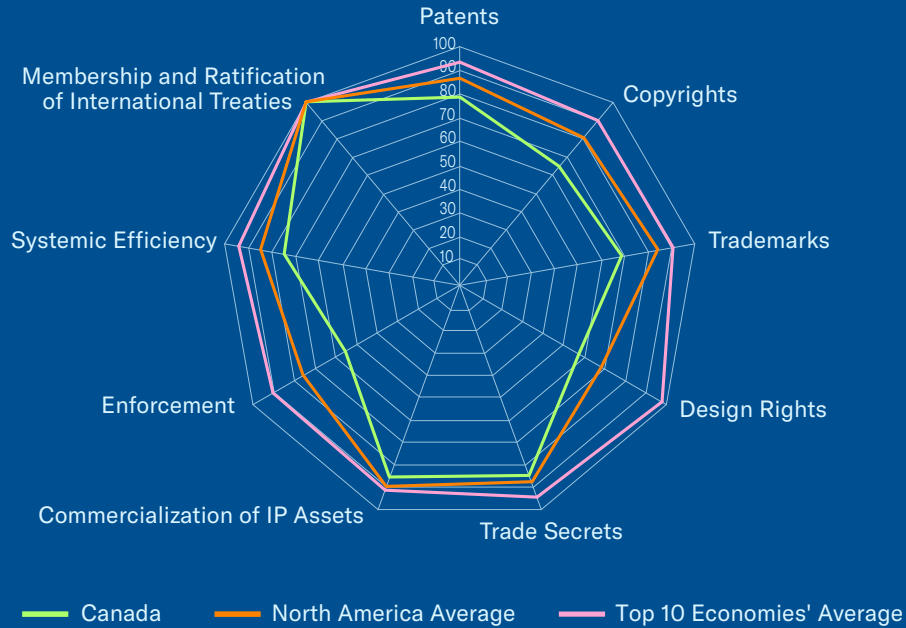
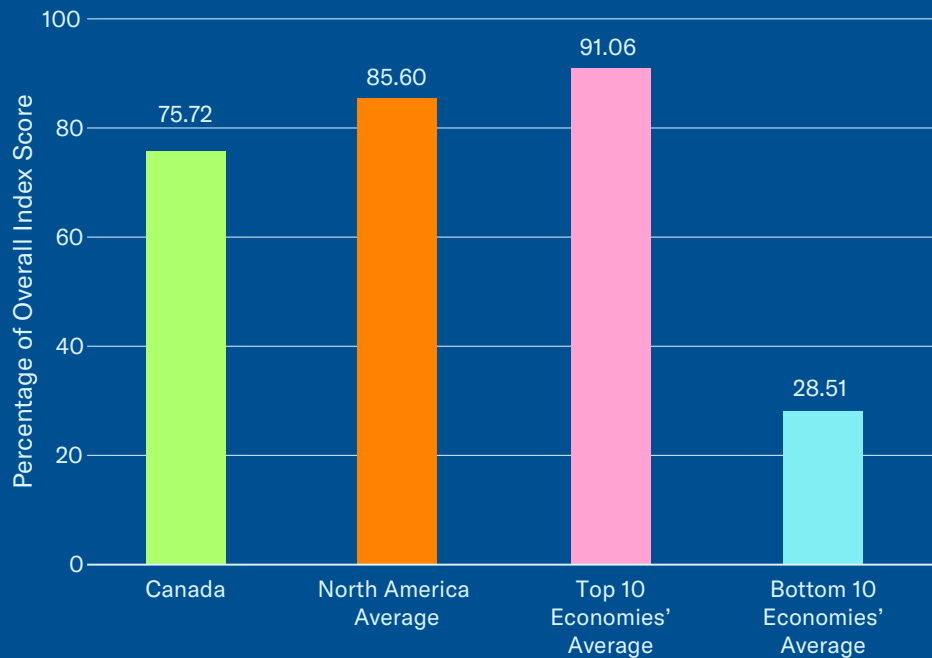


Category Scores



Overall Score in Comparison





Key Areas of Strength

- In May 2022, the Federal Court issued a potentially precedent-setting dynamic injunction order in the case *Rogers Media Inc. v. John Doe 1*, thus signifying further strengthening of copyright enforcement in Canada
- The 2020 Federal Court of Appeal case creates a path for injunctive-style relief against online piracy
- The U.S.-Mexico-Canada Agreement (USMCA) took effect in 2020, which resulted in a longer copyright term, new criminal sanctions for theft and misappropriation of trade secrets, and *ex officio* authority for border action against in-transit goods
- The 2017 Supreme Court judgment on utility doctrine aligns Canada's patentability environment with international standards
- Significant damages awarded in precedent setting 2017 Federal Court case with regard to Canada's DRM provisions

