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Entertainment Software Association of Canada

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Entertainment Software Association of Canada*

The entertainment software industry is one of the fastest growing market segment in the global economy, with Canada rapidly establishing itself as a world leader in the multi-billion dollar global video game industry. The employment opportunities in this industry, as well as its investments in research and technology are also significant. These investments are not without risk – in the highly competitive industry of video game production the chance of a video game being a commercial failure outweighs the chances of its success. Internet piracy of video game software has also undergone explosive growth and represents a significant problem for the entertainment software industry. Video game piracy drastically reduces the industry's capacity to sustain the enormously high creative costs associated with video game production, potentially leading to lost revenue, lost jobs, or worse. In an effort to protect their products from piracy, the video game industry has implemented various measures, including technological protection measures and other copy protection techniques, yet such measures are not fail-safe and are subject to circumvention. Compounding this problem, copyright law in Canada does not provide sufficient protection. Consequently, the Entertainment Software Association of Canada herein presents ways in which Canadian legislators can use copyright law to reduce piracy. Modernizing copyright law will, in turn, allow for a fair and vibrant marketplace and, in so doing, enhance both Canada's competitiveness and the public interest.

* © 2009 Entertainment Software Association of Canada ("ESAC"). This paper is a revised version of ESAC's Copyright Consultations submission of September 13, 2009.

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INTRODUCTION

The ESAC is a not-for-profit trade association that serves the business and public affairs needs of companies in Canada that publish and distribute video and computer games for video game consoles, handheld devices, personal computers and the Internet. The ESAC's members include Canada's leading entertainment software publishers (such as Microsoft Canada, Nintendo of Canada, Sony Computer Entertainment, Electronic Arts, Ubisoft, Activision Blizzard, Disney Interactive Studios, THQ and Take Two Interactive) and distributors (such as Synergex, Solutions2Go and Team One Marketing), which collectively accounted for more than 90 per cent of the \$2.2 billion in retail sales of entertainment software and hardware in Canada in 2008, and billions more in export sales worldwide.¹

One of goals of the ESAC is the improvement of copyright protection for developers, publishers, manufacturers, distributors and rights holders of entertainment software through the enactment of updated legislation and more rigorous enforcement of intellectual property laws in Canada. Growth in the illicit trade in counterfeit and pirated entertainment software has been greatly facilitated by the ease with which such goods can be reproduced and distributed. Without additional legislative protective measures and more rigorous law enforcement, the entertainment software industry in Canada, which generates annual revenues between CAD \$2 and 3 billion,² will continue to face an increasing piracy problem that costs hundreds of millions of dollars in lost revenues to both business and government. Remaining complacent in the face of entertainment software piracy is damaging to the interests of Canadian software developers and publishers who require a strong revenue base to continue to grow. This would result in numerous lost jobs and further millions of dollars in lost taxable revenues to government. Consequently, it is critical that the Government of Canada adopt an active stance to more effectively address piracy, through the enactment of stronger Canadian copyright legislation as well as more rigorous law enforcement. This would serve the interests of both government and industry by acting to stimulate local economic activity, generate

¹ Entertainment Software Association of Canada, *About the ESAC*, online: <<http://www.theesa.ca/about.php>>.

² See *infra* notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.**

government revenue, create job growth, and cultivate future innovation, and benefit consumers by spurring investment in the development of new digital products, services and distribution methods, leading to more consumer choice and lower prices.

Ultimately, a strong copyright protection regime allows businesses to choose the best way to make their own content available, and contribute to the development of a vibrant, healthy, market-driven digital economy. Canadians deserve an equal chance to compete in this increasingly global marketplace and should be permitted to benefit from intellectual property protections that are at least as rigorous as those enjoyed by our major trading partners.

THE ENTERTAINMENT SOFTWARE INDUSTRY IN CANADA

Entertainment software is the fastest growing sector of the entertainment industry, and in fact is one of the fastest growing market segments in the global economy overall. According to PricewaterhouseCoopers, the global entertainment software market is projected to grow at 7.4% annually over the next five years and grow from US\$51.4 billion in 2008 to US\$73.5 billion by 2013.³ Meanwhile, retail sales of entertainment software in Canada grew a remarkable 41.6% to \$1.2 billion (CDN) in 2008,⁴ and the Canadian market is expected to continue growing at a strong 6.2% annual rate over the next five years to reach US\$2 billion by 2013.⁵

Canada is rapidly establishing itself as a world leader in the global video game industry, and Canadian video game publishers and developers are renowned for producing high quality games and are behind some of the world's most successful game titles. Indeed, 10 of the top 50 selling video games in North America and Europe in 2008 were produced by Canadian game development studios,⁶ while

³ PricewaterhouseCoopers LLP, *Global Entertainment and Media Outlook: 2009-2013* (2009) [PwC Report].

⁴ NPD Group, "Canadian video game sales surge despite market fallout" *Edge the Global Game Industry Network* (30 January 2009), online: NPD Group <http://www.npd.com/press/releases/press_090130.html>.

⁵ PwC Report, *supra* note 3.

⁶ Edge Staff, "The 60 Biggest Selling Games of the Last 12 Months" *Edge the Global Game Industry Network* (29 January 2009), online: Edge Online <<http://www.edge-online.com/features/the-60-biggest-selling-games-last-12-months>>.

Electronic Arts Canada and Ubisoft Montreal were recently ranked in the top 6 most successful game studios in the world.⁷ According to Games Investor Consulting, Canadian-made games represented an estimated 13.2% of North American and European games retail revenues in 2007,⁸ and it is due to the tremendous international success of Canadian game companies that Canada recently overtook the United Kingdom to become the third most successful producer of video games in the world (second only to the United States and Japan).⁹

Canadian developers and publishers are generally estimated to generate over CAD\$2 billion in annual revenues,¹⁰ and some estimates place annual revenues as high as CAD\$3.47 billion.¹¹ Furthermore, the Canadian industry is conservatively estimated to contribute over CAD\$1.7 billion in direct economic activity to the Canadian economy (including salaries, overheads and other capital expenditures),¹² and this does not include the considerable amount of non-direct economic activity created by the industry (*e.g.* distributors, retailers, marketers, spin-off industries, etc.).

⁷ Develop Magazine, "Develop 100: The World's Most Successful Game Studios" (2009), online: Develop 100 <<http://www.develop100.com>>.

⁸ Games Investor Consulting, *Playing for Keeps: Challenges to Sustaining a World Class UK Games Sector* (2007) online: <http://www.gamesinvestor.com/Research/Reports/Playing_For_Keeps_07/playing_for_keeps_07.html>.

⁹ *Ibid*; See also Emma Boyes, "Special Report: Crossing Borders", *GameSpot UK* (4 December 2007), online: GameSpot <<http://www.gamespot.com/news/6183562.html>> where she states that, "the huge surge in growth in the games industry in Canada has recently seen the country surpass the UK to become the third-largest producer of games, nudging old Blighty into fourth place."

¹⁰ Entertainment Software Association of Canada, *Entertainment Software: The Industry in Canada* (2007) <http://theesa.ca/documents/ESAC_whitepaper2007.pdf>.

¹¹ Games Investor Consulting, *Raise the Game: The Competitiveness of the UK's Games Development Sector and the Impact of Governmental Support in Other Countries* (2008) online: <http://www.nesta.org.uk/assets/Uploads/pdf/Research-Report/raise_the_game_report_NESTA.pdf>. Specifically, the Report estimated Canadian Industry revenues to be £1.77 billion in 2008, or CAD\$3.47 billion (at the average interbank currency exchange rate for 2008). The Report also projected that Canadian industry revenues in 2009 would be £1.95 billion, or CAD\$3.82 billion.

¹² Entertainment Software Association of Canada, *Canada's Entertainment Software Industry: The Opportunities and Challenges of a Growing Industry* (2009) <<http://www.theesa.ca/documents/ResearchReport09.pdf>>.

