

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION

Recommendation: IIPA recommends that Canada be maintained on the Special 301 Priority Watch List in 2010.

Executive Summary: More than thirteen 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. In 2008, its government finally tabled a bill (Bill C-61) that would do part of the job of meeting global standards; but no action was taken on it. In 2009, government pledges to table a new bill went unfulfilled. While significantly flawed, particularly with regard to the role of service providers in combating online piracy, Bill C-61 is likely to provide a starting point for future consideration of copyright reform. Canada should be encouraged to enact a new version of the bill, with major flaws corrected and necessary improvements in several areas, this year. 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. As a consequence, the piracy picture in Canada is at least as bleak as it was a year ago, and it is fast gaining a reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity. The fact that Canada, home to 0.5% of the world's population, hosts 4 of the top 10 illicit BitTorrent sites in the world, speaks eloquently for itself. To underscore U.S. insistence that Canada finally take 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 2010.

ACTIONS WHICH THE CANADIAN GOVERNMENT SHOULD TAKE IN 2010:

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])
- Create strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy
- Amend the Copyright Act to clarify the scope of the private copying exception for sound recordings
- Amend the Copyright Act to clarify liability for those who operate illicit file-sharing services, or whose actions are otherwise directed to facilitating, encouraging or contributing to widespread infringement
- Create criminal liability and penalties for counterfeiting offenses commensurate with what is provided in the Copyright Act

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.



- Complete the process of making proceeds of crime legislation applicable to proceeds from the distribution, sale and importation of pirated goods, and make the other 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

IIPA regrets to report that its statement in the 2007 Special 301 report – submitted three years ago – remains, disappointingly, true today: “Canada remains far behind virtually all its peers in the industrialized world with respect to its efforts to bring its copyright laws up to date with the realities of the global digital networked environment. Indeed, even most of the major developing countries have progressed further and faster than Canada in meeting this challenge.”

The main legislative and policy challenges that Canada confronts, all of them aggravated by its years of delay in facing them, fall into three main categories: bringing its laws into full compliance with the globally accepted benchmarks for modern copyright legislation (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)); making the necessary legislative changes to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border; and dedicating sufficient resources and establishing adequate policies to ensure effective copyright enforcement efforts within the country. In only the last of these three areas did Canada take any step forward during 2009, and even that forward motion was of limited significance.

In 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.¹ 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.

Although the government announced that it would introduce new copyright reform legislation in the fall of 2009, it did not do so. Instead, it devoted the summer to a nationwide “public consultation” on copyright reform. Focused primarily on online submissions, and supplemented by invitation only roundtables and two town hall meetings, the consultation concluded in September 2009. No legislation has yet been produced. Parliament will not meet again until March 2010, and thus no legislation can be formally introduced until that time. But there is no concrete indication that a bill will be tabled then, either. With the European Union’s recent ratification of the WCT and WPPT, Canada has fallen yet further behind most of the world’s major trading nations.

¹ The Speech from the Throne that opened the November 2008 parliamentary session included a similar commitment to “modernize Canada’s copyright laws and ensure stronger protection for intellectual property.” See also the two Parliamentary committee reports released in 2007, from the Standing Committee on Public Safety and National Security, see <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2985081/ securp10/ securp10-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>.

Despite this disappointing track record, and on the supposition that C-61 may provide a starting point for whatever legislation is tabled this year, we discuss some of the issues it addressed, and offer the following recommendations for legislation to be enacted in 2010.

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 websites based in Canada are involved in the sale of "mod chips" and other circumvention devices to purchasers in other countries. 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. The bill 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-61 was a step in the right direction. Canada should build on this good beginning in the next proposal for copyright reform.

Online Piracy: It is a matter of the greatest priority that copyright reform legislation in Canada address the pervasive problem of Internet piracy. Any liability limitations for Internet Service Providers (ISPs) should be conditioned on affirmative cooperation with copyright owners in combating online infringements. Unfortunately, Bill C-61 fell far short in this regard, since it brought forward, virtually unchanged, the unsatisfactory approach taken in Bill C-60, tabled in 2005.

