Acquis communautaire+
The Copyright Aspects of the EU's Free Trade Agreements

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„[T]he move towards bilateralism must have implication for the multilateral system as the bilateral agreements come to contain stipulations that reflect the domestic standards of the hyperpower".[2]

I. Development of free trade agreements in Europe

National economies have historically tried to guarantee a safe and predictable internal trade order. Border impediments (customs, duties, tariffs, special taxes, quantitative restrictions, quotas etc.) and other border measures that aimed to protect the national markets against foreign goods, services, workers, investments etc. have also had an important role in maintaining the favourable balance of trade and the promotion of the domestic manufacturing. The idea of free trade has already appeared in the 18th century Europe.[3] Finally, in the 20th century, regional economical collaborations as well as globalisation made closed national economies and the imperial rivalries unfeasible. The goal of the regional trading blocs was not the defence of national interest anymore. States have understood how significant and yet untapped potentials exist in the harmonization of the national trade politics, and thus in the access to large unified markets. The creation of multilateral common rules has therefore become a leading motive of regional economic collaborations. On the one hand, these rules made members of the club equal, and – to refer to the European Economic Community's terminology – also allowed for the free movement of goods, services, workers and capital within the community. On the other hand, these rules allowed for the unified actions against those who are not members of the collaborative clubs. Regional trading blocs, like the European Economic Community (EEC), NAFTA, Mercosur, CARICOM, APEC or COMESA, have come into existence mainly for these reasons.

It is self-evident that not everybody can be a part of a given economic collaboration, even if all nations would be happy to be bound by the common rules. The geographic location of a country is such a significant limitation. In theory, a tariff union would be possible between the European Union (EU) and Australia, but it would be hard to guarantee its proper functioning. Nonetheless, geographical locations cannot fully limit the countries in finding the proper ways of collaboration. Consequently, the EU and Australia intends to conclude a free trade agreement that would eliminate tariffs and other technical and administrative limitations against each other, harmonize the definition of services, strengthen services and investments, and protect foreign direct investments.[4] Although this type of agreement is less robust than a customs union, but it seems to be robust enough to meet the economic interests of both the EU and Australia.

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[2] Sam Rickeston - Jane Ginsburg: *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, Volume I., Oxford University Press, New York 2006: para. 4.55.

[3] On the evolution of international trade theory and the institutional history of international trade see Michael J. Trebilcock - Robert Howse: *The Regulation of International Trade*, Second Edition, Routledge, London & New York, 1999: p. 1-24.

[4] Compare to http://ec.europa.eu/trade/policy/countries-and-regions/countries/australia/. (Last visit to all internet sites: September 30, 2018.)

The acceptance and the future success of any trade agreement depend solely on whether the contracting parties can sign a mutually acceptable deal. From a European perspective, such fundamental examples are the trade with dairy products and automotive products. Eurostat's statistics indicate that in 2017 the EU has imported only 292 million € of food (excluding fish) from Japan, but exported 5.921 million € to Japan. The export of automotive products to Japan reached 9.982 million €, and imports totalled 14.038 million €.[5] These numbers indicate that the EU exports of food (including dairy products) massively surpass imports, and the import of Japanese automotive products has the most significant value within the category of machinery and transport equipment. Looking at the same categories of goods, statistics of 2017 indicate totally different trends with respect to Canada. The EU has imported 2.107 million € of food (excluding fish) from Canada, and exported 3.288 million € to Canada. The export of automotive products to Canada reached 5.089 million €, but imports totalled only 628 million €.[6]

Based on these figures, as a part of the economic partnership agreement with Japan, the EU understandably aimed to reach the elimination of e.g. the 30% tariffs applied by Japan against European cheese products.[7] At the same time, the EU agreed to lessen its tariffs on the Japanese car imports. Similarly, the CETA, concluded by the EU and Canada, almost failed on the protest of the Walloon dairy producers, who tried to defeat the agreement by an aggressive referendum as they believed that CETA is detrimental to their businesses. However, the Walloon referendum did not represent the overall economic interests of the EU properly. As indicated by the journalists of the New York Times,