The Canadian video game industry directly employs over 14,000 people in over 240 companies across the country in a wide variety of disciplines, and thousands more are employed in related fields. Over the past 3 years, employment has grown 23% annually, and despite the economic downturn, job growth is expected to increase to 29% annually over the next 3 years.¹³ According to industry surveys, entry-level workers in the entertainment software industry earn almost twice as much as the average recent college graduate, and the average salary across all Canadian provinces is US\$65,500,¹⁴ with higher average salaries in game development hubs such as Vancouver and Montreal. Accordingly, the entertainment software industry as a whole has created thousands of highly skilled, high-paying jobs in Canada in a variety of disciplines, including programming, art, animation, visual effects, game design, sound design, motion capture, production, quality assurance, business and marketing, and contributes billions to the Canadian knowledge economy.

The entertainment software industry also makes a significant investment in research and development of new technologies. According to a study by the National Research Council - Industrial Research Assistance Program (NRC - IRAP) and New Media BC, 55% of Canadian video game companies reported that they are developing proprietary technology to aid them in production (such as game engines and content/asset management software), and 61% of these companies believed they could develop viable commercial products from these technologies.¹⁵ Furthermore, a broad array of service providers have also emerged in most major game industry clusters.

¹³ *Ibid.*

¹⁴ Game Developer Magazine, *Game Career Guide - Fall 2009*, online: <<http://gamedeveloper.texterity.com/gamedeveloper/2009fall/>> at 38.

¹⁵ New Media BC, *National Game Map: Final Report* (March 2005). For instance, London's Digital Extremes, which co-developed the original Unreal Engine with Epic Games, developed its own Evolution Engine for its 2008 action game Dark Sector, and has recently started licensing the game engine technology to game developers, while Toronto's TransGaming Technologies has pioneered a variety of software portability technologies that allow video games to be migrated quickly and cost-effectively across multiple gaming platforms. See Digital Extremes, "Tech: The Evolution Engine", *Digital Extremes* online: <<http://www.digitalextremes.com/tech/>>; TransGaming Technologies, "Business", online: Transgaming Technologies <<http://www.transgaming.com/business/>>.

Many companies that are primarily focused on the television and motion picture industries have found that their capabilities (such as motion capture, sound design, etc.) are in demand by game developers, while game companies are increasingly developing capacity in digital animation and offering computer graphics services to the film industry.¹⁶

Moreover, the influence of entertainment software technologies extends well beyond synergies with similar industries. Advances in raster scan, real-time graphics, three-dimensional graphics, graphical user interfaces, trackball, joystick, artificial intelligence, and network persistence technologies have been driven by the entertainment software industry and have had a considerable impact outside of the industry. For instance, real-time and three-dimensional graphics are now used in military and flight simulations, medical imaging, and architecture, while game design principles are increasingly being applied in education and training to augment traditional instruction.

While the economic value of these transfers from the entertainment software industry to other industries is impossible to determine, it is clear that the impact on Canada's economy is substantial. Coupled with the tremendous growth potential presented by the global market for entertainment software and related technologies, Canada has a substantial interest in the continued expansion and development of this key component of our nation's future prosperity.

VIDEO GAME PRODUCTION

Entertainment software companies in Canada are clearly world leaders in innovation and creativity and contribute significantly to the Canadian knowledge economy in a wide variety of ways. These companies are in the business of creating, financing and

¹⁶ For instance, Ubisoft Montreal has been developing its capacity to create special effects, graphics and animation for the movie industry, acquiring Canadian special effects studio Hybride Technologies, and working with Twentieth Century Fox on James Cameron's science-fiction film *Avatar*. See Brain Ashcraft, "Ubisoft Ready To Blend Movie And Game Business" (2 June 2008), *Kotaku*, online: <<http://kotaku.com/5012195/ubisoft-ready-to-blend-movie-and-game-business>>.

commercializing intellectual property, developing, marketing and selling an array of entertainment software products and services to a range of consumers. Consequently, intellectual property is the cornerstone of the industry, and strong protection and enforcement of intellectual property rights is crucial to the continued growth and success of the industry.

In today's market, developing and publishing a best-selling video game title requires a massive investment, and is a high risk endeavour. Major advances in computing power, graphics, and the sophistication in games have led to significant increases in production costs, as much larger and diverse development teams with specialized expertise are now required to address design and programming complexities. Development costs for a single "Triple A" console game range from \$10-30 million, with teams of 100-200 people working at least a year (and often two or three) to complete it, and it is expected that development costs will double to US\$60 million once the next generation of consoles are introduced.¹⁷ Furthermore, these are just development budgets, and do not include marketing, manufacturing or distribution costs. The global video game market is highly competitive, with hundreds, if not thousands, of video games being released every year, necessitating considerable expenditures on marketing and advertising to ensure video game titles get exposure (especially during the busy holiday season). Consequently, marketing budgets for high-end games often match the development budgets, which in turn increase production costs by a substantial margin.

Moreover, even under the best of circumstances, there is considerable risk that a company that develops and publishes a new video game title will not be able to sell enough copies to recoup these multi-million dollar investments. According to Electronic

¹⁷ Tom Ivan, "Ubisoft: Development Costs To Double Next Gen" (16 June 2009), *Edge Online*, online: <<http://www.edge-online.com/news/ubisoft-development-costs-to-double-next-gen>>. Furthermore, in some instances, development costs have been known to exceed even this lofty figure. For instance, *Too Human*, developed by St. Catherine's Silicon Knights, is estimated to have cost \$80-100 million, while *Grand Theft Auto IV* is estimated to have cost over \$100 million to develop, with over 1000 people working over three years and a half years on the game. See "10 Most Expensive Video Game Budgets Ever" (21 August 2008), *KnowYourMoney*, online: <<http://blog.knowyourmoney.co.uk/index.php/2008/08/10-most-expensive-video-game-budgets-ever/>>.

Entertainment Design & Research, only 20% of video game titles released ever attain profitability,¹⁸ and for every commercial success there are a multitude of commercial failures. Furthermore, most game titles will earn the vast majority of their overall sales revenue within the first 60 days after release, with the bulk of sales occurring within the first few weeks of release. Thus, in order to continue developing and publishing a diverse range of video game titles, video game companies must use the revenues from successful titles, much of which is earned immediately after release, to offset the development costs of unsuccessful games.

In this type of market, piracy of video game software is devastating as it siphons the revenue required to recover the enormous investments necessary to develop successful video game products. Consequently, while Canadian developers and publishers create some of the most popular video games in the world, video game piracy drastically reduces the industry's capacity to sustain the enormously high creative costs associated with video game production, potentially leading to lost revenue, lost jobs, or worse. Indeed, when a game development studio's future hinges on the success of a single game it has spent years developing, as is often the case, the impact of piracy can be ruinous.

TECHNOLOGICAL PROTECTION MEASURES

In an effort to protect their products from piracy, the video game industry makes widespread use of a variety of technological protection measures ("TPMs") that prevent the unauthorized access to, use or transmission of copyrighted materials. Video game TPMs come in a wide variety of forms, from copy protection and access controls built into video game consoles and handheld devices that recognize illegally copied versions of games and refuse to play them, to various online registration and/or authentication systems for PC games such as product keys that verify that the game is original and has not been illegally copied, to new digital distribution services and online games

¹⁸ Luke Plunkett, "Only 20% of Games Make a Profit - EEDAR" (24 November 2008), *Kotaku*, online: <<http://kotaku.com/5098356/only-20-of-games-make-a-profit+-eedar>>.

that tether games to online accounts rather than individual computers.

Not only have TPMs contributed to the phenomenal growth of the video game industry by stemming the flow of piracy, but today's video game TPMs are increasingly implemented in a manner that is flexible, transparent and non-intrusive, and that actually adds value for the consumer. For instance, in the past, most PC games employed a "CD Check" mechanism, so the user had to insert the game disc into the PC drive bay to access the game. However, now publishers and developers are experimenting with more convenient systems, such as online authentication, which allows more portability by permitting consumers to install and authenticate a game on more than one computer and play on those computers without requiring the disc in the drive. Furthermore, some digital download services offer additional consumer-oriented benefits, such as automatic software updates, free or minimal-cost re-downloads, and embedded community features. Given the highly competitive nature of the video game market and positive consumer response to these features, these benefits will only continue to multiply over the coming years.

