



**Canadian
Manufacturers &
Exporters**

Canada's Leading
Business Network

**Manufacturiers et
Exportateurs du
Canada**

Le réseau d'affaires
par excellence du Canada

Canadian Manufacturers & Exporters (CME)

Position Paper – Intellectual Property Rights in Canada and Abroad June 2006

The members of Canadian Manufacturers & Exporters (CME), representing over 75 per cent of manufacturing and over 90 per cent of exports in Canada, are united in the fight against product counterfeiting and copyright piracy in Canada. CME is actively involved in a number of bilateral, regional and international fora to promote intellectual property and to ensure Canada's international competitiveness.

CME members believe that effective and enforced intellectual property rights cultivate an innovative society and economy.

A balanced copyright regime is essential to driving the production of knowledge, the key input to the innovation process. Moreover, in an increasingly global, knowledge-based economy, Canada must ensure that its intellectual property regime is modern, dynamic, and fulfils international commitments.

Canada must be seen as a leader in intellectual property protection, for only then will we be a leader in attracting the talent, investment and research and development opportunities that allow a nation to maximize its innovative potential.

Promoting Canada's international intellectual property interests is critical to ensuring that Canadian holders of intellectual property are protected.

Canada must work diligently in international fora to build a fair, efficient and competitive marketplace for Canadians. The ongoing work must include consideration of new technologies and issues such as those relating to e-commerce, the Internet (e.g. domain names), biotechnology (e.g. patenting of higher life forms) and traditional knowledge.

Markets like China, Russia and India remain a top intellectual property enforcement priority as they do not provide Canadian copyright materials, inventions, brands, and trade secrets the intellectual property protection and enforcement to which they are entitled.

KEY CONCERNS

Global IPR theft and trade in fakes and pirated materials have continued to grow, threatening innovative and creative economies around the world.

Counterfeiting has developed from a localized industry concentrated on the copying of high-end designer goods into a massive, sophisticated global business involving the manufacturing and sale of counterfeit versions of a vast array of products, including soaps, shampoos, razors, batteries, cigarettes, alcoholic beverages, golf clubs, automobile parts, motorcycles, medicines, and health care products, to name a few.

Counterfeiting of such a broad range of products on a global scale affects more than just the companies that produce legitimate products. While it has a direct impact on the sales and profits of those companies, counterfeits also hurt the consumers who waste their money and sometimes put themselves at risk by purchasing fake goods. It also hurts the countries concerned by decreasing tax revenues and deterring investments.

Counterfeiters generally pay neither taxes nor duties, and counterfeiters often do not comply with basic manufacturing standards for the health and safety of workers or product quality and performance.

Piracy of copyright products in digital, print (e.g., books, journals, and other printed materials), and other analog formats (including movies, music, business software, entertainment software, and books), as well as counterfeiting of all types of trademarked products, have grown rapidly because these illegal activities offer enormous profits and little risk for the criminal element of society.

It is now well accepted both internationally and domestically that organized crime groups are involved in IP theft. There is also growing evidence that counterfeiting and piracy are linked to terrorist activities. Criminals can enter into the counterfeiting and pirating business with little capital investment, and even if caught and charged with a crime, the penalties actually imposed in many countries are so low that they offer no deterrent.

- The counterfeit industry in Canada was recently estimated to be worth \$20 – 30 billion dollars annually (CME, 2005);
- OECD estimates that trade in counterfeit and pirated products may account for 5-7% of total world trade;
- The International Chamber of Commerce (ICC) has recently estimated that international trade in counterfeit and pirated products exceeds US\$600 billion.

Due to the clandestine nature of IP crime, it is impossible to accurately quantify economic impact. Moreover, some companies may not want to publicize a counterfeiting problem since it may adversely affect their brand.

USTR Special 301 Watch List

Of key concern to CME members is Canada's presence on the USTR Special 301 Watch List.

Canada has been included on the United States Trade Representative's (USTR) Special 301 Watch List for the past several years for failure to implement its international obligations or to take effective enforcement action against counterfeit and pirated goods, especially at the border.

After making significant progress in improving its IPR regime in 2001 and 2002, Canada made little headway in addressing long-standing intellectual property issues related to copyright and patent reform.

Immediate steps must be taken to remove Canada from the list and ensure that Canada's border enforcement measures are consistent with TRIPS obligations.

CME urges the Canadian government to take effective measures to strengthen border enforcement, including the enactment of legislation that would allow Canada's customs officials to conduct ex officio searches of incoming and outgoing products suspected to be pirate or counterfeit.

Agreement on Trade-Related Aspects of Intellectual Property Rights

The TRIPS Agreement, which requires all WTO members to provide certain minimum standards of intellectual property protection, as well as effective IPR enforcement, was one of the most significant achievements of the Uruguay Round.

The TRIPS Agreement is the first broadly-subscribed multilateral intellectual property agreement that is subject to mandatory dispute settlement provisions.

Developed country members were required to implement the TRIPS Agreement fully as of January 1, 1996. Developing countries were given a transition period for many obligations until January 1, 2000.

By international agreement, Canada has agreed to provide effective criminal enforcement against willful trade-mark counterfeiting and copyright piracy on a commercial scale, as well as to implement border measures to prevent the importation of counterfeit and pirated goods.

Both the World Trade Organization Agreement on Trade- Related Aspects of Intellectual Property Rights ("TRIPS") and the North American Free Trade Agreement ("NAFTA"), require criminal enforcement and border measures.