> *"[t]he Wallonia region of Belgium is home to 3.5 million of the country's 11.2 million people. Yet in single-handedly blocking a trade deal produced over seven years between the European Union and Canada, it effectively determined the terms of commerce applying for 500 million Europeans. The Walloons did not relish the idea of having to compete against imported dairy products from Canada. Britain makes cars, medical devices and sophisticated parts for airplanes. It is a global leader in financial services. Somewhere in the European Union must surely lurk some other Wallonia that will seize the opportunity to slap tariffs on British goods even at the cost of broader economic interests."*[8]

In sum, Jean-Claude Juncker's and Abe Shinzo's common statement perfectly mirrors why free trade agreements are generally important and useful, even if they can hinder some economic sectors on all sides:

> *"[a]mid widening protectionist movements, the finalisation of the negotiations on the EU-Japan EPA demonstrates to the world the firm political will of Japan and the EU to keep the flag of free trade waving high and powerfully advance free trade. (...) This EPA will create a huge economic zone with 600 million people and approximately 30 percent of the world GDP, and it will open up tremendous trade and investment opportunities and will*

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[5] European Union, Trade in goods with Japan 2017, p. 4. (http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113403.pdf).

[6] European Union, Trade in goods with Canada 2017, p. 4. (http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113363.pdf).

[7] Hiroki Tabuchi - Jack Ewing: Europe and Japan Near Trade Deal as U.S. Takes Protectionist Path, *The New York Times*, June 23, 2017 (https://www.nytimes.com/2017/06/23/business/europe-japan-trade-deal.html).

[8] Peter S. Goodman - James Kanter: With Europe-Canada Deal Near Collapse, Globalization's Latest Chapter Is History, *The New York Times*, October 21, 2016 (https://www.nytimes.com/2016/10/22/business/international/european-union-canada-trade-agreement-ceta.html).

contribute to strengthening our economies and societies. It will also strengthen economic cooperation between Japan and the EU and reinforce our competitiveness as mature yet innovative economies. We are confident that, once in place, this Agreement will deliver sustainable and inclusive economic growth and spur job creation, while at the same time confirming our commitment to the highest level of labour, safety, environmental and consumer protection standards and fully safeguarding public services."[9]

In order to secure the best available deal with its negotiating partners, the EU has signed various types of trade agreements. Some of these agreements are so-called free trade agreements. They often include chapters related to intellectual property law, including copyright law. The backbone of these rules is undoubtedly the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This is mainly due to the fact that the most important trade agreement related to intellectual property law combined (almost) all pre-existing international minimum standards of copyright law,[10] and it also introduced an international mechanism for the settlement of disputes.[11] The TRIPS Agreement is a part of the WTO law. The 162 Member States, as well as any future member, shall comply with these rules. Consequently, any new bilateral free trade agreement can only be signed as a TRIPS+ agreement.[12] That is, the new agreement is based on the TRIPS Agreement, however, it either complements the existing standards with stricter rules, or it eliminates the existing flexibilities.[13] In both cases, the new free trade agreement would introduce a higher level of protection for the benefit of copyright holders.

II. The free trade agreements of the EU

The EU has a strong affect on the regional and the world trade by its economic rules, the Customs Union and the four freedoms. This is partially due to the fact that it aims to disseminate its standards on a global scale, in order to guarantee strong protection for its nationals (including copyright holders) in third countries. The EU has developed three main types of trade agreements to reach this goal. The first type is the *customs union*. It aims to eliminate customs duties in trade, as well as to establish joint customs tariffs for imports. The second group of agreements include *association agreements, stabilisation agreements, (deep and comprehensive) free trade agreements and economic partnership agreements*. They all intend to remove or reduce customs tariffs in bilateral trade. Finally, *partnership and*

[9] Joint Statement by the President of the European Commission Jean-Claude Juncker and the Prime Minister of Japan Shinzo Abe, Brussels, 8 December 2017, STATEMENT/17/5182 (http://europa.eu/rapid/press-release_STATEMENT-17-5182_hu.htm).

[10] TRIPS, Art. 9-14.

[11] Ibid., Art. 63-64. The TRIPS refers back to the general rules of GATT on dispute resolution.

[12] Anke Moerland: Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU, *IIC - International Review of Intellectual Property and Competition Law*, No. 7/2017, p. 763.

