SIX SECRET (AND NOW OPEN) FEARS OF ACTA

Peter K. Yu*

Six Secret (and Now Open) Fears of ACTA ................................................................. 1
Introduction .................................................................................................................. 2
I.     A Brief History of ACTA ..................................................................................... 4
     A. Origins and Developments .............................................................................. 4
          1. Japan .......................................................................................................... 4
          2. United States ............................................................................................ 6
          3. ACTA Negotiations .................................................................................. 7
          4. Reactions to ACTA ................................................................................... 9
     B. The Need for an Alternative Forum ............................................................... 10
          1. WTO ........................................................................................................ 10
          2. WIPO ..................................................................................................... 13
II. Fear #1: Lack of Transparency and Accountability ........................................... 16
     A. The ACTA Black Box .................................................................................. 16
          1. Official Reasons ...................................................................................... 19
          2. Additional Reasons ................................................................................ 24
          3. Secretive, Undemocratic Approach .......................................................... 26
     B. Leaks and Consolidated Text ......................................................................... 29
III. Fear #2: Upward IP Ratchet at Home ................................................................. 31
     1. Lies, Damn Lies, and ACTA .......................................................................... 33
     2. Policy Laundering and Backdoor Lawmaking ................................................. 35
IV. Fear #3: Upward IP Ratchet Abroad ................................................................. 38
     A. TRIPS-plus Protection and Legal Transplants ............................................... 38
     B. ACTA-plus Protection and Obsession over Foreign Investment .................... 46

* Copyright © 2010 Peter K. Yu. Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law. An earlier version of the Article was presented at the Transatlantic Consumer Dialogue Meeting on “ACTA and Consumers” at the United States Department of Commerce and the “Beyond TRIPS: The Current Push for Greater International Enforcement of Intellectual Property” Symposium at American University Washington College of Law. The Author would like to thank Michael Carroll, Sean Flynn, James Love, and Manon Ress for their kind invitations and hospitality and to the participants of these events, in particular Sean Flynn, Michael Geist, Daniel Gervais, and Susan Sell, for their valuable comments and suggestions. He is indebted to Michael Geist, Intellectual Property Watch, Ars Technica, the Electronic Frontier Foundation, Knowledge Ecology International, IP Justice, La Quadrature du Net, Public Knowledge, the Program on Information Justice and Intellectual Property at American University Washington College of Law, the Transatlantic Consumer Dialogue, and all those others who worked hard to provide us with up-to-date and hard-to-obtain information about this once-secret treaty.
V. Fear #4: A New Infrastructure for Ratcheting Up IP Protection .................................................. 67
   A. Self-Reinforcing Architecture ........................................................................................................ 67
   B. The ACTA “Country Club” ............................................................................................................ 70
      1. Forum Proliferation ...................................................................................................................... 70
      2. Coalition of the Willing .............................................................................................................. 72
VI. Fear #5: Boomerang Effect at Home ................................................................................................. 49
   A. Reduced Access to Innovative Products or Services ................................................................. 49
   B. Reduced Protection of Human Rights and Civil Liberties ....................................................... 53
   C. Locked-in Protective Standards .................................................................................................... 59
   D. Foreclosed Opportunities for Legislative Reform ....................................................................... 64
VII. Fear #6: Creation of an Ineffective, Superfluous Treaty ............................................................... 67
Conclusion .................................................................................................................................................. 85

“One feels that you’re almost in a bit of a twilight zone. I mean, we’re talking about a copyright treaty. And it’s being treated as akin to nuclear secrets.”

— Michael Geist¹

“Drafting treaties in secret, especially when they concern new crackdowns on intellectual property violations, is a bit like rolling around in red meat, stuffing your pockets with raw hamburger, and jumping into a shark tank; reaction in both cases is likely to be swift and violent.”

— Nate Anderson²

“What’s in ACTA? Well, it kind of doesn’t matter. If it were good stuff, they’d be negotiating it in public where we could all see it.”

— Cory Doctorow³

“If Hollywood could order intellectual property laws for Christmas, what would they look like? This is pretty close.”

— David Fewer⁴

INTRODUCTION

In April 2009, Japan, the United States, the European Community, and other negotiating parties of the Anti-Counterfeiting Trade Agreement (“ACTA”) reluctantly released a joint consolidated draft of the proposed agreement (“consolidated draft”).⁵ The release of this document followed the leaks of many important documents, one of which include

⁴ Proposed Secret Copyright Deal Takes Aim at iPods, Providers, OTTAWA CITIZEN, May 28, 2008, http://www.canada.com/ottawacitizen/story.html?id=bbba4f36-e632-44a7-85f8-7d2c80f3f1db (quoting David Fewer, Staff Counsel, Canadian Internet Policy and Public Interest Clinic, University of Ottawa).
⁵ Anti-Counterfeiting Trade Agreement 10 (Public Predecisional/Deliberative Draft, Apr. 2010) [hereinafter Consolidated Draft].
virtually all of the provisions in this official draft, but also the parties that allegedly are responsible for the bracketed texts as well as the treaty language that have since been left out.6

Building on initiatives to combat global piracy and counterfeiting, such as the Global Congress on Combating Counterfeiting and Piracy7 (“Global Congress”) at the international level, Japan’s proposal for an anti-counterfeiting treaty,8 the STOP! (Strategy Targeting Organized Piracy) Initiative in the United States,9 and the European Commission’s Strategy for the Enforcement of Intellectual Property Rights in Third Countries,10 ACTA was the product of efforts by Japan, the United States, the European Community, Switzerland, and other like-minded developed and emerging countries to strengthen the global protection and enforcement of intellectual property rights. The agreement represents the latest attempt to consolidate the different protections the key ACTA negotiating parties have already developed through their bilateral and regional trade and investment agreements.

While initial fears of the agreement were sparked by a secret negotiation process and the attendant worry that the new agreement would ratchet up the already very high protections in the existing TRIPS-plus international intellectual property system, the release of the consolidated draft has allayed some of these fears. To be certain, the negotiation process is still far from transparent, while public non-industry participation remains wanting. There remain unanswered questions concerning whether the full implementation of the agreement, whatever final form it eventually would take, would necessitate the introduction of higher or new standards of protection.

Nevertheless, if domestic concerns are mainly about the lack of transparency and public participation and the ratcheting up of intellectual property standards in developed countries, the release of the consolidated draft may have greatly reduced many of these concerns. One may wonder whether the recent release has taken away some of the much-needed momentum to mobilize consumer advocates and civil liberties groups and the larger public to put up resistance against this ill-advised treaty.

This Article argues that ACTA remains highly problematic and dangerous. It identifies six different fears of the agreement, all of which I find rational and justified. Although the Article focuses primarily on U.S. laws, and was written with U.S. readers in mind, many of the arguments are equally applicable to other ACTA negotiating parties, including members of the European Community.

Part I of the Article traces the development of ACTA from its origin in the Second Global Congress to the upcoming negotiation in Lucerne, Switzerland. Part II highlights the concerns over the procedural defects of the ACTA negotiation process (fear #1). Part III explores the

---

7 See infra discussion Part I.
8 See infra discussion Part I.
9 See infra discussion Part I.
potential for ACTA to ratchet up the already very high existing intellectual property standards within the United States (fear #2).

Part IV discusses how ACTA would undoubtedly lead to greater protection and enforcement of intellectual property rights abroad (fear #3), especially in those less developed countries where stronger standards are unlikely to be beneficial. Part V shows how ACTA could backfire on U.S. consumers and businesses, even if no legislative changes are indeed required to meet the new treaty obligations (fear #4). Part VI explores how ACTA would result in the development of a new, freestanding, self-reinforcing infrastructure for facilitating future efforts to ratchet up international intellectual property standards (fear #5).

Part VII concludes by noting that ACTA is unlikely to be as effective as rights holders and policymakers in the negotiating parties have anticipated. It points out the sad reality that the agreement would create a new set of unnecessary obligations and adverse side-effects without providing meaningful protection to even the intellectual property industries (fear #6). Given the limited benefits of ACTA, one could not help but question why countries negotiate this agreement in the first place.

I. A BRIEF HISTORY OF ACTA

A. Origins and Developments

1. Japan

The idea of an anti-counterfeiting trade agreement was first introduced by Japanese Prime Minister Junichiro Koizumi to other members of the Group of Eight (“G8”) at the June 2005 meeting in Gleneagles, Scotland.11 Since 2003, Japan has actively pushed for stronger intellectual property protection at both a national strategy and at the international level. In January 2003, Prime Minister Koizumi noted in his speech to the Japanese diet a plan to make Japan “a nation built on the platform of intellectual property.”12 Since that year, Japan has developed an intellectual property strategy program, which is updated every year.13

In November 2005, the proposal for an anti-counterfeiting treaty was officially presented in the Second Global Congress in Lyon, France, an event developed jointly by the International Criminal Police Organization (“Interpol”), the World Customs Organization (“WCO”),14 and the

---

World Intellectual Property Organization ("WIPO") in partnership with the International Chamber of Commerce and its Business Action to Stop Counterfeiting and Piracy (BASCAP) initiative, the International Trademark Association, and the International Security Management Association.15

Dubbed the Treaty on Non-Proliferation of Counterfeits and Pirated Goods at the time of the proposal, the agreement sought to target worldwide counterfeiting and piracy, citing concerns over "safety and security of consumers."16 While the level of protection was intended to exceed that available under the Agreement on Trade-Related Aspects of Intellectual Property Rights17 ("TRIPS Agreement"), which developed countries find inadequate and outdated,18 ACTA did not seek to replace either the TRIPS Agreement or other international intellectual property treaties. During the meeting, both Interpol and WCO had been suggested as possible organizations for being in charge of this new treaty.

At the end of the Second Global Congress, the participants adopted the Lyon Declaration, which recommended the further consideration of "Japan’s proposal for a new international treaty."19 While some participants supported the proposal, others expressed skepticism, citing the lukewarm welcome the proposal had received at the G8 meeting in Gleneagles.20 The agreement was reintroduced in January 2007 in the follow-up Global Congress hosted by WIPO in Geneva.21

Meanwhile, Japan continued to advance the treaty proposal in G8 meetings. In the 2006 meeting in St. Petersburg, Russia, the G8 leaders adopted a Statement on Combating IPR Piracy and Counterfeiting, which "reaffirm[ed their] commitment to strengthening individual and collective efforts to combat piracy and counterfeiting, especially trade in pirated and counterfeit goods."22 The statement alluded to the need for increasing cooperation among themselves and

---

15 Japan Proposes New IP Enforcement Treaty, supra note.
17 See discussion infra text accompanying note.
with such international organizations as WIPO, the World Trade Organization (“WTO”), WCO, Interpol, the OECD (Organization for Economic Co-operation and Development), and the Council of Europe. They also “instruct[ed] their] experts to study the possibilities of strengthening the international legal framework pertaining to IPR enforcement.”

Although the G8 leaders specifically mentioned ACTA in later communiqués, it is worth noting that G8 was an uneasy forum for greater discussion of ACTA. First, it does not have the norm-setting capability as available in existing fora, such as the WTO, WIPO, or any other new forum countries seek to create, including ACTA. Second, Russia, the newest member of the group, was excluded from the discussion of this specific treaty. Although Russia may still be interested in supporting other G8 members in the hope of earning greater support for its accession to the WTO and other initiatives, Russia is unlikely to pro-actively push for a treaty that it was not allowed to negotiate. Likewise, other G8 leaders may also be sensitive to the fact that they did not include Russia in the ACTA negotiations at all.

2. United States

Like Japan, the United States was also interested in strengthening the enforcement of intellectual property rights through cooperation and coordination with key trading partners in the developed world. In 2004, the United States established the STOP! Initiative, a government-wide initiative that was launched to “fight global piracy by systematically dismantling piracy networks, blocking counterfeits at [U.S.] borders, helping American businesses secure and enforce their rights around the world, and collaborating with our trading partners to ensure the fight against fakes is global.”

Because the initiative called for the United States Trade Representative (“USTR”) to reach out to its trading partners to build international support for combating counterfeiting and piracy, Ambassador Susan Schwab, in 2005, “led interagency teams to meet with key trading partners to advocate closer cooperation in fighting piracy and counterfeiting, and to advocate sharing of ‘best practices’ for strong legal frameworks.” A year later, the USTR “encouraged the interagency Trade Policy Staff Committee (‘TPSC’), a committee representing the interests

outcome-has-ip-implications-for-enforcement-trade-and-health/ (discussing the Statement on Combating IPR Piracy and Counterfeiting and the G8 meeting in Gleneagles).

24 Id. ¶ 6.


STOP! is built on five key objectives:
1. Empower American innovators to better protect their rights at home and abroad
2. Increase efforts to seize counterfeit goods at our borders
3. Pursue criminal enterprises involved in piracy and counterfeiting
4. Work closely and creatively with U.S. industry
5. Aggressively engage our trading partners to join our efforts

NAT’L INTELLECTUAL PROP. LAW ENFORCEMENT COORDINATION COUNCIL, REPORT TO THE PRESIDENT AND CONGRESS ON COORDINATION OF INTELLECTUAL PROPERTY ENFORCEMENT AND PROTECTION 4 (2008).

of twenty U.S. government agencies, to endorse the concept of a multi-party, ‘TRIPS-plus’ ACTA.”\(^2\) As Stanford McCoy, Assistant United States Trade Representative for Intellectual Property and Innovation, recalled:

> USTR proposed that a group of leading IPR-protecting nations could work together to set a new standard for IPR enforcement that was better suited to contemporary challenges, both in terms of strengthening the relevant laws and in terms of strengthening various frameworks for enforcing those laws. The interagency TPSC concurred with USTR’s recommendation that USTR begin contacting trading partners to join a plurilateral ACTA.\(^2\)

Building on this initiative as well as the many free trade agreements (“FTAs”) the United States have negotiated since the early 2000s, ACTA began to take shape.

Although the European Community is also quite active in the negotiations, many commentators and leaked documents have credited Japan and the United States for being the primary movers of this treaty. This Part therefore focuses on developments in Japan and the United States. It is nevertheless, important to keep in mind the European Community’s important role in pushing for greater discussion of enforcement issues at the international level—at both the WTO and WIPO—as well as its the European Commission’s *Strategy for the Enforcement of Intellectual Property Rights in Third Countries.*\(^3\)

### 3. ACTA Negotiations

On October 23, 2007, two weeks after WIPO adopted recommendations for actions for its Development Agenda,\(^3\) Ambassador Schwab formally announced the United States’ intent to negotiate a new Anti-Counterfeiting Trade Agreement with its key trading partners.\(^3\) The European Community and Japan made similar, but independent announcements. In addition to Japan, the United States, and the European Community—the usual trilateral alliance for heightened intellectual property protection—the initial negotiating parties included Canada, Mexico, New Zealand, South Korea, and Switzerland. As the USTR press release declared:

> [T]he goal [of the agreement] is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis. . . . The envisioned ACTA will include commitments in three areas: (1) strengthening international cooperation, (2) improving enforcement practices, and (3) providing a strong legal framework for IPR enforcement.\(^3\)

Interestingly, the first round of pre-negotiation technical discussions was already held on October 4, 2007,\(^3\) two weeks before the negotiating parties issued their press releases and the day after the end of the 2007 WIPO General Assembly. According to Michael Geist, Canada received a proposal from the United States as early as October 2006.\(^3\) There was an internal

\(^{28}\) *Id.* at 5.

\(^{29}\) *Id.*

\(^{30}\) *EC STRATEGY FOR IPR ENFORCEMENT, supra* note.

\(^{31}\) *See infra discussion Part I.B.*

\(^{32}\) *USTR Press Release, supra* note.

\(^{33}\) *Id.*


SIX SECRET (AND NOW OPEN) FEARS OF ACTA

discussion paper in January 2007, and follow-up pre-negotiation technical discussions were held in October 2007 and January 2008. This chronology suggested not only a well laid plan to strengthen intellectual property enforcement norms, but also a calculated effort to disclose the treaty to the public at a time that would maximize the impact of its announcement.

The negotiation of ACTA began in earnest in June 2008. Since then, eight rounds of negotiations have been conducted as follows:

- Round 1: Geneva, Switzerland (June 2008) (border measures)
- Round 2: Washington, USA (July 2008) (border measures and civil enforcement of intellectual property rights)
- Round 3: Tokyo, Japan (October 2008) (civil and criminal enforcement of intellectual property rights)
- Round 4: Paris, France (December 2008) (criminal enforcement, international cooperation, enforcement practices, institutional arrangements, and internet distribution and information technology)
- Round 5: Rabat, Morocco (July 2009) (international cooperation, enforcement practices, institutional arrangements, and transparency matters)
- Round 6: Seoul, South Korea (November 2009) (enforcement of rights in the digital environment, criminal enforcement, and transparency matters)
- Round 7: Guadalajara, Mexico (January 2010) (civil enforcement, border enforcement and enforcement of rights in the digital environment)
- Round 8: Wellington, New Zealand (April 2010) (civil enforcement, border measures, criminal enforcement and special measures for the digital environment).

The ninth round of the negotiations will be held in Lucerne, Switzerland from June 28 to July 2, 2010. It is the hope of the negotiating parties that the negotiation will be completed by the end of 2010, although they once harbored the hope of completing the agreement by the end of the Second Bush administration.

