



**HOUSE OF COMMONS  
CANADA**

**COUNTERFEIT GOODS IN CANADA –  
A THREAT TO PUBLIC SAFETY**

**Report of the Standing Committee on  
Public Safety and National Security**

**Garry Breitkreuz, MP  
Chair**

**May 2007**

**39th PARLIAMENT, 1st SESSION**

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# **THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY**

has the honour to present its

## **TENTH REPORT**

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the issue of Counterfeit Goods and agreed to report the following:





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# COUNTERFEIT GOODS IN CANADA — A THREAT TO PUBLIC SAFETY

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## A. Introduction

### Context of the Study

On March 20, 2007, the Standing Committee on Public Safety and National Security decided to hold information sessions on counterfeit goods in Canada, with specific emphasis on the health and safety risks that some of these goods present. The next day, the Standing Committee on Industry, Science and Technology decided to undertake “a study of the Counterfeiting and Piracy of Intellectual Property.”<sup>1</sup> The study undertaken by this Committee concerns, among others things, the effects of counterfeiting and piracy on the Canadian economy. It was still under way when this report was adopted.

From March 27 to April 26, 2007, our Committee held three meetings at which it heard testimony from experts on intellectual property rights and from representatives of departments and agencies involved in the fight against counterfeiting and piracy in Canada and abroad. The witnesses invited to appear had all been proposed by members of the Committee (a list of witnesses who appeared before the Committee is set out in Appendix A and a list of submissions, in Appendix B of this report).

This report summarizes the statements made during those hearings and presents our observations and recommendations in an effort to raise awareness of the health and safety aspects of counterfeit goods in Canada. In light of the evidence heard, we have concluded that the time has come to strengthen our laws and to allocate more resources to the curtailment of the increasingly disturbing phenomenon of counterfeiting.

### Organization of the Report

This report has four sections. The first section defines counterfeiting of goods and piracy of copyright material. The second provides an overview of counterfeiting and piracy in the world, with particular attention to the situation in Canada. The third section briefly explains the means available to the public authorities and intellectual property owners in Canada to stem the tide of counterfeiting and piracy. The fourth section deals with the weaknesses of the Canadian approach to combating counterfeiting and the measures that Canada could take to more forcefully combat the trade in counterfeit goods.

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1 Pursuant to Standing Order 108(2) and the motion adopted by the Committee on March 21, 2007.

## B. Defining Counterfeiting

The term “counterfeiting” commonly refers to the unauthorized reproduction of goods protected by an intellectual property right. In Canada, intellectual property rights are extended to patented inventions, registered trademarks, copyright material, industrial design, and integrated circuit topography.<sup>2</sup> Generally speaking, registration of these rights gives the owner protection against unauthorized use of the intellectual property.

Defined in this way, counterfeiting can entail the imitation of a trade-mark, label or any other important characteristic associated with a product, as well as copyright infringement.<sup>3</sup>

It is important to note at the outset that this broad definition of counterfeiting does not coincide with the definition set out in the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) appended to the 1994 *Agreement establishing the World Trade Organization* (WTO), to which Canada is a party. Under the TRIPS Agreement, the expression “counterfeiting” refers only to trademark violations:

- (a) “counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorization 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 authorized by the right holder in the country of production and which are made

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2 A “patent” is a “government grant giving the right to exclude others from making, using or selling an invention.” A “trademark” is a “word, symbol or design, or combination of these, used to distinguish the goods or services of one party from those of another.” “Copyrights” “provide protection for literary, artistic, dramatic or musical works, computer programs and sound recordings.” “Industrial design” is the “visual features of shape, configuration, pattern or ornament applied to a manufactured article.” And “integrated circuit topography” is the “three-dimensional configuration of the electronic circuits embodied in integrated circuit products or layout designs.” The definitions are taken from the Web site of the Canadian Intellectual Property Office. Other useful definitions may be found on the Office’s site at this address: [http://strategis.ic.gc.ca/sc\\_mrksv/cipo/help/glos-e.html](http://strategis.ic.gc.ca/sc_mrksv/cipo/help/glos-e.html).

3 The Organisation for Economic Co-operation and Development study entitled *The Economic Impact of Counterfeiting* (1998), to which several witnesses alluded in their evidence, defines “counterfeiting” as “any manufacturing of a product which so closely imitates the appearance of the product of another to mislead a consumer that it is the product of another.” This definition thus includes reproductions that are breaches of copyright or trademarks.

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>4</sup>

In his evidence, Cal Becker (Coordinator and Senior Counsel, Intellectual Property Secretariat, Department of Justice) drew the Committee's attention to the important distinction between counterfeiting and piracy, pointing out that the term "counterfeiting" refers specifically to a commercial violation of a protected right under the *Trade-marks Act*, while the expression "piracy" refers to a commercial violation of a right protected by copyright, such as the reproduction of films, software or video games. Although enforcement in these two areas often looks very much the same, he noted the importance of distinguishing between them, as they are governed by different legislative frameworks.