[13] Daniel Acquah: Extending the Limits of Protection of Pharmaceutical Patents and Data Outside the EU – Is There a Need to Rebalance?, *IIC - International Review of Intellectual Property and Competition Law*, No. 3/2014, p. 267.; Marco M. Aleman: *Impact of TRIPS-Plus Obligations in Economic Partnership- and Free Trade Agreements on International IP Law*. In: Josef Drexl - Henning Grosse Ruse-Khan - Souheir Nadde-Phlix (Ed.): *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?*, MPI Studies on Intellectual Property and Competition Law 20, Springer, Berlin-Heidelberg, 2014: p. 62-63. Another expression is present in legal literature. "TRIPS-extra" means that countries include provisions in free trade agreements that were not regulated by TRIPS Agreement. See ibid. at p. 63. On "multilateral-plus" and "multilateral-extra" see further Peter K. Yu: Sinic Trade Agreements, *U.C. Davis Law Review*, Vol. 44, No. 3., 2011: p. 969-970.

cooperation agreements provide "only" a general framework for bilateral economic relations, while they leave customs tariffs unaffected.[14]

The EU applies these various types of agreements partially in accordance with the geographic location of its partners. As the customs union can provide the most liberal trade for nationals and corporations of the contracting countries, the EU has rarely concluded such agreements. At the same time, the two other types of agreements have been used by the EU multiple times recently.

Intellectual property norms are mainly available in deep and comprehensive free trade agreements and economic partnership agreements. Anke Moerland noted that the agreements that the EU concluded before 2006 included only a handsome of intellectual property sections. On the contrary, the ones concluded after 2006 include approximately 33 articles on intellectual property law. This sharp change is partially due to the European Commission's "Global Europe" strategy of 2006, where the Commission declared its wish to raise the competitiveness of the EU.[15] The willingness to regulate intellectual property law through trade agreements, as well as the emergence of the new generation free trade agreements – that make bilateralism, rather than multilateralism, the rule – is also due to the failure of the Doha Round of WTO negotiations to further trade liberalization.[16]

The inclusion of intellectual property, including copyright norms into the EU's free trade agreements fits perfectly into the global standards. As the research paper of WTO's Economic Research and Statistics Division indicated, 71% (174 out of 245) of the still effective agreements submitted to the WTO until 2014 include provisions on intellectual property law. An even higher number, 80%, of the agreements submitted to the WTO after 2000 include such norms.[17] The presence of intellectual property norms in such new-generation free trade agreements is undoubtedly due to the fact that intellectual creations (e.g. works, inventions, trademarked goods etc.) are key elements of the new global economy. Rita Matulionyte noted that

> *"[o]ne of the areas where creative industries may need government support in promoting trade in creative goods and services are strong and effective intellectual property laws, including copyright. Strong IP rights have been seen by the European Commission as instrumental in ensuring remuneration for actors who participated in the creative process and who invested money into it. The EU is thus keen that its trade partners maintain high copyright protection and enforcement standards."*[18]

[14] The full list of the EU's trade agreements is available via http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/.
[15] Moerland: supra note 12 at p. 762-763.
[16] Yu: supra note 13 at p. 961-962.; Csongor István Nagy: Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty. In: *Czech Yearbook of International Law*, Vol. IX, 2018: p. 199., para. 8.05.; Ruth L. Okediji: *Creative Markets and Copyright in the Fourth Industrial Era: Reconfiguring the Public Benefit for a Digital Trade Economy*, ICTSD Issue Paper No. 43., Geneva, 2018: p. 2.
[17] Raymundo Valdés - Maegan McCann: *Intellectual property provisions in regional trade agreements: Revision and update*, WTO Staff Working Paper, No. ERSD-2014-14, 2014: p. 21. (https://www.econstor.eu/bitstream/10419/104752/1/797426418.pdf)
[18] Rita Matulionyte: Future EU-Australia FTA and copyright: what could we expect in the IP chapter?', *Kluwer Copyright Blog*, August 2 2018, p. 2. (http://copyrightblog.kluweriplaw.com/2018/08/02/future-eu-australia-fta-copyrightexpect-ip-chapter/).

