

# Intelligence MEMOS



From: Konrad von Finckenstein  
To: The Minister of Innovation, Science and Economic Development and the Minister of Canadian Heritage  
Date: February 22, 2018  
Re: **FIGHTING INTERNET PIRACY: A WORKABLE PLAN EMERGES**

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Recently, 25 directly affected stakeholders made an application to the CRTC urging it to create an independent agency (Internet Piracy Review Agency “IRPA”) to identify websites and services that are ‘blatantly, overwhelmingly, or structurally engaged in piracy’. This system would have checks and balances, such as:

- full due process in IRPA proceedings;
- CRTC review and oversight of all IRPA recommendations;
- potential appeals or judicial review in the Federal Court of Appeal.

All websites found to be ‘blatantly, overwhelmingly, or structurally engaged in piracy’ will be placed on a list established by the CRTC and all Canadian ISPs will be obliged to block access to those websites.

A follow-up CRTC proceeding to establish criteria and detailing procedures is envisaged.

The scheme is partially based on the successful precedent of the Commission for Complaints for Telecom-television Services (CCTS) established by the CRTC 11 years ago to deal with consumer complaints following the forbearance of local telephone regulation.

Internet piracy is a scourge of the digital age. There is nothing that can be said in its defence. It is simply the act of selling stolen property by means of the internet. While there are both criminal and civil provisions regarding breach in the Copyright Act, it is websites outside Canada that

cause the problem. The IRPA scheme is basically a method to enforce copyright on the internet by blocking the ability of pirates to use the internet.

A detailed opinion from McCarty Tetrault accompanying the application opines that the CRTC has the necessary legal authority.

There remain two major issues:

## 1. Mandate Creep

While the CRTC is charged with responsibility for telecommunication and broadcasting, there is no legislative mention anywhere that facilitating enforcement of copyright is among its mandates. McCarthy’s argument based on s. 7 of the Telecommunications Act is intriguing but not necessarily convincing.

## 2. Governance

The McCarthy opinion states:

The IPRA will be overseen by a board of unpaid directors.... and those directors ... would be responsible for financial and policy oversight but have no involvement whatsoever in evaluating applications regarding particular websites. Instead, responsibility for receiving and reviewing applications and making recommendations to the CRTC would lie with a small number of part-time IPRA staff with relevant experience.

The proposed governance model is inappropriate for a process that involves taking away rights from website holders and obliging ISP’s to block sites. The process would result in the interference with established rights, and, accordingly, the roles, status of decision makers and their interrelationships need to be spelled out clearly and precisely. A review by the CRTC of a recommendation from a quasi-judicial process is inappropriate.

The Fair Play application draws attention the seriousness of internet piracy and the need for Canada to establish a regime similar to those established by a host of other western nations. The proposal could be made workable but it requires either legislation or at least a specific and detailed order under Section 8 of the Telecommunications Act , to cure the deficiencies noted above.

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