

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada be maintained on the Special 301 Priority Watch List in 2011.¹

Executive Summary: More than fourteen years ago, Canada played an important and positive role in negotiation of the WIPO Internet Treaties. But today, Canada stands virtually alone among developed economies in the OECD (and far behind many developing countries) in failing to bring its laws into compliance with the global minimum world standards embodied in those Treaties and in legislative best practices worldwide. Bill C-32, tabled in June 2010, is the third copyright reform proposal in 5 years. Like its predecessors, the Bill takes some critical steps forward toward Treaties compliance, including robust anti-circumvention provisions, and includes a new cause of action against online services designed primarily to enable infringement. However, its approach to the role of service providers in combating online piracy is insufficient and deeply flawed, and it would add a host of new exceptions to copyright protection, many of which are inconsistent with Canada's international obligations under the Berne Convention and TRIPS, and significantly broader than those found in other jurisdictions. Canada should be encouraged to enact the bill this year, but only after its major flaws are corrected. Canada's enforcement record also falls far short of what should be expected of our neighbor and largest trading partner, with ineffective border controls, insufficient enforcement resources, inadequate enforcement policies, and a seeming unwillingness to impose deterrent penalties on pirates. Canada's parliamentary leadership and government, at the highest levels, have acknowledged many of these deficiencies, but have done very little to address them. While we are encouraged by a few examples of improved enforcement responsiveness against physical piracy, overall the piracy picture in Canada is at least as bleak as it was a year ago, and it is cementing its reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity. To underscore U.S. insistence that Canada finally take concrete action to address the serious piracy problem it has allowed to develop just across our border, and that it bring its outmoded laws up to contemporary international standards, IIPA recommends that Canada be maintained on the Priority Watch List in 2011.

PRIORITY RECOMMENDED ACTIONS FOR CANADA IN 2011:

Copyright Law Reform

- Enact legislation bringing Canada into full compliance with the WIPO Internet treaties (WIPO Copyright Treaty [WCT] and WIPO Performances and Phonograms Treaty [WPPT]).
- Enact strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy, including by limiting the scope of liability safe harbors in accordance with international best practices.
- Establish clear liability and effective remedies against those who operate illicit file-sharing services, or whose actions are otherwise directed to promoting infringement.
- Ensure that any new exceptions or limitations to copyright protection conform to international standards.

¹For more details on Canada's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



Enforcement

- Make legislative, regulatory or administrative changes necessary to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border without a court order.
- Make the legal and policy changes to enforcement called for by parliamentary committees.
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada.
- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to intellectual property rights enforcement, including against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes.

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

The main legislative and policy challenges that Canada confronts fall into three main categories: (1) bringing its laws into full compliance with the globally accepted minimum benchmarks for modern copyright legislation (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)); (2) making the necessary legislative changes to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border; and (3) dedicating sufficient resources and establishing adequate policies to ensure effective copyright enforcement efforts within the country. It was in the first of these areas that Canada took a significant step in 2010, with the introduction in June of Bill C-32, Canada's third attempt in five years to bring its copyright law up to modern minimum standards.² This legislation, originally promised for the fall of 2009, was delayed so that the Canadian Government could conduct a nationwide "public consultation" on copyright reform.³ The result is a promising but significantly flawed proposal. While IIPA strongly supports the bill's stated objectives, its actual text fails to achieve them in significant respects. While some of Bill C-32's provisions would bring Canada much closer to compliance with modern global copyright norms, others would take it farther from current best practices and even raise serious questions about compliance with its existing international obligations. A Special Legislative Committee of Canada's Parliament is currently examining Bill C-32. IIPA offers the following comments on the bill.

Technological Protection Measures (TPMs): When Canada signed the WCT and WPPT more than a decade ago, it pledged support for treaties that were designed to respond to what were then new technologies. Notably, as a crucial element to foster the healthy development of e-commerce in copyrighted materials, these treaties obligated adhering countries to enact effective legal regimes to protect technological measures used by copyright owners to control access to and copying of their works. While nearly every other OECD country has either met this obligation or is well on the way to doing so, Canadian law remains hopelessly outdated in this area. This is not a mere theoretical lapse of academic interest: it has already had concrete consequences. In the absence of strong prohibitions to the contrary, Canada now finds itself one of the world's epicenters for the distribution and export of several categories of tools aimed at circumventing TPMs, such as mod chips and game copiers, that enable pirated and counterfeit video games to be played on videogame consoles. Numerous Canadian websites are involved in the sale of "mod chips" and other hardware and software based circumvention devices to purchasers in

²In previous reports, IIPA has narrated how several developments within Parliament and the Government during 2007, including a specific commitment to "copyright reform" in the October 16, 2007, Speech from the Throne, gave rise to hopes that the Canadian Government would finally begin to translate into reality its oft-stated commitment to modernize its copyright laws and border controls. It was not until June of 2008 that the Canadian government tabled Bill C-61, a lengthy and complex bill to amend Canada's Copyright Act. The preamble to C-61 identified as one of the legislation's main aims to bring into Canadian law "internationally recognized norms," such as those embodied in the WCT and WPPT, which it acknowledged "are not wholly reflected" in that law now. If Bill C-61 had been enacted, it would have brought Canada's laws considerably closer toward alignment with the WCT and WPPT standards. However, the bill also retained some of the serious flaws of the predecessor government's proposal, Bill C-60, and proposed some new provisions which were equally troubling in terms of their likely impact on enforcement against infringement in the digital, networked environment. In any case, no action was taken on Bill C-61 before Parliament was dissolved for elections.

