



IATSE Submission re: Broadcasting and Telecommunications Legislative Review

Introduction

IATSE is the largest trade union representing workers in Canada's entertainment industry. The 22,000 Canadian members of the IATSE are not the actors, writers, or producers but the skilled technicians behind the scenes. We are the technicians who work not only on big-budget foreign service productions like *Star Trek: Discovery* in Toronto or *Deadpool* in Vancouver, but also on Canadian productions (or co-productions) like *Cardinal* in Sudbury, or *Maudie* in Newfoundland.

Online Platform Accountability

Online platforms are part of our daily lives. They include social networks, search engines, content-sharing and rating sites, blogs, and more. There is a growing concern around problems resulting from a lack of online accountability. While there is an increasing dissemination of illegal online content inciting hatred, violence, and political interference (as we saw with the Facebook/Cambridge Analytica incident), our industry's focus is on copyright and digital piracy. The public has an expectation that companies should behave responsibly, and make reasonable efforts to prevent foreseeable harms stemming from their products or services. It is government's responsibility to ensure that they do.

Importance of Strong Copyright to Canadian Cultural Industry Technicians

While strong copyright legislation may not seem to have any impact on technicians, digital theft has a direct impact on our membership. For our members, there is no job security. We are the workers behind the camera - the grips and hair stylists, the set decorators and camera operators - who depend on a health industry for their employment. IATSE members are unlike the members of ACTRA or the Directors' Guild. These workers receive no residual payments once a production has wrapped. Their incomes depend solely on what is shooting each day, because once your show wraps, so does your paycheque. So why is strong copyright protection important to the IATSE? Because when producers – our employers – are hit with financial losses due to piracy, there is less money in the pot for future projects, and therefore fewer job opportunities for our members. When the industry suffers because of digital theft, our members suffer because they find themselves out of work.

The Scope of the Problem

Streaming services have overtaken peer-to-peer platforms like BitTorrent, and now account for up to 85% of all piracy. In 2016, there were 1.88B visits to piracy sites by Canadians.¹ The latest method for viewing illegal content is the "fully-loaded" media player. The most popular of these is the Kodi set-top box. These players come pre-loaded with applications that provide users with

¹ *MUSO Report (Canada), 2017.*

access to licensed content, but there are add-ons available which allow users to access unlicensed content. Almost 1 in 10 Canadian homes, or 9.7%, now have a Kodi box. Of these, 70.9%, or 7% of all Canadian homes, are using the unofficial add-ons to access unlicensed content (such as international TV programming).²

To use a Canadian example, *Letterkenny* is the second-most pirated TV show in Canada. The show is one of thousands available to watch legally through a subscription to CraveTV, at a nominal cost of \$7.99/month. It has been downloaded illegally more than 1 million times. Estimates are that these downloads have resulted in up to 350,000 fewer subscriptions to CraveTV, with a monthly value of up to \$2.8 million eliminated from the Canadian cultural industry.

Impact on Canadian Consumers

Internet security experts have long warned that illegal piracy sites can severely infect computers and devices and can render the user vulnerable to spam, viruses, malware, or phishing attacks. Visitors to piracy sites may also be exposed to identity theft, pornography, information theft, and malware distribution, and some have associations with known cybercrime organizations.

The Digital Citizens Alliance and a cybersecurity firm called RiskIQ released a report³ in 2015 which looked at a sample of 800 pirate websites around the globe and compared these to a control group of legitimate sites. The report found that 1 of every 3 sites contained malware, and 4.5% of this malware was delivered through what is called “drive-by downloads” that invisibly download to the user’s computer – without requiring them to click on a link. These findings showed that users are 28 more times likely to get malware from a piracy site than on similarly visited mainstream websites or licensed content providers.

There are other risks to which users of piracy websites expose themselves. In addition to the malware that often accompanies pirated movies and TV shows, consumers are unknowingly having their computers commandeered to mine cryptocurrency. As many of these sites do not have revenue coming in from ads, they are looking at other means to generate income. Pirate Bay, one of the best known piracy websites, admitted to having done this late in 2017.⁴

Where we are now - The Copyright Modernization Act

In 2012 the Copyright Modernization Act was passed with its mandated review of the legislation every five years, bringing us to this discussion. There have been some positive outcomes from its implementation, and we are pleased that progress has been made. For example, the Federal Court of Appeal affirmed a trial court interlocutory injunction in March of 2017 against retailers of set-top boxes, such as the Kodi box.⁵ The appellate court was specific in affirming the finding of irreparable harm to distributors of copyright works if defendants were allowed to continue selling these set-top boxes. This decision (as well as subsequent orders that were issued in cases against repositories offering the public illegal add-ons that enable set-top boxes to access streaming video

² Sandvine, *Video Piracy in Canada*, 2017.

