



**HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
OTTAWA, CANADA**

39th Parliament, 1st Session

The Standing Committee on Industry, Science and Technology has the honour to present its

**EIGHTH REPORT**

Pursuant to Standing Order 108(2), and the motion agreed to by the Committee on Wednesday, March 21, 2007, your Committee has studied the Counterfeiting and Piracy of Intellectual Property and has agreed to report the following:

**COUNTERFEITING AND PIRACY ARE THEFT**

**Report of the Standing Committee on Industry, Science and Technology**

**June 2007**

## LIST OF RECOMMENDATIONS

### RECOMMENDATION 1

That the Government of Canada establish an annual reporting system to provide statistics on the efficacy of the Canadian intellectual property enforcement system. In particular, the reporting system should track:

1. The number of open RCMP counterfeit and piracy investigations and approximate length of time that these investigations have been open;
2. the number of charges laid and criminal sentences obtained against counterfeiters and pirates;
3. the number of counterfeit and pirated shipments that have been seized by the Canada Border Services Agency (CBSA);
4. the country of origin of the counterfeit or pirated goods; and
5. the approximate value of the counterfeit or pirated goods seized.

### RECOMMENDATION 2

That the Government of Canada enact legislation that clearly defines trademark counterfeiting as a specific criminal offence under the *Trade-marks Act*.

### RECOMMENDATION 3

That the Government of Canada create a criminal offence for manufacturing, reproducing, importing, distributing and selling counterfeit goods.

### RECOMMENDATION 4

That the Government of Canada make the manufacture, sale, and distribution of fake labels of authenticity an offence in the *Criminal Code*.

### RECOMMENDATION 5

That the Government of Canada enact legislation clearly defining offences for commercial circumvention activities and making persons who distribute pirated digital works and who manufacture and/or distribute circumvention devices for commercial gain liable.

### RECOMMENDATION 6

That the Government of Canada remove the *Copyright Act* from the list of excluded Acts contained in the *Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence" (Proceeds of Crime)*.

#### **RECOMMENDATION 7**

**That the Government of Canada strengthen civil remedies for counterfeiting and piracy infringements.**

#### **RECOMMENDATION 8**

**That the Government of Canada make provisions for the imposition of personal liability on the directors and officers of a corporation that engages in counterfeiting or piracy, and shareholder liability if it is a shell corporation.**

#### **RECOMMENDATION 9**

**That the Government of Canada introduce administrative monetary penalties for the importation and exportation of counterfeit and pirated goods. The penalties should be set sufficiently high to act as an effective deterrent.**

#### **RECOMMENDATION 10**

**That the Government of Canada increase damages and penalties under the *Copyright Act*.**

#### **RECOMMENDATION 11**

**That the Government of Canada provide the Canada Border Services Agency (CBSA) and law enforcement officials with the express authority to target, detain, seize, and destroy counterfeit and pirated goods on their own initiative and in accordance with due process and Canadian law. The CBSA should also implement policies promoting the detection of such goods, such as mandatory reporting of brand information with shipments.**

#### **RECOMMENDATION 12**

**That the Government of Canada formalize intelligence sharing between the Canada Border Services Agency and the RCMP.**

#### **RECOMMENDATION 13**

**That the Government of Canada amend the RCMP/Department of Justice Copyright Enforcement Policy to target both piracy and counterfeiting, and to place a higher priority on piracy and counterfeiting activities at the retail level.**

#### **RECOMMENDATION 14**

**That the Government of Canada provide the RCMP and the Department of Justice with adequate resources to effectively address counterfeiting and piracy.**

#### **RECOMMENDATION 15**

**That the Government of Canada provide Health Canada officials with sufficient resources to investigate counterfeit food and drug complaints.**

#### **RECOMMENDATION 16**

**That the Government of Canada immediately encourage prosecutors to seek more significant penalties for counterfeiting and piracy violations, including imprisonment.**

#### **RECOMMENDATION 17**

**That the Government of Canada ratify the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.**

#### **RECOMMENDATION 18**

**That the Government of Canada make provisions for the release of information and samples to intellectual property rights holders for the purposes of determining whether detained goods are counterfeit or pirated and enabling intellectual property rights holders to exercise civil remedies.**

#### **RECOMMENDATION 19**

**That the Government of Canada establish an Intellectual Property Crime Task Force, a partnership between government and industry, composed of police officers, customs officers, and federal prosecutors to work with intellectual property business leaders in order to guide and coordinate anti-counterfeiting and anti-piracy efforts in Canada.**

## INTRODUCTION

The term “counterfeiting” is commonly used to refer to a broad range of intellectual property (IP) rights infringements, including both trademark and copyright infringements. Technically, “counterfeiting” refers only to cases of trademark infringement, whereas “pirating” refers to copyright infringement. Often, different types of IP rights infringements overlap. For example, music piracy infringes copyright as well as trademark protection. Fake toys are often sold under a different name but infringe the design protection of the toy.<sup>(1)</sup>

According to the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (“the TRIPs Agreement”), counterfeiting and piracy are defined as follows:

(a) *counterfeit trademark goods* shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

(b) *pirated copyright goods* shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.<sup>(2)</sup>

In a recent report, the Canadian Anti-Counterfeiting Network (CACN) used the terms “counterfeiting” and “piracy” interchangeably to refer to unauthorized

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<sup>(1)</sup> OECD, *The Economic Impact of Counterfeiting*, 1998, <http://www.oecd.org/dataoecd/11/11/2090589.pdf>.

<sup>(2)</sup> Footnote 14, Article 51, World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

knock-offs of legitimate products.<sup>(3)</sup> The Committee, in this report (unless stated otherwise) uses the TRIPS definitions of “counterfeiting” and “piracy.”

