



Canadian
Anti-Counterfeiting
Network

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NAFTA Consultations
Global Affairs Canada
Trade Negotiations - North America (TNP)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, ON K1A 0G2

RE: Consulting Canadians on the renegotiation of the North American Free Trade Agreement (NAFTA) with the United States and Mexico

Thank you for the opportunity to participate in the federal consultation in preparation for discussions with the United States and Mexico on the renegotiation of NAFTA.

The Canadian Anti-Counterfeiting Network (CACN) is a coalition of individuals, businesses and associations that have united in the fight against counterfeiting, fraud and copyright piracy in Canada and abroad. CACN helps prevent the critical and growing problem of intellectual property crime in Canada by raising public awareness, advocating for legislative change, offering training and engaging with law enforcement and government on counterfeiting and piracy issues.

Supporting stable, rewarding, and well-paying jobs for Canadians

Over a decade ago, counterfeit goods were limited in volume and variety – but today, they have escalated to unprecedented levels. Counterfeit and pirated products extend, even in Canada, to virtually all products being manufactured in the legitimate marketplace, including children’s toys, electrical products, computer components, electronics, automobile and aircraft parts to pharmaceutical products, health and beauty products, food and beverages to software, DVDs and media streaming, apparel and luxury goods of all kinds. Many of these illegal products sold online and in retail chains pose a serious threat towards consumer health and safety. Intellectual property theft, counterfeiting and piracy undermine legitimate Canadian businesses, depriving these innovative companies of revenue and negatively impacting the hundreds of thousands of people whose jobs in Canada depend on these vibrant industries.

The economic costs of counterfeiting are astounding. A 2016 OECD report estimated the value of international trade in counterfeit and pirated products at \$461B in 2013, or 2.5% of all international trade. A 2017 BASCAP report estimates that the global economic value of counterfeiting and piracy can reach \$2.3 trillion by 2022.

As noted on the consultation website, while NAFTA's track record is one of economic growth and middle-class job creation in Canada and across North America, there are areas of the agreement that could be clarified and updated, and there are new sections that should be part of a modernized agreement.

Mexico

As our trading partner, Mexico must recognize the importance of preventing counterfeit or pirated goods from entering into legitimate avenues of commerce thereby harming the hundreds of thousands of people whose jobs in Canada depend on intellectual property-related industries. The CACN takes note of a several important ways in which Mexico's laws and regulations fall short of an effective and modern intellectual property enforcement regime:

- **Criminal Enforcement:** Mexico should provide for formal notification to rights holders following the seizure of infringing goods. Materials and implements used to manufacture infringing goods must also be destroyed at the request of rights holders without unwarranted delay or complex processes. Similarly, Mexico must undertake meaningful improvements to its intellectual property enforcement regime, such as increased criminal investigations and prosecutions resulting in deterrent sentences.
- **Criminal Liability:** Mexico's criminal sanctions for commercial-scale infringement are only available if the infringement is for profit. Such conditions can hamper enforcement against online infringement, such as peer-to-peer piracy, which, while on a scale that is immensely harmful to rights holders, can occur without direct profit by the infringer.
- **Border Enforcement:** Like its trading partners, it is essential that Mexico provide customs officers and authorities with *ex officio* authority.
- **Statutory Damages:** A modernized NAFTA IP Chapter should see the implementation of deterrent-level statutory damages which compensate rights holders for infringement when actual damages are difficult or impossible to calculate.
- **Presumption of Copyright Ownership:** Mexico must provide clear presumptions of copyright ownership, and of the validity of copyright protections, in civil, criminal and administrative proceedings, absent proof to the contrary.
- **Civil Enforcement:** Mexico must ensure reasonable cost of experts in civil infringement proceedings, and allow prevailing parties to recover costs and legal fees.
- **Camcording:** As has been done in Canada, Mexico needs to criminalize the act of camcording. Mexico must also eliminate the "for profit" and "intent to distribute" evidentiary requirements as they can adversely impact camcording prosecutions.
- **Satellite and Cable Signal Theft:** Mexico must outlaw cable signal theft (with both civil and criminal sanctions). Such enforcement would be aided by the elimination of the "for profit" requirement for criminal enforcement.
- **Full Implementation of the WIPO Internet Treaties:** While Mexico acceded to the WIPO Internet Treaties in 2002, they have yet to be fully implemented. These treaties are fundamental to the legal infrastructure of digital trade. As such, Mexico needs to amend the Copyright, Industrial Property, Criminal, and Criminal Procedural codes to fully implement the WIPO Internet Treaties.
- **Technical Protection Measures (TPMs):** Mexico must provide protections against the unlawful circumvention of technological protection measures (TPMs) which enable the functionality of most digital business models and contribute to the diversity of offerings and price-points consumers demand. Similarly, Mexico must criminalize the trafficking of tools, devices, components, or services that can be used to circumvent the TPMs protecting all copyright works - current law narrowly applies to only computer software.

