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Commentary

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Debunking Alarmism Over the TPP and IP

WHY THE TRANS-PACIFIC PARTNERSHIP IS A GOOD DEAL FOR CANADIAN INNOVATORS

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Introduction

Jim Balsillie is a highly accomplished Canadian innovation leader: the founder and Chair of the Centre for International Governance Innovation (CIGI); Chair of the Board of Sustainable Development Technology Canada; former co-CEO of what is now BlackBerry; United Nations appointee; and a philanthropist. However, his leadership veered off course when he recently expressed great alarm about the intellectual property (IP) provisions of the recently concluded Trans-Pacific Partnership (TPP). Claiming to have extensively reviewed the IP provisions of the TPP, he states in an interview: "I think in 10 years from now, we'll call the signature [on the TPP the] worst thing in policy that Canada's ever done . . . It's such brilliantly systemic encirclement. I'm just in awe at its powerful purity by the Americans . . .We've been outfoxed. . . . I think our trade negotiators have profoundly failed Canadians and our future innovators. I really lament it" (quoted in Blatchford 2015).

In a similar vein, Professor Michael Geist (2015c) of the University of Ottawa Faculty of Law opines, "the implications for digital policies such as copyright and privacy should command considerable attention. On those fronts, the agreement appears to be a major failure."

What is behind such alarmism? Mr. Balsillie's and Professor Geist's words are confusing and troubling because the answer is – really nothing, as it turns out. The TPP is a progressive trade deal, if the IP and electronic commerce provisions are any indication. With respect to Mr. Balsillie and Professor Geist, the criticisms they make and aspersions they cast are unfounded.

The TPP, which links Canada to 11 Pacific nations that combined represent nearly 40 percent of global GDP, has been criticized as being unduly long (more than 6000 pages) and complex for a "free" trade agreement. However, in a world as regulated and complex as today's, trade agreements must not only mutually reduce tariff barriers but also facilitate harmonization of laws and markets, and this makes for a lot of detail. The benefits of harmonization certainly apply to IP. The IP provisions of the TPP are set out in Chapter 18 and the electronic commerce provisions in Chapter 14. This paper examines both these chapters, attempting to dispel misconceptions and allay unfounded fears.

"These provisions are more important by far – times 10 – than anything else in the agreement," says Mr. Balsillie (quoted in Blatchford 2015) of chapter 18. That may not be entirely true, but it is a view many may share, making it that much more important to set the record straight. IP in the Internet age has become a popular topic. But it is very complex and has become much more the subject of vehement opinion than of close study. That Chapter 18 is 74 pages of dense and detailed IP rules does not encourage self-study. The difficulty actually engaging with the relevant (and copious) texts leads in turn to public reliance on opinion leaders. This makes misstatements by them especially effective in undermining meaningful public debate. As the title of a November 13, 2015 *Globe and Mail* editorial says, "Read the TPP? You must be kidding."

The IP ecosystem

Like most treaties dealing with intellectual property, the TPP largely reinforces the status quo, at least for developed countries like the US, Japan, Canada, and Australia. This status quo is set out in treaties that antedate the TPP, some by more than 100 years, and that cover more of the world's geography than the TPP does. These treaties reflect longstanding efforts to harmonize IP laws among nations. Canada is already a party to and has implemented these treaties, so the TPP will not change much here. The IP provisions of the TPP are not, therefore, particularly new or unique. They incorporate much of the IP law already widely harmonized and require nations that are behind in this harmonization endeavour to catch up over time.

IP treaties that Canada has already implemented include the *Berne Convention*, and the more recent World Intellectual Property Organization (WIPO) *Copyright Treaty* and the WIPO *Performances and Phonograms Treaty* – all copyright treaties – as well as existing trade treaties that also deal with IP, such as the *North American Free Trade Agreement* (NAFTA) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Canada's commitments in the TPP are similar to those made in the *Comprehensive Economic and Trade Agreement* with Europe (CETA), although CETA's corresponding IP provisions are simpler because there was less disparity in IP protection amongst the signatory states to be addressed than is the case across the Pacific Rim. The TPP provisions for phasing in IP measures in some member states (Peru, Brunei, Vietnam, Malaysia, Mexico, and more) indicate the scope of work ahead of them to bring their regimes into compliance (see section 18.83 and what follows).

