

Protection of Intellectual Property

A Case for Ontario



Protection of Intellectual Property: A Case for Ontario
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As the most diverse and most influential business group in the province, the Ontario Chamber of Commerce works closely with governments, labour, academia and various other groups to create a stronger and more vibrant economy in Ontario and the surrounding regions.

The OCC represents 57,000 members through 160 independent chambers of commerce and boards of trade throughout the province. The OCC has worked on behalf of business since 1911.

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**Key
Recommendations**

Addressing the challenges facing Ontario's Intellectual Property Rights (IPR) regime requires coordinated action by all stakeholders, including government, enforcement officials, industry and consumers. While IPR protection legislation is the jurisdiction of the federal government, the province must take a leadership role in improved stakeholder coordination, co-operation and development of best practices in order to more effectively raise awareness and combat IPR crime in Ontario. Increased IPR protection will create a supportive environment for innovation and commercialization.

1. The Federal government must strengthen current IPR protection legislative framework by:
 - a) Enacting legislation that clearly stipulates trademark counterfeiting as a specific criminal offence under the Trade-marks Act.
 - b) Amending the Criminal Code, as well as the Trade-marks and Copyright Acts where necessary, to criminalize the intentional manufacture, reproduction, distribution, importation or sale of counterfeit products
 - c) Amending the Criminal Code, as well as the Trade-marks and Copyright Acts where necessary, to criminalize the intentional possession of counterfeit goods for the purpose of sale under these acts
 - d) Implementing the World Intellectual Property Organization (WIPO) Internet Treaties to curtail internet piracy and counterfeiting. Incur sufficiently severe penalties to deter and neutralize offenders, i.e. inclusion of jail/prison time as punishment. Allow police to seize income and property derived from copyright piracy.
2. Canada Border Security Agency (CBSA) to be given the legislative authority to conduct searches, seize counterfeit and pirated goods, and impound such goods and destroy them in accordance with due process and Canadian law.
3. Federal and provincial governments to provide additional funding and training to CBSA, police, Crown attorneys and judges specifically for the purpose of enhancing IPR protection.
4. Develop and implement effective strategies for combatting IPR crime involve improvements in data collection methods and analysis of information by government, business and other stakeholders.
 - a) Public and private sector stakeholders involved in data collection methods and analysis of IPR information should adopt internationally accepted data collection methods
 - b) All IPR enforcement officials, (i.e. police and border officials) must be given access to databases

5. Federal and provincial governments to establish an IP Crime Task Force and an IP Inter-ministerial Coordination Council.

a) IP Task Force:

- comprising of specialized IPR prosecutors and police officers dedicated to IP related crime
- will coordinate enforcement and prosecution activities against counterfeiters and pirates
- will work with border officials to address counterfeit products detected at border crossings

b) IP Inter-Ministerial Coordination Council:

- comprising high-level representatives from ministries involved in innovation and intellectual property rights protection (Ministry of Research and Innovation, Ministry of Economic Development and Trade, Ministry of Education and Ministry of Finance) partnered with key industry stakeholders
- will be responsible for creating policy programs to promote the protection of IP and increase innovative capacity, such as education programs targeting youth as well as an awareness campaign for businesses and consumers
- key elements of the programs are:
 - i. Exposing the dangers and risks to consumer health and safety as well as to the economy of counterfeit and pirated goods
 - ii. Highlighting the relationship between IPR crime and organized crime and/or terrorist activities
 - iii. Providing information and resources to businesses
 - iv. Creating programs designed to stimulate the commercial exploitation of IP rights

6. Businesses should adopt the Coalition Against Counterfeiting and Piracy (CACP) Supply Chain Toolkit and ensure its six key steps are integrated into their respective business plans:
 - i. Secure legitimate inputs
 - ii. Verify legitimacy of customers and distributors
 - iii. Manage production waste and damaged or unusable inventory
 - iv. Ensure legitimacy of purchased products at retail level
 - v. Monitor Brand Integrity
 - vi. Outreach to law enforcement and regulatory officials
7. Private and public sector stakeholders should work in partnership with consumer protection groups and education institutions to generate greater public awareness of the impact of counterfeiting and piracy on public health and safety, as well as to the economy.

Introduction



As global market pressures force businesses to become more innovative, both the national and provincial intellectual property rights (IPR) regime must provide the support needed for Ontario businesses to thrive. While IPR is customarily viewed as a federal government issue, this report will argue that Ontario and its stakeholders must be more engaged in protecting IPR.

IPR infringement, both at the international and national levels, is occurring more frequently and more blatantly than ever before. The Organisation for Economic Co-operation and Development (OECD) reports that the magnitude and scope of the products is larger than the national GDPs of 150 economies and affects nearly all product sectors. There has been rapid expansion in counterfeited and pirated products varying from wine, DVDs, CDs, luxury items (such as high-end watches and designer clothing), to products that impact consumer health and safety (such as pharmaceutical products, medical equipment, personal care items, toys and automotive parts).¹

It is debatable that the legislative framework and mechanisms Canada has in place to contend with counterfeiting and piracy, theoretically even meet the basic obligations contained in the World Trade Organisation's (WTO) agreement on trade related aspects of intellectual property (i.e. TRIPS). For example, while the OECD states that Canada, China and Brazil (as well as a number of other economies) have "in most cases" mechanisms to meet the basic obligations contained in TRIPS, the OECD also states that IP enforcement in these countries is "viewed by many as inadequate".² Further, the United States Trade Representative (USTR) has stated that Canada's lax border measures "appear to be non-compliant with TRIPS requirements"³ and the Canadian Anti-Counterfeiting Network has stated that "Canada has effectively failed to meet" its TRIPS obligations.⁴

