

Intelligence MEMOS



From: Konrad von Finckenstein
To: The Next Minister of Innovation, Science and Economic Development and the Next Minister of Canadian Heritage
Date: October 7, 2019
Re: **TIME TO MOVE ON INTERNET PIRACY**

Internet piracy is a scourge of the digital age. Nothing can be said in its defence. It is simply the act of selling stolen property. While there are both criminal and civil provisions regarding breaches in *The Copyright Act*, websites outside Canada are a problem.

In 2018, the principal affected stakeholders applied under the name Fair Play Coalition to the CRTC, urging it to create an internal autonomous agency to identify websites and services that are “blatantly, overwhelmingly, or structurally engaged in piracy” and provide for blocking of the same. TV piracy alone has estimated economic impact of \$500 to \$650 million a year, one Bell executive said at the time.

The CRTC declined, saying it was beyond its mandate.

An attempt by means of amendments to *The Copyright Act* was also unsuccessful. The Commons Standing Committee on Industry, Science and Technology in reviewing the Act was sympathetic but punted, recommending:

Following the review of the Telecommunications Act, that the Government of Canada consider evaluating tools to provide injunctive relief in a court of law for deliberate online copyright infringement and that paramount importance be given to net neutrality in dealing with impacts on the form and function of Internet in the application of copyright law.

And the Panel re legislative review of the *Broadcasting and Telecom Act* noted carefully in its interim report:

A number of interested parties indicated that the CRTC should be given regulatory authority to require ISPs to block access to pirated audiovisual content. However, others disagreed, submitting that the regime proposed by Fairplay Canada could threaten freedom of expression, result in over-blocking of legitimate content and undermine net neutrality.

There is one lawsuit before the courts trying to obtain website blocking for an anonymous website engaged in wholesale program piracy. The outcome is uncertain and the entire process is complicated by procedural complexities.

Legislation exists in other countries to deal with piracy. Australia in 2015 introduced its *Copyright Amendment (Online Infringement Act) Act 2015*, and updated it in 2018. It gives the Federal Court power to order a carriage service provider to block access to a foreign website that has the primary purpose or effect of infringing or facilitating infringement.

Clearly, Internet privacy and Internet competition issues are top of mind today. Given the tremendous losses pirates impose on legitimate content providers, a new or refreshed mandate would bring the opportunity to introduce balanced legislation protecting consumers and strengthening providers.

The new government, whatever stripe, should carefully study the Australian example and consider adapting it. *Copyright Act* amendments could allow a court to order the blocking of foreign piracy-focused websites.

The legislation should, the very least, establish:

- The process for getting a web blocking order.
- Who needs to be served.
- Criteria for the order, including duration.
- Fees to be paid to ISPs for implementing the order.
- The process for substituting the web address when pirates shift sites.
- A consequential amendment to *The Telecom Act* to reconcile this provision with net neutrality.
- Safeguards for consumer privacy.

This issue is vital to a healthy Canadian industry providing audio and visual content and should not be further delayed.

The Hon. Konrad W. von Finckenstein, Q.C., was Chair of the Canadian Radio and Telecommunications Commission, a Federal Justice and Commissioner of Competition.

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