The House of Commons Standing Committee on Industry, Science and Technology (“the Committee”) began hearings on counterfeiting and piracy on 25 April 2007 and held four meetings on the issue; the Committee’s focus was on the economic impact of these two types of IP violations. At about the same time, the House of Commons Standing Committee on Public Safety and National Security also began a study of counterfeiting and piracy. The focus of its study was on the health and safety impacts of these activities.

This report focuses on seven main policy issues that were raised during the Committee’s hearings and presents recommendations to the Government of Canada on each issue. The goal of the Committee’s recommendations is to help improve IP protection and enforcement in Canada, and reduce the incidence of counterfeiting and piracy activities.

## **POLICY ISSUES AND RECOMMENDATIONS**

### **1. STATISTICS AND ECONOMIC IMPACT**

Counterfeiting of trademarked goods started as a localized industry focused on the copying of high-end designer products such as watches, handbags, and golf clubs. These “knock-off” goods were priced at a small fraction of the retail value of the “real thing” such that neither fraud nor significant economic harm resulted.<sup>(4)</sup> Both vendor and purchaser generally knew that these goods were knock-offs, and, for the most part, there were no ensuing losses of sales incurred by the manufacturer of the high-end, designer product. In such cases, designer products and their much cheaper unauthorized

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<sup>(3)</sup> Canadian Anti-Counterfeiting Network, *Report on Counterfeiting and Piracy in Canada: A Road Map for Change*, May 2007, p. 1, [http://www.cacn.ca/PDF/CACN%20Releases/Roadmap\\_for\\_Change.pdf](http://www.cacn.ca/PDF/CACN%20Releases/Roadmap_for_Change.pdf).

<sup>(4)</sup> Nevertheless, an intellectual property rights infringement is committed and there is always an ensuing loss of tax revenue from underground economic activity even though such revenue has been deemed not worth pursuing given the cost enforcement.

copies were operating in two distinct markets such that neither product substitution nor degradation of product quality (from that implied by the trademark) occurred.

Today, the counterfeit products industry has developed into a sophisticated global business involving the manufacturing and sale of counterfeit versions of a large range of low- and high-end goods, including electrical products, batteries, cigarettes, alcoholic beverages, golf clubs, automobile parts, motorcycles and pharmaceuticals. In addition to the counterfeiting of trademarked products, IP theft also involves the piracy of copyright products in both digital and analogue formats (e.g., books, music, video and software).

Although once viewed by the casual observer as a “victimless crime” and a problem only for rich countries, today counterfeiting and piracy pose a number of societal concerns across developed and developing countries alike. Anecdotal evidence presented to the Committee suggest that the sale of counterfeit and pirated products is adversely affecting the sale of legitimate products – in effect, “bad” products are driving out “good” products – profits and investments of and by reputable manufacturers are decreasing as a consequence, counterfeit products are injuring people or causing adverse health effects, and organized crime is involved. Moreover, tax revenue losses can no longer be assumed to be insignificant.

The Committee attempted to obtain data on the size and extent of the counterfeit and pirated products “industry.” The manufacture, import/export and sale of counterfeit and pirated products are, by their very nature, “black market” activities, and a black market cannot be measured with precision: people do not self-incriminate and some companies do not want to publicize a counterfeiting or piracy problem since it may adversely affect their brands. For these reasons, statistics on counterfeit and pirated products are, at best, very crude estimates based on suspected and/or seized counterfeit and pirated goods (a best-guess multiplicative factor is often used to obtain the global estimate).

The Committee therefore accepts the witnesses’ reliance on a 1998 Organisation for Economic Co-operation and Development (OECD) study that puts the

trade in counterfeit and pirated goods at about 5% of world trade,<sup>(5)</sup> which, if still appropriate in 2007, would be somewhere between US\$350 billion and US\$600 billion. In Canada, the Canadian Manufacturers & Exporters estimates that the counterfeit industry is valued at C\$20 to 30 billion annually, or 2% to 3% of Canada's merchandise imports and exports combined.<sup>(6)</sup>

The current high level of activity in counterfeit and pirated goods can be attributed to a number of factors: (1) advances in technology; (2) increased international trade and emerging markets; and (3) more products that are attractive to copy, such as software and branded clothing. Counterfeiters can realize large profit margins by substituting cheaper inputs and circumventing critical production techniques in the manufacture of sophisticated products whose quality, safety and/or performance cannot be ascertained by the consumer – and sometimes even by experts – prior to purchase. The trademark, which may bestow a premium stream of profit on its rights holder, thus provides a quality-assurance service for the consumer, but it may also signal activity susceptible to counterfeiting in the absence of criminal enforcement. Furthermore, the low detection rate (resulting from a combination of little enforcement activity and potential legislative deficiencies) combined with minimal fines upon conviction are, not surprisingly, treated as an additional, speculative “cost of doing business,” rather than as deterrent. Folding the shell corporation (i.e., a company with no tangible assets) and re-emerging under a different corporate banner is a common strategy upon conviction; the testimony heard by the Committee suggested that recidivism was high.

Obtaining estimates of Canada's economic losses resulting from counterfeiting and piracy is even more difficult than quantifying the economic value of the activity because the cause-and-effect relationship between the sale of a counterfeit or pirated product and the loss in sales of the authorized product is difficult, if not impossible, to establish with an acceptable degree of confidence. Moreover, the loss of sales and profit does not fully describe society's losses from counterfeiting and piracy.

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<sup>(5)</sup> OECD, *The Economic Impact of Counterfeiting*, 1998, p. 23. The study notes that “there is no substantial aggregated data to support the high percentages, but the figures are now accepted and used to illustrate the extent of the counterfeiting problem.”

