

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Special 301 Watch List in 2014.¹

Executive Summary: Most of Canada's Copyright Modernization Act has now been in force for more than a year, but the concrete results are far from clear. In particular, Canada's intent to change the country's reputation as a haven for technologically sophisticated international piracy operations has not been fully realized. Although one of Canada's most notorious pirate websites was closed down as a result of U.S. litigation, a number of similarly destructive sites with Canadian connections remain in full operation. Progress toward ratification and accession to the WIPO Internet Treaties has been slow, and until this happens, many of the benefits of the new law, especially for the recording industry, won't be realized. Expanded copyright fair dealing exceptions in the new law, combined with problematic legal interpretations of the previous law, have nearly decimated the market for licensing educational uses of copyright materials, inflicting significant damage on the publishing sector in particular. Canadian authorities urgently need to communicate to educational institutions the need for a balanced approach on fair dealing. Tabling of legislation to fix several long-standing shortfalls in Canada's copyright enforcement regime, especially at its borders, is an important positive step; Bill C-8 should be improved and then enacted as quickly as possible. But to make significant progress against piracy in Canada will require not only new laws but also new priorities among enforcement agencies, prosecutors and courts, and additional resources for all these institutions. It will also require stronger incentives for service providers to cooperate with right holders to combat infringement, incentives that the Modernization Act simply may not be able to provide. IIPA urges that the U.S. Government remain extensively engaged with Canada on these and other issues in 2014, with the aim of making clearer progress toward the goal of achieving a healthy marketplace for copyright works in our neighbor and largest trading partner.

PRIORITY ACTIONS REQUESTED IN 2014

Legislative and Regulatory Reform

- Ratify and accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) as promptly as possible.
- Improve (e.g., by extending to in-transit goods) and adopt legislation to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border without a court order, and make other legal changes to the enforcement regime called for by parliamentary committees.
- Adopt strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy, in accordance with international best practices.

Enforcement

- Take steps to limit the decimation of the educational collective licensing market arising from legislative changes and judicial precedents on fair dealing.
- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to intellectual property rights enforcement, including against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes.

¹For more details on Canada's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Canada's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



- Increase resources devoted to anti-piracy enforcement both at the border and within Canada (including online).
- Vigorously enforce new provisions of the Copyright Modernization Act aimed at suppressing the trafficking in illicit devices or services to circumvent technological protection measures.

COPYRIGHT PIRACY AND ENFORCEMENT

The Piracy Situation in Canada – Online

Developments in 2013 clearly demonstrated that enactment of the Copyright Modernization Act the preceding year, with its prohibition of online services “designed primarily to enable copyright infringement,” was not by itself enough for Canada to shed its reputation as a safe haven for Internet pirates. There was certainly positive news, when the notorious Canadian site isohunt.com shut down in October, after more than a decade spent flagrantly promoting and facilitating piracy on a massive and global scale. But the proximate cause of this important victory was not any action taken by Canadian authorities, but rather the March 2013 affirmation by a U.S. appellate court of an earlier decision finding Isohunt and its operator guilty of inducing infringement in violation of U.S. law, and entering a permanent injunction against its operations.² Even after the shuttering of Isohunt, Canada is still the home to some of the world’s most popular Internet sites dedicated to piracy, including *torrentz.eu* and *kickass.to*, which garnered rankings of third and second place, respectively, on one of the most widely accessed listings of the world’s most popular illicit BitTorrent sites.³ Both *torrentz* and *kat.ph*, which morphed into *kickass* after its domain name registrations in the Philippines (*kat.ph*) and Trinidad (*ka.tt*) were cancelled, appeared on the most recent (December 2012) USTR list of “notorious markets ... reportedly engaged in substantial piracy.”⁴ A number of other sites whose business models are based on piracy still have Canadian connections, including the torrent sites *fenopy.se* and *monova.org*, and the linking sites *cuevana.tv*, *free-tv-video-online.me*, and *solarmovie.so*.

It is hard to avoid the conclusion that Canada remains a magnet for sites whose well-understood *raison d’être* is to facilitate and enable massive unauthorized downloading of pirated versions of feature films, TV shows, recorded music, entertainment software, and other copyright materials. The largest of these Canadian-hosted sites attract scores of millions of unique visitors every month,⁵ and their corrosive effects on legitimate markets are felt worldwide (for instance, *cuevana* targets Spanish-speaking markets across Latin America). The same is true of sites dedicated to technologies to circumvent tools used by copyright owners to control access to or copying of their works. Despite the enactment of anti-circumvention prohibitions as part of the 2012 copyright reform, many Canadian sites (such as *R4cardsmontreal.com*, *gamersection.ca*, *r4ds.ca*, *ncardcanada.com*, and *r4itoronto.com*) continue to offer circumvention devices; and computer software that effects a “soft modification” of the security technology of game consoles, and thereby facilitates the play of pirated games, remains available on sites hosted in Canada.

