

A TIME FOR CHANGE:

TOWARD A NEW ERA FOR INTELLECTUAL PROPERTY
RIGHTS IN CANADA

A REPORT FROM THE CANADIAN INTELLECTUAL PROPERTY COUNCIL



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When discussing the major policy challenges that are likely to have the greatest impact on Canada's future, few people would think to include intellectual property rights. But they should.

Intellectual property (IP) is the economic currency of the future. Properly applied IP rights drive job creation, economic growth and innovation. They are truly a pillar of a competitive economy. The protection of intellectual property rights is equally as important for the health and safety of Canadians. Counterfeit goods are becoming more common in Canadian markets and the international trade of these goods has reached well into the hundreds of billions of dollars.

Despite playing such an important role in Canadian society, intellectual property rights are under attack. Weak domestic legislation has allowed criminals to become rich from the proceeds gained from the sale of counterfeit goods, while at the same time the lack of regulation in the virtual world weakens the ability of industries to protect their intellectual property. IP theft has become a major problem within Canada. The Canadian government must take action now to curb the threat posed by counterfeiting and piracy.

There has been a growing awareness of the need to reform Canada's IP regime. The Canadian Intellectual Property Council (CIPC) stands at the forefront of this call for action. Backed by the Canadian Chamber of Commerce, the CIPC is a business coalition which is designed to provide a central voice to press for stronger intellectual property protection both in Canada and worldwide.

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EXECUTIVE SUMMARY

The existence of a strong and competitive intellectual property rights (IPR) system is as vital to a knowledge-based economy as the presence of a world-class higher education system. Unfortunately, Canada's current IPR regime has serious weaknesses that undermine the country's innovation capacity and economic prosperity. These weaknesses pose other problems as well, including risks to the health and safety of Canadians. These issues must be addressed.

The development and implementation of an effective IPR system in Canada continues to lag behind the efforts of other developed nations. Not only is the current Canadian system outdated, but it is also unable to provide the necessary protection of IPR within Canada. As a result, counterfeiting and piracy go largely unchecked within our borders.

Building Consensus for Change

The demonstrated failings of the current Canadian IPR system have spurred a growing consensus of need for IPR reforms within the Canadian government, the Canadian business community, and the general population. This emerging consensus points to a new direction for IPR protection in Canada, where the promotion of IPR allows for continued economic growth and the protection of Canadians from the dangers of counterfeit and pirated goods.

One of the first calls for action was the publication in March 2007 of the *Report on Counterfeiting and Piracy in Canada: A Road Map for Change*. Based on a detailed examination of Canada's IPR situation, the Road Map recommended substantial reforms, including improved domestic IPR legislation, the empowerment of border and law enforcement agencies, and the creation of a national IP Council at the Ministerial level.

Support for better IPR protection continues to grow and has taken root on Parliament Hill. The Government has twice made official commitments to proceed with reforms in the 2007 and 2008 Throne Speeches. Two House of Commons Standing Committees also recognized the need for changes within Canada. Building on this momentum, the Conservative government noted that it would "... support Canadian researchers and innovators in developing new ideas and bringing them to the marketplace..." and "will improve the protection of cultural and intellectual property rights in Canada."¹ In its response to the June 2007 Standing Committee on Industry, Science and Technology report *Counterfeiting and Piracy are Theft*, the Government declared its support for increased protection of intellectual property rights in Canada:

"This government is committed to the importance of providing a robust framework for intellectual property rights, not only to address the risks posed by counterfeit goods...but [also] to foster an environment conducive to innovation, in an effort to further attract investment and high paying jobs to this country's growing knowledge-based economy."²

The Time for Action is Now

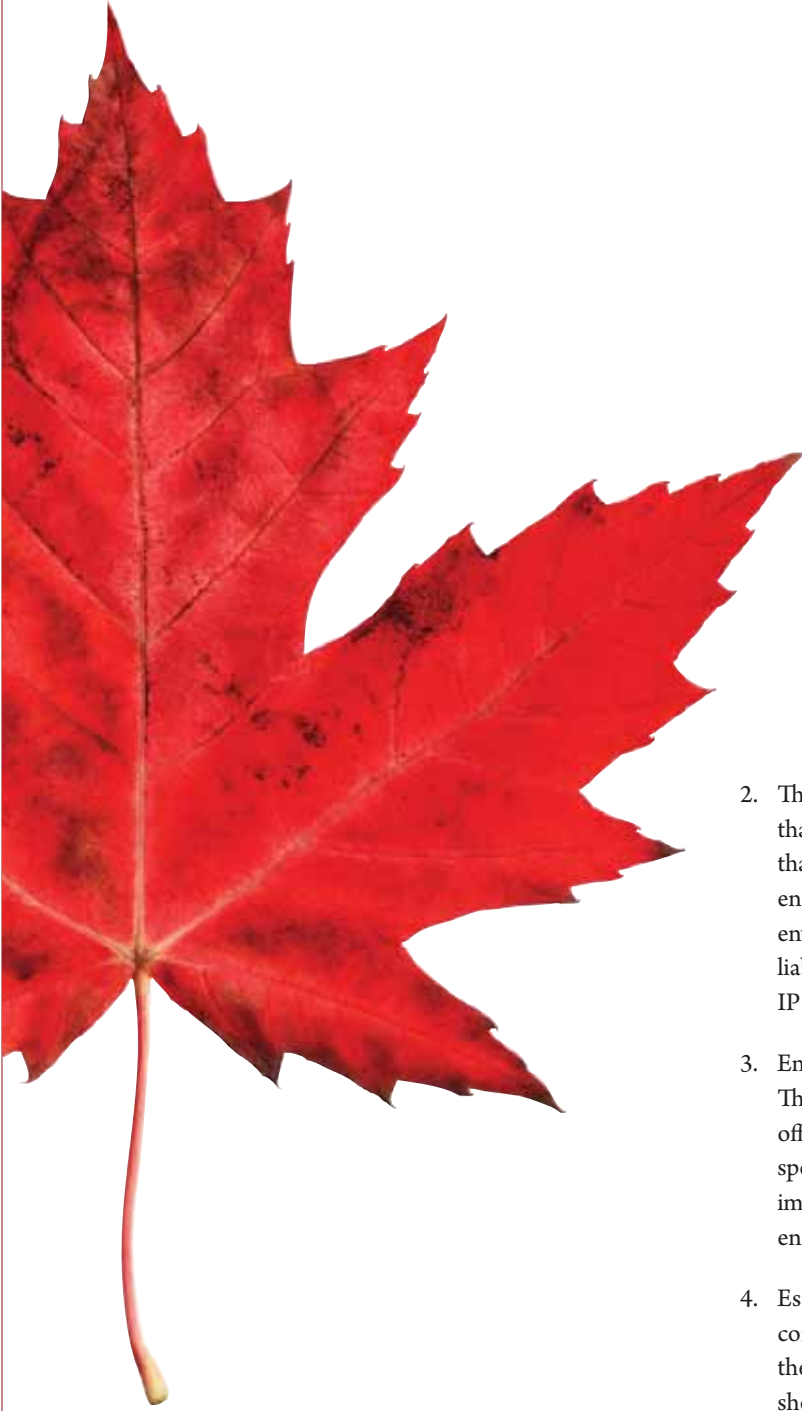
Despite the widespread support for increased protection of IPR in Canada, little has been accomplished to date to implement the necessary policy changes. This is not to say that the Canadian government has not made any advances in the development of a stronger IPR framework, but these advances have been slow in coming and leave many issues still unaddressed. With each year that passes without the implementation of changes to Canada's IPR system, Canadians and the Canadian economy will continue to suffer. Across the nation, small businesses are unable to secure the investment needed to move their ventures from the drawing board to the marketplace. At the same time, criminal organizations are getting rich off of the proceeds generated by the trafficking of counterfeit and pirated goods. Finally, the health and safety risk to consumers grows with every shipment of counterfeit goods that passes through the Canadian border.

The Canadian government must establish an efficient IPR system within Canada. The recommendations outlined in this document address the three main areas where Canada continues to falter: legislative reform; education; and institutional support for the judicial and legal system.

The creation of an effective IPR system is critical for the Canadian economy because Canadian businesses need a level playing field to remain competitive in global markets. This is even more crucial today given the global economic slowdown.

Summary of Recommendations

1. Implement an IPR border enforcement system to stem the flow of counterfeit and pirated goods coming into Canada. The Canada Border Services Agency (CBSA) should be provided with the necessary legislative authority and resources to target, detain, seize and destroy counterfeit and pirated goods.