As this may suggest, TPMs in video games are not only used to prevent unauthorized copying of and access to video game software and services, but are also used for a wide variety of purposes that are beneficial to consumers. For instance, by permitting companies to differentiate products to meet varying consumer demands and offer a greater range of options and flexibility to consumers (*e.g.* rental vs. purchase), TPMs facilitate "trial" and "demo" versions of video game software that enable a "try before you buy" experience for the user. Some trial software is time-limited, others only permit a certain number of plays, while still others permit play in limited areas of a game's universe (*e.g.* limited to certain levels).

Similarly, TPMs also facilitate "versioning", whereby different consumers can obtain access to different features or versions of the software at different price points. For instance, some single-player games may also offer a "multi-player" or "player versus player" mode for a premium. Many "freemium" or "free-to-play" games employ a similar model, whereby players are permitted to play the basic game for free, and are charged instead for upgrades, updates, in-game downloadable content, and/or other enhanced features, while many multiplayer online games such as Activision Blizzard's *World of*

Warcraft charge a subscription. Without TPMs to implement granular and differentiated options for the consumer it would be difficult if not impossible to experiment with such new and innovative video game products, services, and business models.

Video game TPMs also facilitate digital distribution of products, and thus are a critical enabler of electronic commerce. All three console makers offer services that allow users to download games and applications directly onto their consoles, while Valve's *Steam*, Electronic Arts' *EA Store*, and *Direct2Drive* are just a few of the digital distribution services that have emerged for PC games. Not only do these services rely on TPMs to operate, many employ TPMs to offer value-added benefits to consumers. For instance, the *Steam* service not only allows users to purchase computer games online, but tethers any purchased video game software to the *Steam* account rather than a particular computer, so content can be downloaded to any number of internet-connected computers, allowing consumers access to games at convenient times and locations (such as when traveling). Similarly, Microsoft makes a tool available to Xbox 360 users that allows users to simply "migrate" licenses and associated content to a new console in the event of hardware malfunction or failure, or the purchase of a new console.

The entertainment software industry is also concerned about children obtaining access to games not suitable for their age, and employs TPMs to enable enhanced parental control features. All consoles contain parental controls that permit parents to restrict access to games according to their ESRB age rating, allowing parents to make decisions about what is appropriate for their families. The Xbox 360 also contains a timer so parents can determine how long their child may play. Similarly, some Massively Multiplayer Online Games such as Activision Blizzard's *World of Warcraft* include a scheduler, so parents can choose what time of day their children may play and for how long.

Video game TPMs are also used to detect and prevent players from cheating in online games. In an online game, technologically savvy players can cheat by modifying the game experience in order to give him or herself an unfair advantage over other players. Many cheats are implemented by modifying game software (despite end user license agreements which forbid modification) so that the user's character gains an advantage. This kind of activity is generally decried

in the gaming community as fundamentally unfair and disruptive to online gameplay, and TPMs are used to detect and prevent cheating in order to ensure fair and equitable experience for all players.

Thus, the entertainment software industry employs TPMs not only to prevent piracy of video game software, but for a variety of other purposes as well, to the benefit of the consumer. Moreover, given the technological sophistication of video game TPMs, they can be effective at accomplishing their primary purpose of deterring piracy. Indeed, according to industry research, 62% of Canadian adults agree that copy protection technology makes it harder to pirate games than in the past.¹⁹

However, no matter how sophisticated the TPM developed and deployed, none are failsafe. Most TPMs can be circumvented through the application of hardware (such as "mod chips"), software or services developed specifically to descramble, decrypt, bypass or deactivate TPMs, thus rendering pirated games playable and overriding the various features enabled by TPMs. Due to the widespread use of TPMs in video game software and hardware, no other copyright industry has been plagued by these kinds of circumvention devices like the video game industry.

CIRCUMVENTION DEVICES AND SERVICES

While there are a variety of circumvention devices used in video game piracy, the most common form is a modification chip or "mod chip". Video game consoles each contain very effective TPMs that prevent illegally copied games from playing in the console. However, mod chips contain a program that defeats the access protection technology of a console system, allowing the system to run illegitimate copies of games recorded onto optical discs. In order to function, mod chips must be directly connected to the motherboard inside the console, and are installed by opening the console and soldering the mod chip to the internal components of a console (some newer generations of mod chips are "solderless" and clip directly to the motherboard without soldering).

¹⁹ Ipsos Reid, *Video Gaming in Canada: Report Prepared for the Entertainment Software Association of Canada* (August 2008).

The purpose of mod chips is to facilitate the playing of unauthorized copies of video game software on a console, and consequently they are a subject of extreme concern for the video game industry. Contrary to popular perception, those trafficking in these types of circumvention devices and services are not individual hobbyists jerry-rigging homemade devices for their own private use. Rather, the development, distribution and sale of mod chips is quite sophisticated and has become a lucrative, but illegitimate, pirate business in its own right. Developing a mod chip takes considerable effort, often involving the investment of hundreds of thousands of dollars and years in research and development. Furthermore, as a high end technological device, mass-production of mod chips requires advanced manufacturing processes, and as the mod chip market is quite competitive, manufacturers aggressively market their mod chips to distributors and retailers and specialized "modding" forums in order to build brand awareness.

While mod chips themselves typically retail between \$40 and \$60, as the installation of a mod chip requires a certain degree of technical sophistication, a robust "chipping" service industry has also emerged. For a modest services fee of \$30 to \$80, many mod chip sellers will install the mod chip into a purchaser's console for them. Alternatively, many also offer "pre-modded" consoles, with the mod chip already installed, which typically sell for \$60 to \$100 over retail. Some will even offer free pirated games with the purchase of a mod chip or pre-modded console.

Another form of console modification that is on the rise are "softmods" (software modifications), or software that is designed to exploit errors or flaws in console software in order to circumvent the TPMs built into the console and render pirated games playable. "Softmods" often appeal to less technically sophisticated users, as they can be used to "mod" a console without the need to actually install a mod chip. However, as softmodding involves tampering with console software, and like "chipping" runs the risk of rendering a console unusable if not performed properly, many chipping services also sell softmod installation services.

Other circumvention devices that specifically target Nintendo's cartridge-based portable handheld video game systems (the Nintendo DS / DSi, and the Game Boy Advance) are "Flash Carts" and Game Copiers. "Flash Carts" are specially designed SD cartridges

which circumvent the encryption built into the Nintendo DS / DSi handheld and allows users to download video games onto a MicroSD card, insert it into the SD card, and play the game on their handheld. Currently, there are over 20 different types of "flash carts" on the market, but by far the most popular and notorious is the R4 DS flash card. "Game Copiers" are specially designed devices that circumvent the copy protection built into Nintendo game cartridges and copy video game software, without authorization, from the game cartridge onto any type of memory device. This enables the user to make, play and distribute illegal copies of Nintendo video game software, thus facilitating widespread piracy of games for the DS / DSi and GameBoy Advance.

There are also a variety of software circumventions for TPMs in PC games. For instance, "keygens" are programs that illegally create serial keys to unlock games, and are typically distributed online via websites and peer-to-peer networks. "Cracks" are software programs that render PC games TPM-free (generally by adding a file that impedes the TPM), while "cracked games" are games that have been rendered TPM-free by a crack prior to distribution by pirates. Obtaining a crack or a cracked game requires that a user obtain files from locations that are clearly illegitimate and installing them on his or her PC, and there is considerable risk that such files also include viruses, spyware and other malicious software.

Accordingly, there are a variety of circumvention devices and services that are employed to override video game TPMs and facilitate the widespread piracy of video game software. While the entertainment software industry expends considerable effort devising technological responses to these devices and services, such as updating console software or PC games to correct and eliminate identified exploits, these solutions are of limited effectiveness against hardware modification. Moreover, given the considerable harm these devices and services inflict on the entertainment software industry and copyright industries more generally, it is clear that a legislative response is required.