<sup>(6)</sup> Canadian Manufacturers & Exporters (CME), Position Paper – *Intellectual Property Rights in Canada and Abroad*, June 2006, [http://www.cme-mec.ca/pdf/CME\\_IPR0606.pdf](http://www.cme-mec.ca/pdf/CME_IPR0606.pdf).

The Committee was told that counterfeiting and piracy results in job losses in the manufacturing and retailing sectors, lower levels of research and development, and reduced investment and lower tax revenues.

In terms of losses to specific Canadian industries, one witness estimated that losses from software piracy exceeded C\$730 million in 2005, resulting in 32,000 job losses and C\$345 million in tax losses. Another witness suggested that the annual consumer spending loss in Canada due to film piracy in 2005 was approximately C\$270 million, while the loss of tax revenues due to film piracy in Canada in 2005 was approximately C\$41 million. Some counterfeit products, such as counterfeit medicines, also pose a health and safety risk because they may contain an incorrect dose, the wrong ingredients, dangerous additives, or no active ingredients at all, which could result in potentially serious health risks to patients. Furthermore, unsafe and dangerous electrical products may cause property damage and may also have life-threatening effects.

The Committee believes that improvements in the statistical tracking and study of counterfeiting and piracy are possible if further resources are allocated to this undertaking. In terms of statistics on the Canadian IP enforcement system, the Committee recommends:

**That the Government of Canada establish an annual reporting system to provide statistics on the efficacy of the Canadian intellectual property enforcement system.**

**In particular, the reporting system should track:**

- 1. The number of open RCMP counterfeit and piracy investigations and approximate length of time that these investigations have been open;**
- 2. the number of charges laid and criminal sentences obtained against counterfeiters and pirates;**
- 3. the number of counterfeit and pirated shipments that have been seized by the Canada Border Services Agency (CBSA);**
- 4. the country of origin of the counterfeit or pirated goods; and**
- 5. the approximate value of the counterfeit or pirated goods seized.**

## 2. LEGISLATION

Intellectual property laws confer a bundle of exclusive rights upon authors and inventors for a limited period, allowing them to better exploit their works and invention. The rationale for the creation of such rights is that they facilitate and encourage the pursuit of innovation (i.e., increase the profitability associated with innovation by discouraging unauthorized copies from entering the marketplace and competing with the original) and the disclosure of knowledge into the public domain for the common good (i.e., thereby reducing secrecy as a profit-making strategy and permitting others to improve upon the innovation). The IP right is the only industrial tool that rewards the innovator commensurate with the innovation's commercial prospects.

In Canada, the following federal laws and regulations, which are administered by the Canadian Intellectual Property Office (with the exception of the *Plant Breeders' Rights Act*), relate to the protection of IP:<sup>(7)</sup>

- *Patent Act*;
- Patented Medicines (Notice of Compliance) Regulations;
- *Copyright Act*;
- *Trade-marks Act*;
- *Industrial Design Act*;
- *Integrated Circuit Topography Act*; and
- *Plant Breeders' Rights Act*.

In terms of controlling counterfeiting and piracy specifically, other pertinent federal legislation includes the *Food and Drugs Act*, the *Customs Act*, the *Canada Border Services Agency Act* and the *Criminal Code*.

Intellectual property rights are private rights found in both the common law and in federal statutes. When transgressed, the individual rights holder is responsible for enforcing them through civil proceedings. In terms of the *Trade-marks Act* and the *Copyright Act* specifically, both allow rights holders to obtain remedies by way of

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<sup>(7)</sup> Industry Canada, Intellectual Property Policy Directorate, Laws and Regulations, [http://www.strategis.ic.gc.ca/epic/site/ippp-dppi.nsf/en/h\\_ip00007e.html](http://www.strategis.ic.gc.ca/epic/site/ippp-dppi.nsf/en/h_ip00007e.html).

damages, interlocutory or final injunctions, and the return of goods in the event a court finds in the rights holder's favour. Similarly, both Acts empower rights holders with the ability to commence civil proceedings seeking a court order directing the Canada Border Services Agency (CBSA) to detain suspected counterfeit or pirated goods at the border. However, with regard to this last measure, rights holders have had difficulty in obtaining the necessary information for a court order prior to the arrival of a shipment. The Committee heard that for this reason, the court order has been used, on average, less than once a year and only five times in the last eight years.

Since copyright law is purely statute-based, disparities between trademark and copyright law exist. For example, under the *Copyright Act*, but absent from trademark law, there are pre-set damages – the *Copyright Act* contains statutory damages of between \$200 and \$20,000 per infringement; the actual amount awarded is at the discretion of the court based on the intent of the infringer. Thus, when somebody is proven to have violated the *Copyright Act*, the Act provides for the court to award damages without proof of actual damages sustained by the rights holder. This is not the case when a violation under the *Trade-marks Act* has been proven. Furthermore, the RCMP and Crown prosecutors will take action only pursuant to the *Copyright Act*, and not the *Trade-marks Act*, because there are no criminal dispositions in the *Trade-marks Act*, which means the Crown must prove that a fraud occurred and lay charges under the *Criminal Code*. Finally, the RCMP has no authority to seize criminal proceeds under the *Copyright Act*.

Parliament has already deemed some activities involving counterfeit and pirated goods to be sufficiently harmful at the societal level to warrant criminal sanction. There are longstanding provisions in the *Criminal Code* prohibiting persons from forging trademarks and possessing equipment for the purpose of forging trademarks. There are also criminal prohibitions in the *Copyright Act* for various commercial activities involving pirated goods, such as selling, renting, offering for sale or rent, exhibiting or distributing for the purpose of trade, or importing for the purpose of sale or rent.

The *Customs Act* permits the CBSA to detain goods that are prohibited, controlled, or regulated by any Act of Parliament. However, there is no legislation that specifically identifies counterfeit or pirated goods themselves as prohibited, controlled, or

regulated. Under the *Copyright Act*, the pirated goods themselves are not prohibited; rather, the offence is against a person who knowingly makes, sells, or imports the goods for sale.

