



IP Justice
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2022 Special 301 Review

USTR-2021-0021

To: Mr. Daniel Lee,
Assistant U.S. Trade Representative for Innovation and Intellectual Property Office
of the United States Trade Representative
600 17 Street NW, Washington, D.C. 20508

RE: 2022 Special 301 Review: Identification of Countries Under Section 182 of the
Trade Act of 1974

Date: 8 March, 2022

Docket Number: USTR-2021-0021

Submitted Electronically at: www.regulations.gov

USTR Question to IP Justice:

**What has changed in the past year that warrants Canada's removal from the
Special 301 List?**

Dear Mr. Lee,

IP Justice appreciates this opportunity to answer the USTR's question posed to IP Justice regarding Canada's work to increase intellectual property rights and to promote innovation policy as part of the United States Trade's 2022 Special 301 Annual Review Process.

Founded in 2002 and based in San Francisco, IP Justice is an international civil liberties organization that promotes the public interest and human rights in technology laws and policies. We focus on important tech issues such as Internet freedom, innovation policy, and balanced intellectual property rights. IP Justice participates in a number of international law and Internet policy venues which impact digital rights including the Internet Corporation for Assigned Names and Numbers (ICANN), the UN World Intellectual Property Organization (WIPO), and the UN Internet Governance Forum (IGF). IP Justice has held an accredited consultative status with ECOSOC, the Economic and Social Council of the United Nations, since 2003.

IP Justice believes that there are several reasons to remove Canada from the USTR's Special 301 List. Firstly, Canada should never have been put on such a list and doing so only made the USTR's Special 301 Review Process appear to be a political tool and not a serious policy making effort.

The border between the US and Canada is the longest international border in the world at 5,525 miles in length. The two nations share a robust past, have similar cultures and legal systems, and they depend on each for trade and prosperity. And given the similarity between the US' and Canada's treatment of intellectual property rights, it did not make sense for Canada to be put on a list that could lead to trade sanctions from its number one trading partner. It appears the US may be using this process as a means to bully Canada into changing its domestic laws to favor US intellectual property interests and perhaps obtain rights that cannot even be attained in the US.

Canada meets all of its international obligations and is a signatory to five treaties dealing with international intellectual property rights. Recently, the Supreme Court of Canada held cases which have further strengthened the position of IP rights holders in Canada.

For instance, in *AstraZeneca Canada Inc. v. Apotex Inc.* 2017 SCC 36, the Supreme Court of Canada stated that “the Promise Doctrine undermines a key part of the scheme of the [Patent] Act; it is not good law”.

In *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34 the Supreme Court of Canada stated that “[t]he only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. ... If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent irreparable harm”.

These decisions provide rights holders the opportunity to get a global interlocutory injunction, a \$600,000,000 patent infringement award and no longer have to be concerned with the promise doctrine as potentially invalidating patents.

Furthermore, the most significant step taken by Canada was the implementation of intellectual property provisions in the United States-Mexico-Canada Agreement (USMCA), in areas including full national treatment for copyright protections, transparency and due process with respect to new geographical indications, and more expansive trade secret protection, including criminal penalties for willful misappropriation. Canada made significant changes to the Copyright Board related to tariff-setting procedures for the use of copyrighted works, and efforts remain ongoing to implement those measures.

The US-Mexico-Canada Agreement (USMCA) contains important provisions dealing with the issues of free speech and digital trade. Indeed, Article 19.17 of the USMCA relates to Interactive Computer Services (ICS) and provides:

“[N]o Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.”

We understand this provision would reform Canadian law to create immunities for ICSs, moving away from the holding in *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, where the British Columbia Court of Appeal found that an internet forum should be held

liable for failing to "take effective steps [to] remove defamatory content". Additionally, the Supreme Court of Canada in *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38 ("*Voltage*") held in 2018 an internet service provider may become liable for copyright infringement if it has notice of offending material posted on its server and fails to comply with the notice. The adoption and implementation of Article 19.17 of the USMCA in Canada will foster innovation and growth for Internet business and consumer services in Canada because it protects Canadian citizens and businesses from liability for the infringing activities of others. This important alteration of Canadian law should be welcome news to US and Canadian businesses alike.

IP Justice appreciates this opportunity to provide further input into the USTR's Special 301 Annual Review process and we stand ready to provide any additional information or testimony as requested.

Respectfully submitted,

Robin D. Gross
IP Justice Executive Director