

Patents, copyright and innovation

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The overreach of contemporary free trade agreements (FTAs) into areas of public interest regulation is perhaps no more apparent than in the field of intellectual property rights (IPR). Not content with the mere elimination of tariffs and other trade barriers, multinational corporations have pushed for FTAs to include new rules for patents and copyright that would better serve and protect commercial interests. The monopolistic nature of IPR creates issues for remix artists, sequential innovators and software developers, among other creators.¹ Strict IPR can also restrict and punish users based on how they choose to consume content. Furthermore, when these rules are enshrined in international agreements, they can no longer be changed by democratic governments.²



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Proposals to enhance IPR through trade agreements are extremely unpopular with Internet users and have been widely criticized by digital rights organizations, academics and innovative technology firms, among other groups. In 2012, the European Parliament overwhelmingly rejected the Anti-Counterfeiting Trade Agreement (ACTA) due to massive public and political opposition. ACTA threatened to criminalise everyday computer use and undermine EU innovation policy. Yet the EU is now contemplating ACTA's sibling, CETA. By ratifying CETA, the EU would be forced to maintain restrictive intellectual property

protections that would hamper the EU's capacity to properly shape innovation policy in the future.

These provisions are contained in CETA's intellectual property chapter (Chapter 20). On digital rights issues, CETA's most troubling effect will be to benefit patent trolls—'non-practicing entities' that exploit the patent system to win damages from innovative companies without producing any goods or services themselves. CETA would strengthen the position of patent trolls by enhancing patent protections. Earlier leaked drafts of the agreement suggested CETA would also have serious implications for Internet freedom through enhanced copyright provisions.

¹ FFII, EU law and the International Covenant on Economic, Social and Cultural Rights, 2013 (<https://people.ffii.org/~ante/ipred/FFII-IPRED-2013-03.pdf>).

² See, generally, IP out of TAFTA, Civil Society Declaration (<http://www.citizen.org/IP-out-of-TAFTA>).

However, the final text is significantly watered down in these areas.

As such, while CETA is unlikely to have a big direct impact on users in the EU or Canada, it would still limit the EU's and Canada's ability to roll back IPR provisions that limit access to knowledge, participation in culture, and remix culture.

BACKGROUND

At its core, the patent troll issue is a software patent issue. Software (and products containing software) is often encumbered with hundreds or thousands of patents. Many software patents should never have been granted due to lax approval standards and unpredictable long-term applicability. No patent office in the world has been able to comprehensively address bad patents as their sheer volume in the area of software makes re-evaluation too costly.

The large number of patents creates a minefield for innovators. Software patents hamper follow-up innovation, create legal uncertainty, come with high transaction costs and limit interoperability. Non-practising entities (patent trolls) exploit this situation by acquiring patents at low cost—for instance, by buying bankrupted companies—and then litigating against developers or manufacturers that allegedly violate their intellectual property rights. The patents in question tend to have broad claims to trivial software methods such that infringement is unavoidable.

Patent trolls cause significant economic damage by litigating against innovators without producing goods or services themselves. An analysis by US researchers estimates that lawsuits filed by non-practising entities are associated with half a trillion dollars of lost wealth from 1990 through 2010. Most of this loss represents a transfer from technology companies to patent trolls rather than an economically productive transfer from rentiers to small

inventors. The pervasive risk of patent litigation reduces innovation incentives for otherwise creative and productive firms.³

The problem first developed in the US after the appeals process for patent cases was consolidated in the Court of Appeals for the Federal Circuit in 1982. The centralisation of patent proceedings prompted an expansionist interpretation and application of the US Patent Act. In the mid-1990s, software patents became much more easily available in the US and patent trolls emerged to exploit the new legal protections available to patent holders.⁴

The growing patent troll problem in the US eventually prompted the Supreme Court to overturn a series of judgments by the Court of Appeals for the Federal Circuit. The Supreme Court's rulings have limited the validity of software patents in the US. In response, patent applicants are increasingly turning to Europe where the centralisation of patent granting in the European Patent Office has produced a boom in software patentability comparable to the US in the 1990s. As American patent attorney Dennis Crouch has commented, '*most practitioners will agree that the US is now more restrictive in terms of subject matter eligibility and the new pan-European patent enforcement court makes those patents obtained in Europe all the more valuable*'.⁵

In the EU, rolling back the availability of software patents through legislation appears politically unlikely. Holders of large patent portfolios now have a vested interest in strong software patentability

3 James E. Bessen, Michael J. Meurer, and Jennifer Laurissa Ford, 'The Private and Social Costs of Patent Trolls' (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930272).

