2017, Canada’s Federal Court issued its first substantive decision on the provisions of the CMA that codified (in Section 41.1 of the Copyright Act) meaningful prohibitions against trafficking in tools and services to circumvent TPMs used to control access to copyright works. In *Nintendo v. King*,<sup>24</sup> the court found an Ontario-based provider of game copiers, mod chips and modding services (both online and through a retail location) liable for trafficking in circumvention devices and services (as well as the act of circumvention) in violation of Section 41.1, and made important interpretations of several provisions of the new law.<sup>25</sup> IIPA remains hopeful that this strong precedent will be followed in future cases, and, particularly in light of Canada’s commitment to strong TPMs protections in the USMCA, urges that any efforts to weaken existing TPMs provisions in the law be firmly resisted.

### **B. Injunctions Against Distributors of Set-top Boxes and Enabling Apps**

As previously reported, two recent decisions indicate that effective remedies against set-top boxes and their enabling apps are available under current law. In February 2018, the Federal Court of Appeal upheld orders to shut down and seize piracy websites that made available illegal add-ons enabling set-top boxes to access streaming video without authorization.<sup>26</sup> The Court noted that the add-ons were “clearly designed to facilitate access to infringing material” and that the exception to infringement “where one merely serves as a ‘conduit’” should not apply. In March 2017, the Federal Court of Appeal affirmed a trial court interlocutory injunction against retailers of “plug and play” set-top boxes pre-loaded with applications that allow consumers to access TV programs and movies without authorization or subscription.<sup>27</sup> The appellate court specifically affirmed the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue to sell the pre-loaded boxes. The Heritage and Industry Reports recommend that the Government of Canada should “increase its efforts to combat piracy and enforce copyright,” and consider providing injunctive relief for deliberate online copyright infringement and narrowing the scope of safe harbor

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<sup>24</sup>2017 FC 246, available at <https://www.ippractice.ca/files/2017FC246.pdf>.

<sup>25</sup>Notably, the court gave robust effect to the remedial provisions of the statute, deciding that statutory damages for the violation should be calculated on a per-work basis, and imposing the maximum C\$20,000 (US\$15,972) damages for each of the 585 Nintendo videogames protected by the circumvented TPMs. It also imposed C\$1 million (US\$798,665) in punitive damages, based on the violator’s deliberate and recidivist sale of circumvention devices.

<sup>26</sup>*Bell Canada v. Lackman*, 2018 FCA 42.

<sup>27</sup>*Wesley dba MTLFreeTV.com v. Bell Canada*, 2017 FCA 55, affirming *Bell Canada v. 1326030 Ontario Inc. dba ITVBox.net*, 2016 FC 612.

exceptions available to online service providers. Such legislative enhancements are needed to disrupt this growing illicit marketplace, especially in light of the alarming growth of Subscription Piracy services.

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

In November 2019, the Federal Court in *Bell Media Inc. v. GoldTV.Biz*<sup>28</sup> granted an injunction to order a group of ISPs to block access to an illegal IPTV service. The Court rejected arguments that the injunction was improper due to the absence of an express site blocking provision in the Copyright Act and the ongoing debate about the role of site blocking in Canada's telecommunications regulatory regime (discussed below). This landmark ruling, the first site blocking order to be issued by a Canadian Court, is an important step in Canada's progress towards cleaning up its digital marketplace. The decision, however, has been appealed to the Court of Appeal.

The Court in *Bell Media* based its authority to issue the injunction on the ground breaking June 2017 decision of the Supreme Court of Canada (SCC) in *Google v. Equustek Inc.*<sup>29</sup> That case affirmed that Canadian courts can issue global de-indexing orders against search engines to stem illegal activities on the Internet. The injunction required Google to de-index from search results (both in Canada and worldwide) the websites infringing Equustek's trade secrets.<sup>30</sup> The SCC's conclusions—that “the only way to ensure that the injunction attained its objective was to have it apply where Google operates—globally” and that the search engine was “the determinative player in allowing the harm to occur”—have laid the groundwork for Canadian courts to issue effective injunctive relief to combat sites dedicated to copyright infringement. Nevertheless, as discussed below, such a remedy should be explicitly provided in the Copyright Act.