---

39 G8 Leaders’ Communiqué, supra note, ¶ 17 (encouraging “the acceleration of negotiations to establish a new international legal framework, the Anti-Counterfeiting Trade Agreement (ACTA), and seek to complete the negotiation by the end of this year”); see also James Love, The Counterfeit Treaty, HUFFINGTON POST, June 3, 2008, http://www.huffingtonpost.com/james-love/the-counterfeit-treaty_b_104831.html (“There is a huge rush to conclude this agreement before Bush leaves office.”).
4. Reactions to ACTA

During the time when ACTA was being negotiated, the agreement had earned support from participants in other fora. For example, paragraph 17 of the G8 Leaders’ Communiqué on the World Economy declared:

Effective promotion and protection of IPR are critical to the development of creative products, technologies and economies. We will advance existing anti-counterfeiting and piracy initiatives through, inter alia, promoting information exchange systems amongst our authorities, as well as developing non-binding Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE) at the World Customs Organization. We encourage the acceleration of negotiations to establish a new international legal framework, the Anti-Counterfeiting Trade Agreement (ACTA), and seek to complete the negotiation by the end of this year. We will promote practical cooperation between our countries to develop tools to combat new techniques in counterfeiting and piracy and spread best practices. We reaffirm our commitment on government use of software in full compliance with the relevant international agreements and call on other countries to follow our commitment.\(^\text{40}\)

During the Fourth Global Congress in February 2008, the participants called on the Global Congress Steering Group to “work within their organizations, with each other and with other interested parties to encourage international governmental organizations and national governments to develop a holistic strategy on the negotiation and revision of international conventions and treaties related to counterfeiting and piracy.”\(^\text{41}\) As stated in the Dubai Declaration, this strategy “must . . . take into account the project work of the G8 and initiatives aiming at higher standards in the field of IP enforcement such as the WCO SECURE Initiative, and preparations for the conclusion of an Anti-Counterfeiting Trade Agreement (ACTA).”\(^\text{42}\)

Meanwhile, the ACTA negotiations have also faced serious challenges in other fora. For example, the European Parliament adopted a resolution condemning the secretive approach taken by the European Commission and the EU Council of Ministers while threatening to take the issue to the European Court of Justice for resolution.\(^\text{43}\) Through this resolution, which was adopted 633–13, with sixteen abstentions, the Parliament “[e]xpresses its concern over the lack of a transparent process in the conduct of the ACTA negotiations” and “[c]alls on the Commission and the Council to grant public and parliamentary access to ACTA negotiation texts and summaries.”\(^\text{44}\) In addition, the Parliament “[d]eplores the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO, which have established frameworks for public information and consultation.”\(^\text{45}\) The Parliament also “[c]onsiders that further ACTA negotiations should include a larger number of developing and emerging countries, with a view to reaching a possible multilateral level of negotiation.”\(^\text{46}\)

\(^{40}\) G8 Leaders’ Communiqué, supra note, ¶ 17 (emphasis added).
\(^{42}\) Id.
\(^{43}\) European Parliament Resolution on the Transparency and State of Play of the ACTA Negotiations, available at http://www.erikjosefsson.eu/sites/default/files/UNOFFICIAL_CONSOLIDATED_VERSION_OF_ACTA_COMMON_RESOLUTION.pdf (stressing that “unless Parliament is immediately and fully informed at all stages of the negotiations, it reserves its right to take suitable action, including bringing a case before the Court of Justice in order to safeguard its prerogatives”).
\(^{44}\) Id. ¶ 2–3.
\(^{45}\) Id. ¶ 5a.
\(^{46}\) Id. ¶ 8.
B. The Need for an Alternative Forum

One of the biggest criticisms of ACTA to date is the failure of the negotiating parties to develop the agreement in an intergovernmental organization, like the WTO, WIPO, or even the WCO. Although there remain some possibilities for greater interactions between ACTA and these intergovernmental organizations, and some members of the European Parliament have indeed solicited technical assistance from both WIPO and the WTO, ACTA is likely to be developed as a freestanding treaty outside the intergovernmental framework. This Part explores why Japan, the United States, and the European Community—and, for that matter, other ACTA negotiating parties—chose to go outside the WTO and WIPO.

1. WTO

In November 2001, the Doha Development Round of Trade Negotiations was launched during the Fourth WTO Ministerial Meeting in Qatar. Amidst post-September 11 sentiments, and in the wake of the growing need for cooperation between the United States and the less developed world, this new round of negotiations has led to the adoption of the Doha Declaration on the TRIPS Agreement and Public Health (“Doha Declaration”) and the unprecedented acceptance of a protocol to formally amend the TRIPS Agreement. Designated as the new article 31bis of the TRIPS Agreement, this proposed amendment, if adopted, will enable WTO members with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.

Although the Doha Round began as a development round, and has led to developments that are sensitive to the local circumstances in less developed countries, developed countries have actively pushed for heightened intellectual property protection and enforcement in WTO fora. For example, during the TRIPS Council meeting in June 2006, the European Community called for an “in-depth discussion” of enforcement issues. Together with two earlier proposals, the Community’s effort to push for greater discussion of intellectual property enforcement in the TRIPS Council represented the first attempt by a WTO member to revive such discussion since a flurry of exchange among WTO member states during the Council’s

---

49 World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (2002) [hereinafter Doha Declaration].
51 Ratification of this protocol requires two-thirds of the WTO membership. Although the initial deadline for ratification was set at December 1, 2007, it has since been extended twice to December 2009. WTO, Countries Accepting Amendment of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last visited May 26, 2010). As of this writing, slightly over a quarter of the 153 WTO member states, including the United States, India, Japan, China, and members of the European Community, have ratified the proposed amendment.
review of TRIPS-related legislation in 1997.\textsuperscript{54} It also reflected the new \textit{Strategy for the Enforcement of Intellectual Property Rights in Third Countries} developed by the European Commission Directorate General for Trade in April 2005.\textsuperscript{55}

At the June 2006 TRIPS Council meeting, leading developing countries, such as Argentina, Brazil, China and India, strongly opposed the proposal, citing distractions of the WTO trade talks which they claimed “are supposed to focus on development.”\textsuperscript{56} As noted by a Chinese official, the TRIPS Council is “not the right time or right place” to discuss enforcement.\textsuperscript{57} Their reactions were similar to their reactions on the Community’s earlier proposal, when they “argued that enforcement at the WTO is handled by the Dispute Settlement Body,” not the TRIPS Council.\textsuperscript{58}

In the follow-up TRIPS Council meeting in October 2006, the European Community, with formal support from Japan, Switzerland, and the United States, tabled a joint communication seeking to strengthen the implementation of the enforcement provisions in the TRIPS Agreement.\textsuperscript{59} As the communication declared: “The TRIPS Council is an appropriate forum to examine and assist Members in the implementation of enforcement provisions of the TRIPS Agreement. The work of the TRIPS Council in this regard should complement Members’ efforts to use other cooperative mechanisms to address IPR enforcement.”\textsuperscript{60} Citing ongoing challenges in the area, the European Community and the paper’s cosponsors:

— Invite other Members to engage in a constructive discussion of how to implement the enforcement provisions of TRIPS in a more effective manner.

— Invite other Members to engage in a constructive discussion of accompanying measures which could enhance the effectiveness of national implementing legislation and enforcement.

---


\textsuperscript{55} As the strategy stated in one of the recommended specific actions:

The EU will consult other trading partners regarding the possibility of launching an initiative in the TRIPS Council highlighting the fact that the implementation of TRIPS requirements in national laws has proven to be insufficient to combat piracy and counterfeiting, and that the TRIPS Agreement itself has several shortcomings.

For example, the TRIPS Council could consider in the future a number of actions to tackle the situation, including the extension of the obligation to make available customs measures to goods in transit and for export.


\textsuperscript{57} \textit{Id.}


\textsuperscript{59} TRIPS Council, Joint Communication from the European Communities, United States, Japan and Switzerland, \textit{Enforcement of Intellectual Property Rights} ¶ 4, IP/C/W/485 (Nov. 2, 2006) [hereinafter Joint Communication].

\textsuperscript{60} \textit{Id.}
enforcement efforts, such as for example promoting interagency co-operation, fostering a higher public awareness, and reinforcing institutional frameworks.

— Ask the Secretariat to prepare a synopsis of Members’ contributions to the Checklist of Issues on Enforcement that would serve as a basis for the above-mentioned discussion.

— Stand ready, in cooperation with recipients of technical assistance and with relevant international organizations, to better focus the technical assistance they provide in favour of developing countries in order to facilitate the implementation of enforcement provisions.

When the European Community sought to make a formal presentation of this proposal, its effort was met with strong resistance from less developed countries, largely on procedural grounds. The proposal was eventually rejected, and the European Community had to compromise by making a statement, as opposed to a presentation. The reaction from less developed countries was understandable. These countries were concerned about the already high standards required by the TRIPS Agreement with which they had great difficulty in complying following the expiration of the transitional periods. In effect, they were dealing with what Bernard Hoekman and Petros Mavroidis have described as the “Uruguay Round ‘hangover.’” They were also very concerned about the growing TRIPS-plus obligations developed countries have pushed upon them through new bilateral and regional trade and investment agreements.

In addition, less developed countries feared that a greater discussion of the implementation of the TRIPS Agreement would eventually open themselves to future challenges over non-compliance in the enforcement area. To many of these countries, compliance issues should be addressed only through the use of the mandatory WTO dispute settlement process. Some less developed countries also feared that a greater discussion of enforcement issues in the TRIPS Council would lead to unconstructive “finger pointing” that would slow down the Council’s work while creating unnecessary distractions.

During the next TRIPS Council meeting in January 2007, the United States circulated another paper, sharing its experience on border enforcement of intellectual property rights. The document discussed the various techniques that the United States found helpful in addressing intellectual property infringement. The United States also called on the TRIPS Council to “make a positive contribution to addressing [intellectual property enforcement] problems through a

---

62 Joint Communication, supra note, ¶ 7.
66 See Tove Iren S. Gerhardsen, Developed Countries Seek to Elevate Enforcement Measures in TRIPS Council, INTELLECTUAL PROPERTY WATCH, Oct. 25, 2006, http://www.ip-watch.org/weblog/2006/10/25/developed-countries-seek-to-elevate-enforcement-measures-in-trips-council/ (noting that “the paper carries the implied threat [by developed countries] that countries failing to provide ‘adequate’ protection of intellectual property rights ultimately could be found not to be in compliance with TRIPS”).
67 Gerhardsen, WTO TRIPS Council Stumbles, supra note.
constructive exchange of views and experiences.” Although less developed countries found the United States’ approach procedurally acceptable, they insisted that their position “had not changed, and they still [did] not believe [the enforcement issue] belongs in the TRIPS Council.” China, with the support of Argentina, Brazil, Cuba, India and South Africa, stated specifically that “enforcement could not be a permanent agenda item in the council.”

In June 2007, Switzerland introduced another paper on enforcement, suggesting ways to implement the enforcement provisions of the TRIPS Agreement and to improve the overall enforcement of intellectual property rights. The paper underscored the need to develop well-functioning communication and coordination structures in the area of border measures. A few months later, Japan introduced its own paper, sharing its experiences in border enforcement of intellectual property rights while outlining the recent trend on intellectual property infringements.

Shortly after the release of these papers, the ACTA negotiations were announced, and no new papers on enforcement has since been tabled by developed countries in TRIPS Council meetings. It is worth noting that all the key ACTA negotiating parties—Japan, the United States, the European Community, and Switzerland—had at one time or another tabled their own papers on enforcement in TRIPS Council meetings. Thus, despite the wide criticisms over how these countries have ignored multilateral forums, evidence did suggest their intention to open discussions of enforcement at the WTO. As these countries have claimed, the unwillingness by less developed countries to open discussion on enforcement gave them no choice but to explore discussions in another forum.

2. WIPO

At WIPO the key ACTA negotiating parties faced similar, and perhaps even greater, challenges. In October 2004, during the WIPO General Assembly, Brazil and Argentina introduced a proposal to establish a WIPO Development Agenda. After years of deliberation in the Provisional Committee on Proposals Related to a WIPO Development Agenda and the Intersessional Intergovernmental Meeting on a Development Agenda for WIPO, the forty-five recommendations for actions were adopted in October 2007. Recommendation 45 specifically calls on WIPO “[t]o approach intellectual property enforcement in the context of broader societal

---

69 Id. at 1.
71 Id.
interests and especially development-oriented concerns,” taking into consideration the objectives laid out in article 7 of the TRIPS Agreement.\textsuperscript{76}

Although WIPO-administered treaties, like the Paris, Berne, and Rome Conventions, provide virtually no enforcement mechanism—quite unlike the TRIPS Agreement—enforcement issues have been addressed at the organization. Before WIPO made its pro-development turn in the mid-2000s, enforcement-related advisory committees already existed. During the 1998–1999 biennium, the Program and Budget for WIPO called for the establishment of the Advisory Committee on Enforcement of Industrial Property Rights\textsuperscript{77} and the Advisory Committee on Management and Enforcement of Copyright and Related Rights in Global Information Networks.\textsuperscript{78} In October 2002, these two committees were merged into a single committee, the Advisory Committee on Enforcement (“ACE”).\textsuperscript{79} As the WIPO General Assembly stated in its report:

The mandate of the Committee in the field of enforcement, which excludes norm setting, was limited to technical assistance and coordination. The Committee should focus on the following objectives: coordinating with certain organizations and the private sector to combat counterfeiting and piracy activities; public education; assistance; coordination to undertake national and regional training programs for all relevant stakeholders and exchange of information on enforcement issues through the establishment of an Electronic Forum.\textsuperscript{80}

Based on the discussions in the General Assembly, it was quite clear that delegates from less developed countries were highly concerned that the ACE would undertake normative or standard-setting activities.\textsuperscript{81} It was against this background that the General Assembly limited the mandate of the committee to technical assistance and coordination.

The first session of the ACE was held in Geneva in June 2003, with participation from seventy-two WIPO member states, five intergovernmental organizations and sixteen nongovernmental organizations.\textsuperscript{82} During the meeting, members addressed various enforcement issues, including the coordination, training and development of enforcement strategies and the establishment of the Electronic Forum on Intellectual Property Issues and Strategies (the IPEIS Forum).\textsuperscript{83}

A year later, the second session was held to address the role of the judiciary, quasi-judicial, and prosecutorial authorities in enforcement activities, including such related issues as litigation costs.\textsuperscript{84} Shortly after this session, Brazil and Argentina introduced their proposal to

\textsuperscript{76} 45 Adopted Recommendations, supra note, recommendation 45.  
\textsuperscript{77} When this advisory committee was first created, it was known as the Advisory Committee on Enforcement of Industrial Property Rights in Global Electronic Commerce. During the 2000–2001 biennium, the committee was renamed by dropping the phrase “in Global Electronic Commerce.”  
\textsuperscript{78} WIPO, Preceding Committees and Meetings, http://www.wipo.int/enforcement/en/ace/archive.html (last visited May 9, 2010).  
\textsuperscript{80} WIPO, 28th Sess., 13th extraordinary sess. ¶ 114(iii), WO/GA/28/7 (Oct. 1, 2002).  
\textsuperscript{81} For the delegates’ different views on the mandate of the proposed ACE, see id. ¶¶ 82–120.  
\textsuperscript{82} WIPO, First Session of the Advisory Committee on Enforcement (ACE), http://www.wipo.int/enforcement/en/ace/session_1.html (last visited May 5, 2010).  
\textsuperscript{83} WIPO, Advisory Committee on Enforcement [ACE], Conclusions by the Chair ¶¶ 3, 6, WIPO/ACE/1/7 Rev., June 13, 2003.  
\textsuperscript{84} ACE, Conclusions by the Chair ¶ 5, WIPO/ACE/2/13, June 30, 2004.
establish a development agenda at WIPO. That proposal was subsequently adopted by the General Assembly in October 2004.

During the third ACE session in May 2006, which focuses on education, training and awareness-building in the area of enforcement, delegates disagreed on not only the mandate of the committee but also the participation of civil liberties groups. While developed countries took a rather narrow view of enforcement, less developed countries, powered by the new WIPO Development Agenda, wanted to include issues such as limitations and exceptions, competition issues, and biopiracy (or the misappropriation of traditional knowledge and genetic resources).

The fourth ACE session met a year later, a month after the adoption of recommendations for the WIPO Development Agenda. The meeting sought to address “the importance of cooperation and coordination especially among law enforcement agencies at the national, regional and international levels.” Although Italy sought to broaden the committee’s mandate to “include the establishment of guidelines and best practices on enforcement of intellectual property rights” during the 2007 WIPO General Assembly, the proposal was neither adopted at the General Assembly nor explored in the ACE meeting. Instead, Brazil suggested at the meeting that the ACE should take into consideration the newly-adopted WIPO Development Agenda. Meanwhile, the United States did not have a strong contingent in the session, suggesting that the newly-announced ACTA might have “move[d] some attention away from venues such as WIPO.”

In November 2009, the ACE met again to examine the “[c]ontribution of, and costs to, right holders in enforcement, taking into consideration Recommendation No. 45 of the WIPO Development Agenda.” As the conference topic suggested, the Development Agenda now has a growing influence on the work of the ACE. One participant even acknowledged that “[t]he enforcement committee is now the pet of the developing countries.”

This recent turn of events and the increasingly pro-development stand of both WIPO and the ACE may have forced developed countries to other fora—not only ACTA, but also the WCO and the Global Congress. (The Fifth Global Congress was held only a month after the fifth

---

85 ACE, Draft Agenda, item 5, WIPO/ACE/3/1, Mar. 23, 2006.
87 Id.
88 ACE, Conclusions by the Chair ¶ 8, WIPO/ACE/4/10, Nov. 5, 2007.
91 Id.
92 Id.
93 Id.
96 Eddan Katz & Gwen Hinze, The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements, 35 YALE J. INT’L L. ONLINE 24, 26 (1999) (“The decision to use a plurilateral coalition to create new global standards reflects increasing disillusion with WIPO as a norm-setting venue because of its lack of enforcement power.”); see also Michael Geist, The ACTA Threat to the Future of WIPO, INTELLECTUAL PROPERTY WATCH, Apr. 14, 2009, http://www.ip-
ACE session.) To some extent, the developments at both WIPO and the WTO resemble the notorious stalemate between developed and less developed countries over the Nairobi text of the Paris Convention when the convention was under revision in the early 1980s.95 In response to this stalemate, developed countries, led by the United States and influenced by multinational corporations, abandoned WIPO for the General Agreement on Tariffs and Trade (“GATT”), with a goal to establish new substantive intellectual property norms that are enforceable through a mandatory dispute settlement process. These norms eventually became embodied in the TRIPS Agreement.

