

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada remain on the Special 301 Watch List in 2016.¹

Executive Summary: One year after Canada's Copyright Modernization Act has come fully into force, its positive and negative impacts are becoming clearer. The new "enablement" provision is starting to fulfill its potential to make Canada somewhat less attractive to international online piracy operations. But the new law still falls well short in providing incentives (including, but not limited to, meaningful conditions on liability safe harbors) for more legitimate Internet intermediaries to cooperate with right holders to detect and deal with the widespread online infringement that remains a prominent feature of the Canadian marketplace. The new copyright amendments have led directly to the decimation of Canada's educational publishing market, vital collective licensing revenue streams have vanished, and other forms of return on investment are imperiled, largely because the undefined expansion of the fair dealing exception has created an atmosphere of impunity across Canada's educational establishment. Mobilizing the federal government to respond to this crisis and restore a more balanced approach must be a top priority, before the situation deteriorates further. Completing the task of harmonizing duration of copyright protection in Canada with that of its major trading partners, and providing resources and training to make copyright enforcement a priority for police, prosecutors, and courts, are other needed steps. IIPA urges that the U.S. Government remain extensively engaged with Canada on these and other issues in 2016, with the aim of making additional progress toward the goal of achieving a healthier marketplace for copyright works in our neighbor and largest trading partner.

PRIORITY ACTIONS REQUESTED IN 2016

- Make it a government priority to address the crisis in the educational publishing market, including by accelerating the review and clarification of the fair dealing amendments in the Copyright Modernization Act that have contributed fundamentally to it.
- Seek to make further progress against online piracy in Canada by strengthening legal incentives for Internet Service Providers (ISPs), hosting providers, and other intermediaries to cooperate with copyright owners, in accordance with international best practices.
- Closely monitor the implementation of new or expanded copyright exceptions with regard to market impact and conformity with Canada's international obligations.
- 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 online, and to seek deterrent penalties against those convicted of these crimes; and provide police, prosecutors and courts with the resources and training required to do so.
- Complete the process of bringing the duration of protection for copyright into conformance with evolving global norms.

INTRODUCTION

Throughout the extensive reports on Canada that IIPA has filed in each of the past dozen Special 301 cycles, one theme predominates: the need for Canada to modernize its copyright law to confront the challenges of

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/2016SPEC301HISTORICALCHART.pdf>.



today's digital networked marketplace. After years of consideration and several false starts, Canada enacted its Copyright Modernization Act in 2012, and finally completed the task of bringing all of the legislation's provisions into force in January 2015. Now, a year later, it is possible to provide an initial reckoning of how these extensive statutory changes have changed the environment for the copyright industries in Canada.

It is now clear that some of those effects have been profoundly negative, with the decimation of the market for educational publishing in Canada as exhibit A. At the same time, other and more positive changes are beginning to emerge, notably the impact of the "enablement" provision on some of the most egregious Canadian-based services dedicated to online infringement of audio-visual works. Finally, the assessment identifies important areas of Canada's copyright regime where the 2012 legislation has had relatively little impact, because its provisions were simply not designed to address serious problems, or side-stepped important issues altogether. This year's submission spells out this mixed preliminary verdict in more detail, and recommends steps that Canada's Government should be encouraged to take to improve the balance of gains and losses from the decade-long copyright modernization project.

EDUCATIONAL PUBLISHING: COPYRIGHT "MODERNIZATION" PRODUCES MARKET DECIMATION

Although much of the public attention to Canada's copyright modernization project was focused on issues of response to online piracy in particular, in fact the bulk of the legislation consisted of a score of new or significantly expanded exceptions to copyright protection. IIPA has previously sounded warnings about potential problems with several of these changes.² To date, none has had a more concrete and negative impact than the addition of the word "education" to the list of purposes (such as research and private study) that qualify for the fair dealing exception.

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

Today, that system has been all but destroyed. A detailed study released by Pricewaterhouse Coopers (PwC) in June 2015 documents and quantifies the damage.³ "Licensing income from the K-12 sector has been all but eliminated," PwC found, with a similar fate expected this year at the post-secondary level once current licensing agreements expire. The annual loss from the demise of licensing to copy parts of works was estimated at C\$30 million (US\$22 million). And the damage spills over to the full textbook sales market as well, with PwC concluding that massively expanded unlicensed copying "competes with and substitutes for the purchase of tens of millions of books" by educational institutions each year.⁴ A significant share of those losses accrue to U.S. publishers, which have always been major participants in the Canadian educational market.