Regardless of whether Canada has met its basic TRIPS obligations, it is clear that Canada does not have an effective IPR protection strategy. The International AntiCounterfeiting Coalition (IACC) has repeatedly expressed concern surrounding the continued lack of proactive effort by the Canadian Border Security Agency (CBSA) and prosecutors in dealing with counterfeit

1 The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p 5

2 OECD, The Economic Impact of Counterfeiting and Piracy, Executive Summary, June 2007, pp. 6, 7.

3 United States Trade Representative, 2002 Special 301 Report Watch List (2002). Canada has not made any substantive changes to its border measures since the USTR report came out in 2002.

4 Canadian Anti-Counterfeiting Network, Report on Counterfeiting and Piracy in Canada: A Road Map for Change (2007), p. 9.

and pirated goods.⁵ Further, the IACC as well as the OECD⁶ and the International Chamber of Commerce (ICC)⁷ have noted that the inadequate coordination amongst stakeholders interested in IPR protection, including government, enforcement bodies and industry, poses serious obstacles in Canada's battle with counterfeiting and piracy.

Because of the IACC's recommendations and the gaps in relevant IPR legislation, Canada has been placed on the USTR 2007 "Watch List". According to the *2007 Special 301 Report* released by the USTR Office:

*"The United States ...continues to urge Canada to improve its IPR enforcement system to enable authorities to take effective action against the trade in counterfeit and pirated products within Canada, as well as curb the amount of infringing products transhipped and transiting through Canada."*⁸

The USTR's analysis has been supported by the Criminal Intelligence Service of Canada, which found in their annual report on organized crime that there are indications that "Canada functions as a conduit for foreign counterfeit goods destined for the US market" and that the more sophisticated networks in Canada "have organized crime involvement at some or all points of the supply chain from manufacturing to sales".⁹

The Ontario Chamber of Commerce (OCC) is concerned that Canada continues to be on the USTR's "Watch List" as the US and Canada share the most unique trade relationship in the world. As well, the US is Ontario's largest trading partner. In 2006, Ontario exported close to 86 per cent to and imported 65 percent of its total goods from the US. Ontario's second largest export market is the UK with 3.3 per cent, while its second largest import market with close to seven per cent of total goods is China.¹⁰

5 "Get Real. The International Anticounterfeiting Coalition. (IACC) Submission of the IACC to the United States Trade Representative - Special 301 Recommendations (February 12, 2007)p.40

6 The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p 6

7 Addendum to BASCAP Global Survey - <http://www.iccwbo.org/bascap/id12260/index.html>

8 2007 Special 301 Report - Office of the United States Trade Representative. p30

9 Criminal Intelligence Service of Canada, 2005 Report on Organized Crime (2005), pp. 26, 25.

10 Ontario Trade Fact Sheet Ontario - United States: Two Way Trade (August 2007)
http://www.2ontario.com/EI/tradefactsheet/ontario_tradefactsheet.asp?ID=215&type=country

This report will build on both national and international work that has argued for stronger IPR protection. It will examine where IPR infringement has threatened public safety, eroded brand quality of Ontario products, and impacted the economy, including loss of tax revenues. The report also offers recommendations to strengthen Ontario's IPR regime.

There is a real concern that mounting criticism of Canada's IPR regime will impact Ontario's attractiveness to foreign investors, its ability to foster innovation as well as overall competitiveness. The province must take a leadership role in IPR promotion and protection in order to provide and foster an environment where businesses are motivated to become more innovative and take risks. Further, to address Ontario's IPR challenges, the province and its stakeholders must aggressively engage consumers in an IPR strategy.

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.

Intellectual Property Rights Protection

A Necessary Pre-
Requisite for a Prosperous
& Innovative Economy



It is widely agreed that Ontario has considerable economic assets that foster business investment. Ontario's strengths across a range of sectors guarantee firms easy and reliable access to supplies and services. Ontario attracts many multi-national corporations which establish their subsidiaries within its borders and its diversified economy, but still faces challenges as it continues to lag behind peer jurisdictions in Canada and the US.¹¹ According to the Institute of Competitiveness and Prosperity (ICP), Ontario's GDP per capita is 12.6 per cent lower than the median of comparable peer economies.¹²

Over the past few years, the OCC, along with the Ontario Government and organizations such as the ICP, have examined strategies to increase Ontario's competitiveness in the global marketplace and improve overall prosperity.¹³ A common theme discovered through vehicles such as the **Ontario Economic Summit**, is the need for increased innovation throughout the province. Many believe that innovation is a key driver of economic growth, through the development and commercialization of new ideas for new products and processes.¹⁴

Ontario recognizes the importance of fostering ideas and bringing them to market, as evidenced by the creation of the Ministry of Research and Innovation and its commitment of \$1.7 billion over five years to key projects.¹⁵ These investments and initiatives, however have not effectively translated into increased innovation. According to the ICP, a solid measure of a region's innovative capacity and processes is patenting. When compared to US peer jurisdictions, Ontario's patent per output is 55 per cent lower.¹⁶

Ontario must do more to stimulate increased demand for patents and other intellectual property such as copyrights, trademarks and industrial design rights. Further, to ensure the international community continues to view Ontario as a viable place to invest and conduct business, the province must provide firms the necessary support to be innovative and successful through mechanisms such as an effective IPR regime. In 2002, the World Intellectual Property Office