Key Areas of Weakness

- Continued uncertainty over existing interpretation of educational exceptions to copyright; 2021 Supreme Court decision in Access Copyright case adds more layers of uncertainty and legal complexity
- The federal government potentially recognized the dire impact of this uncertainty, stating in a 2022 budget that it would “work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders...”
- Comprehensive Economic and Trade Agreement (CETA) amendments to the Patent Act introducing patent term restoration includes restrictive eligibility requirements and an export claw-out, which effectively undermines biopharmaceutical exclusivity
- Deficiencies with respect to pharmaceutical patent enforcement remain unaddressed in Patented Medicines (Notice of Compliance) Regulations (PMNOC)

Indicator	Score
Category 1: Patents, Related Rights and Limitations	7.05
1. Term of protection	1.00
2. Patentability requirements	0.75
3. Patentability of CIIIs	1.00
4. Plant variety protection	1.00
5. Pharmaceutical-related enforcement	0.25
6. Legislative criteria and use of compulsory licensing	1.00
7. Pharmaceutical patent term restoration	0.30
8. Membership of a Patent Prosecution Highway	1.00
9. Patent opposition	0.75
Category 2: Copyrights, Related Rights, and Limitations	4.54
10. Term of protection	0.79
11. Exclusive rights	0.50
12. Injunctive-type relief	0.75
13. Cooperative action against online piracy	0.25
14. Limitations and exceptions	0.25
15. TPM and DRM	1.00
16. Government use of licensed software	1.00
Category 3: Trademarks, Related Rights, and Limitations	2.75
17. Term of protection	1.00
18. Protection of well-known marks	0.75
19. Exclusive rights and trademarks	0.75
20. Frameworks against online sale of counterfeit goods	0.25
Category 4: Design Rights, Related Rights, and Limitations	1.15
21. Industrial design term of protection	0.40
22. Exclusive rights and industrial design rights	0.75
Category 5: Trade Secrets and the Protection of Confidential Information	2.55
23. Protection of trade secrets (civil remedies)	1.00
24. Protection of trade secrets (criminal sanctions)	0.75
25. Regulatory data protection term	0.80

Indicator	Score
Category 6: Commercialization of IP Assets	5.17
26. Barriers to market access	1.00
27. Barriers to technology transfer	0.75
28. Registration and disclosure requirements of licensing deals	1.00
29. Direct government intervention in setting licensing terms	1.00
30. IP as an economic asset	0.75
31. Tax incentives for the creation of IP assets	0.67
Category 7: Enforcement	3.90
32. Physical counterfeiting rates	0.62
33. Software piracy rates	0.78
34. Civil and preceudal remedies	0.50
35. Preestablished damages	0.50
36. Criminal standards	0.50
37. Effective border measures	0.75
38. Transparency and public reporting by customs	0.25
Category 8: Systemic Efficiency	3.75
39. Coordination of IP rights enforcement	0.50
40. Consultation with stakeholders during IP policy formation	1.00
41. Educational campaigns and awareness raising	0.75
42. Targeted incentives for the creation and use of IP assets for SMEs	0.75
43. IP-intensive industries, national economic impact analysis	0.75
Category 9: Membership and Ratification of International Treaties	7.00
44. WIPO Internet Treaties	1.00
45. Singapore Treaty on the Law of Trademarks and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks	1.00
46. Patent Law Treaty and Patent Cooperation Treaty	1.00
47. Membership of the International Convention for the Protection of New Varieties of Plants, ct of 1991	1.00
48. Membership of the Convention on Cybercrime, 2001	1.00
49. The Hague Agreement Concerning the International Registration of Industrial Designs	1.00
50. Post-TRIPS FTA	1.00

Total: 37.86



Spotlight on the National IP Environment

Past Editions versus Current Score

Canada's overall score has increased from 75.24% (37.62 out of 50) in the tenth edition to 75.72% (37.86 out of 50). This reflects a score increase on indicator 12 and a score decrease on indicator 32.

Area of Note

Biopharmaceutical rightsholders continue to face challenges in exercising their IP rights and granted periods of exclusivity in Canada. A growing focus on rigid cost control and minimizing overall biopharmaceutical spending exists within the Canadian health system. Over the past several years, Canadian authorities have been reforming how patented medicines are evaluated and priced through the Patented Medicine Prices Review Board's (PMPRB) evaluation methodology. These reform efforts have focused almost exclusively on cost and expenditure reduction. Although successful legal challenges have limited the scope of some of these proposals, the changes to the basket of economies the PMPRB uses for international price comparisons has been retained and is now in effect. Specifically, the reforms have expanded the size of the basket and removed the United States and Switzerland as comparator economies. New economies added are Australia, Belgium, Japan, the Netherlands, Norway, and Spain. Given the strict price controls in place in many of these new economies and the removal of the United States and Switzerland as comparator economies, these changes will substantially lower the overall price comparisons and thus the overall biopharmaceutical price level in Canada while adding additional layers of complexity to the pricing and reimbursement process. These changes came into force on July 1, 2022. The Index will continue to monitor the impact the implementation of the new pricing methodology has on Canada's innovative ecosystem, which

has traditionally experienced delayed access to the newest innovative medicines.