The 2012 "education" amendment to fair dealing is one of the root causes of this market decimation. Even before the fair dealing amendment came into force, some of the decisions in the "pentology" of copyright decisions issued by Canada's Supreme Court in July 2012 posed a direct threat to the educational licensing market.⁵ Although

²For detailed analysis of the concerns raised by some of these new exceptions, see e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013, available at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at 130-31.

³Pricewaterhouse Coopers, *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines* (June 2015), available at http://accesscopyright.ca/media/94983/access_copyright_report.pdf (hereafter "PwC").

⁴PwC at 6, 7.

⁵Of the five copyright decisions announced on July 12, 2012, the most impactful rulings for these purposes were *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-...continued>

the *Alberta Education v. Access Copyright* case in the Supreme Court's pentalogy directly affected only a marginal aspect of the educational copying collective licenses, the subsequent statutory amendment poured gasoline on a smoldering fire. The resulting conflagration has virtually destroyed the market.

Lawyers for primary and secondary school systems across Canada, giving both the precedents and the new fair dealing amendment the "large and liberal" reading that the pentalogy decisions encouraged, concluded that fair dealing now eliminates the need for them to obtain any license from the collecting society for authors and publishers (Access Copyright), including for uses such as copying of primary textbooks or of newspaper articles, course packs, digital copying (including digital storage and distribution through learning management systems), and copying for uses outside the classroom. Consequently, as soon as the new Act came into force, virtually all K-12 school boards across Canada (excluding Quebec) cancelled their licenses with Access Copyright. As the PwC study concludes, "[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.... [L]icensing income from the K-12 sector has been all but eliminated.... A similar outcome is expected in the post-secondary market once current licensing agreements expire at the end of 2015."⁶ In fact, 80% of post-secondary institutions did not renew their licenses, and Access Copyright royalty collections from this sector are projected to decline more than 90% by next year (from C\$11.1 million (US\$8.05 million) in 2015 to C\$1 million (US\$725,000) in 2017).

Nor is the damage confined to licensing revenue. As part of an overall attrition of revenues from the sale of educational works in Canada, textbook publishers report significant drop-offs in book orders from university bookstores, presumably because more of the demand is being met by uncompensated copying under the current fair dealing interpretation. The PwC study found that "[f]ewer publishers are responding to requests for proposals to produce [new] textbooks,"⁷ and that sales of digital content and publisher investment in digital resources will be adversely affected.⁸

The impact on Canadian publishers and authors has been particularly devastating. One of the top two educational publishers in Canada was forced into bankruptcy (it has since emerged); two significant Canadian publishers stopped producing new content for the educational market; and a leading international publisher (Oxford University Press) exited the K-12 market altogether.⁹ The damages inevitably spill down to authors and illustrators. The PwC study predicts that "approximately one in three creators will produce fewer works and will reduce focus and time spent on creating content for the education sector."¹⁰ Payments from secondary licensing (such as in the educational market) accounted for 20% of the total income of Canadian authors; these revenues to creators are plummeting.¹¹ 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 fallout from the fair dealing amendments creates similar repercussions in the U.S. creative sector.

All expectations are for the problems to worsen unless promptly addressed. Access Copyright was just beginning the process of implementing new licenses for digital copying in Canadian schools when the "double whammy" of the 2012 Supreme Court decisions and the copyright modernization legislation hit them. The prospects for achieving any licensing revenue for digital copying, which is already becoming more pervasive than photocopying throughout Canadian educational institutions, now appear extremely bleak, because of the widespread belief in the

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csc/en/item/9997/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAAAB, and *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, available at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/9996/index.do?r=AAAAAQALQmVsbCBDYW5hZGEAAAAAAAAB>. Their impacts are discussed in IIPA's 2015 Special 301 submission on Canada, at pages 85-86.

⁶PwC at 6.

⁷PwC at 9.

⁸PwC at 71.

⁹See L. Williams, "Copyright Changes Hit Canadian Publishers Hard," *Publishers Weekly*, Aug. 8, 2014, available at

<http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/63630-copyright-changes-hit-canadian-publishers-hard.html>.

¹⁰PwC at 8.