In this environment, it is not surprising that Canadians continue to demonstrate a formidable propensity to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. A report released in September 2012 found that, on a per-capita basis, Canadians download more unauthorized music than residents of any other country, and two-and-one-half times as much as Americans.⁶ High levels of Internet music piracy in Canada continue to inflict serious harm on the legitimate market for online delivery of music. For example, according to IFPI Recording Industry in Numbers, for the year 2012 the online and mobile share of total music sales in Canada was 43%, compared with 58% in the U.S. Per capita online sales of music in Canada ran well

²*Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013), affirming *Columbia Pictures Industries, Inc. v. Fung*, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at *39-53 (C.D. Cal. Dec. 21, 2009).

³See <http://torrentfreak.com/top-10-popular-torrent-sites-2014-140104/>.

⁴See Out of Cycle Review of Notorious Markets (Dec. 2012), at <http://www.ustr.gov/sites/default/files/121312%20Notorious%20Markets%20List.pdf>.

⁵Kickass.to, the 120th most popular web site of any kind in the world as calculated by alexa.com, counted more than 48 million unique visitors in August 2013, according to comScore World Wide data.

⁶http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html.

behind those in the United States. Fewer digital music providers have introduced new online or mobile digital service models in Canada than in the U.S., Europe and Japan, where there is a proliferation of new digital consumer choices.

The growing availability of copyrighted audio-visual material online from legitimate, licensed sources is worth noting. Entertainment studios are working with new technologies and a multitude of partners, including retailers, cable providers, social networking sites, gaming consoles and websites, to provide an expanding range of legitimate services that enable Canadian consumers to enjoy movies and TV on a variety of platforms. Among the most recent services to launch are Cinema Now, Bell Mobile TV, and Fandor. However, the continued availability of the “free” illicit services hampers the development of the legitimate marketplace and makes it more difficult for it to realize its full potential.

The Piracy and Infringement Situation in Canada – Offline

U.S. publishers serving the educational market with textbooks, journals and other materials are currently facing a comprehensive collapse of an important element of their Canadian market: licensing revenue for permission to copy works for educational uses. Well-established collective licensing mechanisms for administering such permissions are reeling under the combined impact of adverse judicial decisions and drastic legislative changes. The Copyright Modernization Act added “education” to the list of purposes (such as research and private study) that qualify for the fair dealing exception. Because “education” is not defined, 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). Even before the fair dealing amendment came into force, some of the decisions in the “pentology” of copyright decisions issued by Canada’s Supreme Court in July 2012 posed a direct threat to the educational licensing market.⁷ These decisions underscored, among other things, that Canadian courts are to treat fair dealing, not as an exception, but as a “user’s right,” subject to a “large and liberal interpretation”;⁸ that the purposes of the putative user, not those of a commercial or non-commercial intermediary that actually makes the copy and supplies it to the user, are of primary relevance in determining whether a dealing is fair; and, that factors such as the availability of a license to make the use, and even the overall impact of widespread unlicensed use on the actual or potential markets for the work, carry much less weight in Canadian law than they do in U.S. fair use jurisprudence.

Although the *Alberta Education v. Access Copyright* case in the Supreme Court’s pentology directly affected only a marginal aspect of the educational copying collective licenses — reprographic copying of a few pages per student per year of short excerpts of already purchased supplemental texts by K-12 teachers for use in class instruction — its ultimate impact has been much more destructive. 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 pentology decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from a collecting society such as 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 cancelled their licenses with Access Copyright. Anticipated 2013 annual licensing revenue of at least C\$12 million to right holders and authors — much of it destined for U.S. publishers, which enjoy a large market share in the educational sector — evaporated. Similar legal advice was provided to post-secondary institutions, and many of them have declined to renew their Access Copyright licenses as they expire. Access Copyright negotiations with two of Canada’s largest universities — the University of

⁷Of the five copyright decisions announced on July 12, 2012, the main rulings addressing the issues discussed in this submission 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=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>, 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=AAAAAQALQmVsbCBDYW5hZGEAAAAAAB>.

⁸For instance, the Supreme Court ruled that that listening to a sample of a popular recording to decide whether or not to buy it qualifies as “research,” and that classroom discussion of a work qualifies as “private study.” This helps explain the trepidation about how broadly Canadian courts will define “education.”