For example, 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 (*SOCAN v. CAIP*) observed that enacting such a procedure would be an "effective remedy" for the problem.² But the current Canadian government – and its predecessors – appear to be steadfastly opposed to the procedure. Bill C-61 continued this unfortunate trend, confining itself to the same "notice and notice" regime proposed by the Canadian government years ago. One approach is not a substitute for the other.³ 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. But a "notice and takedown" regime is needed to provide an expeditious means of removing or disabling access to infringing content hosted online. Particularly if coupled with an obligation to terminate the accounts of repeat or serious infringers, combining these approaches

² *Society 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>.

³ Similarly, 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.

could be a useful part of a system that gives ISPs strong incentives to effectively address the dissemination of infringing materials.⁴

Bill C-61 not only failed to address online piracy effectively; it could in fact have exacerbated it, because it provided sweeping safe harbors to network service providers without creating any incentives for them to cooperate with copyright owners to deal with copyright infringements that take 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 would have provided safe harbors to far more than just innocent intermediaries.⁵ Bill C-61's safe harbors could have sheltered from liability illegitimate file-sharing services that directly facilitate and profit from the widespread distribution of overwhelmingly infringing material. Indeed, operators of such services publicly called for enactment of these provisions precisely for this purpose. 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."⁶

Bill C-61 also did nothing to clarify liability under Canadian law for those whose actions in the Internet context are directed to promoting massive infringements (for example, illicit p2p services). In step with the international trend, exemplified by successful lawsuits in Australia, Korea, Taiwan and the U.S. against p2p services that were facilitating massive worldwide infringement, the Copyright Act should be amended to enable rights holders to obtain effective remedies against those whose conduct is directed to encouraging, inducing or materially contributing to the infringement. Clear rules on this topic would allow copyright infringement to be dealt with at the source instead of at the point of consumption, thus facilitating the avoidance of litigation against users of illicit p2p services as direct infringers.

A unique "made in Canada" approach to online infringement liability (as the Canadian government has touted its "notice and notice" regime) could offer a significant contribution; but it 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. Bill C-61 failed both tests. We urge Canada's government to take a different approach in new copyright reform legislation.

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. Bill C-61 would have taken a step backwards, by limiting statutory damages to \$500 for all infringements carried out by an individual defendant for his or her "private purposes." Another provision, proposed section 38.1.(1.3), would have authorized even this meager award only to the first copyright owner to proceed to judgment 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

⁴ There are also a number of unanswered questions about the "notice and notice" provisions of proposed section 41.25 in Bill C-61, such as how the statutory damages of \$5000-10,000 (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.

⁵ The flaws of the Bill C-61 safe harbors were manifold. The Bill seemed to overrule the Supreme Court decision in *SOCAN v. CAIP* which had suggested that a service provider would be liable for authorizing infringement if it had notice of infringing content on systems hosted by it and failed to take steps to remove or disable access to the content. The Bill would also have provided a safe harbor to any service provider who in the course of offering a search capability reproduces, caches or communicates copyright content to the public. This form of exception for information location tools was far broader than the very narrow exceptions for search engines in the few countries which have such a provision in their laws. Further, all of the proposed safe harbors lacked the standard qualifying conditions which exist internationally – notably, that service providers implement effective policies for dealing with repeat infringers.

⁶ See WCT, Art. 14.2; WPPT, Art. 23.2.

owner's lawsuit was filed. Although the Government indicated that the act of posting music using the Internet or p2p technology would not be subject to the "private purposes" limitation on liability,⁷ the Bill itself failed to define the term. The likelihood is that Bill C-61's provisions would have effectively eliminated the statutory damages option where it is most needed: in the online environment, including in p2p cases. For example, where a defendant uploads a work – or hundreds or thousands of works -- to the Internet without authorization, or places unauthorized copies in her "shared folder" on a p2p service, 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. 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, Art. 41. That gap will rapidly reopen if these infringing activities are treated as having been undertaken for "private purposes," thus replacing statutory damages with a *de facto* \$500 license for unlimited personal infringement by anyone caught uploading any number of infringing copies. Since Canadian courts already have the full authority to limit statutory damages, based on the facts of the case, to \$500, or even less in appropriate circumstances, Bill C-61's proposed amendments to section 38.1 appear entirely unnecessary and should be eliminated from future copyright law reform proposals. At a minimum, their inapplicability to unauthorized uploading must be made definitive.