Notwithstanding these developments, there are still possibilities that discussion of intellectual property enforcement will return to the WTO or WIPO, even if the ACTA negotiations continue. In the most recent TRIPS Council meeting, China and India have raised concerns about greater enforcement in excess of the TRIPS Agreement.96

II. FEAR #1: LACK OF TRANSPARENCY AND ACCOUNTABILITY

A. The ACTA Black Box

From the very beginning, the ACTA negotiations have been kept in secret. While some questioned, jokingly, whether the acronym ACTA stands for “Anti-China Trade Alliance”97 or “Anti-Canada Trade Agreement,”98 others suggested sadly that the treaty may, in effect, be an “Anti-Counterfeiting Trade Agreement.” 99 Although ACTA officially stands for “Anti-Counterfeiting Trade Agreement,” these alternative labels are not too far off their mark, considering the agreement’s wide implications for China, Canada, and consumers.

The secrecy behind the ACTA negotiations thus far have attracted severe criticisms by consumer advocates and civil liberties groups. As Robert Weiss of Essential Action wrote in his comment to the USTR: “There is no conceivable rationale for the cloak-and-dagger aura around the talks, and the refusal to disclose draft texts and relevant background documents.”100 Likewise, Robin Gross of IP Justice lamented:

The lack of transparency and public participation in the process to negotiate ACTA is deeply troubling to anyone who cares about democracy and the public interest. Outside of a scant

---

95 See generally Yu, A Tale of Two Development Agendas, supra note, at 505–11 (discussing the revision of the Paris Convention).
press release or two, the USTR has provided the general public with virtually no public information about the proposed substance of ACTA.\footnote{IP Justice, *ACTA’s Misguided Effort to Increase Govt Spying and Ratchet-Up IPR Enforcement at Public Expense*, http://ipjustice.org/wp/2008/03/21/acta-ipj-comments-ustr-2008march/ (Mar. 21 2008).}

When these comments are taken together, ACTA generally has raised concerns in four areas: (1) lack of transparency; (2) very limited public non-industry participation; (3) a huge democratic deficit; and (4) virtually no domestic or global accountability.\footnote{See generally ROBIN GROSS, *IP JUSTICE, IP JUSTICE WHITE PAPER ON THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (2008)* [hereinafter IP JUSTICE WHITE PAPER]; IQsensato, *supra* note, at 3.}

While this “cloak of secrecy” has protected ACTA negotiators, it eventually backfired on them by leading to concerns, fears, rumors, allegations, speculations, and paranoia that distracted them from the ongoing discussions. As one IT analyst wrote in the *Sydney Morning Herald*:

> The ACTA draft is a scary document. If a treaty based on its provisions were adopted, it would enable any border guard, in any treaty country, to check any electronic device for any content that they suspect infringes copyright laws. They need no proof, only suspicion.

> They would be able to seize any device—laptop, iPod, DVD recorder, mobile phone, etc—and confiscate it or destroy anything on it, merely on suspicion. On the spot, no lawyers, no right of appeal, no nothing.\footnote{Graeme Philpsion, *Digital Copyright: It’s All Wrong*, *SYDNEY MORNING HERALD*, June 10, 2008, http://www.smh.com.au/news/ Perspec tives/digital-copyright-its-all-wrong/2008/06/09/121263545123.html.}

> Although ACTA is unlikely to requires such draconian measures, the concern over overreaching border guards searching and confiscating travelers’ iPods, DVD players, and laptops has struck a rare chord with the consuming public, most of whom are generally not too interested in intellectual property matters.

> The distractions were so bad that one of the treaty’s key supporters even wrote to the USTR to request for greater transparency in the negotiation process. As Dan Glickman, the chairman and CEO of the Motion Picture Association of America wrote in a letter to Senator Patrick Leahy, chairman of the Senate Judiciary Committee, and USTR Ron Kirk:

> Outcries on the lack of transparency in the ACTA negotiations are a distraction. They distract from the substance and the ambition of the ACTA which are to work with key trading partners to combat piracy and counterfeiting across the global marketplace.

> We appreciate the US government’s efforts thus far to broaden its consultative process on the ACTA. Despite these exceptional efforts, the protests persist, fostering apprehension over the Agreement’s substance. We understand that the ACTA parties agree on the desirability to provide meaningful opportunities for the public to provide input. We support this objective and encourage the US government to direct that process so that we can engage in a meaningful dialogue on substance rather than procedural matters.\footnote{Letter from Dan Glickman, Chairman & CEO, Motion Picture Association of America, Inc., to Senator Patrick Leahy (Nov. 19, 2009), available at http://www.scribd.com/doc/22785108/MPAA-letter-re-ACTA; see also Nate Anderson, *Shocker: Ars, Hollywood Agree on Need for ACTA Openness*, *ARS TECHNICA*, Nov. 20, 2009, http://arstechnica.com/tech-policy/news/2009/11/shocker-arshollywood-agree-on-need-for-acta-openness.ars (discussing the MPAA letter).}
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

To a large extent, the wild speculations and the resulting distractions were sparked by the unnecessary closed-door negotiation process that made it difficult for the public to have a rational policy debate. As one commentator noted with some exaggeration, “With no open negotiating process, and no draft publicly available, ACTA is a black box that could contain a bomb.”\textsuperscript{105} To alleviate this concern, ACTA negotiators have repeatedly emphasized that the new agreement would not result in such draconian outcomes.\textsuperscript{106} They also quickly reached consensus over the need for a \textit{de minimis} provision,\textsuperscript{107} even though there was initial disagreement among the negotiating parties.\textsuperscript{108}

While Glickman’s letter may have suggested a mid-way change of the industry’s position, it also shows a rather complicated picture behind the transparency issue. That picture goes beyond the simple claim that ACTA was negotiated in secret because the U.S. government or the major intellectual property industries wanted it that way. Instead, although the United States initiated the secretive process in December 2007,\textsuperscript{109} the process has now taken on a life of its own that arguably backfires on the interests of both the negotiating parties and their supportive industries. Yet, because the negotiating parties have invested so much in this secretive process, and are now bearing the high political costs of such secrecy, changing the process is more complicated than adding a new item to the meeting agenda.

To make matters worse, the secretive approach has antagonized not only the public, but also lawmakers, including those who have been strongly supportive of the intellectual property industries. Senators Patrick Leahy and Arlen Specter, for example, were the sponsors of the Pro-


\textsuperscript{106} As the USTR noted in its fact sheet:

\begin{quote}
The focus of the discussion on border measures has been on how to deal with large-scale intellectual property infringements, which can frequently involve criminal elements and pose a threat to public health and safety. Past U.S. free trade agreements have called for \textit{ex officio} authority for border enforcement, meaning that border officials are empowered to enforce the law on their own initiative, without waiting for a complaint from a right holder. But this in no way requires searches of travelers’ music players or computers.
\end{quote}

\textsuperscript{107} See Consolidated Draft, \textit{supra} note, at 10 (including a \textit{de minimis} provision stipulating that “Parties may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travelers’ personal luggage [or sent in small consignments]”).

\textsuperscript{108} See Michael Geist, \textit{Canada’s ACTA Briefing, Part Five: The Fight Over a De Minimis Exception}, http://www.michaelgeist.ca/content/view/3834/125/ (Apr. 06, 2009) (“[S]ome groups concerned that it would send a signal that purchasing counterfeit products for personal use is acceptable or that it could lead to the importation of counterfeit medicines.”); see also \textit{Shared Challenges, Common Goals, supra} note, at 3 (noting the need to “[e]xamine whether, and under which circumstances, consumers should also be penalized for purchasing and/or possession of counterfeit and pirated products in countries that don’t already have such measures”); TIMOTHY P. TRAINER & VICKI E. ALLUMS, \textit{PROTECTING INTELLIGENT PROPERTY RIGHTS ACROSS BORDERS} 703 (2008) (“Because of the growing trade in counterfeit and pirate products, there are some governments, notably France, that have decided to take stringent measures by targeting tourists who may have only one counterfeit item. Switzerland appears to be following France’s example.”) (footnote omitted).

\textsuperscript{109} See McCoy Declaration, \textit{supra} note, at 13 (noting the United States’ proposal that “documents relating to the proposed Anti-Counterfeiting Trade Agreement (ACTA) will be held in confidence”).
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

IP (Prioritizing Resources and Organization for Intellectual Property) Act of 2008.\textsuperscript{110} Yet, they were left in the dark and had to demand more transparency over the negotiating process.\textsuperscript{111}

It is, indeed, bizarre that ACTA negotiators, the industries, and their lobbyists did not think more carefully about the unintended political complications their secretive approach would cause. After all, if lawmakers were shut out of the process, the debate would no longer be one about substance, but rather process and trust.\textsuperscript{112} The secretive process, for example, has led the European Parliament to adopt a resolution that showed as much about the need for transparency as the Parliament’s demand for respect following the entering into force of the Lisbon Treaty (Treaty on the Functioning of the European Union).\textsuperscript{113} Following the adoption of this resolution, one member of the European parliament declared emphatically that “the European Parliament is not a doormat.”\textsuperscript{114}

In Canada, similar sentiments were registered. While many Canadian lawmakers were concerned about the impact of the secretive agreement on their constituents, they were equally concerned about the process. As Charlie Angus noted, Canada should not allow the United States “to shape the substance of any copyright reform legislation” before his Parliament has an opportunity to do that.\textsuperscript{115} While he was concerned about the content of the agreement, he was also concerned about how other countries could create constraints that would bind his parliament.

To some extent, the ill-advised secretive approach urged by the ACTA negotiating parties has awakened and brought together two groups of unlikely allies. Instead of challenging the proposed agreement on substantive grounds, they can do so on procedural grounds. By providing the needed alternative focus, the approach has transformed issues that are too technical to capture public consciousness into ones that are considered publicly significant.

1. Official Reasons

Thus far, the U.S. and other administrations have failed to offer satisfactory explanations for their secretive approach. As the USTR noted in its denial of the Electronic Frontier Foundation’s request under the Freedom of Information Act\textsuperscript{116} (“FOIA”), ACTA-related documents concern “information that is properly classified in the interest of national security


\textsuperscript{112} See Nate Anderson, Key Senators Oppose DRM, ISP Filtering in Secret ACTA Treaty, ARS TECHNICA, Oct. 3, 2008, http://arstechnica.com/old/content/2008/10/key-senators-oppose-drm-isp-filtering-in-secret-acta-treaty.ars (“It’s not clear that Leahy and Specter are against any of the items suggested for ACTA by various rightsholder groups, but the two senators are quite concerned that ACTA not limit Congressional power to adapt laws to circumstances. The cynical among us might see the letter as little more than an attempt to preserve personal power—that is, a battle of fiefdoms more than content.” (referring to the letter the Senators sent to the USTR)).

\textsuperscript{113} Cf. Anderson, European Parliament Unites Against 3 Strikes, supra note (reporting a European Parliament member “sum[m]ing up the vote as an ‘epic win’ that showed ‘the European Parliament is not a doormat’”).


\textsuperscript{115} Letter from Charlie Angus, MP to Peter Van Loan, Minister of International Trade (Jan. 26, 2010), available at http://charlieangus.net/docs/lettertovanloanacta.doc?PHPSESSID=eaaf6c3d35c82c2b547e99d3d9b658928 [hereinafter Letter from Charlie Angus].

SIX SECRET (AND NOW OPEN) FEARS OF ACTA

pursuant to Executive Order 12958.” 117 Issued in April 1995 during the Clinton administration, Executive Order 12,958 allows materials to be classified when “the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.” 118 In this executive order, national security is broadly defined as “the national defense or foreign relations of the United States.” 119 Meanwhile, “foreign government information” covers a broad category of information, including:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence; [and]

(2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence . . . . 120

Although government officials, industry groups, and commentators have repeatedly noted the strong link between counterfeiting and piracy on the one hand and organized crime and terrorism on the other, 121 national security, in this case, is more correctly identified with the maintenance of good foreign or diplomatic relations with ACTA negotiating partners. To better understand the impact of the disclosure of these documents on foreign relations, it is important to separate the documents into three different categories: (1) documents developed by foreign governments and submitted to the home government in confidence; (2) documents jointly developed by the home and foreign governments throughout the ACTA negotiating process; and (3) documents developed by the home government. Although the first type of documents, from a diplomatic standpoint, deserves the highest protection, the other types of documents deserve much less protection.

Indeed, the disclosure of the last type of documents should be attributed to an additional reason, which is stated in the Summary of Key Elements Under Discussion, a six-page jointly-developed consensus document that was publicly disclosed by ACTA-related governments, following the inauguration of the Obama administration. As stated in the April 2009 document, which have since been repeatedly revised:

[I]t is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation. This

119 Id. § 1.1(a).
120 Id. § 1.1(d)(1)–(2).
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

allows delegations to exchange views in confidence facilitating the negotiation and compromise that are necessary in order to reach agreement on complex issues.\footnote{McCoy Declaration, supra note, at 6–7.}

In a declaration submitted in the Electronic Frontier Foundation’s follow-up challenge to its partially denied FOIA request, Assistant USTR Stanford McCoy, who was the chief ACTA negotiator until his current post, elaborated:

In my experience, of paramount importance to a successful negotiation is an environment in which negotiating partners can exchange ideas, draft texts, draft comments on texts, and other negotiating records, with the understanding that these exchanges will be held in confidence. When negotiating partners function in an environment of confidence, they are freer to engage in the give-and-take that is necessary to reach a successful conclusion.\footnote{Elec. Frontier Found. [EFF], RIAA v. The People: Five Years Later, http://www.eff.org/wp/riaa-v-people-years-later (Sept. 2008).}

To some extent, it is understandable why intellectual property rights holders would rather keep the treaty negotiating process secret. While it is unlikely that professional counterfeiters would seek to influence the treaty negotiations, thus warranting the nontransparent approach, many rights holders—particularly those in the music industry—have unfortunately considered the file-sharing-loving public as the new counterfeiters. Since September 2003, the industry has filed more than 30,000 lawsuits against individual file-sharers.\footnote{For discussions of the copyright wars, see generally LESSIG, REMIX, supra note; PATRY, supra note; Jessica Litman, War and Peace: the 34th Annual Donald C. Brace Lecture, 53 J. COPYRIGHT SOC’Y U.S.A. 1 (2006); Jessica Litman, War Stories, 20 CARDOZO ARTS & ENT. L.J. 337 (2002); Yu, The Escalating Copyright Wars, supra note.} At the time of the negotiation, the industry is still in the middle of a “copyright war” with the public.\footnote{Mark A. Lemley, Dealing with Overlapping Copyrights on the Internet, 22 U. DAYTON L. REV. 547, 578 (1997); see also Stuart P. Green, Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights, 54 HASTINGS L.J. 167, 238 (2002) (“People whose internal moral codes would never allow them to walk into a store and steal a piece of merchandise apparently think there is nothing wrong with making an unauthorized copy of a videotape or downloading a bootlegged computer program.”); Geraldine Scott Moohr, Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws, 54 AM. U. L. REV. 783, 795 (2005) (“Under any theory of deterrence, it is more difficult to induce law-abiding behavior when underlying social norms do not support the law. Simply put, people are more likely to obey criminal laws that reflect community values or moral judgments of right and wrong.”).} Given the fact that the industries intend to push for the agreement to target the file-sharing public, it is logical for them to expect the agreement not to disclosed to those who are the opponents or who would oppose or disrupt the agreement.

While it is sad that an industry would have taken up such a belligerent approach, it is particularly troublesome when government negotiators also look at the public through a industry-induced bellicose lens. Moreover, governments are supposed to work for the public, and it is the public constituents that get lawmakers elected. After all, as Mark Lemely reminded us, “if a law is so out of touch with the way the world works that it must regularly be ignored in order for the everyday activities of ordinary people to continue, perhaps we should begin to question whether having the law is a good idea in the first place.”\footnote{William Patry, Moral Panics and the Copyright Wars xx (2009) (“The sin of copyright—and it is a large and growing sin—is that it provides the legal framework for … an upside-down business model, a model in which the copyright industries may safely engage in anti-consumer, anti-competitive, and anti-innovative conduct.”).} Likewise, William Patry pointed out that existing U.S. copyright law focuses on protecting certain business models than promoting creativity\footnote{William Patry, Moral Panics and the Copyright Wars xx (2009) (“The sin of copyright—and it is a large and growing sin—is that it provides the legal framework for … an upside-down business model, a model in which the copyright industries may safely engage in anti-consumer, anti-competitive, and anti-innovative conduct.”).}—or, in constitutional terms, “the Progress of Science.”\footnote{William Patry, Moral Panics and the Copyright Wars xx (2009) (“The sin of copyright—and it is a large and growing sin—is that it provides the legal framework for … an upside-down business model, a model in which the copyright industries may safely engage in anti-consumer, anti-competitive, and anti-innovative conduct.”).}
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

In the European Community, the same explanation was given when the EU Council of Ministers denied a public access request by the Foundation for a Free Information Infrastructure (FFII)’s for ACTA-related documents. Cited for such a denial is the need for “protection of the public interest with regard to international relations.” As the Council stated further in a draft reply to the European Ombudsman, the disclosure of these documents “would negatively affect the climate of confidence in the on-going negotiations and hamper open and constructive co-operation, which is essential in this process.” The Council further pointed out that “if the EU’s negotiating partners had reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the EU side, it would also have an adverse effect in future negotiations.” As to documents that do not implicate international relations, the Council claimed that they should remain classified because their disclosure “would reveal the EU’s strategic objectives to be achieved in those negotiations” and that “the overall conduct of the on-going negotiations would thereby be compromised, which would be prejudicial to the EU’s interest in the efficient conduct of such negotiations.”

Although both the European Community and the United States have taken contrary approaches in negotiations at WIPO, WTO, WHO, and other international fora, negotiations at the bilateral and plurilateral levels have, indeed, been kept secret in the past. Given the controversial nature of intellectual property protection today, it is understandable why negotiators would rather limit the discussion to themselves. From a tactical standpoint, a secretive approach would make the negotiation smoother and much more successful. A secretive approach would also help shield the negotiations from external influence, which range from political complications in the capitals to opposition from civil society groups. In addition, by concealing the positions of each party, such an approach would greatly reduce the pressure faced by the negotiators while at the same time promoting a long-term negotiating relationship. Such a relationship may benefit the negotiators in the long run, as the relationship may go beyond the negotiation of this particular agreement or this particular version of the agreement.