³This included an online public consultation. One statistical analysis of submissions raised "serious issues regarding the design and results of the public consultations," noting that "70% of the total submissions were "form letters" originating from a single little-known group of modchip manufacturers." Owens, Noises Heard: Canada's Recent Online Copyright Consultation Process," posted at <http://www.iposgoode.ca/2010/04/noises-heard-canadas-recent-online-copyright-consultation-process/>.

other countries.⁴ It is long past time for Canada to put into place the legal tools that will enable it to put a stop to this increasing pollution of both the Canadian market and the markets of its trading partners.

Sound copyright reform legislation should comprehensively protect TPMs, both insofar as they manage access to copyright works, and in their use to prevent unauthorized copying and the exercise of other exclusive rights. It is particularly important to deal effectively with trafficking in devices aimed at circumventing TPMs, or the provision of circumvention services, and to define violations without imposing onerous intent requirements. Legislation should also provide a reasonable regime of civil and criminal remedies, both for acts of circumvention and for trafficking in circumvention devices or offering circumvention services, while also recognizing some reasonable exceptions to the prohibitions.

Bill C-32 is a major step in the right direction and largely meets these criteria. IIPA's main concern in this area involves the scope of some exceptions and the provision (proposed section 41.21) authorizing recognition of additional exceptions by regulation. IIPA agrees that such an authorization is prudent to allow the law to adapt to unforeseeable technological and market changes, but the Bill C-32 provisions may cross the line from commendable flexibility to debilitating unpredictability. In particular, we urge that regulations be limited to exempting a class of technological measures from protection against the act of circumvention, not against trafficking in devices or services; the latter, more sweeping exceptions, with greater potential to harm the marketplace, should require new legislation. Second, the authority to recognize further exceptions to the prohibition on the act of circumvention should not extend to requiring copyright owners to provide access to works for beneficiaries of the new exceptions. Third, any additional exceptions recognized should be time-limited, not permanent, so that there will be a re-look at whether the conditions that gave rise to the need for a regulatory exception still exist three or four years later.

Making Available Right. Bill C-32 falls short in providing an exclusive making available right for sound recording producers, as required by Article 14 of WPPT. Proposed section 18.(1.1)(a) of Bill C-32 appears to do so (dubbing it a "sole right," like other exclusive rights in the law). However, proposed section 67.1(4)(b) seems to prohibit any lawsuit for infringement of this exclusive right (without Ministerial consent) until a tariff has been filed with the Copyright Board covering the work in question. Such a precondition of prior approval by a government ministry might be suitable for claims of equitable remuneration, but is entirely inapt in the case of an exclusive right.

Online Piracy: It is a matter of high priority that copyright reform legislation in Canada effectively address the pervasive problem of Internet piracy. Bill C-32 does include one potentially useful – but seriously flawed – new legal tool in this arena. Otherwise, it largely follows the unsatisfactory path laid down by the two previous copyright reform proposals.

Proposed section 27(2.3) creates a new form of secondary liability for infringement, for providing a service via the Internet which the provider "knows or should have known is designed primarily to enable acts of copyright infringement," so long as some actual (primary) infringement occurs through use of the service. IIPA strongly supports the principle behind this provision, but is deeply concerned that its potential for providing an effective and deterrent remedy will not be realized unless the provision is revised in at least the following ways:

- None of the four "service provider" exceptions should bar claims under this provision. Currently, the hosting and caching exceptions (proposed sections 31.1(3) and (5)) could be used to shield massive commercial enablers from all liability for inducing infringement, depending on their choice of technology for doing so.⁵
- Those liable under the new provision are not subject to statutory damages. Enablers (like Canada's IsoHunt) should not be immune from this effective deterrent remedy.

⁴For instance, both the IIPA and Entertainment Software Association identified www.modchip.ca in response to USTR's [out-of-cycle review](#) of Notorious Markets.

⁵Making the hosting exception inapplicable to enablement claims is particularly critical, since sites that host and stream or permit downloading of illegitimate content are the most significant growing source of illicit distribution of content online.

Bill C-32, like its predecessors, continues to take a blanket immunity approach (rather than a remedial limitation) for a number of network services activities. This casts serious doubt on whether right holders could ever obtain an injunction to prevent infringements carried out using a service provider's systems, e.g., an order removing an infringing file that is being hosted by a service provider. Additionally, contrary to international best practices there are no threshold requirements to qualify for these immunities. Even a provider who took no steps with regard to known repeat infringers would be eligible for full immunity,

The immunities themselves are much too broad. The hosting immunity in proposed section 31.1(5) (read together with section 31.1(6)) is especially problematic since it contains no conditions at all (including with regard to responsiveness to copyright owner notices of infringing activity). It seems that a party who "provides digital memory" for use by others "for the purpose of allowing the telecommunication of a work through the Internet or another digital network" can never be liable for infringing activity that it hosts, unless it knows that a court has adjudged the user's conduct to be infringing. No takedown would ever be required in order to preserve immunity, which the party could enjoy even with respect to infringing material within its knowledge and under its control. This immunity is far broader than safe harbors provided to hosting services elsewhere in the world. Such broad immunities will do little to encourage needed cooperation between network service providers and content owners, and will instead promote lack of accountability and willful blindness on the part of ISPs.