However, in Canada, there is currently no legal prohibition on either circumventing TPMs, or manufacturing or selling devices or services that circumvent TPMs, and consequently a robust and lucrative (but illegitimate) market for circumvention devices and services has developed. Indeed, in Canada, commercial operations

selling mod chips, flashcarts, and other circumvention devices and various modding services (such as ConsoleSource, GameStuff, GoCybershop, Mod Central and ModChip Canada) operate openly, and have even formed their own lobby group, the Canadian Coalition for Electronic Rights, to advocate against the adoption of anti-circumvention legislation that would adversely affect their circumvention businesses.²⁰ Furthermore, Canadian mod chip vendors typically operate e-commerce sites which sell circumvention devices and services not only to Canadians, but also to purchasers in jurisdictions where such activity is expressly illegal such as the United States.²¹ Consequently, in light of the favourable legal conditions, it should be of little surprise that Canada has become one of the world's epicenters for the transshipment, distribution and export of mod chips and other circumvention devices and services and that enable pirated and counterfeit video games to be played on videogame consoles, a fact that is causing some degree of friction with our major trading partners.²² Moreover, the current legal environment and the ease of access to circumvention devices and services have directly contributed to an unacceptably high level of video game piracy in Canada.

²⁰ See "CCER Launches With A Clear Goal" (6 December 2007), *CCER* online: <<http://www.ccer.ca/canadian-copyright-reform/canadian-coalition-for-electronic-rights/>> in which the CCER announced that "the primary objective of the Canadian Coalition for Electronic Rights (CCER) to represent our member companies and to act as a communication conduit between policy makers at both the federal and provincial levels of government. The CCER seeks to keeps its members informed of policy changes that will affect current and future business models." The CCER also announced that members were "unanimous in their concern over anti-circumvention provisions that may be included in proposed Copyright reform legislation." Interestingly, during the copyright consultation, they re-cast themselves "an advocacy group dedicated to the preservation of user rights," but do not appear to have changed their membership or organizational structure to reflect this apparent change in mandate. See CCER, "Position on Copyright Reform in Canada", *CCER* online: <http://www.ccer.ca/files/ccer_position_on_copyright_reform.pdf>.

²¹ For instance, ConsoleSource (Oshawa) offers \$4.95 flat rate shipping to all customers in the US and Canada, while ModChip Canada (Winnipeg) not only sells into the US, but also advertises that because of its location "in the middle of North America", customers "pay no customs, import or duty fees." See ConsoleSource, online: <<http://www.consolesource.com/ecommm/catalog/index.html>>; ModChip Canada, online: <http://www.modchip.ca/store/home.php>>.

²² See United States Trade Representative, *Special 301 Report 2009* ["Special 301 Report"].

VIDEO GAME PIRACY IN CANADA

Global video game piracy is conservatively estimated to cost the U.S. and Canadian entertainment software industries more than US\$3.5 billion annually (and this does not include any losses suffered from Internet piracy).²³ Canada's level of participation is vastly disproportionate to the size of its market and its population. According to industry research, 34% of Canadian gamers admitted to having obtained pirated games (as compared to 17% of American gamers), and, of those acknowledging having acquired pirated games, Canadian respondents estimated, on average, that 22% of their game collections consisted of pirated games (compared, for example, to 6% of the collections of U.S. respondents).²⁴ Furthermore, 22% of Canadian gamers admitted that their personal video game console or handheld had been modified to enable them to play pirated games, while 49% of acknowledged pirates admitted to having bypassed the copy protection built into a console, handheld or game themselves in order to play a pirated game.²⁵ Accordingly, based on qualitative research on Canadian gamer behaviour and quantitative Canadian video game sales data, NPD Canada has conservatively estimated that between January and June 2009 over 1 million games were acquired through piracy in Canada, which is equivalent to about 10% of all new game sales in Canada over the same period.²⁶

Hard goods piracy, involving the illegal manufacture and sale of counterfeit optical discs for use in consoles or PCs, as well as counterfeit cartridges for handheld devices such as the Nintendo DS / DSi, is pervasive. Industry investigations identified an alarming 20% to 30% of retail specialty stores visited in Toronto and Vancouver sold pirated products.²⁷ Most piracy operations openly advertise on the Internet and many also operate stores full of pirated materials, often

²³ Entertainment Software Association of Canada, *Piracy*, online: <<http://www.theesa.ca/piracy.php>>. [ESAC Piracy Fact Sheet].

²⁴ Nielsen Interactive Entertainment, *ESA Piracy Study Canada 2005 Report* (December 2005); Nielsen Interactive Entertainment, *ESA Piracy Study United States 2005 Report* (December 2005).

²⁵ NPD Canada, *Entertainment Software Association of Canada: Understanding the Canadian Gamer* (July 2009).

²⁶ *Ibid.*

²⁷ ESAC Piracy Fact Sheet, *supra* note 23.

found in malls (such as the notorious Pacific Mall in Markham, Ontario). Popular pirated materials sold by these operations included burned optical discs and memory sticks containing hundreds of illegal copies of videogames for all gaming platforms, consoles housing hard drives pre-installed with numerous pirated copies of games, and mod chips (including installation services). Optical disc piracy in particular is a growing problem; while once it required large-scale operations and access to sophisticated equipment to produce counterfeit optical discs on a commercial-scale, now readily available and inexpensive computer equipment allows anyone to "burn" their own limitless supply of pirated game software. Some retail piracy operations sell pre-burnt optical discs and use burners to constantly replenish inventory, while others give their customers a catalogue of video game titles, and burn copies of those games while they wait. In other cases, counterfeit video game optical discs and cartridges are imported into Canada from Asia due to lax border controls that ensure a steady, cheap supply. Moreover, our outmoded copyright laws, weak enforcement, and porous borders are ideal for transshipment of pirated products, and much of the thriving activity in importing, exporting and distributing pirated entertainment software products and circumvention devices is associated with highly organized international crime groups that use piracy to support more serious criminal activity.²⁸

Internet piracy of video game software has also undergone explosive growth and represents a significant problem for the entertainment software industry. Rapidly expanding access to high-speed Internet connections has fuelled online video game piracy by making it exponentially easier and more efficient to download and distribute unauthorized copies of entertainment software on a global scale. Unauthorized copies of video games are made available through the use of popular Internet protocols, including through websites, FTP sites, chat sessions and, increasingly, through a growing number of peer-to-peer file sharing protocols such as BitTorrent (which is a highly efficient protocol for distributing large files such as video game software to many users) and cyberlockers such as Rapidshare (which hosts files that can only be accessed by selected invitees). The Internet is also used to advertise services that offer pirated hard copies

²⁸ See e.g. Special 301 Report, *supra* note 22.

of disc and cartridge-based games, circumvention devices and circumvention services, either through their own websites and/or online classifieds such as Craigslist.

Our online monitoring service records between half-a-million and over 1 million cases of online video game piracy per month, worldwide, and this is but a fraction of the online infringements detected by the industry as a whole. In 2008, over 750,000 online infringements were traced to Canadian Internet Service Provider (ISP) networks, which represents a stunning 300% increase over 2007. Furthermore, in the first half of 2009, we detected over 670,000 instances of video game piracy over Canadian ISP networks. Accordingly, online piracy of video game software in Canada is continuing to rise at a dramatic rate and is well on track to surpass the number of infringements in 2008.

However, Canadian ISPs are currently under no obligation to act upon notices of infringing content, and consequently, while we submit hundreds of thousands of notices to Canadian ISPs regarding unauthorized downloading of video game software, ISPs were not legally required to respond to any of them (and some have advised us that they would not respond). Moreover, while some ISPs have been willing to forward notices to the end user voluntarily, the current state of the law is such that any realistic possibility of sanction for unauthorized downloading is practically non-existent, and thus we observe a high rate of non-compliance and recidivism. Indeed, in 29% of all Canadian cases of unauthorized downloading in the first half of 2009, the user completely ignored the notice and continued to make the game title available online 7 days after the notice was sent. Given the speed and viral nature of distribution on the Internet and the fact that most video game titles earn the bulk of their revenue immediately after release, any delay in the removal of unauthorized copies of video games distributed online can have a dramatic impact on the commercial success of a product and significantly reduce the ability of a publisher to recover development costs. Canadian ISPs play a key role in Canadian internet piracy, and should bear some responsibility for taking positive action in the fight against piracy.