Many of the witnesses that appeared before the Committee suggested that Canada's laws are generally adequate to deal with ordinary infringement, but not counterfeiting and piracy. The vast majority of these witnesses argued for reform of all of the Acts discussed in this section by criminalizing more counterfeiting and piracy activities. However, this Committee recognizes that criminal law is public law and deals with behaviour believed to constitute an offence against society as a whole or to a government's authority and legitimacy. The decision to criminalize counterfeiting and piracy activities that have traditionally been addressed civilly should not be taken lightly. While openly acknowledging that definitive proof of the degree of societal harm caused by these activities does not exist and will never be forthcoming, the Committee recognizes that the harm to society from counterfeiting and piracy does warrant criminal status.

The Committee believes that further criminal sanctions should be added to Canada's legal framework for IP protection in order to combat counterfeiting and piracy. It therefore makes the following recommendations:

**That the Government of Canada enact legislation that clearly defines trademark counterfeiting as a specific criminal offence under the *Trade-marks Act*.**

**That the Government of Canada create a criminal offence for manufacturing, reproducing, importing, distributing and selling counterfeit goods.**

**That the Government of Canada make the manufacture, sale, and distribution of fake labels of authenticity an offence in the *Criminal Code*.**

**That the Government of Canada enact legislation clearly defining offences for commercial circumvention activities and making persons who distribute pirated digital works and who manufacture and/or distribute circumvention devices for commercial gain liable.**

**That the Government of Canada remove the *Copyright Act* from the list of excluded Acts contained in the *Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence" (Proceeds of Crime)*.**

**In addition, the Committee strongly endorses the Government of Canada's recent move to criminalize the unauthorized camcording of a movie in a movie theatre.<sup>(8)</sup>**

The Committee is also of the opinion that civil remedies for counterfeiting and piracy could be improved. For this reason, it makes the following recommendations:

**That the Government of Canada strengthen civil remedies for counterfeiting and piracy infringements.**

**That the Government of Canada make provisions for the imposition of personal liability for the directors and officers of a corporation that engages in counterfeiting or piracy, and shareholder liability if it is a shell corporation.**

Finally, in terms of improvements to the legal framework to protect IP and fight counterfeiting and piracy, the Committee believes that damages and penalties should either be increased or, in some cases, introduced, in order to act as an effective deterrent against these activities.

**That the Government of Canada introduce administrative monetary penalties for the importation and exportation of counterfeit and pirated goods. The penalties should be set sufficiently high to act as an effective deterrent.**

**That the Government of Canada increase damages and penalties under the *Copyright Act*.**

### **3. ENFORCEMENT**

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<sup>(8)</sup> On 01 June 2007, Bill C-59 *An Act to amend the Criminal Code (unauthorized recording of a movie)* received first reading in the House of Commons. The Bill seeks to amend the *Criminal Code* to prohibit the unauthorized camcording of a movie in a movie theatre.

In order to properly protect IP rights, an adequate IP enforcement system is essential. However, many witnesses suggested that Canada's enforcement regime lags behind those of other developed countries, where, for example, specialized police and prosecutorial resources are dedicated to IP rights enforcement. These witnesses recommended that CBSA and RCMP policies (or mandates, as required) be changed to place a higher priority on combating counterfeiting and piracy, and that these agencies be given the resources necessary to carry out this work. Groups such as the CACN informed the Committee that there are insufficient government resources directed towards the enforcement of IP laws in Canada, and that innovation and Canada's global competitiveness are suffering as a result.

### **Border Enforcement**

Some countries have established stringent measures in an attempt to stop counterfeit and pirated goods at their borders. For instance, France takes a hard line against the importation of counterfeit goods. Signs in French airports warn travellers that customs agents will seize any counterfeit goods they find, even if the good is a fake designer purse for the traveller's personal use. The United States has specialized teams of police and prosecutors dedicated to the enforcement of IP rights and the prosecution of violators. Customs officials there do not need to obtain permission from the police before seizing suspected counterfeit or pirated goods; they may do so on their own initiative.

In Canada, the *Customs Act* permits the CBSA to detain goods that are prohibited, controlled, or regulated by any Act of Parliament. However, there is no legislation that specifically identifies counterfeit or pirated goods themselves as being prohibited, controlled, or regulated. The CBSA can detain (for a limited period of time) counterfeit or pirated goods only if either the IP holder has obtained a court order or the RCMP (or local police officers) agree to seize the goods. While there are two, small joint CBSA/RCMP teams in Toronto and Montreal to coordinate the agencies' efforts, the Committee heard from the RCMP that these teams are overwhelmed and do not have enough resources to investigate most cases of IP crime. Despite establishing economic integrity — including IP rights — as one of its five priorities, many witnesses testified that the RCMP needs more resources to effectively combat counterfeiting and piracy. In

2005, the force laid over 700 charges involving IP crime, however, the RCMP testified that the force has only enough resources to investigate a small fraction of the cases brought to its attention.

