



PUBLIC INTEREST ADVOCACY CENTRE  
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

**Brief of the Public Interest Advocacy Centre to the Standing Committee  
on Industry, Science and Technology's Review of the *Copyright Act***

**1 June 2018**

The Public Interest Advocacy Centre (PIAC) is a national non-profit and registered charity that advocates on behalf of consumers, and, in particular, vulnerable consumers, concerning the provision of important public services like telecommunications and broadcasting.<sup>1</sup> We have represented the interests of consumers in numerous prior reviews of Canada's *Copyright Act*.

Broadly speaking, PIAC hopes that this committee will avoid making any changes to the *Copyright Act* which impact affordability, fair use rights, or freedom of expression of consumers.

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<sup>1</sup> For more information, see online: <https://www.piac.ca>

## Canadian cultural industries are thriving

Canada's cultural industries are thriving. Data from the Canadian Media Producers Association shows that in 2017, video production expenditures increased by 24%, employment increased by 27%, the contribution of production to gross domestic product increased by 24%, and foreign investment in production increased by 41%.<sup>2</sup> Statistics Canada data supports these trends.<sup>3</sup> The CMPA summarized the year's changes as follows:

Indeed, if there is a common thread linking the various elements of the screen-based content sector in Canada, it is the content explosion. It is global viewers hungry for quality screen-based content. It is the proliferation of channels and platforms to deliver that content. It is the surge in production volumes and employment in Canada's industry.<sup>4</sup>

The ways in which Canada's cultural industries are developing is particularly beneficial to consumers. Online video streaming services offer better affordability and choice than was ever possible under traditional broadcasting distribution undertakings. Total estimated revenues of Internet-based streaming services in Canada have nearly tripled over the last five years, from \$654 million in 2012 to \$1,956 million in 2016.<sup>5</sup> We are optimistic that with time and an increasing number of online video services, online services will compete with traditional broadcasting undertakings for content rights and customers, paying more to creators while charging less to consumers.

## Our recommendations for reform

The *Copyright Act* is working well so no major amendments are required.

PIAC's first suggestion would be to amend the rules surrounding the notice-and-notice system under s 41.25 to prevent the misuse of that system by parties impersonating copyright holders and/or making settlement demands, including in circumstances where no copyright violation has occurred<sup>6</sup> or where the settlement amount is not available to the demanding party (for example demands alleging corporate-type liability for a consumer-type infringement (the latter capped at \$5000 in the *Act*) in order to extort higher settlement amounts from individual consumers than those prescribed in the *Copyright Act*. A centralized independent review process is the most fair and cost-efficient means of preventing such fraud.

PIAC's second suggestion is to clarify the anti-circumvention provision (s 41.1) to ensure that it is clear that it does not prohibit practices which are otherwise fair dealing. Otherwise the results of the provision are quite ridiculous. For example, one party to telecom proceedings has a habit of sending their submissions as secured PDFs in French. Technically, in retyping portions of their submissions for the purpose of responding to them, PIAC is circumventing their

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<sup>2</sup> <http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/Profile-2017.pdf> at 3.

<sup>3</sup> Statistics Canada CANSIM tables 361-0047, 361-0038, and 361-0049.

<sup>4</sup> <http://www.primetimeinottawa.ca/wp-content/uploads/2018/02/Profile-2017.pdf> at 6.

<sup>5</sup> CRTC, 2017 Communications Monitoring Report, Table 4.2.5 Estimated revenues of Internet-based video services in Canada by type of service (\$ millions)

<sup>6</sup> <https://www.scribd.com/document/358763770/Notice-and-notice-ATIP>

technological protection measure, although the use would obviously constitute fair use for the purpose or criticism or review.

PIAC is concerned about the affordability of Canadian content and is advocating for a variety of policy changes outside of the scope of the *Copyright Act* to support the creation of Canadian content and ensure Canadians have affordable access to that content. Specifically, PIAC believes that Canada should:

1. Task the Canadian Media Fund with acquiring “second-window rights” to compelling Canadian content for free distribution, so that everyone who is interested in that content can access it on the platform of their choice.
2. Ensure that vertically integrated telecommunications service providers offer discounted television service bundled with discounted broadband through ISED’s affordability portal for low-income Canadians.
3. Redefine Canadian content to focus on content which reflects Canadian perspectives and diversity.
4. Embrace consumer-created content as a cost-effective means of content creation which reaches a large number of Canadians, particularly youth.
5. Expand Canadian content contribution requirements and sales taxes to apply to online services and use the funds to support public broadcasters.

