Innovation by imitation and international intellectual property law: between harmonization and flexibility?

1. Introduction

A 2011 WIPO report acknowledges that innovation is 'the driving force behind economic growth and development'. It defines innovation as 'the conversion of knowledge into new commercialized technologies, products and processes, and how these are brought to market'.

Innovation is at the centre of discussions in intellectual property. Innovation by imitation is a natural process since imitation has to be understood as the norm rather than the exception. It is necessary in some industries, but especially for developing countries. Indeed, some countries go as far as coordinating this imitation process in the hope of building up innovative capacities and infrastructure, a trend which has been called “indigenous innovation”. Economists have long struggled with defining innovative processes and the contribution of imitation in the development of inventions. On one hand, incremental innovation relies on a common technological template and improves it. On another, disruptive innovation seems to be unique, and not linked to any form of imitation. However, whether in using interdisciplinary approaches or using natural processes as inspiration, it is clear that imitation is tied to innovative processes in an indivisible manner.

The actual international context does not seem to leave any room for developing outside an intellectual property framework, as several international conventions were adopted in order to harmonize intellectual property on an international level (Paris Convention for the Protection of Industrial Property of 20 March 1883, Berne Convention for the Protection of Literary and Artistic works of 9 September 1886 and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961).

The World Trade Organization's (WTO) Agreement on trade-related aspects of intellectual property rights (TRIPS) was signed in Marrakech in 1994 during the Uruguay round of the General Agreement on Trade and Tariffs (GATT). It is resulting from a negotiation between multiple Member States. TRIPS incorporates the previously mentioned Conventions and goes even further in enforcing intellectual property rights in general.

In the WTO context, the issue relates more, but not only, on the developing countries' needs for policy space. Problematic about TRIPS is that it provides strong intellectual property rights on a one-size-fits-all approach as regards its Members, notwithstanding their domestic needs. Indeed, intellectual property rights and economic development are linked. But, by implementing the Agreement, developing countries find themselves with a strong intellectual property framework without the level of economic activity found in their countries.

The question here is whether the actual international context, as regards the TRIPS Agreement, leaves any room for flexibilities and if they can be effectively used concerning innovative imitation.

The TRIPS Agreement establishes an elaborated intellectual property framework of protection, but these rights and their enforcement were sometimes absent in some of the Member States. For this reason, several transitional periods were granted to Member States. Developed countries were obliged to implement TRIPS on 1 January 1996. Developing countries were given as up to 1 January 2000. In addition, there was a special transitional period until 1 January 2005 for countries that did not grant patents in certain areas, like pharmaceuticals (e.g. India). Finally, Article

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66 gives least developed countries a transitional period until 2011, with an extension until 2013 and another extension in the field of pharmaceuticals until 2016. Transitional periods allow Members with no intellectual property protection to keep on innovating by imitation for a while. One major example can be found in the case of India which did not grant any patent protection until 2005. These periods allowed it to develop a very strong pharmaceutical industry, and it has become the major producer of generics.

Textual flexibilities\(^2\) can be found in TRIPS, but their application is still very narrow (2.1). As any international treaty, the Agreement is written using very broad terms, giving rise to different interpretative flexibilities (2.2). Moreover, the dispute settlement and retaliation mechanism can also allow a flexible enforcement of IP rights and permit, in certain circumstances, innovative imitation (2.3). But, by establishing minimum standards of protection, TRIPS supports the elaboration of bilateral treaties (3.1) or multilateral conventions, like the ‘Anti-Counterfeiting Trade Agreement’ (ACTA; 3.2), for further protection and enforcement of intellectual property rights. As will be illustrated, these new harmonizing instruments might limit the flexibilities present in the international context.

