

*'It's probably a good deal for us'*

## Trans-Pacific Partnership has minimal IP impact, lawyers say

BY MICHAEL MCKIERNAN

For Law Times

Canada's intellectual property laws face a much smaller overhaul as a result of the Trans-Pacific Partnership that many feared at the outset of negotiations, according to a number of lawyers in the field.

The full 12-country agreement was released last month following years of talks, although the Canadian Parliament must ratify the deal before it comes into force in this country.

Nathaniel Lipkus, a partner in the intellectual property practice group at Osler Hoskin and Harcourt LLP's Toronto office, says a decade of domestic copyright reform and international treaty negotiation, such as the Comprehensive Economic and Trade Agreement with the European Union, have left Canadian IP laws in good shape.

"Coming into negotiations, we already had a fairly modern IP system, which means that the TPP itself isn't going to require much more in terms of changes to laws," Lipkus says.

And even in those cases where the TPP's final text deviates from Canadian practice, the country's delegation negotiated enough "wiggle room" to preserve existing approaches to intellectual property issues, according to Michael Crichton, an Ottawa-based partner at Gowling Lafleur Henderson LLP.

"My sense is that the Canadian representatives were mindful of what Canada's current laws and regimes are, and that they were resistant to changes that would



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drastically alter the intellectual property landscape here," Crichton says. "From an IP perspective, it's not a game-changing treaty."

Crichton points to the issue of online copyright infringement as one in which Canada carved out an exception based on its existing laws. The TPP provides for a notice-and-takedown regime based on the U.S. model, which requires ISPs to notify allegedly infringing subscribers and immediately remove the offending material. However, an annex to the agreement indicates Canada's more liberal notice-and-notice regime, which forces ISPs to simply forward notices from copyright owners to users identified as a possible source of infringement, will be sufficient

for TPP compliance.

Lipkus says the annex also gives Canada an incentive to ratify the deal as the exception only holds for original signatories to the deal.

"It may be that future countries will not be granted as much flexibility and could be held to standards that they are uncomfortable with," he says.

In the realm of trade secrets, Crichton says, the TPP has the potential to significantly alter Canadian law by committing signatories to criminalizing "unauthorized and willful" access, misappropriation, or disclosure of a trade secret. But the text also permits parties to the TPP to "limit the availability of its criminal procedures" to certain specific cases. Crichton says it is also possible that measures available under Canada's existing Security of Information Act — which punishes theft of trade secrets for the benefit of a foreign state or state-owned enterprise with a maximum jail term of 10 years — could satisfy the TPP's requirements.

"It's possible the government may take a broader approach, and criminalize more than just that narrow situation in which the trade secrets affect national security, but it could also be read as consistent with or within the scope of the laws that we already have," Crichton says.

One area in which legislative change is guaranteed in the case of ratification is the 20-year extension of the term of protection for copyright holders from the current life of the author plus 50 years to life plus 70 years to match the situation in the U.S. That provision sparked criticism over the level of American influence on the IP chapter of the TPP from a number of analysts, including Research in Motion co-founder Jim Balsillie, who claimed in an interview with the *Canadian Press* that Canada's negotiating team had been "outfoxed" by their American counterparts.

In New Zealand, where the government would also have to extend its copyright protection term by 20 years to comply with the TPP, it estimated that the cost of the move is around \$50 million per year. However, Jason Hynes, the chair of the Intellectual Property Institute of Canada's IP trade policy committee, plays down the New Zealand study, saying there's no reason to assume the change would have the same effect in this country.

"We have different economies with different drivers, so it's hard to say if it's



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even relevant to a Canadian analysis. Even if it is correct, it works out at about \$11 per person per year, or about three lattes," says Hynes, who is also a partner at intellectual property boutique Bereskin and Parr LLP, based in its Kitchener, Ont. office. "Clearly, there are some works that will be relevant and in demand 90 to 110 years after they come out, but it's only going to be a very small percentage."

The TPP could also result in a change to Canadian patent law, by providing for term extensions in the case of unreasonable delays during processing and examination at the patent office. Daphne Lainson, a partner in the Ottawa office of Smart and Biggar, says that would be a positive move for her clients, which generally operate in the pharmaceuticals industry. "It brings us more in line with many of our trading partners," she says. "In terms of assisting innovative companies to bring new products forward, and to continue to innovate, I think it's a good thing."

Hynes says he believes the TPP is likely to pass, and that critics of the IP chapter overlook the broader picture.

"Much of the criticism ignores the details of the agreement, or fails to understand that Canada has multiple interests to advance," he says.

When viewed as a whole, he says, minor changes to IP in exchange for greater access to foreign markets make the TPP worthwhile.

"On balance, it's probably a good deal for us," Hynes says.

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