Toronto and Western University – collapsed in recent weeks over this issue. The licensing revenue stream from higher education – historically larger than the K-12 revenue – is thus in immediate jeopardy.

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 the widespread belief in the education community that Canada’s copyright law gives educators *carte blanche* for all uses of copyright works⁹. The damage does not stop there. Publishers are not seeing any ‘up-tick’ in privately agreed direct licenses and, in fact, are experiencing attrition of overall revenues from the sale of their educational works — this in spite of the education community’s repeated assurances to Parliament during the copyright revision process that the expansion of fair dealing would not cause a diminution in publishers’ business. Publishers are already re-assessing their planned investments in new materials for this core market.

We urge the U.S. government to engage with Canadian authorities to ameliorate this threat to the entire educational publishing market in Canada, which is already having deleterious impacts on publishing revenue, investments and jobs on both sides of the border. Canadian authorities should be encouraged to communicate directly to the educational institutions and their representatives to reinforce the government’s stated objectives for the fair dealing exception. Even if some expanded uses are permitted, the appropriate balance must still be struck so that educational publishers are duly compensated for their works, thus ensuring a viable domestic marketplace for commercially-published educational materials.

Serious piracy problems persist in Canada’s offline marketplace as well. The RCMP, reviewing statistics from 2005 through 2011, reported “a noticeable yearly increase in the number of reported occurrence involving counterfeit and pirated products,” with copyrighted works presenting the second largest category of seizures in 2011.¹⁰ Flea markets in the Peel Region, neighboring the Greater Toronto Area (GTA), are the most prominent locus for significant sales of counterfeit DVDs, according to the Motion Picture Association of America (MPAA). This illicit trade is conducted on a massive scale and is characterized by ties to organized crime. Infringing audiovisual products are also sold on third-party Internet marketplace sites such as *kijiji.ca* and *ebay.ca*.

BSA | The Software Alliance (BSA) reports that unlicensed use of software by enterprise end users – especially small and medium-sized enterprises – remains a concern, particularly in the province of Québec. In 2011, the software piracy rate in Canada was 27%, representing a commercial value of unlicensed software of US\$1.14 billion.¹¹

The Canadian Enforcement Response

These realities point to serious deficiencies in enforcement against piracy. Historically, much of the problem has been attributable to Canada’s inability to advance copyright law reform. The enactment of the Copyright Modernization Act should contribute to the solution. For example, now that Canada’s copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices, Canadian law enforcement at least has the legal authority to enforce against local mod chip distributors, retailers, and exporters. Effective enforcement of these

⁹The fair dealing amendment of the Copyright Modernization Act is not the only provision of the legislation that may be contributing to this belief. For instance, the broad new exception in section 30.04 would immunize 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. The Act’s extremely low C\$5000 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 insignificant in any copyright dispute with a school, further discouraging enforcement of rights.

¹⁰RCMP, “2011 Intellectual Property (IP) Crime Statistics,” at <http://www.rcmp-grc.gc.ca/fep-pelf/ipr-dpi/report-rapport-eng.htm>.

¹¹Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

new legal provisions is critical, though it will of course entail a learning curve. IIPA therefore recommends that the Canadian government allocate adequate resources to train and educate enforcement personnel (including customs authorities, the RCMP, and prosecutors) about the underlying technologies that will be implicated in enforcement of the new prohibitions.

Similarly, while enactment in the Modernization Act of prohibitions on online services “designed primarily to enable copyright infringement” may provide an effective mechanism for enforcement against some of the most egregious online piracy sites that have found safe haven in Canada until now, it is questionable whether Canadian law overall provides legal incentives sufficiently powerful to motivate the inter-industry cooperation that is essential to effectively combat pervasive copyright infringement online. It remains to be seen whether the new law’s “notice and notice” provisions, which have not yet come into force, will be enacted within a framework that gives copyright owners the tools they need to combat online content theft.