Canadian innovators will benefit from TPP requirements that Canada's Pacific Rim trading partners adopt standards of IP protection similar to Canada's and the other developed country parties to the TPP. Canada's laws already meet the TPP standards almost entirely. Indeed, the TPP requires that parties accede to other, more recent treaties to which Canada is already a party: the *Singapore Treaty* and the *Madrid Protocol* on trademarks; the *Budapest Treaty* on deposit of microorganism samples for biotechnology patents; *UPOV*

1991, on protection of new varieties of plants; and the WIPO *Copyright* and *Performances and Phonograms* treaties (18.7).

Criticism of the TPP: Patents, trolls, and foreign judgments

Mr. Balsillie goes on to say: "We were looking for anti-abusive behaviour for copyright and patent trolls; those were stripped out. You broaden more things you can patent, you get longer patent lives now, you get to add on to its life based on how long it takes to grant the patent. A decision in a foreign court can be enforced in Canada now" (quoted in Blatchford 2015).

One can fairly reliably trace these broad comments to misconstrued provisions of, or absences in, the TPP.

First, it isn't clear that "[rules to circumscribe] . . . abusive behaviour for copyright and patent trolls" were ever part of Canada's negotiating position. Canada has no domestic law to deal with the alleged depredations of either patent or copyright trolls (neither has any other nation, to the best of my knowledge, although in the US certain states have taken limited measures). It is not clear just what are appropriate rules to deal with the "trolls" – or even if we ought to deal with them at all (one man's troll is another's market intermediary, providing liquidity to small inventors/creators). The issue is controversial and heavily politicized, not one to be resolved by trade negotiators.

Moreover, the absence of anti-troll provisions in the TPP is no block to creating them; rather, it leaves government free to act. Should Mr. Balsillie, or anyone else, feel the want of such laws, they are free to advocate for them at home or abroad. But to have expected such a novel policy initiative in the context of a trade agreement negotiation reflects a fundamental misunderstanding of what can be expected in such a deal.

Second, Mr. Balsillie seems to claim that the TPP expands the range of inventions that may be patented. If it were so, that would be a good thing for Canada. But the TPP does not do that. Its basic statement of what may be patented, for instance, is essentially the same broad requirement as in NAFTA (Art. 27(1)). Canada's exclusion for medical treatments is expressly preserved in the TPP (18.37.3(a)). Indeed, the most recent limitation on subject matter of Canadian patents – unique to Canada among OECD countries, alas – denies protection for for higher life forms, and this limitation is also expressly preserved (18.37.3(b)).

Some accommodation of Canadian law, demonstrating although it does presume negotiating victories, is unfortunate. It would have been far better had negotiators taken the opportunity to amend and clarify our patent law. Every other OECD country allows patents on life forms without discrimination as to what's "higher" and "lower". Canada's interpretation of "invention" is out of step and needlessly complicates *Patent Act* (Canada) interpretation by energetically opening the door to other, yet undiscovered exclusions. The exclusion of higher life forms stems from a questionable judgment by a narrow majority of the Supreme Court of Canada (SCC) in *Harvard College v. Canada (Commissioner of Patents*), also known as the Harvard Mouse Case (the minority judgment, by Binnie, J., is stronger, in my view). In other words the problem is not, as Mr. Balsillie claims, that patent protection is overbroad – the problem is, it is arguably too narrow.

Third, Mr. Balsillie claims patent terms will be longer to take into account the time to grant the patent. There is some truth to this statement – which is good – but the provision is not nearly so broad as he says. The TPP provides that patent life would be extended only if the time to grant is "unreasonable or unnecessary". A remedy must be provided where the time for issuance is more than five years, excluding delays that were not the fault of the examining authority (18.46). Such a rule is not only a matter of fairness but also a useful discipline on the examination process. Even if it did result in term extensions in Canada, benefits would

more than offset any associated costs: first, because of the ability of the patent holder to reap the full benefit of its patent, and second, because all patent applicants would benefit from the greater efficiency which such a rule would encourage in the patent-granting authority.

