INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®

1747 PENNSYLVANIA AVENUE, NW • SUITE 825 • WASHINGTON, DC • 20006-4637 • TEL (202) 833-4198 • FAX (202) 872-0546 • WWW.IIPA.COM • EMAIL: INFO@IIPA.COM

December 2, 2005

Via electronic submission: FR0528@ustr.gov
Sybia Harrison
Special Assistant to the Section 301 Committee
Office of the U.S. Trade Representative
1724 F Street, NW
Washington, DC 20508

Re: Special 301 Out-of-Cycle Review: Canada

To the Section 301 Committee:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the Special 301 Out-of-Cycle Review concerning Canada.

About IIPA

The IIPA represents associations and companies that have a significant economic interest in the adequate and effective protection of copyrights in Canada. 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. IIPA is comprised of seven trade associations: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).

These member associations represent over 1900 U.S. companies producing and distributing materials protected by copyright laws throughout the world – theatrical films, television programs, home videos and DVDs; musical records, CDs, and audiocassettes; musical compositions; 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); and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). The copyright-based industries are a vibrant force in the American economy.[1]

[1] According to Copyright Industries in the U.S. Economy: The 2004 Report, prepared for the IIPA by Economists, Inc., the U.S. "core" copyright industries accounted for an estimated 6% of U.S. Gross Domestic Product (GDP), or $626.6 billion, and employed 4% of U.S. workers in 2002 (according to the latest data available through that year), or 5.48 million persons. IIPA's report is available at: http://www.iipa.com/copyright_us_economy.html.

The Out-of-Cycle Review

USTR's Special 301 decision last May maintained Canada on the Special 301 Watch List. With respect to copyright issues, USTR cited two main areas of concern: inadequate legal protections for copyrighted works in the digital environment, and deficiencies in copyright enforcement, particularly with regard to border controls. IIPA can report that serious concerns remain in both these areas, and recommends that Canada be maintained on the Watch List after the Out-of-Cycle Review.

Copyright Law Reform

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 so-called 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. Since USTR's decision was announced last May, the Canadian government has unveiled legislation (Bill C-60) that is ostensibly aimed at closing this gap. IIPA applauds the Canadian government's long-overdue decision to move forward with WCT/WPPT compliance legislation; but, we are dismayed by the fact that Bill C-60, while positive in some respects, still falls far short of fully meeting the WCT and WPPT benchmark. We urge Canada 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.[2]

In particular, the provisions of Bill C-60 are entirely out of step with the approach taken by any other country that has sought to implement the provisions of the WIPO Internet Treaties regarding the use of technological protection measures (TPMs) by copyright owners. USTR's Special 301 announcement encouraged Canada to "outlaw[ ] trafficking in devices to circumvent technological protection measures." Bill C-60 does no such thing; it contains no specific prohibition on making, distributing, or trafficking in a circumvention device of any kind. It can hardly be maintained that this provides the adequate and effective legal protection and remedies against circumvention that the WCT and WPPT require.

The Bill's TPM provisions exhibit further shortcomings. While the legislation does prohibit the act of circumvention of some TPMs, the prohibition for the most part applies only if it can be proven that the circumventor acted with an intent to infringe, a huge impediment to enforcement and one that is not authorized by the Internet treaties. Furthermore, the definition of TPM is so narrow that the act of circumvention of access controls – hacking into a password-protected website to access copyright materials posted there, for instance – appears exempted. As a further practical roadblock, the legislation is ambiguous on whether a wide range of copyright defenses would be applicable to most claims. Finally, no criminal penalties are authorized at all.

[2] With the dissolution of Canada's parliament on November 29, Bill C-60 has become inoperative, which provides a new opportunity for the change of course that is needed.

In sum, the approach taken in Bill C-60 appears 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. It is particularly troubling that this lack of effective protection appears to flow not from a misunderstanding of how technology affects the protection of copyright in the digital age, but from a deliberate decision to permit trafficking in circumvention devices so long as they could, in theory, be used for activities that might fall within the scope of exceptions to copyright protection. Canada appears to be turning its back on the approach taken by most other countries, notably the U.S. and the European Union, despite the fact that this mainstream model has worked efficiently to protect emergent technologies and innovation as well as the copyright industries. This cannot be countenanced. There is simply too much at stake in the global marketplace for Canada's neighbors and trading partners to sit idly by while it, in effect, abandons modern copyright protections.