Entirely apart from the issues addressed in the copyright modernization legislation, Canadian government inaction has effectively handcuffed its law enforcement agencies at the border, a key anti-piracy battlefield. Canadian customs officers in the CBSA lack statutory authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained,¹² only the RCMP can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada’s borders are effectively wide open to imports of infringing materials. Thus, enactment of the pending legislation (Bill C-8) to give CBSA independent authority to act against any suspected pirate or counterfeit imports, as well as to make other long-overdue improvements in Canada’s enforcement regime, is a matter of urgency.¹³

However, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada’s response too often falls short. Both CBSA and RCMP lack dedicated resources – including manpower and data and intelligence management – to address Canada’s growing piracy problems. Nor is there progress to report on interagency cooperation. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.¹⁴

While in general, police agencies have responded well to anti-piracy training programs offered by industry, they too often lack the human and financial resources, and the strategic mandate, to properly investigate IP crimes or to prepare the cases for prosecution. Only a handful of criminal investigations against audio-visual piracy were conducted by the RCMP in 2013, and only a small number of investigations were conducted by Toronto police in the GTA. The Halton Regional Police Service (Ontario) arrested five individuals and dismantled an online counterfeit DVD operation targeting consumers in several countries,¹⁵ but otherwise Internet piracy was not addressed by criminal authorities in 2013. On the whole, the Canadian law enforcement commitment to act against copyright piracy, remains under-resourced, and too few agencies consider it a strategic or organizational priority.¹⁶

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 fail to

¹²Court orders, however, can only be obtained upon the filing of an application by the right holder, supported by affidavit evidence, including information regarding the identity of the importer, exporter or vendor; country of origin or export; quantity and value of the infringing goods; estimated date of arrival in Canada; mode of importation; identity of the ship, train or truck used to transport the infringing goods; and (if available) the serial number of the container in which these goods may be found. In many instances, a right holder will not have access to this information and the necessity of obtaining the court order is itself unduly burdensome and not designed to prevent pirated and counterfeit imports from entering the country.

¹³Two parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted. See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secur/reports/rp2985081/securp10/securp10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

¹⁴The reports of both parliamentary committees called for the government to devote increased resources to, and to require better coordination and information sharing between, CBSA and RCMP.

¹⁵ See <http://toronto.ctvnews.ca/2-more-arrested-in-online-counterfeit-dvd-operation-1.1312838#ixzz2VXwU5mZd>.

¹⁶The Industry, Science and Technology Committee report called for a higher priority for enforcement at the retail level, while the Public Safety and National Security Committee report proposed that knowing possession of counterfeit or pirate goods for purposes of sale be criminalized.

advocate fervently for imposition of deterrent penalties. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.¹⁷ The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism. In a notable exception to this trend, in December 2013 a court in Winnipeg sentenced the operator of Audiomaxxx, which generated nearly C\$2 million in online sales of infringing compilation CDs, to two years' house arrest, and fines and restitution totaling C\$550,000.¹⁸ Though the case took five years from arrest to verdict, it represents a rare instance of a responsive prosecutor's office taking piracy seriously and working with rights holders to build a case and obtain a solid outcome. IIPA hopes that this case will be harbinger of further cooperation in the future.

Above and beyond supporting the needed legal changes to the enforcement regime discussed below, the U.S. Government should press the Canadian Government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy, including a program to crack down on the importation of pirate goods at all major Canadian points of entry. Since the availability of pirated products will not be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences, particularly jail time, Crown counsel should be encouraged to take on more copyright infringement cases, and should be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases.¹⁹

Canada's serious problems of Internet piracy, where law enforcement has up to now played very little role, cannot effectively be tackled without greatly enhanced cooperation between right holders and service providers. A number of major Internet Service Providers participate in a voluntary "notice and notice" system growing out of an industry Code of Conduct. There is no empirical evidence that this program has been effective in changing infringing consumer behavior, which is not surprising, considering its glaring weaknesses. Although more and more notices of infringement are sent by right holders and forwarded by service providers to their customers each year, the providers do not even correlate the notices with individual subscribers to know which are repeat infringers. Consequently, the same notice can be sent an unlimited number of times to a single subscriber, without any apparent consequences for infringing behavior, even those consequences that the customer service agreements in question would authorize. To treat the first-time violator identically with the serial offender jeopardizes any deterrent effect the notices might otherwise achieve.

Canadian authorities had the opportunity, in the context of copyright modernization, to create a much more robust framework of incentives for effective cooperation against online infringement, including a version of the notice and takedown systems that most developed countries have adopted as one tool to deal efficiently with the problem of infringing content hosted by service providers. Unfortunately, Canada spurned that opportunity, opting instead to codify a version of the current voluntary system; and even that has never been brought into force, although the relevant ministries are currently seeking the views of stakeholders. USG should encourage Canadian authorities to do what they can to give service providers greater incentives to come together with right holders to make meaningful progress against online copyright infringement; but further legislative change is likely to be needed.

LEGISLATIVE ISSUES

On June 29, 2012, Canada marked an important step forward in its years-long effort to modernize its copyright law when it enacted Bill C-11, the Copyright Modernization Act. A major stated goal of the copyright reform process in Canada was to enable the country to accede to the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Unfortunately, the formal process of ratification of these crucial

¹⁷While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined 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.

