

CANADA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Canada be maintained on the Special 301 Priority Watch List in 2012.¹

Executive Summary: More than 15 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 and in legislative best practices worldwide. Bill C-11, tabled in September 2011, is the fourth copyright reform proposal in 6 years. Like its predecessors, the Bill takes some critical steps forward toward compliance with the Treaties, including robust anti-circumvention provisions, and a new cause of action that is intended to target online services that primarily enable infringement. However, its approach to the role of service providers in combating online piracy is insufficient and deeply flawed, and it would add a host of new exceptions to copyright protection, many of which are inconsistent with Canada's international obligations under the Berne Convention and TRIPS, and significantly broader than those found in other jurisdictions. Canada should be encouraged to enact the bill this year, but only after its flaws are corrected. 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 inability 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. While we are encouraged by a few examples of improved enforcement responsiveness against physical piracy, and by some improvements in the business software sector, overall the piracy picture in Canada is nearly as bleak as it was a year ago. The country is perpetuating its reputation as a haven where technologically sophisticated international piracy organizations can operate with virtual impunity in the online marketplace. To underscore U.S. insistence that Canada finally take concrete 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 2012.

PRIORITY RECOMMENDED ACTIONS FOR CANADA IN 2012

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]).
- Establish clear liability and effective remedies against those who operate illicit file sharing services, or whose actions are otherwise directed to promoting infringement.
- Ensure that any new exceptions or limitations to copyright protection conform to international standards, and avoid the risk of unintended consequences due to overly broad construction.
- Enact strong legal incentives for Internet Service Providers (ISPs) to cooperate with copyright owners in combating online piracy, including by limiting the scope of liability safe harbors in accordance with international best practices.

¹For more details on Canada's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2012SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2012 global issues, see our cover letter at <http://www.iipa.com/pdf/2012SPEC301COVERLETTER.pdf>.



Enforcement

- 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.
- 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.
- Make the 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, (including online).

COPYRIGHT LEGAL REFORM AND RELATED ISSUES

Canada's main legislative challenge has persisted for more than a decade: to modernize its laws and bring them into full compliance with the globally accepted minimum benchmarks for modern copyright legislation (including the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). The pending Bill C-11, like its immediate predecessor, 2010's Bill C-32,² is a promising but flawed proposal. Although the bill's stated objectives deserve strong support, its actual text fails to achieve them in significant respects. While some of Bill C-11's provisions would bring Canada much closer to compliance with modern global copyright norms, others would take it farther from current best practices and even raise serious questions about compliance with its existing international obligations.

Technological Protection Measures (TPMs): 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 and technologies aimed at circumventing TPMs, and with the provision of circumvention services, and to define violations without imposing onerous requirements to prove the intent of the alleged violator. Legislation should also provide a reasonable regime of civil and criminal remedies, both for acts of circumvention and for trafficking in circumvention technologies or offering circumvention services, while also recognizing some reasonable exceptions to the prohibitions.

Bill C-11 is a major step in the right direction and largely meets these criteria. The main concerns in this area involve the scope of some exceptions, and the provision (proposed section 41.21) authorizing recognition of additional exceptions by regulation. Such an authorization is prudent to allow the law to adapt to unforeseeable technological and market changes, but the Bill C-11 provisions may cross the line from commendable flexibility to debilitating unpredictability. In particular, we urge that regulations be limited to exempting a class of technological measures from protection against the act of circumvention, not against trafficking in devices, technologies or services; the latter, more sweeping exceptions, with greater potential to harm the marketplace, should require new legislation. Second, the authority to recognize further exceptions to the prohibition on the act of circumvention should not extend to requiring copyright owners to provide access to works for beneficiaries of the new exceptions. Third, any additional exceptions recognized should be time-limited, not permanent, so that there will be a reconsideration of whether the conditions that gave rise to the need for a regulatory exception still exist three or four years later.

Making Available Right: Bill C-11 falls short in providing an exclusive making available right for sound recording producers, as required by Article 14 of WPPT. Proposed section 18.(1.1)(a) appears to do so (dubbing it a "sole right," like other exclusive rights in the law). However, proposed section 67.1(4)(b) seems to prohibit any lawsuit for infringement of this exclusive right (without Ministerial consent) until a tariff has been filed with the Copyright Board covering the work in question. Such a precondition of prior approval by a government ministry might be

²Legislative action on Bill C-32 was underway at the time Parliament was dissolved for national elections that were held in April 2011.

suitable for claims of equitable remuneration, but is entirely inapt in the case of an exclusive right. This provision must be changed if Canada is to achieve the government's stated intention of using Bill C-11 to fully comply with the WCT and WPPT.

