Intellectual property in the Transatlantic Trade and Investment Partnership

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The Transatlantic Trade and Investment Partnership (TTIP) aims to galvanise the limping economic recoveries on both sides of the Atlantic by stimulating trade and investment between two of the world's largest markets. And in highly developed economies, it goes without saying that a significant proportion of growth comes through innovation, to deliver a differentiated, if not unique, selling point for the products, services and business models firms rely upon to succeed. It follows that the protection of intellectual property (IP) must be core to any such strategy, giving companies the confidence that the advantages conferred by their innovations will remain exclusive to them rather than being rapidly adopted and exploited by competitors.

That, at least, is the conventional wisdom from one perspective, and it has worked well for many years. But it is equally important to recognise that without exception, every new technology or product launched today builds upon decades if not centuries of previous innovation, going back ultimately to the unknown inventor of the wheel.

Innovation of the kind we expect today is possible only because the riches of previous generations' work are freely available for all to improve upon. The law of intellectual property is not simply about maximising the protection for today's latest thing, although a variety of industry sectors are no doubt urging that upon the negotiators. It is about the rather more subtle task of finding and holding the right balance between different commercial interests: businesses up- and downstream, artists, designers and consumers.

The parties negotiating the TTIP already have some of the most sophisticated IP systems in the world. Political statements about ensuring the best protection for investment abound, but the reality is that while there are plenty of differences of detail, it would be very hard for any industry sector to argue that its interests are simply not given suitable protection in either the USA or the EU.

Rather, the question is whether this grand scale negotiation, in which the negotiators will trade off numerous bargaining chips in one arena to attain a priority objective somewhere else, can be used by any given interest group to adjust the balance struck on one side of the ocean to reflect a balance, more advantageous to its interests, already accepted on the other. In pharmaceuticals, biotechnology, film, music, software, food and drink, there are differences of approach between the parties' laws which are bound to be the target of extensive lobbying.

The US government has long been an effective advocate for its industries' preferred IP standards, which as a result are incorporated in numerous bilateral investment treaties with countries around the world. If the draft IP chapter of the TransPacific Partnership disclosed by Wikileaks is accurate, it is continuing to do so in its discussions with the diverse group of countries participating in that negotiation. Although IP is known to be one strand under discussion in the TTIP, the draft chapter on IP remains secret so informed commentary is not yet possible. But it would be a fairly safe bet to assume that US norms have been proposed for the TTIP as well.

But what would the draft look like if European industry had carriage of it?

One of the most important factors which has given rise to the notorious tribe of so-called 'patent trolls' is the unique nature of the US system for litigation of patent disputes. Three particular aspects could usefully be harmonised in favour of a more European approach: trial by jury, discovery of documents, and the trebling of damages where an infringement is found to be 'wilful'.

The cumulative effect of these is to give a patent troll a potential windfall in damages far exceeding any rational measure of loss, through a litigation process that is massively expensive – discovery can involve millions of documents – and highly unpredictable, since the jury which ultimately decides is very unlikely to include any single person who really understands the technology in question.

As a result, there is a strong incentive for small and medium sized companies to settle even very weak claims, giving the patentee a 'war chest' with which to take on progressively larger targets. The jury system is not used in patent disputes in any other developed country, and results in a high rate of decisions being overturned on appeal, making the process of reaching a final conclusion yet more protracted. EU and all non-US companies would be glad to see the back of all of these – although notably it does appear that in the Trans-Pacific Partnership the US is instead aiming to roll out at least the treble damages principle more widely.

Another almost unique feature of the US IP system is the requirement for copyright to be registered at the Copyright Office before it can be enforced. This position is a retreat from America's former arrangement, under which copyright had to be registered in order to subsist at all, but still leaves EU companies under a burden when it comes to exploiting their copyright works in the USA which they do not face in their own countries, or most of the rest of the world.

Strange as it may seem in view of its current status as the *World's Policeman* on matters of audiovisual copyright, the USA was in fact a very late convert to the Berne Convention, the principal international copyright treaty, signing up only in 1988 and adjusting its laws to the minimum extent necessary to comply. Although sophisticated companies rapidly learn from necessity to negotiate the pitfalls of IP protection in the markets in which they operate, small and medium sized companies doing business only intermittently in the USA do not need additional obstacles of this nature placed in their paths.

The protection of the European heritage of fine foods and wines should also be on the agenda. Distinctive products such as wines, hams and cheeses are protected in the EU because of their association with a particular geographical origin – Champagne, Parma and Wensleydale spring to mind – and producers not located in the appropriate place and using the appropriate production technique are prohibited from describing their products by those names.