Educational/library exceptions: Proposed section 30.04 of Bill C-61 immunized 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 (or a "clearly visible notice" that prohibits the specific act that gave rise to infringement). This provision seemed to allow infringement of a work offline so long as it is available somewhere online without a TPM. The breadth of this exception must be re-examined in drafting a new bill, taking into consideration both the scope of Canada's existing fair dealing exceptions for research and private study, and applicable international standards.

Section 30.1.1.c would have been amended by Bill C-61 to allow libraries, archives or museums to format-shift items in their collection (at least for "maintenance and management" purposes, as current law provides) if a person acting under the authority of the institution "considers" that the format "is becoming obsolete." Since every electronic format could reasonably be considered as starting to "become obsolete" the day it is released, if not before, this should be clarified, lest it prove to be an exception that swallows the rule.

Bill C-61 also brought forward from its legislative predecessor several other flawed and internationally unprecedented proposals in the area of educational and library exceptions. The distance learning exception contained none of the internationally recognized limitations to the scope of copying for educational purposes, nor any requirements to prevent further dissemination of electronic educational materials. The digital reproduction exception effectively created a compulsory license for digital copying. The inter-library loan exception would have authorized inter-library distribution of digital copies, without any limitations on the scope of such copying, and would have had a significant detrimental impact on publishers of scientific, technical and medical materials in particular. All these should be carefully re-examined. 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.

Sound recordings: The proposed codification in Bill C-61 of the exclusive making available right for sound recordings (proposed section 15.(1.1)(d)) was commendable. However, it is disappointing that the bill failed to address the scope of the private copying exception for sound recordings. While IIPA hopes that further judicial interpretation of Canada's current law (section 80) will more clearly establish that the private copying exception applies only to individuals who make copies for their own use from legitimate sources, a legislative amendment is

⁷ Government of Canada, Fact Sheet, Limitations on Statutory Damages, June 2008, <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01162.html>.

also required to clarify that the exception applies only to copies of non-infringing recordings owned by the person who makes the copies. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations. Indeed, Bill C-61 even omitted a provision of Bill C-60 that spelled out that unauthorized uses of non-infringing private copies (e.g., any distribution or public performance) constitute infringements. This clarification should be restored in future legislation.

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 any suspected pirate or counterfeit imports. The two parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy recommended this reform, along with other essential changes, including:⁸

- 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 2009, the Canadian government took a step forward on one of these recommendations, proposing a regulatory change that would bring criminal copyright offenses under the Federal Proceeds of Crime regime. While adoption of this change would be 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 get worse, not better, and is causing serious problems 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 are 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 in cyberspace. 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: Multiple, and often connected, Internet sites in Canada are used as a massive international distribution vehicle for pirated audio-visual material. A number of the world's most notorious and prolific BitTorrent sites for online piracy are hosted or have operators based in Canada. For instance, a compilation of the "25 Most Popular Torrent Sites of 2009" published by TorrentFreak in December 2009, based on widely available worldwide

⁸ See reports cited at footnote 1, supra.

traffic data, included seven sites hosted, registered or otherwise connected to Canada, including 4 of the 10 most popular, and 2 of the 3 leading BitTorrent sites in the world.⁹ 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 and other audio-visual materials by users around the world. For example, as determined by a U.S. federal court in the case of Isohunt.com (one of the three most visited torrent sites in the world) and several affiliated Canada-based sites, "evidence of intent to induce infringement is overwhelming and beyond dispute." The court concluded that these sites "engaged in direct solicitation of infringing activity" (such as soliciting uploads of copies of "the top 20 highest-grossing films then playing in the United States"); that their operators "directly assisted users in engaging in infringement"; that their "business model depends on massive infringing use;" and that the website operator "personally engaged in a broad campaign of encouraging copyright infringement."¹⁰ Clearly what has attracted these advertising-supported commercial online piracy sites to Canada is the practical impunity with which they can operate there. The sites themselves trumpet this fact on their websites.¹¹ As the legal noose tightens around similar pirate services in formerly more sympathetic jurisdictions in Europe, Canada's reputation as a pirate haven for sites that facilitate massive on-line infringement continues to grow.