Online Piracy: It is a matter of high priority that copyright reform legislation in Canada effectively address the pervasive problem of Internet piracy. Bill C-11 does include one potentially useful – but seriously flawed – new legal tool in this arena. Otherwise, it largely follows the unsatisfactory path laid down by the three previous copyright reform proposals.

Proposed section 27(2.3) creates a new form of secondary liability for infringement, for providing a service via the Internet which the provider “knows or should have known is designed primarily to enable acts of copyright infringement,” so long as some actual (primary) infringement occurs through use of the service. The principle behind this “enablement” provision deserves strong support, but its potential for providing an effective and deterrent remedy will not be realized unless the provision is revised in at least the following ways:

- It should incorporate a standard more in line with global norms by covering not just services that are “designed primarily” to enable infringement, but also those that evidence shows are “operated with the object of enabling or inducing infringement.”
- None of the four “service provider” exceptions should bar claims under this provision. As currently drafted, the hosting and caching exceptions (proposed sections 31.1(3) and (5)) could be read to apply enablement claims. This would shield massive commercial enablers from all liability for inducing infringement, depending on their choice of technology for doing so.³
- Those liable under the new provision should be subject to statutory damages. Proposed section 38.1(6)(d) inexplicably immunizes such enablers from Canada's statutory damages regime. Enablers, including those like Canada's IsoHunt that profit from massive commercial scale infringers, should not be immune from this effective deterrent remedy.

Bill C-11, like its predecessors, continues to take a blanket immunity approach (rather than a remedial limitation) for a number of network services activities. This casts serious doubt on whether right holders could ever obtain an injunction to prevent infringements carried out using a service provider's systems, e.g., an order removing an infringing file that is being hosted by a service provider. Additionally, contrary to international best practices, there are no threshold requirements to qualify for these immunities. Even a provider who took no steps with regard to known repeat infringers would be eligible for full immunity.

The immunities themselves are much too broad. The hosting immunity in proposed section 31.1(5) (read together with section 31.1(6)) is especially problematic since it contains no conditions at all (including with regard to responsiveness to copyright owner notices of infringing activity). It seems that a party who “provides digital memory” for use by others “for the purpose of allowing the telecommunication of a work through the Internet or another digital network” can never be liable for infringing activity that it hosts, unless it knows that a court has adjudged the user's conduct to be infringing. No takedown would ever be required in order to preserve immunity, which the party could enjoy even with respect to infringing material within its knowledge and under its control. This immunity is far broader than safe harbors provided to hosting services elsewhere in the world. Such broad immunities will do little to encourage needed cooperation between network service providers and content owners, and will instead promote lack of accountability and willful blindness on the part of ISPs.

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

³Making the hosting exception inapplicable to enablement claims is particularly critical, since sites that host and stream or permit downloading of illegitimate content are a significant and growing source of illicit distribution of content online.

observed that enacting such a procedure would be an “effective remedy” for the problem.⁴ But the current Canadian Government, like its predecessors, remains steadfastly opposed to the procedure. Bill C-11 continues this unfortunate trend, and provides no alternative expeditious means of removing or disabling access to infringing content hosted online.

Instead, the bill confines itself to the same flawed “notice and notice” regime proposed by the Canadian Government years ago. Requiring ISPs to forward notices from copyright owners to infringing end-users, and to preserve identifying information on those end-users for six months, may have value, particularly in the peer-to-peer (P2P) environment. Yet this value is limited if notice after notice is sent with no prospect of real consequences for the infringing end-user.⁵ The value of the proposed “notice and notice” regime is further compromised by the lack of any requirement that ISPs keep track of notices, so that repeat infringers are not repeatedly sent the same notice which they have ignored previously. To treat the first-time violator identically with the serial offender virtually guarantees that the notices will have no deterrent effect.