11 Institute of Competitiveness and Prosperity, Time on the job: Intensity and Ontario's prosperity gap Working Paper 9, September 2006

12 Institute of Competitiveness and Prosperity, Time on the job: Intensity and Ontario's prosperity gap Working Paper 9, September 2006

13 Institute of Competitiveness and Prosperity, Reinventing Innovation and Commercialization Policy in Ontario, (Reinventing Innovation) Working Paper 6, October 2004

14 The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p 17

15 Ontario Ministry of Finance: Background Paper - Expanding opportunities for business in Ontario Investing (March 22, 2007) <http://www.fin.gov.on.ca/english/budget/ontariobudgets/2007/bk1.html> in Ontario's Capacity for Growth and Economic Prosperity

16 Institute of Competitiveness and Prosperity, Reinventing Innovation and Commercialization Policy in Ontario, (Reinventing Innovation) Working Paper 6, October 2004

(WIPO) reported that intellectual property represented 45 to 75 percent of the overall corporate value of the Fortune 500's largest companies. The value of e-commerce alone, a small subset of the knowledge economy, grew from USD \$0.15 trillion in 1999 to USD \$6 trillion in 2004.¹⁷

In 2005, the International Chamber of Commerce surveyed 1,100 corporate and academic economists in 90 countries. The survey found that 83 per cent of the economists surveyed agreed that counterfeit products and the theft of intellectual property are among the more pressing problems facing business today.¹⁸

Members at the G8 2007 Heiligendamm Summit reaffirmed the critical role of intellectual property by unanimously declaring that adequate IPR protection is a necessary factor in sustaining long-term prosperity in the twenty-first century. The declaration states:

*“A fully functioning intellectual property system is an essential factor for the sustainable development of the global economy through promoting innovation. ... The benefits for economic growth and development are increasingly threatened by infringements of intellectual property rights worldwide. We therefore strongly reaffirm our commitment to combat piracy and counterfeiting.”*¹⁹

Increased protection, promotion and awareness of IPR issues will signal to investors that Ontario does indeed view this key area of the economy seriously. By working to foster a strong IPR regime, the province will move towards reaching its full economic potential.

17 WIPO the intellectual property-conscious nation: Mapping the Path from Developing to Developed Kamil Idris and Hisamitsu Arai (April 2006)

18 International Chamber of Commerce – BASCAP Global Survey <http://www.iccvbo.org/bascap/id892/index.html>

19 G8 2007 Summit – G8 Justice and Interior Ministers Meeting Munich, 23-25 May 2007 “Concluding Declaration” http://www.g-8.de/nn_92452/Content/EN/Artikel/2007/05/2007-05-25-g8-innen-ustiz-bschluss__en.html

Economic Impact



As a result of the illicit nature of IPR crime, efforts to understand the economic impact of counterfeiting and piracy have been difficult. A recent report submitted by the Standing Committee on Industry, Science and Technology to the federal government clearly recognizes the challenges of quantifying the costs of IPR crime to the economy. The report states that:

“...counterfeit and pirated products are, by their very nature, “black market” activities, and a black market cannot be measured with precision: people do not self-incriminate and some companies do not want to publicize a counterfeiting or piracy problem since it may affect their brands.”²⁰

The Organisation for Economic Co-operation and Development (OECD) estimates that the value of counterfeit and pirated products traded in the international marketplace was close to USD \$200 billion in 2005.²¹ This figure does not, however, include counterfeit and pirated products that are produced and consumed domestically, nor does it include the significant volume of pirated digital products that are being distributed via the Internet. If these items were added, the OECD has stated that the total magnitude of counterfeiting and piracy worldwide could be several hundred billion dollars more.²² For example, in terms of internet piracy, a United Nations Economic Social and Cultural Organization (UNESCO) report on piracy found that online piracy is “widespread” and “is growing far faster than piracy in the physical world”.²³ In this regard, the OECD found in a December 2005 report that Canada had the highest level of peer-to-peer downloading among OECD countries.²⁴

In Canada, the RCMP and others have acknowledged that there is no comprehensive study regarding the specific amount of pirated and counterfeit goods. However, a widely accepted estimated cost of counterfeiting and piracy to the Canadian economy, ranges between CDN \$10 billion and CDN \$30 billion.²⁵

20 House of Commons, Standing Committee on Industry, Science and Technology, Eight Report Counterfeiting and Piracy are Theft. June 200

21 The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p 4

22 OECD, The Economic Impact of Counterfeiting and Piracy, Executive Summary, June 2007, p.13.

23 Darrell Panethiere, The Persistence of Piracy: The Consequences for Creativity, for Culture, and for Sustainable Development, UNESCO (2006), pp. 18, 22.

24 OECD, Working Party on the Information Economy, Digital Broadband Content: Music (December 2005), p.75.

25 Royal Canadian Mounted Police “Intellectual Property Crime in Canada – Hazardous and Costly” RCMP Feature Focus 2005 Economic Crime in Canada (http://www.rcmp-grc.gc.ca/economic_crime/ip_e.htm)

Canadian piracy and counterfeiting losses are also estimated in relation to the losses experienced in the US. The US Chamber of Commerce estimates that counterfeiting and piracy costs the US economy approximately \$250 billion per year.²⁶ Given that the GDP of the Canadian economy is approximately nine per cent of the US economy, the cost of counterfeiting and piracy in Canada is approximately USD \$22.5 billion.