2. Using TRIPS flexibilities to enhance innovation by imitation

2.1. Textual flexibilities under TRIPS

TRIPS provisions contain several elements regarded as flexibilities. One of them can be found in the opportunity to draft limited exceptions under the three-step test incorporated in the TRIPS Agreement. Indeed, in recent times, harmonization in the international sphere has mainly focused on securing right holders’ interests and increasing the level of protection for copyright. Therefore advanced copyright systems generally offer broad exclusive rights; this is a risky situation since too strong rights might derive in overprotection and on a biased application of the copyright law that incidentally is unbalanced in favor of right holders overlooking some other social interests.

These situations where friction arises between the interests of right holders and general public must be solved trying to get to a proper balance for all the interests at stake; this balancing principle is already included in Article 7 TRIPS. In these terms, limitations and exceptions are the most important legal instruments for reconciling copyright with the individual and collective interest of the general public\(^3\).

The three step test has its origins in Article 9(2) of the Berne Convention; this article states that ‘in certain special cases, providing that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’ exceptions to the exclusive copyright holder’s rights can be established.

From that starting point the test’s reach has been extended from being a principle designed mainly in connection with the right of reproduction to cover the full range of the right holder’s rights. The test, likewise, has been gradually embedded in some other international treaties such as the TRIPS Agreement\(^4\) and the WIPO Treaties\(^5\); finally, the test has also been incorporated to regional\(^6\) and national legislations on copyright.

\(^2\)‘Flexible’, according to the Concise Oxford Dictionary, p.373, means ‘easily led, manageable, adaptable, versatile ...’

\(^3\)Max Planck Institute for Intellectual Property, Competition and Tax Law, ‘Declaration on a Balanced Interpretation of the Three Step Test in Copyright Law’[2008] 39(6) IIC 707

\(^4\)Art. 13 TRIPS

\(^5\)WIPO Copyright Treaty, Art 10; WIPO Performances and Phonograms Treaty, Art 16(2)

The three-step test is in the context mentioned above a central tool to properly design copyright limitations. Whenever a legislative body implements new copyright limitations or courts interpret existing limitations these have to be compatible with the test. In other words, the test controls state autonomy when drafting exceptions and limitations to copyright.

The test was conceived as an essentially flexible element in the international limitation infrastructure of copyright that allowed national law makers to satisfy specific social, cultural and economic needs; it was conceived on purpose in vague and general terms, and it was this very same factor that made the test very attractive for its inclusion in further international treaties.

The first three-step test in international copyright law was devised as a flexible framework within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying particular national needs. In these terms, the test would be able to create some room for the introduction of limitations at the national level, providing states with a certain degree of flexibility in their copyright limitations provisions. Therefore it was meant to be used as a balancing tool to broaden existing limitations and introduce new ones into the system, depending on the national needs and the specific situation of a given country.

However, due to the general and vague wording of the initial test it could also be used on a different direction, in a non very desirable way as to embody a hampering factor for flexibility. This is the result derived from the interpretation made by the WTO panel in its decision on Section 110(5) of the United States copyright act. The same conclusion can be derived from some national cases.

For the purposes of this paper it is enough to say that the panel made a purely literal construction of the test. A literal interpretation of the three step test seems to derive in a biased outcome in favor of right holders and reduce considerably policy spaces and flexibility for national legislators to implement copyright limitations. This interpretation might not be desirable nowadays, in a modern changing society where the copyright system, in its effort not to lag behind technological breakthroughs needs an enlarged dose of flexibility.

For what has been just mentioned, it is clear that the test can either be construed as to imply a tool for enhanced flexibility or just the other way around, to limit the overall flexibility of the system. The current trend, at least among scholars, seems to point towards taking the test to its original and flexible role, redefine its scope so as to get to a balanced interpretation of it (far from literal constructions).