A properly designed and implemented “notice and notice” system is a complement to, not a substitute for, notice and takedown. Particularly if coupled with an obligation to implement policies for identifying and addressing repeat infringers, combining these approaches could be a useful part of a system that gives ISPs strong incentives to effectively address the dissemination of infringing materials.⁶

Similarly, services meeting the exceptionally broad definition of “information location tool” in proposed section 41.27 (“any tool that makes it possible to locate information that is available through the Internet or another digital network”), which arguably could encompass P2P services, BitTorrent trackers, etc., can claim immunity (other than from injunctions) even if they never “take down” links to infringing materials after notice, so long as they pass along those notices.

In sum, Bill C-11 not only fails to address online piracy effectively; it could in fact exacerbate it. The bill provides some of the most sweeping immunities in the world to network service providers without creating any standards that would provide meaningful 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 have actual knowledge of infringement and the power to restrict or prevent it, the bill provides safe harbors to far more than just innocent intermediaries. 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.”⁷

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 per work infringed. Bill C-11 takes some significant steps backwards. First, as noted above, it inexplicably makes statutory damages unavailable in actions against the most culpable violators: massive, commercial scale operations directed at enabling infringement. Second, it limits statutory damages to a range of C\$100 - C\$5,000 for all infringements carried out by any defendant for “non-commercial purposes.” Even this meager award is available only to the first copyright owner to seek a statutory damage award against a given defendant. All other right holders would be barred from seeking statutory damages. Indeed, statutory damages would be entirely eliminated for all other infringements carried out by that defendant prior

⁴Society 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>.

⁵This is precisely why the voluntary “notice and notice system” in which some Canadian ISPs participate has had no appreciable impact on online infringements.

⁶There are also a number of unanswered questions about the “notice and notice” provisions of proposed section 41.25-26 in Bill C-11, such as how the statutory damages of C\$5,000-C\$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.

⁷See WCT, Art. 14.2; WPPT, Art. 23.2.

to the date that the first copyright owner's lawsuit was filed. These sharp limitations can be invoked by institutional as well as individual defendants, and (unlike in some previous bills) they apply even to infringements not carried out for "private purposes." It seems likely that acts such as posting massive amounts of copyright material on a website or otherwise making it freely available for downloading would qualify for the statutory damages limitations, so long as such acts are "non-commercial," a term the bill does not define.

It is likely that these provisions would render the statutory damages option ineffective where it is compellingly needed: in the online environment, including in P2P cases against non-commercial but large scale infringers.⁸ For example, where a defendant operates a publicly accessible server to which he uploads a copy of a work – or of hundreds or thousands of works – 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. Canada's existing statutory damages scheme 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, Article 41. That gap will rapidly reopen if these infringing activities are treated as "non-commercial," thus replacing statutory damages with a de facto C\$100-C\$5,000 retrospective license for unlimited non-commercial infringement by anyone caught uploading any number of infringing copies.

Copyright exceptions: Much of Bill C-11 consists of nearly a score of new or expanded exceptions to copyright protection. Many of these raise significant questions. For example:

(1) Fair dealing (section 29): "Education" would be added to research and private study as uses that qualify for the fair dealing exception. Because "education" is not defined, this could be a dramatic change, with unpredictable impacts extending far beyond teaching in bona fide educational institutions, and weakening protections for a wide range of works. Under Canadian precedent, consideration of the impact on the market for a work is not the predominant factor in a fair-dealing analysis; and Canadian courts are required to give the terms in this section a "large and liberal interpretation".⁹ Book and journal publishers are particularly concerned about the impact on well-established collective licensing mechanisms for administering permissions to copy works for educational use. While a "market failure" concern may justify extension of fair dealing to parody and satire, such a concern is absent in the case of an "education" expansion of the exception.

(2) Non-commercial user generated content (proposed section 29.21): This unprecedented provision allows any published work to be used to create a new work, and the new work to be freely used or disseminated, including through an intermediary, so long as the use or authorization for dissemination (though not necessarily the dissemination itself) is "solely for non-commercial purposes" and does not have a "substantial adverse effect" on the market for the underlying work. The provision substantially undermines the exclusive adaptation right that Canada is obligated under TRIPS and Berne to provide; provides an unjustifiable safe harbor for commercial disseminators; and applies even when the use of the underlying work violates a contract, exposes a trade secret, or requires circumvention of a TPM. In effect, the exception appears to enable wholesale appropriation of an existing work provided some minimal modification is made. At a minimum, the exception requires substantial amendment to meet international standards.