While there are challenges in conducting cross-sector studies to quantify the aggregate economic impact of counterfeiting and piracy in Canada and Ontario, studies have been conducted which focused on specific industry sector losses. For example, annual losses to the software and film industries alone approximate \$1 billion in Canada.²⁷ Many other industry sectors have indicated that job losses, lower level of R&D spending and lower tax revenues collected from certain sectors, can be attributed to IPR infringement.²⁸ Counterfeiting and piracy have significantly harmed dozens of industries (including the automotive industry, pharmaceuticals, music, electrical products, consumers goods, apparel and accessories, etc.).

Information and Communication Technology

Ontario's information and communication technology (ICT) sector exemplifies why the province must demonstrate greater recognition of the importance of IPR protection, both domestically and internationally.

The ICT industry includes leaders in every sector, including telecom equipment, software development and services, digital media and web, and microelectronics, as well as cutting-edge technologies like VoIP, wireless broadband and photonics. Ontario is home to over 5,000 innovative ICT companies, ranging from domestic global giants like Nortel Networks, Mitel Networks, Cognos, Research in Motion and Open Text to foreign multinationals like IBM, Alcatel, Cisco Systems, Dell, Ericsson, Microsoft, Siemens, Motorola and McAfee.²⁹

26 U.S. Chamber of Commerce, *Counterfeiting and Piracy: Threats to Consumers and Jobs*, 2007.

27 See the Business Software Alliance, *Piracy Study*, 2006; CMPDA, *Beyond Borders: An Agenda to Combat Film Piracy in Canada*, 2006.

28 House of Commons, Standing Committee on Industry, Science and Technology, *Eight Report Counterfeiting and Piracy are Theft*. June 2007

29 <http://www.2ontario.com/facts/fact02.asp>

The ICT sector also provides jobs for over 220,000 people, clustered in three major centres:

- Waterloo Region:
400 high-tech companies with particular strength in microelectronics, software and telecommunications
- Greater Toronto Area:
Over 3,300 high-tech companies with leaders in every sector and national dominance in digital media and Internet
- Ottawa
1,600 high-tech companies with particular strength in telecommunications equipment and networking, computer software and photonics³⁰

The impact of counterfeiting and crime on Canada's ICT sector is significant. The RCMP reports that in 2005, the Canadian software industry lost approximately \$736 million and 32,000 software related jobs as a result of counterfeiting and crime, the majority of which were lost in Ontario.³¹

As an example, a privately held company located in Ajax, Ontario has been the victim of IPR infringement. This company has approximately 30 employees and is a leading manufacturer of network access and transmission products for telecommunications markets worldwide. In the fall of 2002, the firm estimated that 25 per cent of its business was lost due to counterfeit copies made in China. As a result of the Chinese company successfully hiding its identity, the Ontario based company was never able to prosecute the IPR violator.

Counterfeiting and piracy is detrimental to the 300 and growing small and medium sized businesses involved in Canada's video game industry. According to the Entertainment Software Association of Canada (ESAC), the software/video game related industries generated \$890-million in Canadian retail sales alone in 2005. Starting salaries for entertainment software developers begin around \$60,000 and the industry in Canada employs between 31,300 and 32,900 full-time employees.³² ESAC claims that, conservatively, piracy costs the North American industry about USD\$3 billion a year.³³

30 <http://www.2ontario.com/facts/fact02.asp>

31 Royal Canadian Mounted Police "Intellectual Property Crime in Canada – Hazardous and Costly" RCMP Feature Focus 2005 Economic Crime in Canada (http://www.rcmp-grc.gc.ca/economic_crime/ip_e.htm)

32 ESAC <http://www.theesa.ca/media-articles.html#01d>

33 ESAC <http://www.theesa.ca/media-articles.html#01d>

Motion Picture and Recording Industry

The Canadian Motion Picture Distributors Association (CMPDA) reports that between 2004 and 2005, its counterfeit seizures increased by 317 per cent. Within the same timeframe the CMPDA's DVD seizures increased by 960 per cent. The annual consumer spending loss in Canada due to film piracy in 2005 was estimated at approximately \$270 million with a loss of tax revenue accruing to an estimated \$41 million.³⁴

The Canadian music industry's retail sales of pre-recorded CDs and cassettes have declined by 44 percent from 1999 to 2005, a decrease of \$541 million. As a result, the Canadian recording industry has had to shed its workforce by 20 per cent, with most lost in Ontario.³⁵

Ontario Wine Industry

Ontario icewine has been the target of counterfeiters, particularly in mainland China. In 2003, a Chinese company sold a product called Vineland icewine and claimed it was a joint venture with a Canadian partner. The Chinese company's website contained a photograph of a winery owned by a Niagara wine maker. However, the use of the winery name, photo and icewine label were unauthorized. Over the past four years, the winery has spent close to \$60,000 in legal fees trying to protect its trademark in China, and will have to wait until 2011 before the Chinese government will hear this case.³⁶

Due to counterfeit icewines invading the Chinese market, sales of Canadian icewine in that country have decreased by almost 60 percent. More of a concern to the Niagara winemaker is the influx of counterfeit icewines to worldwide and domestic markets, damaging the reputation of high quality Ontario icewines.