Online piracy of audio-visual material in Canada damages independent producers as well as the major studios. The Independent Film and Television Alliance (IFTA) reports that, in a worldwide Internet monitoring program it 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.

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 DVD was being conducted in a very organized fashion. Previously, stores in three malls and a several large flea markets were openly advertising, displaying and selling their illegal product to consumers coming from all over the GTA. The industry has engaged in active anti-piracy measures throughout GTA, with over 835,000 counterfeit DVD's surrendered in response to service of industry cease and desist letters in 2009. One bright spot in Canada's otherwise gloomy anti-piracy picture for 2009 is that police forces in the GTA have become engaged, making a number of raids and arrests. Targeted criminal enforcement actions against DVD vendors in the malls and large flea markets have caused the illicit sale to move out of malls and into smaller flea markets and corner stores, where it is harder for customers to locate sources for pirate goods. Continued action by law enforcement, along with the imposition of deterrent penalties on violators, will be needed to provide a long-term solution to the problem. The criminal operations view the relinquishment of pirated product as simply an occasional cost of doing business and are undeterred by any civil action.

Entertainment software: In 2009, the Entertainment Software Association's investigations uncovered numerous 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 Craigslist. Many pirates also operated

⁹http://torrentfreak.com/top-25-most-popular-torrent-sites-of-2009-091213/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Torrentfreak+%28Torrentfreak%29&utm_content=Google+International. Torrentz.com, the second most visited torrent site in the world, is hosted in Canada, where 6 of its 8 IP nodes are located. Isohunt.com, discussed in the text, was the third most visited torrent site in the world in the torrentfreak.com listing, and seems to be an entirely Canada-based operation. The other Canadian sites listed in the torrentfreak compilation include monova, BTMon, Fenopy, TorrentPortal, and Torrentzap. BTJunkie.org, #5 on the Torrentfreak list, also appears to have Canadian connections.

¹⁰ Columbia Pictures Industries, Inc. v. Fung, CV 06-5578 SWW (JCx), 2009 U.S. Dist. LEXIS 122661, at * 39-53 (C.D. Cal. Dec. 21, 2009).

¹¹ "Unless you live in Canada, downloading copyrighted material via P2P may put you at risk for a lawsuit. Canadian users are currently shielded from P2P lawsuits. Canada signed the 1997 World Intellectual Property Organization Internet Treaties, but has not yet ratified them by enacting their provisions into domestic law." <http://www.torrentportal.com/> (visited 1/15/10)

stores, often found in malls, among the most notorious of which are located in the Markham region's 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; consoles housing hard drives pre-installed with numerous pirated copies of games; and circumvention or modification devices (including installation services). ESA's 2009 enforcement activities resulted in the seizure of thousands of pirated games as well as equipment used for mass-scale replication. Circumvention devices and modified consoles were often present with the pirated games.

The widespread availability of circumvention devices in Canada, which are not prohibited under Canadian law, is central to the piracy problem. Circumvention devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing technological protection measures (TPMs) used by rights holders. Consequently, 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 circumvention activity, 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. Because these pirates recognize no borders, Canada functions as a safe haven from which they can redistribute circumvention devices around the world.

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. ESA estimates that, during December 2009 alone, approximately 131,138¹² infringing copies were made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Canada. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

Although several repeat offenders were identified and investigated, then referred to law enforcement, very few criminal cases were brought, with lack of resources the oft-cited reason. Where ESA has been successful in procuring action on the part of RCMP or local police, it is generally because of one or two interested law enforcement officials, motivated by an ESA training event they attended or a working relationship with one of ESA's outside investigators. Unfortunately, even when criminal 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. Until RCMP improves its enforcement efforts and Canadian judges consistently impose sentences that are truly deterrent, piracy in Canada will continue to flourish.

Business software: Although the estimated 2009 piracy rate for business software in Canada crept down from 32% to 30%, it remains well above that of the U.S., Japan, Australia or many Western European countries.

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).

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.

¹² This figure is representative only of the number of downloads of a small selection of game titles, and thus understates the overall number of infringing downloads of entertainment software made via p2p by Canadian ISP subscribers during the period.