¹¹H. Menzies, "The copyright act needs to be edited – for writers' survival," *The Globe and Mail*, Jan. 14, 2016, at <http://www.theglobeandmail.com/globe-debate/article28197828/>

education community that Canada's copyright law gives educators *carte blanche* for all uses of copyright works. Educational publishers report that parts of books and entire articles are frequently copied without permission and posted behind university firewalls, while unauthorized copies of complete textbooks are often shared online among K-12 teachers and students. As the PwC study describes it, Canada's educational sector is now characterized by "an atmosphere where unlimited copying has become commonplace, while content producers are unable to assert their intellectual property rights in any meaningful way."¹² And this atmosphere is at risk of spreading to other sectors. Because "education" is not defined in the statute, and given the expansive interpretation of fair dealing favored by Canadian courts, the amendment creates an obvious risk of unpredictable impacts extending far beyond teaching in bona fide educational institutions (and far beyond materials created specifically for use by such institutions).

Nor is the educational fair dealing amendment the only Copyright Modernization Act provision that may be contributing to the sense of impunity that Canada's educational establishment increasingly displays. For instance, the broad new exception in section 30.04 of the Copyright Act 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.¹³

Canada's central government is well aware of the dire state of its educational publishing market, and of the fact that government actions at the provincial level are among its immediate causes — specifically, the adoption by the Council of Ministers of Education, Canada¹⁴, of the sweeping "fair dealing guidelines" that provide the legal justification for the cessation of licensing royalty payments. We urge the U.S. Government to continue to engage with their Canadian counterparts to encourage meaningful action. Canadian federal 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, and to urge colleges, universities and K-12 authorities to negotiate and implement acceptable use policies that advance those objectives and curb the excesses that now prevail. The goal should 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. To ensure that the serious consequences of the Copyright Modernization Act for the publishing sector are addressed as expeditiously as possible, the government should accelerate its review of at least this aspect of the legislation, instead of waiting until the parliamentary review of copyright law mandated by Section 92 of the Copyright Act as amended begins in late 2017.

IIPA's frequently-stated concerns about the breadth of the new exceptions in Canadian law are by no means limited to the educational fair dealing context. In particular, new section 29.21, entitled "Non-commercial User-generated Content," allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary (including a commercial intermediary), so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is "solely for non-commercial purposes" and does not have a "substantial adverse effect" on the market for the underlying work. The provision could substantially undermine the exclusive adaptation right that Canada is obligated under the WTO TRIPS Agreement (TRIPS) and the Berne Convention to provide, and its breadth raises serious questions of compliance with the 3-step test for permissible limitations and exceptions.¹⁵ Although this exception may have been globally

¹²PwC at 94.

¹³Indeed, there is a pressing need to clarify and narrow the overall scope of the new statutory damage limitation, lest it act as a de facto compulsory license in which only the first copyright owner to sue can enjoy any meaningful monetary relief, no matter how widespread the defendant's "non-commercial" infringements may be.

¹⁴Council of Ministers of Education, Canada is an intergovernmental body founded in 1967 by ministers of education of all 13 Canadian provinces and territories. See <http://www.cmec.ca/11/About/index.html>

¹⁵See, e.g., Article 13 of the WTO TRIPS Agreement.

unprecedented at the time of its enactment, it has already spawned imitators, such as the proposal (thus far rejected) for a similar exception to the Hong Kong Copyright Ordinance. This underscores the importance of close monitoring of how the Canadian user-generated content (UGC) exception is applied in practice, including whether it leads to abandonment of established licensing arrangements, as has already occurred with regard to educational publishing.

ONLINE PIRACY: COPYRIGHT MODERNIZATION PROVIDES A NEW TOOL, BUT FALLS SHORT ELSEWHERE

Canada remains one of the leading potential markets for online commerce in U.S. copyright works. As reported by the Canadian Internet Registration Authority (CIRA), “Canada continues to be one of the most wired countries in the world, with nearly 87 percent of Canadian households connected to the Internet.” CIRA calls Canadians “voracious consumers of online media, watching 43 percent more minutes of video online than their American counterparts.” Almost three-quarters of the Canadian population stream TV, movies or video, and almost 40% of them devote at least 5 hours a week to doing so. The majority of Canadians stream radio online.¹⁶ These trends help explain the strong growth of legitimate digital distribution of creative content in Canada. Nearly thirty music services now offer Canadians licensed downloads, streaming, or both,¹⁷ with revenues from digital delivery of music outperforming all other sources combined for the first time in 2014 (the most recent year for which complete data are available).¹⁸ Similarly, the legitimate online video market is also growing in Canada, with studios and producers continuing to work with a multitude of partners and platforms. Currently, more than 50 licensed services now offer movies, TV programming, or both, online to Canadians.¹⁹