34 The Canadian Motion Picture Distributors Association (CMPDA) *Beyond Borders: An Agenda to Combat Film Piracy in Canada (Beyond Borders) 2006*

35 The Canadian Recording Industry Association, Press Release, March 2, 2006

36 The Toronto Star: Fake Ice Wines hit sales. Schiller, Bill (August 18, 2007) <http://www.thestar.com/article/247573>

Impact of Counterfeiting & Crime on Health & Safety



As counterfeiting and piracy distribution networks become more sophisticated, products are now appearing in mainstream retail outlets and as well as infiltrating supply chains. IPR theft results in substandard and potentially dangerous products, which could lead to health and safety risks ranging from mild to life threatening.

The automobile parts industry is contending with counterfeit products which are flooding the market and diluting the quality of critical components such as brakes. Bendix Inc., a US based manufacturing company for heavy vehicles such as freight trucks and buses, estimates that counterfeiting has cost the company at least USD\$10 million this past year.³⁷ While revenue loss is a major concern for Bendix Inc., a far greater concern is public safety and ensuring that critical components such as brakes function effectively.

Another major threat to consumer health and safety is the growing incidence of counterfeit products with fraudulent stamps of approval from organizations such as the Underwriters Laboratories (UL) and the Canadian Standards Association (CSA). In early 2005, the RCMP seized over 500 electrical power strips, nearly 1000 orange heavy-duty extension cords and 5000 various household extension cords. Samples of these counterfeit products had the UL safety certification markings. However, these products failed standard UL safety tests as they melted and caught fire within a few minutes of testing.³⁸

Canadian Standards Association (CSA) International explains that counterfeit items that may present a real danger to people's lives, such as faulty circuit breakers, computer power supply units, safety footwear, holiday lights, electrical power bars, extension cords and even gas ranges are becoming increasingly prevalent in the marketplace. Counterfeits are no longer being sold exclusively on street corners or at flea markets, and are instead showing up on the shelves of major retailers across North America as criminals are using increasingly sophisticated distribution networks.³⁹

A sobering example of this occurred recently when counterfeiters bypassed stringent safeguards and infiltrated an Ontario retail pharmacy. Law enforcement officials seized drugs which

37 US Chamber of Commerce <http://www.uschamber.com/nfc.intiatives/counterfeiting.htm>

38 Underwriters Laboratories – Electrical product counterfeiters pay heavy price in Canadian Courts, May 22, 2007 <http://www.ul.com/newsroom/newsreel/nr052207.html>

39 CSA International: Counterfeits in Canada: Socioeconomic & Safety Issues - Speech July 2007 <http://www.csa-international.org/news/articles/default.asp?articleID=9110>

contained no medicinal ingredients or were considered “grey-market” drugs. The drugs seized were grey market Norvasc pills used to treat hypertension and angina, and were suspected to be connected to the deaths of 11 patients of the pharmacy in question. A coroner’s office investigation determined that the deaths were caused by “possible unauthorized medication substitution.”⁴⁰

In the US, the Coalition Against Counterfeiting and Piracy (CACP), was formed. This broad-based business coalition is committed to the understanding of the negative impact of counterfeiting and piracy. The CACP worked with the US administration to develop a Supply Chain Best Practice Tool Kit which provides information on how businesses can secure their supply chain and prevent the production and sale of counterfeit products.⁴¹ According to this toolkit, there are six key steps businesses can take:

1. Secure legitimate inputs
2. Verify legitimacy of customers and distributors
3. Manage production waste and damaged or unusable inventory
4. Ensure legitimacy of purchased products at retail level
5. Monitor Brand Integrity
6. Outreach to law enforcement and regulatory officials

By adopting proactive measures such as the key steps above, businesses can play an important role in mitigating the impact of counterfeiting and piracy.

40 Criminal Intelligence Service Canada Central Bureau, Strategic Analytical Services Counterfeit Pharmaceuticals in Canada (August 2006)

41 Coalition Against Counterfeiting and Piracy – Supply Chain Best Practice Tool Kit. www.thecacp.com

Enforcement & Prosecution



Studies and analysis conducted by organizations such as the ICC and the International Intellectual Property Alliance (IIPA) indicate that many large consumer based economies have become lucrative markets for counterfeit and pirated goods.

The OECD reports that potential profits gained from many counterfeiting and piracy activities in some cases far exceed the profitability of illicit drug trades.⁴² The close relationship between IPR infringement and organized crime has been made by law enforcement officials both from Canada (and Ontario) and worldwide. Interpol has stated that groups involved in counterfeiting and piracy (such as the mafias in Europe and North America and the Asian “triads”) are also involved in heroin trafficking, prostitution, gambling, extortion, money laundering and human trafficking.⁴³ The RCMP agrees, reporting that in 2005, “organized crime was a primary actor in counterfeiting activities in Canada.”⁴⁴

In the *Strategic Intelligence Assessment of Intellectual Property Crime in Canada*, the RCMP reports:

*“There are numerous indications throughout [Ontario] that point to significant IP criminal activity. [T]he problem is seen as a growing one. Ontario has seen a sizable shift in the problem in recent years, both in the nature of the products, the size of the shipments, and the location of their sale. The range of products is now limitless. Infringing products are now surfacing in some large retail chains. Extension cords, power bars, lamps, glue guns, soldering irons, circuit breakers, power tools, computer fans, neon signs, clothing, safety boots, carbonated yogurt beverage and cigarettes – all are surfacing in Ontario.”*⁴⁵

The lack of deterrent mechanisms such as heavy penalties for IPR related crime, effective enforcement, and effective prosecution serve to promote the growth of supply and demand of counterfeit and pirated goods in markets such as Ontario. As Canada and Ontario lack these mechanisms, the ideal environment has been created to foster rampant counterfeiting and piracy.