### **D. Copyright Board Reform**

Sweeping reforms to Canada's Copyright Board took effect in April 2019. As reported last year, those changes 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. The amendments substantially revise the timelines for proposing and objecting to the tariffs, and allow tariffs to be filed earlier and remain effective longer. This should help to avoid the extreme delays that have made economic forecasting nearly impossible for stakeholders (including users as well as rights holders) and have made it very difficult for Collective Management Organizations (CMOs) to collect and distribute license fees by forcing them to apply tariffs retrospectively. The amendments will also streamline procedures and formalize case management to allow the Board to operate more efficiently, and to focus its resources on contested tariffs in cases in which negotiated agreements are not possible. The government has released draft regulations requiring the Copyright Board to issue its decisions within 12 months following the close of hearings, which is a positive development.

Importantly, the amendments introduce statutory rate-setting criteria that requires the Board to consider, among other things, the willing buyer/willing seller principle in determining the royalty rates. While the 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.<sup>31</sup> 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 criteria, such as taking into account the “public interest.” This “public interest” criterion, which the Heritage Report recommends revisiting in a future review of the new rules, is unclear and does not have a basis in economics.

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<sup>28</sup>2019 FC 1432.

<sup>29</sup>2017 SCC 34.

<sup>30</sup>Google's attempt to vary the SCC's decision based on a U.S. court ruling it obtained was rejected in 2018 by a lower court, which concluded that “there is no suggestion that any U.S. law prohibits Google from de-indexing.” 2018 BCSC 610.

<sup>31</sup>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.

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

The Copyright Board is currently drafting regulations to implement these reforms. IIPA applauds Canada's commitment to reforming its tariff-setting process, and is hopeful that the implementing measures bring Canada's system into closer alignment with comparable rate-setting and dispute resolution entities in major developed markets by improving timeliness, ensuring greater predictability, and yielding tariffs that more accurately reflect the economic value of the rights.

## **2. How Canada's Legal Regime Falls Short**

Experience in the Canadian market reveals significant deficiencies in its overall copyright regime, and unintended adverse consequences from the adoption of the CMA. The main goal of any amendments to the Copyright Act should be to correct these issues.

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

The bulk of the 2012 CMA consisted of a number of new or significantly expanded exceptions to copyright protection. None has had a more concrete and negative impact than the addition of "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 dismantling of the well-established collective licensing regime to license and administer permissions to copy books and other textual works for educational uses, both at the K-12 and post-secondary levels across Canada.<sup>32</sup> 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 new content and in innovative means to deliver textual materials to consumers. A detailed study by PricewaterhouseCoopers (PwC) in June 2015 documented and quantified the damage stemming from severe reductions in licensing royalties as educational institutions across English-speaking Canada stopped paying remuneration for their use of copyrighted materials.<sup>33</sup>

USTR's 2019 Special 301 Report noted the U.S. Government's continuing concerns with "the ambiguous education-related exception added to the copyright law in 2012, which has significantly damaged the market for educational publishers and authors."<sup>34</sup> Unfortunately, there has been little progress in rectifying the current situation, despite the CMA review. The July 12, 2017 decision in the long-running case brought by Access Copyright against York University provided a glimmer of hope for ameliorating the disastrous impact on licensing in the educational publishing market. The main issues in the case were whether the university could copy materials within the limits of its "fair dealing guidelines" and whether the university could disregard the Copyright Board-approved tariff issued by

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<sup>32</sup>See IIPA's 2017 Special 301 country survey on *Canada* ("IIPA 2017"), available at <https://www.iipa.org/files/uploads/2017/12/2017SPEC301CANADA.pdf>, at 97-100.