At the same time, Canada still has far to go to rectify its reputation as a safe haven for Internet pirates. Indeed, a number of the world’s most popular Internet sources dedicated to online theft of copyright material retain connections to Canada. This includes the biggest BitTorrent²⁰ site in the world in terms of visitors and popularity, *Kat.cr*, along with the various other incarnations that the so-called “Kick Ass Torrents” operation has assumed in its domain-hopping peregrinations over the past eight years. *Kat.cr* attracts more than 25 million unique visitors per month seeking access to its six million torrent files that are verified and available for download, representing tens of thousands of infringing movies, TV shows, music, video games, books and apps. *Kat.cr* is the 75th most visited site on the entire Internet, and monetizes its illegal conduct by selling advertising space throughout the site, including adjacent to posts of torrents relating to infringing content. Since 2012, it has been the subject of blocking orders in five European countries as well as in Malaysia, but continues to be hosted in Canada as well as in other jurisdictions. The site operators also have entered into affiliate agreements with companies that produce software designed to hide users of BitTorrent from detection by ISPs and monitoring companies. All this earned *Kat.cr* a listing in USTR’s 2015 Out-of-Cycle Review that identifies notorious markets that fuel online piracy.²¹ Other leading bit-torrent sites based in Canada include *Sumotorrent.sx* and *Seedpeer.eu*. A disturbing recent trend is the emergence of stand-alone BitTorrent applications that employ an attractive, user-friendly interface that enables users to illegally stream and download infringing movies and TV programs; these applications are available in Canada both online and pre-loaded onto set-top boxes.

Online piracy operations using other forms of technology besides peer-to-peer protocols like Bit Torrent have also managed to shelter in the Canadian Internet. USTR’s list includes *zippyshare.com*, a cyberlocker which is the world’s leading source of illicit recorded music files available before authorized release. Its domain name is registered with a Canadian company although the site appears to be hosted in France. This advertising-supported

¹⁶<https://cira.ca/factbook/current/the-canadian-internet.html>

¹⁷<http://www.pro-music.org/legal-music-services-north-america.php>

¹⁸RIN 2015 at 64.

¹⁹www.wheretowatchincanada.com.

²⁰BitTorrent is by far the leading protocol used by unlicensed Peer-to-Peer (P2P) file sharing networks.

²¹USTR, 2015 Out-of-Cycle Review of Notorious Markets (December 2015), at 14, available at <https://ustr.gov/sites/default/files/USTR-2015-Out-of-Cycle-Review-Notorious-Markets-Final.pdf>.

site responds to take down notifications, usually within 24 hours, but the same infringing content that is taken down is regularly re-uploaded to the site. The publishing industry is plagued by the activities of *tuebla.ca* (also operating as *tuebl.com*), a Canadian-operated site which serves both as a cyberlocker for infringing ebooks and as a compendium of links to similar infringing material stored elsewhere, all catalogued by author and genre. While *tuebl.ca* complies with take down requests and provides a form for takedown purposes, re-uploading of content, sometimes mere hours after removal, remains extremely problematic. A linking site focused on first run motion pictures and television content, *solarmovie.is*, is also hosted in Canada. On this site, each infringing title is offered with dozens of links from multiple sources that are graded by users for quality. *Solarmovie.is* and related sites have been the subject of judicial blocking orders issued in Italy, Denmark, the U.K. and Romania.

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 *R4cardmontreal.com*, *gamersection.ca*, *ncardcanada.com*, and *r4toronto.com*) continue to offer circumvention devices. Computer software that effects a “soft modification” of the security technology of game consoles, and thereby facilitates the play of pirated video games, remains available on sites hosted in Canada, such as *gamersparadise.ca*, which bills itself as “Toronto’s Ultimate Mod Shop” and offers both physical and soft modification services. Several circumvention device sites have Canadian hosts, including the popular ISPs Hawk Host and Crocweb. Additionally, direct download (ROM) 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.

As the *solarmovie* and *kat.cr* examples indicate, because Canada’s legal environment provides inadequate tools to deal with the problem at its source, courts in many other countries have had to order major ISPs to block access to these sites. However, in 2015, there were encouraging indications that a provision of the Copyright Modernization Act may help end Canada’s practice of outsourcing to other jurisdictions the burden of combating these online theft operations. In October 2015, a Canadian Federal Court issued a sweeping injunction against the Canadian developers of PopcornTime, a computer application using an interface modeled on Netflix to enable one-click access to on-demand streaming of infringing motion pictures, shutting down the *PopcornTime.io* website where the most popular version of the application was available for free download. The court relied, in part, on claims that the defendants had provided services primarily for the purpose of enabling acts of copyright infringement, in violation of the newly enacted provision, section 27(2.3). Movie industry investigators also relied on this new “enablement” prohibition in successful efforts to shut down two globally popular Canadian bit-torrent sites. These developments suggest that this provision of the Copyright Modernization Act is finally beginning to realize its potential value as a tool to help purge the Canadian online environment of these outlaw services that undermine legitimate digital markets for copyright materials worldwide.