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, to 38.3% in 2009 from 60% in 2008, 73% in 2007, and 122% in 2006. This indicates that digital music purchases are gaining considerably less traction in Canada than the US – 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.¹³ 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 Legal Deficiencies

These realities point to serious deficiencies in enforcement against piracy. Much of the problem is attributable to the inaction of Canada’s government on law reform. For example, Canada’s outmoded copyright law contains no criminal prohibitions on the manufacture or distribution of devices (such as mod chips and game copiers) whose primary purpose is to circumvent technological protection measures used by copyright owners to fight piracy. Consequently, although organized criminal groups in Canada likely dominate trade in these circumvention devices, RCMP and local enforcement authorities are powerless to act against them. Only when Canada’s copyright law is modernized to include clear criminal prohibitions against this activity 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 obtained¹⁴, only the 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

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

¹⁴ Court 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 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.

deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes. Perhaps the Parliament's Committee on Public Safety and National Security was correct when it identified "a lack of strong leadership" as a major "obstacle to the development of an effective Canadian strategy to fight counterfeiting and piracy." Whatever the explanation for Canada's years of policy paralysis in this area, it is long past time for the Canadian government to identify which statutes, regulations or policies must be amended in order to confer meaningful *ex officio* authority on border enforcement agencies, and to act promptly to institute the needed changes.¹⁵

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. Notably absent are clear legal incentives for network operators to cooperate in anti-piracy efforts, whether through a notice and takedown system such as the regime that has been in place in the U.S. since 1998, or through the use of liability doctrines to encourage network operators to take more proactive steps to detect and deal with pirate activity online. Until Canada adopts a modernized legal regime that includes such incentives, prospects for progress against online piracy will remain dim.

The Enforcement Shortfalls

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. While Canadian authorities may say that combating copyright piracy is an important objective, some of their actions – in terms of priority setting, resources, training, and the outcome of prosecutions – suggest the contrary. Piracy is a serious problem in Canada, but the evidence is that the Canadian government is still not taking it seriously.

In its Special 301 announcement last April, USTR noted that "the provision of additional resources and training to customs officers and domestic law enforcement personnel would enhance IPR enforcement." 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. 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.¹⁶

Nevertheless, there are a few encouraging signs, such as the increased law enforcement engagement against sales of pirate DVDs in the Greater Toronto Area in 2009. RCMP, Toronto Police, York Regional Police, and other law enforcement agencies have all been involved in this effort. In another example, a November 2009 RCMP operation dubbed Project OACTION disrupted a major burning operation and seized thousands of pirated games when it executed search warrants at two retail units in Pacific Mall, a residence, and two associated vehicles. ESA also reports success working with Canadian police departments, including the Toronto Police Services (TPS). In one such TPS action, authorities discovered a large-scale burning operation, leading to the arrest and sentencing of two individuals to 12 months of probation. On the whole, though, the Canadian law enforcement commitment to enforcement against retail piracy remains generally under-resourced.¹⁷ 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

¹⁵ Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

¹⁶ The 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.

¹⁷ The 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.

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. RCMP's response to the Pacific Mall is a case in point. Although vendors at the Pacific Mall have for years openly sold pirated game product, RCMP has not undertaken the kind of coordinated effort and aggressive enforcement that is necessary for a long-term solution. When RCMP does take action, it is often only in the form of issuing cease and desist orders to vendors engaged in the sale of pirated product. As evidenced by a large number of recidivists in the Pacific Mall, however, cease and desist orders are not adequately deterrent. Vendors who receive a cease and desist order often resume their pirate activity in a matter of days or weeks knowing that the likelihood of criminal penalties is remote. 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.¹⁸ 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.¹⁹ 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 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."²⁰ The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism.

USTR 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.²¹

¹⁸ RCMP continues to take actions against some producers of high volumes of pirate optical disc products, notably in raids in Montreal in December 2008 that targeted a major producer of pirate DVD versions of television series. Tens of thousands of DVD-Rs involving 350 different titles were seized, as well as 200 DVD burners and other equipment, and some 2500 shipments of the counterfeit product were intercepted, in the largest enforcement operation of its kind in Canada.

¹⁹ While 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.

²⁰ See 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.

²¹ Numerous recommendations of the parliamentary committees echo these concerns.