The Committee believes that Canada's border enforcement policies should be modernized to target pirated and counterfeited goods, and that customs officials should be empowered to perform this task. It therefore recommends:

**That the Government of Canada provide the Canada Border Services Agency (CBSA) and law enforcement officials with the express authority to target, detain, seize, and destroy counterfeit and pirated goods on their own initiative and in accordance with due process and Canadian law. The CBSA should also implement policies promoting the detection of such goods, such as mandatory reporting of brand information with shipments.**

The Committee is also of the opinion that collaboration between the CBSA and RCMP with respect to targeting counterfeit and pirated goods at the border can be improved. For this reason the Committee recommends:

**That the Government of Canada formalize intelligence sharing between the Canada Border Services Agency and the RCMP.**

### **Enforcement Resources**

The RCMP and Department of Justice's Copyright Enforcement Policy<sup>(9)</sup> is intended to promote a more strategic and effective deployment of scarce enforcement resources. For that purpose, it identifies the type of criminal infringement appropriate for investigation and prosecution. The policy stipulates that "cases selected for investigation and prosecution should, as a matter of priority, constitute copyright piracy on a commercial scale" (i.e., commercial infringement by a manufacturer, wholesaler or

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<sup>(9)</sup> RCMP / Department of Justice, Copyright Enforcement Policy, <http://www.justice.gc.ca/en/dept/pub/fps/cep/index.html>. N.B. The policy deals specifically with copyright piracy and not trademark counterfeiting.

importer.) Under the policy, infringement at the retail level is not an enforcement priority in its own right.

The Committee was told, however, that even some retailers are now involved in large-scale piracy activities. For example, witnesses reported that whereas it once took sophisticated factories with multi-million dollar equipment to produce CDs and DVDs, today raids on suspected IP rights violators are finding equipment capable of pirating hundreds of CDs and DVDs per hour hidden in the backrooms and basements of retailers. While witnesses reported that most retailers, and especially those with a reputation for selling high quality goods, want to assist in the fight against counterfeit and pirated goods, there are a handful of retailers that profit from the violation of IP rights.

The Committee is of the opinion that the RCMP and Department of Justice should be placing a higher priority on piracy and counterfeiting infringements at the retail level, and that the joint enforcement policy should refer explicitly to both counterfeiting and piracy activities. For these reasons, the Committee recommends:

**That the Government of Canada amend the RCMP/Department of Justice Copyright Enforcement Policy to target both piracy and counterfeiting, and to place a higher priority on piracy and counterfeiting activities at the retail level.**

Witnesses reported that when police do raid locations known for selling counterfeit and pirated goods, stores are closed, market stalls torn down, and suspects flee to avoid being arrested. According to the CACN, so many suspects take off at the first sign of law enforcement, that in some raids conducted by the RCMP, only 10% to 15% of suspects are apprehended. In parts of the United States, landlords can be held liable if their retail tenants sell counterfeit or pirated goods. Doing so helps overcome enforcement problems caused by the transitory nature of many counterfeiters and pirates, but may place an unfair burden on landlords to monitor their tenants. Nonetheless, difficulties in prosecuting retailers have led some groups to recommend such measures be applied in Canada.

The Committee wants to ensure that the RCMP, Department of Justice and other government departments and agencies have adequate resources to stem counterfeiting and piracy activities in Canada. It therefore recommends:

**That the Government of Canada provide the RCMP and the Department of Justice with adequate resources to effectively address counterfeiting and piracy.**

**That the Government of Canada provide Health Canada officials with sufficient resources to investigate counterfeit food and drug complaints.**

#### **4. PROSECUTION**

According to the CACN, there is inadequate enforcement of IP rights at both the police and prosecutorial levels. The reasons for this void are: (1) inadequate police resources; (2) inadequate prosecutorial resources; and (3) lack of training or expertise in the prosecution of criminal IP offences. The CACN asserts that very few prosecutors have a substantive knowledge of IP criminal law in Canada and no Canadian prosecutors dedicate themselves exclusively to IP crime. Jurisdictional issues may also affect the prosecution (and enforcement) of counterfeiting and piracy violations. Primary responsibility for IP crime enforcement lies with the Federal Enforcement Branch of the RCMP. The branch deals with enforcement of federal statutes, including the *Copyright Act* and has authority to lay charges under the *Criminal Code*. However, federal prosecutors generally do not prosecute matters under the *Criminal Code* and provincial and local law enforcement and prosecutors, generally do not lay charges or prosecute under the *Copyright Act*. Furthermore, criminal prosecutions, including for IP offences, are heard by provincial courts and not by the Federal Court of Canada, the court having the most expertise in IP matters in Canada.<sup>(10)</sup>

In addition to civil remedies that are available under the Copyright and Trademark statutes, Canadian law also contains criminal penalties for certain counterfeiting and piracy offences. The *Copyright Act* provides criminal penalties for

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<sup>(10)</sup> Brian Isaac and Carol Osmond, *The Need for Legal Reform in Canada to Address Intellectual Property Crime*, January 2006, <http://www.cacn.ca/PDF/CACN%20Position%20Paper%20January%202006%20Clean.pdf>.

infringement of copyright that include fines of up to \$1 million and imprisonment for up to five years. Criminal provisions for misuse of trademarks are part of the *Criminal Code*, and are generally enforced by provincial authorities. Punishment for trademark offences is imprisonment for a term not exceeding two years. Despite the existence of severe penalties for some offences, the Committee heard that in the rare cases where counterfeiters are prosecuted, they typically end up paying minimal fines (usually less than \$10,000) and serving no jail time. Even in the most serious cases, fines are typically \$25,000 or less.<sup>(11)</sup> Many witnesses argued for increased penalties for counterfeiting and piracy offences. However, as pointed out by one witness, even with increased penalties, there is no guarantee that stronger punishments will be handed out by the courts. Although the Committee believes that increasing the penalties for counterfeiting and piracy offences is important, it is also of the opinion that the justice system should be imposing stiffer penalties for such offences within the limits of current legislation. The Committee therefore recommends:

**That the Government of Canada immediately encourage prosecutors to seek more significant penalties for counterfeiting and piracy violations, including imprisonment.**

## **5. CANADA'S INTERNATIONAL OBLIGATIONS**

According to international agreements, Canada has agreed to provide effective criminal enforcement against wilful trademark counterfeiting and copyright piracy on a commercial scale, as well as to implement border measures to prevent the importation of counterfeit and pirated goods. For example, both TRIPS and NAFTA require criminal enforcement and border measures. As noted in earlier sections of this report, Canada does have a legal framework to protect intellectual property rights and combat counterfeiting and piracy.