In other respects, however, the Copyright Modernization Act simply fails to respond adequately to the challenge of online piracy.²² In particular, Canada’s “notice and notice” system, which came into force in January 2015, does not change the overall picture of inadequate legal tools. While we endorse the concept of ISPs sending notices to their users to alert them that their accounts are being used for infringing purposes, simply sending notices to ISP subscribers that their infringing activity has been detected is not the most effective approach, especially when multiple notices may be sent without any further consequences. In addition, some rights holders report that not all Canadian ISPs are fulfilling their obligations under the statutory system. Even where notices are sent, there are reports that multiple repeat infringers will be delivered the same notice, and service providers have indicated that they do not track the number of notices sent to particular subscribers. Some rights holders have further reported that some ISPs have arbitrarily decided to limit the number of notices sent to repeat infringers within a certain window of time, and thus deem notices outside these limits to be erroneous. Moreover, there are insufficient incentives for ISPs

²²These shortcomings are detailed in IIPA’s more detailed analysis of the Copyright Modernization Act, see e.g., IIPA, *Canada*, 2013 Special 301 Report, February 8, 2013, available at <http://www.iipa.com/rbc/2013/2013SPEC301CANADA.PDF>, at 127-131, and other sources referenced therein.

to respect the legislated “notice and notice” system, because their failure to forward notices from right holders does not affect their exposure to copyright infringement liability. Data from Canadian ISPs could be useful in assessing the overall effectiveness of the “notice and notice” regime, and in encouraging cooperation for enhancements to the program.

The Canadian law also inadequately addresses hosting service providers who fail to disable access to infringing materials that they are hosting, even after it is brought to their attention. While “notice-and-takedown” (which the Canadian law lacks) is far from a panacea for online piracy, it does, at a minimum, provide some incentives for cooperation. Canada’s steadfast refusal to adopt any impactful legislative requirements as a condition for limiting the liability of hosting providers leaves it an outlier in the global environment, and substantially diminishes both the utility of the legislative mechanisms in place, and the efforts and interests of rights owners and stakeholders impacted by widespread infringement online. The consistent absence of any criminal enforcement in Canada against even the most blatant forms of online theft complete the picture of a system that is still not up to the challenge. Canada should review the effectiveness of its current regime, and consider alternatives to remedy its shortcomings and the current lack of incentives to stimulate full inter-industry cooperation against online piracy.

The propensity of many Canadian consumers to patronize illegal online sources of copyright material has been well documented. 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.²³ As noted above, recent growth in the Canadian market for licensed online music and audio-visual services gives hope that this propensity may be declining. Nevertheless, the digital music space continues to underperform in Canada: the uptake on legitimate subscription music services lags well behind the levels in comparable countries. While the gap is narrowing, deficiencies in Canada’s online liability legal regime still tilt the field of competition against licensed services, and also continue to send the wrong signals to consumers about whether infringing activities are tolerated. Another discouraging factor arises from the Copyright Board’s decision to set tariff rates for webcasting at a small fraction of the rates negotiated in the marketplace or those applicable in neighboring markets. The Board’s decision on “Tariff 8” in 2014, rendered after a six-year proceeding, falls far short of establishing conditions for healthy growth of the legitimate marketplace in digital music delivery.

IIPA urges USTR to continue to press Canada to address these deficiencies in order to fully open its digital marketplace for global copyright works. The U.S. Government 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. In this regard, it is truly unfortunate that Canada negotiated for itself an exemption within the Trans Pacific Partnership (TPP) Agreement that seems designed to permit it to retain its current inadequate system. Specifically, it is exempted from the requirement, accepted by all eleven other TPP partners, to condition liability safe harbors on the obligation to take down infringing material of which the hosting provider is aware, or of which it is notified.²⁴

Finally, some key areas of needed modernization of Canadian copyright law simply were not addressed by the Copyright Modernization Act. A notable example is the disparity in duration of copyright protection between Canada and its largest trading partner (the U.S.), and indeed with the vast majority of OECD economies. IIPA applauds Canada’s action in June 2015 extending the term of protection for sound recordings to 70 years after publication, or 100 years after fixation, whichever comes first. It is now time for Canada to 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. IIPA is pleased to note that this is an obligation that Canada agreed to accept in the TPP Agreement.²⁵

²³http://www.huffingtonpost.ca/2012/09/20/music-piracy-canada-top-countries_n_1899752.html.