And the EU is certainly a strong advocate for intellectual property law, as statistics have for long confirmed the importance of this sector for the European Economy. A 2016 report noted that

> *"[i]n the European Union (EU 28), in 2013, Cultural and Creative industries (CCIs) (excluding high-end industries) constituted 11.2 % of all private enterprises and 7.5 % of all persons employed in the total economy. In terms of value added, core CCIs and the fashion industry generate 5.3 % of the total European GVA."*[19]

As Csongor István Nagy has warned us, however,

> *"[t]he share of free trade in the global economy is becoming paramount and the emerging new-generation free trade agreements not merely abolish tariffs and quotas (as old-fashioned agreements did) but effectively open up national regulatory sovereignty to international governance, re-shaping regulatory autonomy, internationalizing national competences and, according to some, raising serious questions of democratic legitimacy. New-generation free trade agreements cover the whole spectrum of items (goods, services, technology, capital etc.), ambitiously, address not only traditional barriers to trade (such as tariffs and quantitative restrictions), but also, in a comprehensive manner, all trade restrictions and state acts (e.g. regulatory disparities, public procurement, certain fundamental rights issues)."*[20]

Likewise, Peter K. Yu noted that "[i]f the agreements are motivated by trade liberalization and are complementary to multilateral reforms, they will help achieve what developed countries cannot through traditional bargaining in the WTO or other international bodies".[21]

The research paper of the Max Planck Institute on Innovation and Competition also confirmed that such a broad application of intellectual property law norms does not generally aim to provide a high(er) level of protection for rights holders. To the contrary, they contribute to the conclusion of more robust and comprehensive free trade agreements that include intellectual property norm *as well*. As the report stated,

> *"[s]ince the early 1990s, the world has witnessed an unprecedented inclusion of IP provisions in trade and other agreements that are outside the traditional domain of international IP law. Those agreements cover a wide range of issues and allow for deals in which IP provisions are agreed in exchange for trade preferences and other advantages. On both sides, these deals are driven by export interests and other objectives external to the IP system rather than the common goal to achieve a mutually advantageous, balanced regulation of IP among the parties. While these agreements may pursue an overall balance of concessions, they usually do not lead to international IP rules that address the interests of all countries affected."*[22]

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[19] *Boosting the competitiveness of cultural and creative industries for growth and jobs*, Final Report, EASME/COSME/2015/003, 2016: p. 28. (Footnotes omitted).
[20] Nagy: supra note 16 at p. 198, para. 8.03.
[21] Yu: supra note 13 at. p. 967.
[22] Max Planck Institute on Innovation and Competition: *Principles for intellectual property provisions in bilateral and regional agreements*, 2013: p. 1., Part One, I.1. (http://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/06_principles_for_intellectua/principles_for_ip_provisions_in_bilateral_and_regional_agreements_final1.pdf).

In other words, intellectual property law is a part of the bargain, a small weight on the scale, where the ultimate goal is to reach an effective "*package deal*".[23]

III. Two lessons of EU's free trade agreements and copyright law

1. Contingent and adaptive refining of the agreements

The first lesson we have learned so far is that the negotiations of the new-generation free-trade agreements and the acceptance of the original plans were "successful to varying degrees".[24] To put it differently, the final content of the agreements heavily reflected the rapid domestic and international changes in the copyright ecosystem. As Rita Matulionyte noted, the original draft of CETA mirrored the accepted text of ACTA (Anti-Counterfeiting Trade Agreement). However, following the rejection of ACTA by the European Parliament in July 2012,[25] and the acceptance of the Canadian Copyright Modernization Act of 2012,[26] the negotiations of CETA took a visibly different path.[27] Similarly, the EU gave up some of its proposals during the negotiations of the EU-Korea free trade agreement (e.g. remuneration for performers and phonogram producers for the public performance of the phonograms; rules on *droit de suite*).[28]

There are other notable international examples for the purposeful reliance on Realpolitik in international trade and IP negotiations. Ruth L. Okediji correctly opined that "the shroud of secrecy enveloping both ACTA and TPP [Trans-Pacific Partnership Agreement] generated a significant political backlash".[29] The massive public resistance of European citizens against ACTA has undoubtedly led to its rejection.[30] The President of the United States of America also stepped back from the TPP on 23 January 2017 (although for purely political, rather than intellectual property related reasons). During the same year, the remaining 11 negotiating countries have concluded the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 11 November 2017. They dropped some norms (e.g. on the term of protection, technological protection measures, rights management information and legal remedies and safe harbours) from CPTPP that were proposed by the USA during the original negotiations.[31]