Canadian patent holders are more likely to benefit from extensions to their terms abroad in jurisdictions bringing their examination processes up to par than they, or foreign patent holders, are in Canada. This is because Canada benefits from a well-established patent review system. The TPP also provides that the parties will endeavour to cooperate on patent law and administration, including to reduce differences in patent filing and examination procedures, and to share search and examination results. Such cooperation would benefit patent holders for whom the variance of patent rules and procedures around the world is a real and unnecessary burden (18.14).

Finally, Mr. Balsillie decries the enforcement of decisions of foreign courts in Canada. But this is nothing new; enforcement of foreign judgments is common in Canada in many areas of law, including intellectual property, under the rules of judicial comity. However there is nothing in Chapters 18 or 14 that deals with such enforcement.

Copyright term extension

The *Globe and Mail* in a November 13, 2015 editorial writes:

> One of the bigger examples . . . is the requirement for all signatories to keep copyrighted material out of the public domain for 70 years after the death of the author. In Canada, the protected period is 50 years. What will the implication be if Canadian companies suddenly have to pay royalties on works for an additional 20 years? Some have argued it will cost our economy hundreds of millions of dollars.
>
> The TPP contains similar language in many areas, including the Internet[.]

What the editorial writers at the *Globe and Mail* meant when they stated that "The TPP contains similar language in many areas, including the Internet", only they can know. Perhaps they wanted merely to spread alarm. But what about the copyright term extension from which the *Globe and Mail* fears such expense?

The TPP requires Canada to change the term of copyright protection from the life of the author plus 50 years to the life of the author plus 70 years (18.63). The 70-year period has long been the rule in the United States, the most innovative economy in the world, demonstrating that term extensions are consonant with great innovation, and may in fact cause it (indeed, some economic research supports causation; see Sookman 2015b). Many other countries around the world including Canada's trading partners have already adopted it. Yet the *Globe and Mail* editorial suggests that such a change could cost the Canadian economy "hundreds of millions of dollars". Professor Geist makes the same claim (2015a).

A study produced for Canada's federal government concludes that the impact of the term extension to be that "User costs may increase slightly", and that it would "likely contribute in a small way to . . . [a net] outflow of royalties from Canada" (Hollander 2011). In other words, effects would be immaterial if, perhaps, negative. Hollander's is a qualitative study that may not fully anticipate all the effects of introducing the longer period. If more copyrighted products will be sold than before, a consequence of the longer term, it would produce more economic activity. And even if some consumers will be out of pocket for the difference in price of a royalty-bearing good and a public domain good (some studies dispute the existence of a price differential in at least some circumstances; see PwC 2006 and Sookman 2015a) a Canadian author's estate will be better off by as much, so it would often be a wash economically. And Canada would benefit from the reinvestment of

those royalties in its creative economy (see for example EU Commission 2008 and Sookman 2015a).

Mr. Balsillie is said to have expressed fear that Canadians will have to pay more for inputs to innovation (Blatchford 2015). He may have been referring to his expectations of the increase in patentable subject matter and extension of patent terms. Those are dealt with above. Could these innovation-damping effects be attributed instead to the copyright term extension? This is not likely as copyright-protected "innovation inputs" (Blatchford 2015*)* are few. One would not, for instance, think of re-printing Mavis Gallant stories that will stay longer under copyright as squelching innovation.

Computer software would seem to be the obvious example. It is a form of IP protected by both copyright and patent. However its commercial lifespan is typically short; many producers do not even bother to apply for available patent protection because it is expected that the value of the software will expire before the patent application process concludes. Thus, the extended term of copyright protection will be practically irrelevant. Other than computer software, one seeks in vain for deleterious effects to Canadian innovation. Indeed, to require the creation of original work instead of plagiarism or re-sale of someone else's in the public domain would be innovation *enhancing*.

