



September 29, 2006

Via Email: FR0627@ustr.eop.gov

Ms. Sybia Harrison
Special Assistant to the Section 301 Committee
Office of the U.S. Trade Representative
600 17th Street NW
Washington, DC 20508

Re: Canada: Special 301 Out-of-Cycle Review
(71 Fed. Reg. 49491, August 23, 2006)

To the Section 301 Committee:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide the Committee with our views on the Special 301 out-of-cycle-review of Canada's intellectual property rights practices.

IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials.¹ The IIPA has formally provided its views on Canada's copyright law, piracy and enforcement efforts several times in recent years, most recently in our 2006 Special 301 submission to USTR.²

On April 28, 2006, USTR retained Canada on the Special 301 Watch List and announced that this out-of-cycle-review would be held. It identified four "key areas for action," including (1) ratification and implementation of the WIPO Internet Treaties; (2) copyright law amendments "to provide adequate and effective protection of copyrighted works in the digital environment"; and (3) improvements in Canada's IPR enforcement system.³ The first two of these depend upon reform of Canada's outdated copyright laws. IIPA understands that an extensive legislative

¹ IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media).

² See IIPA's Special 301 2006 report on Canada, February 13, 2006, available online at <http://www.iipa.com/rbc/2006/2006SPEC301CANADA.pdf>.

³ The fourth targeted action area deals with pharmaceutical test data. IIPA has no comment on this issue.

proposal is being developed by the Canadian government, but no proposed copyright reform bill has been released to date. It is hoped that this will occur during the next few weeks.

Because this unfinished business of copyright law reform is so central to the criteria USTR is to apply in this out-of-cycle review, IIPA is withholding any recommendation at this time as to where Canada should be placed on the Special 301 lists. We urge that the conclusion of the pending review remain open for a reasonable time to permit a full evaluation of whatever legislative proposal is brought forward by the Canadian government, and we ask for the opportunity to supplement this submission after we have had a chance to perform that evaluation.

In the meantime, IIPA does have comments to offer on the issue of improvements to Canada's IPR enforcement system.⁴ We have seen little, if any, forward progress on this issue in the five months since USTR identified it as one of the key areas where action is needed. To the contrary, we can report that the copyright piracy problems in Canada identified in our 2006 Special 301 filing have not improved, and in some cases have demonstrably worsened. Furthermore, the specific enforcement shortfalls identified in USTR's Special 301 report on Canada have not been addressed.

The prevalence of pirated copies of many kinds of copyrighted materials in the Canadian market remains disturbing. Pirated entertainment video games continue to flow into the country, mostly from Asia. Canadian authorities themselves concede that international organized criminal groups control the sales and distribution of much of this pirate product. See http://www.rcmp-grc.gc.ca/economic_crime/ip_e.htm. In addition, the problem of unauthorized camcording of films in Canadian theaters, flagged in the IIPA Special 301 report, has worsened, and is now nearing crisis levels. MPAA analysis of counterfeit copies of recently released movies on DVD seized throughout the world reveals that more than 90 percent can be sourced back to theatrical camcording. As of August 2006, MPAA had documented 179 member company titles that had been stolen in this manner since 2004, providing the source copies for pirate DVDs discovered in the markets of 46 other countries on every inhabited continent. In 2005, 23 percent of camcords worldwide were sourced to Canada. The number of titles affected is consistently trending upwards, and the problem is national in scope, with theaters from Nova Scotia to British Columbia identified as sites of unauthorized camcording.

The Canadian government's response to these growing problems has been far from satisfactory. It remains the case, as IIPA reported last February, that there are "serious deficiencies in enforcement against piracy, starting at Canada's borders." The USTR Special 301 finding listed several specific areas where improvements were needed. None of these needs has yet been addressed.