Further, the mere fact that an international agreement has been accepted by the legislative organs of the EU does not necessarily mean that all Member States agree with all elements of these agreements. Such a notable example is the request for an opinion of the CJEU submitted

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[23] Xavier Seuba: The Relevance of the Principles for Intellectual Property Provisions in Bilateral and Regional Agreements vis-à-vis European Preferential Trade Agreements, *IIC - International Review of Intellectual Property and Competition Law*, No. 8/2013, p. 944-945.; Pedro Roffe: *Intellectual Property Chapters in Free Trade Agreements: Their Significance and Systemic Implications*. In: Drexl et al., supra note 13 at p. 23.
[24] Matulionyte: supra note 18 at p. 3.
[25] *European Parliament rejects ACTA*, Press Releases, 04-07-2012 (http://www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta).
[26] Copyright Modernization Act, S.C. 2012, c. 20.
[27] Matulionyte: supra note 18 at p. 2-3.
[28] Ibid. at p. 2.
[29] Okediji, supra note 16 at p. 11.
[30] Christophe Geiger: Weakening Multilateralism in Intellectual Property Lawmaking: A European Perspective on ACTA, *WIPO Journal*, Issue 2/2012, p. 166.
[31] Pratyush Nath Upreti: From TPP to CPTPP: why intellectual property matters, *Journal of Intellectual Property Law and Practice*, No. 2/2018: p. 100.

by the Kingdom of Belgium.[32] By this request, Belgium seeks guidance from the CJEU, whether the CETA is compatible with the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law; whether the general principle of equal treatment and the requirement that EU law is effective applies also to CETA; and whether Section F of Chapter 8 of the CETA (on the resolution of investment disputes between investors and states, in fact, the Investor Court System) is compatible with the right of access to an independent and impartial tribunal.[33] On January 29, 2019, Advocate General Yves Bot recommended to the CJEU that it should provide an answer to the affirmative in all raised questions.[34] But even if the CJEU will do so, the mere fact that the Kingdom of Belgium might be willing to halt the entry into force of the CETA shows how deep differences do exist among the Member States' views on the new generation free trade agreements.

In sum, the final texts of the free trade agreements are constantly affected by the domestic and international politics, as well as the economic interests of and the social reactions in the contracting parties. And this also leads to the fact that the EU adaptively refines its legislative plans when concluding the ever latest free trade agreement.[35] That is, the EU aims to include an ever greater part of its *acquis communautaire* into its trade agreements, but only as long as the European or its trading partners' political, economic and social circumstances allows for that.

This is clearly visible when we take a look at the four new generation free trade agreements of the EU. The *EC-CARIFORUM Economic Partnership Agreement* includes almost no substantive copyright norms; indeed, it is focuses mainly on the transplantation of the EU's enforcement *acquis*.[36] This is partially due to the high number of contracting parties (15 out of the 16 CARIFORUM members, with the sole exception of Cuba, have signed the agreement), and the fact that these countries have significantly different copyright regimes. Many of them have not joined the most important multilateral intellectual property (and copyright) treaties. Consequently, finding the proper starting point of the negotiations looked particularly hard. This also reasons why the e-commerce *acquis*[37] did not either appear in the agreement.

The *EU-Korea FTA* includes a great number of substantive norms. South Korea did not join all relevant international copyright treaties by that time. Nonetheless, the level of copyright protection in the Asian country was much closer to the *acquis communautaire*. South Korea was also well aware of the positive effects of a strong intellectual property protection on the overall Korean economy. In sum, the negotiating parties included more substantive norms in the FTA, which have ripened since then. South Korea has signed various international treaties, it has launched the policy objective of creative economy in 2013, the *post mortem*