<sup>33</sup>PricewaterhouseCoopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at [http://accesscopyright.ca/media/94983/access\\_copyright\\_report.pdf](http://accesscopyright.ca/media/94983/access_copyright_report.pdf) (hereafter "PwC"). The PwC study noted that "[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." At the time, the PwC study estimated the annual loss from the demise of revenue from licensing to copy parts of works at C\$30 million (US\$22.9 million). In its 2017 Annual Report, Access Copyright reported that the income it distributed to authors and publishers had declined "a full 46% from 2016." See Access Copyright Annual Report 2017 at 7, [https://www.accesscopyright.ca/media/1289/access\\_2017ar.pdf](https://www.accesscopyright.ca/media/1289/access_2017ar.pdf). In addition to declines in licensing revenue, the educational publishing industry also saw significant declines in full textbook sales, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.

<sup>34</sup>See USTR, 2019 Special 301 Report at 80, <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>.



Access Copyright for post-secondary institutions. The court's answer on both issues was no, marking a clear rejection of the very expansive interpretation of the statutory exception favored by Canada's educational establishment. The court concluded the university's guidelines were "arbitrary and not soundly based in principle," that Access Copyright had proved "that the market for the works (and physical copying thereof) has decreased because of the Guidelines, along with other factors," and that the approved tariff was mandatory and enforceable against any person or entity, such as York University, that carried out acts covered by the tariff.<sup>35</sup> York University has appealed the decision.

The sense of impunity from copyright responsibility that Canada's educational establishment displays has decimated not only copyright owners' licensing revenue for copying, but has contributed to an overall attrition of revenues from the sale of textbooks and other educational works in Canada. While the 2015 PwC study provided examples of potential revenue loss,<sup>36</sup> a fresh example emerged in 2017, when 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.<sup>37</sup> 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 provided 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.<sup>38</sup> This would bring needed clarity to Canada's law regarding which works should or should not be subject to a license. Until the legal framework is clarified, the crisis in the educational publishing sector will continue to worsen. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing articulated by Canadian courts, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions). Nor is the educational fair dealing amendment the only problematic CMA provision for educational publishers. The broad exception in Section 30.04 of the Copyright Act is also concerning. It immunizes nearly anything done "for educational or training purposes" by an educational institution or its agent with respect to "a work or other subject matter that is available through the Internet," so long as the Internet site or the work is not protected by a TPM.

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

**Non-Commercial User-Generated Content Exception:** In addition to those impacting the educational publishing sector, one exception in particular that merits close scrutiny is the exception in Section 29.21, entitled "Non-commercial User-generated Content." This provision allows any published work to be used to create a new work, and

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<sup>35</sup>Canadian Copyright Licensing Agency ("Access Canada") v. York University, 2017 FC 669.

<sup>36</sup>See PwC at 9, 71; see also *This is What Falling Off a Cliff Looks Like*, available at <http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/>.

<sup>37</sup>Kate Taylor, "Concordia University caught on the wrong side of copyright," <https://www.theglobeandmail.com/arts/books-and-media/concordia-university-caught-on-the-wrong-side-of-copyright/article34263532/>.

<sup>38</sup>Other helpful recommendations in the Heritage Report include that the Government of Canada: review Canada's exceptions to ensure they meet its international obligations; promote a return to licensing through collecting societies; review, harmonize and improve the enforcement of statutory damages for infringement for non-commercial use in section 38.1(1) of the Copyright Act; and harmonize remedies for collective societies under the Copyright Act.

the new work to be freely used or disseminated, including through an intermediary (including a commercial intermediary), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is “solely for non-commercial purposes” and does not have a “substantial adverse effect” on the market for the underlying work. The provision could substantially undermine the exclusive adaptation right that Canada is obligated to provide under the TRIPS Agreement and the Berne Convention, and its breadth raises serious questions of compliance with the three-step test for permissible limitations and exceptions.<sup>39</sup> Although enactment of the exception was globally unprecedented, it has spawned would-be imitators, such as the proposal for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of clarifying and/or removing the user-generated content (UGC) exception as part of revisions to the Copyright Act, in accordance with recommendations in the Heritage Report.<sup>40</sup>