For this redefinition to be done some measures are advised namely that, none of the three steps should be prioritized, the test to be applied reversely, and that some extrinsic elements are considered such as fundamental and human rights; the inclusion of all these elements will help to achieve a more balanced and flexible assessment of the test. It could be said that we are in front of a crossroad at this point; on the one hand we have the literal construction of the test that as said above restricts copyright limitations and renders just very little room for flexibility, acting as a limit of the limits; on the other hand it is the wide interpretation of the test that allows a more balanced approach to the previously established limitations, enabling the creation on the go of new

9 See, for example, Mulholland Drive, French Supreme Court, February 28, 2006, (2006) 37 I.I.C. 760, reversing Paris Court of Appeal, April 22, 2005, (2006) 37 I.I.C. 112. Although in some other instances, courts have interpreted the „test“ much more flexible. See, for example, Re the Supply of Photocopies of Newspaper Articles by Public Library (Case I ZR 118/96) [2000] ECC 237 (BGH, German Federal Supreme Court)
10 Cristophe Geiger, ‘The Role of the three step test in the adaptation of the Copyright Law to the information society’ [2007] Unesco Doctrine and Opinions series, p. 17; see Christophe Geiger ‘Pour une plus grande flexibilité dans le maniement des exceptions au droit d’auteur’ [2004], p. 213
limitations in a similar way to what is done under the fair use doctrine. This potential flexibility permitted by the test is crucial in the digital era where legislation lags behind real world practices.

Another textual flexibility which relates to imitation can be found in Article 9§2 TRIPS, which states that 'copyright protection shall extend to expressions and not to ideas, procedures, methods, operation or mathematical concepts as such'. This well-known concept of the idea/expression dichotomy in copyright is another major flexibility, since what is not protected by copyright can be freely imitated. This dichotomy explains why, in the software industry, reverse engineering, used in order to create new or improved products by examining the construction or composition, is generally accepted and preserved. Whereas Article 6 of the European Union's Computer Directive\textsuperscript{11} provides for an exception on decompilation but limits it to cases relating to the making of interoperable products, reverse engineering is a key element of innovative imitation in this field and has been particularly used in Asia. Indeed, as it was trying to compete with the United States of America's (USA) leading position in the field of computer programs, Japan was very much in favor of such a provision. Meanwhile, this principle was consecrate in a general manner in the Agreement and applies to all fields of copyright indifferently.

2.2. Interpretative flexibilities of TRIPS

As Professor Daniel Gervais points out, 'mechanical implementations of TRIPS are unlikely to generate positives measured in terms of domestic innovation'\textsuperscript{12}. In accordance with public international law rules of interpretation, as provided in Article 31 of the Vienna Convention on the Law of Treaties (1969) - which states that such an interpretation must be literal, made in its context and in the light of the treaty's 'object and purpose' - interpreting TRIPS provisions is another possible manner of using it in a flexible way. According to Professor Xu Yi-chong\textsuperscript{13}, beside the states themselves, such an interpretation ought to be made by the TRIPS Council, the panels and Appellate Body and the Ministerial conferences. This interpretation can be made on the basis of different articles.

Firstly, since TRIPS provisions must be interpreted in their context and in the light of its objective and purpose, Articles 7 on the objectives and 8 on the principles must be kept in mind whenever interpreting any article of the treaty. By requiring that any intellectual property protection must contribute to 'the promotion of technological innovation and to the transfer and dissemination of technology … in a manner conducive to social and economic welfare...' (Article 7) and by allowing Member States to take measures in order to 'promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measure are consistent with the provisions of this Agreement' (Article 8), these articles could justify in certain circumstances the elaboration of national legislation allowing imitation. However, in the Canada-Patent Protection for Pharmaceutical Products case\textsuperscript{14}, the panel argued those articles were not the only indicated objectives and purposes of the Agreement, and in practice it is debatable as to whether Articles 7 and 8 are mere preambular provisions rather than operative articles. In the above mentioned case, the panel ruled, consistent with a narrow interpretation of Article 30 TRIPS, that these articles could not justify the drawing of an exception on the basis of public health issues.