(3) Private copying (proposed section 29.22): Any legitimate and legally-obtained (other than by borrowing or renting) copy of a work may be further copied if the reproduction is "used only for private purposes" – a phrase that remains undefined, and may not be limited to the private purposes of the copier. The exception is not limited to format-shifting; it applies to all works (including computer programs and cinematographic works on DVD, which were excluded from the exception in some earlier bills; it contains no numerical limitations on the number of copies or for

⁸Of course, as already noted, statutory damages would be denied altogether in claims against parties that knowingly enable online infringement, under Sec. 27(2.3).

⁹*CCH Canadian v. Law Society of Upper Canada*, 2004 SCC 13. See also *SOCAN v. Bell Canada et al.*, 2010 FCA 139 (Federal Court of Appeal holding that 30-second previews offered by commercial online music services qualify as copying for "research" for fair dealing purposes).

whom they can be made; and it is silent on whether the exception trumps a contractual prohibition on copying. The two main limitations – that the exception does not apply if a technological protection measure has been circumvented, and that all copies made under the exception must be destroyed if the user gives up possession of the source copy – are not sufficient to dispel concerns about this very broad exception, which needs substantial trimming.¹⁰

(4) Back-up copies (proposed section 29.24): Copying of any work, a copy of which the user owns or is licensed to use, is permitted “solely for back-up purposes,” and so long as the source copy is non-infringing, no TPM is circumvented, the back-up copy is not distributed, and all back-up copies are destroyed once the user no longer owns or has a license for the source copy. Apparently an unlimited number of copies would be permitted, and there would be no limitation to originals in vulnerable formats. Presumably the more specific (and more limited) back-up copy provision applicable to computer programs under current section 30.6(b) would continue to apply to software, but this should be clarified, and the justification for any broader exception for other works should be explained.

(5) Educational exceptions: Some of these expand on exceptions that are already in the Copyright Act, but others (proposed sections 30.01-04) are entirely new. For example, proposed section 30.04 would immunize 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; but the exception would not apply if the user knows or should have known that the work was made available online without consent of the copyright owner. The provision still seems to allow infringement of a work obtained offline so long as the same work is available somewhere online without a TPM. This should be re-examined, taking into consideration both the scope of Canada’s existing fair dealing exceptions for research and private study, and applicable international standards. Other concerns about these proposed education exceptions include the practical enforceability of some of the conditions on their exercise, and in some cases their impact on well-functioning established collective management systems for licensing, which seemingly would be replaced by untested compulsory licenses.

(6) Library/museum/archive exceptions: These involve expansions of existing exceptions, notably for inter-library loan (ILL). Proposed section 30.2(4) and (5) would take ILL into the wholly digital realm. Under it, libraries may choose to pool their resources and decide to divide the purchasing of printed or digital works (such as professional or scholarly journals) among themselves. Each library would then provide access to its collection of works to the patrons of all other libraries through an on-demand delivery mechanism, whether through the Internet or other networked means. With business models that facilitate one-off electronic delivery of single articles continuing to evolve, such an exception is unjustified. It threatens to drastically reduce incentives to explore new business models and new ways of providing consumers access to reading materials when and where they want them. Additionally, though the proposed provision requires that the providing library take measures to prevent further distribution of the digital copies, it fails to define what such measures should be and does not require that the measures actually be effective.

(7) Computer program exceptions: The first of these would expand existing section 30.6 so that a licensed user of a computer program, as well as an owner of a copy, could adapt or modify the copy in order to run on a particular computer. This calls into question the principle that any license agreement that is enforceable under general provisions of contract law should govern relations between a software publisher and a user with respect to the software. The second (proposed section 30.61) would create a new exception allowing reproduction of an owned or licensed program for purposes of interoperability with “any other computer program.” The latter provision omits many of the safeguards appearing in comparable statutes of most other countries, and when considered in conjunction with the interoperability exception for circumvention, could effectively prevent a company from taking any

¹⁰Bill C-11 fails to make the needed legislative amendment to Canada’s existing private copying exception for sound recordings (section 80), to clarify that it applies only to individuals who make copies for their own use from recordings they already own. Any broader application of the private copy exception would raise serious questions about Canadian compliance with its WTO TRIPS obligations.

measures to protect proprietary software from tampering, modification or reverse engineering. This proposal demands close scrutiny.

