

# Ideas for Inclusion in National IP Strategy

Submission to:  
Innovation, Science and Economic  
Development Canada

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## EXECUTIVE SUMMARY

Supporting innovation for 90 years, the Intellectual Property Institute of Canada (IPIC) is the professional association of patent agents, trademark agents, and lawyers practicing in all areas of intellectual property (IP) law. Our membership totals over 1,700 individuals, consisting of practitioners in law firms and agencies of all sizes, sole practitioners, in-house corporate intellectual property professionals, government personnel, and academics. Our members' clients include virtually all Canadian businesses, universities and other institutions that have an interest in intellectual property (e.g. patents, trademarks, copyright, and industrial designs) in Canada or elsewhere, and also foreign companies who hold intellectual property rights in Canada.

IPIC is pleased to provide some 'big ideas' for consideration of Innovation, Science and Economic Development Canada (ISED) in the development of their comprehensive National IP Strategy mentioned in the *Federal Budget 2017 – Building A Strong Middle Class*.

***“A national IP strategy strengthens a country's ability to generate economically valuable IP assets. All countries have wealth in the form of human capital; literary and artistic works; crafts and folklore; and genetic and biological assets. An IP strategy helps nations unlock these assets in a planned, efficient, and sustainable manner.”***

**World Intellectual Property Organization, 2017**

Intellectual property is a fundamental element in the growth of innovative companies. Therefore, IPIC was extremely pleased to see ISED commit in the budget to a national IP strategy as a key piece of the overall Innovation Agenda.

***“Let's be clear about what's at stake: Canada is in a global innovation race. We are competing with countries around the world for the most talented people, the newest technologies, and the fastest-growing companies. Jobs and prosperity will go to the countries that succeed in those three areas.”***

**Innovation for a Better Canada: A Message from our Ministers**

Because innovation and intellectual property are inextricably linked, countries that are global innovation leaders have robust IP systems. These systems function effectively because of many elements including legislation, education, incentives, and the way each IP actor performs to sustain innovation. For Canada to succeed in a global innovation race we need to create a culture of innovation, built from the ground up and instilled within the very fabric of the Canadian economy and DNA of the Canadian people.

It is for these reasons we are recommending the ideas within this submission, grouped into five categories: education, tax incentives / financial support, legislative changes, enforcement and practice policy.

## EDUCATION

### *INCREASE IP LITERACY ACROSS CANADA*

**Background/Need:** Comments from business, legal advisors, researchers and academics in recent round-table consultations with Innovation, Science and Economic Development Canada suggest that Canadians are not exposed to basic information about IP, methods of protection and benefits of ownership and registration in a way that encourages them to take advantage of the Canadian IP system when they have IP rights to protect, or ensure that they respect the IP rights of others.

**Recommendation:** To promote a culture of innovation from the ground up, IPIC recommends that the Federal Government liaise with provincial education bodies at all levels, including public and high schools, colleges, trade schools and universities and other research institutes, to assist students to be better informed about IP, and how IP rights impacts their day-to-day activities and business plans. Not only might such education help avoid or reduce counterfeiting activities, but it would help everyone from authors and artists, software designers and start-up manufacturers to initiate an IP protection strategy as early as possible. IPIC would be pleased to be involved in any steps taken at the provincial or federal level to assist with such education.

## TAX INCENTIVES / FINANCIAL SUPPORT

### *PROVIDE SUBSIDIES, GRANTS, OR TAX INCENTIVES TO ENCOURAGE CANADIAN SMES TO FILE FOR INTELLECTUAL PROPERTY PROTECTION IN CANADA AND ABROAD*

**Background/Need:** Canada lags behind other countries in innovation and protecting innovations, and has experienced a decline in patent filings in recent years. Other countries, such as China, that subsidize IP filings experience higher IP rates, presumably reflecting higher local innovation.

It is also extremely important to ensure we encourage trademark filings in Canada. [A recent study](#) suggests that trademark count may be a better predictor of innovation than patent count.

