

Once Upon a Time in the EU: Three Barriers to Access and the Ensuing Quandary

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The EU, like many other economic powerhouses, has sought to strengthen and enforce intellectual property rights through multiple regimes that span from the regional to the international level. A recent study by the European Patent Office (EPO) and the Office for Harmonisation in the Internal Market (OHIM) seems to give a clue as to why: intellectual property rights-intensive industries generate more than a quarter of employment and more than a third of economic activity in the EU. The report which sought to quantify for the first time, the overall contribution of the intellectual property system to the European economy, optimally provides a rational basis for a regime of increased intellectual property protection and enforcement. Yet, over extensive protection of intellectual property has its downside: it stifles access to medicines (specifically, generic medicines) and information. What is interesting (and at the same time contrasting) about the present situation is that the EU's development policy prioritises access to medicines for all. There thus seems to be a problem: the EU is faced with the choice whether to follow the path of increased intellectual property rights with the aim of creating jobs for its citizens and boosting its economy or, to moderate the rate of intellectual property enforcement to promote access to medicines. A plausible thing will be for the Union to strike a balance between these two conflicting policy objectives in its intellectual property law making – especially, in regard to third countries. But, has the Union the goodwill to do so? Albeit the Union has policies that purport to promote access to medicines, prevailing developments on the ground do not seem to point to that direction. Internally, the EU has passed new border laws on intellectual property and proposed new trademark rules that appear to tighten existing intellectual property rules. The previous rules have in the past caused problems for generic medicines passing through the EU borders; and even though it appears as though it is the European Commission's intention to avert such occurrences, the contents of these new laws seem not to have answers to that. Externally, the EU is in the process of contracting series of third generation free trade agreements with third countries that come with extensive intellectual property chapters. These do not augur well for access. Without adequately finding a way to resolving this conundrum (both at the internal and external level), this has, and could yet generate into series of legal and civic actions which clearly puts the Union in a state of quandary. Focusing specifically on the contents and developments related to the EU Border Measures Regulation, the failed ACTA and the intellectual property chapters of selected EU free trade agreements, this contribution argues that the EU is “neither here nor there” in regard to the issue of access to medicines.