Most other developed countries have put in place a procedure for "notice and takedown" to deal more efficiently with the problem of pirate material being hosted by ISPs. A 2004 decision of Canada's Supreme Court observed that enacting such a procedure would be an "effective remedy" for the problem.⁶ But the current Canadian Government, like its predecessors, remains steadfastly opposed to the procedure. Bill C-32 continues this unfortunate trend, and provides no alternative expeditious means of removing or disabling access to infringing content hosted online.

Instead, the bill confines itself to the same "notice and notice" regime proposed by the Canadian Government years ago. Requiring ISPs to forward notices from copyright owners to infringing end-users, and to preserve identifying information on those end-users for six months, has value, particularly in the peer-to-peer (P2P) environment. Yet this value is limited if notice after notice is sent with no prospect of real consequences for the infringing end-user.⁷ "Notice and notice" is a complement to, not a substitute for, notice and takedown. Particularly if coupled with an obligation to implement policies for addressing repeat infringers, combining these approaches could be a useful part of a system that gives ISPs strong incentives to effectively address the dissemination of infringing materials.⁸

Similarly, services meeting the exceptionally broad definition of "information location tool" in proposed section 41.27 ("any tool that makes it possible to locate information that is available through the Internet or another digital network"), which arguably could encompass peer-to-peer (P2P) services, BitTorrent trackers, etc., can claim immunity (other than from injunctions) even if they never "take down" links to infringing materials after notice, so long as they pass along those notices.

In sum, Bill C-32 not only fails to address online piracy effectively; it could in fact exacerbate it, because it provides sweeping immunities to network service providers without creating any standards that would provide meaningful incentives for them to cooperate with copyright owners to deal with copyright infringements that take

⁶Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45, available at <http://scc.lexum.umontreal.ca/en/2004/2004scc45/2004scc45.html>.

⁷Similarly, there is no evidence that the voluntary "notice and notice system" in which some Canadian ISPs participate has had any appreciable impact on online infringements.

⁸There are also a number of unanswered questions about the "notice and notice" provisions of proposed section 41.25-26 in Bill C-32, such as how the statutory damages of C\$5,000-C\$10,000 (which would be the exclusive remedy against an ISP that fails to forward the notice or preserve the identifying data) is to be assessed in the typical p2p situation in which a right holder gives notice simultaneously about hundreds or thousands of infringements of multiple works. Of course, the most effective deterrent against non-compliance with "notice and notice" would be to reduce or eliminate protections against infringement liability for non-compliant ISPs.

place in the digital network environment. By immunizing service providers against liability, even when they had actual knowledge of infringement and the power to restrict or prevent it, the bill provides safe harbors to far more than just innocent intermediaries. Such an approach seems inconsistent with the stated intentions of the legislation's drafters, and can hardly be said to comply with the mandate of the WIPO Internet Treaties that national law "permit effective action against any act of infringement of rights covered by this Treaty."⁹

We respect the Canadian Government's efforts to craft a unique "made in Canada" approach to online infringement liability; but that approach must be consistent with international copyright norms, and must encourage ISPs to play a more constructive and cooperative role in the fight against online piracy. Despite the positive signal sent by the new "enablement" prohibition, Bill C-32 fails both tests. We urge that it be amended to correct flaws such as those summarized above.

Statutory Damages: One of the most progressive features of current Canadian copyright law is Section 38.1, providing copyright owners who have been victimized by infringement with the option to choose statutory damages, to be set by the court within a range provided by the statute per work infringed. Bill C-32 takes a step backwards, by limiting statutory damages to a range of C\$100 - C\$5,000 for all infringements carried out by any defendant for "non-commercial purposes." Even this meager award is available only to the first copyright owner to seek a statutory damage award against a given defendant; statutory damages would be entirely eliminated for all other infringements carried out by that defendant prior to the date that the first copyright owner's lawsuit was filed. These sharp limitations apply across a much broader range than the comparable provisions of the previous reform bill: institutional as well as individual defendants can invoke them; and since there is no longer a restriction to infringements carried out for "private purposes," it seems likely that acts such as posting copyright material on a website or making it available via P2P technology would qualify, so long as such acts are "non-commercial," a term the bill does not define.

It is likely that these provisions would render the statutory damages option ineffective where it is compellingly needed: in the online environment, including in P2P cases against non-commercial but large scale infringers.¹⁰ For example, where a defendant, without authorization, uploads a work – or hundreds or thousands of works – to a cyberlocker or other Internet location, it may be extremely difficult to calculate actual damages, since logs of how many people downloaded infringing copies as a result may be unobtainable or non-existent. Canada's existing statutory damages fills this gap, and allows the courts at least to approximate the fully compensatory and deterrent damages award which Canada, as a WTO member, is obligated to make available. See TRIPS, Article 41. That gap will rapidly reopen if these infringing activities are treated as "non-commercial," thus replacing statutory damages with a de facto C\$100-C\$5,000 retrospective license for unlimited non-commercial infringement by anyone caught uploading any number of infringing copies.

