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PUBLICATION

USMCA (NAFTA 2.0): What's New for Intellectual Property in Canada

Date: October 10, 2018

On September 30, 2018, just hours before the midnight deadline, Canada reached a new trilateral trade agreement with the United States and Mexico. The new United States-Mexico-Canada Agreement (USMCA) will replace the North America Free Trade Agreement (NAFTA) currently in force. The full text of the USMCA can be found here.

Chapter 20 "Intellectual Property Rights" of the USMCA replaces Chapter 17 of the NAFTA and stipulates updated intellectual property(IP) provisions that Canada must implement upon coming into force of the USMCA. On October 5, 2018, the Government of Canada published a summary of the IP Chapter.

Many of the updated IP provisions have already been incorporated into Canada's recent amendments to the *Patent Act* (expected to come into force in 2019), the *Industrial Design Act* (coming into force on November 5, 2018) and the *Trademarks Act* (expected to come into force in early 2019). However, Canada still needs to make further implementations, most significantly in the following aspects:

1. Patent term adjustment for Unreasonable Patent Office delays (brand new for Canada)
2. 10-year data protection for biologics (currently 8 years in Canada)
3. Copyright term of 70 years following the life of the author (currently 50 years in Canada)
4. Legal authority for border officers to detain suspected counterfeit or pirated goods in transit (brand new for Canada).

A more detailed summary of these provisions is provided below.

Patent Term Adjustment for Unreasonable Patent Office Delays

At present, unlike the US, there is no patent term adjustment to compensate patent applicants for unreasonable delays in the processing of patent applications in Canada. Under Article 20.F.9 of the USMCA, Canada has an obligation to provide such patent term adjustments. 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.

This Article shall apply to all patent applications filed after the coming-into-force date of the USMCA for Canada, or the date two years after the signing of the USMCA, whichever is later.

Canada has 4.5 years beginning on the coming-into-force date of the USMCA to implement this obligation in domestic law.

Data Protection for Biologics

Canada's current data protection law affords an 8-year data protection term (with an additional ½ year paediatric extension) running from the date of first marketing approval in Canada for new pharmaceutical products containing biologics or small molecule drugs. The data protection law protects the innovator manufacturer's undisclosed data concerning the safety and efficacy of a new pharmaceutical product such that a generic manufacturer cannot obtain market approval for a generic version of the product before the data protection term expires, if the generic relies on the undisclosed data.

Under Article 20.F.14 of the USMCA, Canada must extend the data protection term for biologics by two more years. The USMCA defined biologic as “a product that is produced using biotechnology processes and that is, or, alternatively, contains, a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, protein, or analogous product, for use in human beings for the prevention, treatment, or cure of a disease or condition.” In addition, that biologic cannot be a previously approved biologic.

Canada has 5 years beginning on the coming-into-force date of the USMCA to implement this obligation in domestic law.

Copyright Term

Currently, the basic copyright term in Canada is life of the author(s) plus 50 years, while in the US, this term is generally plus 70 years for works created after January 1, 1978. Under Article 20.H.7 of the USMCA, Canada is obligated to provide a general term of copyright protection of “life plus 70 years” for works and 75 years for performances and sound recordings (Canada currently 70 years).

Canada has 2.5 years beginning on the coming-into-force date of the USMCA to implement this obligation in domestic law.

Border Measures

Under Article 20.J.6 of the USMCA, Canada shall provide that its border officers may initiate measures against suspected counterfeit trademark goods or pirated copyright goods that are in transit. This measure is currently not available in Canada.