

Legal Regulation & Education: Doing the Right Thing?

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The solar intolerance of patent trolls (BILETA, 2014)

Are patent trolls patentable? Under the WTO TRIPs Agreement, inventions are patentable if they are novel, non-obvious (involving an inventive step), useful (or 'industrially applicable'), and are not excluded from patentability on one of the permitted grounds. These criteria will be examined under European and American (United States) law, in relation to various invented non-human creatures, namely vampires, zombies and golems, as well as trolls.

Trolls (in the generic sense) are disclosed (inter alia) in JRR Tolkien, *The Hobbit* (1937), and Tolkien, *The Lord of the Rings* (1954-5). Taking these sources as canonical in relation to trolls, the following propositions will be advanced:

In relation to European Law:

- Trolls do not lack novelty, since neither the disclosure in Tolkien (1937 and 1954), nor the actual existence of trolls in Middle Earth, constitutes an 'enabling disclosure'.
- However, trolls fall under the exclusion for 'plant or animal varieties', and are therefore per se unpatentable.
- The industrial applicability of trolls is dubious, but need not be considered further; likewise the question of whether trolls are inventive.
- The issues of morality and 'ordre publique' also need not be considered.

In relation to US law:

- Whether trolls are novel, depends on whether trolls were 'published or patented' in the USA. Their prior existence in Middle Earth is not relevant.
- Trolls are not useful.
- The majority of trolls are solar-intolerant, to an extreme degree.
- Living trolls are therefore inherently unpatentable under the *Diamond v Chakrabarty* criteria, confining patent protection to 'anything under the sun that is made by man'.

In relation to both systems of law.

- The actual inventor of trolls would appear to have been Sauron, who (being non-human) is not a national of the USA, nor of any European or WTO contracting state.
- Neither Sauron, nor the trolls themselves, appear to be precluded from owning and asserting patents, notwithstanding that they are totally inhuman.
- The non-patentability of trolls (including patent trolls) has significant social and economic consequences, in so far as trolls have nothing to lose from the patent system, and are therefore onto a one-way bet in endeavouring to make that system as unreasonable and oppressive in relation to ordinary people, as is humanly (or inhumanly) possible.