Michael Geist (Professor, Faculty of Law, University of Ottawa) cautioned that counterfeiting "should not be conflated with more contentious copyright issues" and pointed out that the term "counterfeiting," has become a "catch-all" for a wide range of issues that have nothing to do with counterfeit goods. He noted:

While no one would dispute that the sale of fake watches or handbags would be included within the "counterfeiting" definition, that umbrella has been used to capture far more. This committee has heard claims that stuffed animals that don't contain a label confirming that they're made of new materials are counterfeit products. Such products are merely mislabelled or fail to meet safety standards. But I'd argue that they are not counterfeit. Similarly, extension cords that fail to meet Canadian Standards Association's standards are a safety concern, but not necessarily a counterfeit concern, unless they include a CSA logo that has been mistakenly or fraudulently applied.<sup>5</sup>

In the interest of accuracy, this report uses the terms "counterfeiting" and "piracy" as defined in the TRIPS Agreement. Counterfeit goods are thus goods that contravene the *Trade-marks Act*.

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4 World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 51, Note 14, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm).

5 Evidence, April 26, 2007.

## C. Overview of Counterfeiting and Piracy

### A Growing Phenomenon

During the hearings, a number of witnesses told the Committee that counterfeiting and piracy are on the rise in Canada, as in the rest of the world. They felt that this trend could be attributed to various factors, including technological progress, the increase in trade, and the widespread public perception that counterfeiting and piracy are victimless crimes.

Although counterfeiting and piracy used to be localized activities centred on high-end designer goods, they have now developed, we were told, into a worldwide industry involving a vast array of products ranging from clothes to medications, multimedia, batteries, electronics, toys, cosmetics and parts for automobiles, ships and aircraft. The witnesses said virtually no industry escapes.<sup>6</sup>

To illustrate the growth of this phenomenon in Canada, Chief Superintendent Mike Cabana (Director General, Border Integrity, Federal and International Operations, RCMP) noted that ten years ago, counterfeit and pirated goods were not considered by the RCMP a major criminal problem in Canada.

Counterfeit goods usually consisted of luxury items such as fake Rolex watches and brand-name clothing. They were generally sold at flea markets, and for the most part the consumers knew exactly what they were buying. Although many members of the general public still have this perception, as do some police officers, this is no longer accurate.<sup>7</sup>

As did other witnesses, the Chief Superintendent explained to the Committee that, these days, counterfeit and pirated goods are much more numerous and varied than in the past. They are sold in major retail stores, not just in flea markets. Some of these counterfeit and pirated goods are also apparently very difficult to detect, not just for consumers, but also for merchants, who C/Supt Cabana suggested often unknowingly sell counterfeit and pirated goods.

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6 Brian Isaac, Partner, Smart & Biggar/Fetherstonhaugh, Chair, Legislation and Lobbying Committee, CACN, Evidence, March 29, 2007. See also the evidence given by Lorne Lipkus, Chair, Education and Training Committee, CACN, Evidence, March 29, 2007.

7 Chief Superintendent Mike Cabana, Director General, Border Integrity, Federal and International Operations, Royal Canadian Mounted Police, Evidence, March 27, 2007.

We learned that, to win consumer confidence, some counterfeiters even attach counterfeit certification marks such as UL (Underwriters Laboratories Inc.) or CSA (Canadian Standards Association), which, when genuine, tell consumers that the product meets industry and consumer safety standards. This fraudulent use of certification marks may also cause a loss of confidence in our standards organizations.

Although the evidence heard by the Committee leaves no doubt that some counterfeit goods are manufactured, sold and shipped through this country, all available estimates tend to show that Canada is not a major source of counterfeit goods. Nancy Segal (Acting Director, Intellectual Property, Information and Technology Trade Policy Division, Department of Foreign Affairs and International Trade) said that “most counterfeit goods come from places like China, Russia, [and] various other countries.” Professor Geist (Faculty of Law, University of Ottawa) also emphasized this point by noting that the RCMP estimated, in 2004, that almost 90% of counterfeit goods on the Canadian market were manufactured outside the country.<sup>8</sup>

### **Repercussions of Counterfeiting and Piracy**

Although the repercussions of counterfeiting and piracy are difficult to measure, in part because of their clandestine nature, a study conducted by the Organisation of Economic Co-operation and Development (OECD) estimated in 1998 that these activities represented 5% to 7% of world trade.<sup>9</sup> While its authors acknowledge the lack of substantial aggregated data supporting their estimate, this study is still the most frequently cited in the literature to establish the scope of this phenomenon.

To date, Canada has no comprehensive independent study of the impact of counterfeiting and piracy.<sup>10</sup> That being said, the Manufacturers and Exporters of Canada estimate the economic impact of these activities to be between \$20 and \$30 billion a year.<sup>11</sup> Chief Superintendent Mike Cabana (Director General, Border Integrity, Federal and International Operations, RCMP) for his part said that “[w]hile the RCMP are not prepared to give exact figures [...] I’m comfortable stating that the impact [of these

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8 *Project SHAM. A Strategic Intelligence Assessment of Intellectual Property Crime in Canada*, Criminal Intelligence Directorate. Criminal Analysis Branch, Royal Canadian Mounted Police, December 15, 2004.