\textsuperscript{11}Council's Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC)
\textsuperscript{13}Yi-chong Xu, ‘Last Chance: Multilateralism, TRIPS and Developing Countries’ in J Malbon & C Lawson (eds.), ‘Interpreting and Implementing the TRIPS Agreement: Is It Fair?’(Edward Elgar 2008)
\textsuperscript{14}Canada-Patent Protection for Pharmaceutical Products, 17 March 2000, WT/DS114/R
Secondly, as far as innovation by imitation is concerned, as the TRIPS Agreement is drawn in general terms and provides no definition of the rights and especially their availability and registration, Member States can establish a legal framework of intellectual property, but raise the requirements for protection. As less subject matter would be eligible for protection, such a situation would favor imitative innovation in all the unprotected areas. The Agreement also establishes minimum standards of enforcement, and thus a kind of de minimis harmonization between WTO Members. However, it also leaves room for some flexibilities with provisions which do not establish an implementation obligation as such. Indeed, Part III of the TRIPS Agreement is about enforcement obligations Members ‘shall’ or ‘may’ implement. The latter provisions could mean they only allow a Member to implement the provision at stake. It is rather a suggestion than an obligation.

Finally, Article IX(2) of the Agreement Establishing the World Trade Organization allows authoritative interpretation by the Ministerial Conference and the General Council - that means that these two bodies (composed of all WTO Member States) can interpret TRIPS provisions and that such interpretation, as opposed to the one made by panels or the Appellate Body, binds the Member States. Such an authoritative interpretation could be done as regards Articles 13, 17 and 30 on limited exceptions of respectively, copyright, trademarks and patents, in order to draw an exception relating to imitation in some fields and in certain conditions.

2.3. Using the Dispute Settlement Agreement to create flexibilities

The fundamental advantage of bringing intellectual property in the World Trade Organization was to submit it under the Dispute Settlement Understanding. When a WTO Member considers another Member is not complying with the TRIPS Agreement, the first step before bringing the case in front of a panel is consultation. The complaining party may close down the period of consultation and ask the establishment of an ad hoc group, called the panel, which is going to decide whether the legislation of the defendant Member is in conformity or not with TRIPS rules. The report it renders is sent either to the Appellate Body in case of disagreement, either to the dispute settlement body for adoption with negative consensus. Afterwards, if the losing state does not comply with this decision, the complaining party may decide to retaliate against it.

Minimum standards established by TRIPS are tailored for developed countries which need strong intellectual property rights, disregarding developing countries’ needs for larger policy space. It seems that imitation is no longer a solution to be taken into account as a means to innovate for them. Nonetheless, by bringing TRIPS under the WTO Dispute Settlement Understanding, a country can suspend TRIPS provisions as a means of cross-retaliation, that is cross sectoral retaliation. Indeed, complaining developing countries can chose to retaliate by suspending intellectual property rights against a developed country that did not comply with one WTO obligation. Nevertheless, the question here is whether such a mechanism is a viable alternative as Henning Grosse Ruse-Khan points out. According to him, TRIPS suspension can allow domestic regime to regain some policy space and enact development, e.g. by innovative imitation.

Nevertheless, in the EC-Banana III case of 1997, while the WTO arbitration panel allowed

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16Article 64 TRIPS

17Henning Grosse Ruse-Khan, ‘Suspending Intellectual Property obligations under TRIPS, a viable alternative to enforce prevailing WTO rulings?’ [2008] The Center of International Environmental Law

18European Communities – Regime for the Importation, Sale and Distribution of Bananas, 21 December 2007, WT/DS27/ARB/ECU
Ecuador to suspend some TRIPS obligations, the latter preferred to settle with the European Community in 2001, because such a suspension would also be detrimental to its domestic economy. Another case of the WTO failure to give developing countries the opportunity to cross-retaliate and foster their growth, can be found in the US-Gambling case\(^\text{19}\), where, even if the panel allowed the suspension of TRIPS provisions, the U.S.A moved to withdraw their WTO commitments under the WTO General Agreement on Trade and Services (GATS) of 1995, in order to end the dispute. Some might therefore argue that suspending TRIPS is not a current viable alternative, and that a lot must be made in order to derogate from its provisions and allow innovation by imitation.