[32] Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17).
[33] See Christina Eckes: Don't Lead with Your Chin! If Member States continue with the ratification of CETA, they violate European Union law, *European Law Blog*, March 13, 2018 (https://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law/). The CJEU did not publish its opinion until the end of 2018.
[34] Opinion 1/17 - Request for an opinion by the Kingdom of Belgium, Opinion of Advocate General Bot, January 29, 2019, ECLI:EU:C:2019:72.
[35] This question has already been discussed by legal literature in great details with respect to industrial property law. See Roffe: supra note 23 at pp. 21., 24. and 29.; Moerland: supra note 12 at p. 764.
[36] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
[37] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

auctoris 70 years copyright term was introduced, and the Presidential Council on Intellectual Property was also established.[38]

The *CETA* includes only a few substantive copyright and e-commerce norms,[39] and focuses more on law enforcement.[40] This backtrack is due to the high level of copyright protection in Canada. Nevertheless, the Canadian Government has successfully resisted the EU's push to increase the term of protection to *post mortem auctoris* 70 years.[41]

The *EU-Japanese EPA* shows another minor backtrack from the adaptive refining model. As Japan has joined the vast majority of the leading international copyright treaties and agreements, the EU-Japan economic partnership agreement includes only a handsome of substantive norms. Similarly, the law enforcement measures, procedures and remedies of the agreement are expressly "complementary" to those of the TRIPS Agreement.[42] These rules are similar to the Enforcement Directive, although rules are only selectively transplanted (see below in paragraph 2). The substantive norms are much more limited compared to the *acquis communautaire*. Only the rights holders, their economic rights, the term of protection, and the three-step test are included into the text.[43] Even these rules are limited in scope, especially related to the term of protection. Namely, performers are not granted a general 70 years term,[44] and the revival of copyrights is also expressly excluded.[45] Some soft law provisions are also included in the agreement, which actually reduce the obligations of the parties. Namely, parties agreed to "continue discussion" on the use of phonograms, to "exchange views and information" on the resale royalty right, and they "recognise[d] the importance" of, agreed "to promote" and "endeavour to facilitate" issues related to collective rights management.[46]

2. Asymmetric rules

Such backtrack in the EU-Japan EPA, similarly to the limited scope of CETA is due to another feature, namely, the symmetry of contracting parties. More precisely, the EU is ready to adapt its trade agreements to the level of development of its contracting parties. And where the EU agrees with a country with a developed economy, intellectual property rules are much less regulated. *Vice versa*, the intellectual property chapters of the trade agreements between

[38] Civic Consulting and the Ifo Institute: *Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea Interim Technical Report Part 1: Synthesis Report*, June 2017: p. 159.
[39] The CETA regulates the broadcasting and communication to the public right (Article 20.8), the protection of technological measures (Article 20.9) and rights management information (Article 20.10), safe harbours for internet service providers (Article 20.11) and the prohibition of camcording (Article 20.12).
[40] Article 20.32 to 20.42 mirror the Enforcement Directive's provisions.
[41] Roffe: supra note 23 at p. 25-26. Although the negotiations over the amendment/replacement of NAFTA is not a part of our discussion, it is worth to note that the publicly available text of the newly accepted trilateral USMCA (United States-Mexico-Canada Agreement) intends to introduce an obligatory *post mortem auctoris* 70 years term of protection. See United States-Mexico-Canada Agreement Text, 20.H.7(a). (https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-states-mexico)
[42] EU-Japan EPA, Article 14.40.1.
[43] Article 14.8-14.11, 14.13 and 14.14 respectively.
[44] Compare Article 14.13.2 to Article 3(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).
[45] Article 14.17.2.
[46] Article 14.12, 14.15 and 14.16 respectively.

the EU and developing nations tend to be more detailed and require the adoption of EU's stronger or higher level of protection.[47]

As Yu noted,

"*[w]hen the negotiating partners have equal bargaining strength, the goal of these agreements is to harmonize laws, policies, and standards of, or foster common policy positions among, the participating countries. (...) When the negotiating partners have unequal bargaining strength, such as in North-South FTAs and EPAs involving developed and less-developed countries, the goal of the agreements is to provide the needed »carrots and sticks« to induce less-powerful countries to change their laws, policies, and standards. Oftentimes, the agreements will lead to transplants from developed countries.*"[48]

Such asymmetry is visible in multiple ways.