9 In response to growing concern among public authorities and industry, the OECD is currently carrying out another investigation to determine the economic impact of counterfeiting and piracy, and the repercussions of these activities on consumer health and safety. Organisation of Economic Co-operation and Development, *The Economic Effects of Counterfeiting*, 1998, p. 23.

10 See, among others, the evidence of Michael Geist, Professor of Law, University of Ottawa, Evidence, April 26, 2007.

11 Canadian Manufacturers and Exporters, 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)).

activities in Canada] is easily in the billions of dollars, and it is growing.”<sup>12</sup> Of all the witnesses heard by our Committee, only Professor Geist felt that “there is likely to be limited economic impact in Canada from counterfeiting.”<sup>13</sup>

In light of the evidence heard, there is no doubt that counterfeiting and piracy cause economic harm to intellectual property owners, private companies and Canadian governments.

In addition to the economic impact of these activities, there is no denying that the presence of counterfeit goods on the Canadian market represents a serious health and safety risk for Canadians. We feel that the development of this type of crime is disturbing.

During his appearance, Doug Geralde (Chair, Canadian Anti-Counterfeiting Network) circulated counterfeit objects found on the Canadian market that represented a serious threat to consumer safety. These included a power cord with insufficient grounding and an extension cord with the wrong gauge of wire, creating a fire and electrocution hazard. During the hearings, many other disturbing examples of potentially dangerous counterfeit goods were brought to our attention, such as automobile brake pads made with sawdust, shampoo that could cause infections, and even jewellery and children’s toys containing lead.<sup>14</sup>

During our hearings, we also took note of the serious effect that certain counterfeit medicines have on consumer health. Diana Dowthwaite (Director General, Health Products and Food Branch, Department of Health) told us that counterfeit medicines may contain the incorrect dose, the wrong ingredients, dangerous additives, or no active ingredients at all, which could lead to potentially serious health risks for patients, and even death.

Lee Webster (Chair, Intellectual Property Committee, Canadian Chamber of Commerce) illustrated the danger of counterfeit medication using the example of the woman in British Columbia, who died recently after taking counterfeit medicines that she had bought over the Internet. This tragedy reminds us of the urgency of fighting this disturbing phenomenon. According to the World Health Organization (WHO), counterfeit medicines account for less than 1% of the market in wealthy countries, but 50% of medicines sold over the Internet are counterfeit.<sup>15</sup>

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12 Evidence, March 27, 2007.

13 Evidence, April 26, 2007.

14 See among others Nancy Segal, Assistant Director, Intellectual Property, Information and Technology Trade Policy Division, Department of Foreign Affairs and International Trade, Evidence, March 27, 2007.

15 World Health Organization, *WHO and partners accelerate fight against counterfeit medicines*, 2006, <http://www.who.int/mediacentre/news/releases/2006/pr69/en/index.html>.



The fact that it is difficult to document cases of injury or death attributable to counterfeit goods, in part because many people do not know they have such products in their possession, should not affect our determination to act. Like some of the witnesses heard during our study, we feel that this threat requires forceful action. To contain it, we feel that the Canadian public must be made aware of the fact that counterfeiters care nothing about consumers' health and safety; their sole objective is to make money. Here is what Michael Murphy (Executive Vice-President, Policy, Canadian Chamber of Commerce) had to say on the subject:

The criminal element, unfortunately, does not care if counterfeit products are unsafe for consumers; they care only about turning a profit. Some counterfeit batteries imported into Canada have been found to contain mercury and have posed a threat to explode because they were not properly vented. Counterfeit shampoo contaminated with bacteria that could cause infection has been found in Canada and imported into the U.S. from here.<sup>16</sup>

Like the majority of the witnesses, we believe that counterfeit goods also pose a risk because of the involvement of organized crime. According to certain witnesses, the profits from the sale of counterfeit and pirated goods often go to these groups. We were reminded on several occasions of the statement by the Secretary General of Interpol that intellectual property crimes are dominated by organized crime.<sup>17</sup> Doug Geralde of the Canadian Anti-Counterfeiting Network explained that:

Some of the shipments [of counterfeit and pirated goods] are tied into organized crime, because they're coming in through the same circuitous routes as the drugs and they're often packaged with drugs. The counterfeiters are the same people, with the same networks. They're getting into our supply chains, and we have to put a stop to it.<sup>18</sup>

Of course, not all counterfeit goods represent a public health and safety hazard. However, in light of the evidence heard, it appears that Canadians are being exposed to increasingly serious risks.

## **D. Overview of the Legal Framework**

Counterfeiting and piracy are intellectual property violations against which Canada has pledged to provide effective legal protection in accordance with the international agreements it has signed, including the TRIPS Agreement and the North American Free Trade Agreement (NAFTA).

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16 Evidence, March 29, 2007.