2. The Government of Canada should rapidly adopt IP legislation that fully implements the WIPO Internet treaties in a manner that is consistent with international norms and standards and enables the curtailment of counterfeiting and piracy in the online environment (whether physical or digital), as well as clarifying the liability of counterfeiting and piracy operations under Canadian IP law.
3. Enact criminal legislation that expressly targets IPR crimes. This legislation would make counterfeiting and piracy criminal offences under the Criminal Code; trademark counterfeiting a specific criminal offence under the Trade-marks Act; and would impose stronger penalties for counterfeiting and pirating that endangers the health and safety of Canadians.
4. Establish an Intellectual Property Rights Coordination Council consisting of senior government officials, representatives from the business community and IP rights holders. The Council should develop and implement an IPR framework that promotes the creation and commercialization of innovative products and services in Canada.
5. Establish a specialized IP Crime Task Force to guide, coordinate and lead anti-counterfeiting and anti-piracy enforcement efforts in Canada.
6. Establish an intellectual property education program targeting the public, businesses, innovators, creators, and government officials.

PART I: CANADA'S EMERGING CONSENSUS ON INTELLECTUAL PROPERTY RIGHTS

Some progress has been made in Canada over the last two years concerning the promotion of awareness of Canada's ineffective intellectual property rights (IPR) system. From a situation where IPR issues were buried in the shadows of public policy debate, they have moved onto centre stage amid growing concern over the weaknesses in Canada's IP laws and enforcement regime. However, more advancement is needed. Despite the fact that the past few years have seen an emerging consensus among the government, the business community and the general public regarding the need for reforms, Canada still has a long way to go to develop better protection for IPR and to bring our policies up to international standards. Recent initiatives by both the Canadian government and the businesses community have started to pave the way for change. Progress in this area has become all the more urgent at a time of growing job losses and economic uncertainty.

A Road Map for Change

A watershed moment in this new IPR era was the publication in March 2007 of the *Report on Counterfeiting and Piracy in Canada: A Road Map for Change*. This report was the first comprehensive report of its kind on counterfeiting and piracy in Canada. Initiated in response to the weak Canadian IPR system, the study provided a wide-ranging examination of the Canadian IPR system and offered "practical and concrete solutions for key decision makers."³ Canada's business community united behind the report, which was produced by the Canadian Anti-Counterfeiting Network and endorsed by the Canadian Chamber of Commerce, Canadian Council of Chief Executives, Retail Council of Canada and the Canadian Association of Importers and Exporters.

The Road Map identified many current weaknesses in Canada's IP laws and enforcement system, including "a lack of police and prosecutorial resources dedicated to counterfeiting, insufficient criminal penalties, a lack of effective civil remedies, and disempowered Customs officials."⁴ In urging the Government of Canada to take action, the Road Map outlined specific recommendations, among them:

- Enacting legislation to address shortfalls in the current legislative framework;
- Establishing key IPR institutions, including an IP Crime Task Force and an IPR Coordination Council; and,
- Developing an ongoing, formalized IPR education campaign.⁵

The Government's Building Commitment to Action

Distributed to key federal Cabinet ministers, Parliamentarians and policy-makers in Ottawa, the Road Map galvanized Canada's IPR policy discussion. Within months of its publication, two House of Commons Parliamentary committees held hearings on the impact of IP theft in Canada. Both committees' hearings culminated in unanimous all-party reports calling for stronger IPR protection. Their recommendations reflected measures proposed in the Road Map.

Both committees declared that urgent action was required to improve Canada's IPR system. As the House of Commons Standing Committee on Public Safety and National Security found:

"Canada acknowledges the importance of protecting intellectual property to foster an environment that encourages economic prosperity, innovation and competition. ... Our study has nevertheless revealed serious weaknesses in the current [IPR] system. ... [The weak IPR system in Canada] is not only a disturbing phenomenon, but one that calls for solutions with some urgency."⁶

Similarly, the House of Commons Standing Committee on Industry, Science and Technology found that:

"[IP rights] facilitate and encourage the pursuit of innovation and the disclosure of knowledge in the public domain for the common good. The IP right is the only industrial tool that rewards the innovator commensurate with the innovation's commercial prospects. ... In order to properly protect IP rights, an adequate IPR enforcement system is essential. ... [IP theft is] a drain on the Canadian economy and, in the case of some counterfeit goods, 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."⁷

The Government responded positively to both reports, giving cause for optimism that substantive action would be taken to address the deficiencies in Canada's IPR protection regime. In separate responses to the committees, the Government said it is:

"committed to the importance of providing a robust framework for intellectual property rights,

not only to address the risks posed by counterfeit goods to consumer health and safety but to foster an environment conducive to innovation, in an effort to further attract investment and high-paying jobs to this country's growing knowledge-based economy."⁸

In the October 16, 2007 Speech from the Throne, the Conservative Government further defined the action it would take in the upcoming Parliamentary session by stating: "Our Government will improve the protection of cultural and intellectual property rights in Canada, including copyright reform."⁹ This was reiterated in the November 19, 2008 Speech from the Throne and was coupled with recognition of the clear link between IPR, innovation and economic prosperity.¹⁰

Building on this growing commitment to action, in October 2007 the Government announced its participation in negotiations to develop an Anti-Counterfeiting Trade Agreement (ACTA) along with Japan, the United States, the European Union and Switzerland. Describing the proposed treaty as "a model of intellectual property protection for the world," the International Trade Minister at the time summarized its need as follows: "Intellectual property theft is a particularly pernicious form of piracy. It hurts creators and innovators. It puts consumers in danger and it supports organized crime."¹¹

Taking IPR Policy to the Next Level

In December 2007, the Ontario Chamber of Commerce published a key policy report titled *Protection of Intellectual Property: A Case for Ontario*. The report concluded that the weak IPR regime in Ontario had "threatened public safety, eroded brand quality of Ontario products, and impacted the economy, including loss of tax revenues."¹² Focused on the provincial level, this report also drew a clear link between IP rights protection, innovation and prosperity. It noted that "Provincial strategies that enhance enforcement and raise awareness of counterfeiting and piracy can curtail IPR infringement and protect the integrity of Ontario's business investment and innovation climate."¹³

The founding of the Canadian Intellectual Property Council (CIPC) in the spring of 2008 marked a significant development where businesses committed to work towards strengthening Canada's IPR system. Under the umbrella of the Canadian Chamber of Commerce, the CIPC serves as the central voice for Canadian business on IPR issues. The CIPC advocates to the federal government for measures that will create the right environment for a flourishing innovative economy in Canada, while reducing counterfeiting and piracy of IP-

related goods. The organization's founding members include more than a dozen leading corporations and industry associations. Perrin Beatty, President and CEO of the Canadian Chamber of Commerce, called the CIPC's creation "... a positive step toward achieving much needed improvement in Canada's intellectual property rights regime, encouraging innovation and ensuring global competitiveness for Canadian companies."¹⁴

Another milestone in Canada's IPR debate occurred in May 2008, when the Conference Board of Canada hosted its inaugural conference on intellectual property, *Intellectual Property Rights Conference: A Catalyst for Innovation*, which was partly sponsored by the Canadian Chamber of Commerce. Leaders in policy, business, and government from across Canada and around the world discussed the IPR challenges in Canada. Speakers included the Honourable John Wilkinson, Minister of Research and Innovation for the Province of Ontario; John Peller, then Chair of the Canadian Chamber of Commerce; Michael Keplinger, Deputy Director General of the World Intellectual Property Organization (WIPO); and Keith Maskus, a former lead economist for the World Bank.

In a report summarizing the forum's key findings, the Conference Board found that:

"In the knowledge economy, utilizing the value of innovative ideas and creative works through the protection of IP rights is critical in achieving (and maintaining) global competitiveness. ... [As an advisor to the French Government emphasized] a robust IPR framework was essential to creating the necessary incentive for individuals or companies to generate innovative products and services. Without this incentive, a jurisdiction's innovative output would fall significantly below capacity. ... [The] lack of an adequate IPR framework in Canada was a significant economic drag on the Canadian economy."¹⁵

2008 also saw the launch of IP Osgoode, the new Intellectual Property Law and Technology Program at Osgoode Hall Law School. The first program of its kind in Canada, IP Osgoode's mandate includes research, public policy discussion and teaching. It provides an "independent and authoritative voice that explores legal governance issues at the intersection of intellectual property (IP) and technology."¹⁶ The program draws on researchers and collaborators from academia, government, business and other fields, and is guided by an advisory board of eminent legal experts,

including a Justice of the Supreme Court of Canada, the Honourable Mr. Justice Marshall Rothstein.