If the Committee would like more detail regarding these proposals and the rationale for them, please refer to our submissions to the CRTC’s consultation on the future of broadcasting distribution in Canada.<sup>7</sup> The key point for the purposes of this committee’s review is that we do not believe that copyright reform is needed to address broadcasting affordability or remuneration for Canadian content creators. Copyright is a crude mechanism for promoting content creation because it:

- prices many consumers out of the market,
- oversubsidizes the most profitable (predominantly foreign) works, and
- requires extensive transaction costs to negotiating rights.

While there is a role for copyright, PIAC sees other mechanisms as better suited to supporting the creation of Canadian content and ensuring Canadians have affordable access to that content.

### **Our concerns about others’ recommendations**

PIAC expects copyright holders to seek broader rights and additional enforcement remedies through this review. While we will have to evaluate each proposal on its merits, PIAC does not believe that broadening rights or remedies is necessary or appropriate.

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<sup>7</sup> See: Broadcasting Notice of Consultation CRTC 2017-359, Call for comments on the Governor in Council’s request for a report on future programming distribution models (12 October 2017); online: <https://crtc.gc.ca/eng/archive/2017/2017-359.htm> . PIAC submissions at: <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3023946> and <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=3068359> .

## Site blocking

One remedy copyright holders may seek is the ability to obtain orders blocking access to websites engaged in copyright infringement.

PIAC has reviewed and analyzed the evidence of online piracy and the effectiveness of website blocking in great detail, and we invite the Committee's analysts to review those submissions.<sup>8</sup> The United States Government Accountability Office found that there was no basis for any of the three most commonly sourced estimated of losses due to pirate goods.<sup>9</sup> The figures being used by Canadian copyright-holders are barely any better. Proponents of website blocking cite the number of website visits to pirate websites, ignoring that the average visit duration was as little as 10 seconds for some sites. They cite web traffic shares associated with piracy ignoring that virtually all of that web traffic is attributable to purpose-built set-top boxes which stream even when no one is watching. They use unreliable data derived from spyware. They use expansive definitions of piracy which, for example, include services which only provide sub-titles and translated sub-titles without video for the benefit of the deaf/hard of hearing and foreign-language speakers. They misrepresent the conclusions of academic studies, claiming for example that a study shows an 8% to 10% increase in demand from piracy when the underlying study only showed an 8% to 10% increase in legal site visits among pirates (who were already much heavier users than the general population).

Properly analyzed, the evidence suggests that online piracy is a small and shrinking problem, and that site blocking will have minimal benefits for Canadian creators.

Canadians are strongly opposed to the implementation of any online censorship, particularly where that censorship would be driven by corporate or government interests.<sup>10</sup> Creating an administrative mechanism whereby corporations can apply to block websites would undermine public trust in the Internet as an open and neutral communications platform. Because pirate websites generally contain some legal content and provide access to content which would not otherwise be available, any attempt to implement pirate website blocking will infringe on freedom of expression, and some technologies used to implement blocking may constitute an unreasonable search.

Canada's broadcasting market is highly concentrated. Broadcasting groups exercise market power to underpay creators and overcharge consumers. Creators lack other platforms to which to sell their content, so they can only capture a small portion of the value it generates for distributors. While PIAC does not condone piracy and supports various remedies to address piracy like following the money, PIAC also believes that piracy is being driven by broadcasting market power and that to the extent it has any effect, the threat of piracy helps to restrain the market power, forcing broadcasters to offer better quality and lower prices to distinguish themselves from illegal offers.

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<sup>8</sup> Public Interest Advocacy Centre Intervention (3 April 2017), Fairplay Part 1 Application before the CRTC at Part 2 "The Factual Context".

<sup>9</sup> <https://www.gao.gov/new.items/d10423.pdf>

<sup>10</sup> An OpenMedia petition received over 86,000 signatures/

Regardless, Parliament should not unilaterally implement stronger copyright remedies. Copyright is subject to numerous international agreements. Stronger copyright protections are a bargaining chip for Canada in international negotiations, particularly in securing reciprocal protections for Canadian creators in foreign countries.<sup>11</sup>

### **Device and Internet taxes**

Some copyright holders may argue that devices or internet services should be subject to additional fees dedicated to support content creation – fees currently apply to CD sales for this purpose. Such fees should be avoided. Fixed fees impact the affordability of telecommunications services and force everyone to support content creation regardless of whether they are consuming that content illegally, or even consuming it at all. Fees deprive consumers of a choice as to whether to purchase content.

CD's were more of a luxury item and more closely linked with infringing activity than devices or internet service. If an Internet tax is imposed, the tax should be based on a percentage of revenues in excess of the cost of a basic Internet service plan, in order to avoid pricing consumers out of the market and in light of the more likely link between high-tier internet plans and copyright infringing activities.

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<sup>11</sup> See for example the Berne Convention.