17 Criminal Intelligence Service Canada, Financial Crime, Intellectual Property Rights Crime, 2005.

18 Evidence, March 29, 2007.

Like the other signatory countries, Canada acknowledges the importance of protecting intellectual property to foster an environment that encourages economic prosperity, innovation and competition. Michael Murphy (Senior Vice-President, Policy, Canadian Chamber of Commerce) told the Committee that:

In a knowledge-based economy, intellectual property is an essential element for promoting investments in Research and Development, innovation, international trade and investment, consumer protection, and overall economic growth. In the rapidly changing global economy, protecting IP is critical to ensuring a competitive Canada.<sup>19</sup>

A number of witnesses observed that companies prefer to set up in jurisdictions where their products and trademarks are protected against unfair competition. Legitimate businesses cannot compete with counterfeiters, who are able to evade not only quality standards in the manufacturing process, but also the considerable costs with respect to research, development and marketing borne by legitimate companies.

Currently, a number of Canadian laws protect intellectual property rights.<sup>20</sup> As mentioned earlier, registering an intellectual property right generally gives the holder protection against unauthorized use of the product in question.

Individuals or companies that own a trademark, copyright or both currently have certain remedies to enforce their rights. The *Trade-marks Act* and the *Copyright Act* allow intellectual property owners to institute civil proceedings when their rights have been violated. Successful litigants may be awarded damages, a share of the profits, interlocutory or permanent injunctions, and surrender of the counterfeit or pirated goods. We have, however, learned that civil proceedings with respect to counterfeiting and piracy are so difficult, long and costly that the majority of victims feel it is pointless to undertake such proceedings. Some of the recommendations that we present in the second section attempt to correct some of these shortcomings, in part by allowing border officers and intellectual property owners to exchange information.

At present, those who pirate copyright material are also subject to criminal prosecution under the *Copyright Act*. This offence is punishable by a fine of up to \$1 million or a maximum of five years' imprisonment, or both.

There is no provision in the *Trade-marks Act* for criminal proceedings against counterfeiters. Proceedings must be instituted under the *Criminal Code*. The main provisions allowing for criminal proceedings against counterfeiters of trademarks are to be

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19 Ibid.

20 For more information, consult the Web site of the Canadian Intellectual Property Office ([http://strategis.ic.gc.ca/sc\\_mrksv/cipo/help/glos-e.html](http://strategis.ic.gc.ca/sc_mrksv/cipo/help/glos-e.html)).

found in sections 407 to 411. Upon summary conviction, offenders can receive a fine of up to \$2000 and a sentence of up to six months in prison (or both) and, upon indictment, a sentence of up to two years in prison.

## **E. Proposals for Reform**

We are aware of the national and international efforts of the Government of Canada in combatting counterfeiting and piracy. Our study has nevertheless revealed serious weaknesses in the current system. The following sections describe these weaknesses and makes recommendations for their remedy.

### **The Need to Improve Coordination**

The Committee is aware that counterfeiting involves issues of interest to numerous departments and agencies. We feel that the sharing of information and knowledge among the various actors (departments, agencies, companies, international partners, etc.) is essential to the fight against counterfeiting and piracy.

During our first meeting on counterfeit goods, we learned about the work of the Interdepartmental Intellectual Property Working Group, with respect to cooperation and information-sharing at the national and international levels. This working group is composed of ten federal departments and agencies with an interest in, or responsibilities for, intellectual property rights. It is currently chaired by the Director of the Intellectual Property, Information and Technology Trade Policy Division of the Department of Foreign Affairs and International Trade.

While we completely support the Working Group, it nevertheless appears that a lack of strong leadership translates into excessive slowness in negotiations, and thereby constitutes an obstacle to the development of an effective Canadian strategy to fight counterfeiting and piracy.

To promote a more coordinated and robust approach in the fight against counterfeit goods, and ensure that a high priority is placed on the public health and safety aspect, the Committee feels it is necessary to designate the Minister of Public Safety as the minister responsible for the fight against counterfeit goods.

### **RECOMMENDATION 1**

**The Committee recommends that the Government of Canada designate the Minister of Public Safety as the minister responsible for the Canadian strategy to combat the counterfeiting of goods.**

To accelerate the process of developing a coordinated strategy to fight counterfeiting, the Committee also recommends the creation of a committee composed of senior federal officials and chaired by the assistant deputy minister of Public Safety. This committee should be charged with coordinating the Canadian strategy to fight counterfeit goods.

## **RECOMMENDATION 2**

**The Committee recommends that the Government of Canada create a committee composed of assistant deputy ministers and chaired by the assistant deputy minister of Public Safety to develop a coordinated strategy to fight counterfeit goods. This committee must also be charged with coordinating the strategy.**

The Committee also feels that it is important and advisable to benefit from the knowledge and expertise of the Interdepartmental Intellectual Property Working Group, which has been studying the issues of counterfeiting and piracy for some time, by asking it to submit its recommendations concerning the Canadian strategy against the counterfeiting of goods to the minister responsible for this file. Accordingly:

## **RECOMMENDATION 3**

**The Committee recommends that the Interdepartmental Intellectual Property Working Group submit its recommendations on how the Government of Canada should respond to the threat of counterfeit goods to the Minister of Public Safety, before October 2007.**

### **Suggested amendments to the *Trade-marks Act* and *Copyright Act***

Some witnesses told the Committee that Canada's intellectual property legislation is obsolete and ineffective. During the hearings, some also deplored the fact that, for over ten years, Canada has been on the "special 301 watch list" prepared by the United States Trade Representative (USTR), which assesses the protection of intellectual property rights in 87 countries,<sup>21</sup> even though the Government of Canada does not recognize this list. The government feels that it lacks reliable and objective analysis, and that it is driven entirely by U.S. industry.<sup>22</sup>

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21 Evidence, March 29, 2007.