## **B. Incentives are Lacking for Necessary Players to Cooperate Against Online Infringement**

Despite the narrow “enablement” provision in Section 27(2.3), Canada’s Copyright Act fails to respond adequately to the broader challenge of online infringement.<sup>41</sup> The statute lacks important tools that leading copyright regimes now routinely provide to incentivize intermediaries to address infringement of copyright committed with the aid of their services, and the tools it does provide fall demonstrably short of addressing the problem. As a whole, Canadian law lacks incentives for cooperation by a range of essential legitimate players, such as advertisers, payment processors, and domain name registrars and their affiliated privacy/proxy registration services. As described above, such services, including those offered in Canada, are all too often abused to facilitate online copyright theft.

The enablement provision in Section 27(2.3) establishing civil liability for providing online services primarily for the purposes of enabling acts of copyright infringement was an important step forward, but it is unduly limited. For example, because it applies only to the provision of services, it is a far less optimal tool for distributors of goods used primarily for infringing purposes. Thus, trafficking in set-top boxes pre-loaded with software applications designed to enable unauthorized access to online streaming services, or even trafficking in such software tools, may fall outside the scope of the “enablement” provision. Section 27(2.3) also does not apply to those who provide offline services for the purpose of enabling copyright infringement. The enablement provision’s significant gaps should be corrected to address all actors in the value chain who enable acts of infringement.

Beyond enablement, the Canadian online enforcement regime relies heavily on the “notice and notice” system, which came into force in January 2015. There is no evidence that this system provides any incentives for online intermediaries to cooperate against online piracy, nor was it designed to do so: it was intended merely as an educational tool aimed at end-users, but there is no evidence that it is contributing to mitigation of infringing activity of consumers. 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. Furthermore, it creates little meaningful incentive for service providers to try to rid their service of illicit material, in effect providing free rein to build services on the back of unauthorized content. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system.<sup>42</sup> ISPs have insufficient incentive to respect the legislated “notice and notice” system, because their failure to forward notices from rights holders does not affect their exposure to copyright infringement liability.<sup>43</sup>

Fundamentally, the “notice and notice” regime was never even intended to address a different and very serious problem: hosting service providers that fail to disable access to infringing hosted materials, even after it is

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<sup>39</sup>See, e.g., Article 13 of the WTO TRIPS Agreement. In the U.S.-Mexico-Canada Agreement (USMCA), Canada reinforced its commitment to confine copyright exceptions and limitations to the three-step test. See USMCA Article 20.65.

<sup>40</sup>A key recommendation in the Heritage Report is that the Canadian Government review, clarify, and/or remove broad exceptions to ensure that exceptions in Canada’s law are consistent with its obligations under the TRIPS Agreement and the Berne Convention.

<sup>41</sup>The shortcomings of the legislation are detailed in past more extensive analyses of the CMA by IIPA. See e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013 (“IIPA 2013”), available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CANADA.pdf>, at 127-131, and other sources referenced therein.

<sup>42</sup>See IIPA 2017 at p. 96 for a summary of concerns.

<sup>43</sup>See Section 41.26(3) of the Copyright Act, providing limited statutory damages as the sole remedy for such failure.

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 community, 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 online infringement. The law lacks necessary incentives for legitimate Internet intermediaries to cooperate with rights holders to combat online infringement. For example, the law's conditioning of liability for hosting infringing material on obtaining a judgment against an end user<sup>44</sup> 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, including by limiting the scope of the safe harbor provisions to apply only to passive and neutral intermediaries that take effective action against infringing content. Effective action should include measures that have been demonstrated effective in preventing or restraining infringement, including, among other things, disabling access to the specific location of identified (by the rights holder) infringing content. The 2019 USMCA Bill did not address these deficiencies.<sup>45</sup> The amendments of Bill C-86 were another missed opportunity. While they further clarified the content to be included in notices of claimed infringement issued to ISPs, the amendments failed to include any meaningful incentives for intermediaries to cooperate with rights holders.