42 The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p 15

43 The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p 15

44 Royal Canadian Mounted Police “Intellectual Property Crime in Canada – Hazardous and Costly” RCMP Feature Focus 2005 Economic Crime in Canada (http://www.rcmp-grc.gc.ca/economic_crime/ip_e.htm)

45 RCMP Criminal Intelligence Directorate – Project SHAM “A Strategic intelligence assessment of Intellectual Property Crime in Canada” December 15, 2004

Weak Penalties

The RCMP has stated that light penalties against IPR crime encourage recidivism.⁴⁶ Exemplifying the positive correlation between light penalties and recidivism is a case involving a pirate video game retailer operating in a Markham, Ontario mall. The RCMP had raided this retailer and seized thousands of pirated video games and counterfeit game devices. Although the retailer pleaded guilty to six offences and paid a fine of \$67,000 after sentencing, this individual purchased two new stores at the same mall and continued selling counterfeit video games and devices.⁴⁷

In assessing Canada's IPR protection policy regime, the RCMP concluded that:

“Counterfeiters have stated to police that they will continue to sell counterfeit goods because the deterrents offer no incentive. ... Minimal sentences and low fines offer little incentive for law enforcement to pursue this issue more vigorously, and every incentive for criminals to continue pirating copyrighted goods.”⁴⁸

In response to these deficiencies, the federal government announced that it would be committed to “providing a robust framework for intellectual property rights” in order to “foster an environment conducive to innovation”. In terms of internet piracy, the government announced that it is, “working towards bringing Canada's copyright regime into conformity with the World Intellectual Property Organization (WIPO) Internet Treaties” in order to establish a “fair, clear and predictable environment” on the Internet.⁴⁹

Following the lead of our major trading partners, such as Australia, Japan, and the United States, ratifying the WIPO Internet treaties would be a key measure to create marketplace integrity on the Internet and stimulate investment by online content providers. As Steve Ehrlick, President of Orange Record Label, an independent record label in Toronto, has commented, marketplace integrity is a key component in acquiring the necessary venture capital:

⁴⁶ International Intellectual Property Alliance 2007 Special 301 Report – Canada p.16

⁴⁷ International Intellectual Property Alliance 2007 Special 301 Report – Canada p.16

⁴⁸ as quoted from: International Intellectual Property Alliance 2007 Special 301 Report – Canada - RCMP, “An Assessment of Commercial Scale Criminal Copyright Piracy and Trade-mark Counterfeiting in “Canada”, 2000

⁴⁹ Government Response to the Standing Committee on Industry, Science and Technology, October 17, 2007, signed by Minister of Public Safety, Minister of Industry, Minister of International Trade, and Minister of Justice and Attorney General of Canada.

“Private investors consistently regurgitated what they were reading in the newspapers, basically that kids were stealing music and how is a new record company like ours going to make any money. There wasn’t a bank or venture capitalist that would touch us – despite a business plan that was warmly received. It was because they considered the music industry to be the Wild West – no laws, no marshals, and most importantly to them, no profits.”⁵⁰

Enforcement

According to the OECD, counterfeiters and pirates exploit free trade zones as well as perceived weaknesses in customs enforcement to establish sophisticated distribution systems. In free trade zones, international traders can store, assemble and manufacture products that move across the border with minimal regulation. Shipping documents can be changed to hide their initial point of origin.⁵¹ Counterfeiters and pirates take advantage of the minimal IPR-related enforcement mechanisms available in these free trade zones.

Under the *Customs Act*, the Canadian Border Security Agency (CBSA) is permitted to detain goods that are prohibited, controlled or regulated by any Act of Parliament, such as the *Hazardous Products Act*.⁵² Since there is no legislation that identifies counterfeit or pirated goods as prohibited, controlled or regulated, CBSA seizure powers are limited. Unless the goods have been ordered to be detained under another Act of Parliament, the CBSA can only detain counterfeit goods for a limited time period, or if the IP holder has obtained a court order.⁵³ If counterfeit goods are detected at border checkpoints, the RCMP must be notified to examine the products of interest.

The federal Standing Committee on Industry, Science and Technology states in its counterfeiting and piracy report that the RCMP currently does not have the capacity to investigate most cases of IPR infringement due to limited resources. The Committee reports there are two small joint CBSA/RCMP teams in Toronto and Montreal dedicated to IPR crime at border checkpoints.⁵⁴

⁵⁰ Canadian Anti-Counterfeiting Network, Report on Counterfeiting and Piracy in Canada: A Road Map for Change (2007), p. 6.

⁵¹ The Economic Impact of Counterfeiting and Piracy Executive Summary (OECD 2007) p14

⁵² House of Commons Canada – Counterfeit Goods in Canada, A threat to Public Safety. Report of the Standing Committee on Public Safety and National Security. May 2007 p13

⁵³ House of Commons, Standing Committee on Industry, Science and Technology, Eight Report. Counterfeiting and Piracy are Theft. June 2007

⁵⁴ House of Commons, Standing Committee on Industry, Science and Technology, Eight Report. Counterfeiting and Piracy are Theft. June 2007

As a result, the CBSA has often inadvertently allowed containers of potentially dangerous or unsafe counterfeit products (such as batteries and other counterfeit and pirated goods) into the country. For example, counterfeit toothpaste tubes allegedly containing a harmful substance were ordered by Health Canada to be stopped at the border by CBSA. These tubes of counterfeit toothpaste were later found in Guelph and Halifax.⁵⁵ Unless more resources are allocated, the IPR enforcement officials' success in combating IP crime will continue to be limited.