Even more beneficial, such an approach would allow a country to complete their negotiations and then decide whether they want to walk away from the treaty they help shape and negotiate. Powerful countries, indeed, have taken such a position in the international arena in the past, earning frustrations from their weaker negotiating partners. While the United States was

---

130 The European Ombudsman “is appointed by the European Parliament for a renewable five-year term and can investigate complaints of maladministration against the EU’s bodies and institutions (except its courts).” CLIVE ARCHER, EUROPEAN UNION 45 (2008).
131 Id. at 3–4; see also European Commission Fact Sheet, supra note, at 2 (“For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion.”).
133 See Essential Action Comment, supra note. For a brief discussion of openness in these and other international fora, see generally Memorandum from Electronic Frontier Foundation et al. to Ron Kirk, USTR attachment 1 (July 22, 2009), available at http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf.
134 For example, although Australia already has a FTA with the United States, it is now negotiating the Trans-Pacific Partnership Agreement with the country as well as with other countries in the Pacific Rim.
heavily involved in the negotiation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and demanded significant concessions from other negotiating parties.\textsuperscript{136} it (along with Israel) eventually voted against the convention and refused to become a party.\textsuperscript{137}

If these benefits are not enough, the negotiators do have a strong worry that the disclosure of ACTA would create a slippery slope where the public would demand disclosure of negotiations of other bilateral and regional trade, investment, and intellectual property agreements. As a leaked document indicated: “The [European Commission] feared to establish a precedent for the free trade agreement currently under negotiation. It is not the intention that the position of the EU in those will be completely public. This could have great repercussions for the interests of the EU.”\textsuperscript{138}

Notwithstanding these potential concerns, it is worth noting that the United States had indeed managed to release documents that were covered by the December 2007 confidential agreement following consultation with other ACTA negotiating parties.\textsuperscript{139} Unlike trade agreements which can include tariffs, quotas, financial data, or other sensitive information, ACTA focuses primarily on intellectual property enforcement and does not deserve the same type of protection as a trade agreement. To some extent, a trade agreement is more a pretext for secrecy than the actual nature of the agreement. As Sherwin Siy of Public Knowledge rightly criticized, “ACTA’s status as a trade negotiation seems less based in the nature of its substance than in the convenience that this designation provides.”\textsuperscript{140}


\textsuperscript{137} Alan Riding, UNESCO Adopts New Plan Against Cultural Invasion, N.Y. TIMES, Oct. 21, 2005, at E3 (reporting that “[t]he convention, the result of two years’ heated and occasionally bitter negotiations, was adopted at Unesco’s Paris headquarters by 148 votes in favor, with the United States and Israel voting against and just four countries—Australia, Nicaragua, Honduras and Liberia—abstaining”).

\textsuperscript{138} Brenno de Winter, New ACTA Leaks Reveal Internal Conflicts Among Negotiators [sic], COMPUTER WORLD, Feb. 25, 2010, http://news.idg.no/cw/art.cfm?id=05CD8788-1A64-6A71-CE97003EDC06B00.

\textsuperscript{139} As Assistant USTR Stanford McCoy noted in his declaration: Some of [the records disclosed to the Electronic Frontier Foundation] were protected by the confidentiality agreement we reached with the other ACTA negotiating partners. However, after reviewing the documents carefully, we considered that, from the U.S. point of view, release of some of the documents would not harm the negotiations. In light of the confidentiality agreement, we consulted with our partners and asked them to agree to release the records in question, and they agreed.

\textsuperscript{140} Id. at 10. As Essential Action reminded the USTR: It is true that some trade talks, including U.S. bilateral free trade negotiations, are conducted in secrecy. But this is no rationale for secrecy in the ACTA context, for several reasons. First, it is illogical for USTR to point to its own practice of demanding secrecy as a justification for secrecy in this case. Second, even if secrecy were the norm, there is no argument to be made for following a bad, self-imposed policy just because of precedent. Third, if there is any logic to the secrecy in bilateral talks (and we do not believe a good case can be made), it is that negotiators necessarily are discussing benefits and sacrifices for different national industry groups, and if the industry groups were able to respond to every proposal, the negotiation might be bogged down. But this argument has no relevance to the ACTA context. Are negotiators worried that counterfeiters might seek to influence the negotiations?

Essential Action Comment, supra note, at 2.

\textsuperscript{140} Sherwin Siy, The Trouble with ACTA, American Constitution Society, Apr. 6 2010, http://www.acslaw.org/node/15774; see also Rose, supra note (“This is not a trade agreement. This is a multilateral intellectual property agreement. It’s only about intellectual
2. Additional Reasons

While foreign relations and negotiation strategy have been offered as the two official reasons behind the secretive process—one external and one internal—a careful analysis of the negotiation context enables one to come up with a few additional reasons. First, if one travels back to the early days of the TRIPS negotiations, one could not help but notice the lack of substantive negotiation in the early sessions of the TRIPS Negotiating Group. In those sessions, the negotiators had spent a tremendous amount of time, energy, and resources on building up consensus on the need for stronger protection, agreeing on the scope of protection of the new agreement, and at times arguing over the negotiation mandate. As Daniel Gervais recalled: “Between 1987 and 1989, negotiations progressed slowly, as the Secretariat amassed a vast amount of material explaining, comparing and identifying lacunae of existing intellectual property conventions and national laws. Delegations tabled documents outlining areas where new rules were considered useful.”

Although there has yet to be any public record of the early ACTA negotiating sessions, and there will unlikely be any in the future, one can only imagine how much information there was actually in the first few negotiating sessions. As shown through leaks, many of the early documents are negotiation charts that are closer to a collection of provisions or negotiation points than to a draft text. Moreover, as the negotiations continue, new issues will come up and are being added to the agenda. For example, in light of developments in Germany, the Netherlands, the United Kingdom, the discussion of generic drug seizure has become a hot issue in the middle of the negotiations. Thus, the ACTA negotiating parties might very well have been telling the truth, at least in the early stages, when they insisted that “[a] comprehensive set of proposals for the text of the agreement does not yet exist.”

property. “They’ve called it a trade agreement in order to get secrecy and protection that trade agreements normally get.” (quoting Gigi Sohn, president of Public Knowledge)).

141 In addition to the United States and the European Community, South Korea offered the same reasons to justify the denial of a public access request for ACTA-related documents. See Danny O’Brien, Blogging ACTA Across the Globe: Lessons from Korea, Electronic Frontier Foundation, http://www.eff.org/deeplinks/2010/01/acta-and-korea (Jan. 29, 2010) (stating that IPELeft’s August 2008 request for disclosure of South Korea’s stance on the ACTA negotiation was denied, due to “a harmful effect on a diplomatic relationship with foreign countries and severe damage to considerable national interests”).

142 For excellent discussions of the TRIPS negotiations, see generally DANIEL GERV AIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 3–26 (2d ed. 2003) (describing the origins and development of the TRIPS Agreement); JAYASHREE WATAL, INTELLIG ENTIAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 11–47 (2001) (recounting the negotiation process for the TRIPS Agreement); Yu, TRIPS AND ITS DISCONTENTS, supra note, at 371–79 (examining four different accounts of the origins of the TRIPS Agreement).

143 See GERV AIS, supra note, at 14; see also Daniel J. Gervais, Intellectual Property, Trade & Development: The State of Play, 74 FORDHAM L. REV. 505, 507–08 (“Prior to the tabling of these texts, the discussions had focused on identifying existing norms and possible trade-related gaps therein, but the emerging outline of a possible TRIPS result had essentially been at the level of principles, not legal texts.”). The negotiating documents, including those of the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (NG11), are available at http://www.wto.org/english/docs_e/gattdocs_e.htm. For discussion of the disagreement between developed and less developed countries over the negotiating mandate, see WATAL, supra note, at 21; Peter K. Yu, The Objectives and Principles of the TRIPS Agreement, 46 HOU S. L. REV. 979, 984–85 (2009) [hereinafter Yu, Objectives and Principles].


145 Summary of Key Elements, supra note, at 1. As the European Commission explained in a fact sheet in November 2008: A number of “texts”, wrongly presented as draft ACTA agreements have been circulated on the web. At a preliminary stage of the discussions about the idea of a future ACTA, some of the negotiating parties have
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

Second, while the United States and the European Community have been heavily criticized for their secretive approach in the negotiation process, it is important to note that emerging countries like Singapore and South Korea may be equally, if not more, concerned about the disclosure of their negotiating positions. Given how much the draft provisions resemble those of U.S. or EU laws, and the harsh criticisms these governments have received in the past following the negotiation of FTAs with the United States, negotiators from these countries are understandably concerned about criticisms at home—over their incompetence, inadequate representation of their own countries, their kowtowing to powerful foreign interests, or, worse, betrayal. Indeed, a leaked Dutch document has identified Singapore and South Korea—along with Belgium, Denmark, Germany, Portugal, and the United States—as those opposing the disclosure of the draft text.  

In retrospect, the concerns for emerging countries are generally somewhat different from those of the United States and the European Community. While the former feared that such disclosure would result in serious political ramifications at home, the latter feared that such disclosure would result in parties walking away from the negotiation table (in addition to protests at home).  

In many emerging and less developed countries, there is still a significant disconnect between what policymakers want at the international level and what the actual local conditions are in their own countries. The relationships between capitals and diplomatic outposts (usually Geneva or Brussels) are complicated, to say the least. The policymakers’ increasing, and sometimes blind, focus on using intellectual property protection to attract foreign direct investment has also led them to become more interested in agreeing to stronger intellectual property protection at the international level than is suitable at home. As Kevin Gallagher observed, policymakers in less developed countries increasingly “trade away” the ladder that would enable them to catch up with other developed countries.  

Finally, transparency could be used as a bargaining chip for the ACTA negotiating parties. For example, before the eighth round of negotiation in Wellington, the USTR spokesperson stated, partly as a signal to other negotiating parties:

submitted concept papers, to present their initial views of the project to other partners. Some of these concept papers have been circulated on the net or commented in the press and presented as “draft ACTA texts or negotiating guidelines”, which they are not.  

European Commission Fact Sheet, supra note, at 4.  


The U.K. wants full disclosure with support from, among others, the Netherlands, Poland, Estonia, Finland, Sweden and Austria. Germany and Denmark are opposed to that. It turns out that Singapore and South Korea also demand secrecy. Japan switched position and now favors full disclosure. The U.S. is silent on the matter.  

But the position of Washington becomes apparent when the report states that Italy and France fear retaliation.  


carolyn deere, the implementation game 314 (2009) (“Developing country diplomats working on IP issues in Geneva frequently expressed frustration with IP reforms underway at home that sacrificed TRIPS flexibilities.”).  

See Yu, The International Enclosure Movement, supra note, at 892–901 (discussing the “incentive-investment divide”).  

Increasing transparency in the ACTA negotiations, including providing improved means for public input into the process, is a priority for the United States. In this upcoming round of ACTA negotiations, the U.S. delegation will be working with other delegations to resolve some fundamental issues, such as the scope of the intellectual property rights that are the focus of this agreement. Progress is necessary so that we can prepare to release a text that will provide meaningful information to the public and be a basis for productive dialogue. We hope that enough progress is made in New Zealand in clearing brackets from the text so that participants can be in a position to reach a consensus on sharing a meaningful text with the public.\footnote{Press Release, USTR, The Office of the U.S. Trade Representative Releases Statement on Upcoming ACTA Negotiating Round in New Zealand (Apr. 11, 2010), http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-statement-up.}

As Professor Geist noted, reading between the lines, one can see the suggestion that satisfactory resolution of the differences between the United States and other negotiating parties—and more likely, accommodation of the United States’ preference—will be a condition for disclosure of the draft agreement.\footnote{See Michael Geist, U.S.: No ACTA Transparency Unless Other Countries Cave on Substance, http://www.michaelgeist.ca/content/view/4949/125/ (Apr. 12, 2010) (“Note what the U.S. is actually saying—resolving scope of the treaty (the E.U. is seeking a broader scope that includes patents) and removing square brackets (the sources of disagreement) is needed to reach consensus on sharing text with the public.”).} After all, although the United States faced pressure from lawmakers and civil society organizations, they still might face less pressure at home than its negotiating partners. Or at least, the U.S. negotiators were less concerned about the pressure they faced at home and therefore had a stronger bargaining position.

Meanwhile, the “transparency” bargaining chip can be used in the opposite direction. For example, those countries that would obtain gains in a much more transparent environment could use the threat of loosening up the secret veil, including leaks, to secure concessions. In the case of ACTA, these countries are more likely to be those that are less powerful within the group and in need of public support to fight back the demands of their more powerful negotiating partners. Nevertheless, these countries may be concerned about the potential retaliations by the more powerful negotiating parties, such as the ejection from the treaty negotiations and other trade and diplomatic repercussions, both within ACTA and without.

3. Secretive, Undemocratic Approach

Although these five reasons, combined together, have helped explain why ACTA negotiating parties were reluctant to discuss the draft treaty in the open, the lack of transparency, public participation, and accountability in the negotiation process remains highly problematic in a democratic society. Without the release of the draft text, it is indeed hard for the lawmakers and public at large to debate whether the treaty reflects appropriate standards and policies.

In addition, a secretive, undemocratic approach is likely to result in the creation of “a process that necessarily has an artificially constrained view of the values at stake.”\footnote{Siy, supra note.} As the Computer and Communications Industry Association and NetCoalition wrote to the USTR Ron Kirk, “given the highly technical nature of intellectual property law, and the inconsistent U.S.
court decisions in this area, USTR would benefit from broad public input to ensure that U.S. negotiating positions do not stray from U.S. law.”

At the moment, the U.S. administration has provided key briefings to selected industry groups, even though it may have kept the public in the dark. Under the confidential agreement, each negotiating party can disclose selected information to a small group of individuals outside the government. In the United States, these individuals include (1) government advisors and (2) those with “a need to review or be advised of the information in [the ACTA-related] documents” (a designation that is to be unilaterally determined by the administration). Because industry leaders and corporate lobbyists typically serve on the administration’s industry trade advisory committees, they have access to key ACTA information, while most consumer advocates and civil liberties groups do not. As a result, the administration’s selective disclosure of the negotiating documents has created a problem of “unequal access by stakeholders.” As Gwen Hinze of the Electronic Frontier Foundation rightly protested:

There’s a fundamental fairness issue at stake here. It’s now clear that the negotiating texts and background documents for this trade agreement have been made available to representatives of major media copyright owners and pharmaceutical companies on the Industry Trade Advisory Committee on Intellectual Property. Yet private citizens—who stand to be greatly affected by ACTA—have had to rely on unofficial leaks for any substantive information about the treaty and have had no opportunity for meaningful input

---

156 McCoy Declaration, supra note, at 6 (stating that ACTA-related documents “may be given only to government officials or persons outside government who participate in the party’s domestic consultation process and have a need to review or be advised of the information in these documents”).
157 See USTR, Advisory Committees, http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees (last visited May 3, 2010). One of these committees, ITAC–15, focuses on intellectual property in particular. As Assistant USTR Stanford McCoy noted in his declaration: ITAC–15 provides valuable information and technical expertise to USTR that allows USTR to more effectively address intellectual property concerns around the world. ITAC members have security clearances. . . . Members of ITAC–15 include representatives from the software, recording, movie, and publishing industries, as well as the Global Health Council. To solicit views from ITAC members, USTR posts documents on a secure website, and individual members can access the documents and provide comments directly to individual USTR officials. ITAC comments may range from technical comments on wording choices in draft negotiating texts to overall U.S policy on trade-related IPR issues.
158 See Love, supra note; see also McCoy Declaration, supra note, at 8 (“Advisors from other advisory committees, including representatives from public interest groups such as Consumers Union, also have access to these texts, and some members of the advisory committees have provided comments.”); Sherwin Siy, ACTA Remains Closed: The Difference Between Inclusion and Transparency, http://www.publicknowledge.org/node/62710 (Oct. 20, 2009) (discussing the very limited access to ACTA-related documents Public Knowledge had); USTR’s Advisory Committee on Intellectual Property Rights: Public Interest Groups Still Calling for a Voice, INTELLECTUAL PROPERTY WATCH, Nov. 4, 2004 (reporting that “a U.S. General Accounting Office (GAO) report on the role, structure and operations of the trade advisory committee system (prepared at the request of the U.S. Senate Committee on Finance) noted that at that time only two of USTR’s industry advisory committees included non-business interests—in both instances as a result of legal challenges.”).
into the negotiation process. This can hardly be described as transparent or balanced policy-making.160

Even more problematic, while some industries had access, others did not. As Professor Geist has shown through a freedom of access request in Canada, in its now-aborted plan to develop an Intellectual Property and Trade Advisory Group, the Canadian government planned to invite fourteen industry groups (including the recording, movie, software, and game industries) while leaving out key industries in the telecommunications, technology, and internet sectors.161 In some countries, the failure to account for these other powerful interests—such as the highly powerful Telemex in Mexico—could even spell complications, if not impossibility, for future implementation of the agreement.162

In addition to the lack of participation by the public and selected industries, the current negotiating process also overlooks the need for governmental agencies to have access to the negotiating documents. Under the current process, it is up to the ACTA negotiators to determine whether they want to share confidential information with those colleagues who are not involved in the negotiations. From the rights holders’ perspective, such a strategy would be effective, because it would prevent other agencies, such as those involved in public health or education, from derailing the discussions. From the standpoint of good government, however, such an approach would impede the ability of other equally capable government agencies to prepare for changes that would be required under the new agreement. The secretive approach also takes away the opportunity for these agencies to share their experiences and best practices or to warn about potential unintended consequences in areas outside the intellectual property field.

To complicate matters, both the Second Bush and Obama administrations have chosen to negotiate the agreement as a sole executive agreement.163 As Jack Goldsmith and Lawrence Lessig pointed out in an opinion piece in the Washington Post, such an approach has raised some very serious constitutional concerns:

Historical practice and constitutional structure suggest that [sole executive agreements] must be based on one of the president’s express constitutional powers (such as the power to recognize foreign governments) or at least have a long historical pedigree (such as the president’s claims settlement power, which dates back over a century).