One might also ask whether it is not simply fair for Canadians to pay for works of foreign origin in the same circumstances where purchasers in foreign markets must pay for ours. The TPP, and other IP and trade treaties, are based on national treatment, so that foreign citizens benefit from IP rights the same as nationals do, generally. Article 18.8 of the TPP reiterates this requirement for national treatment. Under this rule, Canadians benefit already from the 70-year term in the US, so why not recognize similar rights of US copyright holders in Canada?

It is also worth noting that the *Berne Convention* on copyright allows limited discriminatory treatment. Under this treatment a nation could adopt the "rule of the shorter term" to accord foreign nationals the benefit only of the shorter term copyright term allowed by their home jurisdictions, provided that it is not shorter than the minimum length provided by treaty. Thus, Canadian creators currently would not benefit from the 70-year term in a jurisdiction with such a reciprocal protection provision in its copyright law. By adopting a 70-year period, Canadian copyrights will gain 20 years protection in such countries, which include those of the European Union – hardly an insignificant market for Canadian authors. And harmonization with our many trading partners that have adopted the 70-year rule is itself beneficial, facilitating rights clearances and cross-border trade in IP.

Copyright is not like patent law. The protection it affords is often referred to as "thin". Copyright protection extends only to the limited extent of a work's original expression. It does not protect all of a work, only what is original and expressive. It does not create a monopoly; it only prevents copying a material amount of a work and that only if none of the many exceptions in the *Copyright Act* applies. The only prohibition is not to copy; one can say the same thing as the work says, or function the same as other software, for ideas have no protection under copyright law. One can even use the same expression so long as it is not copied. Copyright law does not stifle innovation. The alleged impacts on the public domain of an extension of term needs to be considered from this perspective. Copyright is just not a strong form of IP protection.

Notice and notice

Introduced in the recent *Copyright Modernization Act* (Canada), amending the *Copyright Act*, there is a "notice-and-notice" regime for ISPs (ss. 41.25, 41.26). This regime requires an ISP to accept notices of copyright infringement and pass those notices on to those users who posted the material, if it can. If the ISP does so its further liability for the infringing material is limited.

It has been much bruited about that the TPP changes the requirement from a notice-and-notice regime to a "notice-and-takedown" regime such as the US adopted (*Digital Millennium Copyright Act* (United States), s. 512(c); see for instance Geist 2015b, and, for the change in Professor Geist's views after release of the final text of the TPP, Geist 2015c). Broadly, the difference is that an ISP would be required by the latter not only to pass on a notice of infringement, but also to take down the infringing material if it were on that ISP's servers, subject to a counter notice from the alleged infringer objecting to the original allegation of infringement. Thus the notice-and-takedown regime applies more narrowly than notice-and-notice but may require direct intervention by the ISP.

Frankly, a switch to a notice-and-takedown regime would be a good outcome for IP protection in Canada. Although the admonitory effects of notice-and-notice are helpful, there is every reason to expect it to protect IP much less effectively than a notice-and-takedown regime. However, Annex 18-E lifts the requirement for a notice-and-takedown system where certain conditions are met. Canada's notice-and-notice regime meets those requirements. So here again we have more of the status quo.

Spreading digital gospel

This brings us to another line of argument against the TPP, one perhaps most developed by Professor Geist. This argument is built around not what the TPP is, but rather what it is not (akin to Mr. Balsillie's lamenting the lack of rules on patent and copyright trolls). Perhaps the proponents of such argument find insufficient scope for criticism in what is in the TPP and thus need to venture outside its confines. According to Professor Geist (2015c):

> Canadian negotiators adopted a defensive strategy by seeking to maintain existing national laws and doing little to extend Canadian policies to other countries. . . .
>
> Meanwhile, Canadian policies that promote user generated content, limit statutory damages, or establish consumer exceptions are all missing from TPP.
>
> The absence of Canadian policies in the agreement is also reflected in the privacy and e-commerce provisions. Canada features national privacy laws, but the TPP allows countries to meet the privacy requirements with enforceable "voluntary undertakings", a nod to the weaker US approach. Similarly, Canadian net neutrality regulations and anti-spam rules cannot be found in the TPP, which instead features watered-down versions of each.