22 Nancy Segal, Deputy Director, Intellectual Property, Information and Technology Trade Policy Division, Department of Foreign Affairs and International Trade, Evidence, March 27, 2007.

Some witnesses even felt that Canada does not respect its international obligations in the fight against counterfeiting and piracy.<sup>23</sup> According to them, this country's lax approach makes it an attractive place to sell counterfeit and pirated goods. This view was not shared by all witnesses.

Between 2001 and 2004, the RCMP conducted over 1800 intellectual property investigations. During that period, it laid some 2200 charges against individuals and over 100 charges against companies. Chief Superintendent Mike Cabana (Director General, Border Integrity, Federal and International Operations, RCMP) observed that "the number of charges [for this type of crime] has increased from an average of approximately 400 in recent years, to 700 in 2005."<sup>24</sup> He also noted that intellectual property crimes are one of the RCMP's five strategic priorities.

While there is no question that intellectual property owners in Canada, along with the public authorities, currently have certain remedies against the sale of counterfeit and pirated goods and that Canadian police enforce the laws in those cases in which such products present a public health and safety risk or involve organized crime or terrorist organizations, it does seem to us, however, that the legislative framework for trademarks and copyright has serious weaknesses.

Like most of the witnesses we heard, the Committee feels that amendments to the *Trade-marks Act* and the *Copyright Act* are needed to give public authorities and intellectual property owners the powers and resources needed to stem the tide of counterfeiting and piracy. The legislation must provide a criminal remedy for counterfeiters of trademarks, and clearly prohibit the importing of counterfeit and pirated goods, as well as the possession of such goods for the purpose of sale.

We also believe that the legislative amendments we propose in the following recommendations would send a clear message to Canadians and the international community that counterfeiting and piracy are crimes for which the perpetrators will be subject to serious penalties.

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23 Brief submitted by the Canadian Anti-Counterfeiting Network, *Report on Counterfeiting and Piracy in Canada*, 2007.

24 Evidence, March 27, 2005.

In light of these considerations:

#### **RECOMMENDATION 4**

**The Committee recommends that the *Trade-marks Act* be amended to include a criminal remedy similar to that provided for in the *Copyright Act*, prohibiting anyone from knowingly engaging in counterfeiting by manufacturing, reproducing, distributing, importing or selling counterfeit products.**

#### **RECOMMENDATION 5**

**The Committee recommends that the *Trade-marks Act* and the *Copyright Act* be amended to make it a criminal offence to knowingly possess counterfeit goods for the purpose of sale.**

#### **RECOMMENDATION 6**

**The Committee recommends that the *Trade-marks Act* and the *Copyright Act* be amended to formally prohibit the importation of counterfeit or pirated products into Canada. The penalties for this offence should be sufficiently severe to deter potential offenders and neutralize convicted offenders. The government should also provide harsher sentences for repeat offenders.**

We also learned during our hearings that the current penalties do nothing to deter counterfeiters and pirates. During his appearance, Chief Superintendent Mike Cabana (Director General, Border Integrity, Federal and International Operations, RCMP) said:

The current criminal penalties imposed by courts pose little deterrence. It is not unusual to charge the same groups multiple times for IPR [intellectual property right] crimes, as they see the fines simply as the cost of doing business.<sup>25</sup>

Michael Murphy (Canadian Chamber of Commerce) said that we should not be surprised to see organized crime becoming more and more involved in counterfeiting and piracy, since this is a form of crime with high profit margins and low risk of being caught or receiving a severe penalty.

To deter counterfeiters and pirates, the police and a number of industry representatives feel that Crown attorneys should be authorized to use the provisions of the *Proceeds of Crime Act*, including those concerning reverse onus of proof, in cases of

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<sup>25</sup> Evidence, March 27, 2007.

counterfeiting and piracy. At present, proceeds-of-crime legislation cannot be invoked in cases of copyright violations. As Brian Isaac (Partner, Smart & Biggar/Fetherstonhaugh, Canadian Anti-Counterfeiting Network), among others, pointed out, this means that at present “[r]emoving profitability is ... unlikely.”<sup>26</sup>

The Committee agrees completely with this analysis. Accordingly:

## **RECOMMENDATION 7**

**The Committee recommends that the *Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence" (Proceeds of Crime)* be amended to allow the police to seize income and property derived from copyright piracy.**

### **The Need to Strengthen Border Controls on Goods**

Cal Becker (Coordinator and Senior Counsel, Intellectual Property Secretariat, Department of Justice) explained to the Committee that the primary role of the Canadian Border Services Agency (CBSA) in controlling counterfeit and pirated goods is to execute the court orders obtained by intellectual property owners<sup>27</sup> and to cooperate with the RCMP on criminal investigations, either by informing the RCMP of the arrival of suspect cargo, or by intercepting the cargo using information provided by the RCMP.