Taken as a whole, the deficiencies in Canada's online liability regime significantly disadvantage licensed services, and continue to send the wrong signals to consumers about whether infringing activities are tolerated. The Heritage and Industry Reports recommend that Canada's government review the current law to ensure ISPs are accountable for their role in the distribution of content, and that the government monitor the implementation of safe harbor legislation in other jurisdictions, a clear acknowledgement of Canada's status as a global outlier on this issue. Canada should follow through on these parliamentary recommendations and look for ways to make its current regime more effective, and to provide meaningful incentives to stimulate inter-industry cooperation against online piracy.

### **C. Injunctive Relief Needed Against Online Infringement**

In accordance with recent case law, Canada should provide tools to effectively address the problem of flagrantly infringing online content, particularly content hosted outside of Canada, including providing effective injunctive relief to disable access to such infringing content. A growing list of countries around the world have adopted such a framework to address the serious problem of illegal marketplaces hosted in one country that target consumers in another. This is necessary because of the failure of the services' host countries to take effective action against their own "homegrown" notorious markets, which pollute the markets of neighboring countries or trading partners. Increasingly, responsible governments have pushed back against this "offshoring" of enforcement responsibility, by developing means and processes for blocking access to these foreign pirate sites from within their borders. As noted last year, in response to a 2018 proposal to create a website-blocking mechanism, the Canadian Radio-television and Telecommunications Commission (CRTC) acknowledged the harm caused by piracy, but declined to consider the merits of the proposal, holding that copyright enforcement falls solely within the statutory scheme of the Copyright Act. In granting the website blocking order, the Court in *Bell Media* (discussed above) cited this decision to reject the argument that disabling access to infringing websites will interfere with the CRTC's regulatory role. The Industry Report recommended that the Government of Canada evaluate tools to expressly provide injunctive relief in a court of law for deliberate online copyright infringement. In accordance with the recommendation, the Canadian Government should

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<sup>44</sup>See Section 31.1 of the Copyright Act.

<sup>45</sup>It is unfortunate that the USMCA exempted Canada's flawed system and does not even obligate Canada, at an absolute minimum, to require takedown of infringing content in response to a proper notice (or upon the service having knowledge or awareness of the infringement).

revise the Copyright Act to provide express injunctive relief to effectively disable access to infringing content in line with recent case law.

#### **D. Discrimination and Duration**

Other issues should be addressed in the implementation of Canada's Copyright Act review recommendations and USMCA obligations.

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

The Canadian music marketplace suffers from Canada's denial of protection to producers of U.S. sound recordings for communication of their recordings by commercial radio broadcasters, as well as for use as background music in commercial establishments, and in fitness studios and dance clubs. Canada also refuses any compensation for online simulcasting, webcasting, or other forms of communication to the public by telecommunication of virtually all pre-1972 U.S. sound recordings (those first or simultaneously first published in the United States). Performers on all these sound recordings suffer similar denials. This discrimination applies only to sound recordings; musical works are fully protected.

Canada's unfair and discriminatory policy does not befit its status as our neighbor and major trading partner. IIPA highlights that U.S. law provides for full national treatment, regardless of whether the country of origin provides reciprocal rights, and Canada committed in the USMCA to provide full national treatment regarding protection of intellectual property. Moreover, any pretext for discrimination against pre-1972 U.S. sound recordings has been eliminated by the enactment of the 2018 Music Modernization Act (MMA), which ensures full compensation for uses of these recordings in the United States. While we applaud Canada's long-delayed entrance into the community of nations that accord sound recording producers the broad scope of exclusive rights needed to manage digital dissemination of their products, Canada's discriminatory practices should end immediately with the implementation of the USMCA.