Professor Geist laments the opportunity lost to the Pacific Rim to adopt Canada's Anti-Spam Legislation (CASL), but Pacific Rim countries may be forgiven for turning up their collective noses at this widely criticized, expensive, overbroad, and very likely unconstitutional legislation. Similarly, he would have us impose on our TPP partners Canada's privacy laws – laws we haven't even managed to harmonize in our own country – and our user-generated content exception, a novel and controversial provision of the *Copyright Modernization Act* on which Canada is an international outlier. In any event, the TPP does contain provisions to encourage the development of anti-spam and privacy laws, as well as consumer protection and consumer Internet access (14.6, 14.7, 14.10). Limits on statutory damages are preserved; others are free also to adopt such limits, or not to have statutory damages at all (18.74.6).

Canada and Canadians are free to encourage adoption of our approaches to these problems as other TPP parties move towards legislative implementation. This is important to remember; TPP negotiations were the wrong forum to proselytize detailed policy initiatives, but the conclusion of those negotiations hasn't closed the door on future efforts. The TPP prescribes minimum standards and allows maximum possible flexibility for development of national legislative regimes. In some cases those minimum standards are more

detailed than others. This is not to reflect the specific national policy of any party, but rather the state of IP harmonization owing to the many previously concluded treaties. Thus the provisions of chapter 14 are briefer and less detailed than those of chapter 18; the law of electronic commerce has not yet been subject to the degree of international harmonization that IP has, so there is less to include.

The TPP is a trade treaty, not a pure IP treaty. Professor Geist errs to expect to find in it bold digital or IP policy initiatives. Such is not the purpose of a trade treaty, which is to harmonize markets while interfering in domestic law only to a necessary extent. If it were otherwise, as Professor Geist seems to think, then imagine the howls of objection were harmonization required on much more elaborate policy initiatives. There would be no guarantee that the policies adopted would have been Canada's, or even in its interests. Moreover, such an objective would merely guarantee that a trade treaty would never be successfully concluded. It was hard enough to get the *Copyright Modernization Act* – merely a domestic law – through the lengthy processes of consultation and parliamentary approval.

Other nits Professor Geist (2015c) picks from the Electronic Commerce Chapter:

> The TPP also bans certain digital protections that may come back to haunt Canadian policy makers. For example, it restricts legislative initiatives that require storage of personal information in Canada or that limit data transfers outside the country. It also creates a ban on rules requiring the disclosure of software source code found in mass-market products, a provision that has cyber-security experts and consumer advocates concerned about the implications for detecting harmful software or products that fail to comply with consumer protection or environmental standards (such as Volkswagen's emissions violations).

The provisions to which Professor Geist refers are good, not bad. To allow the cross-border transfer of data, even personal data, is an important concession to the practicalities of conducting business. Canadian companies will certainly benefit. It occurs widely. And the requirement is subject to all the protections in the TPP that could reasonably be sought, including a provision allowing every party to adopt measures inconsistent with allowing such data transfer for any "legitimate policy purpose" – a very broadly worded exception (14.13.3), subject only to the reasonable conditions that any such measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

Moreover the restriction does not apply at all to data held by or contracted for by governments (14.2.3) – a very broad exception in Canada, since it would embrace, *inter alia*, health care information, and save existing provincial initiatives respecting it (Nova Scotia and British Columbia). Finally, the TPP subjects Chapter 14 to paragraph (c) of Article XIV of GATS, which also expressly allows for exceptions for protection of individuals' privacy.

Not to disclose source code is standard and the provision regarding it should be uncontroversial. Source code for mass-market software is almost never disclosed (in part because of security risk attendant on disclosure). The provision will not restrict legitimate regulatory concerns in the manner Professor Geist seems to fear. First, software installed in automobiles is not "mass market software" within the meaning of the section. The market for such software is limited to the single car manufacturer – far from a "mass market". Second, exceptions in the TPP could apply to allow disclosure for regulatory evaluation (for instance, 29.1.3), as would rules of discovery once litigation was commenced.