The program has earned praise from Jim Balsillie, Co-Chief Executive Officer of Waterloo-based Research In Motion, who remarked that “IP Osgoode will finally bring a credible and balanced voice to Canada’s most important IP issues.”¹⁷

Growing Public Awareness of the Need for Action

The need for stronger IPR protection is recognized not just by creators, business leaders and government officials; it is also recognized by the Canadian public. A NANOS poll commissioned by the Public Policy Forum found that 80% of Canadians support or strongly support the protection of intellectual property rights for new products, inventions and discoveries.¹⁸ Similarly, a 2006 social values study by Environics Research found that:

“Although research shows that a strong foundation of respect for intellectual property already exists among Canadians, this respect may be eroded over time if present conditions persist. Currently, Canadians operate in a virtual vacuum of regulation or even social standards when it comes to the use and abuse of intellectual property.”¹⁹

An Environics poll conducted shortly after the June 12, 2008 introduction of Bill C-61 in Parliament (which would have reformed the Copyright Act) found that 68% of Canadians supported the legislation when they were provided with details of its key provisions.²⁰ The poll also found that 74% of Canadians supported the bill as a means of bringing Canada’s copyright laws in line with the international standards set out by the World Intellectual Property Organization.²¹

In recent years, Canadians have been exposed to a growing volume of media coverage on IPR issues. The *Toronto Star’s* pull-out supplement on counterfeiting in October of 2007 provided a detailed look at the extent of counterfeiting and piracy in Canada.²²

Editorials in the *Toronto Star* have drawn attention to the critical need to improve Canada’s ailing IP system:

“[T]here are economic repercussions to counterfeiting and piracy. ... They are driving out *legitimate* manufacturers, causing job losses and lowering the level of research and

development in this country. Canada lags far behind other industrialized countries in fighting counterfeiting...”²³

...

“The growth of the Internet and other technologies has enabled consumers to download, copy and share music, movies and other material with a few clicks of a computer mouse, thereby eroding the ability of artists to control and earn a living from their work. Canada’s Copyright Act simply hasn’t kept up... Creators of music, books and movies deserve fair compensation for their time and effort and a say in how their work is used. True, they have benefited from the creative possibilities presented by new technologies. But those same technologies have also made it easier for savvy users to steal their work. By failing to update its laws to take this new reality into account, Canada risks stifling creativity and innovation among artists who may be even harder pressed to make a living.”²⁴

A November 2008 Environics survey into Canadians’ attitudes toward counterfeiting found strong support for government action against the trade in knock-off products. Three in four respondents (73%) indicated they are likely to support a political party that imposes laws and enforcement against counterfeiting, and 63% wanted tougher measures if organized crime is involved.²⁵

Government of Canada: Initiating Action on IPR

In response to growing concern about IPR, the federal Government has begun to take steps to improve Canada’s IPR system. Bill C-61, the Government’s long-awaited amendments to the Copyright Act, was intended to bring Canadian copyright law into the digital age and fulfill the country’s decade-old commitments under the WIPO Internet Treaties.

Though Bill C-61, like the similar Bill C-60 before it, died on the Order Paper with the dissolution of the minority Parliament in September 2008, there continues to be a need for the introduction of a new copyright reform bill and other federal Government IP protection measures. This need has been recognized by the Government which reiterated its commitment to reforming the Copyright Act with the 2008 Throne Speech.

These changes would build on the progress made by Bill C-59, *An Act to Amend the Criminal Code (unauthorized recording of a movie)*. This bill made amendments to the Criminal Code designed to deter the camcording of movies and was implemented in response to mounting concern over Canada's reputation as a major source of pirated films.²⁶ The film industry, which combined with the television production industry employs over 125,000 people in Canada, warmly applauded the adoption of this bill.²⁷

Moving Forward

The need for reforms to Canada's IPR system has become clear – it is time for Canada to adopt international standards concerning the protection of IPR. The widespread support for reforms suggests that now is the time for Canada to enter into an area of positive action in which the protection of Canadian citizens and businesses and the creation of innovative jobs will be of the highest priority. The necessary reforms require action in three areas:

- The development of a strong IPR framework to improve innovation in Canada;
- The creation of an empowered and modernized IPR enforcement system; and
- The adoption of legal reforms to bring Canada's copyright law into the digital age and in much needed conformity with the WIPO Internet Treaties.

The CIPC will play an active role in these developments and will work closely with the government, policy-makers, leading IPR experts, and enforcement officials to help shape and drive reforms to ensure they are based on:

- Well-established international best practices;
- Sound policy research; and,
- The needs of the Canadian business community and the interests of Canadian consumers.



PART II: THE IMPORTANCE OF INTELLECTUAL PROPERTY RIGHTS AND INNOVATION

Innovation: The Key to Canada's Prosperity

In the 21st century, innovation has been identified as the key driver of economic growth, productivity and competitiveness in Canada.²⁸ In June 2008, the federally appointed Competition Review Panel found that, with innovation underpinning so many Canadian industries and high-value jobs, the country's innovative performance would likely determine the "difference between success and failure in the global marketplace."²⁹ The scale of Canada's innovative economy is often underappreciated. One subset of this sector alone, the creative industry, is three times larger than Canada's agricultural sector, comprising 7.4% of GDP and employing more than one million people.³⁰ As the Ontario Minister of Research and Innovation has noted, innovation is the driver of economic growth in Canada:

"[In] all high wage, high value dollar jurisdictions, it is innovation that drives prosperity. We are never going to be able to have an economic plan based on the fact that we are going to be cheaper than somebody else, that we are going to copy

somebody else's technology. We are a jurisdiction that has to be committed to being at the forefront of innovation and the ability to take new ideas and bring them to the market."³¹

In an innovative economy, intellectual assets are increasingly the most valuable resource employers have, with different forms of IPR – copyrights, patents and trademarks – providing their economic foundation. For example, trademarks are vital for consumer goods, retail and financial services sectors; patents are critical in the fields of advanced technology, telecommunications and life sciences; while copyrights underpin the software, film, music, television, publishing and new media industries. Protection of IPR ensures that businesses and creators are able to profit from their goods and services, thereby encouraging the production of new products. As WIPO has noted, intellectual property is becoming "the ultimate asset" across a wide range of industry sectors in the developed world.³²

Case Study: Intellectual Property and Canada's Life Sciences Sector

Canada's current IPR system does not offer the protection required for the development of an internationally competitive and innovative life sciences sector. The current level of protection has had negative impacts on this sector of the Canadian economy. Of particular concern to this major player in Canada's innovative economy is the disparity between patent protection in Canada and in its main international competitors. Currently, patents are protected for 20 years in Canada, but that protection runs from the date of a patent application.³³ In the life sciences sector, the majority of this period is necessarily dedicated to product development and occurs during a time when the relevant products are seeking marketing approval. Many of Canada's competitors have adopted patent term restoration (PTR) policies that are intended to recoup some of the patent life lost during the approval process. In order to attract much-needed investment into the life sciences sector, Canada needs to ensure that it offers a competitive environment for Research and Development (R&D). Canada is losing jobs because of this and should amend the *Patent Act* to include the adoption of PTR.

Another problem facing the life sciences sector concerns the *Patented Medicines (Notice of Compliance) Regulations*; a crucial system for protecting patents in this industry. Due to peculiarities in the system, the ability of innovators to appeal court rulings is restricted. Under the regulations, the Federal Court is unable to revoke a Notice of Compliance (i.e. marketing approval) once it has been granted to a generic company. This undermines the ability to appeal an adverse decision by the original patent holder and effectively insulates the decisions of the Federal Court from review. In contrast, generic manufacturers are always able to appeal a decision that is against them. Reforms to the Canadian system should ensure that innovators can have their appeals heard.

Finally, while Canada provides protection for the data generated during the clinical development of products that is in line with its international treaty obligations, this country still lags behind other states in terms of the extent of this protection. For example, members of the European Union are required to offer up to 11 years of protection for this data. Canada provides for only eight years.³⁴ In terms of biologics, there are proposals in the U.S. that would offer 12 to 14 years of protection to an innovative biologic product. Canada must keep pace with changes in the international community to ensure that it offers competitive protection for innovative products in the life sciences sector.