**Recommendation:** Provide funding to companies to encourage them to engage with the intellectual property regime (patents, trademarks, and industrial designs, specifically). This could be implemented in the form of a “First Patent” program (a non-repayable contribution to defray the cost of obtaining a SME’s first patent; evidence of R&D may be required) or an “innovation box” (a tax regime in which revenue generated directly from IP is subject to a reduced tax rate);

Given the importance of IP to growth of businesses, Canada could also establish a ‘voucher program’ to offset the costs of expenses associated with innovation costs, including clearance, filing and managing an IP portfolio. A set of pre-defined criteria would be needed to determine what

expenses companies are reimbursed for in this regard, however expenses would include professional services for patents, trademarks, industrial designs, or copyright.

**Other Jurisdictions:** The Government of Québec's First Patent program; the UK, France, and other European countries have introduced "innovation box" or similar schemes. Ontario has introduced a 'scale-up voucher program' that offsets costs of scaling, up to \$250,000 per voucher. These costs include professional services in the area of intellectual property.

***PROVIDE A "COMMERCIALIZATION COUPON" TO RESEARCHERS RECEIVING FEDERAL GRANTS TO SUPPORT COMMERCIALIZATION ACTIVITIES SUCH AS PATENTING, MARKET STUDIES, AND BUSINESS PLAN PREPARATION***

**Background/Need:** Protecting and commercializing innovations can be time and cost-prohibitive. Because of the resources required, researchers may only consider seeking intellectual property protection if they already have a commercialization partner in industry, with the result that some patenting and commercialization opportunities may be lost.

**Recommendation:** To encourage researchers receiving federal grant funding (operating grants from NSERC/CIHR/SSHRC) to protect inventions made in the course of their research, an optional "Commercialization Coupon" could be made available to researchers, as a one-time-only option in the span of a grant term (either during the period of the grant or within one year of the grant's completion), to support commercialization activities.

The coupon would provide a small amount of additional funding to the researcher for limited activities, specifically pertaining to commercialization: primarily for patenting, but other activities could be included, such as consultant fees for a market study, or business plan preparation.

The amount of the coupon would be set at \$10-\$20 K, possibly depending on the size of the operating grant. The funds would be dispensed only to successful grant holders, but without further competition, or peer review.

As a requirement to release of funds, forms to be completed by both the researcher and the technology transfer office of the institution would be required. The recommendation by the technology transfer office would be required for funds to be dispensed, and funds would be dispensed directly to the technology transfer office. Funds could only be applied against the proposed commercialization activities, or to reimburse for those activities (if already undertaken, for example if urgent patent filings previously made prior to a public disclosure).

This solution has the advantage of permitting commercialization activities to follow grant money, without the need to be included in the budget of an operating grant before any invention is made. The previously conducted peer review process deeming the proposed research to be meritorious need not be repeated. A separate commercialization review panel need not be convened. However, the subsequent vetting (in the form of support from a technology transfer office) nevertheless

provides a certain amount of specialized review. There is no need to convene a review panel for the smaller amount of funds dispersed with this coupon.

Not all operating grant holders will access this funding. Indeed, it is entirely optional. Many researchers will have no desire to undertake commercial activities.

For researchers that have the desire to proceed with commercial activities, the requirement of the coupon to be supported by the institution's technology transfer office has the benefit of bringing these two parties together. The researcher will benefit from the commercialization officer's expertise.

Commercialization activities can be expensive, and researchers need not locate a commercial partner in industry prior to proceeding with intellectual property protection. Instead, the coupon will encourage researchers to have patent protection at least provisionally in place before undertaking discussions with industry.

The commercialization coupon would encourage researchers to take inventions forward, when made during the course of a government funded research grant. This is a necessary step to bringing such developments to fruition, ultimately benefitting the Canadian public that funded the research.

#### ***ENCOURAGE PRIVATE SECTOR INVESTMENT IN RESEARCH AND DEVELOPMENT TO IMPROVE CANADA'S BUSINESS ENTERPRISE RESEARCH & DEVELOPMENT (BERD) METRIC***

**Background/Need:** There are two excellent studies about the lack of innovation in Canada (Conference Board of Canada and DEEP in Waterloo). Both point to the fact that Canada's BERD has been in decline for at least a decade – contrary to the OECD average. Canadian businesses are not investing enough in R&D. This is linked directly to a decline in patent filings.