Internet domain name regulation

Professor Geist (2015c) goes on: "The agreement even reverses the longstanding Canadian hands-off approach to the Internet. While Canada has previously rejected regulation of the domain name system, the TPP mandates domain name registrant information disclosure requirements and intellectual property protections for each country-code domain, a remarkable intervention into Internet policy."

The provision Professor Geist presumably refers to, Art. 18.28, addresses long-standing concerns relating to domain name registration systems. But contrary to Professor Geist's assertion, it does not require legislation or regulation; it could as easily be implemented under a registration authority's own rules, without enacting legislation requiring it.

Art. 18.28 requires fair, equitable, not overly burdensome, and expeditious domain name dispute resolution system, and one that doesn't preclude judicial proceedings (18.28.1), and it also requires:

> appropriate remedies shall be available at least in cases in which a person registers or holds, with a bad faith intent to profit, a domain name that is identical or confusingly similar to a trademark (18.28.2).

Of course, if a domain name registrar lacks such rules, it should not. Thankfully, Canada's CIRA rules already comply. Because this is all that the TPP requires there again will be no change to Canadian law or policy.

For those interested, a more detailed refutation of Professor Geist's claims about the TPP can be found on Barry Sookman's blog in a December 15, 2015 post, "TPP, Copyright, e-Commerce and Digital Policy: A reply to Michael Geist."

Trade secrets

Trade secret law is also provided for under the TPP (18.78). Trade secret theft has not been subject to criminal penalty in Canada since the SCC found that information did not qualify as property for the purposes of the theft provisions of the *Criminal Code* (Canada); see *R. v. Stewart*. This changed partially when the *Security of Information Act* (Canada) (SIA) was passed, insofar as the perpetrator acted on behalf of a sovereign entity. Provisions of the *Criminal Code* do deal with hacking and mischief in relation to data (ss. 342.1, 430).

Depending on its implementation, the TPP could broaden the applicability of criminal penalties to any misappropriation of trade secrets. It appears however that the SIA satisfies the minimum requirements of the TPP (18.78(3)), so government need not implement further penalties. Statutory trade secret protection has long been the rule throughout the United States, so there are ample models and experience to draw on should government elect to expand statutory trade secret protection. Moreover, given the growing scale of international IP theft by hacking, especially by the Chinese, expanding the application of criminal penalties for trade secret appropriation may very well be sound policy.

Pharmaceuticals

The TPP provisions relating to pharmaceutical patents have not been subject to much public criticism. While such patents are not immune to controversy, the reality is that the regime in Canada will be little changed by the TPP if at all, over Canada's existing commitments in CETA. A good, high-level assessment of these provisions can be found in a November 28, 2015 blog post by Lawrence Herman, "Trans-Pacific Trade and the Intellectual Property Challenge."

The TPP and international development

The TPP will be good for Pacific Rim countries, including developing ones. Studies of development and IP underscore the importance of strong legal rights as a pillar of development and prosperity. Strong IP rights improve the climate for local entrepreneurs. They create favourable and indeed necessary conditions for technology transfer from more developed countries, which is a critical basis of technological development in less industrially advanced economies. The TPP commits member countries to helping others develop and improve IP laws and enforcement. This may well be part of the reason why less developed economies are signatories to the TPP. It is in their economic interest. Because these countries will have much more work to do to implement the TPP, they are being given substantial extra time and assistance to do so.

Commenter Thomas Conway responded to my November 11, 2015 article in the *Financial Post* to suggest that to accept the obvious development benefits of the TPP at face value is naïve because, after all, industrialized countries benefit from having the patents held by their citizens respected in the jurisdictions of foreign trading partners. Of course they benefit, but that does not alter the fact that benefits accrue to less-developed economies from the same circumstance. Whether the provisions in the TPP find their inspiration in cynicism or idealism (like other things human, probably both) is irrelevant to outcomes on the ground.