Joining ACTA by sole executive agreement would far exceed these precedents. The president has no independent constitutional authority over intellectual property or communications policy, and there is no long historical practice of making sole executive

---

162 See Posting of Blayne Haggart to Blayne Haggart’s Orangespace, http://blaynehaggart.blogspot.com/2010/03/acta-all-global-treaties-are-local.html (Mar. 6, 2010, 09:15) (pointing out that ACTA negotiating parties failed to align their interests with those of Telmex, a politically powerful internet service provider owned by the third richest man in the world).
163 The use of sole executive agreements can be partly attributed to the fact that the executive branch has lost its fast track trade authority at the expiration of the Trade Promotion Authority in 2007. See Katz & Hinze, supra note, at 30. For an excellent overview of fast track trade authority, see TODD TUCKER & LORI WALLACH, THE RISE AND FALL OF FAST TRACK TRADE AUTHORITY (2009), available at http://www.fasttrackhistory.org/TheRiseAndFallOfFastTrack.pdf.
agreements in this area. To the contrary, the Constitution gives primary authority over these matters to Congress, which is charged with making laws that regulate foreign commerce and intellectual property.\textsuperscript{164}

Such a “go-it-alone” approach, according to Professors Goldsmith and Lessig, would violate President Obama’s pledge for greater transparency during his electoral campaign. Such an approach also would have serious implications in other areas of international law. As they continued: “If the president succeeds in expanding his power of sole executive agreement here, he will have established a precedent to bypass Congress on other international matters related to trade, intellectual property and communications policy.”\textsuperscript{165}

Finally, if ACTA ultimately is to be accepted by the public as fair and legitimate, getting the agreement completed through a shady backdoor deal is unlikely to lead to wide public acceptance of the new norms embodied in the agreement. As Kimberlee Weatherall reminded us:

> The secrecy is . . . operating, once again, to bring intellectual property law into disrepute. To the extent that at some later point governments and IP owners will ask people to accept the outcomes as “fair” and ones that should be adopted, it will be more difficult to convince them when the agreement has the appearance of a secret deal done with minimal public input. Since neither copyright, nor trade mark, are readily “self-enforcing” laws they depend for their effectiveness on a certain amount of support among the public. Secret negotiations on IP policing powers are not an ideal way to garner such support.\textsuperscript{166}

It is also ironic that the agreement, in its current draft form, includes a transparency provision.\textsuperscript{167} If the ACTA negotiating parties want to teach others how to honor commitments under the transparency provision, teaching by example is unlikely to be a good idea. How can one expect others to respect transparency when the negotiating parties do not respect transparency in the first place? Moreover, if a lack of transparency is the key to the success to these negotiations, why would ACTA members give up this formula of success after the negotiations are completed?

**B.Leaks and Consolidated Text**

Despite the secretive, transparent approach, the barrage of criticisms and public access requests from lawmakers, academics, consumer advocates, and civil liberties groups have led the negotiating parties to release limited information in the form of press releases, meeting agendas, fact sheets, negotiation summaries, and discussion papers. The jointly-developed *Summary of Key Elements Under Discussion*, for example, clarified the objectives of ACTA, summarized the key issues under discussion, and provided an overview of the suggested contents for the agreement.\textsuperscript{168} With close coordination, trade ministries or foreign affairs departments have also posted information on specially-created websites that are dedicated to the negotiation of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Weatherall, *ACTA*, supra note, at 3 (footnotes omitted); accord Michael Geist, *ACTA Negotiations, Day Three: Secret Talks on Transparency*, http://www.michaelgeist.ca/content/view/4515/125/ (Nov. 5, 2009) (“ACTA is quickly becoming so broadly discredited that it will be nearly impossible to garner public support for the treaty. ‘The secret copyright treaty’ is hardly a selling feature for a treaty that may be dead-on-arrival in the minds of citizens around the world.”).
\item \textsuperscript{167} See Consolidated Draft, supra note, art. 5-A.
\item \textsuperscript{168} *Summary of Key Elements*, supra note.
\end{itemize}
\end{footnotesize}
agreement. In addition, from time to time, countries have solicited comments from the public about different parts of the agreement. They have also provided briefings to the public about the state of the negotiations. Although countries have clear, and often unrevealed, differences in their negotiating positions, the contours of the agreement have begun to emerge.

If official disclosure is insufficient, civil liberties groups have been active in providing information to help the public understand the potential impact of the agreement. In March 2008, more than a couple of months before the first round of negotiations, for example, IP Justice published a pioneer and very informative white paper discussing the potential negotiation items on ACTA. Academics and civil liberties groups across the world also worked hard to obtain information through FOIA, the Canadian Access to Information Act, or their equivalents. Many of them even managed to obtain “leaked” information or documents, which were quickly posted on to the internet via WikiLeaks and other websites. In addition, commentators—most notably Professor Geist—have offered concise, yet valuable commentary on the potential provisions while keeping the public up-to-date about the state of the negotiations.

Finally, because ACTA relies heavily on the provisions of the FTAs negotiated by the United States and the EPAs advanced by the European Community, researchers and commentators were able to gain important insights into the possible treaty language by carefully studying the provisions in those agreements, which arguably provide good proxies for ACTA. By closely watching the call for comments in countries such as Australia and New Zealand, they were also able to get a good sense of what provisions would be included in the agreement.

In March 2010, a January 2010 consolidated draft was leaked to the public, indicating the different positions that have been allegedly taken by the negotiating parties. This document indicated who the demandeurs were with respect to each particular provision or negotiating item. While the leaked draft created embarrassment for officials involved in ACTA negotiations, especially those that have been less than forthright about the negotiations, it also raised questions among other government officials who did not have or were denied access to the negotiating documents. In addition, the leaked document confirmed, or denied, many of the concerns and fears that have been registered thus far.

---

169 These documents can be accessed through the following URLs:

170 In the United States, for example, the Office of the USTR accepted public comments on ACTA from February 15, 2008, to March 21, 2008.

171 IP Justice WHITE PAPER, supra note.

172 Examples of these academics and organizations include Michael Geist, the Electronic Frontier Foundation, the Foundation for a Free Information Infrastructure, IPLeft, Knowledge Ecology International, and Public Knowledge, among others.

173 See, e.g., USTR, Anti-Counterfeiting Trade Agreement, http://www.ustr.gov/acta (last visited May 3, 2010) (“Members of the public who are interested in understanding the U.S. approach to possible legal framework provisions of the ACTA should review the ‘ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS’ Article of the intellectual property rights chapters of recent U.S. Free Trade Agreements (FTAs).”); Kaminski, supra note, at 251 (surmising on ACTA’s potential terms by closely examining the FTA texts).


175 Leaked Draft, supra note.
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

Following the eighth round of negotiations in New Zealand in April 2010, the ACTA negotiating parties finally agreed to release a consolidated draft of the agreement.176 As noted in the consensus press release, “there was a general sense from this session that negotiations have now advanced to a point where making a draft text available to the public will help the process of reaching a final agreement.”177 The text was released on April 21, 2010, in the United States, the European Community and Japan (and on April 22, 2010 in countries such as Australia and New Zealand). While the officially released version is very similar to the earlier leaked version, some of the provisions and footnotes in the leaked version have been removed or altered. The official draft also fails to include any attribution to the bracketed texts, which make the official version less attractive than the unauthorized version.

Ironically, the challenges for the ACTA negotiators over unauthorized distribution via the internet were identical to those that have confronted the music and movie industries. More disappointingly, by providing the public with an inferior version—like those tethered downloads record companies offered to the public—the negotiators seem to have failed to learn from the mistakes made by the industries in their unsuccessful responses to ongoing challenges in the digital environment. The negotiators’ lack of long-term vision, indeed, is problematic. How can one expect the ACTA negotiators to come up with solutions that successfully adapt to the changing technological environment if they could not even foresee the potential problems created by providing a document that is far inferior to what has already been leaked online?

As the documents revealed, there are six different parts: (1) initial provisions and definitions; (2) legal framework for enforcement of intellectual property rights; (3) international cooperation; (4) enforcement practices; (5) institutional arrangements; and (6) final provisions. Part II, which is the most controversial and longest of the agreement, is subdivided into four different sections: (a) civil enforcement; (b) border measures; (c) criminal enforcement; and (d) enforcement of intellectual property rights in the digital environment. Although new provisions and sections can still be added in the remaining stages of the negotiation, the final form of the agreement is unlikely to be dramatically different from this draft.

With the disclosed drafts, the negotiation process is undoubtedly more transparent than it was before. Nevertheless, there remain lingering questions concerning how transparent the negotiation process will be from now on, how much public input there will be in the remaining days of the negotiation, and whether the agreement’s oversight committee,178 if created, would eventually be open to participation by civil society organizations.

III. Fear #2: Upward IP Ratchet at Home

Although the discussion of ACTA, thus far, have focused primarily on the lack of transparency and accountability, a related fear induced by the secretive process concerns the potential upward ratchet of intellectual property standards in even those countries that have already very high standards, such as the European Community and the United States.

176 Consolidated Draft, supra note.
178 See discussion infra Part VI.
When the draft negotiation documents were leaked in bits and pieces, consumer advocates, civil liberties groups, and commentators began to be able to confirm some of their worst fears. The documents also have raised concerns among those less developed countries that were not invited to negotiate ACTA, but most likely would be “coerced” into joining the agreement or adopting its standards in the near future.179

Interestingly, officials from the European Community and the United States continue to insist that the agreement would not require changes in the existing laws within their countries.180 Other countries, by contrast, made much weaker statements that could potentially include revision of their laws. For instance, Australia indicated that it did not “seek to drive change in domestic law through ACTA.”181 Canada insisted that ACTA would be “subservient” to domestic copyright law.182 Meanwhile, New Zealand noted that the agreement “will not change [its] ability to set its own standards for the protection of copyright and trade marks.”183 None of these countries, however, was willing to state that ACTA would not require legislative changes in the country.

A careful reading of the drafts raises serious doubts about the accuracy of the positions of virtually all of these countries, especially when one takes into account the many significant differences between U.S. and EU intellectual property laws, not to mention the additional differences among the ACTA negotiating parties.184 Consider the United States, for example. As Gwen Hinze observed in her preliminary analysis of the consolidated draft:

[T]he text includes a EU proposal, for criminal sanctions for “inciting, aiding and abetting” intellectual property infringement (Article 2.15(2)). That language is taken from the draft 2007 EU IPR enforcement criminal sanction directive. US copyright law does not recognize the concept of “inciting” copyright infringement, so it is unclear what this means and when it would apply. This raises the concern that ACTA could expand the scope of secondary copyright liability for Internet intermediaries, consumer device manufacturers and software developers, beyond the boundaries of the doctrines enunciated by US courts. Next, ACTA’s chapter on “Special Measures Related to Technological Enforcement of Intellectual Property in the Digital Environment” contains a proposal (apparently put forward by Japan, based on the leaked 18 January 2010 draft) requiring ACTA signatories to enable IP rightsholders to expeditiously obtain subscriber identity information from ISPs after giving “effective notification” (Article 2.18(3ter) (Option 2)). This appears to be inconsistent with US standards of due process and judicial oversight. US copyright holders must currently file a lawsuit and seek a court injunction to force ISPs to disclose such information. Further,

179 See discussion infra Part VLA.
180 See European Commission Fact Sheet, supra note, at 2 (“ACTA will not go further than the current EU regime for enforcement of IPRs—which fully respects fundamental rights and freedoms and civil liberties, such as the protection of personal data . . . .”); USTR Fact Sheet, supra note, at 4 (proclaiming that ACTA will not rewrite U.S. law and that “[o]nly the U.S. Congress can change U.S. law”).
181 See Brett Winterford, Australia Comes Clean on ACTA Role, IT NEWS, Mar. 11, 2010, http://www.itnews.com.au/News/169254,australia-comes-clean-on-acta-role.aspx (“Australia already has a high standard of IP protection (including a safe harbour scheme) that many others are yet to meet, and seeks an agreement capable of broad acceptance. The Government does not seek to drive change in domestic law through ACTA.” (quoting a spokesman of the Department of Foreign Affairs and Trade)).
184 See TRAINER & ALLUMS, supra note, at 623 (“Given the complexity of IPR enforcement and the different obligations imposed by TRIPS, it is rare for two WTO Member States to have the same IPR enforcement system, although there may be many common enforcement elements.”).
ACTA’s civil enforcement chapter includes two proposals for UK-style loser-pays attorney fee awards, something that is not common practice in US civil litigation (Article 2.2(5)).

Indeed, when her colleague, Eddan Katz, pressed further over whether the USTR could assure the rejection of those proposals that are in direct conflict with U.S. law, Assistant USTR Stanford McCoy punted the question by “answer[ing] that ACTA will focus on large-scale intellectual property infringement and ‘in no way requires search of personal computers or music players.’” The fact that ACTA would not result in iPod-searching border guards seems to be rather different from the fact that the agreement would require no legislative changes.

To be certain, many of these differences are still in square brackets, which will eventually be removed as part of the negotiation. Given the United States’ strong bargaining position and the fact that Japan and United States were the primary drafters of some of the chapters, one can easily assume that the United States may be able to obtain a treaty that does not require substantial changes in its domestic law. After all, as negotiators love to say, “nothing is agreed until everything is agreed.”

However, treaty negotiation is always a two-way street that requires gives and takes. In fact, if no country is going to change anything in its own laws, what is the point of having treaty negotiation in the first place? While there are still benefits to having a lower-common-denominator treaty that lays out the common standards of the negotiating parties, with the hope that such an agreement would convince other non-parties to raise their standards, it is unlikely that the industries in either the European Community or the United States will be content with such a low-level agreement, given the positions they have taken when the agreement is under negotiation and based on comments they have filed thus far with their governments.

1. Lies, Damn Lies, and ACTA

There are three plausible scenarios one could think of. First, as Cory Doctorow pointed out in the copyright context, “[s]ince all these countries have irreconcilably different copyright systems, someone is lying. My money is on all of them.” If this scenario were indeed true, it would be a disgrace for government officials to mislead the public about the lack of changes in domestic laws. The scenario would raise serious accountability issues. Even if we assumed the government officials were truthful and sincere, there would still be tough questions on why the officials are that ignorant about the intention of other negotiating parties or naive that they can
actually achieve a treaty where only their negotiating partners will have to change their laws. Either way, the questions have raised serious governance issues.

Second, none of the officials is lying, and the draft text is much, much more ambitious than what the consensus the negotiating parties can eventually achieve. By the time ACTA is complete, it would become a heavily watered-down, lower-common-denominator-type agreement. In short, ACTA would be a heavily tamed, if not toothless, tiger. If this scenario were true, all the time, energy, and resources that negotiators have put into the process would have been wasted—at a time of a global economic crisis when there is an acute shortage of resources. The costly waste would raise puzzling questions about why countries have engaged in negotiation in the first place.

Third—and the reason why many people hate lawyers—conflicts are legally impossible under how laws operate in the countries. For example, in a so-called dualist jurisdiction like the United States, international agreements are rarely self-executing—that is, they can rarely be enforced in courts without prior implementing legislation. Because ACTA is negotiated as a sole executive agreement, it is guaranteed not to modify domestic laws. As the USTR stated in its fact sheet in the early days of the negotiations, “[o]nly the U.S. Congress can change U.S. law.” That statement, of course, is not entirely correct in a common law jurisdiction where judges do make law. However, it does state the legal conclusion that a sole executive agreement cannot change U.S. law.

In this scenario, if conflicts existed between the agreement and domestic law, domestic law would prevail and would remain intact until Congress chooses to amend the law. In fact, the United States can always choose not to fully implement an international agreement. For example, section 110(5)(B) of the U.S. Copyright Act remains intact even though a WTO dispute settlement panel has found the Fairness in Music Licensing Act inconsistent with the TRIPS Agreement. Likewise, despite an adverse WTO panel decision, the United States has not amended section 211(a)(2) of the U.S. Omnibus Appropriations Act of 1998, which prohibited the registration or renewal of trademarks previously abandoned by trademark holders whose business and assets have been confiscated under Cuban law. Under both scenarios, U.S. laws stay the same even though the country is in breach of its international obligations.

Obviously, if the United States chooses not to honor its commitments, there is an additional question concerning what other countries could do under the agreement. Unlike the WTO, ACTA does not possess a strong enforcement mechanism. The closest one could get is an oversight committee, which, according to one bracketed text, may help resolve disputes concerning the interpretation or application of the agreement. Thus, as far as enforcement is concerned, the agreement is closer to an organized treaty-based dialogue than a plurilateral trade agreement.

---

190 USTR Fact Sheet, supra note, at 4.
193 See Consolidated Draft, supra note, at 5.1.2(c).
Regardless of which scenario one finds more plausible, ACTA has raised justified fears that it would have serious adverse implications for not only consumers, but also businesses within the United States. Even if the laws remain the same, one may wonder whether and how much ACTA would affect the common-law interpretations of existing laws and whether and how the laws would be enforced differently once the agreement comes into effect. As Professors Goldsmith and Lessig reminded us, “a judicial canon requires courts to interpret ambiguous federal laws to avoid violations of international obligations. This means courts will construe the many ambiguities in federal laws on intellectual property, telecom policy and related areas to conform to the agreement.”

2. Policy Laundering and Backdoor Lawmaking

If the claim that ACTA would not increase protection within the United States turns out to be incorrect, and some adjustments are indeed required to avoid flouting the country’s newly-added international obligations, such an agreement would result in what commentators have called “policy laundering.” As two commentators defined:

“Policy laundering” is a term that describes efforts by policy actors to have policy initiatives seen as exogenously determined, or even seen as requirements imposed by powerful others. The United States and the United Kingdom are identified as policy actors that routinely push for the establishment of regulatory standards in international policy venues so that domestic policies can be brought into line with those policies “under the requirement of harmonization and the guise of multilateralism.”

In the case of ACTA, many of the protections required by the agreement have been considered controversial, unpopular, and inexpedient on American soil, as well as on the soils of other countries. The controversial nature of these provisions was indeed partly the reason why the negotiation of the agreement has to be kept in secret thus far. Notwithstanding their unpopularity at home, these controversial provisions have been received much more favorably, or have been even considered necessary, by industries, among policymakers, and at the intergovernmental level. As a result, those policymakers who want to get these provisions enacted at home have a strong incentive to take the provisions outside to a more favorable, and largely unaccountable, international forum.

