

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301

CANADA

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that Canada be maintained on the Watch List in 2006, and that an out-of-cycle review be held no later than September 2006.

Actions Which the Canadian Government Should Take in 2006:

Copyright Law Reform

- Enact legislation bringing Canada into full compliance with the WIPO "Internet" Treaties (WIPO Copyright Treaty [WCCT] 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 that illicit file-sharing services authorize infringement
- Make unauthorized camcording an indictable offense

Enforcement

- Make legislative, regulatory or administrative changes necessary to streamline the process for *ex officio* seizures of counterfeit product at the border
- Increase resources devoted to anti-piracy enforcement both at the border and within Canada
- Direct the RCMP, 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 imposition of prison sentences for material infringements

CANADA Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2005¹		
INDUSTRY	2005	
	Loss	Level
Records & Music	NA	NA
Business Software ²	580.6	36%
Motion Pictures ³	118.0	8%
Entertainment Software ⁴	NA	NA
Books	NA	NA
TOTALS	698.6+	

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

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, most of the major developing countries have progressed further and faster than Canada in meeting this challenge.

The globally accepted benchmark for modern copyright legislation can be found in the WIPO "Internet" Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Canadian copyright law remains far out of compliance with the standards set in the WCT and WPPT. In 2005, the Canadian government unveiled legislation (Bill C-60) that was ostensibly aimed at closing this gap; but this legislation, while positive in some respects, fell far short of meeting the WCT and WPPT benchmark. Bill C-60 died when a federal election was called on November 29, 2005. We urge Canada's new government to take advantage of this opportunity to jettison the approach taken by Bill C-60 in favor of legislation more consistent with that of other nations that have already implemented these treaties.

Notably, the provisions of Bill C-60 deviated sharply from the approach taken by every other country that has sought to implement the provisions of the WCT/WPPT on the use of technological protection measures (TPMs) by copyright owners. Indeed, the approach taken in Bill C-60 appeared better suited to a country seeking to establish itself as a worldwide producer and supplier of protection-cracking tools than one wishing to join the global mainstream by appropriately modernizing copyright legislation to provide for the levels of protection necessary in the current technological environment. IIPA urges Canada's new government to choose a

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Canada, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

different path and to make that choice concrete by proposing TPM provisions that fully comply with the WCT and WPPT. This means legislation that:

- comprehensively protects TPMs, both in so far as they manage access to copyrighted works and in their use to prevent unauthorized copying and the exercise of other exclusive rights;
- outlaws trafficking in devices aimed at circumventing TPMs, or providing circumvention services, and defines violations without imposing onerous intent requirements;
- defines defenses with care so as to avoid the creation of a market for circumvention devices or services; and
- provides strong civil and criminal remedies for violations.

Bill C-60 also fell far short in terms of encouraging Internet Service Providers (ISPs) to cooperate with copyright owners in combating online infringements. The blanket liability exemptions in the bill could have been interpreted to shelter illicit p2p services or websites established expressly to facilitate collection, location or dissemination of infringing materials. The exemptions would have applied even when ISPs had actual knowledge of and control over infringing material, and would have barred even injunctive relief. The legislation that succeeds Bill C-60 must close these loopholes and condition liability limitations for ISPs on affirmative cooperation with copyright owners in combating online infringements. As recommended by the Supreme Court of Canada in *SOCAN v. CAIP*, legislation should also provide a true "notice and takedown" system that offers an expeditious means of shutting off access to infringing online activity, rather than confining itself to the mere "notice and notice" regime of Bill C-60. While an obligation for an ISP to forward notices from copyright owners to end-users would be a useful supplement to a system that gives ISPs strong incentives to "take down" infringing materials, it is no substitute for it.

Other features of Bill C-60 also deserve careful re-examination before they are included in the successor copyright reform bill. For instance, Bill C-60 included an ill-defined new exception for use of a work in a "lesson, text or examination" in educational settings. Another provision had the effect of creating a compulsory license for digitizing and online dissemination of a work to any student, wherever located, so long as the student's institution was covered by an existing collective license for printed copies, even if the Canadian publisher had no rights over digital dissemination of the work. A third problematic feature of Bill C-60 eliminated the existing provisions for interlibrary loan and replaced them with a provision that authorized interlibrary distribution of digital copies, a proposal that would have had a significant detrimental impact on publishers of scientific, technical and medical materials in particular. The new 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, and that they provide ample room for market solutions.

New legislation should also address other issues, notably the scope of the private copying exception for sound recordings. While IIPA hopes that further judicial interpretation of Canada's current law will more clearly establish that the private copying exception applies only to individuals who make copies for their own use, a legislative amendment is 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.