**Recommendation:** The government needs to come up with a strategy, with consensus from business, about increasing BERD. See <http://www.theglobeandmail.com/report-on-business/rob-commentary/our-metrics-are-lousy-but-canada-does-have-the-makings-of-an-innovation-economy/article28746248/>.

## LEGISLATIVE CHANGES

#### ***CANADA TO INTRODUCE TRADE SECRETS LEGISLATION***

**Background/Need:** Although some may argue trade secrets are exclusively within the purview of provincial jurisdiction as a matter of common law and civil rights (Québec), trade secrets are an important part of a complete IP picture in Canada. If enacted federally, trade secret legislation could respond to a dire need to, inter alia, delineate trade secrets as a form of IP, provide statutory

and criminal remedies, which could enhance Canada’s innovation-friendly profile and make it more attractive to businesses that rely on that valuable form of intellectual property.

**Recommendation:** Introduce trade secret legislation at the federal level that would protect a company’s trade secrets and allow for damages, injunction, and criminal fines for release of a company’s trade secrets.

**Other Jurisdictions:** The United States has both federal and state level trade secrets legislation. Federally the US has the *Uniform Trade Secrets Act* and the *Economic Espionage Act* defining and regulating trade secrets, and at the state level rules often have their own version of the Uniform Trade Secrets Act provisions. Depending on the situation, companies have a choice between using federal or state courts to enforce their rights.

### **TRADEMARK ‘USE’ REQUIREMENT ESSENTIAL TO CANADIAN BUSINESS**

**Background/Need:** Canada has historically been a use-based trademark rights jurisdiction, such that a trade-mark registration can only be acquired in Canada if the applicant has, prior to registration, used the trade-mark either in Canada or abroad, with the relevant filing basis appearing on the Register.

Pursuant to amendments introduced in Bill C-31, applicants will no longer need to have used the trade-mark sought to be registered in Canada with any goods or services anywhere in the world prior to registration in Canada, and it appears that provision of use or proposed use information will not be part of the application process.

Registration of a trade-mark gives the owner numerous rights, including not only an exclusive right to use the registered mark for the registered goods/service across the country, but also the right to prevent the use, anywhere in Canada, and registration of confusing marks. The owner of a Canadian trade-mark registration also enjoys a presumption of the validity of its registration. Further, once registered, the trademark cannot be cancelled for non-use for at least 3 years.

Bill C-31 eliminated “use” as a registration requirement. The result, should the amendments be implemented, will result in the Register no longer being a useful record of information about use, or marks that reflect actual business activity. In addition, it is expected that the removal of use requirements will both encourage trade-mark speculators and purely defensive registrations where the owner has no real intention of ever using the trade-mark in Canada. These changes will make it more onerous and expensive to evaluate the risks posed by pending applications or registrations as part of clearance of new marks or deciding whether to oppose a new mark.

The onus of removing any mark not used, or in which the owner has lost interest, is on third parties, who must either initiate summary non-use cancellation proceedings through the Trade-marks Office, or seek to expunge the registration in the Federal Court of Canada. Both proceedings require significant legal fees to be incurred, and are time-consuming, with even a summary non-use

proceeding under s. 45 of the *Trade-marks Act* taking more than nine months, from start to finish, when undefended by the registrant, and much longer if defended. Submissions in response to Bill C-31 from owners, IP groups and academics all raised concerns about the implications of removing the ‘use’ requirement for registration, which was not required by any international treaties, and is a disadvantage to all users of Canada’s trademarks Register, particularly Canadian businesses, many of whom have limited resources both for clearance, and for taking any steps to cancel marks that are no longer in use.