##### ***ii. The Radio Royalty Exemption Should be Removed***

Another key concern for the music industry is the statutory exemption from protection of recorded music used by commercial radio stations in Canada.<sup>46</sup> The Copyright Board concluded that there is no economic rationale for this provision, which it called a "thinly veiled subsidy" to "large, profitable broadcasters."<sup>47</sup> As with the discrimination against U.S. repertoire detailed above, this royalty exemption applies only to sound recordings; musical works are fully protected. Furthermore, this exemption discriminates against other Canadian businesses that publicly perform or communicate recorded music (such as satellite radio, restaurants or background music suppliers), none of which are subject to such an exemption from paying royalties to sound recording producers and performers. Since 1997, when the radio royalty exemption was enacted, record labels have been deprived of over C\$160 million (US\$121 million) that they would have received in the absence of the exemption. Nor, arguably, does the Canadian system guarantee the "equitable" remuneration that Canada is obligated to provide by Article 15 of the WIPO Performances and Phonograms Treaty (WPPT) and that Canada committed to provide under the USMCA.<sup>48</sup> Both the Heritage Report and the Industry Report called for narrowing this exemption so that it does not apply to the vast majority of commercial radio stations. The C\$1.25 million commercial radio royalty exemption should be eliminated as part of implementation of the USMCA or the Copyright Act review, or otherwise.

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<sup>46</sup>See Section 68.1(1) of the Copyright Act. As previously reported, each of Canada's nearly 700 commercial radio stations, regardless of its size, revenues, profitability, or co-ownership, is statutorily exempted from communications royalties for sound recording broadcasts on its first C\$1.25 million (US\$951,000) of annual advertising revenue. Other than a nominal C\$100 (US\$176) payment, radio stations pay the Copyright Board-approved tariff only for revenues in excess of the C\$1.25 million threshold.

<sup>47</sup>See Copyright Board, Public Performance of Music Works 2003-2007 and Public Performance of Sound Recordings 2003-2007, October 14, 2005, p. 32, 37-38.

<sup>48</sup>See USMCA Article 20.62.

### **iii. Term of Protection**

A notable example of a needed modernization of Canadian copyright law that was not addressed by the 2012 amendments is the disparity in duration of copyright protection between Canada and its largest trading partner (the U.S.), and indeed, the vast majority of OECD economies. Although Canada extended the term of protection for sound recordings in 2015, Canada should join the growing international consensus by extending the term of protection for all works measured by the life of the author to life plus 70 years. It is commendable that Canada made this commitment in the USMCA, as well as committing to extend its term of protection for sound recordings an extra five years to 75 years. Canada should not delay bringing its law into line with this global norm, particularly in light of the Heritage Report's recommendation to do so. While the 2019 USMCA Bill included provisions extending copyright term of protection to USMCA-required minimums for sound recordings and certain other works, it did not propose extending the term of protection for all works measured by the life of the author, as Canada is obligated to do under USMCA Art. 20.62(a). This omission should be corrected when Canada implements its USMCA obligations in 2020. Furthermore, any extension of the term of copyright protection should not be accompanied by Berne-prohibited formalities or measures that undermine contractual certainty.

## **GOVERNMENT ACTIONS ON COPYRIGHT ENFORCEMENT**

The 2015 entry into force of Bill C-8 (the Combating Counterfeit Products Act) addressed many of the legal insufficiencies that hampered Canada's copyright and trademark enforcement regime over the previous decade or more (with the notable exception of the denial of *ex officio* authority with regard to in-transit infringing goods).<sup>49</sup> But Bill C-8 did nothing to address the underlying problem—the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. A clear change in direction is needed.