(8) Temporary copies: Proposed section 30.71 immunizes any copying that “forms an essential part of a technological process,” lasts no longer than the duration of the “process,” and has the sole purpose of facilitating a non-infringing use. None of the key terms is defined and the word “temporary” appears only in the title of the section. When considered in combination with the wide range of uses that would henceforth be considered “non-infringing,” this could prove to be a very broad exception.

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. Two parliamentary committees that issued reports in 2007 on the problems of counterfeiting and piracy called for this reform, along with other essential changes, including:¹¹

- 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.

Adopting all these Parliamentary recommendations would repair long-standing defects in Canadian law, and help to provide the legal framework necessary for effectively addressing piracy.

COPYRIGHT PIRACY AND ENFORCEMENT

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 on digital networks. 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: A 2010 joint study conducted by IPSOS and Oxford Economics for the Motion Picture Association documents the harm inflicted by movie piracy on the Canadian economy. The report estimates more than C\$1.8 billion and 12,600 full-time equivalent jobs were lost across the entire Canadian economy in 2009-10 as a result of movie piracy. It also estimated direct consumer spending losses to the movie industry, i.e. cinema owners, distributors, producers and retailers, at C\$895 million (US\$898 million); tax losses to government at C\$294 million; (US\$295 million) and a loss of GDP of C\$965 million (US\$968 million) across the Canadian economy.¹²

An increasing share of this damage is inflicted online. Canada is home to some of the world’s most popular Internet sites dedicated to piracy. Because Canada is viewed as a country in which laws to address digital piracy are

¹¹See reports from the Standing Committee on Public Safety and National Security, <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>.

¹²Canadian Motion Picture Distributors Association/Canadian Association of Film Distributors and Exporters News Release “Ipsos/Oxford Economic Study Reveals \$1.8 billion in Losses Across the Canadian Economy due to Movie Piracy”, February 17,2011, http://www.mpa-canada/CMPDA-CAFDE_news-release_ottawa-ON_February-17-2011_EN.pdf

weak, ineffective or non-existent, many sites dedicated to piracy claim that their services are legal there. Although the locus of pirate sites tends to shift across borders to avoid enforcement efforts, Canada has consistently been home to the operators or hosts of some of the world's top pirate BitTorrent sites. 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, TV shows, and other copyright materials.

As an example, IsoHunt, which boasts that it is “one of the 200 largest websites on the Internet,” has operated with impunity from Canada for more than 8 years.¹³ A U.S. court issued a permanent injunction against IsoHunt after finding that over 90% of the downloads made using IsoHunt's services related to infringing content and that the defendants were liable for inducing infringement.¹⁴ Yet its Canadian operator continues to openly run the site and has commenced an action in Canada seeking a declaration that its operations do not violate Canadian law. IsoHunt is ranked as the fourth most popular infringing BitTorrent site in the world, with another Canadian-hosted site, kat.ph, ranking third.¹⁵ Both Isohunt and Kat.ph (formerly KickAssTorrents) were cited by USTR in its Notorious Markets list released in December 2011, along with a third BitTorrent Indexing site with Canadian connections, torrentz.eu, which is an aggregator of dozens of leading BitTorrent sites.¹⁶ The scope of these mega-sites is staggering: IsoHunt receives over 1.2 million visitors per month (according to Compete.com), and claims to handle 142 queries from users every second, or over 12 million per day.¹⁷ The sites directly impact the U.S. market; for instance, in October 2011, IsoHunt attracted 180,000 unique users from the United States. But smaller pirate sites also use Canada as a base for disrupting other global markets for audio-visual product; for instance, a number of French language torrent and peer-to-peer services are operated from the province of Québec.

Online piracy of audio-visual material in Canada damages independent producers as well as the major studios. Internet piracy prevents the establishment of legitimate online distribution platforms and services for consumers, which independents can use to finance future productions. The Independent Film and Television Alliance (IFTA) reports that online piracy in Canada remains a significant export constraint for independent producers and distributors, the majority of which are small to medium sized businesses. It has also begun to impact financing and distribution of independent content. Authorized distributors find it almost impossible to compete with the Internet pirates, and so are increasingly unable to commit to distribution agreements. The drastically lower license fees that distributors can offer in this environment are inadequate to assist in financing of independent productions. Minimum guarantees for license fees for all licensed uses of content – including DVD, television, and online rights – are being undermined by piracy. In a marketplace dominated by illegal content, often offered free to the consumer, legitimate Canadian distributors that pay taxes and employ workers find it increasingly difficult to develop viable legal offerings, and are being pushed out.