A Robust IPR Framework: The Cornerstone of the Innovation Economy

Leading innovative jurisdictions have recognized that securing the value of innovative ideas and creative works through the protection of IPR is critical to achieving and maintaining global competitiveness. Without a robust IPR framework, the value of intellectual assets will remain underdeveloped. For example, the life sciences industry, which is at the forefront of Canada's innovative economy, is suffering from a continued lack of stable protection for their patents. This has stifled their ability to make Canada a major destination for investment in research and development activities. As Moises Naim, former Executive Director of the World Bank has noted:

“Without guaranteeing [IP] ownership rights – and income – to creators of new, valuable ideas, the incentives for inventors will disappear and innovation will dwindle. It's a logical argument, and even countries that are short of inventors, patent holders, and corporations that own major brands understand the principle.”³⁵

Similarly, the World Bank's former lead economist, Keith Maskus, has stated that a robust IPR framework promotes “dynamic competition through innovation, technology absorption and product design.”³⁶ Without a strong IPR system, “it is difficult to foster attitudes of creativity, invention and risk taking” and “the economy will stagnate in a mode favouring copying and counterfeiting.”³⁷ It is not surprising, therefore, that Canada, along with the other members of the G8, have expressly acknowledged that “a fully functioning intellectual property system is an essential factor for the sustainable development of the global economy through promoting innovation.”³⁸

Without proper protection, the creation and dissemination of knowledge-based goods and innovative products are vulnerable to market failure because of:

- (1) **Inadequate Access to Capital** – Without properly protected IPR, small and medium-sized enterprises (SMEs) are generally unable to attract the capital needed to commercialize their creative products. As Scott Inwood, Director of Commercialization at the University of Waterloo, has noted, without proper IPR protection many Canadian start-ups remain “still born” because they are unable to access venture capital.
- (2) **Revenue Drag** – Without adequate IPR protection, knowledge-based goods that require substantial amounts of capital to develop, distribute and market are susceptible to imitative “free riding” by copycats and counterfeiters. As a result, according to the OECD, there is an erosion of business revenue, a “reduction in incentives to innovate,” and a drag on “medium and long-term growth rates.”³⁹
- (3) **Stunted International Expansion/Reduced Foreign Direct Investment** – A study conducted by the International Finance Corporation indicated that over 80% of the corporations interviewed reported that adequate protection for IPR played a significant factor in deciding whether or not to invest in domestic R&D.⁴⁰ Canadian failure to properly protect IPR directly affects the willingness of foreign firms to invest domestically. The same is true for the interest and ability of Canadian companies to expand into countries with poor IP regimes. For example, Canadian ice wine sales have been “completely wiped out” in parts of Asia because of the lack of effective IP protection.⁴¹

Lagging Innovation in Canada: The Need for a New IPR Framework

According to Michael Keplinger, Deputy Director of WIPO, governments with the greatest innovative economies have also developed strong intellectual property protection.⁴² Like many developed nations, Canada will increasingly depend on innovation as a primary driver of its future economic growth and competitiveness. Unfortunately, Canada has consistently rated a ‘D’ in innovation in the Conference Board of Canada's annual Report Card on the Canadian economy.⁴³ The Conference Board has found that Canada “remains at the bottom of the class” in terms of innovation compared with the rest of the developed world. This presents a major hurdle to Canada's future economic success. The Conference Board has recommended that:

“The key [emphasis added] policy issue for Canada is how to foster an innovative culture through an optimal intellectual property system. ... Coupled with its [Canada's] uncoordinated innovation

infrastructure, is a marginal framework for developing and exploiting intellectual property from both the private and public sectors. ... It is clear that Canada's intellectual property system is not effective..."⁴⁴

The Competition Policy Review Panel noted that Canada ranked "poorly across almost all aspects of innovation."⁴⁵ In proposing solutions to this problem, the panel recommended that Canada's IPR system be strengthened and modernized because:

"Intellectual property frameworks play a central role in rewarding and encouraging innovation by granting creators the rights that enable them to monetize the products of their innovation. ... [Canada should] develop strong IP capacity and demonstrate to the world how competition and productivity can be furthered by a modern IP regime."⁴⁶

Intellectual Property Rights and SMEs: The Need for an IP Commercialization Framework

While IPR are important for a wide range of businesses, they are especially critical for start-up businesses that rely on the protection of their innovations for their success. Whether in the form of patented technology, a copyrighted creative work, or a branded new design, IPR are often the principal (or only) significant asset of innovation-based small and medium-sized enterprises (SMEs). As Tom Jenkins, Executive Chairman of Open Text Corporation noted at the 2008 Ontario Economic Summit, the Government must do a better job to help Canadian companies commercialize their innovative ideas and bridge the current IP gap.⁴⁷ According to the Institute of Competitiveness and Prosperity, the Government has placed an "overemphasis on the hard sciences and traditional R&D" and not enough attention on how to help businesses translate innovative ideas from the drawing board to the store shelf.⁴⁸ Similarly, as the Conference Board of Canada has concluded, while Canada has "good science faculties" and produces a comparatively high number of scientific articles, we do not have an effective public policy system that translates inventiveness and creativity into beneficial commercial products and services.⁴⁹ As a result, Canada creates "a supply of scientific discovery" but does not "go the extra step of fostering demand for innovative products" or assisting Canadian SMEs to succeed on "a globally efficient scale."⁵⁰

Maximizing the Benefits of Academic Research and Development

The poor performance of Canadian universities turning government research dollars into economically successfully (and socially beneficial) products and services is another area of concern. In comparison to our global competitors, with one or two exceptions, Canadian universities do a poor job of generating commercially viable innovative products that add "value to the economy and society."⁵¹ According to Professor Pina D'Agostino, Director of IP Osgoode, it is not because Canadian universities suffer a deficit of top-tier academics. Rather, it is because they generally lack the "policies, governance frameworks, support and awareness" that translate creativity and inventiveness into valuable IP.⁵² One of the few exceptions to this rule is the University of Waterloo, where a combination of world-leading IP policies, commercialization centres, and education programs have transformed the Waterloo region into a global innovation hotspot. As Curtis Cook, the former Principal Research Associate in Innovation at the Conference Board concluded in 2008, the key for Canadian universities is to build upon the policies being used successfully at Waterloo "so that innovation, research and development" in Canada are more "effectively commercialized for society's benefit and economic growth."⁵³



Case Study: The Waterloo Miracle

The Waterloo region in southern Ontario is widely recognized as a leader in the Canadian innovative sector. Waterloo relies on innovative ventures to drive its economic development. Home to some of the most prominent Canadian advanced technology businesses, including global success story Research in Motion, the Waterloo region has become a bastion for Canada's knowledge-based sector. Today, the region houses 514 high-tech companies that, in 2008, generated \$13 billion in revenue, and enjoys a 7% growth rate in high-tech employment.⁵⁴ Waterloo's success can be credited to its distinctive IPR policy and education system, which stresses the importance of profit sharing with innovators. The University of Waterloo offers a competitive program that sees a substantial portion of the profits generated by innovative ventures passed on to the creators. As George Dixon, Vice President of Research at the University of Waterloo has noted:

“Waterloo has the ability to transfer many of its pure research findings into practical applications for the benefit of society. It stands alone in its inventor-owned intellectual property policy that encourages the practical application of research by supporting technology transfer and company incubation.”⁵⁵

In effect, IPR protection is the driver that pushes inventions out of the research labs and into the marketplace. The success of this innovative system has been widely recognized, culminating in the institution being ranked as Canada's number one comprehensive research university.⁵⁶ The secret of Waterloo's success is its 'Creator Owns' IP policy where inventors own their inventions.

Encouraging the commercialization of IPR is another factor behind the region's success. For example, the Accelerator Centre at the Waterloo Research and Technology Park encourages the growth of local start-ups by mentoring innovators on IPR management issues and effective ways to accelerate the creation and commercialization of their new products and services. Dr. Tom Corr, the CEO of the Accelerator Centre, has found that many of the successful businesses in the Waterloo region rely almost entirely on IPR protection. Similarly, Scott Inwood, Director of Commercialization at the University of Waterloo, has noted that IP rights have “everything to do with” the “Waterloo Miracle”:

“Waterloo is considered to be the home to one of North America's leading sources of technology players, technology transfer, commercialization expertise, venture capital and early stage capital investment. ... Economic incentive is the best motivator to encourage commercialization ... So if the breadth and scope of IP protection is diminished or more difficult to secure, then the breadth and scope of commercial opportunity will also be diminished and less likely to attract capital... [In sum,] the ability to secure strong IP rights is a fundamental precursor to creating economic development like we've done successfully in the Region of Waterloo.”⁵⁷

PART III: THE NEED FOR STRONG ACTION TO FIGHT COUNTERFEITING AND PIRACY

Counterfeiting and piracy affects virtually every industry and no sector is immune. While there has been some progress in Canada over the past two years regarding the formation of a consensus on IPR, this consensus has yet to translate into action aimed at closing the gaps in Canada's IPR system. It is time for the various parties to work together in the development of a cohesive IPR system.