For Canada's main federal law enforcement agency, the Royal Canadian Mounted Police (RCMP), intellectual property crimes in general, and copyright crimes in particular, are neither a strategic nor an operational priority. Indeed, the RCMP has been transferring its case files to municipal police forces, which, like the RCMP, too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Thus, while local police agencies have generally responded well to anti-piracy training programs offered by industry, they are simply not in a position to deal effectively with organized copyright piracy, and thus increasingly fail to pursue even well-documented referrals from industry. Recently, local law enforcement has engaged with rights holders regarding a few illegal subscription IPTV cases that involved the more traditional or real-world criminal act of signal theft. More resources are needed to address this growing problem. On the whole, because Canadian law enforcement remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back more than a decade, remain basically unchanged.<sup>50</sup>

Similar problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training in prosecuting such offenses, and too often dismiss the file or plead the cases out, resulting in weak penalties. Crown Counsel are now declining training offered by rights holders; since police are no longer referring files to the Department of Justice, there are no cases to prosecute. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.<sup>51</sup> The weak

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<sup>49</sup>In practice, the impact of the legislation has been minimal. Its central feature, giving border agents *ex officio* power to intercept counterfeit and pirated goods at the border, has been invoked only 72 times in the first two years under the legislation, and in only 59 such cases were rights holders even contacted to assist in interdicting the infringing imports. IIPA is encouraged, however, that Canada has committed in the USMCA to provide *ex officio* authority for its customs authorities, including regarding goods in transit. See USMCA Article 20.84(5).

<sup>50</sup>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://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391\\_INDU\\_Rpt08/391\\_INDU\\_Rpt08-e.pdf](http://www.ourcommons.ca/Content/Committee/391/INDU/Reports/RP3060548/391_INDU_Rpt08/391_INDU_Rpt08-e.pdf). A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://www.ourcommons.ca/Content/Committee/391/SECU/Reports/RP2985081/ securp10/ securp10-e.pdf>.

<sup>51</sup>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.

penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism. And in too many cases, law enforcement action never materializes, even when law enforcement is notified of a sale of a physical product that threatens public safety (such as a Piracy Device that fails to comply with electrical safety standards).

The continued deterioration of Canadian enforcement efforts comes at a singularly inopportune time, just as the nature of the criminal enterprise involved in physical goods piracy is becoming more sophisticated and complex. Instead of low volume production and sales of counterfeit optical discs, the threat, as noted above, increasingly involves widespread sale of Piracy Devices, such as set-top boxes pre-loaded with applications that enable significant infringement. The problem extends to the sale of devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention, including through sites on Canadian e-commerce services. But since Canadian law enforcement authorities are almost completely unengaged in criminal enforcement against online piracy of any kind, their inability to deal with the sale of physical goods, such as these Piracy Devices, is even more discouraging.<sup>52</sup>

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

## **MARKET ACCESS**

Significant market access issues continue to impede participation by U.S. film and TV producers and distributors in the Canadian market. Implementation of the USMCA could have a positive impact on the following issues, as long as Canada does not rely on the exception to its obligations regarding the "cultural industries" under Article 32.6.<sup>53</sup> These longstanding issues include:

- *Television Content Quotas*—The CRTC imposes quotas that determine both the minimum Canadian programming expenditure (CPE) and the minimum amount of Canadian programming that licensed Canadian television broadcasters must carry (Exhibition Quota). Such quotas are discriminatory and artificially inflate the amount expended on, or the time allocated to, Canadian programming.
  - *CPE Quotas*—Large English-language private broadcaster groups have a standardized CPE obligation equal to 30% of each group's gross revenues from its conventional services and discretionary services (specialty and pay-TV) combined, but there is some flexibility as to allocation among the services within the group. As their licenses are being renewed, CPE obligations are being assigned to independent signals and to discretionary services that have over 200,000 subscribers. These quotas became effective September 1, 2018 and are based on historical levels of actual expenditure.
  - *Exhibition Quotas*—Private conventional broadcasters must exhibit not less than 50% Canadian programming from 6PM to midnight. The overall 55% exhibition quota was removed in 2017. Private English-language discretionary services (specialty and pay-TV) that are not part of a large private broadcasting group must exhibit not less than 35% Canadian programming overall.

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<sup>52</sup>As noted in text above, the affirmance of an interlocutory injunction against retailers of "plug-and-play" Piracy Devices strikes a more positive note for enforcement through civil litigation. In addition, the video game industry notes good cooperation with Canada Border Services Agency (CBSA) on seizures of counterfeit video game products in 2019.