CBSA officers are also responsible for enforcing the federal legislation of other departments relating to prohibited, controlled or regulated goods, including the *Hazardous Products Act* and the *Food and Drugs Act*.

However, since there is no federal legislation stating that counterfeit and pirated goods are prohibited, controlled or regulated, border officers are not generally able to target and seize this type of product on their own initiative, unless there is a contravention of other acts, such as the *Hazardous Products Act*.<sup>28</sup>

Although the RCMP currently has the authority to conduct criminal investigations of counterfeiting and piracy, we have learned that a lack of human resources means that it must give priority to counterfeiting and piracy activities that pose a public health and safety risk or that involve organized crime or terrorist organizations.

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26 Evidence, March 29, 2007.

27 Procedures set out in the *Trade-marks Act* and *Copyright Act* allow intellectual property owners to apply to a court of superior jurisdiction to obtain an order authorizing the interception of goods at the border.

28 The border officers may also conduct searches when they suspect that goods, such as drugs or toys, are prohibited or controlled by legislation such as the *Hazardous Products Act* or the *Food and Drugs Act*. Evidence, March 27, 2007.

A number of witnesses deplored this situation, pointing out that the weakness of our border controls helps make Canada an attractive place to sell counterfeit and pirated goods and harms our international reputation. This situation is all the more unacceptable given that, according to the witnesses, Canadian police authorities estimate that at least 80% of the counterfeit goods sold in Canada are imported.

The Committee was also told that the role of Canadian border officers is limited compared to that of officers in countries such as the United States, Australia and the United Kingdom or in the European Union.<sup>29</sup>

Although some witnesses noted the lack of conclusive studies demonstrating that more rigorous border measures are effective in fighting counterfeiting and piracy, we nevertheless feel that tightening border controls can only help to stem the tide of this phenomenon. Accordingly:

#### **RECOMMENDATION 8**

**The Committee recommends that the mandate of the Canada Border Services Agency be expanded to permit border officers to conduct searches and to seize counterfeit or pirated goods, and to impound such goods and destroy them in accordance with due process and Canadian law.**

#### **RECOMMENDATION 9**

**The Committee also recommends that the Government of Canada allocate additional financial and human resources to enable the Canada Border Services Agency (CBSA) to perform these new functions.**

#### **RECOMMENDATION 10**

**The Committee recommends that the Canada Border Services Agency (CBSA) adopt regulations to facilitate the detection of counterfeit or pirated goods in accordance with due process and Canadian law.**

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29 For example, Cal Becker, from the Department of Justice, noted in his evidence that “[i]n the U.S. [...] the border services agency is the competent authority for making determinations about whether goods are counterfeit or pirated, and the U.S. border services agency will effect the seizure, store the goods, and destroy the goods, largely at the expense of the U.S. government.” He also noted that in “the EU, the U.K., and Australia, the tendency is to facilitate the enforcement of intellectual property rights by the rights holder. Generally speaking, in those jurisdictions [...], the costs of enforcement are borne not by the government but by the rights holders. The [intellectual property] rights holders would be responsible for the costs entailed in operating registration schemes, storing counterfeit and pirated goods, and in the destruction of those goods.” Evidence, March 27, 2007.



The Committee agrees with a number of witnesses that the detection of counterfeit and pirated goods would be facilitated by the exchange of information between intellectual property owners and border services officers. As mentioned previously, at present CBSA officers can alert the RCMP to the arrival of suspect shipments. However, the law does not allow CBSA officers to inform the intellectual property owners affected. Allowing such communication would be an inexpensive measure that, we feel, could prove to be an effective deterrent. Accordingly:

## **RECOMMENDATION 11**

**The Committee recommends that the federal government amend the *Customs Act* to permit information to be exchanged between Canada Border Services Agency (CBSA) officers and intellectual property owners affected by counterfeiting and piracy. The new powers should enable the CBSA to establish a registration system that intellectual property owners could use to register their rights with the CBSA. The Act should also allow intellectual property owners to alert the CBSA when they suspect that counterfeit or pirated goods are being shipped to Canada.**

### **The Need to Increase the Human and Financial Resources**

The vast majority of the witnesses that appeared before us noted the inadequacy of the human and financial resources allocated to the curtailment of counterfeiting and piracy. Brian Isaac (Partner, Smart & Biggar/Fetherstonhaugh) said that “we have insufficient dedicated personnel with experience in prosecution of counterfeiters, including within the ranks of the federal prosecutors.” Others also criticized the lack of police officers assigned to investigations of this kind. For example, Chief Superintendent Mike Cabana (Director General, Border Integrity, Federal and International Operations, RCMP) explained that, in all of Canada, only two small joint RCMP-CBSA project teams, in Montréal and Toronto, are dedicated exclusively to the investigation of matters concerning intellectual property rights.<sup>30</sup>

We also learned that, for want of resources, the RCMP prioritizes criminal proceedings in cases of counterfeit goods that they suspect present health or safety hazard or involve organized crime or terrorist organizations.