As noted in Part II, such an IPR framework is a pillar of the innovation economy, and is necessary for the creation of high-tech, knowledge-based jobs and continued economic prosperity. The immediate establishment of an IPR foundation is crucial for Canada, especially in this period of economic uncertainty. Canada is currently seeking ways to shore up the economy in the face of a sharp global downturn, while at the same time attempting to recover from the loss of thousands of well-paying jobs in the manufacturing sector. In this challenging economic climate, rampant IP theft is an unwelcome drag on job creation and business expansion, and creates a compelling rationale for the importance of rapidly establishing an effective intellectual property system in Canada.

According to a study commissioned by the Business Software Alliance (BSA), losses to the Canadian economy due to software piracy surpassed \$1 billion in 2007.⁵⁸ Further, a BSA economic impact study indicated that a reduction of software piracy in Canada by 10% over the next four years could inject \$2.7 billion into the economy and generate more than 5,200 high-skilled jobs.⁵⁹ Film piracy resulted in consumer spending losses of approximately \$270 million in 2005, as well as tax revenue losses of \$41 million.⁶⁰ Canada's music industry, faced with unchecked online counterfeiting and piracy, experienced a 48% (\$637 million) drop in retail sales from 1999 to 2006.⁶¹ The impact on individual businesses and creators can be devastating: counterfeit products undercut profits; the ability of entrepreneurs to raise capital is undermined; and all too often, businesses are forced to close.⁶² Closed businesses equates to lost jobs.

The Canadian population appears to understand this correlation. According to the November 2008 Environics survey, two-thirds of Canadians believe that, given the state of the economy, it is less justifiable to buy counterfeit goods because of the harm to manufacturers, retailers and employees.⁶³

Illicit Profits and the Involvement of Organized Crime

Counterfeiting and piracy are enormous problems in Canada, both in the real world of physical products and in the virtual world of the Internet. Due to the very nature of black market economies, the true scale of today's trade in counterfeit and pirated goods is difficult to measure. It has been conservatively estimated that counterfeiting

and piracy cost the Canadian economy \$22 billion annually in lost tax revenue, investment and innovation.⁶⁴ This poses an enormous problem to Canada. The RCMP has found that:

“The number and type of goods being counterfeited continues to climb as new products constantly appear on the scene. ... No part of Canada is immune from the effects of this type of criminality. The [counterfeiting] network can extend its tentacles into the furthest corners ... IP crime tends to be pervasive. The demand for such goods matches that of many commonly purchased items...”⁶⁵

The involvement of organized crime has led to greater investment in the quality and quantity of counterfeit goods. This has made it more difficult for consumers to distinguish between knockoffs and legitimate products. It has been estimated that the global trade in counterfeit and pirated goods reaches several hundred billion dollars annually.⁶⁶ This represents a growth rate eight times that of trade in legitimate goods since the early 1990s.⁶⁷ In 2007, customs officials in the European Union were responsible for the seizure of over 79 million counterfeit articles.⁶⁸ These products ranged from luxury goods, pharmaceutical products, electronic equipment, tobacco products, articles of clothing, and pirated CDs and DVDs. Across the globe, ports of entry are being inundated with illicit products, and the proceeds are being funnelled into criminal and terrorist organizations.

American officials have found cases where the proceeds from the trafficking of illicit products have been directly linked to support for terrorist organizations. In 2003, Mohammad Youssef Hammoud was sentenced to 155 years in prison for sending a portion of the proceeds generated by the illicit sale of cigarettes to Hezbollah.⁶⁹ In Northern Ireland, the sale of counterfeit goods has been directly linked to paramilitary groups.⁷⁰ Even the Chief of INTERPOL has acknowledged that Al Qaeda may be using the shipment of counterfeit goods as a form of financing.⁷¹

Within Canada, the low risk of being prosecuted for IP theft and the high profits generated by this illicit trade have made counterfeiting and piracy a lucrative industry. For example, a kilo of counterfeit Viagra pills can be worth up to \$80,000 – much more than a similar quantity of cocaine.⁷² Convictions associated with drug trafficking often lead to years of jail time, while the penalty for trafficking illicit goods typically equates to small fines, usually of less than \$10,000.⁷³ As the RCMP has noted: “minimal sentences and low fines [for IP Crime] offer little incentive for law enforcement to pursue this

issue more vigorously, and every incentive for criminals to continue pirating copyrighted goods.”⁷⁴

According to the RCMP, almost all major crime cartels within Canada are involved in the trafficking of counterfeit and pirated goods.⁷⁵ These goods take a wide variety of forms and affect many Canadian businesses. Criminal organizations are generating enormous profits from the lack of enforcement within Canada and are using these proceeds to fund their activities with little regard for the dangers these goods pose to the health and safety of Canadians. The proceeds generated by this trade equate to lost duty and tax revenue for the Canadian government and to the loss of needed revenue for Canadian employers.

The Illicit Trade in Tobacco Products

The illegal trade in cigarettes has been increasing steadily since the mid-1990s. In 2008, the problem rose to the point where 33% of all cigarettes in Canada were being sold through unregulated channels, up from 22% in 2007. On top of this, the percentage of people who are smoking illicit cigarettes has also increased from 11% in 2006 to 19% in 2008.⁷⁶ While the provinces of Quebec and Ontario remain the hotspots for the black market trade of illicit tobacco products, other provinces are also beginning to see a growth in this illegal activity.⁷⁷

The major problem of contraband tobacco products consist of grey market tobacco brands (i.e. legitimate third-party owned international brands which are illegally sold in Canada), local undeclared production, distribution and sales of lookalike and certain brands manufactured on First Nations territory which openly violate both Canadian trademark rights and copyrights. The particular geographical location of certain First Nations reserves and their special status in Canada and in the United States has allowed certain individuals and/or manufacturers located on this territory to use these reserves as a channel for the illicit trade of tobacco products.⁷⁸

The availability of illicit tobacco products in Canada has a direct financial impact on legitimate businesses and costs the Canadian and provincial governments billions of dollars in lost tax and import tariff revenue and leads to even greater health risks as a result of the non-compliant and uncontrolled manufacture, distribution and sale of such illicit products.⁷⁹

Similar to other black market economies, the proceeds from the sale of illegal cigarettes are virtually impossible to track and have been linked to funding other criminal activities. One of the most disturbing aspects of the illicit trade in tobacco products is the prevalence of

illegal cigarette usage in youth. A recent study conducted by the Canadian Convenience Store Association showed that in Ontario and Quebec, an average of 30% of cigarette butts recovered from near high schools grounds were illicit.⁸⁰ If no action is taken to curb the trade in illegal tobacco products, it is anticipated that by 2010, 50% of all tobacco products in Canada will be illicit.⁸¹

A Threat to Health and Safety

Counterfeit goods also represent a significant threat to the health and safety of Canadians. For example, counterfeit batteries – often identical in appearance to well-known brands – can contain dangerous levels of mercury and are becoming more common. In 2007, over four tonnes of counterfeit batteries were seized in Montreal alone.⁸² To date, over 86 cases of leaking or exploding batteries have been reported in Canada, almost half of them involving children’s toys.⁸³ This is unacceptable.

In the automotive sector, counterfeit brake pads and steering components – even faulty airbag mechanisms – have been reported. Counterfeit entertainment equipment, power cords, circuit breakers and other components have infiltrated the electronics industry. These products fail to meet Canadian safety codes, are often made with substandard material and are falsely marked with safety certifications in order to mislead consumers. The Standards Council of Canada has warned Canadians of the health and safety threat posed by these goods.⁸⁴

One of the most significant threats to consumer health is the counterfeiting of pharmaceutical products. The sale of counterfeit pharmaceuticals has become so lucrative that the World Health Organization (WHO) estimates that over 30% of medicines used in South Asia, Latin America and Sub-Saharan Africa are fakes.⁸⁵ These same reports also state that over 50% of the pharmaceutical products sold over the Internet are illegitimate. Estimates are that 16% of these products contain the wrong ingredients, 17% contain the right ingredients in the wrong quantities, and 60% contain no active ingredients at all.⁸⁶ These chemical cocktails can contain mixtures that are toxic to humans and have been linked to tens of thousands of deaths worldwide.⁸⁷ Since the costs incurred by the production of counterfeit medicines are low, and the facilities needed are usually basic, it comes as no surprise that the reported number of confiscated fake drugs is increasing annually. While precise numbers can be difficult to obtain, the Centre for Medicines in the Public Interest has predicted that the global sale of counterfeit drugs will reach US\$75 billion by 2010, an increase of more than 90% from 2005.⁸⁸