Once the provisions have been adopted as part of an international agreement—in this case, ACTA—the administration could then bring them back to the home soil. Because of the new-found need for international harmonization, through the laundering process, the unpopular

---

194 See Siy, supra note (suggesting that ACTA provisions may “require particular interpretations of U.S. law—much of it judicially-made case law subject to ongoing interpretation and evolution”).

195 See Rob Pegoraro, Copyright Overreach Goes on World Tour, WASH. POST, Nov. 15, 2009, at G1 (“A U.S. trade official who spoke on the condition of anonymity emphasized that the government’s proposals for ACTA color within the lines of existing U.S. laws. But trying to globalize them invites fine-print changes in emphasis or detail that could lead to changes in their enforcement here.”).

196 Goldsmith & Lessig, supra note.


and ill-advised provisions now look more legitimate at home than they were before. As Pamela Samuelson reminded us:

Had [the development of the WIPO Database Treaty] succeeded in Geneva, Clinton administration officials would almost certainly have then argued to Congress that ratification of the treaties was necessary to confirm U.S. leadership in the world intellectual property community and to promote the interests of U.S. copyright industries in the world market for information products and services.

Policy laundering is dangerous, because it will upset the dynamics of the domestic lawmaking process. When Congress deliberates the needed legislation to implement a treaty—or subsequent legislation to ensure its full compliance, if ACTA, indeed, is deemed to be a sole executive agreement—the main focus of the policy debate may no longer be whether the policy would benefit the American economy—or, better, the American people. Instead, the focus may become whether the failure to adopt such a policy would isolate the country from the international community. The tone of the debate and the congressional committees involved may change. Even if the same committees are involved, they may have a difficult time adapting to new international issues, which are often quite different from the domestic issues that they are used to handling.

While policy laundering is undesirable and would result in the adoption of ill-advised laws and policies, it is particularly problematic from the standpoint of democratic governance. If left unchecked, policy laundering would result in what I have described as “backdoor lawmaking,” which is defined as “a process of outsourcing the legislative process to an international forum of unelected representatives in an effort to create laws that the domestic legislature would not have otherwise enacted.”

By presenting ACTA to the legislature as a fait accompli, the administration successfully used “backdoor lawmaking” to make an end run around Congress and the domestic deliberative process. The agreement also forestalls pending efforts to reform the intellectual property system. Such a form of lawmaking represents rent-seeking at its best, and the laws created through the process will eventually haunt the American people.

---

199 See Hosein, supra note, at 188 (noting the general notion that “international cooperation is inherently good” and the general belief that international cooperation is “seen as benign and . . . for the most part uninterrogated”).


201 See The Policy Laundering Project, supra note.


203 Other commentators have made similar observations. Accord Aaron Shaw, The Problem with the Anti-Counterfeiting Trade Agreement (And What to Do About It), 2 KNOWLEDGE ECOCITY STUD. 4 (2008), http://kestudies.org/ojs/index.php/kes/article/view/34/59 (stating that ACTA “threaten[s] to overturn the existing balance of rights and regulations established through global governance institutions”); Sfy, supra note (suggesting that “ACTA might be a form of ‘policy laundering’”).

204 See Kaminski, supra note, at 250 (“Since there is important legislation on precisely the same issues pending in, for example, the European Union, ACTA represents a clear attempt to bypass internal process in addition to multilateral process.”); Monika Ermert, Embattled ACTA Negotiations Next Week in Geneva; US Sees Signing This Year, INTELLECTUAL PROPERTY WATCH, May 30, 2008, http://www.ip-watch.org/weblog/2008/05/30/embattled-acta-negotiations-next-week-in-geneva-us-sees-signing-this-year/ (“In my opinion it is not acceptable that international agreements are negotiated behind closed doors while Parliament is working on legislation on the very same issue in a co-decision procedure. It is contradictory to European rules to prejudice EU legislation in that way, and it does not serve our democratic process.” (quoting Eva Lichtenberger, Green Party member of the European Parliament)); Letter from Charlie Angus, supra note (stating that “if Canada agrees to ACTA before new legislation is introduced, the government will have given away to the United States Trade Representative (USTR), the right of the House [of Commons] to shape the substance of any copyright
Like in the United States, ACTA poses similar danger to the European Community. For example, the agreement would bring into the Community criminal provisions that have been resoundingly rejected during the deliberation of the EC Intellectual Property Rights Directive,\textsuperscript{205} the so-called IPRED, in 2004.\textsuperscript{206} Because of the complications raised by harmonizing criminal laws within the Community, the discussion of the follow-up directive on criminal enforcement, the so-called IPRED2, remains stalled in the legislative process.\textsuperscript{207}

Although the European Commission continued to insist that “ACTA will not go further than the current EU regime for enforcement of IPRs—which fully respects fundamental rights and freedoms and civil liberties, such as the protection of personal data,”\textsuperscript{208} its mixed intentions were arguably betrayed by its advocate-like summary on criminal enforcement in its fact sheet:

> It would be key to the effectiveness of ACTA as an enforcement instrument for it to contain clear standards for deterrent and efficient criminal action against counterfeiter. There is no EU legislation in this area yet. The Commission has proposed a Directive harmonising the treatment of criminal IP infringements at EU level in 2006, but it has not been adopted so far. This means that The EU Presidency, on behalf of its Member States will coordinate this area of the negotiation . . . .\textsuperscript{209}

It is therefore no surprise that the European Parliament was very upset with the secrecy behind ACTA. As one parliament member noted: “This Parliament will not sit back silently while the fundamental rights of millions of citizens are being negotiated away behind closed doors. We oppose any ‘legislation laundering’ on an international level of what would be very difficult to get through most national legislatures or the European Parliament.”\textsuperscript{210}

Indeed, some commentators have suggested that the European Community seeks to use ACTA as a “policy laundering” exercise to revive the discussion of IPRED2.\textsuperscript{211} They also have noted the potential EU-related competency problems the negotiation will run into as far as criminal enforcement is concerned.\textsuperscript{212} In addition, it will also be interesting to see whether the European Community sought to use ACTA to export to the United States—and, for that matter, Australia, Canada, New Zealand, and other non-EU countries.


\textsuperscript{208} European Commission Fact Sheet, supra note, at 2.

\textsuperscript{209} Id. at 4 (emphasis added).


Despite strong denial by both the European Commission and other ACTA negotiating parties, the push by the European Community for greater criminal enforcement and border controls for all forms of intellectual property rights seems to match closely with the push by the United States to globalize the equally unpopular Digital Millennium Copyright Act ("DMCA"). In both cases, the negotiating parties seek to push on to the others legislation that is highly unpopular at home, yet unavailable in the other country. This is policy laundering at its best, and one could not find a better quid-pro-quo bargain!

IV. FEAR #3: UPWARD IP RATCHET ABROAD

A. TRIPS-plus Protection and Legal Transplants

While ACTA may have limited impact on the European Community and the United States, as well as those other countries that have raised their standards by virtue of new bilateral or regional trade agreements, it will require much more substantial changes in other countries. After all, the key objective of ACTA is to develop high common standards for the protection and enforcement of intellectual property rights—standards that are higher than what already exists under the TRIPS Agreement and other international intellectual property treaties. In many countries, especially those in the less developed world, such ratcheting up of intellectual property protection is likely to be highly problematic.

To provide a few examples, ACTA would require participating countries to offer protection against both the circumvention of technological measures used to protect copyrighted works, and the removal of copyright management information, at times beyond what is required by the WIPO Internet Treaties. A greater push for anticircumvention laws and digital rights management tools is likely to have serious implications for system interoperability and free and open source software.

ACTA would also require participating countries to strengthen its regulation over internet service providers (ISPs), including the adoption of a DMCA-style notice-and-takedown procedure, secondary or third party liability for these providers, active deterrence against repeat infringement, and a more streamlined process to facilitate copyright enforcement.

\begin{footnotes}
\footnotetext[216]{See Yu, Anticircumvention and Anti-anticircumvention, supra note, at 38 (noting that the DMCA has been misused in recent years to deter competition and interoperability in tangible products that only incidentally incorporated copyrightable software code). For excellent discussions of the unintended consequences of the DMCA, see generally EFF, UNINTENDED CONSEQUENCES: SEVEN YEARS UNDER THE DMCA (2006), http://www.eff.org/IP/DMCA/DMCAunintendedv4.pdf; Jacqueline Lipton, The Law of Unintended Consequences: The Digital Millennium Copyright Act and Interoperability, 62 WASH. & LEE. L. REV. 487 (2005).}
\footnotetext[217]{See id. art. 2.18(3).}
\footnotetext[218]{See id. arts. 2, 4, art. 2.18(3ter). For a critique of some of these measures, see generally Peter K. Yu, Digital Copyright Reform and Legal Transplants in Hong Kong, 48 U. LOUISVILLE L. REV. (forthcoming 2010) [hereinafter Yu, Digital Copyright Reform].}
\end{footnotes}
addition, despite the potential for quick technological obsolescence, the agreement would require the introduction of anti-camcording laws, which to date have sent one young American woman to jail for two days after tapeing her sister’s birthday party in a cinema.

In the area of border controls, ACTA would require countries to devote their scarce resources to deal with border measures and to develop “specialized expertise” and “specialized law enforcement authorities.” It might also “entail significant change in agency structure and legal authority.” In addition, greater criminal enforcement will shift costs, responsibility, and risks from private rights holders to that of national governments. Depending on one’s interpretation, the burden in the enforcement area is likely to be significant for many less developed countries. As noted in the IP Justice White Paper:

The financial expense to tax-payers to fund ACTA would be enormous and steal scarce resources away from programs that deal with genuine public needs like providing education and eliminating hunger. ACTA would burden the judicial system and divert badly needed

---

224 See Yu, Digital Copyright Reform, supra note (discussing technology neutrality and the ill-advised nature of technology-specific legislation).
225 See Consolidated Draft, supra note, art. 2.14(3).
226 See Dan Rozek, Alleged Pirate Won’t Walk Plank, Chi. SUN-TIMES, Dec. 12, 2009, at 10 (reporting that one woman “had faced up to three years in prison [for] . . . copying parts of the film [Twilight: New Moon] during a family birthday party” and had “spent two days in a jail cell following her arrest”).
227 See Consolidated Draft, supra note, art. 4.1(1).
228 See TRAINER & ALLUMS, supra note, at 705–06 (noting that “the upgrading of the border enforcement system to a more aggressive and proactive system will entail significant change in agency structure and legal authority”).
229 As Carlos Correa noted:

Criminalization is regarded by its proponents as a stronger deterrent than civil remedies. For right holders there are some significant advantages: actions can or must be initiated ex officio and the cost of procedures is fully borne by the states. However, it is clear that IPRs are private rights and that states’ only obligation under the TRIPS Agreement is to ensure that enforcement procedures are available, and not to enforce IPRs themselves on its own cost and responsibility.

Correa, supra note, at 42 (footnote omitted); see also Li, Ten General Misconceptions, supra note, at 28 (“[R]esponsibility of enforcement has cost implications. . . . [B]y shifting responsibility, it would shift the cost of enforcement from private parties to the government and ensure right-holders are beneficiaries without asking responsibility.”); Henning Grosse Ruse-Khan, Re-delineation of the Role of Stakeholders: IP Enforcement Beyond Exclusive Rights, in INTELLECTUAL PROPERTY ENFORCEMENT, supra note, at 43, 51–52 (noting the “trend for externalizing the risks and resources to enforce IP rights away from the originally responsible rights-holders towards state authorities”).

230 See SUSAN K. SELL, THE GLOBAL IP UPWARD RATCHET, ANTI-COUNTERFEITING AND PATRIC ENFORCEMENT EFFORTS: THE STATE OF PLAY 9 (IQsensato, Occasional Papers No. 1, 2008), http://www.iqsensato.org/wp-content/uploads/Sell_IPEnforcement_State_of_Play-OPs_1_June_2008.pdf [hereinafter SELL, GLOBAL IP UPWARD RATCHET] (“The opportunity costs of switching scarce resources for border enforcement of IP ‘crimes’ is huge. There surely are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms.”); TRAINER & ALLUMS, supra note, at 706 (“There are significant government cost considerations if administrative agencies involved in border enforcement are given added authority to make substantive decisions on the merits.”); id. at 709 (“The added undertaking [of criminal enforcement] could be expensive because law enforcement officials have additional equipment and training needs to conduct criminal investigations.”); Correa, supra note, at 54 (“The sophistication and cost of the means necessary to deter IPRs infringement are significant and may well exceed the tax income eventually generated by legitimate activities that would have been otherwise displaced.”); Carsten Fink, Enforcing Intellectual Property Rights: An Economic Perspective, in THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES xiii, 15 (ICTSD Programme on IPRs and Sustainable Development, Issue Paper No. 22, 2009) [hereinafter GLOBAL DEBATE ON THE ENFORCEMENT] (“[E]nforcement actions take real resources. Courts, police forces, customs offices, and other competent authorities need to be adequately staffed and equipped to respond to complaints by right holders and to act on their own. In addition, governments face the costs of maintaining prisons and, possibly, destroying seized pirated and counterfeit products that cannot be auctioned off as generic goods.”).
Indeed, because *ex officio* actions do not require rights holders to post bond or other forms of security that could be used to defray any potential damages, these actions “not only shift the initiative and costs for taking action to the state but also entail significant risks of damaging claims by affected importers whenever the goods suspended in the end are not IP infringing.” In addition, these claims could frighten investors, thus defeating what some less developed countries see as a main purpose of increasing intellectual property protection in the first place. They might also lead to bilateral actions, if not retaliation, from usually more powerful states—thus creating a double whammy which they would not face had the risks not be transferred from private rights holders to state authorities.

Even in the United States, there are significant trade-offs between greater enforcement and other public policy goals. As Carsten Fink reminded us, “greater spending on counter-terrorism in the US after September 11, 2001 has left fewer resources for fighting crime, reportedly causing rates of crime to go up in many US cities.” Likewise, commentators have noted that it is “simply impossible to raid all the warehouses [in New York] all of the time without swallowing the entire NYPD anti-counterfeiting budget and taking officers off other duties.” In fact, the European Commission noted in its *Strategy for the Enforcement of Intellectual Property Rights in Third Countries*:

> It is important to identify a limited number of countries on which the efforts of the Commission in the framework of the present strategy should be concentrated. The human and financial resources allocated to the enforcement of IPR being limited, it is unrealistic to pretend that our action can extend equally to all, or even most, of the countries where piracy and counterfeiting occur.

Capacity and resource constraints have remained a key concern for many less developed countries, even though negotiators from many developed countries continue to insist blindly—

---

231 IP Justice, *IP Justice Comments to U.S.T.R. on the Proposed Anti-Counterfeiting Trade Agreement (ACTA)* (Mar. 21, 2008), available at http://ipjustice.org/wp/2008/03/21/acta-ipj-comments-ustr-2008march/; accord FREDERICK M. ABBOTT & CARLOS M. CORREA, WORLD TRADE ORGANIZATION ACCESSION AGREEMENTS: INTELLECTUAL PROPERTY ISSUES (Quaker United Nations Office, Global Economic Issues Paper No. 6, 2007), available at http://www.quno.org/geneva/pdf/economic/Issues/WTO-IP-English.pdf (“For many developing countries, protection of IPRs is not, nor should it be, a national priority. Financial resources are better invested in public infrastructure projects, such as water purification and power generation.”); Correa, *supra* note, at 43 (“[I]n developing countries that suffer from high levels of street crime and other forms of criminality that put at risk the life, integrity, or freedom of persons on a daily basis, it seems reasonable that fighting such crimes should receive higher priority than IP-related crimes where protected interests are essentially of a commercial nature (except when associated with adulteration of health and other risky products.”); Lí Xuan & Carlos M. Correa, *Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations*, in INTELLECTUAL PROPERTY ENFORCEMENT, *supra* note, at 207, 210 (noting that the demands for strengthened intellectual property enforcement “seem to overlook the cost of the required actions, the different priorities that exist in developing countries regarding the use of public funds (health and education would normally be regarded as more urgent than IP enforcement) and the crucial fact that IPRs are private rights and, hence, the burden and cost of their enforcement is to be borne by the right-holder, not the public at large”); Xue Hong, *Enforcement for Development: Why Not an Agenda for the Developing World*, in INTELLECTUAL PROPERTY ENFORCEMENT, *supra* note, at 133, 143 (“Increment and strength of public enforcement measures will inevitably impose an economic burden on the developing countries and divert the priorities of these countries, such as prosecution of violent crimes or relief of poverty.”).

232 Ruse-Kahn, *supra* note, at 52.


234 PHILLIPS, *supra* note, at 36.

235 EC STRATEGY FOR IPR ENFORCEMENT, *supra* note, at 5 (citation and footnote omitted).
and, I would add, incorrectly—that the lack of protection in these countries shows a lack of political will. 236 As Carsten Fink, WIPO’s first-ever chief economist, clearly explained:

Given other demands on public expenditure and diminishing returns to enforcement actions, society “tolerates” to some extent violations of laws. . . . In addition, “tolerable” levels of IPRs-infringements may well differ from country to country, depending, inter alia, on societies’ preferences for different public goods. As mentioned in the introductory section, developing countries are likely to have different public spending priorities. Even within the law enforcement domain, the optimal share of budgetary resources devoted to IPRs enforcement will be lower in countries with higher levels of violence or less secure real property rights. Indeed, the enforcement part of the TRIPS Agreement sensibly recognizes that governments face competing demands for scarce law enforcement resources. 237

It is therefore no surprise that less developed countries specifically demanded the inclusion of article 41.5 in the TRIPS Agreement, 238 which states explicitly that a WTO member state is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement. 239 A similar provision can also be found in the consolidated draft of ACTA, which states that “[n]othing in this Agreement creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and enforcement of law in general.” 240 In the chapter on international cooperation, one draft provision also states that the obligations under chapters 3 and 4 “are subject to the domestic laws, policies, resource allocation and law enforcement priorities of each Party.” 241

Although the agreement did not explicitly require border guards to search one’s iPod, DVD players, laptops, or other electronic devices, it would give them the authority to order the seizure, confiscation or destruction of the suspected counterfeit or pirated goods. 242 The agreement would also give them ex officio authority to suspend the allegedly infringing goods, 243 which at times may exceed what is available in the European Community 244 and the United States. 245 If border guards in these countries choose to conduct more intrusive searches, ACTA would provide the needed support for such draconian measures, as well as a defense against the potential civil liberty intrusion or human rights violation. After all, it is beyond dispute that ACTA would be exported to countries that respect human rights and civil liberties as well as those that do not.

