

The USMCA: Good News for Intellectual Property Rights Holders

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Canada's current intellectual property laws, including the imminent amendments to the *Trademarks Act* and *Industrial Designs Act*, are largely compliant with the obligations imposed by the United States-Mexico-Canada Agreement (USMCA). The USMCA replaces the North American Free Trade Agreement (NAFTA).¹ However, once the USMCA is ratified, Canadian laws will likely need to undergo some change with respect to intellectual property. These key changes are outlined below.

What You Need To Know

- New biologic drugs will now be entitled to a 10-year term of data protection instead of eight. The USMCA did not address the date of implementation of that 10-year term and whether it would apply to biologic drugs already on the market.
- A patent term adjustment mechanism will be introduced in Canada.
- Copyright protection in Canada will be extended to life of the author plus 70 years.
- Canada will be required to crack down on counterfeit and pirated goods.
- There are a number of procedural steps required before these changes could be made law in Canada, giving effect to USMCA.

Patents and Undisclosed Test or Other Data

Increased Data Protection for New Biologic Drugs

The USMCA increases the term of data protection for new biologic drugs. Biologic drugs are defined in the USMCA as products produced using biotechnology processes (i.e., as vaccines, antibodies, toxins or genetic therapies), and are

unlike the chemical (small molecule) compounds that are the active ingredient in many pharmaceutical products.

Presently, “innovative drugs” that contain a medicinal ingredient not previously approved in a drug by Health Canada are entitled to an eight-year term of data protection, which can be extended for an additional six months for pediatric population submissions. The current eight-year period of exclusivity applies to both new biologic drug products and new chemical (small molecule) drugs. When Canadian law is changed to give effect to the USMCA, an additional two years of exclusivity for biologic drug products meeting the current definition of innovative drug will be added. This is still less than the 12-year period for biologics that is granted by the U.S. Food and Drug Administration. The USMCA does not require Canada to provide data protection for data, which has been generated for new indications/uses of approved drugs. New small molecule drugs will continue to be entitled to only eight years of data protection.

As indicated below under “What’s Next,” Canada has a five-year transition period to implement this obligation after the USMCA comes into force.

It is currently uncertain whether the increased term of data protection will apply retroactively to any previously approved biologic drug products.

New Patent Term Adjustment Mechanism

The USMCA contains a provision on patent term adjustment to compensate an applicant for an unreasonable delay in the issuance of a patent. An unreasonable delay would include the issuance of a patent more than five years from the date of filing of the application in Canada, or three years after a request for examination of the application has been made, whichever is later. Patent term adjustment has been available in the United States for some time.

However, there are many exclusions from the determination of a delay, including those “not directly attributable” to the patent office. Thus, it is unclear what types of delays would be considered “unnecessary or unreasonable” and how the patent term would be adjusted from the current period of 20 years from the filing date. The USMCA does not specify the maximum term of the extension of the patent term.

As indicated below under “What’s Next,” Canada has four and a half years to implement this change after the USMCA comes into force.

Trademarks

Pre-Established Damages for Trademark Counterfeiting

The USMCA will require Canada to establish a system providing for pre-established damages in civil proceedings with respect to trademark counterfeiting. According to the USMCA, these pre-established damages should be “in an amount sufficient to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.”

Presently, statutory damages exist under Canadian laws for copyright infringement, but not for trademark infringement. The quantity of the pre-established damages for counterfeit trademarks is currently uncertain.

Border Enforcement

The USMCA allows customs officials, on their own initiative, to take control of suspected counterfeit trademark or pirated copyright goods that are imported, ready for export, in-transit, or admitted into or exiting a free trade zone or bonded warehouse. Canada will need to extend its current anti-counterfeiting legislation to allow customs officials to stop in-transit shipments with suspected counterfeit or pirated products (i.e., shipments that are passing through Canada on the way to another country).

Customs officials will also be permitted to destroy “suspected counterfeit trademark goods or pirated copyright goods” following a determination that the goods are infringing, such that the Canadian Intellectual Property Office or a court is not required to make a finding of infringement prior to destruction.

Copyright

Extension of Canada's Copyright Term

The USMCA increases the term of copyright protection in Canada from life of the author plus 50 years, to life of the author plus 70 years for natural persons. Additionally, for works in which the basis of the term of protection is other than the life of a natural person (e.g., performances and sound recordings in Canada), the USMCA requires that the term be 75 years from the first authorized publication, or, if not published within 25 of its creation, 70 years from its creation. Currently, Canadian copyright laws provide for only 70 years of protection for sound recordings and performances.

As indicated below under "What's Next," Canada will have two and a half years to extend the term of copyright protection after the USMCA comes into force.

Remedies Relating to TPMs and RMIs

Under the USMCA, Canada will be required to implement civil and criminal remedies for parties that willfully circumvent Technological Protection Measures (TPMs) (e.g., digital locks) and Rights Management Information (RMIs) (e.g., digital watermarks) for the purpose of commercial advantage or financial gain. Although some remedies already exist in Canadian law, Canada will be required to implement additional remedies where currently deficient.

Trade Secrets

Canada may be required to criminalize the willful misappropriation of trade secrets. The USMCA defines a "trade secret" as information generally unknown or not readily accessible to people who normally deal with the kind of information in question, has actual or potential commercial value because it is a secret, and has been subject to reasonable steps to keep it so. The willful misappropriation of trade secrets might include practices such as breach of contract, breach of confidence and inducement to breach.

What's Next

Although an initial agreement for the USMCA has been reached between Canada, Mexico and the United States, it may be several years before these changes are actually implemented in Canada's domestic intellectual property laws. It is expected that the USMCA will be signed by December 1 and ratified sometime in 2019. Amending Canada's domestic intellectual property laws typically requires steps of publishing for comment the draft amendments to the laws before enactment.

Canada has various transition periods to implement its IP-related obligations after the USMCA comes into force, ranging from two and a half years to five years, depending on the obligation.

It is notable that Canada has been on the "watch list" of the Office of the United States Trade Representative as a country that does not adequately protect or enforce patent rights. Several of these changes bring Canada more closely in line with U.S. IP rights. As noted above, it remains to be seen whether these changes will apply retroactively; based on past reform in these areas, IP right holders should not expect these benefits to be applied to IP registered/issued before the coming into force date of the legislative amendments.

¹ See our previous bulletin, "[NAFTA 2.0: The United States-Mexico-Canada Agreement](#)" for more information on the USMCA.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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