These dangerous fakes are entering Canada. In 2005, the Ontario Coroner's Office opened an investigation into the deaths of 11 individuals who were suspected of having been exposed to a counterfeit version of Norvasc. As a result of the investigation, the Office of the Chief Coroner issued six recommendations, which were directed to Health Canada, the Ontario College of Pharmacists, and the Ontario Ministry of Health and Long-Term Care. Three out of the six recommendations addressed the need for an extensive review of policies regarding counterfeit medications, a clear indication of the need to re-examine current legislation in this area. The three recommendations are:

- "Current resources allocated to the identification and elimination of counterfeit and non-approved medication should be reviewed and, if necessary, modified, in order to minimize the risk of entry into legitimate distribution channels.
- Existing statutes and regulations regarding counterfeit medications should be reviewed, taking into account emerging trends in criminal methodology, and perhaps statutes and enforcement strategies that have proven effective in other jurisdictions.
- The classification of counterfeit and non-approved medications should be reviewed to determine whether they should be prohibited items for import into Canada."⁸⁹

In March of 2007, counterfeit pills containing lethal doses of heavy metals were responsible for the death of a woman in B.C. who had purchased the medicine over the Internet.⁹⁰ During the same year, Health Canada advised border agents to block incoming shipments of Chinese toothpaste after counterfeit products of a well-known brand were found to contain the toxic compound *diethylene glycol*, a common ingredient in anti-freeze.⁹¹ More recently, in November 2008, testing by both Health Canada and the U.S. Food and Drug Administration confirmed the presence of trace amounts of melamine in North American baby formula.⁹²



Recent years have seen a drastic increase in both the amount and variety of counterfeit goods infiltrating Canadian markets. Without the adoption of policies specifically designed to curb this trend, it is likely that increasing numbers of Canadians will suffer due to the government's inaction. It is time for the Canadian government to take the necessary steps to protect its people from the dangers posed by counterfeit products.

The Online Environment: The Perfect Venue for Black Markets

The explosion of physical counterfeiting has been closely mirrored by rapid growth in online IP theft. The online sale of counterfeit and pirated goods is one of the greatest problems facing many Canadian businesses. Not only are counterfeiters able to sell fraudulent goods in an arena lacking quality control, they are also able to infiltrate markets that were previously beyond their reach. According to WIPO, online IP theft is "widespread" and "increasing."⁹³ Similarly, a report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) has found that "online piracy is growing far faster than piracy in the physical world."⁹⁴ While this is a worldwide phenomenon, the problem is particularly acute in Canada where the existing copyright laws continue to remain outdated and ineffective. A 2005 study by the Organization for Economic Co-operation and Development (OECD) found that Canada's per capita rate of peer-to-peer downloading was the highest among OECD countries.⁹⁵ The RCMP has identified an "ever-growing use of the Internet for IP crime" in Canada, and predicted that the problem will escalate because "software, music and movie piracy are easy, low-risk activities."⁹⁶ In November of 2007, the Quebec Superior Court declared that unauthorized file sharing in Canada was an "endemic" problem.⁹⁷ The problem, however, extends well beyond the piracy of digital media, as luxury goods and pharmaceutical products are also victims of counterfeit sales through third-party or unregulated websites. It is clear that Canada needs to take steps to regulate its online environment.

Canada's inaction to date against counterfeiting and piracy has brought unwelcome attention on the world stage. Several international organizations and countries have specifically identified Canada for its failure to adequately protect IP rights. In March 2008, the International Intellectual Property Alliance placed Canada in the same league as well-known counterfeiting havens like China and Russia by listing it among "countries of the greatest concern."⁹⁸ In April 2008, the United States Trade Representative (USTR) placed Canada on the Special 301 Watch List for the fourteenth consecutive year.⁹⁹ Despite such widespread international concern, Canada has yet to undertake efforts to rectify the problem. The first step in this process should be the ratification of the World Intellectual Property Organization (WIPO) Internet Treaties, which Canada signed more than a decade ago.

The WIPO Treaties

The WIPO treaties are two separate agreements that were adopted in 1996. These treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT), reflect the international consensus that creators deserve the right to protect and profit from their works. Based on the principal that copyright protection provides the incentives and protection necessary for the promotion of innovation, these treaties provide a framework upon which states are able to base their own domestic copyright legislation for the online environment. With over 65 states having ratified the agreements as of October 2008, they clearly provide a global standard by which to measure the minimum level of copyright protection for the digital age. According to WIPO, the WCT and the WPPT are "...critical for creating a legal environment in which rights owners can protect against infringement ... and develop new, more sophisticated products and licensing options."¹⁰⁰

One of the reasons behind the widespread adoption of these treaties is that for the majority of cases, domestic implementation of the treaties requires only minor alterations to existing legislation. The WCT and the WPPT call for basic levels of protection, such as ensuring that creative works are protected from IP infringement, that creators and producers of these works maintain the right to control their distribution, and that they receive remuneration for the distribution or reproduction of this material.

"Undoubtedly the single most important task for governments that want to make their copyright and related-rights regimes suitable for the age of electronic commerce is prompt ratification and faithful implementation of both WIPO Treaties."¹⁰¹

Canada's outdated Copyright Act remains out of step with its major trading partner's protection of IP rights on the Internet. As a result, Canadians still lack clear guidance regarding their online behaviour.

Enforced behavioural guidelines are needed for the survival of businesses in the online environment. The French government's Olivennes Commission, established by President Sarkozy to examine the issue of online piracy, found that:

"Internet users appear to have every encouragement to opt for illegal consumption. It is at once easy – because of good quality high-speed connections – free, and in all media-friendly formats. ... Illegal consumption [on the Internet] is today destroying value: by undermining creators' income, funding for production and the economic efficiency of distribution, it jeopardizes the diversity of works and poses a threat to the vigour of creative output ... It is now imperative to reverse the signals sent out to those who contribute to the economy, especially consumers, and to make them aware that for non-paying illegal

use to become the norm incurs a collective cost for the cultural industries, content creators and the nation."¹⁰²

A Counterfeit Pipeline that Overflows

Despite longstanding efforts by brand owners, industry associations and police to remove counterfeit products from Canadian retail shelves, under the current legislative and enforcement regime they continue to be widely available across the country. This was evident following major anti-counterfeiting sweeps in the Greater Toronto Area, Ottawa and Montreal in November 2008. Over 100 separate enforcement actions in the three cities – the most extensive such operation ever in Canada – netted more than \$4 million in counterfeit goods.

PART IV: TOWARD A NEW ERA FOR INTELLECTUAL PROPERTY RIGHTS IN CANADA

It is time for Canada to take action to upgrade our IP regime and properly protect IPR. Several of the studies, reports and white papers on IP referenced earlier offer detailed recommendations for action. The path to a more vigorous IPR regime is clear: policymakers can act with confidence on the recommendations in this report, knowing that a large and diverse group of key stakeholders stand behind them.

The core elements of an effective IPR system are laws, education and enforcement. These are matters of government responsibility. The development of this system requires a multi-faceted approach involving three fundamental building blocks: legislative integrity; institutions; and education. The recommendations proposed here comprise the core elements in each of these policy areas. In addition to being supported by a broad range of policy makers, business leaders and Parliamentarians, these recommendations mirror well-established international best practices that have proven to be effective and workable in other nations. In fact, the establishment of these building blocks was one of the key outcomes of the Fourth Global Congress on Combating Counterfeiting and Piracy (Fourth Anti-Piracy Global Congress). Convened by the World Intellectual Property Organization (WIPO), the International Criminal Police Organization (INTERPOL), the World Customs Organization (WCO) and the International Chamber of Commerce (ICC), the Congress made a series of concrete recommendations to effectively curb counterfeiting and piracy that are aligned with the recommendations in this report.¹⁰³

Legislation

The starting point for any properly functioning IPR system is the creation of an effective legal framework. If creative and inventive works can be unlawfully reproduced without legal sanction, there is little incentive to continue to produce or invest in such works.

To effectively stop counterfeiting and piracy, legislation must target the international, domestic, and online distribution channels. Canadian law is currently lacking in all three of these areas.