4 For a short introduction to patent trolls, software patents and the US situation, see James Bessen, 'The patent troll crisis is really a software patent crisis', Washington Post, 3 September 2013 (<https://www.washingtonpost.com/news/the-switch/wp/2013/09/03/the-patent-troll-crisis-is-really-a-software-patent-crisis/>).

5 Dennis Crouch, 'US Patent Applicants Heading to the EPO', Patentlyo, 3 March 2016 (<http://patentlyo.com/patent/2016/03/patent-applicants-heading.html>).

because they can use the current rules to eliminate competition from start-ups and small- and medium-sized enterprises. These powerful patent holders have lobbied extensively not to limit the availability of new, or weaken protections for existing, patents. In part due to this lobbying, the European Commission tried, in 2002, to give software patents a stronger legal basis, but the attempt failed after public protests.⁶

The patent troll issue in the EU is exacerbated by rules that prevent the EU Court of Justice from intervening to discourage the harmful practice. The patent lobby succeeded in deliberately excluding the Court of Justice from the Unified Patent Court. According to Josef Drexler, director of the Max Planck Institute for Innovation and Competition, this decision by the EU ‘could easily amount to a mistake of historic dimensions’.⁷

Despite the cautionary example of economic damage and Supreme Court intervention in the US, the warnings from academics and innovation policy experts in the EU, and continued public opposition to excessive patent protections worldwide, the EU continues to push for more favourable conditions for patent trolls. ACTA, which was rejected by Europe in 2012, would have raised the bar for IPR enforcement well beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Since then, elements of ACTA (or worse) have appeared in other proposed trade agreements. For instance, the draft EU–Singapore agreement arguably allows for even higher damages than permitted under ACTA.⁸

6 Ingrid Marson, ‘Software patent directive rejected’, ZDNet, 5 July 2005 (<http://www.zdnet.com/article/software-patent-directive-rejected/>).

7 For the relevant quote and the lack of a legislative feedback loop, see: <https://blog.ffii.org/unified-patent-court-a-mistake-of-historic-dimensions/> (original article not available any more: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553791).

8 Ante Wessels, ‘ACTA-plus damages in EU-Singapore Free Trade Agreement’, FFII blog entry, 26 September 2013 (<https://blog.ffii.org/acta-plus-damages-in-eu-singapore-free-trade-agreement/>).

KEY PROVISIONS

Patent trolls and innovation policy

CETA is the latest agreement to contain ‘ACTA-plus’ IPR provisions. Whereas ACTA gave parties the right to exclude patents from the scope of the civil enforcement section (ACTA Section 2; Footnote 2), the CETA text does not contain such an exclusion. All the strong IPR enforcement measures in CETA will be available for patent rights holders, including the provisions on precautionary measures (Article 20.37), injunctions (Article 20.39) and damages (Article 20.40).

CETA strengthens the position of patent trolls in a second way. Although it is unlikely, the EU may eventually decide to roll back the protections offered to patent holders or otherwise reduce the power of patent trolls through legislation. Under CETA, any attempt to weaken intellectual property rights could be subject to an investor claim for compensation through CETA’s Investment Court System (ICS) (see chapter 3 in this report).

