

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

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SPECIAL MENTION

CANADA

In 2002, following extensive public consultations, the Canadian Government unveiled a three-tiered agenda for copyright reform in the form of a report presented to the House of Commons Standing Committee on Canadian Heritage (the "Committee"). The first tier (so-called "short term agenda") called for Canada to ratify the WIPO "Internet" Treaties, which Canada signed in 1997, in order to "ensure that Canadian rights holders will benefit from copyright protection recognized in all treaty countries." In order to do so, the Government identified necessary amendments to Canada's Copyright Act, including adoption of a making available right and protection for technological protection measures and rights management information. In June 2004 the Committee recommended that the Government of Canada immediately ratify the WIPO "Internet" Treaties and that legislation permitting such ratification be introduced in the House of Commons by mid-November 2004.

Although the Canadian Government's stated commitment to ratify the WIPO Treaties in the "short term" is laudable, the actions of the Canadian Government in this regard have been woefully inadequate. Nearly ten years after playing a major role in negotiating and drafting the WIPO Treaties, and roughly eight years after signing them, the Government of Canada still has failed to ratify, or even introduce legislation to implement them — in spite of repeated requests from the responsible Parliamentary Committee and statements of intent from the Government. Meanwhile, 50 countries worldwide, including all of the countries in North America apart from Canada, have ratified. Each year that Canada has failed to act on the WIPO Treaties, it has fallen further and further out of step with its trading partners.

Quick action on copyright reform is necessary, not only to harmonize Canada's regime with much of the world, but to ensure adequate and effective protection of copyright works in the digital environment. This was made clear by a 2004 Federal Court of Canada decision (BMG Canada, Inc. v. Doe, 2004 FC 488) that effectively legitimized Internet piracy of sound recordings of music — a decision that has left Canada not just out of step with its major trading partners in developing modern norms of protection, but in direct violation of its obligations under TRIPS to protect the reproduction right and to provide for effective infringement penalties. A subsequent decision of the Canadian Federal Court of Appeal, with respect to the private copying regime, found that copies made on fixed memory in MP3 players (and presumably on computers' hard drives) do not fall within the private copying regime. Both decisions are under appeal.

Canada's out-of-date copyright law has created an environment of legal uncertainty for digital copyright in Canada. As the Supreme Court of Canada has stated in an extraordinary criticism of the Canadian government for its failure in this regard:

Parliament's response to the World Intellectual Property Organization's (WIPO) Copyright Treaty, 1996 ('WCT') and the Performances and Phonograms Treaty, 1996, remains to be seen. In the meantime, the courts must struggle to

transpose a Copyright Act designed to implement the Berne Convention for the Protection of Literary and Artistic Works of 1886, as revised in Berlin in 1908, and subsequent piecemeal amendments, to the information age, and to technologies undreamt of by those early legislators.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45 (para. 43).

The result has been widespread trafficking in pirated intellectual property that has left the recording industry particularly vulnerable. The broad availability of pirate copies of recordings on the Internet and illegal digital copying are devastating sales. Prime Minister Paul Martin recognized the danger in the aftermath of the *BMG v. Doe* decision: "We are not going to let an industry that is so important to this country . . . be jeopardized." The time to act is now, and we urge the U.S. Government to press for immediate reform, and to initiate consultations in the WTO if immediate reform is not forthcoming.

Private copying exception: As amply demonstrated by the Federal Court of Canada and Federal Court of Appeal decisions referred to above, the Canadian Copyright Act's limited exception for the private copying of sound recordings requires clarification. The definition of private copying must be clarified to specify that it does not exempt Internet file sharing from copyright infringement and only applies to private individuals making copies for their own use of non-infringing sound recordings they legitimately own. In the digital era, anything broader than this definition transforms private copying into public copying, in violation of TRIPS. There is nothing private about the 2.6 billion sound recording files downloaded on the Internet each month without the consent of the artist or record company. Without specified limitations, the limited "private copying" exception for sound recordings is inappropriately transformed into an unlimited public copying license, with disastrous results for rights holders worldwide.