3. Harmonization as a means to restrain innovation by imitation

3.1. Bilateral treaties as means of further harmonization

As regards harmonization on the other hand, many examples can be found on the international level, but only in a way towards greater protection of IP rights. Bilateral treaties, for instance, are a means of further harmonization. Indeed, in a manner largely parallel to the development of multilateral intellectual property standards within WIPO and the WTO, there has been a considerable proliferation of bilateral treaties that pertain to minimal standards in intellectual property.

In a manner of definition of terms, these bilateral treaties include broad bilateral free-trade agreements, as well as more narrow investment protection treaties. Investment protection treaties pertain to intellectual property insomuch as state sanctioned or state tolerated infringements of intellectual property rights constitute an expropriation or confiscation of an investment\(^\text{20}\). The number of bilateral investment treaties has grown from 385 at the end of the 1980s to 1,857 between 173 countries at the end of the year 2000\(^\text{21}\). Commenting on the spur of the conclusion of bilateral and regional free-trade agreements in 2006, Pascal Lamy, director-general of the WTO, has said that regional trade agreements should be considered as complementary, not as a substitute, to the institutional framework of the WTO\(^\text{22}\).

With the European Union and the United States as the main drivers to many of these bilateral treaties, it is clear the initiatives for further integration have emerged from the arguably dormant state of multilateral negotiations within the main intellectual property organizations (WIPO and WTO). Considering that TRIPS has been largely hailed as the *nec plus ultra* of integration of IP norms, it can be questioned whether TRIPS has been the “tour de force” that many believe it is\(^\text{23}\). In terms of negotiation dynamics, countries with preferences with stronger IPRs may choose to opt for bilateral agreements in order to avoid the “deadweight loss” resulting from compromise with too many negotiation parties\(^\text{24}\).

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\(^{19}\)United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, 22 June 2007, WT/DS285/22


\(^{22}\)See http://www.wto.org/english/news_e/sppl_e/sppl46_e.htm (last accessed on 21 May 2012)


\(^{24}\)Supra 23, p. 21
While bilateral treaties are often analyzed within a framework where they are seen as an imposition of stronger IP norms on otherwise “unwilling” countries, these countries may also choose to conclude these treaties and forgo some local interest in order to promote further foreign direct investment. However, many consequences may arise, namely in regards to the rise of litigation in national forums, or compromise on the rights of aboriginal peoples with regard to traditional knowledge.

More precisely, the main fields of further harmonization found within bilateral treaties are the following. Broadly speaking, these are fields where TRIPS has left unharmonized and where the bilateral treaties furnish so-called “TRIPS-plus” protection in sectors where innovation by imitation can be of most importance:

- The protection of databases: for example, as the sui generis protection of databases in the EU resulting from the Database Directive requires reciprocity, this protection can be imposed on parties negotiating with the European Union.
- Digital Rights Management and Technological Protection Measures: these can be modeled on the requirements of the WIPO Copyright Treaty.
- The UPOV Convention: substantial adherence to the terms of this treaty go beyond TRIPS requirements, insofar as TRIPS does not mandate strict adherence to the UPOV Convention and tolerates flexibilities.
- Terms of protection: particularly as regards the term of copyright protection, internationally harmonized at the life of the author plus fifty years, yet the requirements of bilateral treaties often require the life of the author plus seventy years.

These are broad examples of fields where bilateral treaties pertaining to IP go beyond the mandatory requirements of the TRIPS agreement. Many authors have been highly critical of the tendencies of bilateral agreements to require adherence to stricter IP norms, as these lack of flexibility that is required to tailor treaties to domestic needs.