While we agree that health and safety issues must be paramount in the fight against counterfeiting, we nevertheless noted, during our hearings, that the human and financial resources allocated to action against counterfeiting and piracy are insufficient.

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30 Evidence, March 27, 2007.

As some witnesses asked: How can we know if organized crime is involved, or if the counterfeit items represent public health and safety hazards, if we do not conduct investigations? In light of the preceding:

## **RECOMMENDATION 12**

**The Committee recommends the allocation of additional financial and human resources to the appropriate departments and agencies to allow them to take effective action against counterfeiting and piracy.**

### **The Need for Raising Public Awareness**

The widespread public perception that counterfeiting and piracy are victimless crimes is one of the factors that contribute, according to the evidence heard, to the increase in the sale of counterfeit and pirated goods in Canada. The Canadian Anti-Counterfeiting Network presented the results of a poll it had commissioned on this question, which suggests that Canadians are three times more likely than Americans to purchase counterfeit and pirated goods.<sup>31</sup>

According to Paul Hoffert (Chief Executive Officer of Noank Media) and Bob Sotiriadis (Lawyer and Partner, Léger Robic Richard, L.L.P.) in particular, the government's inaction in the fight against counterfeiting and piracy can only reinforce that perception and foster "[...] a culture and a society that have a kind of disregard for law in general."<sup>32</sup> Here is what Mr. Sotiriadis had to say on the subject:

Logically, when a behaviour is [normalized] — as Mr. Hoffert said earlier — it raises the tolerance level for illegal activities and makes them more prevalent.<sup>33</sup>

The Committee agrees with this analysis and the prevailing view of the witnesses that raising public awareness of counterfeiting and piracy is central to the solution. We feel that when consumers are aware of the risks that certain counterfeit goods present to their health and safety, as well as the harm this does to the Canadian economy, they will be more vigilant and less inclined to purchase such products. Accordingly:

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31 Document presenting the results of a Pollara poll presented to the Committee by the Canadian Anti-Counterfeiting Network, 2007.

32 Paul Hoffert, Chief Executive Officer of Noank Media, Evidence, April 26, 2007.

33 Evidence, April 26, 2007.

### **RECOMMENDATION 13**

**The Committee recommends that the Government of Canada institute a campaign to raise awareness of counterfeit and pirated goods to make the public aware of the economic and social costs associated with this scourge, and emphasize the public health and safety hazards they represent. The campaign should also raise Canadians' awareness of the involvement of organized crime in the counterfeiting and piracy of goods.**

#### **The Need for Monitoring**

Finally, the Committee feels that it is important to establish without delay a more rigorous mechanism for monitoring counterfeiting and piracy in order to evaluate our strategy and the progress made in the fight against these activities. This information will allow us to fully evaluate the evolution of counterfeiting and piracy, and thus to fight the phenomena more effectively. In light of the preceding:

### **RECOMMENDATION 14**

**The Committee recommends that the Government of Canada develop a monitoring mechanism that can be used to collect, analyze and disseminate information about counterfeiting and piracy in Canada.**

## **F. Conclusion**

Clandestine by nature, counterfeiting is a phenomenon that is difficult to quantify. However, judging from the evidence presented to this Committee, it seems undeniable that the counterfeiting of goods is a growing phenomenon in Canada, and one that increasingly involves goods that present health and safety hazards for consumers. The representatives of industry and of law enforcement who testified to the Committee painted a rather alarming portrait of the situation in Canada. It is not only a disturbing phenomenon, but one that calls for solutions with some urgency. We believe that the implementation of the recommendations that we have formulated in this report will make it possible to correct the weaknesses that were brought to our attention during our study.



## **LIST OF RECOMMENDATIONS**

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### **RECOMMENDATION 1**

The Committee recommends that the Government of Canada designate the Minister of Public Safety as the minister responsible for the Canadian strategy to combat the counterfeiting of goods.

### **RECOMMENDATION 2**

The Committee recommends that the Government of Canada create a committee composed of assistant deputy ministers and chaired by the assistant deputy minister of Public Safety to develop a coordinated strategy to fight counterfeit goods. This committee must also be charged with coordinating the strategy.

### **RECOMMENDATION 3**

The Committee recommends that the Interdepartmental Intellectual Property Working Group submit its recommendations on how the Government of Canada should respond to the threat of counterfeit goods to the Minister of Public Safety, before October 2007.

### **RECOMMENDATION 4**

The Committee recommends that the *Trade-marks Act* be amended to include a criminal remedy similar to that provided for in the *Copyright Act*, prohibiting anyone from knowingly engaging in counterfeiting by manufacturing, reproducing, distributing, importing or selling counterfeit products.