In the absence of a strong, certain and effective legal regime protecting digital copyright, Canada is increasingly perceived as a jurisdiction where laws addressing online piracy are weak, ineffective or non-existent. Several of the world's most popular unauthorized file

sharing sites such as isoHunt, BTJunkie and BTMon operate from Canada, and most of these sites claim that they have moved to Canada to more easily and legally conduct business.²⁹ Indeed, isoHunt recently sued the record industry in Canada for a declaration that it can legally operate its BitTorrent site in Canada. These sites not only openly and brazenly facilitate a staggering amount of unauthorized file sharing,³⁰ but the majority are for-profit operations that earn revenue through online advertising or subscription fees.³¹ Similarly, several pirate servers have indicated that they are considering re-locating their operations to Canada due to its favourable legal environment.³²

²⁹ See e.g. "BTJunkie", *Wikipedia* online: <<http://en.wikipedia.org/wiki/BTJunkie>> indicating that BT Junkie, "the largest torrent site indexer on the web [...] moved to Canada for legal reasons"); Enigmax, "CRIA Orders ShutDown of What.cd, Other Major BitTorrent Trackers" (27 May 2008), *TorrentFreak* online: <<http://torrentfreak.com/cria-launches-assault-on-major-bittorrent-trackers-080527/>>, where Moxie Communications refused to comply with a cease and desist letter and stop providing file hosting services to BitTorrent site BTMon on the basis that "these sites are not breaking any laws in Canada."

³⁰ For instance, as of September 8, 2009, there were 90.57 million files with a combined size of 9637.9 terabytes being shared by 9.35 million peers on isoHunt. See "isoHunt", *isoHunt* online: <<http://isohunt.com/>>.

³¹ See e.g. Gillian Shaw, "Court ruling on isoHunt could have huge ramifications, says founder" (1 May 2009), *Vancouver Sun*, online: <<http://communities.canada.com/vancouver/blogs/techsense/archive/2009/05/01/court-ruling-on-isohunt-could-have-huge-ramifications-says-founder.aspx>>, where isoHunt founder Gary Fung admits that isoHunt "is a business. We have to make money to sustain our business, and to sustain the lawsuits that are costing quite a bit."

³² For instance, Arberb, which hosts pirate servers for Nexon's immensely popular free-to-play MMO MapleStory, announced its intention of relocating its operations to Canada if the Government does not introduce a strong copyright bill on the basis that it will be able to simply ignore cease & desist notices with impunity: "If the bill gets rejected that means I will be able to bring the site to Canada and the server without worrying about Nexon. Nexons C&D letters are b.s. in Canada if this bill gets rejected. Thus if Nexon attempts to sue they will get ownt [sic] 5 minutes or less in court. The judge will just laugh in there [sic] faces. So yeah. We will see what happens next month." See Arberb, "We may move the site to Canada if bill c-61 does not get passed" (20 August 2009), *Arberb* online: <<http://arberb.com/3-arberb-com/11-news-announcements-arberbs-releases/28694-we-may-move-site-canada-if-bill-c-61-does-not-get-passed-help-here.html>>.

PERCEPTIONS OF CANADIAN COPYRIGHT

Canada is now virtually alone among developed economies in remaining almost entirely out of compliance with the global minimum standards embodied in the World Intellectual Property Organization (WIPO) Copyright Treaty³³ and the WIPO Performances and Phonograms Treaty³⁴ (collectively, the "WIPO Internet Treaties"), and as a consequence of our favourable legal environment for piracy operations, we have gained a regrettable, but deserved, reputation as a piracy haven.

The United States, as our closest trading partner, has been the most vocal in expressing its concern with the current state of Canadian copyright law. Recently, the US Trade Representative elevated Canada to the "Priority Watch List" in its Special 301 Report, citing "serious concerns with Canada's failure to accede to and implement the WIPO Internet Treaties,"³⁵ and the U.S. Congressional International Anti-Piracy Caucus also placed Canada on its 2009 International Piracy Watch List, observing that "Canada has become known as a 'safe haven' for Internet pirates," and that there is an "urgent need for amendments to the Copyright Act in order to comply with the World Intellectual Property Organization (WIPO) Internet Treaties."³⁶ However, the US is not alone in its assessment of Canadian copyright law, and the European Union and other major trading partners have also expressed concern over crucial weaknesses in Canada's Intellectual Property framework.³⁷

³³ *World Intellectual Property Organization Copyright Treaty*, adopted 20 December 1996, 36 ILM 65, online: <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> [WCT].

³⁴ *World Intellectual Property Organization Performances and Phonograms Treaty* adopted 20 December 1996, 36 I.L.M. 76. online: <http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html> [WPPT].

³⁵ Special 301 Report, *supra* note 22.

³⁶ US Congressional International Anti-Piracy Caucus, "2009 Country Watch List", *United States House of Representatives* online: <http://schiff.house.gov/antipiracycaucus/pdf/IAPC_2009_Watch_List.pdf>.

³⁷ For instance, in connection with the new Comprehensive Economic and Trade Agreement between Canada and the European Union, the EU has expressed concerns about IP enforcement challenges in Canada. See *Assessing the Costs and Benefits of a Closer EU-Canada Partnership: A Joint Study by the European Union and the*

The state of Canada's copyright laws has also not gone unnoticed by the international business community, and Canada's world rankings in indexes that measure the state of our copyright laws have been slipping measurably. According to International IP Law Firm Taylor Wessing's *2009 Global IP Index Report*, Canada recently experienced a dramatic drop of 6 ranks (from 5th to 11th place) in its Global Copyright Index,³⁸ and Canada is currently ranked as a third tier country, alongside South Korea, Israel and Spain (all jurisdictions with well known piracy issues). Similarly, in the World Economic Forum's *Global Competitiveness Report 2008-2009*, Canada's ranking in the Intellectual Property Protection category fell from 15 to 19, and is marked as a "competitive disadvantage".³⁹ These reports reflect a growing perception internationally that Canada's copyright laws are inadequate and out of step with international norms, including the international standards set out in the WIPO Internet Treaties.

Moreover, these deficiencies have repeatedly been acknowledged by the Canadian Government and Parliamentarians, and the matter of implementing the necessary changes to Canada's copyright law has been the subject of a variety of hearings, consultations and reports. In 2002, the Government of Canada conducted a comprehensive assessment of the operation of the *Copyright Act*,⁴⁰ and concluded that digital issues and issues relating to WIPO Internet Treaty implementation were priorities that needed

Government of Canada (Ottawa: Foreign Affairs and International Affairs Canada 2008).

³⁸ Taylor Wessing *Global Intellectual Property Index 2009*, online: <<http://www.taylorwessing.com/ipindex/>> [GIPI 2]. The Index, which provides a comprehensive assessment of the IP regimes of 24 key countries, indicates that "Canada has suffered the greatest fall in GIPI 2, both in rank and rating. It has attracted numerous adverse comments, such as having "ineffective border controls", "insufficient enforcement resources", "inadequate enforcement policies" and an "unwillingness to impose deterrent penalties on pirates". In a pending case, an ISP has considered the regime sufficiently benign to sue a rights-holder in the Canadian court for a decision on whether search engines should be held accountable for copyright infringement (isoHunt Web Technologies Inc. v Canadian Recording Industry Association)."

³⁹ World Economic Forum, *The Global Competitiveness Report 2008-2009*, online: <<http://www.weforum.org/documents/gcr0809/index.html>>. By contrast, Canada's overall ranking in the report climbed from 13 to 10, and Canada ranked 8th in the Property Protection category.

⁴⁰ *Copyright Act*, R.S.C., 1985, c. C-42 [*Copyright Act*].

to be addressed in the "short-term" (1 - 2 years).⁴¹ In 2004, the Standing Committee on Canadian Heritage recommended a series of reforms to the *Act*.⁴² In 2007, both the Standing Committee on Public Safety and the Standing Committee on Industry, Science and Technology engaged in a comprehensive examination of counterfeiting and piracy problems in Canada and made a variety of recommendations to address significant deficiencies in Canadian law.⁴³ In 2008, the Government's Competition Policy Review Panel urged reforms to bring Canada's laws into the Internet era.⁴⁴ Moreover, in each of the three most recent throne speeches setting out the Government's goals and strategy, the Government explicitly pledged to "modernize Canada's copyright laws and ensure stronger protection for intellectual property."⁴⁵

⁴¹ Copyright Consultations, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002).

⁴² Standing Committee of Canadian Heritage, *Interim Report on Copyright Reform*, 37th Parl., 3rd Sess. (May 2004).