USTR's Special 301 decision also highlighted the importance of Canada's "establishing a 'notice-and-takedown' system to encourage cooperation by ISPs in combating online infringements." Bill C-60 falls far short of this benchmark as well. Instead of "notice and takedown," the legislation creates a "notice and notice" regime, under which an Internet Service Provider is obligated to forward to its subscriber a notice of infringement it receives from the right holder, as well as to retain certain identifying information about the alleged infringer. While this obligation could be a useful supplement to a system that gives ISPs strong incentives to "take down" infringing materials, it is no substitute for it, particularly in the scenario when the ISP itself is storing the materials in question on its system.[3] More generally, the ISP provisions of Bill C-60 appear to create blanket liability exemptions that cover even the act of hosting, that apply regardless of the ISP's knowledge of the infringing character of the activity, and that may bar even injunctive relief. Such a sweeping immunity is far broader than anything that the WIPO Internet Treaties allow. The ISP provisions of the current legislation are ambiguous in a number of respects and require clarification as well as correction of the features summarized above.

Bill C-60 also provides an ill-defined new exception for use of a work in a "lesson, text or examination" in educational settings. Another provision in effect creates a compulsory license for digitizing and online dissemination of a work to any student, wherever located, so long as the student's institution is covered by an existing collective license for printed copies. A third problematic feature of Bill C-60 eliminates the existing provisions for interlibrary loan and replaces them with a provision that appears to authorize interlibrary distribution of digital copies if certain technological safeguards are applied. These proposed educational and library exceptions raise serious questions about Canada's compliance with its existing and anticipated international obligations; such questions should be resolved before provisions on these topics are enacted.

Bill C-60 contains 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 USTR to encourage Canada 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

[3] Moreover, the authorization for ISPs to charge fees for forwarding notices could create a significant financial burden on copyright owners that suffer widespread online infringement and thus might need to send a high volume of notices.

implementation of the WIPO Internet Treaties and its re-entry into the global copyright protection mainstream.

USTR also expressed concern, in its Special 301 report on Canada, about a court decision (BMG Canada v. Doe) effectively legitimizing piracy of sound recordings via peer-to-peer services. IIPA was pleased when, on May 19, 2005, a Federal Court of Appeal decision in this case set aside the lower court's findings with respect to copyright as premature, and listed a number of provisions in the Canadian Copyright Act, all of which had been overlooked in the original decision, and all of which suggest that uploading and/or downloading constitute infringement. While we hope that further interpretation of Canada's current law will even 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 private copying 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.

Enforcement

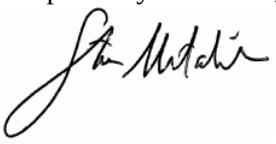
USTR's Special 301 announcement called attention to the weaknesses of Canada's border enforcement system against importation of pirate products. The situation has not significantly improved in the seven months since then. Canadian customs officers (Canadian Border Services Agency, or CBSA) still lack authority to seize even obviously counterfeit products as they enter Canada. Only the Royal Canadian Mounted Police (RCMP) can do this, and coordination between the two agencies is generally not effective. As a result, virtually no seizures at the border have occurred, and an increasing volume of pirate product, including DVDs from East Asia, Pakistan and Russia, and videogames from Asia, is found in the Canadian market. CBSA officials also lack training in identification of pirate imports, and both agencies are short of dedicated resources to attack this problem. 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.

Significant shortcomings are also present in Canada's enforcement efforts against pirate products in the Canadian retail market. Street vendors and even retail stores in the Toronto area increasingly sell pirate DVDs, usually in the DVD-R format. Numerous retail stores in major Canadian cities 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 RCMP has long been reluctant to target retail piracy; it devotes few resources to this area; and its record of cooperation with right holders to attack piracy in the Canadian market is 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. Canadian authorities should be encouraged to build on these efforts by according a higher priority to the serious retail piracy problems within their country, and devoting adequate resources to the investigation and prosecution of these cases. Canadian courts should be looked to for more consistently deterrent sentences, including jail time for serious piracy cases.

The exponential growth of unauthorized camcording of films in Canadian theaters is a disturbing new trend that must be confronted. In the first nine months of 2005, seizures of pirate copies around the world have been traced back to 27 different locations across Canada where camcorded "masters" have been made. Indeed, Canadian theaters collectively are now the world's leading source of pirate masters produced by the camcording method, and thus a major contributor to audiovisual piracy worldwide. The recent crackdown on illegal camcording in the United States may help to explain this trend, but in any case it is now time for Canadian authorities to step up to this problem, through prompt consideration of amendments necessary to make unauthorized camcording an indictable offense.

IIPA appreciates this opportunity to present its views, and would be pleased to provide any further information USTR needs to carry out its Out-of-Cycle Review for Canada.

Respectfully submitted,



Steven J. Metalitz
Senior Vice President
International Intellectual Property Alliance