First, as indicated above, the EU contingently and adaptively refines its trade agreements to the certain political, economic and social circumstances and the level intellectual property norms of its trading partner. Thus, the agreements might include (and require the implementation of) broader substantive norms or stronger law enforcement, but the exact contents of the agreements vary case-by-case.[49]

Second, the EU's agreements require the ratification of or accession to international treaties/agreements that the EU has long adhered to. Consequently, such requirements do not pose any extra obligation on the EU but only the other parties.

Third, the EU has only selectively transplanted its law enforcement provisions into its trade agreements. Namely, the strong enforcement measures are included almost verbatim in the texts, but the checks and balances are almost always left out from the agreements or only a conditional use of them is required. This is especially true with respect to the measures for preserving evidence, right of information and the provisional measures.[50] It is equally interesting how the EU-Korea FTA has eliminated[51] the optional rule of TRIPS Agreement that does not oblige member states to provide for an injunction against innocent or good-faith infringers.[52] Similarly, competition law related limitations are similarly missing from the agreements.[53] All these instances represent a clear TRIPS+ or – as the EU's law enforcement regime is even broader than that of the TRIPS Agreement – *acquis communautaire*+ logic. Occasionally the trade agreements miss to regulate unique European copyright norms. To use another example, although the EC-CARIFORUM EPA and the EU-Korea FTA included some rules on the copyright protection of databases,[54] the *sui generis* protection of database

[47] Xavier Seuba: *Implementation Issues Arising from Intellectual Property Chapters Contained in Trade Agreements Between the EU and Developing Countries*. In: Drexl: supra note 13 at p. 294.; Matulionyte: supra note 18 at p. 3.
[48] Yu: supra note 13 at pp. 963-964. and 966.
[49] Roffe: supra note 23 at p. 23-24.; Thomas Jaeger: *IP Enforcement Provisions in EU Economic Partnership Agreements*. In: Drexl et al., supra note 13 at p. 192.; Josef Drexl: *Intellectual Property and Implementation of Recent Bilateral Trade Agreements in the EU*. In: ibid. at p. 267.; Moerland: supra note 12 at p. 765.
[50] Jaeger: supra note 49 at p. 194-198.; Seuba: supra note 47 at p. 299-302.
[51] EU-Korea FTA, Article 10.48.
[52] "Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right." See: TRIPS Article 44(1) second sentence.
[53] Seuba: supra note 47 at p. 945.
[54] See EC-CARIFORUM EPA, Article 139(3); EU-Korea FTA, Article 10.2.2(a).

producers is missing from these (and all the four) agreements.[55] This might be explained by one of the two following arguments. It is possible that the contracting parties were reluctant to transplant such broad level of protection for the producers of databases. Alternatively, it is also possible that the EU was dread by the consequences of such regulation. Namely, the *sui generis* protection of database producers currently applies only to EU nationals. Should any trade agreement grant the *sui generis* protection to the nationals of the given contracting party (parties), the EU would be obliged to extend the protection *erga omnes*, that is, to nationals of all TRIPS signatories under the most-favoured-nation treatment principle. It is easy to imagine why the EU is not ready to do so. Such logic is similarly mirrored by the mere lack of regulating exhaustion by the agreements. In fact, the regional exhaustion doctrine, accepted by the EU in all fields of intellectual property law, will not be expanded to an international exhaustion regime, even though the fully free flow of goods (including copyrighted expressions or patents/trademarks etc.) could trigger more extensive global trade.

Finally, the limited (or no) transplantation of copyright limitations and exceptions (L&Es) similarly mirrors a TRIPS+ or *acquis communautaire*+ logic. Thus, on the one hand, the partners of the EU are not required to provide for the same L&Es in their domestic regulations, but, on the other hand, all L&Es shall comply with the three-step test.[56] More precisely, such construction of the agreements mean that less-powerful countries are required to give up (some) flexibilities built into the international copyright norms.[57] This construction can lead to a situation where the nationals of the contracting parties have less L&Es, and so the European rights holders are protected stronger in the contracting states.[58] Indeed, in compliance with the most-favoured-nation treatment principle[59] EU's contracting partners are obliged to automatically and unconditionally guarantee the broader protection to the nationals of all other parties to the TRIPS Agreement.[60]