While Canada has arguably technically complied with the text of the treaties, by not providing the necessary resources or effective enforcement tools, it has fallen far short of satisfying the spirit of the provisions.

This failure to effectively comply with its international obligations is an irritant in Canada's trade relations, and especially with the United States.

Consumer Health and Safety

Counterfeit and pirated products available in Canada today include pharmaceutical products; software, CDs and DVDs; children's toys; electrical products; safety clothing and footwear; automobile and aircraft parts; food and beverages, including alcoholic beverages; luxury goods of all kinds; and of course, clothing, watches, and similar items.

Essentially any product on the world market today can and is being counterfeited from bottled water to entire automobiles.

Further, sale of counterfeit and pirated products in Canada is no longer limited to flea markets and street vendors. In fact, such products are now routinely found in up-scale shopping malls and reputable retail chains.

Some phony goods pose direct serious threats to consumer health. Products bearing counterfeit certification marks that do not meet applicable standards also pose safety issues.

Canadian IPR Interests Abroad

Weak IPR protection and enforcement, particularly in China and Russia, continue to be a key concern for CME members. Rampant counterfeiting and piracy problems continue to plague both China and Russia, indicating a critical need for stronger intellectual property protection in both countries.

Canadian business is also concerned with inadequate IPR enforcement with such trading partners as Argentina, Belize, Brazil, Egypt, India, Indonesia, Israel, Lebanon, Paraguay, Turkey, Ukraine, and Venezuela. Levels of piracy and counterfeiting remain unacceptably high in these countries. Significantly improved enforcement against counterfeiting and piracy is required to adequately protect Canadian interests.

KEY ACTION ITEMS

CME supports the recommendations outlined in the January 2006 position paper issued by the Canadian Anti-Counterfeiting Network entitled *The Need for Legal Reform in Canada to Address Intellectual Property Crime*.

Specifically CME supports the CACN recommendation to enact a statute that:

- Defines the activity prohibited by the statute;
- Prescribes offences for manufacture and commercial importation and distribution of counterfeit and pirated products;
- Provides for authority to seize and simple, inexpensive administrative procedures for destruction of counterfeit and pirated products;
- Enacts border measures to mandate and facilitate detection, seizure and destruction of imported counterfeit and pirated products;
- Deals with jurisdictional issues in respect of administrative and criminal enforcement and prosecution;
- Provides for disclosure of information to and cooperation with IP owners; and
- Provides summary civil proceedings and statutory damages for clear cases of product counterfeiting and piracy.

As identified in the paper issued by the CACN, Canada must stop imported counterfeit and pirated products at the border. One of the primary aims of reform must be to provide CBSA with a clear mandate to enforce IP rights at the border.

Regardless of the particular model used, a revamped Canadian border enforcement system should incorporate at least the following elements:

- A clear prohibition on the importation of counterfeit and pirated goods into Canada;
- Express authority for the CBSA to target, detain, seize and destroy counterfeit and pirated goods either on its own initiative or at the request of an IP owner;
- Intelligence sharing and investigative and enforcement management with cooperation between the RCMP and the CBSA.
- Provisions for the disclosure of information and the provision of samples to IP owners for purposes of determining whether detained goods are indeed counterfeit or pirated and to allow IP owners to exercise their civil remedies; and
- Administrative fines for the importation of counterfeit and pirated goods.

As mentioned in the CACN paper, is essential even with new border enforcement measures that the CBSA continue to work in close cooperation with the RCMP and other law enforcement agencies.

In this regard, provision should also be made for the mutual sharing of information between the CBSA and law enforcement agencies of information that may assist in detecting counterfeit and pirated goods, such as legitimate ports of entry, legitimate importers and exporters, samples of counterfeit products, details of detection devices associated with products, information with respect to past seizures, known counterfeiters and so on.

CME also urges the Canadian government to:

- Work with US authorities and implement the recommended measures needed to remove Canada from the USTR 301 Watch List. This includes:
 - Ratification and implementation of the WIPO Internet Treaties;
 - Amendment of the copyright law to provide adequate and effective protection of copyrighted works in the digital environment;
 - Enactment of legislation to protect against unfair commercial use of undisclosed test and other data submitted by pharmaceutical companies seeking marketing approval for their products;
 - Improvement of the IPR enforcement system so that Canada can take effective action against the trade in counterfeit and pirated

products within the country, as well as curb the amount of infringing products transshipped and transiting through Canada.

- Implement legislative changes to provide a stronger border enforcement system by giving its customs officers the authority to seize products suspected of being pirated or counterfeit without the need of a court order.

Greater cooperation between Canadian Customs and the Royal Canadian Mounted Police would enhance enforcement, as would the provision of additional resources and training to its customs officers and domestic law enforcement personnel. *(Taken from the 2006 USTR 301 Watch List*

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file190_9339.pdf)

- Defend Canadian intellectual property rights abroad, specifically in countries like China, Russia, India and Brazil, by working with these countries to ensure that they implement the appropriate measures.

CME also recommends that the Canadian government, in FIPA negotiations with China and India, and any future negotiations with other countries, ensure that any final agreement contains meaningful provisions to protect Canadian intellectual property.

Where transparency is not improved and measures have not been taken to protect Canadian IPR in foreign markets, the Canadian government must work with business to help build anti-counterfeiting elements into products, labeling and packaging, and help Canadian firms protect and segregate core intellectual property.