In the offline world, the Motion Picture Association of America (MPAA) reports that through greater engagement of police forces in the Greater Toronto area (GTA), notably the Toronto Police Services, York Police Department, and RCMP, the level of illegal distribution and sale of counterfeit DVDs in GTA malls has decreased. The hard goods piracy problem for the motion picture industry is now concentrated in the nearby Peel Region, where distribution and sales of pirate product are highly organized on a large scale, especially in flea markets. More than 30 vendors openly display counterfeit DVDs at various flea markets in this region. The problem is likely to persist until other regional police forces become more engaged in the fight against piracy. Enforcement efforts continued in Peel Region in 2011, with over 1 million counterfeit DVDs surrendered to industry investigators.

¹³“Celebrate! 8 Years of IsoHunt Torrent Search,” at <http://isohunt.com/forum/viewtopic.php?t=693393&start=0&postdays=0&postorder=asc&highlight=&sid=>, (visited 1/28/11).

¹⁴Columbia Pictures Industries, Inc. v. Fung, CV 06-5578 SVW (JCx), 2009 U.S. Dist. LEXIS 122661, at * 39-53 (C.D. Cal. Dec. 21, 2009). The U.S. court concluded with respect to IsoHunt and related sites that “evidence of intent to induce infringement is overwhelming and beyond dispute;” that the sites “engaged in direct solicitation of infringing activity” and that their “business model depends on massive infringing use.”

¹⁵“Top 10 Most Popular Torrent Sites of 2012,” <http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2012-120107/> (visited 1/28/11)

¹⁶See http://www.ustr.gov/webfm_send/3215.

¹⁷“Celebrate! 8 Years of IsoHunt Torrent Search,” at <http://isohunt.com/forum/viewtopic.php?t=693393&start=0&postdays=0&postorder=asc&highlight=&sid=>, (visited 1/28/11).

Entertainment software: In 2011, the Entertainment Software Association's (ESA) investigations uncovered a number of instances of retail piracy in Québec, British Columbia, and Ontario involving sales of pirated software to local consumers. Pirates openly advertised these operations on the Internet through their own websites and/or online classifieds, such as Kijiji and Craigslist, and via social networking sites. Some of these pirates also operated stores, often found in malls, including the notorious Pacific Mall, and some of these 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, as well as personal computers and modified consoles containing hard drives pre-installed with sometimes hundreds of pirated copies of games; and circumvention or modification devices (including installation services).

The widespread availability of circumvention devices in Canada, which are not clearly prohibited under Canadian law, also serves to aggravate the piracy problem. As noted earlier, circumvention devices, such as mod chips and game copiers, enable the playback of pirated games by bypassing the TPMs in game consoles. Computer software that effects a "soft modification" of the security technology of game consoles, and thereby facilitates the play of pirated games, is widely available on sites hosted in Canada and are used by Canadian circumvention services. 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 engaging only in sales of circumvention technologies and services, thereby allowing them to induce and/or facilitate game piracy without fear of prosecution. The lack of TPM protections in Canada also enables vendors to import circumvention devices from overseas manufacturers by the thousands and then export them to buyers in the United States and other countries where such devices are illegal. Because these pirates recognize no borders, Canada functions as a safe haven from which they can redistribute circumvention devices around the world. Some of the sites through which circumvention devices are sold to U.S. consumers relocated their hosting from the U.S. to Canada to continue operations. Efforts by RCMP and Canadian prosecutors to clamp down on this activity as violations of computer intrusion laws have been thwarted by courts in Québec, further underscoring the lack of effective remedies.

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 console games that were unlawfully downloaded. Indeed, two of the world's leading Internet sites dedicated to the sale of circumvention devices for all current consoles are based in Canada, although they market aggressively to U.S. customers and price products in U.S. dollars. Both these sites – modchip.ca and consolesource.com – appear on the USTR list of notorious online markets released in December 2011.¹⁸ At least one of the world's top sites dedicated to aggregating links to pirate entertainment software – fullreleases.net – is also Canadian-based. These sites' practices are vigorously and publicly defended by the Canadian Coalition for Electronic Rights, an advocacy group that represents circumvention businesses and which continues to actively lobby to defeat Bill C-11.

