

## **PUBLIC KNOWLEDGE HEARING STATEMENT**

### **2012 SPECIAL 301 HEARING**

Thank you. I want to thank the Special 301 hearing committee for giving me an opportunity to testify today. In response to concerns expressed at last year's hearing that comments should be country specific, my comments will focus on Canada and explain why Canada should not be placed on the Priority Watch List or Watch List. We believe that Canada is a clear example of a country whose laws and practices are similar to those of the U.S. and therefore does not qualify from increased attention under the Special 301 process. Furthermore, we hope that our comments will also inform evaluation of other, similarly situated, countries. These comments have been prepared with the assistance of Prof. Michael Geist, professor at the University of Ottawa and Canada Research Chair in Internet and E-commerce Law.

Section 182 of the Trade Act directs the Office of the United States Trade Representative (USTR) to identify countries that fail to provide adequate and effective protection to the intellectual property (IP) rights of US persons. However, the Act does not define the scope and strength of the IP rights that need to be protected. In making that decision, the USTR must be guided by principles that underlie U.S. laws that define the scope, strength, and limitations of various IP rights, while recognizing that other countries will implement those principles in ways tailored to their particular domestic environments. Furthermore, the Trade Act defines adequate protection as the ability to "secure, exercise and enforce" IP rights. To the extent that Canadian laws are based on similar principles as US law and provide US rights holders with a means to sell their creative products, receive appropriate compensation, and enforce their rights, it satisfies the requirements of the Trade Act and cannot be placed on the Priority Watch List or Watch List.

Canada is a member of the Berne Union and the World Trade Organization (WTO). In accordance with the requirements of these agreements, Canadian law provides exclusive rights similar to copyright owners, much like U.S. law does. In some respects copyright protections in Canada are stronger than in the US. For example, Canada has a more developed collective management system than the US and this system ensures that copyright owners have a greater ability to license their works.

Limitations and exceptions to exclusive rights in Canada are designed to permit user's ability to access copyrighted works on fair terms and use them for purposes such as scholarship, education, and commentary. Many of the Canadian limitations and exceptions are much narrower than their US counterparts. For example, unlike in the U.S., Canadian law has no exception for parody. Similarly, unlike in the U.S., Canada does not have a clear time-shifting exception. Expansion of these provisions would be justified by the goal of improving the Canadian public's rights, while at the same time not jeopardizing the rights of copyright owners.

Second, Canadian law provides effective enforcement mechanisms, including effective civil remedies and criminal penalties. Civil remedies for copyright infringement include statutory damages, which can result in very high damages awards. Criminal penalties include fines that can be as high as \$ 1 million and jail time of upto 5 years. Canadian courts have imposed these penalties in many cases.

Furthermore, Canadian law enforcement and border officials actively enforce IP rights. For example, in 2010, the Royal Canadian Mounted Police reported a significant increase in the enforcement of IP crime with 818 occurrences of IP crime investigated, a 37% increase from previous years.

Despite the diligent law enforcement efforts of Canadian authorities, some have characterized Canada as a “piracy haven.” Contrary to this claim, evidence from independent sources as well as industries that benefit from the Special 301 process indicate that infringement rates have been declining in Canada. At the same time markets for content have been expanding. For instance, operating revenue for motion picture theatres has grown steadily since 2005, with industry enjoying operating profit margins of 11.3% in 2010. Canada is the 6<sup>th</sup> largest market for recorded music in the world. The entertainment software industry has also enjoyed remarkable growth.

In view of these positive trends, the presence of some copyright infringement should not constitute grounds for placement of Canada on the watch lists. If that were the measure of success, the U.S. would not meet the standards that the Special 301 process seems to apply to other countries. The most diligent and effective enforcement efforts, whether in Canada or any other country will fail to bring infringement rates down to zero. In fact, efforts to bring infringement rates down to zero would require an enforcement overreach that would claim due process, privacy, and free speech rights of citizens as collateral damage. If the USTR pressures countries to take overbroad enforcement measures, the credibility of the Special 301 process will suffer.

I will end my comment with an observation that law reform efforts in Canada would not undermine the effectiveness of protection available to IP rights owners. Provisions in the proposed bill include measures designed to strengthen Canada’s limitations and exceptions. If these measures were to pass, Canadian limitations and exceptions would still be narrower than U.S. limitations and exceptions. I would also like to mention that more than 1500 U.S. citizens support our request to the USTR to not consider limitations and exceptions as a derogation from

protection of IP. These citizens have signed a petition drafted by Public Knowledge and ask that you permit us to submit this petition into the record.