

IP monitor

Trans-Pacific Partnership (TPP): Canada joins a new club

November 2015

Patents

Copyright and entertainment

Intellectual property

Trade-marks and branding

On November 5, 2015, text of the Trans-Pacific Partnership (TPP) was released. The TPP is a multilateral free-trade agreement covering the Pacific region, entered into between twelve nations: Canada, Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the United States (“Member Countries”). Notably, China is missing from this list of Member Countries.

Chapter 18 of the TPP relates to intellectual property. This chapter includes sections on the enforcement of intellectual property rights, as well as areas in which the Member Countries agree to cooperate. There is also a section dedicated to internet service providers. It is important to note that the text of the TPP must be ratified by the Canadian Parliament prior to becoming Canadian law. It is still unclear whether the new Liberal government will support the TPP as drafted.

One objective of the TPP is the protection and enforcement of intellectual property rights in a way that contributes to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of both producers and users.¹ Cooperation is a theme of Chapter 18. The Member Countries agree to reduce differences in procedures related to the granting of patents and to cooperate to facilitate the sharing of search and examination work between patent offices.

The TPP addresses numerous areas of intellectual property law such as patent, trademark, geographical indications, copyright, domain names and industrial design regimes. For example, with respect to trademarks, registration of sound marks is included, and each Member Country shall make best efforts to register scent marks.² In addition, owners of registered trademarks have an exclusive right to prevent third parties that do not have the owner’s consent from using identical or similar signs, including geographical indications.³ The section also includes a provision on “Well-Known Trademarks” stipulating that Member Countries must refuse the application or cancel the registration and prohibit the use of a trademark that is identical to or similar to a well-known trademark, provided that certain conditions are met.⁴ Furthermore, the TPP requires each Member Country to adopt or maintain a trademark classification system

¹ *Trans-Pacific Partnership*, Chapter 18, art 18.2.

² *Ibid.* at art 18.18.

³ *Ibid.* at art 18.20.

⁴ *Ibid.* at art 18.22.

consistent with the *Nice Classification*.⁵ Notably, the Canadian Bill C-31, anticipated to come into force in 2017 or 2018, provides provisions to include sound and scent marks in the definition of a trademark, as well as the adoption of the *Nice Classification* system.

With regards to copyright, one notable provision is the term for protection of copyright and related rights, which is stipulated to be increased by 20 years to the life of the author plus 70 years.⁶ Member Countries are also required to endeavor to achieve an appropriate balance in their copyright systems through, among other things, exceptions and limitations for legitimate purposes.⁷

The TPP contains particularly strong civil and criminal enforcement provisions in regards to copyright and trademark infringement. Such provisions include that each Member Country must provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Wilful importation or exportation of counterfeit trademark goods or pirated copyright goods on a commercial scale must be subject to criminal penalties.⁸ These provisions are in line with Canada's *Combating Counterfeit Products Act*.⁹

With regards to patents, the TPP stipulates that a Member Country shall make patents available for "any invention whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application."¹⁰ It is also permissible for a Member Country to exclude from patentability, diagnostic, therapeutic and surgical methods, animals other than microorganisms, and essentially biological processes for the production of plants or animals.¹¹ Most of the sections relating to patents under TPP are consistent with current Canadian law. Notably, the TPP includes a section on patent term adjustment for patent office delays,¹² which is presently not implemented in Canada. The patent term adjustment section calls for each Member Country to provide means to adjust the term of the patent to compensate for unreasonable delays in a Member Country's issuance of patents. An unreasonable delay includes a delay in the issuance of a patent of more than five years from the date of filing of the application, or three years after a request for examination of the application has been made, whichever is later.¹³

The TPP also includes provisions related to market exclusivity for pharmaceutical products and thus has implications for the *Patented Medicines (Notice of Compliance) Regulations*.¹⁴

An important qualifier to the Member Countries' obligations under Chapter 18 is their commitment to the *Doha Declaration on the TRIPS Agreement and Public Health*. The Member Countries recognize that Chapter 18 does not prevent them from taking measures to protect public health and to promote access to medicines.¹⁵

Rita Gao, Christopher N. Hunter

⁵ *Ibid.* at art 18.25.

⁶ *Ibid.* at art 18.63.

⁷ *Ibid.* at art 18.66.

⁸ *Ibid.* at art 18.77.

⁹ *Combating Counterfeit Products Act*, SC 2014, c 32.

¹⁰ *Supra note 1* at art 18.37.

¹¹ *Ibid.*

¹² *Ibid.* at art 18.46.

¹³ *Ibid.*

¹⁴ *Ibid.* at Section F, Subsection C.

¹⁵ *Ibid.* at art 18.6.

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