⁴³ Standing Committee on Public Safety and National Security, *Counterfeit Goods in Canada — A Threat to Public Safety*, 39th Parl., 1st Sess. (June 2007); Standing Committee on Industry, Science and Technology, *Counterfeiting and Piracy are Theft*, 39th Parl., 1st Sess. (June 2007). Specific recommendations included enacting legislation to ratify the WIPO Internet Treaties, strengthening civil remedies for counterfeiting and piracy infringements, and provide customs and law enforcement officials with *ex officio* authority to target, detain, seize, and destroy counterfeit and pirated goods on their own initiative.

⁴⁴ Competition Policy Review Panel, *Compete to Win: Final Report* (June 2008). The report observed that the Internet "has brought new urgency to updating IP frameworks in Canada," and that "[t]here is no reason for Canada's patent and copyright frameworks not to be 'state of the art' for the Internet age." Accordingly, it urged the Government to develop a strong IP capacity and "demonstrate to the world how competition and productivity can be furthered by a modern IP regime."

⁴⁵ In the throne speech of October 2007, the Government pledged to "improve the protection of cultural and intellectual property rights in Canada, including copyright reform," while in the November 2008 throne speech the Government committed "proceed with legislation to modernize Canada's copyright laws and ensure stronger protection for intellectual property." See Speech from the Throne, 39th Parl., 2nd Sess. (16 October 2007), *Government of Canada* online: <<http://www2.parl.gc.ca/Parlinfo/Documents/ThroneSpeech/39-2-e.html>>; Speech from the Throne, 40th Parl., 1st Sess. (18 November 2008), *Government of Canada* online: <<http://www.sft-ddt.gc.ca/eng/media.asp?id=1364>>. While the throne speech of January 2009 did not expressly reference copyright or intellectual property, the Government pledged to "attend to the other important priorities that it set out in the Speech from the Throne to open the 40th Parliament," and thus all commitments were incorporated by reference. See Speech from the Throne, 41st Parl., 1st Sess. (29

Canadian businesses have also recognized the need for stronger and better enforcement of copyrights in Canada, and have made a variety of specific recommendations for reforms.⁴⁶ Furthermore, according to Environics Research, 90% of Canadians agree that "strong patent, copyright and trademark laws are required to protect those who create intellectual property for a period of time so that they can sell or commercialize their ideas before competitors are allowed to copy their creations", while 83% of Canadians agree that "music, videos, computer software and books are all forms of intellectual property which deserve the same degree of protection from copyright theft as physical goods do from physical theft."⁴⁷ These findings are roughly consistent with a survey conducted by Nanos Research, which found that 69% of Canadian adults support or strongly support protection of copyrights for software and 63% of Canadian adults advocate for strong or very strong enforcement of copyrights for software.⁴⁸ Accordingly, it would appear that the majority of Canadians also agree with the need for stronger and better enforcement of copyrights in Canada.

COPYRIGHT REFORM

A strong and robust copyright regime that clearly and effectively addresses digital issues is critical to the health and success of both the Canadian creative sector and the emerging digital economy. Any reform of the *Copyright Act* must "promote the public interest in the encouragement and dissemination of works"⁴⁹ by

January 2009), *Government of Canada* online: <<http://www.sft-ddt.gc.ca/eng/media.asp?id=1384>>.

⁴⁶ See e.g. Canadian Anti-Counterfeiting Network, *Report on Counterfeiting and Piracy in Canada: A Road Map for Change* (March 2007); Ontario Chamber of Commerce, *Protection of Intellectual Property: A Case for Ontario* (December 2007); Canadian Chamber of Commerce and the Canadian Intellectual Property Council, *A Time for Change: Toward a New Era for Intellectual Property Rights in Canada* (February 2009).

⁴⁷ Environics Research Group, "Looking for Leadership: Canadian Attitudes Toward Intellectual Property" (June 2008), *Environics* online: <http://erg.environics.net/media_room/default.asp?aID=673>.

⁴⁸ Nanos Research, "Canadians on Intellectual Property" (April 2008), *Nanos Research* online: <<http://www.nanosresearch.com/library/polls/POLNAT-S08-T295.pdf>>.

⁴⁹ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 17 CPR (4th) 161 (SCC).

effectively protecting the considerable time, money, labour and creativity creators and companies invest in innovative new digital products, services and distribution methods, and enabling creators and companies to determine the most appropriate means for protecting their investment and distributing their works. This is critical to the development of a market-driven digital economy, where a vibrant ecosystem of new and innovative digital business models offer a wide variety of digital products and services, fostering legitimate competition, allowing market forces to protect consumer interests, and facilitating greater choice and lower prices for Canadian consumers. Furthermore, as we exist in a global context and participate in a global economy, any reform must be consistent with international standards, and modernized in accordance with the WIPO Internet Treaties and international best practices so that we are in line with the European Union, the US, Japan and our other major trading partners.

Given the industry's widespread use of TPMs and the increasing impact of piracy, the entertainment software industry regards the implementation of the WIPO Internet Treaties, including the introduction of prohibitions on circumventing TPMs and services and devices that circumvent TPMs, as critical to its ongoing success. Furthermore, in light of the rapidly growing problem of online video game piracy in Canada, the entertainment software industry strongly urges the adoption of an ISP liability regime that both provides appropriate limitations on ISP liability and facilitates the expeditious removal of infringing content, including statutory "notice-and-takedown" for hosted content and measures that provide appropriate incentives to ISPs to impose effective sanctions against repeat

at para. 30. While copyright is often "presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)," copyright policy should not be regarded as a zero-sum game, where stronger protection for creators is "bad" for users, or any "gain" by producers must result in a corresponding "loss" for consumers. Rather, strong copyright actually serves the public interest in the creation and dissemination of works *by* preventing someone other than the creator from appropriating the benefits of the work (thus providing a just reward for the creator) and ensuring that the investment in creation is adequately and effectively protected.

infringers in order to address infringing activity occurring through transitory network communications, such as peer-to-peer networks.

These recommendations and others are discussed in greater detail below.

ANTI-CIRCUMVENTION AND THE WIPO INTERNET TREATIES

First and foremost, the Government of Canada must enact copyright reform legislation that brings Canada into full compliance with the WIPO Internet Treaties, including adopting prohibitions specifically addressing both the act of circumventing TPMs and the trafficking (in terms of the sale, distribution, import or export) in circumvention devices and services, and implementing deterrent criminal and civil remedies against those engaged in the provision of services and tools that circumvent TPMs.

The WIPO Internet Treaties, negotiated and adopted in 1997, recognized the need to make the digital environment safe for the dissemination and exploitation of copyrighted works. These Treaties provide an internationally recognized norm for reducing digital piracy, including provisions to protect against circumvention of the technology that copyright owners may use to protect their works.

Virtually all of Canada's major trading partners, including all members of the European Union, Japan, Australia, and the United States, have enacted legislation to implement these Treaties. However, despite having played a major role in negotiating and drafting the WIPO Internet Treaties – as well as being an original signatory to them – Canada has yet to fully implement its Treaty obligations. Consequently, there is no legal prohibition in Canada on either circumventing TPMs, or manufacturing or selling devices or services that circumvent TPMs, and "mod chips" and other devices and services designed to circumvent TPMs and facilitate video game piracy have become widely available, contributing directly to an abnormally high level of game piracy in Canada.

Opponents of legal protection for TPMs argue that there is "considerable flexibility" in how to implement the WIPO Internet Treaties. More specifically, they argue that as the Treaties require countries to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological

measures" only insofar as such TPMs are "used by authors in connection with the exercise of their rights,"⁵⁰ merely prohibiting circumvention for the purposes of infringement will satisfy Treaty requirements. Furthermore, they also argue that there is no obligation to prohibit trafficking in circumvention devices and services.⁵¹

Simply put, this is not the case. First, this interpretation is actually inconsistent with guidance on the WIPO Internet Treaties provided by WIPO itself. In its *Guide to Copyright and Related Rights Treaties*, WIPO advised that, because acts of circumvention are often carried out privately, any prohibition limited to just the act of circumvention can be very difficult to enforce, and therefore such a limited prohibition cannot be said to "provide adequate legal protection and effective legal remedies." Thus, WIPO advised that countries will only

fulfil their obligations under Article 11 of the Treaty if they provide the required protection and remedies: (i) against both unauthorized acts of circumvention, and the so-called "preparatory activities" rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention); (ii) against all such acts in respect of both technological measures used for "access control" and those used for the control of exercise of rights, such as "copy-control" devices (it should be noted from this viewpoint that access control may have a double effect extending also to copy-control); (iii) not only against those devices whose only - sole - purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which its [sic] is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such; and (iv) not only against an entire device which is of the nature just described, but also against individual

⁵⁰ WCT, *supra* note 33 at Art. 11. The equivalent obligation under the WPPT employs the same wording, except in respect of "technological measures that are used by performers or producers of phonograms" rather than "authors". See WPPT, *supra* note 34 at Art. 18.