**Recommendation:** Canada should consider the following steps as part of its National IP Strategy:

1. Ensure that the Trademark Register, which is publicly available at no charge and used by all businesses to evaluate and clear trademarks, trade names and business names in Canada, remain a useful tool that reflects real business activity by requiring use, in Canada or abroad, as a condition to registration;
2. Maintain “use” details on the Register, and continue to collect such information as part of the application process;
3. Set a positive requirement for registrants to “show” that their marks are in use, to ensure that the Register remains a useful tool for clearance and evaluation of rights; and

## ENFORCEMENT

### ***IMPLEMENTATION OF A “SIMPLIFIED PROCEDURE” TO CANADA’S IP BORDER ENFORCEMENT MEASURES***

**Background/Need:** The Canadian government has acknowledged that counterfeit goods pose public health and safety risks, undermine consumer confidence in the marketplace, disrupt Canadian markets through lost tax revenues and increased costs for legitimate Canadian businesses, as well as lost revenues for rights holders leading to delays in creating new products and innovative services.

Notwithstanding the above, the current IP framework places the weight of combatting counterfeit products on the shoulders of Canadian businesses and Canadian IP rights holders. For example, the Request for Assistance (RFA) regime enables customs officers to assist registered rights holders by detaining goods suspected of infringing copyright or trademark rights and sharing information about those goods so that the rights holders can pursue a civil remedy in court.

Under the current regime, a Canadian IP rights holder who has filed a request for assistance is initially given just 3 days to confirm whether a shipment suspected by customs is indeed counterfeit, and if so, to decide whether it will commence legal proceedings against the

importer/exporter. Any such proceedings must typically be commenced within just 10 days of first being given notice of the detention, otherwise the shipment will be released.

Requiring Canadian IP rights holders to commence infringement proceedings in order to permanently remove every shipment confirmed to be counterfeit has created an unaffordable barrier to the effective use of the RFA regime.

**Recommendation:** An affordable and effective means to *enforce* Canadian IP rights is a critical component of any national IP innovation strategy. Otherwise, Canadian businesses are unable to protect their investments and whatever IP “rights” that may have been secured.

We recommend amending Canada’s Request for Assistance regime (i.e. border enforcement measures) to incorporate the use of a “simplified procedure” in those cases where an importer/exporter does not contest the seizure of goods that have been confirmed by a Canadian IP rights holder to be infringing/counterfeit.

This recommendation is intended to improve the accessibility (i.e. affordability) and use of the RFA regime by Canadian IP rights to enforce their rights in those cases where infringing parties decline to engage in the IP legal framework, or otherwise abandon their illicit goods.

As proposed, the RFA regime would be amended such that when a Canadian IP rights holder confirms that a detained shipment/product is counterfeit:

1. notice would be given to the importer/exporter/owner
  - a. indicating that the product/shipment has been seized because it has been identified as counterfeit; and
  - b. requiring a written response within 20 days to either dispute the claim of infringement or to voluntarily abandon the shipment.
2. if a response to dispute the claim of infringement is received, the IP rights holders will be required to commence proceedings in Court (as currently required);

if the shipment is voluntarily abandoned, or no response is received in the requisite 20 days, then the shipment will be forfeited and removed from the channels of commerce.

**Other Jurisdictions:** The EU has an administrative regime that offers a streamlined process for handling detained shipments in an efficient and cost effective manner. This simplified procedure includes a mechanism whereby the rights holder, upon receiving notification of the seizure, provides Customs officials with information regarding the infringing character of the suspected counterfeit or pirated goods. The importer then has a specific period of time within which to object to the seizure and claim the goods are genuine. If the importer fails to respond, it is considered “deemed consent” to relinquish the seized counterfeit goods to the brand owner and the shipment is subsequently destroyed.

This type of streamlined process is also in step with the regimes of other key Canadian trading partners, including the United Kingdom, Australia, and the U.S.A.

The World Customs Organization (of which Canada is a member) also proposed a “simplified procedure” in its "Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights".

### ***CREATION OF THE OFFICE OF COUNTERFEITS, PIRACY & FRAUD***

**Background/Need:** 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, a number of organizations have recommended the creation of a federal office to protect Canadians from harmful online piracy, counterfeits and fraud. 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.

