

Goodmans^{LLP} Update

Canada Added to U.S. Intellectual Property Priority Watch List

On April 27, 2018, the United States Trade Representative (USTR) added Canada to a “Priority Watch List” of countries it says fail to protect and enforce intellectual property (IP) rights.

What Happened?

The USTR publishes an annual “Special 301 Report” (the “**Report**”) for the U.S. Congress that evaluates the state of IP protection around the world. It does so with a view to identifying countries with shortcomings said to negatively affect U.S. interests. In developing the Report, the USTR seeks input from IP-related businesses and associations in the U.S., as well as U.S. embassies abroad. A country the USTR deems to insufficiently protect IP rights may be listed on the USTR’s “Watch List” or “Priority Watch List”, the latter reserved for what the USTR deems to be the worst offenders.

Canada has been on the Watch List for many years, but has not been on the Priority Watch List since 2012.

The USTR criticized Canada for what it called a “failure to resolve key longstanding deficiencies in protection and enforcement of IP”, including:

- poor border and law enforcement with respect to preventing counterfeit or pirated goods from being shipped through Canada;
- a weak patent and pricing environment for innovative pharmaceuticals;
- deficient copyright protection; and
- inadequate transparency regarding the protection of geographic indications of origin.

Canada joins only 11 other countries, including Algeria, China, India, Russia, and Venezuela, on the Priority Watch List. Canada is the only G7 country on the list.

What led to Canada’s re-classification?

The move to put Canada on the Priority Watch List must be viewed in the context of the ongoing negotiations between Canada, the U.S. and Mexico over the North American Free Trade Agreement (NAFTA). The U.S. has been demanding stronger IP protections be included in a renewed NAFTA pact. The Report specifically noted the USTR’s efforts to seek stronger IP protections in the renegotiation of NAFTA, and the press release accompanying the Report noted Canada’s IP protection will be a continuing priority in bilateral trade relations during the coming year.

Canada’s re-classification comes on the heels of recent efforts by Canada to boost IP protection. The day before it was put on the Priority Watch List, Canada introduced a new IP strategy with the stated goal of helping Canadians “understand, protect and access intellectual property” (for more details on this new IP strategy, please see our May 9, 2018 Update, *Canada Unveils its Intellectual Property Strategy*). Canada also amended its anti-counterfeiting legislation in 2014 to increase powers for border officials. Further, in 2017, Canada amended the *Patented Medicines (Notice of Compliance) Regulations* to, among other things, offer increased patent protection for certain innovative pharmaceuticals, as a result of Canada’s implementation of the Canada-European Comprehensive Economic and Trade Agreement (CETA).

What does it mean for IP in Canada?

The short-term implications of Canada’s re-classification to the Priority Watch List are likely minimal. Canadian policy-makers have, in the past, given the USTR classification little credence (at least publicly). The official government position is that the USTR process and report are analytically flawed due to their reliance on U.S. industry allegations rather than objective empirical evidence.

That said, the move is clearly intended as a nudge to Canadian lawmakers to strengthen IP protections, and may be a signal as to the U.S.'s intentions in the NAFTA renegotiation. Whether the USTR move is a negotiation tactic that is ultimately temporary or is rooted in a legitimate criticism of Canadian laws, the Canadian government may re-evaluate its IP protections in response, particularly if required as a result of the NAFTA renegotiation.

However, whether increased IP protection would be a positive shift is a matter of perspective. For example, the Parliamentary Budget Office recently estimated that the enhanced patent protections implemented as a result of CETA will add hundreds of millions of dollars to Canadian health care and pharmaceutical costs. Canadian lawmakers must be alive to the balance that must be achieved between heightened IP protection and fair access to Canadian and international IP.

For further information concerning this development, please contact any member of our Intellectual Property Group.

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