Enforcing Intellectual Property beyond its limits via Bilateral Trade and Investment Agreements: A Threat to the Social Function of IP Law

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Where once delicate balances were needed and compromises hardly negotiated multilaterally within international organizations when elaborating IP rules, ensuring thus that flexibilities were preserved for states to regulate in order to preserve their local interests, the bilateral rulemaking process reflects more the result of power-games and intransparent compromises. For the European Union (EU), the dynamics of signing bilateral trade and investment agreements with third countries has been steadily going forward. Good recent examples are the controversial “Comprehensive Economic and Trade Agreement” (“CETA”) signed between Canada and the EU in 2016 or the Transatlantic Trade and Investment Partnership (“TTIP”) that has been negotiated between the EU and the United States starting 2013.

Both agreements contain provisions dedicated to intellectual property but their principal characteristic lies in the inclusion of IP rights in the list of investments protected by a specific section of these agreements. When implemented, the enforcement of this protection will be entrusted to arbitration tribunals or to a special court for the protection of investments that is yet to be set up. Hence the question arises whether the regulation of intellectual property by the European Union or one of its Member States, in a way that would affect the scope of the intellectual property rights held by certain large private companies, could be considered as a potential threat to their investments. If this was the case, proceedings could be brought against the EU or one of its Member States, leading to the risk of considerable limitations being imposed on legislators in the necessary implementation of a balanced and effective intellectual property law in Europe. Also, protecting intellectual property as an ‘investment’ according to international investment law risks undermining the flexibilities left to states by the international IP framework, leading to a change in the rationale of the IP system and to the enforcement of IP rights beyond their limits. This paper analyses these consequences and draws on the findings of the recently published “Research Handbook on Intellectual Property and Investment Law” edited by the author to propose solutions in order to safeguard the social function of the intellectual property system.