In response to the COVID-19 pandemic, Canadian policymakers at all levels of government have rightly recognized the strategic nature of the research-based biopharmaceutical industry and the socioeconomic value it brings to Canada. At the federal level, the government in 2021 launched the *Biomanufacturing and Life Sciences Strategy*. Significantly, the strategy seeks explicitly to make Canada a more "attractive destination for leading life sciences firms to establish and grow." Similarly, in 2022, the province of Quebec—Canada's second largest by population—released *Quebec Life Sciences Strategy*, a similar document seeking to encourage local biopharmaceutical R&D and innovation within the province's broader health policy. As the Index has detailed over the past decade, the biopharmaceutical IP environment in Canada could in many respects be strengthened and aligned with best practices in the United States, the European Union, and leading Asian economies. Similarly, adequate pricing and reimbursement policies for biopharmaceuticals would also improve the competitiveness of the Canadian environment, one of the primary objectives of the government's life sciences strategies. The Index will continue to monitor these developments in 2023.

Copyrights, Related Rights, and Limitations

12. Expedient injunctive-style relief and disabling of infringing content online: In 2019, a Canadian court ordered a group of ISPs to disable access to websites hosting alleged infringing content. The case was appealed in 2020, and a final verdict was issued in 2021, with the Federal Court of Appeal upholding the granted injunction. As noted in last year's Index, the Federal Court of Appeal ruling is of real significance to Canadian

rightsholders because not only did the court clearly affirm the right to injunctive relief and the disabling of access to infringing content online under existing Canadian statute, but it also affirmed, both in principle and in the specific circumstances of this case, that where clear *prima facie* evidence of infringement is taking place, injunctive relief did not interfere with the principles of net neutrality or freedom of expression. Moreover, both the Court of Appeal and lower court judgment recognized the possibility and need for amendments to the order with respect to relevant domain names and website addresses as the infringing parties would seek to circumvent it. In response to such activity, many economies around the world are introducing “dynamic” injunctions. Such an injunction addresses the issue of mirror sites and disables infringing content that reenters the public domain by simply being moved to a different online access point. In a positive and hopefully precedent-setting decision, the federal court in May 2022 issued just such a dynamic injunction order in the case *Rogers Media Inc. v. John Doe 1*. The order requires Canadian ISPs to disable access to infringing content online—in this case, the illegal live streaming of National Hockey League matches—identified by the rightsholders in real time. The order is the first of its kind, and, if followed by similar rulings, will finally give rightsholders in Canada an effective way of enforcing their rights without delay. In a separate development, the Supreme Court of Canada in March 2022 denied Teksavvy Solutions’ request for appeal with regard to the Federal Court of Appeal’s 2021 upholding of the initial 2019 order. The Supreme Court’s decision not to hear the case should remove any lingering uncertainty as to whether injunctive relief and the disabling of access to infringing content through judicial orders are an acceptable legal pathway of enforcement available to Canadian rightsholders. As a result of these developments, the score on this indicator has increased by 0.25.

13. Scope of limitations and exceptions to

copyrights and related rights: As has been noted repeatedly in the Index over the past decade, the 2012 amendments to the Copyright Act considerably broadened Canada’s framework for exceptions to copyright, including the expansion of education and personal-use exceptions. Canadian Supreme Court decisions that same year also widened the scope of the judicial interpretation of existing exceptions to the extent that continued compatibility with the Berne three-step test was highly questionable. Unfortunately, neither a series of statutory reviews conducted by the Canadian Parliament nor a 2021 Supreme Court decision has effectively addressed this issue. Not only did the Supreme Court ruling not alter the long-standing negative dynamics and long-term consequences of the 2012 Copyright Act amendments and Supreme Court decisions, but it also adds even more layers of uncertainty and legal complexity to an already convoluted and tangled area of Canadian copyright law. As the Index and others pointed out following Parliament’s amendments to the Copyright Act and Supreme Court decisions in 2012, at best, the changes to Canada’s copyright regime would lead to a higher level of uncertainty for publishers and, at worst, a shrinking of their industry and business model.

Today, it is clear that both have occurred. Industry figures suggest that the Canadian publishing industry has suffered greatly over the past decade, with estimated uncompensated copying outside of fair dealing amounting to over CAD200 million. The net effect of the reforms and 2012 Supreme Court rulings has been a contraction in the publishing sector, with the Canadian publishing industry and individual rightsholders reporting publishing income decreasing substantially. The bottom line is that after 10 years of litigation and uncertainty, Canadian rightsholders have failed to achieve effective redress for the clear violation of their copyright or gain any further understanding of what constitutes fair dealing and what does not within the context of education. In 2022, the federal



government appears to have finally recognized the dire impact of the 2012 amendments and subsequent Supreme Court rulings. In the 2022 budget *A Plan to Grow Our Economy and Make Life More Affordable*, the government stated plainly that it would “work to ensure a sustainable educational publishing industry, including fair remuneration for creators and copyright holders, as well as a modern and innovative marketplace that can efficiently serve copyright users.” The Index will continue to monitor these developments in 2023.