While it is clear that bilateral treaties have political underpinnings and self-interest at their forefront, it can be stated that these arise from often inequitable bargaining position between countries. As regards developing countries, the proliferation of bilateral treaties has been discussed as short-cutting the institutional processes of the WTO and WIPO, where developing countries can further voice their concerns. Generally, the proliferation of bilateral treaties has undermined the relevant fora of trade and IP negotiation.

At the very least, the proliferation of bilateral and regional trade agreements pertaining to IP

25 The case of Jordan has been analyzed after the conclusion of an FTA with the United States.
27 Supra 20, p. 5
has led to a multiplication of transaction costs as there are further complications in determining what, if any, of the relevant treaties are applicable, and which are to be given priority. Bhagwati has called this phenomenon the “spaghetti bowl” theory, as mapping out all the applicable treaties between parties leads to dense layering and overlaps of agreements. Indeed, this applies to the field of intellectual property rights. Thus, bilateral treaties pertaining to intellectual property add a further degree of harmonization of IP norms, but one that is diffuse and arguably goes against the spirit of open negotiation in designated fora and common international standards providing some flexibility.

3.2. ACTA as a step towards further harmonization?

It can be discussed whether ACTA, which focuses on the enforcement of intellectual property rights, can be considered as a step towards harmonization concerning the dealing with innovation by imitation in International Law. At the time when writing this article, the Agreement was not in force yet as several parties, inter alia the EU, although hardly criticized for this step, signed the Agreement but not ratified it yet. According to Article 40 ACTA, it will come into force as soon as six parties have ratified. The enforcement of intellectual property rights by TRIPS via the WTO panel system seems to have reached its limits. The interests of developed countries which prefer a maximalist IP agenda and developing countries which favor a more flexible approach concerning intellectual property rights protection diverge too broadly and cannot be harmonized more by WIPO and WTO.

Due to the globalization of trade, stakeholders in developed, intellectual property exporting countries, are losing billions of dollars annually through counterfeit goods flooding the markets worldwide. Therefore, developed countries started searching for ways to deal with intellectual property rights enforcement outside the two international forums WIPO and WTO by concluding bilateral (see above) or multilateral TRIPS-plus agreements.

Hence, several industrial nations with maximalist IP agendas, i.e. the US, Canada, Japan, the EU and its Member States, Australia, Korea, Morocco, New Zealand, Singapore, Mexico and Switzerland started officially negotiating ACTA in 2008. They argued that the markets of their countries can ‘only remain competitive if they can rely on the protection of innovation, creativity, quality, and brand exclusivity, which are all protected by intellectual property rights’. Consequently, ACTA as a multilateral enforcement agreement can also be regarded as a ‘logical extension of (especially) the United States’ bilateral approach to TRIPS-plus norm setting.’

In comparison to the enforcement system provided by TRIPS, ACTA entails stronger

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30 Supra 23, p. 20
32 See the following section of this article
35 Supra 33
36 Preliminary negotiations started in 2006 by Japan and the US
37 http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/#about (last accessed on 17 May 2012)
enforcement measures in relation to trademark, copyright and patent infringement, including a vast extension of the scope of criminalized behavior and criminal sanctions, enhanced damages, mandatory injunctions and broader border protection measures. Taking the title of the agreement into account, it pursues a legitimate aim: in order to protect rights owners, consumers, public health and security by the aforementioned means it intends to strengthen the fight against the worst case of imitation, i.e. the counterfeiting, generally understood as unauthorized exact copying of intellectual property rights. However, ACTA has been highly criticized by, inter alia, European scholars concerning its compatibility with international law. For instance, the following three illustrative problematic issues with regard to international harmonization by ACTA arise.