IV. Concluding remarks

The above analysis introduced how widely – contingently, adaptively and asymmetric – the EU tries to transplant its norms into its trade agreements. Due to the dangers posed by this TRIPS+ or *acquis communautaire*+ logic the Max Planck Institute on Innovation and Competition has summarized the issues that third countries willing to negotiate with the EU shall cautiously take into consideration.[61]

Peter K. Yu has earlier introduced six fears related to the acceptance of ACTA.[62] Although the EU's new generation trade agreements and ACTA are quite different in their scope and purpose, they also share some similarities, especially the TRIPS+ treatment of law enforcement. At least two of these fears can have direct relevance with respect to the trade agreements of the EU as well. Namely, as ACTA, the FTAs will lock in some of the legal standards of the existing intellectual property regime. These lock-ins privilege existing

[55] Drexl: supra note 49 at p. 271.
[56] Such obligation exists under several multilateral treaties, and two of the bilateral trade agreements. See the EU-Korea FTA, Article 10.11 and EU-Japan EPA, Article 14.14.
[57] Yu: supra note 13 at. 982.
[58] Roffe: supra note 23 at p. 26.; Moerland: supra note 12 at p. 765-766.
[59] TRIPS Agreement, Article 4 first sentence. Indeed, the most-favoured-nation treatment is explicitly mentioned in the EU-Japan EPA, Article 14.5.
[60] Roffe: supra note 23 at p. 26.
[61] Max Planck Institute: supra note 22 at p. 1-4.
[62] Peter K. Yu: Six Secret (and Now Open) Fears of ACTA, *SMU Law Review*, 2011: p. 975-1094.

business models and may "harm small and mid-sized enterprises and innovative start-ups".[63] Second, the lock-ins may also foreclose the European legislation to revise the copyright laws in the future. More precisely, legislation can always raise the level of protection, but in light of the trade agreements, and certainly only in the fields regulated by these agreements, it can not lower the level of copyright protection.[64] Such a notable example is the term of protection. The issue of limitations and exceptions is a much relevant example here. Although the currently negotiated copyright reform proposal under the Digital Single Market Strategy[65] includes some new L&Es, the EU cautiously refrained from discussing L&Es in details in the trade agreements.

Further, the new generation free trade agreements may also pose some implementation duties on the EU as well. Some provisions, like the criminal measures against wilful and commercial scale criminal infringements,[66] or the obligation to introduce criminal procedures and penalties for camcording[67] do not form a part of the harmonized EU law. Any failure to implement these rules by the EU may lead to a breach of the agreement. Some have argued that the inclusion of the above criminal law provisions were not accidental. Although many Member States have resisted against the direct harmonization of criminal law, the indirect unification through "backdoor lawmaking"[68] may be reached through the FTAs in Europe.[69]

What can we expect from the ongoing negotiations on the trade agreements with Australia, Mexico, New Zealand, Singapore and the Mercosur states? These agreements aim to contribute to the strengthening of trade between EU and the partner countries/regions. This can be reached through reducing existing barriers of trade in goods and services, growing competition of corporations, increasing investments, promoting sustainable development in trade. These purposes are generally unrelated to intellectual property law, with the exception of food and drink products and pharmaceuticals. In fact, we can expect that intellectual property, especially copyright law, will remain a part – and indeed a really small portion – of the package deal that the EU aims to reach with its negotiating partners. Further, the new negotiating partners have quite developed copyright regimes. The Australian, New Zealand and Singaporean copyright law have British roots. The copyright regime of Mexico and the Mercosur states (Argentina, Brazil, Paraguay and Uruguay) reflect the French or Spanish authors' rights systems. Based on this, there is a clear chance that the forthcoming trade agreements will mainly focus on law enforcement issues rather than substantive copyright norms.

[63] Ibid. at p. 1045.
[64] Ibid. at p. 1066-1070.
[65] Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market [COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)] (Ordinary legislative procedure: first reading).
[66] EU-Korea FTA, Article 10.57-61.
[67] CETA, Article 20.10.
[68] Yu: supra note 13 at 985.
[69] Drexl: supra note 49 at p. 273-274.