³ Digital Citizens Alliance/RiskIQ, *Digital Bait: How content theft sites and malware are exploited by cybercriminals to hack into internet user’ computers and personal data*, December 2015.

⁴ engadget, *Pirate Bay ‘borrows’ visitor CPUs to mine virtual coins*, by John Fingas, Sept. 16, 2017.

⁵ Wesley dba MTLFreeTV.com v. Bell Canada, 2017 FCA 55, affirming Bell Canada v. 1326030 Ontario Inc dba ITVBox.net, 2016 FC 612.

without permission) indicates that some remedies against illicit streaming devices are available under the Copyright Modernization Act, but there are still many areas in which the current legislation falls short.

In 2015, the “notice and notice” system came into force, which was intended as an educational tool for end-users. Education is good, but there is no evidence that “notice and notice” has contributed to any significant change in consumer behaviour. There are no consequences for the consumer, and no incentives for internet service providers (ISPs) to purge their service of illegal material. There is also insufficient incentive for ISPs to respect the “notice and notice” system because any failure on their part to forward notices from rights holders has no impact on their exposure to copyright infringement liability.⁶ “Notice and notice” also does not address the issue of hosting services that fail to disable access to illegal materials that they are hosting, even after those illegal materials are brought to host’s attention. As long as recognized illegal content is easily available online, Canada is hobbled in its attempts to fight digital theft.

Under the Canadian section of its 2018 global report on copyright protection and enforcement, the International Intellectual Property Alliance (IIPA) states that the deficiencies in Canada’s online liability legal regime “still tilt the field of competition against licensed services, and also continue to send the wrong signals to consumers about whether infringing activities are tolerated. In the upcoming Copyright Act review, Canada should look for ways to make its current regime more effective, and to provide meaningful incentives to stimulate full inter-industry cooperation against online piracy.”⁷

What’s the Solution?

Governments worldwide are coming to the realization that regulation must exist for online platforms and social media. After human trafficking was brought to light, the United States made the first change in years to Section 230, and responsible behaviour is now a requirement for the Googles and Facebooks of the world. The internet is no longer a Wild West; governments are coming to realize that regulation and greater oversight is necessary. There is no single solution that will solve this many-faceted issue, but we offer a few.

1. Allow Rights Holders to Obtain Injunctive Relief Against Intermediary Service Providers

All intermediary service providers, such as Internet service providers (ISPs), hosting providers, domain registrars, and search engines, who facilitate access to illegal content, have a key role to play in ensuring a modern and responsible digital ecosystem and are best-placed to reduce the overall harm caused by online piracy. As much has been recognized in Europe where for years rights holders have been able to obtain broad and effective injunctive relief against intermediaries whose services are used by third-parties to infringe copyright. There is now global recognition that injunctions that disabling users’ access to illegal content, including via site-blocking, are proven and effective tools to reduce online piracy. The Copyright Act should therefore be amended to expressly

⁶ Section 41.26(3) of the Copyright Act - providing limited statutory damages as the sole remedy for such failure.

⁷ International Intellectual Property Alliance (IIPA) *2018 Special 301 Report on Copyright Protection and Enforcement*, pg. 115, 2018.

allow rights holders to obtain injunctive relief, including site-blocking, against intermediaries whose services are used to infringe copyright.

2. Narrow the Scope of the Safe Harbour Provisions

The Copyright Act contains safe harbour provisions and exceptions that shield intermediary service providers from liability, even when they host infringing material or knowingly have their systems used for infringing purposes. To bring Canada in-line with international best practices, the Copyright Act should be amended to:

(a) provide that all intermediary exceptions only apply where the service provider is acting in a passive or neutral manner; and

(b) ensure that Canada's safe harbour provisions do not protect intermediaries that have knowledge that their systems are being used for infringing purposes but take no steps to stop it.

3. Implement Site Blocking for Blatant Piracy Sites

the IATSE was one of the 25 organizations behind FairPlay Canada, which also included unions, broadcasters, production companies, and other stakeholders. When the last copyright review was undertaken, film industry stakeholders all had differing, and often contrary, positions on what the new legislation should look like. This time, we were united. Things have changed. The last time the major broadcasters appeared before government, their broadcast arm was the larger influence in their positions. This time, it is their content arm, and protecting content creators is a goal we have in common.

You are likely aware that FairPlay Canada filed an application with the CRTC to help protect content creators. The proposal was a system, similar to one used in countries like the UK, Australia and France, that would empower the CRTC to identify and remove the ability of illegal piracy websites to reach Canadians. Under FairPlay's proposal, the CRTC would create an independent, not-for-profit organization called the Internet Piracy Review Agency (IPRA), which would make recommendations to the CRTC on which sites should be blocked. The group would represent a broad range of stakeholders, including consumer groups, and would be responsible for receiving and considering applications to identify blatant piracy sites.