Business software: Unlicensed use of software by business end users accounts for the largest part of piracy losses in the business software sector. However, active enforcement efforts are having a positive impact on the end-user piracy problem, though it remains serious, particularly in the province of Québec. Online piracy of business software is also a serious problem.¹⁹

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

¹⁸See http://www.ustr.gov/webfm_send/3215.

¹⁹BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Canada was 28%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$693 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

patronize illegal online sources of copyright material, thus stunting the availability and growth of legal alternatives. For example, according to Nielsen SoundScan Canada, the digital share of total album sales in Canada was 19.1% in 2010, compared with 26.5% in the US.

Overwhelmed by competition from “free” music on the Internet, retail sales of music in Canada have dropped by more than half since 1999, including a 13.5% total decrease in 2010. 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 Canadian Response

These realities point to serious deficiencies in enforcement against piracy. Much of the problem is attributable to Canada’s inability to advance copyright law reform. For example, only when Canada’s copyright law is modernized to include clear criminal prohibitions against trade in circumvention devices 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.

Canadian government inaction has effectively handcuffed its law enforcement agencies at the border, a key anti-piracy battlefield. 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 obtained,²⁰ 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 deficiency and has been studying the issue for years, it has failed to introduce the necessary legislative changes.²¹

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. Until Canada adopts a modernized legal regime that includes such tools, prospects for progress against online piracy will remain dim.

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. Both CBSA and RCMP lack 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.²²

²⁰Court 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.

²¹Both parliamentary committees that studied this topic in 2007 called explicitly for such amendments to be enacted.

²²The 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.

Nevertheless, there are some encouraging signs, notably the increased and largely effective law enforcement engagement against sales of pirate DVDs in the GTA malls, as well as improved law enforcement activity against game piracy in 2011 in Toronto and Québec. This commendable engagement should be sustained and expanded to other law enforcement agencies. Police agencies have responded well to anti-piracy training programs offered by industry, but too often lack the resources to properly investigate IP crimes or to prepare the cases for prosecution. On the whole though, the Canadian law enforcement commitment to act against copyright piracy, especially on the retail level, remains under-resourced.²³ ESA reports that in most of the country, police action generally depends on 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.

The continued prevalence of pirate product in Canada's retail market reflects the Canadian Government's failure to provide RCMP with adequate enforcement resources, and shows that its record of cooperation with right holders to attack piracy, while improving, 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. 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. 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, and prosecutors generally lack specialized training, and too often fail to advocate fervently for imposition of deterrent penalties. The result is that those few pirates who are criminally prosecuted generally escape any meaningful punishment.²⁴ This is true even for some recidivists involved with large commercial operations, for which a financial penalty is merely the cost of doing business. Almost all ESA cases in 2011 resulted in modest penalties with no jail time, for example.

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."²⁵ The weak penalties obtained also discourage prosecutors from bringing cases, and encourage recidivism. The 2010 regulations authorizing the confiscation of proceeds of copyright infringement as a remedy in criminal cases could help to interrupt this vicious cycle, but only if prosecutors invoke them and courts implement them vigorously.

The U.S. Government 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

²³The 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.

²⁴While 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.

²⁵See Public Safety and National Security Committee report, at 12. RCMP has been saying this consistently in policy assessments going back at least 12 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.

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.²⁶

While the shortcomings of Canada's legal regime hinder any efforts at criminal prosecution of the online piracy that is prominent in the market, the law also fails to provide adequate incentives for service providers to cooperate with right holders in dealing with online infringement. A voluntary code of conduct, to which a number of the major ISPs subscribe, calls for a "notice and notice" system, under which ISPs are supposed to pass along to their subscribers notices received from copyright owners regarding infringing activity. There is no indication that this voluntary system has had any material effect on the problem, no doubt because even repetitive notices to subscribers carry no consequences. Even though the ISP customer service agreements prohibit the use of their services for copyright infringement, and provide for suspension or termination of service for violations, these provisions have never been enforced, at least not publicly, which is the only way that they could have any widespread deterrent effect. ISPs do not even track how many notices are sent to any individual subscriber, and thus have disabled themselves from instituting any effective repeat infringer program. Not until there are stronger legal incentives for effective cooperation against online piracy is the situation likely to improve.

²⁶Numerous recommendations of the parliamentary committees echo these concerns.