### **RECOMMENDATION 5**

The Committee recommends that the *Trade-marks Act* and the *Copyright Act* be amended to make it a criminal offence to knowingly possess counterfeit goods for the purpose of sale.

## **RECOMMENDATION 6**

**The Committee recommends that the *Trade-marks Act* and the *Copyright Act* be amended to formally prohibit the importation of counterfeit or pirated products into Canada. The penalties for this offence should be sufficiently severe to deter potential offenders and neutralize convicted offenders. The government should also provide harsher sentences for repeat offenders.**

## **RECOMMENDATION 7**

**The Committee recommends that the *Regulations Excluding Certain Indictable Offences from the Definition of "Designated Offence" (Proceeds of Crime)* be amended to allow the police to seize income and property derived from copyright piracy.**

## **RECOMMENDATION 8**

**The Committee recommends that the mandate of the Canada Border Services Agency be expanded to permit border officers to conduct searches and to seize counterfeit or pirated goods, and to impound such goods and destroy them in accordance with due process and Canadian law.**

## **RECOMMENDATION 9**

**The Committee also recommends that the Government of Canada allocate additional financial and human resources to enable the Canada Border Services Agency (CBSA) to perform these new functions.**

## **RECOMMENDATION 10**

**The Committee recommends that the Canada Border Services Agency (CBSA) adopt regulations to facilitate the detection of counterfeit or pirated goods in accordance with due process and Canadian law.**

#### **RECOMMENDATION 11**

**The Committee recommends that the federal government amend the *Customs Act* to permit information to be exchanged between Canada Border Services Agency (CBSA) officers and intellectual property owners affected by counterfeiting and piracy. The new powers should enable the CBSA to establish a registration system that intellectual property owners could use to register their rights with the CBSA. The Act should also allow intellectual property owners to alert the CBSA when they suspect that counterfeit or pirated goods are being shipped to Canada.**

#### **RECOMMENDATION 12**

**The Committee recommends the allocation of additional financial and human resources to the appropriate departments and agencies to allow them to take effective action against counterfeiting and piracy.**

#### **RECOMMENDATION 13**

**The Committee recommends that the Government of Canada institute a campaign to raise awareness of counterfeit and pirated goods to make the public aware of the economic and social costs associated with this scourge, and emphasize the public health and safety hazards they represent. The campaign should also raise Canadians' awareness of the involvement of organized crime in the counterfeiting and piracy of goods.**

#### **RECOMMENDATION 14**

**The Committee recommends that the Government of Canada develop a monitoring mechanism that can be used to collect, analyze and disseminate information about counterfeiting and piracy in Canada.**





# APPENDIX A LIST OF WITNESSES

| Organizations and Individuals   | Date       | Meeting |
|---|------------|---------|
| <p><b>Canada Border Services Agency</b><br/>Kimber Johnston, Director General<br/>Policy and Program Development Directorate</p> <p><b>Department of Foreign Affairs and International Trade</b><br/>Nancy Segal, Deputy Director<br/>Intellectual Property, Information and Technology Trade Policy<br/>Division</p> <p><b>Department of Health</b><br/>Diana Dowthwaite, Director General<br/>Health Products and Food Branch Inspectorate</p> <p><b>Department of Justice Canada</b><br/>Cal Becker, Coordinator and Senior Counsel<br/>Intellectual Property Secretariat</p> <p><b>Royal Canadian Mounted Police</b><br/>Mike Cabana, Chief Superintendent<br/>Federal and International Operations, Director General, Border<br/>Integrity</p> | 2007/03/27 | 35      |
| <p><b>Canadian Anti-Counterfeiting Network</b><br/>Doug Geralde, Chair<br/><br/>Brian Isaac, Partner<br/>Smart &amp; Biggar Fetherstonhaugh<br/><br/>Lorne Lipkus, Chair<br/>Education and Training Committee</p> <p><b>Canadian Chamber of Commerce</b><br/>Michael Murphy, Executive Vice-President<br/>Policy<br/><br/>Lee Webster, Chair<br/>Intellectual Property Committee</p> <p><b>Canadian Recording Industry Association</b><br/>Graham Henderson, President</p>  | 2007/03/29 | 36      |
| <p><b>As an Individual</b><br/>Michael Geist, Canada Research Chair<br/>Internet and E-commerce Law, University of Ottawa<br/><br/>Paul Hoffert, Chief Executive Officer of Noank Media<br/>Faculty Fellow, Harvard Law School<br/><br/>Bob Sotiriadis, Lawyer and Partner<br/>Léger Robic Richard, L.L.P.</p>  | 2007/04/26 | 40      |



# **APPENDIX B LIST OF BRIEFS**

## **Organizations and Individuals**

### **Thirty-Ninth Parliament, 1st Session**

Canadian Anti-Counterfeiting Network

Canadian Chamber of Commerce

Michael Geist



# 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. 35, 36, 37, 40, 41, 42, 45 and 46](#)) is tabled.

Respectfully submitted,

Garry Breitkreuz, MP  
Chair