Copyright exceptions. Most of Bill C-32 consists of nearly a score of new or expanded exceptions to copyright protection. Many of these raise significant questions. For example:

(1) Fair dealing (sec. 29): "Education" would be added to research and private study as uses that qualify for the fair dealing exception. Because "education" is not defined, this could be a dramatic change, with unpredictable impacts extending far beyond teaching in bona fide educational institutions, and weakening protections for a wide range of works. Under Canadian precedent, consideration of the impact on the market for a work is not the predominant factor in a fair-dealing analysis; and Canadian courts required to give the terms in this section a "large and liberal interpretation"¹¹. Book and journal publishers are particularly concerned about the impact on well-established collective licensing mechanisms for administering permissions to copy works for educational use. While a

⁹See WCT, Art. 14.2; WPPT, Art. 23.2.

¹⁰Of course, as already noted, statutory damages would be denied altogether in claims against parties that knowingly enable online infringement, under Sec. 27(2.3).

¹¹*CCH Canadian v. Law Society of Upper Canada*, 2004 SCC 13. See also *SOCAN v. Bell Canada et al.*, 2010 FCA 139 (Federal Court of Appeal holding that 30-second previews offered by commercial online music services qualify as copying for "research" for fair dealing purposes).

“market failure” concern may justify extension of fair dealing to parody and satire, such a concern is absent in the case of an “education” expansion of the exception.

(2) Non-commercial user generated content (proposed sec. 29.21): This unprecedented provision allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary, so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is “solely for non-commercial purposes” and does not have a “substantial adverse effect” on the market for the underlying work. The provision substantially undermines the exclusive adaptation right that Canada is obligated under TRIPS and Berne to provide; provides an unjustifiable safe harbor for commercial disseminators; and applies even when the use of the underlying work violates a contract, exposes a trade secret, or requires circumvention of a TPM. In effect, the exception appears to enable wholesale appropriation of an existing work provided some minimal modification is made. At a minimum, the exception requires substantial amendment to meet international standards.

(3) Private copying (proposed sec. 29.22): Any legitimate and legally-obtained (other than by borrowing or renting) copy of a work may be further copied if the reproduction is “used only for private purposes” – a phrase that remains undefined, and may not be limited to the private purposes of the copier. This is a greatly expanded rewrite of the format-shifting exceptions from Bill C-61. It no longer requires format-shifting; applies to all works (including computer programs and cinematographic works on DVD, which were excluded from the exception in the earlier legislation); contains no numerical limitations on the number of copies or for whom they can be made; and is silent on whether the exception trumps a contractual prohibition on copying (the C-61 version did not override a contract when the source copy was downloaded from the Internet). The two main limitations are that the exception does not apply if a technological protection measure has been circumvented, and that all copies made under the exception must be destroyed if the user gives up possession of the source copy. These restrictions are not sufficient to dispel concerns about this extremely broad exception, which requires substantial trimming.¹²

(4) Time-shifting (proposed sec. 29.23): This provision is similar to the one in Bill C-61, except that it trumps any applicable contract or other agreement not to copy. The individual must receive the program legally, must not circumvent a TPM in order to copy, and may make only one copy, keep it no longer than necessary for time-shifting, and use it only for “private purposes.” The exception does not apply to material received via an on-demand service (defined in the bill).

(5) Back-up copies (proposed sec. 29.24): Copying of any work, a copy of which the user owns or is licensed to use, is permitted “solely for back-up purposes,” and so long as the source copy is non-infringing, no TPM is circumvented, the back-up copy is not distributed, and all back-up copies are destroyed once the user no longer owns or has a license for the source copy. Apparently an unlimited number of copies would be permitted, and there would be no limitation to originals in vulnerable formats. Presumably the more specific (and more limited) back-up copy provision applicable to computer programs under current section 30.6(b) would continue to apply to software, but this should be clarified, and the justification for any broader exception for other works should be explained.

(6) Educational exceptions: Some of these expand on exceptions that are already in the Copyright Act, but others are entirely new: for distance learning (proposed section 30.01); digital reproductions (when the school already has a reprographic reproduction license) (proposed section 30.02 and 30.03); and for educational uses of works “available through the Internet” (proposed section 30.04). This last provision would immunize nearly anything done “for educational or training purposes” by an educational institution or its agent with respect to “a work or other subject matter that is available through the Internet,” so long as the Internet site or the work is not protected by a TPM; but the exception would not apply if the user knows or should have known that the work was made available

¹²Bill C-32 fails to make the needed legislative amendment to Canada’s existing private copying exception for sound recordings (section 80), to clarify that it applies only to individuals who make copies for their own use from recordings they already own. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations.

online without consent of the copyright owner. The provision still seems to allow infringement of a work obtained offline so long as the same work is available somewhere online without a TPM. This should be re-examined, taking into consideration both the scope of Canada's existing fair dealing exceptions for research and private study, and applicable international standards. Concerns about these proposed exceptions generally include the practical enforceability of some of the conditions on their exercise, and in some cases their impact on well-functioning established collective management systems for licensing, which seemingly would be replaced by untested compulsory licenses.