**Recommendation:** The proposed office would be an ongoing rapid response and coordination mechanism against counterfeits, piracy and fraud. The office would provide a space for the Canadian public and industry to collaborate and coordinate with the federal government. It would put Canada in line with its major trading partners including the United States and United Kingdom.

Specifically, the office would protect Canadian consumers, science and innovators with:

1. *Intelligence*

Identifying the problem in real time – an open federal office to allow the public, rights holders, trade associations, law enforcement and government agencies to report and identify problems in real time. A focused federal office to gather data and focus efforts on real time threats.

2. *Rapid response & enforcement*

Coordinating a rapid federal response and law enforcement to ensure public safety, the protection of innovators and creators, and a healthy economy by ensuring Canadian consumers can trust the security of online transactions.

3. *Education*

Lay the foundation for partnerships between industry and law enforcement agencies to provide education among them and to the public through readily available training and timely public service announcements about real time harms and threats to public safety.

**Other Jurisdictions:** The *United States - National Intellectual Property Rights Coordination Center (IPR Center)* is the U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) led National Intellectual Property Rights Coordination Center (IPR Center) which stands at the forefront of the United States Government's response to global intellectual property (IP) theft and enforcement of its international trade laws.

The *United Kingdom – Action Fraud National Fraud & Cyber Crime Reporting Unit* In the UK, is the National Fraud Intelligence Bureau (NFIB) and sits alongside Action Fraud within the City of London Police which is the national policing lead for fraud.

The NFIB takes all Action Fraud reports and uses millions of reports of fraud and cyber-crime to identify serial offenders, organised crime gangs and established as well as emerging crime types.

## PRACTICE POLICY

### ***ENSURE GOVERNMENT AND OFFICE POLICIES ALIGN WITH OBJECTIVES OF AN INNOVATION AGENDA***

**Background/Need:** Canada has embarked on a wide reaching public consultation on developing a strategy for intellectual property policy that will help to encourage commercialization of IP in Canada and spark the growth of Canadian business. This national IP strategy development began through the government's commitment in the 2017 federal budget to introduce a comprehensive National IP Strategy within a one-year timeframe.

In a separate but related part of the government Innovation Agenda, they have launched a supercluster initiative involving the following industry sectors: e.g., advanced manufacturing, agri-food, clean technology, digital technology, health/bioscience and clean resources, infrastructure and transportation. Many of these industries demonstrate Canada's economy transitioning to the information age with computer-implemented / information-based / diagnostic field innovations critical to the growth of these industries.

Unfortunately, current published CIPO policy (Practice Notices PN 2013-02 and PN 2013-03) and Commissioner's Decisions lead to delays and rejections of patent applications in computer-implemented / information-based / diagnostic fields. This is a clear obstacle in the government's push in these industries, including the push for Artificial Intelligence as a future driver of the Canadian economy.

<http://www.mondaq.com/canada/x/458794/Patent/Pulling+Out+All+The+Stops+Patenting+Computer+Implemented+Inventions+In+Canada+Despite+Unprecedented+Obstacles>

There is a disconnect if the government is supporting and funding these industries through its innovation agenda and supercluster initiative, but the Canadian Intellectual Property Office won't grant patents in these areas.

**Recommendation:** Align government policies and practices, including those of CIPO, to support the innovation agenda and supercluster initiative; this may require statutory change.

### *IMPROVE CIPO SERVICES AND INFRASTRUCTURE*

**Background/Need:** CIPO has shown the stress of its aging IT systems and the need to keep up with modern expectations in client service.