¹⁸ See <http://www.winnipeg.sun.com/2013/12/19/counterfeit-music-scheme-nets-550k-penalty>.

¹⁹Numerous recommendations of the parliamentary committees echo these concerns.

treaties did not even begin until almost a year after copyright reform legislation was enacted; and best estimates of the time needed to carry out the remaining procedural steps indicate that accession is unlikely to occur before mid-2014. This delay is particularly concerning to the recording industry, since the provisions of Bill C-11 recognizing an exclusive making available right in sound recordings will not be proclaimed in force until accession to the WPPT occurs. U.S. sound recording producers thus face the prospect of at least two full years of discriminatory denial of the full scope of their exclusive rights over digital dissemination of their products in Canada, even though U.S. law accords full rights to Canadian producers without discrimination. WPPT provides the needed minimum standards and the legal points of attachment to set the music industry on the path to a robust legitimate online market in Canada. The U.S. Government should encourage Canada to correct this injustice by completing the ratification and accession process as expeditiously as possible.

The modernized Canadian copyright law features a number of critical legal tools needed to protect copyright in the digital networked environment and to promote the healthy growth of electronic commerce in creative works; but it also contains a number of seriously problematic provisions. Some, such as elements of Canada's online copyright liability regime, fall well short of evolving international best practices. Changes made to Canada's statutory damages regime could reduce the effectiveness of that remedy in the online environment, where it is compellingly needed. Serious questions also remain unanswered about whether many of numerous new or expanded exceptions to copyright protection in the Modernization Act comply with Canada's obligations under the Berne Convention, TRIPS, and the WCT/WPPT to confine exceptions to those that meet the "3-step test."²⁰ IIPA urges USG to monitor closely the implementation of all these exceptions, as well as developments in Canada's service provider liability and statutory damages regimes, as the real impact of the modernized Canadian law becomes clearer in the year ahead.²¹

Of course, some important copyright law issues were not even considered in the context of copyright modernization, notably the disparity of term of protection of copyright between the U.S. and its largest trading partner. This divergence will make trade tensions almost inevitable in the future, with respect to a growing body of works that remain protected in one country but not in the other, so Canada should join the growing international consensus in support of term extension.

Having completed its copyright modernization exercise, Canada's government finally turned in 2013 to long-overdue reform of its enforcement regime for copyright (and trademark). Bill C-56 (now superseded by the identical Bill C-8 in the current parliamentary session) will plug a critical gap repeatedly stressed by USTR in its Special 301 reports on Canada (as well as by IIPA), by empowering Customs officers to act *ex officio* against suspected pirate or counterfeit imports or exports, as well as to share information about suspect shipments with rightholders upon request. The failure of the bill to provide similar authority regarding goods in-transit through Canada is puzzling, however, and should be corrected in order to reduce the risk that pirate products will enter the U.S. market via Canada. It is also of potential concern that the full costs of the border enforcement enhancements (including storing, handling and destroying detained goods) are to be borne by right holders. Bill C-8 contains other important improvements, including creating new offenses for export of infringing copies, and for possession of such copies for sale, rental, or distribution of public exhibition "by way of trade." It would also empower law enforcement to seek communication interception orders in criminal copyright investigations. The legislation commendably seeks to implement a number of the enforcement reforms that have been called for by parliamentary committee reports dating back to 2007. However, many other parliamentary recommendations are not taken up in this legislation, such as

²⁰See Art. 9(2) of the Berne Convention; Art. 13 of the WTO TRIPS Agreement; Art. 10 of the WIPO Copyright Treaty; and Art. 16(2) of the WIPO Performances and Phonograms Treaty.

²¹For IIPA's more detailed analysis of the Copyright Modernization Act, see our 2013 Special 301 submission on Canada at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at pp. 127-131, and other sources referenced therein.

increasing maximum penalties for piracy. Bill C-8 also does nothing to address the numerous parliamentary non-legislative recommendations directed to enforcement policy and resources.²²

Bill C-8 is an important step toward addressing the long-neglected shortfalls in Canada's enforcement regime against piracy and counterfeiting, but more ambitious and comprehensive steps are called for. Prompt parliamentary approval of the legislation should be encouraged, but accompanied by needed improvements that would further narrow the gap between Canadian enforcement standards and global best practices. Canada's government should also be encouraged to commit the resources and to set the enforcement priorities that are needed to respond effectively to piracy and counterfeiting.

²²See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/secup10/secup10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.