1) Border Protection – Guarding Against the Global Trade in Stolen IP

Since the early 1990s, the international trade in counterfeit and pirated goods has grown at approximately eight times the rate of legitimate trade and is now larger than the GDP of 150 national economies.¹⁰⁴ Faced with this enormous economic threat, almost

the entire developed world has enacted legislation which makes the importation of counterfeit and pirated goods an offence and empowers customs officials to seize them. At a *minimum*, international institutions like the World Customs Organization (WCO) have called for customs officials to have independent, or *ex officio*, authority to seize counterfeit and pirated contraband. This authority is emphasized in the model legislation developed by the WCO:

“Customs’ powers to act *ex officio* are a key feature of an effective border enforcement regime. In the vast majority of cases, customs officers are the only ones to know when and which allegedly infringing goods are transported. Therefore, unless customs are empowered and obliged to act on their own to stop suspected shipments at the borders, the border measures will remain ineffective.”¹⁰⁵

In Canada, customs officials lack proper authority and are unable to seize suspected counterfeit or pirated goods. According to the Criminal Intelligence Service of Canada, “Canada functions as a conduit for foreign manufactured counterfeit goods destined for the U.S. market.”¹⁰⁶ Echoing the findings in the Road Map, the House of Commons Standing Committee on Public Safety and National Security has called this situation “unacceptable” and recommended stronger border enforcement measures to “stem the tide” of counterfeit and pirated goods entering Canada.¹⁰⁷ Similarly, the Standing Committee on Industry, Science and Technology recommended 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.”¹⁰⁸

Recommendation: Implement a robust IPR border enforcement system to impede the international flow of counterfeit and pirated goods into Canada. Specifically, the Canada Border Services Agency (CBSA) should be provided with the legislative authority and resources needed to target, detain, seize and destroy counterfeit and pirated goods on its own initiative.

2) *Online Integrity – Curtailing Digital Piracy and Counterfeiting*

Alarmed by the growing impact of unauthorized file sharing on the Internet, WIPO has recognized the urgent need to restore integrity to the digital marketplace. A critical first step to achieving this goal is the implementation of the 1996 WIPO Internet Treaties. Although this will not end online piracy, the Treaties' provisions ensure that the fundamental principle of copyright law "... fully applies in the digital environment (and) to the use of works in the digital form."¹⁰⁹

Like most signatories to the WIPO Internet Treaties, the UK implemented these treaties several years ago. In doing so, the British government emphasized the need to protect its innovators in the digital age. It concluded in a report on its creative economy that "if creative artists cannot earn a living as a result of their work, then our creative industries will not thrive."¹¹⁰ Like many of the countries that have implemented the WIPO Treaties, France has since taken further steps to protect and foster intellectual property creation in the digital sphere. Specifically, France established the Olivennes Commission to examine how additional measures can be used to curtail Internet piracy and counterfeiting. In recommending a 'three strikes' policy for repeat online infringers, the Commission concluded that it is *imperative* that France:

"Reverse the signals sent out to those who contribute to the economy, especially consumers, and ... make them aware that for non-paying illegal use to become the norm incurs a collective cost for the cultural industries, content creators and the nation."¹¹¹

Many of Canada's other global competitors have implemented the WIPO treaties and have taken additional steps to update their laws to assure their relevance in the digital era. For example, as WIPO, Interpol, WCO and the ICC recommended at the Fourth Anti-Piracy Global Congress, additional measures should be taken in the area of ISP and content owner partnership to curb piracy and counterfeiting occurring over the Internet:

"Intermediaries should undertake immediate actions to prevent and deter counterfeiters and pirates from accessing their services for the purposes of illicit trade and distribution. These measures should include ... providing a mechanism for receipt of notices from rights owners and prompt responses thereto, filtering of illegal digital content by ISPs, refusing to host sites

with counterfeit and pirated content, removing such sites from search results, supporting efforts for increased transparency of data."¹¹²

Canada remains unique in the developed world in not having a WIPO-compliant copyright law. The CIPC urges the government to deliver on its promise to swiftly reintroduce legislation that implements the WIPO Internet Treaties and "brings Canada's intellectual property protection in line with that of other industrialized countries."¹¹³

The principles underlying Bill C-61, the legislation designed to implement the WIPO Internet Treaties in Canada, were welcomed by many stakeholders, including the Canadian Chamber of Commerce. Any new legislation must effectively inhibit online infringement, bring Canadian law into line with international norms and standards, and support legitimate business initiatives in the online environment. In particular, IP reform should promote cooperation and partnership between IP owners and Internet intermediaries to facilitate the detection and curtailment of counterfeiting and piracy. In doing so, IP reform legislation must guarantee Internet intermediaries reasonable security when they act as innocent intermediaries, but not create overly broad blanket immunities that could inadvertently shelter wide scale infringement operations. It must also clarify the liability of wilful pirate enterprises under Canadian law in order to avoid the prospect of Canada becoming a piracy haven.

Recommendation: The Government of Canada should rapidly adopt IP legislation that fully implements the WIPO Internet treaties in a manner that is consistent with international norms and standards and enables the curtailment of counterfeiting and piracy in the online environment (whether physical or digital), as well as clarifying the liability of counterfeiting and piracy operations under Canadian IP law.

3) *Targeting Domestic Manufacturing and Distribution of Counterfeit and Pirated Goods*

While a large portion of counterfeit and pirated goods pass through Canada's borders, a significant volume of counterfeit and pirated goods are produced *within* Canada. Domestic laws targeting their manufacture and distribution are another critical part of the overall

IPR strategy. Criminal laws are by far the most effective deterrent against the organized criminals who dominate the manufacturing and supply of counterfeit and pirated goods in Canada. Civil remedies, which are well-suited to resolving commercial disputes between legitimate businesses, are ineffective against organized criminals who are proficient at avoiding detection, identification and legal consequences.

We must untie the hands of Canadian law enforcement agents who are confined by the Criminal Code's lack of provisions that specifically target counterfeiting or piracy.

"In its responses to the two Parliamentary committees, the Government said it is "fully supportive of initiatives to ensure that the appropriate mechanisms and legislation are in place to protect Canadians from the harms associated with the marketing and use of [counterfeit] products."¹¹⁴

Recommendation: Enact criminal legislation that expressly targets IP crimes. Such legislation should make: counterfeiting and piracy explicit criminal offences under the Criminal Code; trade mark counterfeiting a specific criminal offence under the Trademarks Act; and, impose stronger penalties for counterfeiting and pirating violations that endanger the health and safety of Canadians.

The core legal remedies of border enforcement, online integrity, and domestic security comprise a foundation for additional measures against counterfeiting and piracy. They provide the rules that allow government and industry to act, and perhaps just as importantly, they deliver a *clear signal* to Canadians that the rights of creators, inventors and rights holders deserve protection and respect.

These laws can be established quickly and easily and without incurring financial burdens. Canada does not have to invent new provisions nor risk untried approaches as well-established and effective international best practices can be used as a guide. Key government departments and a federal interdepartmental IPR working group have studied these issues for nearly a decade. There is consensus among the Canadian government, industry and numerous other stakeholders that action is urgently required. All that is needed now is the political will to implement these recommendations.

Establishing IPR Institutions

While effective laws are a critical first step that will, on their own, greatly improve Canada's IPR situation, they must be accompanied by institutional support to be truly effective. Institutions enhance the capacity of laws to affect change by providing a focal point that establishes and guides the "rules of the game."¹¹⁵ WIPO refers to them as a "vital" component to promote and protect IP.¹¹⁶ Strong institutions are widely viewed as the "missing link" in economic growth and innovative capacity. Nations with the most effective IPR regimes have established two specialized institutions: an IPR Coordination Council and an IP Crime Task Force.

IPR Coordination Council

Reflecting the importance of intellectual property rights in today's knowledge-based economy, a growing number of countries have established centralized coordinating bodies to advance IP rights. This includes the federal governments of Japan, France, Brazil, Singapore and the U.S. For example, with the passage of the *Pro-IP Act* in October 2008, the U.S. government established an IP council permanently within the Executive Branch that enhanced and formalized its coordinated IP enforcement efforts in order to "systemically dismantle the networks that manufacture and distribute IPR infringing goods."¹¹⁷

The most effective measures to promote IP rights must be coordinated so that, "government officials and agencies act to increase value and raise standards of living by advocating an increased use of IPR."¹¹⁸

In his 2002 keynote address to Parliament, the then Prime Minister of Japan declared that the creation of an IP Council was necessary so that Japan's:

"Research activities and creative endeavours are translated into intellectual properties that are strategically protected and utilized so that we can enhance the international competitiveness of Japanese industries."¹¹⁹

In Japan and other leading innovation-based economies where IPR councils have been established, these bodies share four critical elements:

- They are led by high-ranking government officials from key ministries;
- They partner with industry stakeholders;

- They are supported by permanent staff dedicated to promoting IP and innovation; and
- They benchmark their efforts.

Each of these elements should form the foundation of an IPR coordinating council in Canada.