- **Rights Management Information (RMI):** Mexico needs to define RMI and provide civil and administrative sanctions for its unauthorized removal or alteration.
- **Ensure Exceptions and Limitations are Confined to the Three-Step Test:** Mexico must recommit to ensuring that its copyright exceptions are implemented in accordance with international obligations as codified in the three-step test.

Canada

Global trade and commerce is rapidly transforming the Canadian economy, and yet there is currently no effective, accountable, and timely government mechanism to combat the growing problem of counterfeits and piracy in either the physical or digital economic sectors. There is no simple and easy access or entry point for the public or private sector to highlight real-time problems and no clear co-ordination between departments. This is a problem that has been acknowledged by present and past Members of Parliament from all political parties in Parliamentary Committee discussions.

Responsibility for counterfeit goods and piracy in Canada is divided amongst many federal departments, including Public Safety, ISED, Heritage, CBSA, Health, Finance and the RCMP. In this climate, crime and fraud is allowed to take advantage of the lack of a central authority to proliferate to the detriment of Canadian innovation, the safety and security of Canadians, and the stability of the economy at large.

Canada is also experiencing an unprecedented public health crisis involving counterfeit prescription medications. Since 2013, the number of overdoses and deaths due to counterfeit pills containing fentanyl have risen dramatically in communities across the country. The rapid expansion of the problem has also created significant challenges for local, provincial, and federal authorities in establishing a coordinated response including tracking, investigating, and disrupting supply chains.

Recent findings in Canada of counterfeit electronics, household appliances, toys, health and beauty products and contact lenses are only some of the examples of clearly dangerous products being imported and sold in Canada.

Internet security experts warn that pirate sites can severely infect computers and devices, render the user vulnerable to spam, viruses, malware or phishing attacks, and are unsafe for consumers. They can even be used to steal personal information such as e-mail addresses and passwords. Malware on rogue websites represents a clear and present danger to Canadians who regularly use the Internet, many of whom are often children.

CACN recommends that, under a renegotiated NAFTA, Canada should undertake the following legal reforms and enforcement measures, which would significantly improve market conditions for innovative Canadian industries and the millions of Canadians who rely on intellectual property protection to earn their livings:

- **Ensure Exceptions and Limitations are Confined to the Three-Step Test:** NAFTA should confine its exceptions and limitations provision to the three-step test, and ensure that all copyright exceptions are implemented in accordance with international obligations as codified in the three-step test.
- **Intermediary Liability:** Canada's intermediary liability framework should be modified to provide adequate legal incentives for intermediaries to cooperate with rights holders, specifically to obligate intermediaries to enforce their terms of service more aggressively and take action when they become aware of infringing activity using or being facilitated by their services.
- **Copyright Duration:** Canada must complete the process of bringing the duration of protection for copyright into conformance with global standards.
- **Enforcement:** Canada must improve its criminal enforcement regime, including by directing the RCMP, other police forces in Canada and Crown prosecutors to give the requisite priority to intellectual property rights enforcement, not just in traditional physical markets but also in the case of online piracy and the trafficking in illicit streaming devices and other circumvention tools. Police, prosecutors, and courts require resources and training to implement this priority and impose deterrent penalties on major violators.
- **The proposed Office of Counterfeit, Piracy and Fraud:** In an effort to protect Canadian innovators, consumers, and legitimate businesses from the increasing harms of online piracy, counterfeit goods, and illegitimate sites, and to keep pace with rapid technological change, the CACN recommends the creation of a federal office to protect Canadians from harmful online piracy, counterfeits, and fraud. The office would be an ongoing rapid response and coordination mechanism against these growing threats to Canadians. The office would provide a space for the Canadian public and industries to collaborate and coordinate with the federal government, and protect Canadian consumers, businesses and innovators with i.) Intelligence, ii.) Rapid Response & Enforcement, and iii.) Education. It would also bring Canada in line with its major trading partners, including the United States (National Intellectual Property Rights Coordination Center) and the United Kingdom (National Fraud Intelligence Bureau) and demonstrate to the world that Canada is serious about protecting its citizens and industries from the growing threats of online piracy, counterfeits, and fraud.

Conclusion

Year-over-year, the RCMP, industry and others involved in counterfeiting issues have reported a steady increase in the importation and availability of counterfeit goods, which has impacted almost every Canadian industry from pharmaceuticals to technology. From alcohol, pharmaceutical products, contact lenses and health and beauty products, to computer components, electronics, illicit streaming devices, to food, beverages, medicine, to children's toys to batteries, and electrical products, automobile and aircraft parts, counterfeit products are readily accessible and putting Canadians in harm's way while damaging the Canadian economy.

The CACN welcomes negotiations with Mexico and the United States to modernize NAFTA, which was negotiated before the dawn of the digital age that has so dramatically changed the landscape of the marketplace for goods and services protected by intellectual property rights.

The traditional physical marketplace, now supplemented by the rise of the online marketplace for physical goods and the growing digital ecosystem, offers great opportunities for those Canadians employed in intellectual property related industries. But for that to effectively happen, the legal and enforcement regimes of both Mexico and Canada require significant improvement.

Best regards,

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on behalf of the Canadian Anti-Counterfeiting Network