CBSA's power to combat counterfeiting and piracy is significantly weaker than its counterparts from Canada's major trading partners such as the US. By way of comparison, the US Customs and Border Patrol Agency (CBP) plays a crucial role in the fight against counterfeiting and piracy. The CBP is empowered to combat IPR crime by diversifying its enforcement to include approaches that complement traditional techniques focused on identifying and seizing counterfeit and pirated goods at US borders.⁵⁶

The agency has developed innovative methods such as risk modeling to identify high-risk shipments for border inspection, and expanded its efforts beyond border seizures by conducting intellectual property rights audits of importers. In addition, CBP works with trademark and copyright owners to protect intellectual property rights at the border, and with foreign governments and international organizations to enhance customs enforcement internationally.⁵⁷

To address the limitations of Canadian border officials, the Standing Committee on Public Safety and National Security has recommended that the federal government allow CBSA border officers to conduct searches and to seize counterfeit and pirated goods, and to impound such goods and destroy them in accordance with due process and Canadian law.⁵⁸

While strengthening the CBSA's authority to combat IPR crime is essential, this must be complemented with additional resources to RCMP and police officials dedicated to IPR infringement. According to the Canadian Anti-Counterfeiting Network (CACN), lack of financial and human resources often prevent police from initiating prosecutions against counterfeiters, even when presented with evidence from the intellectual property rights owner.⁵⁹ To address

55 The Toronto Star: Dangerous Fake goods crossing border, Marlow, Iain (July 2, 2007) <http://thestar.com/pintArticle/231583>

56 http://www.cbp.gov/xp/cgov/newsroom/news_releases/052007/05232007_5.xml

57 http://www.cbp.gov/xp/cgov/newsroom/news_releases/052007/05232007_5.xml

58 House of Commons Canada – Counterfeit Goods in Canada, A threat to Public Safety. Report of the Standing Committee on Public Safety and National Security. May 2007 p14

59 Canadian Anti-Counterfeiting Network, Report on Counterfeiting and Piracy in Canada: A Road Map For Change, 2007, p. 11.

the challenges faced by police, it is essential that the federal government act on the Standing Committee on Public Safety and National Security's recommendation to allocate additional financial and human resources to the appropriate departments and agencies. This will allow police enforcement officials to take effective action against counterfeiting and piracy.

Addressing the challenges facing Ontario's IPR regime also requires increased coordination by government, enforcement officials, industry and consumers, as recommended in June 2007 at a conference held jointly by Interpol and the RCMP in Niagara Falls, Canada. The delegates called for improved international co-operation, co-ordination and development of best practices in order to more effectively combat IPR crime.⁶⁰

Interpol is developing a new Database on International Intellectual Property (DIIP) crime. This new database will facilitate co-ordination by making regional and world wide information available to assist law enforcement investigation of counterfeiting.

This international database should be accessible by all IPR law enforcement officials, which include the RCMP, Ontario Provincial Police (OPP) and the CBSA. Governments at all levels, business and other stakeholders can improve data collection methods and analysis of information as these are seen as essential for the development and implementation of effective strategies for combatting IPR crime. The province can play an effective role by working closely with its federal counterparts to ensure all IPR enforcement officials are given access to databases such as the DIIP. Government and law enforcement officials should:

- i. adopt a common approach to collecting enforcement data
- ii. develop a reporting framework to document the health and safety effects of counterfeits and pirated goods
- iii. increase information flow between governments and business
- iv. together with the federal government, establish an annual reporting system to provide statistics on the efficacy of the Canadian intellectual property enforcement system.

⁶⁰ Press Release: Interpol/RCMP Intellectual Property Crime Conference calls for greater co-ordination <http://www.interpol.int/public/News/2007/IPCCconf20070621.asp>

Prosecution

Additional resources to police enforcement and increased coordination amongst IPR stakeholders are critical in strengthening Ontario's IPR regime. However, unless the shortfalls existing in prosecuting IPR crime is addressed, counterfeiting and piracy will persist. The most significant challenge is the lack of adequate resources available to effectively prosecute IPR crime. Very few Crown attorneys have substantial knowledge of IP criminal law in Canada and there are currently no prosecutors in Canada or Ontario that dedicate themselves exclusively to IPR crime.⁶¹ According to the CACN, this has resulted in a lack of willingness by prosecutors to pursue criminal convictions. There is an opportunity for the province to proactively address issues surrounding enforcement by dedicating additional resources to hiring or training specialized provincial prosecutors and judges to combat IPR infringement.