Despite the existence of this legislation, Canada continues to find itself on the United States Trade Representative's (USTR) "Special 301" Watch List. The Special

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<sup>(10)</sup> Canadian Anti-Counterfeiting Network, *Report on Counterfeiting and Piracy in Canada: A Road Map for Change*, May 2007, p. 11.

301 annual review examines IP rights protection in 87 countries. Canada was placed on the list for the thirteenth consecutive year in 2007 because it has not ratified and implemented the WIPO Internet Treaties<sup>(12)</sup> and does not prohibit the unauthorized camcording of films in movie theatres.<sup>(13)</sup> The USTR also suggests that Canada needs to improve its IP rights enforcement system at the border so that it can take effective action against the trade in counterfeit and pirated products within Canada, as well as curb the amount of infringing products transiting through Canada. The United States did commend Canada for issuing regulations correcting deficiencies in its system for protecting against unfair commercial use of pharmaceutical data generated to obtain regulatory approval.<sup>(14)(15)</sup>

The Committee understands the importance of the WIPO Internet Treaties and therefore makes the following recommendation:

**That the Government of Canada ratify the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.**

## **6. GOVERNMENT/INDUSTRY ACTIVITIES AND COLLABORATION**

Collaboration between enforcement agencies, government departments and industry, in concert with an adequate IP protection regime and anti-counterfeiting/piracy measures from industry, is considered to be a key element in properly protecting IP rights and reducing IP crime. In Canada, a federal interdepartmental working group on intellectual property issues, which is comprised of

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<sup>(12)</sup> The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty [http://www.wipo.int/freepublications/en/ecommerce/450/wipo\\_pub\\_l450in.pdf](http://www.wipo.int/freepublications/en/ecommerce/450/wipo_pub_l450in.pdf).

<sup>(13)</sup> On 01 June 2007, Bill C-59 *An Act to amend the Criminal Code (unauthorized recording of a movie)* received first reading in the House of Commons. The Bill seeks to amend the *Criminal Code* to prohibit the unauthorized camcording of a movie in a movie theatre.

<sup>(14)</sup> United States Trade Representative, *2007 Special 301 Report*, 30 April 2007, [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2007/2007\\_Special\\_301\\_Review/asset\\_upload\\_file980\\_11122.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file980_11122.pdf).

<sup>(15)</sup> On 18 October 2006, the Government of Canada published Regulations Amending the Food and Drug Regulations. One of the amendments was to increase the market exclusivity (i.e., data protection) period for pharmaceutical products from five to eight years.

10 departments and agencies, is responsible for studying options to improve Canada's IP regime and for preparing recommendations for each department's Minister. The group receives input and advice through surveys, round tables, and seminars from such stakeholders as the Canadian Chamber of Commerce and the CACN.

According to industry representatives that testified before the Committee, industry is doing its part to protect its own IP. For example, companies such as Microsoft engineer their software with anti-piracy devices and spend millions of dollars each year pursuing pirates in civil court. Since 2003, the motion picture industry has imprinted watermarks on its films that allow its investigators to examine pirated movies and determine the theatre at which they were made. Industry is also involved in educating government officials about IP infringement. The Canadian Standards Association and Underwriters Laboratories run anti-counterfeiting workshops to teach officials the dangers that counterfeiting poses to health and safety and how to detect counterfeit products.

Witnesses from companies and organizations affected by counterfeiting and piracy suggested that their efforts to protect their IP could be better coordinated with those of the federal government. IP rights holders need to provide detailed information about a shipment of suspected counterfeit or pirated goods to receive a court order to seize it. Obtaining this information is often difficult due to the clandestine nature of IP violators. However, customs agents and police officers frequently come across these details during the course of their investigations. The witnesses suggested that if the CBSA and the police are unable to take action against counterfeiters and pirates, that they provide the rights holders with any information they have that would facilitate the rights holder obtaining a court order to impound the goods. The Committee agrees with this suggestion and therefore recommends:

**That the Government of Canada make provisions for the release of information and samples to intellectual property rights holders for the purposes of determining whether detained goods are counterfeit or pirated and enabling intellectual property rights holders to exercise civil remedies.**

Some witnesses also suggested that the CBSA implement an IP rights registry. Rights holders who are concerned that imported goods may violate their copyrights and trademarks could register these marks with the CBSA. The registry would serve to highlight to the CBSA goods that may be at increased risk of being counterfeited or pirated, provide detail as to how to differentiate a counterfeit or pirated good from the genuine article, and offer information on possible IPR violators. The United States and some European countries already have such registries, and the CACN credits them with assisting in the seizure of tens of thousands of shipments of counterfeit and pirated goods.

A few witnesses requested that there be better collaboration among law enforcement officials, federal prosecutors and industry to fight counterfeiting and piracy activities in Canada. The Committee agrees and recommends:

**That the Government of Canada establish an Intellectual Property Crime Task Force, a partnership between government and industry, composed of police officers, customs officers, and federal prosecutors to work with intellectual property business leaders in order to guide and coordinate anti-counterfeiting and anti-piracy efforts in Canada.**

## **7. EDUCATION AND PUBLIC AWARENESS CAMPAIGNS**

Several groups note that stronger education campaigns are required in Canada to inform manufacturers, distributors, retailers, consumers and others about the economic and social impact of counterfeiting and piracy. Many members of the public view infringements related to counterfeiting and piracy as being victimless and harmless. The CACN presented the Committee with the results of a survey of Canadians that it had commissioned indicating that 28% of respondents had knowingly purchased counterfeit products, and another 12% had found out later that they had done so.<sup>(16)</sup> The combined figure (40%) is more than triple the proportion (13%) found in the United States by a similar survey.