(7) Library/museum/archive exceptions: These involve expansions of existing exceptions, notably for inter-library loan. Proposed section 30.2(4) and (5) would take ILL into the wholly digital realm. Under it, libraries may choose to pool their resources and decide to divide the purchasing of printed or digital works (such as professional or scholarly journals) among themselves. Each library would then provide access to their collection of works to the patrons of all other libraries through an on-demand delivery mechanism whether through the Internet or other networked means. With business models facilitating one-off electronic delivery of single articles (from journals or newspapers) continuing to evolve, such an exception is unjustified. It threatens to drastically reduce incentives to explore new business models and new ways of providing consumers access to reading materials when and where they want them. Additionally, though the proposed provision requires that the providing library take measures to prevent further distribution of the digital copies, it fails to define what such measures should be and does not require that the measures actually be effective. The Canadian Government should ensure that any legislative proposals it makes on educational and library exceptions to copyright can pass muster with its existing and anticipated international obligations; that they provide ample room for market solutions; and that there are practical enforcement mechanisms for any conditions on these exceptions

(8) Computer program exceptions: The first of these would expand existing section 30.6 so that a licensed user of a computer program, as well as an owner of a copy, could adapt or modify the copy in order to run on a particular computer. This calls into question the principle that any license agreement that is enforceable under general provisions of contract law should govern relations between a software publisher and a user with respect to the software. The second (proposed section 30.61) would create a new exception allowing reproduction of an owned or licensed program for purposes of interoperability with "any other computer program." The latter provision omits many of the safeguards appearing in comparable statutes of most other countries, and when considered in conjunction with the interoperability exception for circumvention, could effectively prevent a company from taking any measures to protect proprietary software from tampering, modification or reverse engineering. This proposal demands close scrutiny.¹³

(9) Temporary copies: Proposed section 30.71 immunizes any copying that "forms an essential part of a technological process," lasts no longer than the duration of the "process," and has the sole purpose of facilitating a non-infringing use. None of the key terms is defined and the word "temporary" appears only in the title of the section. When considered in combination with the wide range of uses that would henceforth be considered "non-infringing," this could prove to be a very broad exception.

Legal Reforms Needed to Enforcement Regime: Along with reform of Canada's substantive copyright law, legislative changes are necessary, though not alone sufficient, for Canada to begin to remedy its serious deficits in copyright enforcement (discussed in more detail in the next section). Among other critical changes, the Canadian Border Services Agency (CBSA) must be given the independent authority it currently lacks to act *ex officio* against

¹³Under proposed section 30.62, reproduction of a lawfully obtained copy of any work would be allowed when needed for purposes of encryption research, so long as the copyright owner is notified. Under proposed section 30.63, copying of any work for the sole purpose of security testing of a computer, system or network would be allowed with the consent of the owner of the computer, system or network being tested. Both these new exceptions (as well as the interoperability exception discussed in text above) are clearly intended to parallel proposed exceptions to the anti-circumvention provisions discussed above. These exceptions to copyright have the effect of making one of the conditions for each of these circumvention exceptions – that the circumventor (or the trafficker in circumvention tools) not infringe copyright (see, e.g., proposed section 41.12(6)) – a dead letter.

any suspected pirate or counterfeit imports. Two parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy recommended this reform, along with other essential changes, including:¹⁴

- allowing seizure of income and property derived from copyright piracy;
- providing the Royal Canadian Mounted Police (RCMP) and the Department of Justice with adequate resources for enforcement against piracy;
- adding criminal penalties for counterfeiting violations along the lines of those provided for copyright infringements;
- establishing a copyright enforcement policy that effectively targets piracy and counterfeiting; and
- increasing damages and penalties.

In 2010, the Canadian government completed action on the first of these recommendations, adopting a regulatory change that would bring criminal copyright offenses under the Federal Proceeds of Crime regime. While this is a positive step, the full range of Parliamentary recommendations should be acted upon promptly, to repair long-standing defects in Canadian law, and to provide the legal framework necessary for effectively addressing piracy.

COPYRIGHT PIRACY AND ENFORCEMENT

The piracy problem within Canada continues to cause serious problems both within the country and for markets in other countries, including the U.S. In large part, this is because in 2010, as in so many prior years, Canadian law enforcement officials were denied the legal tools and the resources needed to secure Canada's borders against pirate imports and to crack down effectively on infringing activities being carried out by organized criminal groups within its borders.

The Piracy Situation in Canada

The biggest void in Canada's enforcement effort is online. Canada has gained a regrettable but well-deserved reputation as a safe haven for Internet pirates. No other developed country is farther behind the curve in combating copyright infringement on digital networks.. No Canadian enforcement authority currently has adequate resources, training and legal tools to tackle the problem effectively. Meanwhile, most copyright industry sectors report serious offline piracy problems as well.

Audio-visual: Canada is home to some of the world's most popular illegitimate Internet sites, including illegitimate P2P download and streaming sites. Canada is viewed as a country in which laws to address digital piracy are weak, ineffective or non-existent, and as a result many sites dedicated to piracy or information sources about them claim that locating or operating in Canada is to their advantage because their services are legal in Canada. Canada has been home to the operators or hosts of five of the world's top ten pirate BitTorrent sites, and it continues to be a major source of online theft in Canada and around the world.¹⁵ While the specific rankings and traffic figures fluctuate over time, there is no doubt that Canada has become a magnet for sites whose well-understood *raison d'être* is to facilitate and enable massive unauthorized downloading of pirated versions of feature films, TV shows,

¹⁴See reports from the Standing Committee on Public Safety and National Security, <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/securep10/securep10-e.pdf>, and from the Standing Committee on Industry, Science and Technology, see <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10476&Lang=1&SourceId=213200>.