Further benefits from IP in the TPP

The TPP takes a very balanced approach to IP. It emphasizes the importance of a "rich and accessible" public domain (18.15), and of exceptions to copyright for fair dealing (18.66). The TPP actually provides an affirmative obligation to balance the copyright regime with fair dealing exemptions and access for the disabled (18.66). Canada's fair dealing rules (*Copyright Act* ss. 29, 29.1, 29.2) are broad, and there is nothing to indicate that they are not TPP compliant. Particularly since the SCC case *CCH Canadian Ltd. v. Law Society of Upper Canada* ([2004] 1 SCR 339) Canada's fair dealing exception has already been read very expansively.

The TPP IP provisions also include protection of public health initiatives and enshrinement of the importance of access to medicines (18.6); reciprocity on broadcasting collectives treatment (18.8(2)); cooperation on traditional knowledge (18.16); technical assistance to developing economies (throughout); greater enforcement against counterfeit goods, to the benefit of consumers and business alike (Chapter 18, Section I); and general recognition and acceptance of Canada's existing IP laws (throughout). I could go on. A fair assessment of the TPP's IP provisions must acknowledge the reach and breadth of its frequently enlightened approach, the substantial amount Canada achieved in negotiation, and, of course, the fact that to expect the IP provisions to have been more detailed and complex at the expense of the rest of the treaty would be unrealistic.

Critics will assert that the TPP truncates Canadian sovereignty in respect of its IP policies. So it must. Trade treaties sacrifice discriminatory policies – which usually only hurt those enacting them anyway – for gains in trade. Canadian innovators will be better served by predictable, universal IP rules; that said, wide flexibility remains for policy development in Canada. That flexibility should be used judiciously.

In any event, one is hard-pressed to point to Canadian concessions in Chapters 14 and 18. Even the one significant change, to the 70-year copyright term, also benefits Canadians.

A great deal of intellectual weight (including from Canadian academics, Industry Canada, and Heritage Canada) goes into the negotiation of intellectual property treaties and trade treaties. While not above criticism, of course, their efforts should be given the benefit of the doubt as the best achievable in a complex and important negotiating forum. To know exactly how each provision will be implemented and with what effect exceeds the possible right now, so we should remain vigilant. But the TPP is a good basis from which to start.

Purporting to find a fox, Mr. Balsillie, like Professor Geist, has cried wolf. Because of the privileged positions they occupy in Canada their cries have echoed far and wide, clouding the future of a meritorious trade deal with aspersion and error. Canada's future depends on trade and the TPP improves access to Pacific markets for Canadian goods and services. It would be terrible if public debate were so undermined by misinformation as to seriously threaten such an important deal. Now it is up to our new government to see to it that Canada will benefit from accession to the treaty and implementation of its provisions, and ignore controversy that would have been better never begun.

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Richard Owens is a lawyer who has specialized in business and commercial law, regulation of financial institutions, intellectual property and technology. He has served financial services providers, technology companies, drug companies and others in Internet, technology, intellectual property strategy and patent law, M&A, outsourcing, strategic alliance and joint ventures, licensing and other areas. He has been repeatedly recognized as among Canada's best lawyers in technology law and attained the highest rating on Martindale Hubbell. He conducted his practice with three of Canada's leading law firms. Richard is past chair of the board of directors of the University of Toronto Innovations Foundation, and member of the advisory committee to the Office of the Privacy Commissioner of Canada. He is a member of the board of the Center for Innovation Law and Policy at the University of Toronto Faculty of Law, and served as a director of the International Technology Law Association. He is on the boards or advisory boards of other companies and not-for profit enterprises. Richard is an adjunct professor, teaching courses on the law of information technology and electronic commerce, innovation law and policy, intellectual property, digital content and the creative economy, and the law and policy of biotechnology, all at the University of Toronto Faculty of Law, where he has taught for over twenty years and also served as the Executive Director of the Centre for Innovation Law and Policy. Richard has written and published widely on intellectual property law, the law of information technology, privacy, and the regulation of financial institutions.

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