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<sup>(16)</sup> POLLARA, “Canadians Are Three Times More Likely Than Americans to Buy Counterfeit Goods, New Poll Finds” 27 February 2007, <http://www.pollara.com/Library/News/counterfeit.html>. The online poll was based on a 16-20 February 2007 survey of 2,034 online households, selected at random from the Canadian online population. The poll had an estimated sampling error of plus or minus 2.2% in 19 out of 25 cases. The complete survey results are available at [www.cacn.ca](http://www.cacn.ca).

Groups such as the CACN want the public perception about such activities to change, and are encouraging the federal government to invest further in the area of public education and awareness campaigns. Public campaigns would inform local communities, businesses, and the public on the potential benefits of the intellectual property protection regime, and of buying legitimate goods and services that foster innovation and economic growth. It would also inform them of the health and safety dangers involved with certain counterfeit products. Witnesses pointed to public education campaigns in countries such as France (“*Contrefaçon: Non Merci*”) as being good examples of collaborative efforts among government, industry and consumer groups to stop counterfeiting and piracy.

## **CONCLUSION**

The Committee views trademark counterfeiting and copyright piracy as a drain on the Canadian economy, and, in the case of some counterfeit goods, as a threat to public health and safety. The Committee is of the opinion that a stronger legislative framework and adequate financial and human resources are important for the fight against counterfeiting and piracy in Canada. It believes that the recommendations made to the Government of Canada in this report will help reduce the manufacture, importation, distribution and sale of counterfeit and pirated goods in Canada.

## Appendix A: Summary of Witness Recommendations

Issue	Recommendation	Witnesses
<b>Statistics and Economic Impact</b>	Establish a reporting system to provide statistics and precedents for the Canadian IP enforcement system.	Canadian Anti-Counterfeiting Network
<b>Legislation – Offences</b>	Enact legislation that clearly defines trademark counterfeiting as a specific criminal offence under the <i>Trade-marks Act</i> .	Canadian Recording Industry Association; Canadian Anti-Counterfeiting Network; Microsoft Canada Co.
	Enact legislation to make cam-cording in a theatre a criminal offence.	Canadian Recording Industry Association; Canadian Anti-Counterfeiting Network; Canadian Motion Picture Distributors Association; Daniel Drapeau
	Implement legislation clearly prohibiting the importation of counterfeit goods.	Canadian Recording Industry Association
	Create a criminal offence for manufacturing, reproducing, importing, distributing and selling counterfeit goods.	Intellectual Property Institute of Canada; Canadian Manufacturers & Exporters; Eaton Electrical; Daniel Drapeau
	Make the manufacture, sale, and distribution of fake labels of authenticity an offence in the <i>Criminal Code</i> .	Microsoft Canada Co.
	Enact criminal legislation clearly defining offences for criminal circumvention activities (including trafficking in circumvention devices) and treat those activities as well as the commercial distribution of pirated digital works as a criminal enforcement priority	Canadian Anti-Counterfeiting Network; Entertainment Software Association of Canada

Issue	Recommendation	Witnesses
	Remove the <i>Copyright Act</i> from the list of indictable offences excluded from Proceeds of Crime legislation.	Canadian Anti-Counterfeiting Network; Intellectual Property Institute of Canada; Canadian Motion Picture Distributors Association
	Provide strict liability offences.	Canadian Manufacturers & Exporters
	Impose personal liability of directors and officers of a corporation; shareholder liability if it is a shell corporation.	Intellectual Property Institute of Canada
	Improve the summary proceeding in the <i>Copyright Act</i> and add a similar (improved) proceeding to the <i>Trade-marks Act</i> .	Intellectual Property Institute of Canada
<b>Legislation – Penalties</b>	Provide statutory damages and penalties under the <i>Copyright Act</i> .	Intellectual Property Institute of Canada; Daniel Drapeau
	Increase damages and penalties under the <i>Copyright Act</i> .	Intellectual Property Institute of Canada; Entertainment Software Association of Canada
	Introduce administrative fines for the importation of counterfeit goods. The fines should be set sufficiently high to act as an effective deterrent.	Canadian Anti-Counterfeiting Network
<b>Legislation – Civil remedies</b>	Strengthen civil remedies for counterfeiting and piracy, including: <ul style="list-style-type: none"> <li>• Specialized injunctions and seizure orders upon proof of counterfeit and pirated activities;</li> <li>• Summary enforcement proceedings; and</li> <li>• Minimum “floor level” statutory damage awards and heightened damage awards for wilful or repeat offenders.</li> </ul>	Canadian Anti-Counterfeiting Network; Microsoft Canada Co.

Issue	Recommendation	Witnesses
	Enact civil legislation that clearly makes persons who manufacture and/or distribute counterfeiting tools, such as mod chips, liable for contributory copyright infringement.	Canadian Anti-Counterfeiting Network; Entertainment Software Association of Canada
	Provide civil remedies for clear cases of counterfeit and IP theft.	Canadian Manufacturers & Exporters
<b>Legislation – Treaties</b>	Immediately implement the provisions of the WIPO Copyright and Performance and Phonograms treaties.	Microsoft Canada Co.
	Committee should clearly state that the counterfeiting file should proceed independently from the WIPO Internet treaties and the broader issues of copyright reform.	Michael Geist, Professor, Internet Law, University of Ottawa
<b>Legislation – Enforcement and Resources</b>	Empower customs officials.	Canadian Recording Industry Association
	Provide the CBSA with the express authority to detain, target, seize and destroy counterfeit goods on its own initiative.	Canadian Recording Industry Association; Microsoft Canada Co.
	Provide the RCMP and the Department of Justice with adequate resources to effectively address counterfeiting.	Microsoft Canada Co.
	Grant power to seize to all peace officers.	Intellectual Property Institute of Canada
<b>Legislation – Other</b>	Amend the <i>Radiocommunication Act</i> to address: <ul style="list-style-type: none"> <li>• New forms of signal theft;</li> <li>• Increase criminal penalties to facilitate effective enforcement;</li> <li>• Limit importation of satellite receiving and decoding tools; and</li> <li>• Strengthen civil remedies.</li> </ul>	Canadian Anti-Counterfeiting Network
<b>Enforcement</b>	Amend the RCMP/Department of Justice Copyright Enforcement Policy to target piracy and counterfeiting at the retail level.	Polyform Foam Plastics Inc.; Underwriters Laboratories Inc.