¹⁵The piracy damage inflicted through illicit BitTorrent services is by no means confined to the audio-visual sector. For instance, in 2009 BSA requested the removal of 153,000 torrent files containing BSA member company software from just nine of the largest BitTorrent index sites worldwide. These torrent files were being used by nearly 4 million individuals to download software with a retail value in excess of USD\$2.2 billion.

and other copyright materials. As an example, IsoHunt, the third most popular infringing BitTorrent site in the world, continues to operate with impunity from Canada.¹⁶ It boasts having 40.7 million peers and over 6.7 million active torrents.¹⁷ A U.S. court issued a permanent injunction against IsoHunt after finding that over 90% of the downloads made using IsoHunt's services related to infringing content and that the defendants were liable for inducing infringement.¹⁸ Yet its Canadian operator continues to openly run the site and has commenced an action in Canada seeking a declaration that its operations do not violate Canadian law.

Online piracy of audio-visual material in Canada damages independent producers as well as the major studios. Internet piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions. The Independent Film and Television Alliance (IFTA) reports that online piracy in Canada remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. In a worldwide Internet monitoring program that IFTA conducted in the last quarter of 2009 for 90 of its members' films, Canada ranked third in the world in the number of P2P infringements detected, far ahead of numerous markets many times its size. Independent producers partner with local authorized distributors to finance and distribute their films and programming. These authorized distributors find it almost impossible to compete with the Internet pirates. Unable to compete with free, legitimate distributors are unable to commit to distribution agreements or offer drastically lower license fees which are inadequate to assist in financing of independent productions.

In the offline world, the Motion Picture Association of America (MPAA) reports that the market for infringing DVDs has traditionally been concentrated in the Greater Toronto area (GTA) where illegal distribution and sale of counterfeit DVDs was being conducted in a very organized fashion. Law enforcement efforts to target specific problem areas, commenced in 2009, continued in 2010. Police activity, including raids, seizures (over 1.4 million pirate DVDs were either seized by authorities or surrendered to industry investigators in 2010) and arrests, was critical to the substantial reduction in the number of illicit vendors operating openly in key malls with a reputation for piracy in the GTA. These activities resulted in 70 arrests and a number of ongoing prosecutions. Toronto Police Services and RCMP engagement with the piracy problem in the GTA has been particularly notable in 2010. Despite the inroads that have been made in 2009 and 2010, continued action by law enforcement will be required to identify a permanent solution to the hard goods problem in small malls and flea markets in the GTA, identify the sources of illicit hard goods and ensure that illicit activity does not return.

Entertainment software: In 2010, the Entertainment Software Association's (ESA) investigations uncovered numerous retail piracy operations in Québec, British Columbia, and Ontario. Pirates openly advertised these operations on the Internet through their own websites and/or online classifieds such as Kijiji and Craigslist. Many pirates also operated stores, often found in malls, including the notorious Pacific Mall, and increasingly with multiple locations. Popular pirated materials sold by these operations included burned optical discs and memory sticks containing hundreds of illegal copies of videogames for numerous gaming platforms including the Wii, PlayStation 2, Xbox 360, DS, PSP, and personal computer; modified consoles housing hard drives pre-installed with numerous pirated copies of games; and circumvention or modification devices (including installation services). ESA's 2010 enforcement activities resulted in the seizure of thousands of pirated games.

A big obstacle to reducing the level of game piracy in Canada is the low availability of law enforcement resources throughout much of Canada to act against game piracy targets, except in Quebec, where the RCMP has shown itself to be interested and active in pursuing game pirates. Elsewhere in Canada, police action generally depends on one or two interested law enforcement officials, motivated by an ESA training event they attended or a

¹⁶[http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2011-110105/#](http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2011-110105/)

¹⁷www.isohunt.com, visited 1/31/11, 12:14 pm EST.

¹⁸Columbia Pictures Industries, Inc. v. Fung, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at * 39-53 (C.D. Cal. Dec. 21, 2009). The U.S. court concluded with respect to IsoHunt and related sites that "evidence of intent to induce infringement is overwhelming and beyond dispute;" that the sites "engaged in direct solicitation of infringing activity" and that their "business model depends on massive infringing use."

working relationship with one of ESA's outside investigators.¹⁹ Unfortunately, even when criminal actions are undertaken and prosecutions are pursued, courts have been tepid in their sentencing, typically imposing fines instead of jail sentences, even for recidivists involved with large commercial operations who view the financial penalty as the mere cost of doing business. A number of cases in 2010 resulted in modest penalties with no jail time. Until prosecutors advocate more fervently for the imposition of stronger sanctions and Canadian judges consistently mete out sentences that are truly deterrent, piracy in Canada will continue to flourish.

The widespread availability of circumvention devices in Canada, which are not clearly prohibited under Canadian law, also serves to aggravate the piracy problem. As noted earlier, circumvention devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing the TPMs in game consoles. As ESA's investigations have revealed, most vendors of pirated games also offer circumvention services or devices for sale, and an increasing number of vendors are beginning to engage only in sales of circumvention devices, which allows them to induce and/or facilitate game piracy without fear of prosecution, due to Canada's lack of anti-circumvention laws. The lack of TPM protections in Canada also enables vendors to import circumvention devices from overseas manufacturers by the thousands and then export them to buyers in the United States and other countries where such devices are illegal. Because these pirates recognize no borders, Canada functions as a safe haven from which they can redistribute circumvention devices around the world. In addition, many Canadian websites offer software-based modifications, or "soft mods," which are downloadable files that once installed are capable of defeating game console TPMs in a similar manner as traditional mod chips or game copiers. As soft mods often require some level of expertise to install, vendors are able to charge a premium for soft modding services.