⁵¹ See *e.g.* Michael Geist, "My Short Answer" (21 July 2009), *Speak Out on Copyright* online: <<http://speakoutoncopyright.ca/my-short-answer>>.

components or built-in special functions that correspond to the criteria indicated concerning entire devices.⁵²

This view is consistent with that of a variety of international copyright scholars and experts, who have concluded that "the dominant view internationally is that legislation that prohibits only the circumvention of TPMs for the purpose of infringement would not be adequate and effective," and that most consider that "the WIPO Internet Treaties obligate member states to legislate against the circumvention of access controls and trafficking in devices to circumvent access controls, rather than simply the circumvention of copy controls."⁵³ Consequently, any anti-circumvention legislation that merely prohibits circumvention for the purposes of infringement "rather than prohibiting the circumvention of "access controls" and the trafficking in circumvention devices ... fails to meet the obligation under [the WIPO Internet Treaties] to provide adequate legal protection and effective legal remedies."⁵⁴

Moreover, these proposed minimalistic forms of WIPO Internet Treaty implementation would be of little to no assistance in the entertainment software industry's ongoing efforts to stem the flow of video game piracy. Lax anti-circumvention prohibitions would make it extremely difficult for either rights holders or law enforcement officers to pursue legal action against those who traffic in circumvention devices and services, as the requirement that circumvention be for the purpose of infringing copyright permits offenders to simply deny their intention to infringe a copyright. This poses problems for the rights holders in terms of the level of proof

⁵² WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related rights Terms* (WIPO, English No.891(E), 2004) at paras. CT-11.14 - CT-11.17.

⁵³ Heather A. Sapp, "North American Anti-Circumvention: Implementation of the WIPO Internet Treaties in the United States, Mexico and Canada" (2005) 10 *Comp. L. Rev. & Tech. J.* 1 at 9-10 [Sapp]. See also Mihaly Ficsor, *The Law Of Copyright And The Internet* (Oxford Univ. Press 2002) at 549-550; Michael Schlesinger, "Implementation of the WIPO Treaties Beyond the U.S. and the EU" in Fordham University School of Law *Eleventh Annual Conference on International Intellectual Property Law & Policy* (23 April 2003) at 12-13.

⁵⁴ Sapp, *ibid.* at 34-35. Consequently, the author is forced to conclude that the anti-circumvention provisions proposed under Bill C-60 would not have complied with the requirements of the WIPO Internet Treaties.

required to overcome such a claim. Furthermore, it would be an open question as to whether such a limited anti-circumvention provision would even apply to many mod chip sellers or circumvention service providers, as the very nature of "chipping" is such that the act of circumventing TPMs and the act of copyright infringement may be distinct acts performed by separate individuals.

Accordingly, the entertainment software industry strongly supports the robust implementation of the WIPO Internet Treaties proposed in Bill C-61,⁵⁵ which were vastly superior to the ineffective provisions proposed in the previous Bill C-60.⁵⁶ Bill C-61 contained prohibitions of both the circumvention of TPMs and trafficking in circumvention services, technology, devices, or components. In addition, Bill C-61 contained deterrent remedies for both the circumvention and trafficking in circumvention devices or services (including criminal liability for knowingly trafficking in circumvention devices or services).⁵⁷ These provisions are imperative for the industry's continued success. Further, concerns over security, privacy and interoperability, as well as other concerns were appropriately addressed through the inclusion of exceptions in that bill.

Opponents of anti-circumvention legislation also raise a variety of arguments against legal protection for TPMs, citing concerns over free speech, digital lockout, and privacy.⁵⁸ However, the majority of these concerns do not withstand any serious scrutiny, or else can be addressed through appropriately calibrated exceptions, and certainly do not justify failing to implement effective anti-circumvention legislation. Indeed, a recent study examining the impact of legal protection for TPMs on statutory exceptions to copyright in the UK found that the "nightmarish vision of digital lock-up" professed by opponents of anti-circumvention legislation had not materialized, and that TPMs had not, in fact "impacted on many acts

⁵⁵ [Bill C-61](#), *An Act to Amend the Copyright Act*, 2nd Sess., 39th Parl., 2007-2008 [Bill C-61].

⁵⁶ [Bill C-60](#), *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005. [Bill C-60].

⁵⁷ Bill C-61, *supra* note 55.

⁵⁸ See *e.g.* Michael Geist, "Anticircumvention Legislation and Competition Policy: Defining a Canadian Way", in Michael Geist, ed. *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005); Michael Geist, "61 Reforms to C-61", online: <http://www.michaelgeist.ca>.

permitted by law."⁵⁹ Similarly, a rigorous survey of the impact of anti-circumvention legislation in the United States concluded that "technological protections are not yet as pervasive or as intrusive as critics have feared [as a] host of legal, technological and market factors work together to counter digital lockup and provide a safety valve to accommodate legitimate uses," and that "we should allow the new types of digital deliveries that are promoted by [DMCA] § 1201 the opportunity to continue to flourish."⁶⁰

ISP RESPONSIBILITY

It is a matter of the greatest priority that copyright reform legislation in Canada address the pervasive problem of Internet piracy. While the entertainment software industry supports clarifying the uncertainty surrounding the potential liability of Canadian ISPs for copyright infringements occurring over their networks and introducing an appropriately crafted safe harbour, any such liability limitations should be conditioned on affirmative co-operation with copyright owners in combating online infringements.

Specifically, the entertainment software industry strongly advocates that any ISP liability regime must provide appropriate incentives to ISPs to expeditiously remove infringing content that is stored or hosted on a system or network controlled or operated by

⁵⁹ Patricia Akester, *Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment* (May 2009) online <<http://www.law.cam.ac.uk/faculty-resources/download/technological-accommodation-of-conflicts-between-freedom-of-expression-and-drm-the-first-empirical-assessment/6286/pdf>>.

Furthermore, Dr. Akester also found that in many cases, beneficiaries of exceptions who reported limited or no enjoyment of the exception were unable to provide any actual evidence in support of those claims, and that many beneficiaries of exceptions who claimed to have been prevented from carrying out those permitted acts because of TPMs had not availed themselves of the complaints mechanism built in to UK law to address these very concerns.

⁶⁰ June Besek, "Anti-Circumvention Laws and Copyright: A Report from The Kernochan Center For Law, Media And The Arts" (2004) 27 *Columbia Journal of Law & the Arts* 385. Professor Besek also concluded that the evidence available did not support introducing any new statutory exemptions that had not already been incorporated into the DMCA.

such ISPs, and strongly urges the adoption of a statutory "notice-and-take down" regime for such hosted communications.

Notice-and-takedown is extremely effective in dealing with infringing content that is hosted or stored at a specific location on a system or network. Given that most popular video games (which also tend to be the titles that are widely pirated) earn the bulk of their revenue shortly after release (which also tends to be when the titles are the most widely pirated) and given the Internet's capacity to rapidly distribute infringing content, the ability to expeditiously remove or disable access to infringing content is critical. Notice-and-takedown facilitates the rapid removal of such infringing content by the service provider that controls or operates the storage system or network. Hence, when the Supreme Court of Canada considered ISP liability for communications to the public by telecommunication, it observed that an "effective remedy" for the problem of online infringement "would be the enactment by Parliament of a statutory 'notice and take down' procedure as has been done in the European Community and the United States."⁶¹

Indeed, notice-and-takedown is the standard for most developed countries, including many members of the European Union, South Korea, Australia, Singapore and the U.S. Under these regimes, infringing content can be expeditiously removed on delivery of a notice of claimed infringement and be restored by a counter notice from the content poster. This is far more fair and equitable than a *de facto* form of notice-and-takedown, where service providers are only permitted to rely on liability limitations if they have no knowledge of the infringement and no formalized notice or counter notice process is available. Moreover, a properly calibrated counter notice procedure, whereby an individual who posted content can challenge takedown and request that the hosting service put content back up, along with proper sanctions for issuing fraudulent notices in bad faith or other forms of abuse, provides mechanism to ensure that both freedom of expression and due process are properly respected.