First, USTR called for "legislative changes to provide a stronger border enforcement system by giving [Canadian] customs officers the authority to seize products suspected of being pirated or counterfeit." Officers of the Canadian Border Service Agency (CBSA) still lack the

⁴ The categories of law reform and enforcement are not mutually exclusive. For example, Canada's failure to outlaw trafficking in devices and services aimed at circumventing effective technological measures underlies its lack of enforcement against the makers or distributors of so-called "mod chips" and "flash ROM linkers" which enable users to bypass the technological protections used by software publishers. A similar problem exists with respect to unauthorized camcording in theaters, discussed below.

needed *ex officio* authority, and no legislative proposal to provide it to them has yet been put forward by the Canadian government. CBSA must be given independent authority to act against any suspected pirate or counterfeit imports; but 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.

Second, USTR flagged the need for greater cooperation between CBSA and the Royal Canadian Mounted Police (RCMP). There is no progress to report on this front either. The existing arrangement under which CBSA can refer cases to the RCMP through designated RCMP liaison officers is unwieldy and impractical.

Third, USTR called for more anti-piracy resources and training to be provided both to CBSA and to domestic law enforcement officials. This has not happened. Both CBSA and RCMP remain short of dedicated resources – including manpower and data and intelligence management – to address Canada’s growing piracy problems. Efforts by the Entertainment Software Association (ESA) to schedule CBSA officers for free training in techniques for identification of counterfeit and pirate product has met with only limited success.

Unfortunately, the shortfalls in Canada’s enforcement efforts against piracy extend beyond those specifically mentioned in USTR’s brief summary. For example:

- Although the RCMP has now listed intellectual property crimes among its top stated priorities, its actions belie this label. Under the Justice/RCMP Copyright Enforcement Policy, RCMP still will not take action against retail outlets engaged in piracy, except in some cases in which it is shown that the target is a repeat offender.⁵ The Enforcement Policy does not account for the reality that as technology constantly advances, the “retailers” now use ordinary computer equipment to become mass manufacturers, producing literally hundreds of thousands of pirated DVDs, CDs, software and video games. Not surprisingly, the retail piracy problem in communities such as Vancouver, Montreal, Edmonton, Calgary and Greater Toronto continues to worsen.
- Neither the RCMP nor local authorities will take action against unauthorized camcording. One of theater owners who sought assistance from law enforcement was told that the only reason the police would attend the theater was to arrest the theater owner if he tried to either confiscate the recording equipment or detain the person operating it. Amending the Criminal Code to outlaw unauthorized camcording would not only provide essential deterrence, but also ensure that local police, who are often called upon for assistance, would have the mandate to act.
- Finally, the penalties for engaging in copyright piracy in Canada – usually an insignificant fine – remain simply insufficient to deter people from engaging in this highly profitable and

⁵ ESA reports that in several instances, RCMP has been unwilling to take action against targets that the agency itself has identified as involved in entertainment software piracy. The RCMP appears willing to take on targets only when the industry has already attempted to act against the pirate but the target is undeterred and either remains open for business or re-opens under a new entity. Where the industry or a member company has referred a case to the RCMP and it has been refused, the reasons typically offered are: 1) they lack the resources to pursue the case; or 2) there are other “more important” priorities.

relatively risk-free crime. The light penalties also encourage recidivism. To give but one example, consider the aftermath of a 2005 raid on a retail operation in Pacific Mall in Toronto, undertaken by RCMP based on information supplied by ESA. The retailer was selling and distributing pirated entertainment software products and circumvention devices, as well as providing circumvention services. After the retailer escaped with a minimal fine, he was found to be back in operation in different premises and under a different business entity in July 2006. The RCMP then conducted raids of several premises connected to the retailer, resulting in the seizure of pirated video games as well as equipment used to produce them.

In sum, the overall enforcement picture in Canada has not improved in any meaningful way since USTR announced this out of cycle review. While IIPA reported some promising enforcement developments in 2005, these have not been repeated so far this year. The evidence suggests that the piracy problem in Canada is serious, but that it is not being taken seriously by Canada's government.

When it concludes this review, USTR should reiterate the need for progress on the enforcement issues it identified last April, as well as on prioritization of piracy and counterfeiting offenses, and on consistent imposition of deterrent penalties. It should also emphasize the urgent need for effective legislation to outlaw unauthorized camcording in Canadian theaters.

IIPA thanks the Section 301 Committee for its consideration of this submission. If further information is needed, please do not hesitate to contact us.

Respectfully submitted,



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