**Recommendation:** Provide CIPO with the funding and assistance it needs to:

- improve online access to all of CIPO's documents and records, including full patent/trademark file histories and current patent/trademark application status
- increase client-centred (i.e., IP holder or their representatives) behaviour of the Commissioner of Patent and Registrar of Trademarks
- develop reliable and accountable electronic filing of IP applications, correspondence, and fees (compare CIPO's offerings to the USPTO)
- improve efficiency and accountability of CIPO in the handling of client files
- attract and keep good staff; reward its staff not only for work product and effort, but for responsibility, innovation, and excellence

### *ASSIST INNOVATORS WITH COMMERCIALIZATION WITH A "SHERPA" SYSTEM TO GUIDE USERS THROUGH BUREAUCRATIC PROCEDURES AND ACCESS GOVERNMENT SERVICES*

**Background/Need:** Many innovators have difficulty with administrative procedures—not only with intellectual property offices, but with other departments and agencies in all levels of government whose work is relevant to commercialization or production of an innovation. Often, the personality traits that make a person a good inventor may not be the same traits that make a person capable of dealing patiently with the administrative procedures of a bureaucracy.

As an example, an inventor may have a brilliant invention for dealing with septic system effluent that would be of immense value to the public, particularly in areas where there is no municipal water system, and where septic beds tend to leach into lakes and ground water. But if the inventor does not know how to get through the regulatory, bureaucratic and certification hurdles, the invention will not be of use to anyone.

**Recommendation:** Develop a "Sherpa" system to guide inventors through bureaucratic procedures, such as offering a one-stop shop of information on: (a) available government grants; (b) provincial and federal incorporation and registration of a business; (c) certification and testing regimes that may apply before a product can be put on the market; and (d) a database of prototype makers, accountants, designers, artists, engineers, suppliers, investors, prospective firms in that field of invention that may be interested in pursuing the invention.

### **CREATE A POST-GRANT REVIEW PROCESS FOR PATENTS**

**Background/Need:** Currently a third party's only options for seeking review of a granted patent are limited to re-examination (in which evidence is limited, and which is *ex parte*) and impeachment (which is extremely cost-prohibitive).

**Recommendation:** Implement an *inter partes* post-grant review process similar to the processes implemented by our trading partners.

This would also have the benefit of freeing up the Federal Court's resources, as some patent disputes may be resolved via post-grant review rather than litigation.

**Other Jurisdictions:** Europe, United States, Australia, Japan, for example.

### **CONSIDER IMPLEMENTING A UTILITY MODEL SYSTEM OF INTELLECTUAL PROPERTY PROTECTION TO BETTER MEET THE NEEDS OF SMEs**

**Background/Need:** Small- and medium-sized entities (SMEs) make up a significant proportion of the Canadian economy. Many of these businesses innovate by making gradual improvements on existing technology. Such innovations can be difficult to protect through the traditional patent system, because such incremental improvements may not meet the test of inventiveness that is required for a patent to be granted. Also, the patent application process is slow and expensive. The high cost of trying to obtain a patent can be difficult for SMEs to justify, particularly given that a patent application needs to be filed at an early stage and before the full commercial value of an invention is generally known. Further, the long typical timelines (e.g. 2-4 years to obtain a patent if examination is not expedited) are not practical for products which may have a short commercial lifespan of a few years. SMEs that do try to use the patent system to protect an incremental innovation may have a negative experience (for example, high cost that is not subsequently recouped, refusal of patent application, design around of patent by a competitor, or so on), that then dissuades them for engaging with the intellectual property system again and leaves them with a negative view of the IP system generally.

**Recommendation:** Utility model protection is a type of intellectual property protection that is intermediate between a patent (which has a high threshold requirement of inventive step or non-obviousness) and an industrial design (which protects only the way a product looks). Utility model protection is best suited to protecting minor improvements or innovations in existing products, and in many countries is only available for mechanical innovations. Australia launched its version of a utility model system, termed an "innovation patent" in 2001 with the goal of providing a low cost entry point into the intellectual property system, particularly for SMEs. Utility model protection is typically easier and less expensive to obtain than patent protection, and has a shorter term (e.g. 7-10 years as opposed to 20 years for a patent).

**Other Jurisdictions:** Utility model-type protection is currently available in several of Canada’s major trading partners, including China, Australia, Germany, Mexico, Brazil, and a number of other Asian, European and South American countries. A full list provided by the World Intellectual Property Organization is available [here](#). The United States and the United Kingdom do not have utility model systems.