While notice-and-takedown is effective for hosted content, it is not the most efficient regime for addressing infringing activity occurring through transitory network communications such as peer-

⁶¹ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45; 2 S.C.R. 427 at para. 127.

to-peer communications. Rather, for transitory network communications, a "notice-and-notice" regime, whereby ISPs are required to forward infringement notices from copyright owners to infringing end-users, is more appropriate, provided that liability limitations for ISPs are conditioned on compliance and such notices carry a realistic possibility of effective sanction (to ensure end-user compliance). Thus, the entertainment software industry supports the implementation of ISP liability mechanisms that provide appropriate incentives to ISPs to impose effective sanctions against repeat infringers (through such methods as disabling, suspending or terminating the accounts of repeat infringers) and effect the prompt disclosure of repeat infringer information to right holders under appropriate circumstances. Furthermore, the industry also favours regular, cooperative dialogue between content owners and the ISP community, and supports any measures that facilitate collaborative and effective efforts to address infringing activity online.

Recent experiences of other jurisdictions that have modernized their copyright laws suggest that these measures can have a substantial and salutary effect on Internet piracy. For instance new enforcement legislation in Sweden based on the European Union's *Intellectual Property Rights Enforcement Directive* (IPRED) caused a 30% drop in the country's total Internet traffic the day after it came into effect, which experts attribute to a sudden precipitous decline in illegal file-sharing (which represents between 50 and 75% of Internet traffic worldwide).⁶² Moreover, not only has there been a sustained reduction in illegal file-sharing traffic, there has also been a significant increase in the use of legitimate online services. Similarly, a recent survey conducted in the UK found that 33% of people sharing copyrighted files on the Internet would stop if they received a warning notification email from their ISP, but 70-80% of downloaders would stop if there was a possibility of sanctions, such as disconnection.⁶³ While showing that the realistic possibility of sanctions can be an effective deterrent for online piracy, the survey

⁶² "Swedish anti-piracy law keeps downloaders on the defensive", *The Local* (4 Aug 2009), online: *The Local* <www.thelocal.se/21092/20090804>.

⁶³ Nate Anderson, "Stern letters from ISPs not enough to stop P2P use after all" (10 June 2009), online: *Ars Technica* <http://arstechnica.com/tech-policy/news/2009/06/stern-letters-from-isps-not-enough-to-stop-p2p-use-after-all.ars>>.

also supports the position that infringement notices alone without any effective sanctions are clearly insufficient.

Unfortunately, the "notice-and-notice" regime proposed under Bill C-61,⁶⁴ which essentially mirrored the same unsatisfactory approach to ISP liability taken in Bill C-60,⁶⁵ adopted this notice only model, and consequently fell far short of what is required to address the rapidly growing problem of online video game piracy. While requiring ISPs to forward notices from copyright owners to infringing end-users does have value for transitory network communications if the notices carry a realistic possibility of sanction, this approach is completely ineffective for hosted content. In addition, it promotes costly and lengthy litigation by compelling rights holders to obtain a formal court order every time a content poster opts not to voluntarily comply with an infringement notice (or possibly two, if the posters' identity is not known) in order to remove or disable access to infringing content. In the fast-paced world of the Internet, where the availability of even a single unauthorized copy can trigger a sequence of events that makes thousands of copies available for worldwide download, this is not a viable or effective remedy.

Moreover, by defining "network service providers" very broadly, and effectively immunizing such service providers against liability under any circumstances, Bill C-61 would have provided safe harbours to more than just innocent intermediaries.⁶⁶ Indeed, as the safe harbour was not subject to any conditions (including fulfilling the fairly minimal obligation to forward notices), the liability exception would have applied even if the service provider had actual knowledge that the copyright in material has been infringed or acquired constructive knowledge of an infringement, or has the right and ability to control the infringing activity, or even if it received a financial benefit directly attributed to the infringement. Consequently, the "notice-and-notice" regime proposed in Bill C-61 would not only have failed to address online piracy effectively, it probably would have only exacerbated the problem.

⁶⁴ Bill C-61, *supra* note 55.

⁶⁵ Bill C-60, *supra* note 56.

⁶⁶ Bill C-61, *supra* note 55.

SECONDARY INFRINGEMENT

In Canada, the liability of those who knowingly facilitate, encourage or contribute to infringement (such as illicit file-sharing services) is ambiguous and uncertain. While it is probable that acts that induce or materially contribute to copyright infringement could be considered authorizing infringement and/or secondary infringement, this is unclear. Secondary infringement doctrines are essential for rights holders to pursue legal action against online pirate sites and services, and consequently the law in this area must be clarified and the liability of those who knowingly facilitate, encourage or contribute to infringement must be firmly established.

REMEDIES

Hard goods piracy, including the manufacture and sale of counterfeit optical discs and cartridges, is on the rise in Canada and represents a significant problem for the entertainment software industry. This problem is greatly exacerbated by the lack of effective civil remedies, which significantly limit the industry's efforts to combat retail piracy. Accordingly, civil remedies for retail piracy should be strengthened by (i) increasing damages and penalties under the Copyright Act, including establishing a minimum "floor" for statutory damage awards and heightened damage awards for willful or repeat offenders; (ii) specialized injunctions and seizure orders upon proof of retail piracy activities; and (iii) summary enforcement proceedings.

IP CRIME AND ENFORCEMENT

While the objective of this consultation is to obtain views and input on the modernization of Canada's copyright laws, one cannot examine copyright in a vacuum, and any reform of Canada's copyright regime must also take into account the broader need to reform Canada's IP crime laws. The Canadian Anti-Counterfeiting Network's *Report on Counterfeiting and Piracy in Canada: A Road Map for*

*Change*⁶⁷ and the Canadian Intellectual Property Council's White Paper *A Time for Change: Toward a New Era for Intellectual Property Rights in Canada*⁶⁸ each provide a detailed set of recommendations to address critical deficiencies in Canada's IP Crime laws. However, the following is a short list of measures that must be taken:

- Amend Proceeds of Crime legislation to include proceeds from the distribution, sale and importation of pirated goods;
- Make the legislative, regulatory or administrative changes necessary to empower customs officials to make *ex officio* seizures of counterfeit and pirate product at the border without a court order;
- Provide law enforcement with the resources and training required to effectively combat piracy both at the border and within Canada;
- Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to IPR enforcement, including against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes; and
- Establish and properly fund an IP Crime Task Force, composed of police officers, customs officers, and federal prosecutors, to guide and coordinate IP criminal enforcement.

CONCLUSION

While Canada strives to be a world leader in global video game industry, its ongoing failure to bring its outmoded intellectual property laws up to contemporary international standards and impose deterrent penalties on pirates, as well as its ineffective border controls, insufficient enforcement resources, and inadequate enforcement policies, are adversely affecting the Canadian video game industry and limiting the industry's growth. Despite the industry's enforcement efforts, unless action is taken and these recommendations are effected, video game piracy in Canada will continue its rampant growth,

⁶⁷ *Supra* note 45.

⁶⁸ *Ibid.*

leading to reduced investment in game production, lost jobs and lost opportunities. Moreover, the introduction of such measures ultimately benefits the Canadian economy and Canadian consumers by enabling a vibrant marketplace for video games and encouraging development of, and investment in, new products, services and distribution methods, which in turn leads to increased consumer choice, increased competition, and lower prices.

Ultimately, a strong copyright protection regime allows businesses to choose the best way to make their own content available, and contribute to the development of a vibrant, healthy, market-driven digital economy. Canadians deserve an equal chance to compete in this increasingly global marketplace and should be permitted to benefit from intellectual property protections that are at least as rigorous as those enjoyed by our major trading partners.