Issue	Recommendation	Witnesses
	Establish, and sufficiently fund, an Intellectual Property Crime Task Force, composed of police officers, customs officers, and federal prosecutors to work with IP business leaders in order to guide and coordinate anti-counterfeiting and anti-piracy efforts in Canada.	Canadian Anti-Counterfeiting Network
	Provide the Canada Border Services Agency with the express authority to target, detain, seize, and destroy counterfeit goods on its own initiative and to implement policies promoting the detection of such goods, such as mandatory reporting of brand information with shipments.	Canadian Anti-Counterfeiting Network; Canadian Manufacturers & Exporters
	Provide the RCMP and the Department of Justice with adequate financial and human resources to effectively address counterfeiting.	Canadian Anti-Counterfeiting Network; Underwriters Laboratories Inc.; Caccia Fashions.
	Formalize intelligence sharing and investigative enforcement management through cooperation between the RCMP and CBSA.	Canadian Anti-Counterfeiting Network
	With respect to counterfeit goods, priority should be given to public safety and security concerns.	Michael Geist, Professor, Internet Law, University of Ottawa
<b>Prosecution</b>	Immediately encourage prosecutors to seek more significant penalties, including jail time.	Canadian Anti-Counterfeiting Network
<b>Government/Industry Activities and Collaboration</b>	Make provisions for the disclosure of information and the provision of samples to IP rights holders for the purposes of determining whether detained goods are counterfeit and enabling IP rights holders to exercise civil remedies.	Canadian Anti-Counterfeiting Network

Issue	Recommendation	Witnesses
	<p>Adopt a recordation system whereby IP rights holders may record their rights with CBSA and highlight “high-risk” products that are known or likely counterfeit targets.</p>	<p>Canadian Anti-Counterfeiting Network</p>
<p><b>Education and Public Awareness</b></p>	<p>Establish a federal Intellectual Property Coordination Council consisting of senior civil servants and IP rights holders whose key objectives would include:</p> <ul style="list-style-type: none"> <li>• Creating and implementing educational programs, with emphasis on Canadian youth, that teach the rationale for and importance of intellectual property;</li> <li>• Communicating with IP right holders to ensure that their IP needs are being met by the current application of the laws;</li> <li>• Developing broad-based marketplace framework policies that focus on sustaining and growing the creation and exploitation of IP in Canada;</li> <li>• Ensuring that all government departments recognize the importance of IP in the creation and development of strategies designed to make Canada more competitive and innovative; and</li> <li>• Creating and implementing specialized enforcement educational programs, e.g., educating police, customs officers, prosecutors, and the judiciary, to assist in sophisticated and efficient IP enforcement and adjudication.</li> </ul>	<p>Canadian Anti-Counterfeiting Network</p>

## **REQUEST FOR GOVERNMENT RESPONSE**

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 56, 57, 58, 59, 62, 63, 67, 68, 69, and 70 is tabled.](#))

Respectfully submitted,

**JAMES RAJOTTE**  
*Chair*

## NDP SUPPLEMENTARY OPINION

**Brian Masse, M. P.  
Windsor West  
NDP Industry Critic**

### **POLICY INSTRUMENTS**

#### **ENFORCEMENT**

With foreign counterfeiting and intellectual property theft having a significant impact on our manufacturing industries, in particular the tool, die, and mould sectors as well as auto and aerospace sectors, additional measures are needed to intervene to halt the serious economic damage that is occurring. Therefore the NDP recommends,

**That the Government of Canada establish as part of the Intellectual Property Crime Task Force, an enforcement division composed of RCMP and CBSA agents deployed to the five largest exporting countries to Canada that have significant counterfeiting and intellectual property (IP) theft occurring within them. This enforcement agency is to work with police and law enforcement personnel in those foreign countries to prevent the export of counterfeit and IP violating products from those countries into Canada. The priority of the enforcement agency is to focus on industrial products from the auto, aerospace, transport, tool, die, and mould sectors.**

#### **TRADE REMEDIES**

To ensure the foreign countries cooperation in preventing and prosecuting counterfeiting and intellectual property theft within their own countries against corporations and individuals who are resident therein, the NDP recommends,

**That the Government of Canada amend the appropriate legislation to allow for the banning of products involved in intellectual property and counterfeiting legal disputes, whether criminal or civil, until the conclusion of the legal action. Furthermore, that tariffs maybe placed on any of products of any country, which has a company or individual found to be manufacturing and exporting to Canada products which are either counterfeit or are the result of intellectual**

**property theft. The tariffs imposed are to be set to recover not only the economic loss to Canadian companies and individuals but also to create a disincentive to counterfeiting and intellectual property theft within the foreign country that the company or individual originates. Finally, if the counterfeit product injures the health or safety of individuals, additional penalties maybe imposed on any product that originates from that foreign country where the counterfeit product originates. These penalties are to compensate the Canadian victims and potential victims. These penalties are in addition to the tariffs.**