The US system, by contrast, permits place names to be registered as trademarks independently of the origin of the product, method of production or location of the producer, so that a quite different set of rules applies as to what products can be marketed under the name. Although a deal was done in 2006 to reinstate some protection for European wines, it was substantially vitiated by a 'grandfather' clause which permitted US winemakers to continue to use descriptions which they were already using – so California Champagne and many others continue to be sold. Repeating the pattern which eventually led the US to sign up to the Berne rules of copyright, however, parts of the US wine industry have started to realise that strong protection for a high quality, geographically located product – Napa wines, for instance – is valuable to prevent the quality reputation of all producers being undermined by lower quality products being sold under the same name. Maybe the time is ripe for re-asserting the European tradition.

Each of the issues identified here is capable of provoking heated debate among the businesses affected and their advisers. But the most important point remains that made at the beginning: these are all varnishes on an already fit-for-purpose system of IP protection. Of course businesses push hard for small changes which will make their lives marginally easier and their profits marginally greater. But the need for change should be carefully balanced against the disruption caused to a working system by tinkering, and perhaps inadvertently tilting the playing field to the disadvantage of another group of market participants, whose voices may not have reached the negotiators' ears.

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There will, however, be a number of areas where IP-rich industries from both continents can agree. The software, publishing and audiovisual sectors all suffer from online piracy which is complex and difficult to stamp out, and ramping up the legal penalties or changing the division of responsibility between internet service providers and their subscribers may be seen as a way to address it.

The difficulty is that although there are copyright pirates in every jurisdiction, the global nature of the internet means that no amount of deterrence in the EU or USA is going to solve the problem: the servers are simply relocated to Russia or other jurisdictions where enforcement, whatever the laws may say, remains a challenge. The negotiators are unlikely to achieve a substantial improvement in protection by agreeing higher standards, while the legitimate businesses which underpin the operation of the internet are already bearing a significant responsibility for policing rights from which they themselves profit little.

As Graham Smith, author of *Internet Law and Regulation*, has pointed out, *"With each new round of regulation aimed at preventing wrongdoing, the greater the temptation to rectify the failure of the previous round by throwing a wider regulatory net over non-culpable actors engaged in general purpose activities. Site blocking injunctions against online intermediaries is an obvious example. Co-option of payment processors, advertising networks, domain name registrars and search engines is another."* Negotiation should be cautious however loudly the film and music industries may shout: – in such a complex area, the governing law is that of unintended consequences.

More usefully, attention could be paid to the law of trade secrecy which is frankly unsatisfactory on both sides of the Atlantic. In the USA, protection of confidential information is a matter of the law of the individual states, and varies significantly between them – and the same is true in the EU. In 2013 the European Commission began the process of consultation on a draft Directive aimed at improving and harmonising the protection for valuable, secret information between member states. The negotiators should seize this rare opportunity to harmonise this commercially important area of law with an important trading partner at the same time.

The topic of confidentiality of one category of information is certainly on the table already: that of clinical data produced for the approval of drugs and agrochemicals by the regulators. In the EU, companies get at least 10 years'

exclusivity over their data; in the US, where biological products are concerned, it is 12. A suggestion to increase the EU limit is bound to be made – but as with so many areas of IP, this again concerns a balancing of interests. Once the data loses its exclusivity, then other manufacturers can cross-refer to it in their applications for approval, reducing the need to duplicate clinical trials and, of course, speeding up the market entry of competing products, to the benefit of patients and healthcare payers. A decade is a long period in healthcare, and where biological medicines are concerned the 'second entrant' is never a mere copycat since no two biological molecules are identical.

Increasing the term of data protection adds a further cost and delay to the development of effective – sometimes improved – variants on an original molecule without necessarily increasing the rate of innovation and improvement elsewhere. The EU led the world in introducing a path to market for these so-called biosimilars, and European universities and companies contribute valuable research and development skills to this industry sector. A levelling of the period of exclusivity in the USA to 10 years would benefit both patients and payers, on both sides.

Finally, the negotiators should definitely agree to avoid the troubled question of what software can be patented. The law in the USA is in disarray – the Court of Appeals for the Federal Circuit found itself completely at sea when asked to rule on the question in 2013 – and the EU has long ago given up trying to legislate a solution. For the moment, a case-by-case approach seems to be the best that can be achieved – and with so many more tractable questions to occupy them, it is best for the TTIP team to leave it that way. ■