---

237 Fink, supra note, at 16.
238 Correa, *supra* note, at 417 (“[Article 41.5] was introduced upon a proposal by the Indian delegation, and essentially reflects developing countries’ concerns about the implications of Part III of the [TRIPS] Agreement.”); UNCTAD-ICTSD, *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* 585 (2005) [hereinafter TRIPS RESOURCE BOOK] (noting that article 41.5 “was in fact one of the few provisions in Part III where developing countries’ views made a difference”).
239 TRIPS Agreement, *supra* note, art. 41.5.
240 Consolidated Draft, *supra* note, art. 1.2(2).
241 *Id.* art. 3.1(4).
242 *See* Consolidated Draft, *supra* note, art. 2.16(1)–(2).
243 *See* id. art. 2.7.
244 Correa, *supra* note, at 58 (noting that, with respect to the obligation to criminalize intentional infringements of any kind of IPR on a commercial scale, “the European Commission is demanding from [the EPA-participating] countries a higher standard than that domestically deemed acceptable in the EU context”).
245 TRAINER & ALLUMS, *supra* note, at 540 (“The Department of Homeland Security’s Bureau of Customs and Border Protection’s . . . protection of patents against the importation of infringing goods varies substantially from the agency’s protection of copyrights, and trademarks, does not involve ex-officio action, and is much more limited in scope.” (footnote omitted)).
Finally, with respect to remedies, ACTA lumps together infringements in different forms of intellectual property rights—including copyright, patent, and trademark—although that definition remains highly contested between the European Community and the United States. Many of the remedial provisions, which range from those concerning pre-established or statutory damages to criminal penalties on noncommercial copyright-related activities, including those that have no direct or indirect motivation of financial gain, are troublesome even in developed countries. To some extent, ACTA would globalize the No Electronic Theft Act ("NET Act"), which is rather controversial in the United States. In addition, the agreement might affect how injunctions are to be granted and how damages are to be calculated. Disturbingly, the agreement would also create new penalties for "inciting, aiding, and abetting" intellectual property infringements.

In fields adjacent to intellectual property, ACTA would have serious negative implications on the protection of personal data and individual privacy, an issue that is of great concern to the Europeans, although the negotiating parties seem to be interested in including a safeguard provision to "ensure nothing in the Agreement detracts from national legislation regarding protection of personal privacy." As Peter Hustinx, the European Data Protection Supervisor, the agreement’s data sharing arrangement is highly troubling from the standpoint of individual privacy. The concerns become even greater when data are being shared with governments in countries that have very limited or virtually no protection of personal data and individual privacy. In countries that have repressive governments, such intrusion could even lead to human rights violations, thereby raising challenging complicity questions on the part of the European Community, the United States, and other cooperating governments.

Given the growing volume of academic literature and public comments that deal with the proposed ACTA provisions, and on intellectual property reforms induced by new bilateral and

---

246 See Consolidated Draft, supra note, art. IX (stating that "intellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the [TRIPS] Agreement"); see also SELL, GLOBAL IP UPWARD RATCHET, supra note at 12 (criticizing ACTA and the IP enforcement agenda’s “big tent” approach for “strategic obfuscation” over the considerable differences among the various types of intellectual property rights).

247 Gwen Hinze, Preliminary Analysis of the Officially Released ACTA Text, Electronic Frontier Foundation, Apr. 22, 2010, http://www.eff.org/deeplinks/2010/04/eff-analysis-officially-released-acta-text; Ermert, European Commission on ACTA, supra note (quoting Luc Devigne, the European Community’s lead ACTA negotiator, as stating that “all IP rights are equal”).

248 See Consolidated Draft, supra note, art. 2.2(2).

249 See Consolidated Draft, supra note, art. 2.14(1)(a). Under this proposal, “financial gain includes the receipt or expectation of receipt of anything of value.” Id. n.37.

250 See Yu, Digital Copyright Reform, supra note.

251 See, e.g., Peter Hustinx, Opinion of the European Data Protection Supervisor on the Current Negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), (2010), available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-02-22_ACTA_EN.pdf (discussing ACTA’s shortcomings in protecting personal data in the area of data sharing and the potential inclusion of a graduated response mechanism). Peter Hustinx is the European Data Protection Supervisor. In his review, he noted his “regrets that he was not consulted by the European Commission on [ACTA’s] content.” Id. at 2.

252 See Consolidated Draft, supra note, art. 1.4.

253 Id. art. 3.2.

254 See, e.g., Peter Hustinx, supra note, at 14–19.

SIX SECRET (AND NOW OPEN) FEARS OF ACTA

regional trade and investment agreements, this Part does not analyze further the specifics of each of these provisions. Instead, the remaining part of this section delves into how ACTA-induced protections would harm countries abroad, in particular those in the less developed world. Because many of the draft provisions were drawn directly from the FTAs or EPAs and sought to transplant laws literally from the developed world, they might also harm less developed countries in at least four different ways, not to mention the strong likelihood that they might not result in greater and sustained protection and enforcement of intellectual property rights.

First, as we learn from the failed “law and development” movement, legal transplants tend to be insensitive to the local environment. Because of differences in economic conditions, imitative or innovative capacities, and research and development productivities, an innovation scheme that works well in one country does not always suit the needs and interests of another. Unquestioned adoption of foreign intellectual property laws therefore not only may fail to result in greater innovative efforts, industrial progress, and transfer of technology, but it may also drain away the resources needed for dealing with the socio-economic and public health problems created by the new legislation.

Even worse, such adoption might exacerbate the dire economic plight of many less developed countries, as the new laws may enable foreign rights holders to crush local industries through threats, or even actual use, of litigation. Even if the new laws may be beneficial in the long run, many of these countries may not have the wealth, infrastructure, and technological base to take advantage of the opportunities created by the system in the short run. For countries with urgent and desperate public policy needs and a dying population, the realization of the hope for a brighter long-term future seems far away, if not unrealistic, and the present population undoubtedly will greatly suffer.

Second, the transplanted laws may stifle local development, because the interests and players that the new laws will benefit, or are designed to protect, may not be present in the local communities. Most of the time, the laws will favor foreign rights holder at the expense of the local constituents. Although commentators and policymakers have explained at length why

---

260 See Yu, The International Enclosure Movement, supra note, at 890.
261 See generally JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS & FOREIGN AID IN LATIN AMERICA 280 (1980) (contending that the law and development movement is “an energetic but flawed attempt to provide American legal assistance and to transfer American legal models, which were themselves flawed”).
264 See MASKUS, supra note, at 237 (noting that “long-run gains would come at the expense of costlier access in the medium term”).
265 As Carlos Correa rightly noted:

While [higher intellectual property enforcement standards] may benefit a selected group of individuals or innovative domestic companies, tightened measures against IPRs violations are in the primary interest of right holders in developed countries, who control the vast majority of IP-protected intellectual assets worldwide. Enforcement rules generate costs for developing countries that may not be compensated by the alleged benefits. In fact, costs may off-set benefits, especially when the states are required to substitute right holders in the defence of their private rights and assume liabilities that correspond to the latter.

Correa, supra note, at 59.
stronger intellectual property protection in less developed countries may help stimulate inventive activities at the local level, the linkage between intellectual property protection and inventive activities depends on whether the intellectual property system is struck at the right balance. If the system overprotects, intellectual creators and inventors eventually may not have enough raw materials to develop their creations. Meanwhile, the public will have very limited access to the needed information and knowledge.

Third, although promoting uniform rules may be beneficial, greater harmonization of legal standards may take away the valuable opportunities for experimentation with new regulatory and economic policies. The creation of diversified rules may also facilitate competition among jurisdictions, thus making the lawmaking process more accountable to the local populations by allowing them to decide for themselves what rules and systems they want to adopt. In the digital age, when laws are introduced quickly and often without convincing empirical evidence, greater experimentation and competition are indeed badly needed.

Finally, and the most important of all, legal transplants—especially those involving controversial laws and policies—may bring to the recipient countries problems from the source countries—similar to the introduction of diseases to the colonized world a few centuries ago. Examples include the anticircumvention provision and the notice-and-take-down procedure of the DMCA, which are non-prescient, flawed, and prone to abuse. The fact that legal transplants can bring with them problems is particularly troubling for less developed countries, which have very limited expertise in assessing the potential problems and the unintended consequences that will result from these ill-advised transplants. Even worse, many countries do not have the needed resources to put in place mechanisms that will help correct the system should the transplants upset the balance of the existing system. Because reforms based on foreign models always incur political costs on those pushing the reforms, policymakers also may have limited political capital to put in place further “correction” reforms once their initial reforms fail.

To be certain, law-transplanting international agreements, like ACTA, generally lay out the minimum standards of intellectual property protection and enforcement. Countries, therefore, are free to introduce limitations and exceptions that meet the three-step test as enunciated in the Berne Convention, the TRIPS Agreement, and the WIPO Internet Treaties. In the area of anti-circumvention protection, one draft proposal, which may come from United States as

---

267 See id. at 706–07.
268 See Yu, Anticircumvention and Anti-anticircumvention, supra note, at 50–54.
269 See Yu, Digital Copyright Reform, supra note.
270 See id.
271 See id., at 890; see also COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 4 (2002), http://www.iprc.commission.org/papers/pdfs/final report/CIPRfinal.pdf [hereinafter IPR COMMISSION REPORT] (noting that “the costs of getting the IP system ‘wrong’ in a developing country are likely to be far higher than in developed countries” and that the lack of “sophisticated systems of competition regulation [in less developed countries] to ensure that abuses of any monopoly rights . . . makes such countries particularly vulnerable to inappropriate intellectual property systems”); KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 237 (2000) (noting that developed countries “have mature legal systems of corrective interventions” in which “the exercise of IPRs threatens to be anticompetitive or excessively costly in social terms”).
272 Yu, The International Enclosure Movement, supra note, at 890.
273 See Berne Convention for the Protection of Literary and Artistic Works art. 11, Sept. 9, 1886, as last revised in Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]; TRIPS Agreement, supra note, arts. 13, 30; WCT, supra note, art. 10; WPPT, supra note, art. 16(2).
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

suggested by the leaked draft, goes even further to state that “each Party may adopt exceptions and limitations to [anticircumvention protection] measures . . . so long as they do not significantly impair the adequacy of legal protection of those measures or the effectiveness of legal remedies for violations of those measures.”

Notwithstanding this possibility, many less developed countries have neither the capacity nor the geopolitical leverage to introduce these exceptions. As Public Knowledge reminded us in its comments to the USTR:

[II]n countries lacking a robust and flexible regime of limitations and exceptions, many legitimate uses remain unlawful, but are permitted through non-enforcement. Requiring specific enforcement practices in such a situation, before legitimate uses can be recognized and codified into local limitations and exceptions, will frustrate the balance of intellectual property required to ensure creativity and innovation.

It is therefore no surprise that commentators have widely criticized the U.S. trade policy for “exporting exclusive rights but not the flexibility and balance that facilitated the emergence of leading thinkers in new innovative spaces such as the internet.”

One also may wonder how important ACTA is in a post-FTA world, where countries are increasingly committed to TRIPS-plus standards. As a TRIPS-plus agreement, ACTA undoubtedly would raise the standards of many less developed countries, it remains fair to question whether ACTA would be any different from the many bilateral or plurilateral agreements that these countries have already entered into or are likely to do so in the future, regardless of whether ACTA enters into effect. As a result of these agreements, the countries would have raised their standards to ACTA level—like Australia and Singapore after signing the U.S. FTAs. The standards advanced by ACTA, therefore, are unlikely to raise the standards of these countries. Nor will the provisions be entirely new to them.

Nevertheless, as Kimberlee Weatherall pointed out convincingly, there are two main reasons why countries should not easily give in to higher TRIPS-plus standards in ACTA, even though they may be subject to similar TRIPS-plus bilateral or plurilateral agreements. First, when countries signed on to the bilateral or regional trade and investment agreements, they usually obtain concessions in other areas, usually outside the intellectual property field, such as in agriculture or textiles. If the increase in intellectual property protection turns out to outweigh the benefits of these non-intellectual property related concessions, countries can always scale back, as long as they are willing to forgo the beneficial terms in other areas.

274 Consolidated Draft, supra note, art. 2.18(5) (Option 2).
276 Mara, US Wrestles, supra note.
277 See Weatherall, ACTA, supra note, at 5.
278 As Professor Weatherall noted in the Australian context:

Second, it is one thing to have a bilateral agreement—even with one of the most powerful trading partners, like the European Community or the United States—but another thing to have agreements (or a plurilateral one) with many different trading partners. As she continued:

Although [these countries] are currently a party to stringent standards, those standards are found only in one bilateral agreement. Further consolidation of such standards at a plurilateral level only further decreases their flexibility and increases the number of trade partners who may complain of their failure to meet such standards . . . .

B. ACTA-plus Protection and Obsession over Foreign Investment

While unquestioned transplants of TRIPS-plus protections from developed countries would undoubtedly harm their less developed counterparts, ACTA may lead to protection that is even stronger than what is offered in the developed world. Thus, even if we assume that the transplanting countries are well-intentioned and sincerely pushed for stronger protection as “a difficult but essential measure to jumpstart global economic development” in less developed countries,280 the outcome may be rather different, and often surprising, from what these countries have envisioned.

First, countries may not have the capacity to correctly implement the provision by including both the protection and its accompanying limitations or exceptions. At times, these countries may simply transcribe provisions in international agreements onto their domestic laws. Such transcription therefore leaves out important limitations or exceptions that the agreement allows, but fails to mention explicitly. As Rochelle Dreyfuss pointed out in the case of trade secret protection, “since TRIPS does not mention a right to reverse engineer [which exists in the United States], transcription would create a level of protection surpassing that found in the United States, where the right to copy is privileged.”281 Like the TRIPS Agreement, ACTA focuses primarily on laying out the minimum standards of intellectual property protection and enforcement. Because countries may not be aware of the different exceptions and limitations reserved in ACTA, unquestioned transcription of the treaty language would likely lead to higher protection than what is currently offered in the developed world.

Second, even if countries are aware of the flexibilities that have been built into the agreement, policymakers may be strongly discouraged from introducing limitations and exceptions. For example, they may face external pressure from their powerful trading partners—section 301 actions and the suspension of Generalized System of Preferences (GSP) benefits immediately come to mind.282 Even if the limitations and exceptions may be found in one of the powerful trading partners, those limitations and exceptions may raise concerns among other equally powerful trading partners. For example, the European Community has looked at askance the fair use provision in U.S. copyright law,283 despite the fact that many consider fair use a key

279 Id. at 5.
280 Daniel J. Gervais, The TRIPS Agreement and the Doha Round: History and Impact on Economic Development, in 4 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 23, 43 (Peter K. Yu ed., 2007). As Professor Gervais noted, during the TRIPS negotiations, less developed countries “were told to overlook the distasteful aspects of introducing or increasing intellectual property protection and enforcement in exchange for longer-term economic health.” Id.
strength of the U.S. copyright system. (ACTA does not even mention fair use, or fair dealing, at all!) Likewise, even though article 6(4) of the EC Information Society Directive allows each member state to “take appropriate measures to ensure that rightholders make available to the beneficiary of [the specified] exception or limitation provided for in national law . . . the means of benefiting from that exception or limitation,” the U.S. DMCA does not include a similar exception.

In the near future, it is very likely that ACTA would be considered one of the key factors in determining whether a country has adequately protected intellectual property rights. As the U.S. Trade Act has indicated, the USTR can take section 301 actions on countries that have failed to provide “adequate and effective protection of intellectual property rights notwithstanding the fact that [they] may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights.” Based on similar logic, it would be no surprise if the USTR takes ACTA obligations into consideration in the section 301 process once the agreement is adopted. After all, the USTR has put Canada repeatedly on the section 301 watch list, citing the country’s failure to ratify the WIPO Internet Treaties, among other reasons.

Moreover, countries may be dissuaded from introducing exceptions through either lobbying efforts by foreign rights holders or technical assistance efforts initiated by both the right holders and their supportive governments. At the very least, the template created by ACTA would be presented by some technical assistance “experts” as best practices around the world—or even the gold standard of intellectual property enforcement. In discussion with those in the publishing industry in Hong Kong (my hometown), I was told disturbingly that fair use is good only for countries with well-established publishing industries like the United States. According to one industry representative, the publishing industry in Hong Kong has yet to develop to a stage where fair use would be beneficial—an unproven faith-based proposition that I believe is also woefully incorrect!

286 As Public Knowledge and the Electronic Frontier Foundation noted in their joint public comment submitted to the USTR as part of the 2010 Special 301 process:
The 2008 and 2009 Special 301 reports refer to the proposed Anti-counterfeiting Trade Agreement (ACTA) being negotiated by the USTR on behalf of the U.S. and 36 other countries, which is intended to create new IP enforcement standards that go beyond those in the TRIPs Agreement. ACTA negotiating countries intend that developing countries will be required to accede to and implement ACTA. As noted above, one of the controversial criteria used by the USTR to evaluate countries’ identification in the Special 301 Report is their accession to, and particular implementation of, the WIPO Internet Treaties. The references to ACTA in the two previous Special 301 Reports appear to indicate that accession to ACTA, and implementation of its substantial standards, will be required of countries to avoid adverse consideration in the Special 301 annual review.
PUBLIC KNOWLEDGE & EFF, IN THE MATTER OF 2010 SPECIAL 301 REVIEW: IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1974, at 6 (2010), available at http://www.publicknowledge.org/pdf/pk-eff-special-301-20100218.pdf; see also Nate Anderson, ACTA Arrives (Still Bad, but a Tiny Bit Better), Apr. 21, 2010, http://arstechnica.com/tech-policy/news/2010/04/acta-is-here-articles/ (“How will ACTA be used? Probably in the same way that the DMCA has been used: as a worldwide stick to beat through a US-centric version of copyright and IP law.”); Richard Poynder, Michael Geist on the Anti-Counterfeiting Trade Agreement (ACTA), http://www.richardpoynder.co.uk/Geist_Interview.pdf (Mar. 7, 2010) (“Within a year or so many of those [developing] countries will be told, as part of trade deals, that this is the new standard and this, therefore, is what they have got to incorporate into their domestic law. And then it won’t be long before we will see these countries being named in Special 301 reports as having inadequate IP laws because they don’t conform to ACTA.” (quoting interview response from Professor Geist)).
The third reason why exceptions and limitations may not be introduced is because policymakers in less developed countries have developed a maximalist mindset, which assumes that more is always better. This mindset is deeply inspired by the oft-presumed linkage between intellectual property protection and foreign direct investment. While the attraction of foreign direct investment has always been used as a macroeconomic justification for stronger intellectual property protection, economists have shown a rather ambiguous relationship between the two. Economists have also questioned whether foreign direct investment will always be desirable. Even more problematic, there is a complicated inverse relationship between stronger intellectual property protection and greater foreign direct investment. As intellectual property protection strengthens, some rights holders may consider other means of investment—such as licensing. Under that scenario, the volumes of foreign investment will, in fact, decrease.