Any interested party could make an application regarding a site, and the application would be served on the website and the ISPs. IPRA would receive submissions from all parties and, if required, conduct an oral hearing. IPRA would then make a recommendation to the CRTC on whether to add the site to the list of blatant piracy sites. It would only recommend adding a website to the list if the evidence presented establishes that it is *blatantly, overwhelmingly, or structurally* engaged in piracy. The CRTC would be responsible for making the final determination and then providing ISPs the list and, of course, updating the list accordingly. The CRTC decision would ultimately have been subject to oversight by the Federal Court of Appeal. Once a site was on the list, ISPs would have been required to block any Canadian user from accessing that site, which could be located anywhere around the world.

The proposal in no way infringed on net neutrality. Both the IATSE and FairPlay support open access to all legal content on the internet. Net neutrality protects only the flow of legal content on the internet and was not impacted by this proposal. Again, the proposal focused exclusively about blatant piracy sites, not sites where piracy might exist – meaning a site like Pirate Bay, which exists

primarily to share copyrighted materials, not, for example, YouTube, where the majority of content is original and posted by the creator.

If you were aware of FairPlay Canada's proposal, you will also be aware that the CRTC issued its decision on October 2. While they acknowledged the harm caused by piracy, they denied the application on the grounds that they do not have jurisdiction. They instead pointed to the reviews of the *Copyright Act* and *Broadcasting & Telecommunications Act* as appropriate avenues to address this issue. Which is where we find ourselves now.

Netflix and Foreign Over-the-Top (OTT) Providers

Finally, we would like to address the foreign streaming services available in Canada. These services have access to Canadian consumers, without having to pay for that access. The IATSE has always supported the notion that not all contributions from foreign OTT providers need be direct financial contributions, and we recognize that simply choosing to shoot in Canada is beneficial to our industry and to Canadian cultural workers. That being said, the streaming market has seen such dramatic growth, resulting in huge profits for these OTT providers, that now is the time to consider expanding their contributions into the financial realm.

We agree with the CRTC's recent recommendation that the government require internet service providers and wireless internet providers to contribute to the content funding system in the same manner as BDUs. Other developed countries are now starting to make this move, and Canada needs to ensure it is not left behind. The UK has announced that as of April 2020, it will be levying a 2% tax on the UK tax revenues of international tech giants (like Netflix, Amazon, and Apple) that generate at least £500 million in global revenues. Any companies with less than that revenue will be exempt. The tax will be based on the money these companies make on digital services like advertising and streaming entertainment, but not on online sales.

The UK government expects to raise more than £400 million (CAD \$673 million) annually, based on current revenues. We have not heard where these revenues will go, but if something similar were implemented in Canada, we would suggest that they go back into the production of content, along the same lines as BDU contributions. We understand that the UK will continue to work with the OECD (Organization for Economic Co-operation and Development) and the G20 on a global technology tax agreement, and if one emerges before 2020, may abandon its proposed Digital Services tax.

Elsewhere, in early October, the European Parliament voted to implement a content quota on Video on Demand (VOD) platforms like Netflix and Facebook, ensuring they commit at least 30% of their programming to content produced in the region. The low dollar also makes this a good time for Canada to move in this direction. Foreign producers will shoot where they get the most bang for their buck, so the low dollar still more than off-sets any small tax they might be paying into Canadian coffers.

Executive Summary

The IATSE represents entertainment industry technicians and advocates to protect existing jobs and create new jobs in Canada's creative industries. Though our members do not receive any

post-production remuneration, we are vulnerable to job losses when piracy takes funds away from creators. In order to help combat piracy, we have offered three suggestions: 1) Allowing rights holders to obtain injunctive relief against intermediary service providers, 2) Narrowing the scope of the Safe Harbour provisions, and 3) Implementing site blocking for blatant piracy sites. The IATSE believes that there is no single solution in the fight against online piracy, so we must be prepared to combat it using many different tools.

It is time for Canada to look at more innovative solutions to piracy. The creative industries need support to ensure that the livelihoods of tens of thousands of talented Canadians are not only protected, but that the entire industry continues to grow and become stronger. The Canadian film industry could also be strengthened through financial contributions from foreign OTT providers. Those foreign entities enjoying the increased revenues provided to them by Canadian subscribers should be diverting some of that increased revenue into Canadian coffers. The UK and the European Parliament have begun to make these changes, and Canada needs to do the same.

IATSE - Description

Founded in 1893, the International Alliance of Theatrical Stage Employees is a trade union representing 140,000 North American technicians in the entertainment industry. Our members work in all forms of live theatre, film and television production, trade shows and exhibitions, television broadcasting, and concerts, as well as the equipment and construction shops that support all these areas of the entertainment industry. Our members comprise virtually all behind-the-scenes workers necessary to the functioning of the entertainment industry, from all forms of live entertainment, to motion picture and television, to conventions and trade shows.