Another critical challenge to IPR prosecution relates to jurisdictional issues. The RCMP has the primary authority for IP enforcement in Canada and deals with enforcement of federal statutes, which include laying charges under Sections 42 and 43 of the *Copyright Act* or allegations related to the fraud provisions of the *Criminal Code*. Federal prosecutors however, do not proceed on matters under the *Criminal Code*. Provincial and local law enforcement and prosecutors generally do not lay charges under the *Copyright Act*, as those cases that do end up in court typically result in the offender paying relatively small fines and often continue their illegal activities.⁶²

The *Civil Remedies Act* allows the Attorney General to freeze, seize and forfeit to the Crown property that is determined to be the proceeds or instruments of unlawful activity. The legislation has been used to target illicit activities such as fraud, internet and telemarketing scams, drug-trafficking and marijuana grow-operations. However, organizations such as the CSA and the CACN claim that the *Civil Remedies Act* is ineffective because counterfeiters are criminals and do not respect the law.⁶³ Essentially, IPR crime is clandestine in nature. Counterfeiters and pirates conduct their activities in ways to avoid the justice system by not keeping accounting records as well as by keeping in-stock inventories small which can easily be "turned-over" on a weekly or daily basis.⁶⁴

61 Brian Isaac and Carol Osmond, *The Need for Legal Reform in Canada to Address Intellectual Property Crime*, January 2006

62 House of Commons, Standing Committee on Industry, Science and Technology, Eight Report. *Counterfeiting and Piracy are Theft*. June 2007

63 Canadian Anti-Counterfeiting Network "A Missing Link in Ontario's Innovation Agenda: The protection of intellectual property rights." p.24

64 CSA International: *Counterfeits in Canada: Socioeconomic & Safety Issues* - Speech July 2007 <http://www.csa-international.org/news/articles/default.asp?articleID=9110>

It is internationally accepted that the only effective method to fight counterfeiting and piracy is criminal enforcement of IPR. The inclusion of jail time as punishment essentially is the critical element.⁶⁵ According to the World Intellectual Property Office (WIPO):

“Criminal law imposes different standards of liability that are generally harder for the prosecution to meet than in civil cases; however criminal penalties are more onerous. Large-scale, commercial counterfeiting and piracy operations have traditionally looked upon civil fines as merely the cost of doing business. However, when the threat or especially the reality of prison is introduced into the mix, the real enforcement starts to take shape.”⁶⁶

Addressing existing gaps in relevant legislation, such as the *Trade-marks Act*, *Copyright Act*, and *Criminal Code*, will give enforcement and prosecution officials more authority to combating IPR infringement. Such measures include adding a criminal remedy in the *Trade-marks Act* that is consistent with the *Copyright Act*. In addition, the *Criminal Code*, as well as the *Trade-marks Act* and *Copyright Act* where necessary, should be amended to make it illegal for intentionally manufacturing, reproducing, distributing, importing or selling counterfeit products. These acts should also make it illegal to knowingly possess counterfeit goods for the purpose of sale. Any penalties incurred should be sufficiently severe to deter and neutralize offenders. Police should also be allowed to seize income and property derived from copyright piracy and trade-mark counterfeiting.

A final, but critical measure in combatting counterfeiting and piracy in Ontario is to address existing gaps in border enforcement legislation. Amendments must be made to both the *Trade-marks Act* and the *Copyright Act* to make it a criminal offence to import counterfeit and pirated goods into Canada.

65 Canadian Anti-Counterfeiting Network “A Missing Link in Ontario’s Innovation Agenda: The protection of intellectual property rights.” p.25

66 Canadian Anti-Counterfeiting Network “A Missing Link in Ontario’s Innovation Agenda: The protection of intellectual property rights.” p. 26 (U.K. Department of Trade and Industry, Counter Offensive: An IP Crime Strategy, 2004)

Conclusion

Attitudes and Awareness surrounding Counterfeiting and Piracy

While strengthening enforcement and prosecution is essential, more effort must be made to change attitudes and generate awareness about the impacts of IPR crime in Ontario and in Canada.

According to a 2005 survey conducted on behalf of the Entertainment Software Association of Canada (ESAC) by Nielson Interactive, 34 per cent of video game consumers admitted to having acquired either through purchase and/or download a video game which was knowingly copied or pirated. The Canadian Anti-Counterfeiting Network (CACN) conducted another survey to gauge attitudes towards buying counterfeited and pirated products. Results indicate that Canadians are three times more likely than Americans to buy counterfeit goods.⁶⁷

Results from a survey conducted by the Canadian Alliance Against Software Theft (CAAST) and the Business Software Alliance (BSA) indicate that while almost 90 per cent of Canadians acknowledge there is ‘something wrong’ with illegally copying software, only one quarter of that group view it as a serious offence. Software piracy ranked near the bottom of the list of perceived serious offences at 25 per cent, alongside copying or downloading a DVD at 23 per cent. Falsifying a resume ranked the highest (46 per cent) followed by stealing office supplies from work (37 per cent) and keeping incorrect change from store clerks (36 per cent).⁶⁸

As counterfeiting and piracy operations become more sophisticated, the challenges to IPR protection become greater. With weak IPR protection legislation, enforcement measures and lack of awareness, Ontario will remain an ideal target for IPR crime. Unless a multifaceted approach involving both public and private sector stakeholders is adopted, IPR crime will continue to threaten public health and safety as well as Ontario’s overall competitiveness. Strengthening the province’s IPR regime will signal to international investors that Ontario is indeed a desirable place to conduct business.

⁶⁷ Canadian Anti-Counterfeiting Network – Press Release: Canadians are three times more likely than Americans to buy Counterfeit Goods, New Poll finds.

⁶⁸ Canadians find falsified resumes a bigger offence than using pirated software: CAAST Survey Shows Double Standards Continue to Plague Personal and Corporate Ethics –Toronto (Thursday, September 14, 2006) <http://www.caast.org/release/default.asp?alD=158>

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Ontario Chamber of Commerce
180 Dundas Street West, Suite 505
Toronto, ON
M5G 1Z8
Tel: (416) 482 - 5222
Fax: (416) 482 - 5879
Web: occ.on.ca

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