Canada's lack of TPM provisions also exacerbates the rate of online piracy, because without the aid of circumvention devices, users would be unable to play games that were unlawfully downloaded. It is no surprise, then, that Canadian ISP subscribers rank as some of the most egregious in terms of downloads of unauthorized entertainment software. During 2010, ESA vendors detected 1.56 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Canada.²⁰

Business software: The estimated 2010 piracy rate for U.S. vendor business software in Canada was 29%, above that of the U.S., Japan, Australia or many Western European countries, with an estimated commercial value of pirated US-vendor software of \$575 million.²¹ In addition to unlicensed use of software by business end users, which accounts for the largest part of piracy losses in the business software sector, online piracy is also a serious problem. For instance, one BSA survey indicated that in the first 9 months of 2010, over 63,000 P2P infringements of selected BSA member company titles by Canadian subscribers to Canadian ISPs were identified. Since this survey did not attempt to encompass all business software applications, all P2P protocols, or all ISPs, this figure is at best indicative of what may be a much more pervasive problem.

Books: Book publishers report continuing piracy problems in Canada with regard to infringements such as high-volume photocopying, and unauthorized uploading and downloading (especially of textbooks). As a result of mounting complaints from legitimate businesses in the university press industry, an investigative project was initiated to take a closer look at groups involved in the illegal distribution and sale of photocopied university books in Montréal. The investigators found that it was a well-organized practice affecting all the local universities. Early in

¹⁹One ESA member, for instance, reports having received excellent results in working with the Saskatoon RCMP and the Regina Tech Crime Unit, culminating in the arrest of a local man suspected of selling modified game consoles pre-loaded with infringing game software, and the seizure of over 7,000 units of pirated game product.

²⁰These figures do not account for downloads that occur directly from hosted content, such as games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

²¹BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in Canada. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA's final piracy figures will be released in mid-May, and the updated US software publishers' share of commercial value of pirated software will be available at www.iipa.com.

2011, officers of the Royal Canadian Mounted Police Federal Investigation Section conducted four searches in photocopy stores. Some 2,700 counterfeit books and digests were seized as well as a significant quantity of material used for copying. The total value of the books seized is estimated at close to \$540,000. A total of 13 individuals were arrested in the course of the police operations. Charges under the Copyright Act could be filed at the end of the investigation. These businesses had been active for several years. Some used a legitimate front to engage in illegal photocopying of university books. Others rented premises in the vicinity of universities for the back-to-school period and advertised their services through various means. A student showing an ID card could obtain photocopies based on university program course lists, at about a quarter of the list price on average.

Music and Sound Recordings: Internet music piracy remains prevalent in Canada, aided by weak and outdated copyright laws. This uncertain legal environment contributes to the formidable propensity of Canadians to patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. For example, according to Nielsen SoundScan Canada, the digital share of total album sales in Canada was 13.6% in 2009, compared with 20.4% in the US.

Furthermore, the rate of digital track sales growth in Canada has slowed steadily and dramatically over the past few years. This indicates that digital music purchases are gaining considerably less traction in Canada than the U.S. – an unusual divergence given the historical similarity of the markets – and that the Canadian market could plateau at a much lower level.

Overwhelmed by competition from “free” music on the Internet, retail sales of music in Canada have dropped by more than half since 1999. In 2006, research firm Pollara conservatively estimated the number of unauthorized downloads in Canada at 1.3 billion, swamping the number of legitimate downloads that year (20 million) by a factor of 65:1. These statistics bear out the OECD’s 2005 conclusion that Canada has the highest per capita incidence of file-swapping in the world.²² With the continued decline of recorded music sales in Canada since then, there is no indication that Canada’s piracy problem has abated.

Very few digital music providers have introduced new digital service models in Canada. This stands in sharp contrast with other markets all over the world, where there is a proliferation of new digital consumer choices. The fact is that Canada lacks the marketplace integrity required for innovative digital business models to flourish as they do in other countries.

The Canadian Response

These realities point to serious deficiencies in enforcement against piracy. Much of the problem is attributable to Canada’s inability to advance copyright law reform. For example, only when Canada’s copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices will Canadian law enforcement even have the legal authority to enforce against mod chip manufacturers, distributors and exporters. Until then, rather than attacking the problem at its source, the burden of combating this activity is unfairly shifted to law enforcement in the countries to whose markets these devices are being exported, and whose governments (unlike Canada’s) have already stepped up to the problem by adopting laws to implement the WIPO Internet Treaties.

A key anti-piracy battlefield where Canadian government inaction has effectively handcuffed its law enforcement agencies, is at the border. Canadian customs officers in the CBSA lack statutory authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained,²³ only the

²²Organization for Economic Cooperation and Development, “Digital Broadband Content: Music,” Dec. 13, 2005, p. 75, <http://www.oecd.org/dataoecd/13/2/34995041.pdf>.