Firstly, several provisions of ACTA do not ensure a balance between the interests of different parties. Thus, ‘either safeguards existing under International Law have been eliminated or the Agreement failed to introduce safeguards corresponding to the introduced new enforcement measures’. Even though the parties to ACTA commit in Article 1 to fully consider the regulations of TRIPS, i.e. inter alia Article 7 TRIPS that provides the requirement of exceptions and limitations to the exclusive rights of right holders, the Agreement has a strong tendency to strengthen one-sided only the rights owners´ remedies against IP infringement without fixing concrete necessary checks and balances for defendants. With regard to the vast expansion of the scope of criminal remedies by ACTA, it could also be considered critically that Article 26 ACTA provides that criminal authorities can act ex officio, i.e. without a complaint by a right holder.

Secondly, the scope of several provisions remains unclear as they contain undefined notions. It stays for example vague what is meant by the very broad and important notion of ‘a commercial scale’ in relation to criminal measures for willful trademark counterfeiting or copyright or related rights piracy in Article 23.1 ACTA. It remains to be seen if the domestic legislation and/or jurisprudence will adopt the WTO panel’s differentiated approach in interpreting the term of ‘commercial scale’ in Article 61 TRIPS – a provision reiterated by Article 23.1 ACTA. The WTO panel’s flexible approach takes into account the product, the market in question and the extent of the infringement.

Thirdly, as a more politically based criticism, ACTA has only been negotiated by developed countries. Developing countries were not invited to negotiations, although they will be allowed to later join the agreement. But their motivation might be quite limited to do so as they were excluded from the negotiations and would have to adopt standards for IP protection that contravene their interests.

Hence, ACTA pursues on the one hand the reasonable aim of ‘restoring fair global competition and to facilitate trade in legitimate goods and services worldwide’. But on the other hand, the above mentioned problematic sides of ACTA could weaken the flexibilities provided by

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39 See ACTA, Art. 5(d) and the definition for trademark counterfeiting


41 Supra 40, p. 68


43 Christophe Geiger, ‘Of ACTA,”pirates” and organized criminality- how “criminal” should the enforcement of intellectual property be?’ [2010] IIC, p. 630


45 Supra 42, p. 646
TRIPS and potentially hinder export and innovation by imitation; especially with regard to the fact that ACTA standards will be likely a requirement for future bilateral Free Trade Agreements and might therefore affect, for example by its border measures, (especially developing) countries that did not participate in the negotiation of these standards 46.

4. Conclusion

As a result to this article, there is less and less policy space for promoting innovation by imitation.

Like illustrated, TRIPS’ one-size-fits-all approach has some inadequacy to provide sufficient safeguards regarding its flexibilities and thus might obstruct a member to use them in order to foster its development. There are textual flexibilities like the three-step test or the idea/expression dichotomy in copyright law that give room for broad interpretations and thus allow wide exceptions for innovation by imitation, especially with regard to the adaptation of the law to developments in the digital area. However, such provisions can, because of their broad terms, either be understood as a tool for enhanced flexibility or just the other way around, i.e. to limit the overall flexibility of the system by a literal interpretation. As seen, unfortunately, the latter approach seems to be the predominant trend concerning the three-step test at the moment. Moreover, as shown, the interpretation of TRIPS’ provisions in the light of its objective and purpose as well as the fact that it leaves to the Members to provide a precise definition of the rights and their scope of protection gives space for the elaboration of national legislation allowing imitation. Furthermore, the WTO dispute settlement mechanism and its facility of suspension of TRIPS’ obligations could be used by developing countries to create policy space and perform development by innovative imitation.

At the same time, bilateral and multilateral agreements on intellectual property rights such as ACTA are concluded that refer to fields of protection that TRIPS has left unharmonized, but that concern sectors where innovation by imitation can be of most importance. These agreements set the benchmark for protection higher and higher and do not only affect the parties to these agreements, but also states that are not willing to adhere to them. The fact that innovating by imitating is a natural process in the market and should especially be open to developing countries seems to be left aside by the parties drafting international legislation. Consequently, agreements like ACTA as well as bilateral treaties have the potential to constrain even more the flexibilities and policy spaces provided by the TRIPS Agreement and its litigation system and should be considered critically.

46 Supra 42 p. 647
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