²⁴TPP, Chapter 18, Annex 18-E.

²⁵TPP Art. 18.63.

ENFORCEMENT

The entry into force in 2015 of Bill C-8 (the Combating Counterfeit Products Act) significantly upgraded Canada's copyright and trademark enforcement regime, notably by giving *ex officio* authority to Canadian Border Services Agency (CBSA) officers to seize suspected pirate or counterfeit imports or exports at the border, as well as to share information about suspect shipments with right holders upon request. However, some shortfalls remain, notably the denial of *ex officio* authority with regard to in-transit goods.²⁶

As IIPA has consistently pointed out in its annual Special 301 reports over the past decade, copyright enforcement problems in Canada are attributable only in part to the fact that enforcement agencies lack adequate legal tools. Now that enactment of Bill C-8 has addressed many of these legal insufficiencies, it is critical that Canada turn its attention to the other half of the equation — the lack of resources devoted to copyright enforcement, and the accompanying shortfall in political will to address the problem as a priority. Nothing in Bill C-8 directly addresses this problem, and the new legislation will be unlikely to realize its potential without a clear change in direction on the importance of enforcing against copyright infringement.

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, in the past year, 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. On the whole, because the Canadian law enforcement commitment to act against copyright piracy remains under-resourced, and too few agencies consider it a priority, the non-statutory barriers to effective enforcement, as identified in parliamentary reports going back nearly a decade, remain basically unchanged.²⁷

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. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.²⁸ The weak penalties typically imposed on offenders further discourage prosecutors from bringing cases, creating a vicious cycle that encourages recidivism.

We continue to urge the U.S. Government to press the Canadian Government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include specialized training on the new prohibitions on circumvention of technological protection measures and its relationship to piracy. 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 must take on and fully prosecute more copyright infringement cases, and should be provided with the training and other support needed. Right holders remain at the ready to assist and have extended offers to provide such training. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases.

²⁶In another disappointing feature of the TPP Agreement, Canada will apparently be allowed to continue to leave this gap unplugged. See TPP Art. 18.76.5.c, n.123.

²⁷For instance, a report from the Industry, Science and Technology Committee in 2007 called for a higher priority for enforcement at the retail level, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>. A report the same year from the Public Safety and National Security Committee raised similar concerns about law enforcement priorities and funding. See <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp298508f1/secup10/secup10-e.pdf>.

²⁸This 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.

IIPA urges Canadian law enforcement, prosecutors and courts to extend their reach beyond retail hard goods onto the Internet, including sites on third party marketplaces such as *kijiji.ca* and *ebay.ca*. Set-top boxes pre-loaded with infringing BitTorrent applications used to stream movies and television programming without authorization are readily available on such sites. So are devices intended to circumvent access controls on video game consoles, as well as counterfeit video game copies whose use is enabled by such circumvention. Canada has been identified as one of the top three countries in the world for circumvention device listings on online marketplaces.²⁹

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

DISCRIMINATION AGAINST U.S. PERFORMERS AND SOUND RECORDING PRODUCERS

In conjunction with its copyright 2014 accession to the WIPO Performances and Phonograms Treaty (WPPT), Canada brought into force the provisions of the Modernization Act recognizing an exclusive making available right in sound recordings. At the same time, however, the Canadian Government exercised its prerogatives under the Copyright Act to deny all equitable remuneration to U.S. sound recording producers for recordings publicly performed in Canada through terrestrial broadcasting, and for any form 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 these sound recordings were similarly denied remuneration.

While we welcome Canada's 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, IIPA also urges Canada to reverse its unfair and discriminatory policy embodied in Canada's implementation decision. We highlight that U.S. law provides for full national treatment, regardless of whether the country of origin provides reciprocal rights. The Canadian decision to exercise its prerogatives in a discriminatory fashion is inappropriate for its relations with its neighbor and largest trading partner, and should be reconsidered.

²⁹In the last 9 months of 2015, almost 900 devices pre-loaded with infringing games were taken down from *kijiji*, and more than 1900 such listings were removed from eBay.