²³Court orders, however, can only be obtained upon the filing of an application by the right holder, supported by affidavit evidence, including information regarding the identity of the importer, exporter or vendor; country of origin or export; quantity and value of the infringing goods; estimated date of arrival in Canada; mode of importation; identity of the ship, train or truck used to transport the infringing goods, and (if available) the serial number of the container in which these goods may (...continued)

RCMP can carry out an *ex officio* seizure, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and Canada's borders are effectively wide open to imports of pirate CDs, DVDs or videogames and other infringing materials. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports. Although the Canadian Government has acknowledged this deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes.²⁴

As discussed above, similar legal deficiencies hamper attempts by copyright owners or law enforcement to combat piracy on the Internet. Though the online piracy problem is pervasive and growing, Canadian law lacks the fundamental legal tools for addressing it. Until Canada adopts a modernized legal regime that includes such tools, prospects for progress against online piracy will remain dim.

However, not all enforcement problems in Canada can be traced to deficiencies in the law. Even when pirate activity is clearly illegal, Canada's response too often falls short. Both CBSA and RCMP remain short of dedicated resources – including manpower and data and intelligence management – to address Canada's growing piracy problems. Nor is there progress to report on interagency cooperation. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.²⁵

Nevertheless, there are some encouraging signs, notably the increased and largely effective law enforcement engagement against sales of pirate DVDs in the Greater Toronto Area in 2009, as well as the activism of RCMP officers in Quebec in addressing videogame and book piracy, as discussed above. This commendable engagement should be sustained and expanded to other law enforcement agencies. On the whole, though, the Canadian law enforcement commitment to act against retail piracy remains generally under-resourced.²⁶ In particular, the RCMP's efforts are held back by a lack of resources to properly investigate criminal copyright infringements.

The continued prevalence of pirate product in Canada's retail market is reflective of the Canadian Government's failure to provide RCMP with adequate enforcement resources, and shows that its record of cooperation with right holders to attack piracy remains spotty. Although the RCMP has now listed intellectual property crimes among its top stated priorities, its actions in the past have not always reflected adherence to this commitment. The RCMP Enforcement Policy, which reflects a reluctance to target "retail" piracy, does not account for the reality that as technology constantly advances, "retailers" now use ordinary computer equipment to become mass manufacturers, producing literally hundreds of thousands of pirated DVDs, CDs, software and video games. Moreover, there is a demonstrated link between those who sell, manufacture and distribute counterfeit products and organized criminal operations. When government authorities refuse to pursue criminal investigations or initiate prosecutions against retail pirates, copyright owners are left with only civil remedies to pursue, and pirates are not deterred.

The same problems extend to prosecutors and courts in Canada. Few resources are dedicated to prosecutions of piracy cases; prosecutors generally lack specialized training; and some judges seem to deprecate the seriousness of copyright piracy. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.²⁷ Even the RCMP acknowledges that the penalties for engaging in copyright piracy in Canada – usually insignificant fines – remain simply insufficient to deter people from engaging in this highly profitable and relatively risk-free crime. As the RCMP told a parliamentary committee in 2007, "[t]he current criminal

(...continued)

be found. In many instances, a right holder will not have access to this information and the necessity of obtaining the court order is itself unduly burdensome and not designed to prevent pirated and counterfeit imports from entering the country.

²⁴Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

²⁵The reports of both parliamentary committees called for the government to devote increased resources to, and to require better coordination and information sharing between, CBSA and RCMP.

²⁶The Industry, Science and Technology Committee report called for a higher priority for enforcement at the retail level, while the Public Safety and National Security Committee report proposed that knowing possession of counterfeit or pirate goods for purposes of sale be criminalized.

²⁷While calling for increased statutory penalties for piracy, and for new remedies such as forfeiture of the proceeds of piracy, the Industry, Science and Technology Committee of the House of Commons also opined that "the justice system should be imposing stiffer penalties for such offences within the limits of current legislation," and recommended that the government "immediately encourage prosecutors" to do so.

penalties imposed by courts pose little deterrence. It is not unusual to charge the same groups multiple times for IPR crimes, as they see the fines simply as the cost of doing business."²⁸ The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism. The new regulations authorizing the confiscation of proceeds of copyright infringement as a remedy in criminal cases could help to interrupt this vicious cycle, but only if prosecutors invoke them and courts implement them vigorously.

The U.S. Government should press the Canadian Government to initiate and adequately fund a coordinated federal law enforcement effort against copyright piracy. This should include a nationwide program to crack down on the importation of pirate goods at all major Canadian points of entry. Raids and seizures against retail targets, as well as against the manufacturers of pirate products, must be stepped up. Since the availability of pirated products will not be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences, particularly jail time, Crown counsel should be encouraged to take on more copyright infringement cases, and should be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistent deterrent sentences, including jail time for piracy cases. Canadian authorities should be encouraged to accord a high priority – in practice, not just in rhetoric – to the serious piracy problems within their country, and to devote adequate resources to the investigation and prosecution of these cases.²⁹

²⁸See Public Safety and National Security Committee report, at 12. RCMP has been saying this consistently in policy assessments going back at least 9 years. See RCMP, "An Assessment of Commercial Scale Criminal Copyright Piracy and Trade-mark Counterfeiting in Canada", 2000 ("minimal sentences and low fines offer little incentive for law enforcement to pursue this issue more vigorously, and every incentive for criminals to continue pirating copyrighted goods"); see also, RCMP, "A strategic intelligence assessment of Intellectual Property Crime in Canada", 2004; RCMP, "Intellectual Property Crime in Canada – Hazardous and Costly," 2005.

²⁹Numerous recommendations of the parliamentary committees echo these concerns.