New legislation should also clarify liability under Canadian law for illicit peer-to-peer (p2p) services. In contrast to the international trend, exemplified by the successful lawsuits in Australia, Korea, Taiwan and the U.S. against p2p services that were facilitating massive worldwide infringement, recent Canadian case law on liability for authorizing infringement raises questions as to whether a comparable enterprise would be found liable under Canadian law.

Bill C-60 contained several positive features, notably the specification of an exclusive right of "making available," and a new section banning dissemination or public performance of a copy of a sound recording made under the private copying exception. IIPA urges the new Canadian government to build on these positive elements while significantly revamping other provisions of Bill C-60, including those summarized above. In this way, the new legislation can become a vehicle for Canada's long-delayed implementation of the WIPO Internet Treaties and its re-entry into the global copyright protection mainstream.

COPYRIGHT PIRACY AND ENFORCEMENT

Most copyright industry sectors report disturbing features of the Canadian landscape with respect to copyright piracy. For example:

- In 2005 more than 500,000 counterfeit audio-visual products in optical disc format - mostly DVD-Rs - were seized in Canada; more than twelve times as many as the year before. This pirate audio-visual product is readily obtained from street vendors and even from retail stores in the Toronto area.
- Pirate videogames and entertainment software also abound in the Canadian market, much of it imported from Asia. Retail stores in major cities⁵ not only sell pirate videogames - often virtually to the exclusion of legitimate product - but also offer products and services to circumvent technological protections in videogame consoles, thus further perpetuating the pirate market.
- The estimated piracy rate for business software in Canada in 2005 of 36% far exceeds that of the U.S. or of many Western European countries.

These realities point to serious deficiencies in enforcement against piracy, starting at Canada's borders. Canadian customs officers (Canadian Border Services Agency, or CBSA) lack authority to seize even obviously counterfeit products as they enter Canada. Unless a court order has been previously obtained, only the Royal Canadian Mounted Police (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. CBSA officials also lack training in identification of pirate imports, and both agencies are short of dedicated resources to attack this problem. However, there have been encouraging situations in which customs authorities functioned effectively within these limitations. For example, on two occasions in the summer of 2005, customs authorities in Vancouver, while unable themselves to seize counterfeit videogames being transshipped through Canada to Mexico, alerted Mexican authorities, who seized the goods (a total of 115,000 units) when they arrived there.

USTR should press the Canadian government to initiate and adequately fund a coordinated and nationwide program to crack down on importation of pirate goods at all major Canadian points of entry. The new government should also move swiftly to identify which

⁵ The Entertainment Software Association (ESA) reports conducting over 60 investigations in 2005 in the cities of Vancouver, Toronto, Montreal, Quebec City, Calgary and Edmonton.

statutes, regulations or policies must be amended in order to confer meaningful *ex officio* authority on border enforcement agencies, and act promptly to institute the needed changes.

The continued prevalence of pirate product in the retail market indicates another enforcement shortcoming: the RCMP's long-standing reluctance to target retail piracy. Its record of cooperation with right holders to attack piracy is also spotty at best. Examples of unwillingness to share information, reluctance to disclose the inventory of pirate entertainment software product seized, and insistence on formalities such as Canadian copyright registration are all too common. Some industries have noted promising recent developments in enforcement, such as the seizure in November 2005 of more than 250,000 pirate DVDs in raids carried out at three malls, as well as significant criminal actions against vendors of pirated entertainment software; criminal cases were filed against three retailers in Toronto, one of whom has pleaded guilty and been fined. Notwithstanding raids and seizures conducted by law enforcement, the availability of pirated products will not be reduced without criminal prosecutions against infringers and the imposition of deterrent sentences. Crown counsel should be encouraged to take on more copyright infringement cases, and be provided with the training and other support needed to fully prosecute them. Canadian courts should be looked to for more consistently deterrent sentences, including jail time for piracy cases. Canadian authorities should be encouraged to build on the increased enforcement efforts in 2005 by according a high priority to the serious retail piracy problems within their country, and devoting adequate resources to the investigation and prosecution of these cases.

One of the most unsettling new trends is the exponential growth of unauthorized camcording of films in Canadian theaters. Counterfeit optical discs seized in 23 countries have been traced back to "masters" camcorded in Canadian theaters. In 90% of all cases the first pirated copy of a film is sourced from theatrical camcording, and more of the theaters in which this occurs are in Canada than in any other country. Three-quarters of all illegally camcorded films in Canada come out of theaters in Montreal, which was recently identified as the "no. 1 [city] in the world for surreptitious camcording," since pirates can readily create both English and French language masters there.⁶ Thus, Canada is a major contributor to audio-visual piracy worldwide. It is imperative that Canadian authorities step up to the problem by making unauthorized camcording an indictable offense.

⁶ "Pic Pirates hit Canada bilingually," *Weekly Variety*, Dec. 12-18, 2005, at 12.
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