As investment lawyer Pratyush Nath Upreti has argued, investors may be able to use existing investor–state dispute settlement (ISDS) mechanisms to challenge decisions of the Unified Patent Court (UPC).⁹ Among other international treaties, investors could try to invoke TRIPS article 27(1) against the withholding or invalidation of software patents.¹⁰ CETA would further expand the coverage of ISDS/ICS for patent cases, bring

9 Pratyush Nath Upreti, ‘Can Investors Use the Proposed Unified Patent Court for Treaty Shopping?’, EFILA blog entry, 11 May 2016 (<https://efilablog.org/2016/05/11/can-investors-use-the-proposed-unified-patent-court-for-treaty-shopping/>). Note that a single state may have to bear the litigation costs and damages awards, as explained Ante Wessels, ‘FFII, UPC and ISDS: who would have to pay the damages awards?’, FFII blog entry, 1 July 2016 (<https://blog.ffii.org/upc-and-isds-who-would-have-to-pay-the-damages-awards/>).

10 Ante Wessels, ‘EU commission goes into denial mode regarding effect ISDS on software patents’, FFII blog entry, 1 March 2016 (<https://blog.ffii.org/eu-commission-goes-into-denial-mode-regarding-effect-isds-on-software-patents/>).

EU legislative decisions under the scope of ISDS/ICS, and make it impossible for EU member states to withdraw from ISDS/ICS.

CETA would further distort the problematic implications of the UPC, which will be a specialized tribunal prone to expansive interpretation, without appeal to the EU Court of Justice, and without parliamentary influence on the development of law. Through CETA, the EU would further manoeuvre itself into a position from which it cannot challenge or roll back the power of patent trolls. In pandering to the holders of large patent portfolios that can eliminate competition from innovative start-ups and other small- and medium-sized enterprises, the EU is relinquishing its capacity to properly shape innovation policy and is inviting serious economic consequences.

Copyright and Internet freedom

Early drafts of CETA's IPR chapter included strict new rules for digital locks, liability for Internet service providers (ISPs), new criminal penalties for infringement, and other controversial copyright measures that largely overlapped with ACTA.¹¹ However, the final CETA text abandons most of these proposals. The copyright provisions that made it into the agreement are generally consistent with existing standards in the EU and Canada. According to IPR expert Michael Geist, this outcome '*represents a win for Canada*' because the EU was the party pushing for stronger copyright rules in the first place.¹²

CETA's copyright provisions are contained in the intellectual property chapter and they are generally watered down from earlier drafts.

¹¹ Michael Geist, 'ACTA Lives: How the EU & Canada Are Using CETA as Backdoor Mechanism To Revive ACTA', personal blog entry, 9 July 2012 (<http://www.michaelgeist.ca/2012/07/ceta-acta-column/>).

¹² Michael Geist, 'How Canada Shaped the Copyright Rules in the EU Trade Deal', personal blog entry, 21 August 2014 (<http://www.michaelgeist.ca/2014/08/canada-shaped-copyright-rules-eu-trade-deal/>).

→ Article 20.7 requires Canada and the EU to comply with four specific international IPR agreements, including the Berne Convention and WIPO Copyright Treaty, but both parties already do so voluntarily.

→ Article 20.8 ensures the protection of broadcast works, but falls short of earlier proposals to radically expand copyright protections for broadcasters. An exclusive right to broadcast in public places, for example, was dropped from the final text.

→ Article 20.9 requires the parties to provide '*adequate legal protection and effective legal remedies*' for technological protection measures (TPMs) that are applied to copyrighted materials. These '*digital locks*' have been criticized by Internet freedom advocates, but the CETA text does not go beyond existing rules in either Canada or the EU. The text also provides for flexibility in how Article 20.9 is applied.

→ Similarly, Article 20.10 requires the parties to provide '*adequate legal protection and effective legal remedies*' against the removal of rights management information (RMI). RMI is data attached to a work that identifies its rights holders and provides other legal information. Canada and the EU already protect RMI under their laws.

→ Article 20.11 ensures limited liability for '*intermediary service providers*', which mainly refers to Internet service providers, in the event of copyright infringement by users. The reversal here from earlier EU proposals is significant because limited liability for ISPs is crucial for Internet freedom. If an ISP can be held liable for a user's alleged copyright infringement, the ISP can be forced to identify that user to legal authorities or to censor offending content. The ISP is also at risk of litigation from copyright holders directly. Fortunately, CETA does not strip ISPs of their limited liability, which may have provoked increased surveillance of users and/or filtering of certain kinds of content.