<sup>53</sup>Unfortunately, these issues were not addressed in the 2019 USMCA Bill. IIPA expects that if Canada does resort to this "cultural carve out" to avoid implementing any of its obligations under the agreement, USTR will use the robust retaliation provision under Article 32.6 to ensure that Canada meets its commitments.

- *Non-Canadian Signal and Service Restrictions*—Canadian broadcasting distribution undertakings (BDUs), such as cable and direct-to-home satellite, must offer more Canadian than non-Canadian services. These protectionist measures inhibit the export of U.S. media and entertainment services.
  - BDUs must offer an all-Canadian basic tier for not more than C\$25 per month. This basic tier may include one set of “U.S. 4+1” (ABC, CBS, FOX, NBC and PBS) signals from the same time zone as the BDU’s headend, where available, or, if not available, from another time zone. BDUs may also offer an alternative basic tier that includes the same set of U.S. 4+1 signals. A BDU may only offer a second set of U.S. 4+1 signals to its subscribers if it receives authorization by the CRTC pursuant to a condition of license. Unless otherwise authorized by condition of license, the second set of U.S. 4+1 signals may be offered only to cable or satellite subscribers who also receive at least one signal of each large multi-station Canadian broadcasting group originating from the same time zone as the second set of U.S. signals.
  - Except as permitted by a BDU’s license from the CRTC, all other non-Canadian signals and services may only be carried on a discretionary basis and must be selected from the list of non-Canadian programming services authorized for distribution (the Authorized List) approved by the CRTC and updated periodically. A service will not be added to the Authorized List if a competitive Canadian pay or specialty service (other than a national news service) has been licensed. A service may be removed from the Authorized 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 operators and satellite television distributors), must meet certain tests of Canadian ownership and control: (1) a licensee’s CEO must be Canadian; (2) at least 80% of a licensee’s directors must be Canadian; and (3) at least 80% of the licensee’s voting shares and votes must be beneficially owned and controlled by Canadians. If the licensee is a subsidiary corporation, its parent must be Canadian and at least two-thirds of the voting shares and votes of the subsidiary must be beneficially owned and controlled by Canadians. In addition, the parent corporation or its directors cannot exercise control or influence over programming decisions of its licensee subsidiary where Canadians own and control less than 80% of the voting shares and votes, the CEO of the parent company is non-Canadian, or less than 80% of the directors of the parent corporation are Canadian. In such circumstances, the CRTC requires that an “independent programming committee” must be put in place to make all programming decisions pertaining to the licensee, with non-Canadian shareholders prohibited from representation on the independent programming committee. No other developed market in the world maintains such discriminatory foreign investment limitations.
- *Québec Distribution Restrictions*—The Québec Cinema Act severely restricts the ability of film distributors not based in Quebec to do business directly in the province. Since 1986, the Motion Picture Association (MPA) member companies may apply for a Special License for any film produced in English that meets the less-restrictive requirements set out in an Agreement between the MPA and the Québec Minister of Culture. The Agreement was revisited in 2015 and was extended for seven years.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

Canada’s international agreements with the U.S. most relevant to copyright obligations include TRIPS and the North American Free Trade Agreement (NAFTA).<sup>54</sup> Canada recently made further commitments regarding copyright in the USMCA, as discussed above, although that agreement has not yet entered into force. In accordance with U.S. law, the President should ensure Canada has fully met its USMCA commitments before the agreement enters

<sup>54</sup>IIPA commends Canada’s accession to the WIPO Internet Treaties (WIPO Copyright Treaty (WCT) and WPPT), which were enabled by bringing the CMA into force.

into force with respect to Canada.<sup>55</sup> 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"),<sup>56</sup> and with Canada's commitments under the USMCA.

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<sup>55</sup>See 19 USC § 4205(a)(1)(G).

<sup>56</sup>See TRIPS Article 13.