Recommendation: Establish an Intellectual Property Rights Coordination Council consisting of senior government officials, representatives from the business community, and IP rights holders. The Council should develop and implement a robust IPR framework that promotes the creation and exploitation of innovative products and services in Canada. (Detailed recommendations are provided in the Appendix.)

IP Crime Task Force

Closely connected to the IPR Council, the IP Crime Task Force is a specialized police unit created to specifically target IP crime. Countries with specialized IP crime units include the United Kingdom, Australia, Brazil, Singapore, Taiwan, U.S., South Africa, Thailand, Paraguay, Spain, Philippines and Italy. These bodies have proven to be highly effective in fighting IP theft, particularly in the face of sophisticated and resilient criminal organizations. An IP Crime Task Force should be established in Canada.

The UK has found its IP Crime Group, created in 2004, to be an essential IP rights enforcement tool:

“Combating IP crime *requires* [emphasis added] a new and coordinated approach. The challenge is to create and coordinate an enforcement network which targets resources more effectively and produces results ... Too many autonomous [enforcement] agencies duplicate effort, waste resources and give ambiguous signals. Recent successes demonstrate that stronger partnerships between enforcers and businesses bring greater levels of competence and effectiveness.”¹²⁰

Canadian officials now recognize the benefits of coordinated enforcement and the need for an IP crime task force. The RCMP

has called for specialized IPR “joint forces operations” to uncover criminal activities, generate useful intelligence, and more effectively coordinate resources.¹²¹ In its report on counterfeiting in Canada, the House of Commons Standing Committee on Industry, Science and Technology recommended that an “Intellectual Property Crime Task Force” be established to “guide and coordinate anti-counterfeiting and anti-piracy efforts in Canada” and act as a “partnership between government and industry” to curtail IP theft.¹²²

In its response to the committee, the Government said it

“agrees that meaningful and lasting progress in combating counterfeiting and piracy requires collaboration and continued vigilance. We further acknowledge the importance of collaboration with federal/provincial/territorial and domestic stakeholders, and our international partners.”¹²³

Recommendation: Establish a specialized IP Crime Task Force to guide, coordinate and lead anti-counterfeiting and anti-piracy enforcement efforts in Canada.

Education

The third major component of a successful IPR framework is establishing a formalized and comprehensive IPR education program. As WIPO asserts:

“Building public awareness of the role of IP is key to fostering a broad understanding of, and respect for, it and the system that promotes and protects it. ... Without political will, the appropriate legislative framework, and an IP culture, there can be no enforcement, and ultimately, the country and economy will suffer.”¹²⁴

Similarly, the OECD has found that it is critical for consumers, rights holders and government officials to understand the importance of intellectual property, the effects of IP theft, and how to combat counterfeiting and piracy. Here in Canada, both the Standing Committee on Public Safety and National Security and the Standing Committee on Industry, Science and Technology have emphasized the importance of IPR education. As the Industry Committee stated

in its report on counterfeiting and piracy, IPR education should 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.”¹²⁵

While most Canadians know that such goods as clothing, watches, music and movies are commonly copied and sold as counterfeits, relatively few are aware that this is the case for drugs (51%), toys (44%), batteries (28%) and extension cords (22%), according to the November 2008 Environics poll.¹²⁶ This points to the need to better educate Canadians on how counterfeiting affects not only their jobs and the economy, but also their personal safety.

IPR education programs in other countries provide a framework for Canadian policymakers in three key areas:

- **Public Education** – These programs are designed to improve public respect for intellectual property. In France, the Comité National Anti-Contrefaçon organizes a national awareness campaign (Contrefaçon: Non Merci!), operates a national call centre to report counterfeiting and piracy crimes, and maintains a website to build awareness of the dangers of counterfeit and pirated goods.¹²⁷
- **Inventor/Creator Education** – These programs are designed to help future inventors and creators understand the importance of IP and the rights related to their designs, creations and inventions. In Japan, IP education courses have been established in 70 colleges across the country.¹²⁸ In the U.S., IPR education courses are used to help small and medium-sized businesses understand, and better exploit, their IPR assets.¹²⁹
- **State Education and Official Training** – These programs are designed to educate enforcement officers, prosecutors, judges and other government officials on IP rights and related legal issues. In the U.S., the National IP Law Enforcement Coordination Council provides training and education programs for Foreign Service and other government officials as well as enforcement personnel and judicial officials.¹³⁰

Recommendation: Establish a formalized and comprehensive intellectual property education program targeting the public, businesses, innovators, creators, and government officials.



CONCLUSION

Despite the growing awareness surrounding the inadequacy of Canada's IPR regime and the acknowledgement by the government of the need for reform, this recognition has yet to be met with substantial action. The passage of anti-camcording legislation, followed by the introduction of Copyright Act amendments in Bill C-61, demonstrates that the federal government is willing to take action. Unfortunately these early steps are not enough. It is time for the government to live up to all of the commitments that it has made, not only to the international and Canadian business communities, but also to the Canadian population.

The government's recent Throne Speech commitments, along with its active participation in negotiations toward an Anti-Counterfeiting Trade Agreement (ACTA), provide greater confidence that it will soon take action. In these times of economic uncertainty it is imperative that the Canadian government adopt measures to ensure that Canadian businesses have the protection they require to compete and grow, while at the same time protecting its citizens from the dangers posed by the trade of counterfeit goods. Canada can no longer afford to lag behind its peers in terms of the protection of IPR. The Canadian government needs to act now to implement changes to bring our IPR regime up to international standards.

APPENDIX: IPR COORDINATION COUNCIL DESIGN

Recommendation	International Best Practice	Canadian Context
<p>Element 1:</p> <p>IP Council Led By High-Ranking Government Officials from Key Ministries</p>	<p>Governments that set a high priority on strengthening IP rights and innovation have appointed high-ranking officials to their IPR councils. In Japan, for example, the IP Strategy Council is chaired by the Prime Minister himself, and its sitting members include all Cabinet Ministers as well as ten experts.¹³¹</p>	<p>The establishment of an IP council requires leadership from the Prime Minister’s Office and cooperation from the leadership of key departments and agencies such as Industry, DFAIT, Justice, and Finance, as well as the RCMP and CBSA. Support for the council should come from a dedicated IP policy staff who would work in tandem with industry stakeholders.</p>
<p>Element 2:</p> <p>Partner with Industry Stakeholders</p>	<p>Businesses are on the front lines of creating and protecting IPR. As such, industry stakeholders are often best-positioned to advise the government on IPR issues such as counterfeiting trends and retail hot spots. In Brazil, for example, key industry leaders have permanent seats on the National Anti-Piracy Council (NAPC) and work closely with the government to establish and implement national IP strategies.¹³²</p>	<p>The IP coordination council should include representatives from the Canadian business community such as the Canadian Chamber of Commerce, the Retail Council of Canada, the CIPC, and other stakeholders who are affected by counterfeiting and piracy.</p>
<p>Element 3:</p> <p>IP Council Supported By Permanent Staff Dedicated to the Promotion of IP and Innovation</p>	<p>High-ranking government officials must be supported by a core group of bureaucrats dedicated to supporting innovation, promoting Canadian businesses and entrepreneurs, and fighting IP crime. This staff should be small in numbers and led by a high-ranking policy expert, either from government or industry, who is aligned with the government’s commitment to protect and promote IP rights. In France this has been accomplished through the establishment of a high-level anti-counterfeiting and anti-piracy commission that is overseen by the French President and led by the Ministers of Culture and Economics.</p>	<p>The Council will require the support of a small team of staff who are dedicated to the promotion of IP rights in Canada. This team would aid in the establishment and implementation of Canadian IP policy.</p>

**Element 4:
Benchmarking Efforts
to Promote and
Protect IP**

In order to ensure continual progress and address deficiencies in IP rights regimes, IPR Councils typically require progress reports on the state of the knowledge economy, the fight against IPR crime, and innovation performance. For example, in Japan, the Prime Minister, as chair of the IPR Strategy Council, requires that IP programs are regularly evaluated, updated and expanded, and that these efforts are detailed in annual reports.¹³³ Similarly, in the U.S., the National Intellectual Property Law Enforcement Coordination Council provides an annual report on its activities to the President and Congress. The report includes data on:

- The Council's effectiveness in assisting businesses to secure and leverage their IP rights.
- The effectiveness of IPR educational awareness programs and initiatives.
- The number and outcome of criminal prosecutions involving counterfeit and pirated goods, with details on settlements, sentences, recoveries and penalties.
- Seizures of counterfeit or pirated goods, including the number of actions and the volume and value of goods seized.
- US-led initiatives to promote IPR abroad.¹³⁴

The Council should produce an annual report to serve as a benchmark for annual IP related progress.

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