Finally, policymakers in less developed countries may be blinded by their concern about compliance with international obligations. As Keith Maskus and Jerome Reichman pointed out, many countries are “compliance oriented.” Policymakers in these countries, therefore, fail to “treat intellectual property as an integral part of national or regional systems of innovation.” Indeed, as I pointed out earlier, there is a growing “incentive-investment divide” among policymakers who are responsible for developing intellectual property regimes. Obsessed with using intellectual property rights to attract foreign investment, technology transfer, inward trade flows, and human capital, policymakers in these countries have focused so much on

---


289 See Peter K. Yu, Intellectual Property, Economic Development, and the China Puzzle, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 176–80 (Daniel J. Gervais ed., 2007) [hereinafter Yu, The China Puzzle] (reviewing the literature discussing the theoretical ambiguity over this presumed linkage). As economists have shown:

The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer, in INTELLECTUAL PROPERTY AND DEVELOPMENT 41, 66 (Carsten Fink & Keith E. Maskus eds., 2005); see also id. at 42 (“Emerging countries have strong and growing interests in attracting trade, foreign direct investment . . . , and technological expertise, although such encouragements must be tempered with accompanying programs to build local skills and to ensure that the benefits of competition actually arise.”).

290 See Yu, The China Puzzle, supra note, at 179 (“If the firm chooses to externalize its production through, say, licensing, stronger intellectual property protection arguably would have the ‘cancel out’ effect of reducing FDI.”).

291 See MUSA1, supra note, at 123 (“[A]s IPRs in a particular nation become stronger, firms will tend to choose more technology licensing and joint ventures and less FDI.”); Carlos A. Primo Braga & Carsten Fink, The Relationship Between Intellectual Property Rights and Foreign Direct Investment, 9 DUKE J. COMP. & INT’L L. 163, 172 (1998) (stating that “higher levels of protection may cause [transnational corporations] to switch their preferred mode of delivery from foreign production to licensing”).

292 See DEERE, supra note, at 242 (“TRIPS implementation in the OAPI [African Intellectual Property Organization] countries was shaped by a pro-IP and “compliance-plus”-oriented political environment.”); Maskus & Reichman, supra note, at 18.

293 See Yu, The International Enclosure Movement, supra note, at 892–901 (discussing the “incentive-investment divide”).
investment that they ignore the reason behind having intellectual property rights in the first
place—that is, to provide incentives for creativity and innovation.

In short, while ACTA may not require less developed countries to offer stronger
intellectual property protection, they may still offer protection that is stronger than what is
required under the agreement and what is available in developed countries. As Carolyn Deere
has shown recently, and shockingly, some of the poorest countries in francophone Africa have
adopted some of the highest protections in the intellectual property area296—standards that “were
well in advance of their TRIPS deadlines.”297 As she rightly questioned, “Why did some of the
poorest countries adopt some of the highest IP standards?”298 This question is important,
especially when viewed in light of the fact that “[n]o African [least developed country] has ever
been cited on the US Special 301 list or subject to a WTO dispute.”299

In those countries, one has to question not only whether the TRIPS-induced high
protectionist standards are expedient, but also whether such high protection is indeed realistic
under the local conditions. After all, in many less developed countries, stronger protection on
the books is often moderated in reality by lax enforcement—or what commentators have termed
“benign neglect.”300 If rights holders count on ACTA to offer them the needed protection for
their investment, they are likely to be quickly disillusioned and vastly disappointed.

V. FEAR #4: ACTA’S BOOMERANG EFFECT AT HOME

Part III discussed how ACTA is likely to modify U.S. laws, despite what the USTR and
other government officials have claimed. Such modification could take the form of statutory
revision, changes in common-law interpretation of existing laws, or changing emphasis on how
laws are being enforced. Part IV explores how ACTA would definitely require legislative
changes in the United States. This Part looks at the interface between the two and examines how
the changes in Part IV can backfire on U.S. consumers and businesses, creating what some
commentators have described as the “boomerang effect.”301

A. Impact on Local Consumers and Businesses

As discussed earlier, ACTA would undoubtedly raise the standards of many other
countries, including those that are currently negotiating parties and those others that would join
the agreement after the negotiation is complete. At the international level, ACTA therefore
would lock in certain legal standards, which, in turn, would privilege those business models that
rely heavily on strong intellectual property protection. The agreement might also lead to both
TRIPS-plus and ACTA-plus protections—as a result of the push by either local policymakers
(through legislation that calls for protection levels that exceed what is required under international obligations) or the customs authorities (through either overzealous protection or

296 See Deere, supra note, at 240–86.
297 Id. at 20.
298 Id. at 104.
299 Id. at 306.
300 See, e.g., Frederick M. Abbott, Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the
Preservation of Multilateralism, 8 J. INT’L ECON. L. 77, 100 (2005); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory
confusion caused by the complexity of the agreement). As a result, U.S. consumers may no longer have access to a large range of innovative products or services from abroad.

Due to globalization, consumers today can have easy access to products that are developed abroad. While products may not appear in certain markets, due to either strong lobbying from the leading industries or conscious business choices made on the part of domestic manufacturers, many of these products are legitimate and important to consumers. Leading examples are electronic goods and cell phone technologies that are unavailable in the United States or the European Union, but that have been developed to an advanced stage in Japan and South Korea, two of the ACTA negotiating parties.

Because the internet is global by nature, changes in other countries can also easily affect the information U.S. users will be able to obtain. In fact, if companies are eager to develop a transnational policy that will satisfy the laws and policies of all the major markets, the more restrictive laws and policies other countries have will eventually dictate the type of policy U.S. internet users are subject to. As I have observed often in the Chinese context, it is important to look at not only how the internet will affect China, but also how China will affect the internet.

Unless companies are willing to abandon the Chinese market, or give up efficiency created by economies of scale, they will have to develop policies that take this major market in mind. At times, a policy that effectively accommodates the more restrictive policy in China will lead to sacrifice abroad—such as a reduction of coverage of political-sensitive information. Although China has always been used as the poster boy of censorship, it is important to remember that many other countries have restrictive policies. As Google recently has shown, the company has received requests for user data or content removal from government agencies in a diverse array of countries, including China, Brazil, Germany, India, the United States, South Korea, the United Kingdom, Italy, Argentina, Spain, Australia, and Canada, among others.302 In their book, Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain also documented information control policies in different parts of the world.303

Even worse, U.S. citizens may be subject to more intrusive searches abroad. Although ACTA does not require intrusive searches, it does encourage such searches, especially when local policymakers believe that more thorough, and often more intrusive, searches will ensure better ratings in next year’s section 301 report. As we have vivid memories from the days of heightened security following September 11, and as air travelers still experience on occasion, powerful laws sometimes can lead to overzealousness, if not overreaching, on the part of law enforcement officers.304

Likewise, bona fide entrepreneurs and legitimate businesses may be affected by heightened protection abroad. As Eddan Katz and Gwen Hinze noted, “U.S. technology exporters looking to expand into new markets will confront foreign laws lacking the flexibility
that was key to their innovation.”  

Under that scenario, there is a “potential for US Internet companies to be subject to more onerous requirements and higher levels of liability in other countries in which they operate. And this in turn, is likely to have an adverse impact on citizens’ freedom of expression, and ability to access content hosted on platforms in different countries.”

The additional protection may also lead to greater confusion on the part of border and customs authorities. For example, expensive drugs developed or distributed by a U.S. brand name pharmaceutical manufacturer can be locked up by customs authorities who fail to make distinctions between two arguably different packages. As Sean Flynn pointed out convincingly in the recent Transatlantic Consumer Dialogue meeting at the U.S. Department of Commerce, the labels for many drugs look quite similar to each other by virtue of public health regulations and the fact that many of these drugs used names that were derived from international nonproprietary names for pharmaceutical substances or active pharmaceutical ingredients. In those cases, heightened protection would also mean error on the side of protection.

To be certain, the affected businesses can always seek help from their governments—in the U.S. case, the American embassy or the USTR. However, such mishaps would not have taken place had the protection and enforcement levels not been raised without careful consideration of the agreements’ potential shortcomings. In fact, given the limited training and lack of sophistication in many less developed countries, it is a mistake for policymakers in developed countries to assume that the complex ACTA provisions would always be interpreted and implemented as intended. Given the stiff competition abroad, limited procedural safeguards, and inadequate rule-of-law development, it is also misguided to assume that it would be easy for U.S. firms to contest wrongful judgment on the part of customs authorities. Indeed, customs measures, if unreasonable or unreasonably implemented, could ultimately become nontariff barriers to trade—a concern that has dominated international trade discussions in the past.

Moreover, as Timothy Trainer and Vicki Allums reminded us:

“A[n] intellectual property rights . . . border enforcement system or any type of enforcement system that empowers competent authorities to take ex officio actions imposes greater responsibilities on the enforcement officials. The government officials, whether police, customs, or others, would have to be able to recognize the possible existence of an IPR violation in order to take any enforcement action. The ability of enforcement authorities to identify suspect goods requires that there be a vigorous training program between the IPR owners and the enforcement authorities in order for the enforcement officials to formulate a legal basis to believe that there is an IPR violation.”

To date, many enforcement authorities in less developed countries do not have the needed financial resources, human capital, administrative capacity, or legal expertise to make ACTA

---

305 Katz & Hinze, supra note, at 34.
306 Hinze, supra note.
307 Thanks to Sean Flynn for providing this wonderful example. See Consumer Groups Fear ACTA Could Encourage Generic Drug Seizures, INSIDE U.S. TRADE, Apr. 30, 2010 [hereinafter Consumer Groups Fear ACTA].
309 TRAINER & ALLUMS, supra note, at 685 (footnote omitted).
implementation successful. Moreover, in places with high risks of corruption, it would seem a rather bad idea to give customs authorities a considerable amount of discretionary authority. It is also unlikely that U.S. citizens or businesses will be comfortable going through the bureaucratic or judicial processes in some of these countries, not to mention the fact that some of these processes may not offer the same safeguards or share the same type of values as found on U.S. soil.

Even in the United States, one may still remember the confusion on the part of U.S. customs officials over the legality of importation of yellow beans from Mexican farmers. Of concern were naturally grown varieties that have been native to Mexico “at least since the time of the Aztecs.” Such confusion, which was caused by the issuance of a patent and plant variety protection certificate to the Enola variety, eventually resulted in significantly reduced bean exports from Mexico to the United States. Adding insult to the injury, the Enola patent was later invalidated by the U.S. Patent and Trademark Office, with no compensation to affected Mexican farmers.

Many infringement issues, indeed, are rather difficult to adjudicate. As Timothy Trainer and Vicki Allums pointed out in their treatise on cross-border protection of intellectual property rights, “[g]iven the technical nature of the works protected by patents, a determination that a patent has been infringed frequently requires an analysis based upon scientific, engineering, or other technological concepts rather than an observation of the infringing article as in the case of trademarks and copyrights.” Indeed, “[c]ustoms IPR branch attorneys and field officers typically lack technical and scientific backgrounds.” Given the problems in maintaining

310 See TRAINER & ALLUMS, supra note, at 707 (“[I]f the border enforcement agency does not have any legal expertise in IPR issues, a new unit would have to be organized.”).

311 See, e.g., NAM, supra note, at 192 (discussing the corruption problems with a new drug squad in Russia and the elite federales in Mexico); Yu, The U.S.-China Dispute, supra note (criticizing the United States’ use of the WTO dispute settlement process to push for greater discretionary power within the Chinese customs without taking serious consideration of the local protectionism challenges confronting American businesses).


314 Rattray, supra note.


316 TRAINER & ALLUMS, supra note, at 540. Likewise, Carlos Correa noted: Whereas trademark counterfeiting and copyright piracy may be easily established through visual inspection, it is extremely difficult to determine whether an infringement of a product or process patent, even if literal, has taken place without appropriate testing or producing other evidence, and without technical and legal expertise. For instance, without proper research or experimentation, custom authorities cannot possibly establish whether an imported pharmaceutical active ingredient infringes a patent covering a particular process for manufacturing it, or whether a patent covering a gene construct used in plants is violated by the importation of grains or a derivative product from such plants.

Correa, supra note, at 49 (footnote omitted); accord CHOW, supra note, at 187 (“In most cases, patent infringements tend to be complex matters because determining whether a patent has been infringed can involved detailed scientific and technical analysis.”); CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 440 (2007) (“[E]stablishing infringement would normally require a thorough examination of often complex technical issues including whether non-literal infringement exists.”); Li, Ten General Misconceptions, supra note, at 38 (“Determination of [patent] infringement requires a construction of the meaning of the claim language and then application of the claims so construed to the accused product or process.”); Ruse-Khan, supra note, at 52 (“Border control by customs should be limited to prima facie detectable infringing goods—which generally excludes the determination of patent and utility model infringements where infringement cannot be assessed without specific legal and technical expertise.”).

317 TRAINER & ALLUMS, supra note, at 540.
patent quality in both developed and less developed countries, there is also a strong likelihood that the patents involved may be later invalidated—similar to the patent in the Enola beans.\textsuperscript{318}

The same challenges can be found in the copyright field. As an Australian judge recently noted in a case involving ISP liability:

[C]opyright infringement is not a straight ‘yes’ or ‘no’ question. The Court has had to examine a very significant quantity of technical and legal detail over dozens of pages in [a legal] judgment in order to determine whether [internet] users, and how often [these] users, infringe copyright by use of the BitTorrent system.\textsuperscript{319}

If judges find it difficult and time-consuming in deciding on infringement cases, one could only imagine how challenging it is for customs officials to decide the issues based on prima facie evidence. One also has to wonder how high the costs of administrative errors would be.

\textbf{B. Protection of Human Rights and Civil Liberties}

ACTA may undermine the longstanding interests of the United States in promoting human rights, civil liberties, and the rule of law. Unless explicit safeguards are included in the agreement to protect free speech, free press, and privacy, there is a very good chance that ACTA would provide a pretext for other countries to tighten control of information.

It is beyond dispute that intellectual property rights, as a means of control, have strong implications for the protection of free speech, free press, and privacy. Commentators have widely discussed the tension between intellectual property protection and the protection of free speech and free press.\textsuperscript{320} In a recent book, Neil Netanel described this copyright–free speech conflict as the “copyright’s paradox.”\textsuperscript{321} Although the United States Supreme Court described copyright as the “engine of free expression”\textsuperscript{322} and pointed out that the U.S. copyright scheme “incorporates its own speech-protective purposes and safeguards,”\textsuperscript{323} there is significant tension between the protection of copyright and that of free speech in many less developed countries.\textsuperscript{324}

This tension is particularly acute in countries where information flows are heavily regulated. Censored materials—which they are deemed politically sensitive, culturally insensitive, or generally indecent or inappropriate—are often not created by the one disseminating the information. As a result, the dissemination of censored materials often involves unauthorized reproduction and distribution.

\textsuperscript{318} Correa, \textit{supra} note, at 42–43 (“Often patents are found invalid or revoked when scrutinized by courts, due to the lack of patentability requirements, insufficient disclosure, or other reasons.”); id. at 67 n.84 (“In the US, for instance, patent owner’s likelihood of success in patent validity challenges is only 51 per cent if the trial is heard before a judge alone. If the trial is heard before a judge and jury: 68 per cent. Overall chances of success for the patent owner if the trial is held in Massachusetts and Northern California, respectively: 30 per cent, 68 per cent.”).


\textsuperscript{320} For a recent treatment of the tension between intellectual property protection and the protection of free speech, see generally NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX (2008). See other sources cited in Yu, \textit{The Escalating Copyright Wars, supra} note, at 927 n.145.

\textsuperscript{321} NETANEL, supra note; see also Melville B. Nimmer, \textit{Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?}, 17 UCLA L. REV. 1180, 1181 (1970) (describing the conflict as “a largely ignored paradox”).


Moreover, in countries with strict information control, the reuse of materials that have previously satisfied content review may sometimes be badly needed to enable internet users to create their intended message. As Rebecca MacKinnon observed, “In order to evade the [blog service provider’s] internal censors, Chinese bloggers frequently deploy satire, euphemisms, literary allusions, vague or coded phrases, and even graphics to convey critical messages.”

The more pre-existing texts they use, the more successful they will be in avoiding censorship. Drawing on literature on democratic culture, some commentators have also noted how the creative reuse of preexisting materials would help develop a participatory culture in China that in turn would help promote democratic transition.

If that is not complicated enough, it is often difficult to pinpoint the usefulness of the materials that can be used to promote democratic transition and the development of civil society. While many entertainment products are uncontroversial, highly commercial and seemingly frivolous, they may create unintended spillover effects in promoting democratic transition in repressive countries. It is not uncommon to find Hollywood movies or American television programs filled with discussions of the American government, the need for checks and balances or the separation of powers, and the protection of constitutional rights and civil liberties. Even the latest installments of *Star Wars* are filled with issues concerning corruption, slavery, federalism, democracy, racial tension, and the American government.

Although I would not go so far to claim that the broadcast of the television series *Dallas* in East Germany has led to the collapse of the Berlin Wall, as some have suggested, I also hesitate to claim that Western entertainment products played no role at all. After all, it is more than simple trade protectionism when countries choose to ban Hollywood movies from their domestic markets!

Indeed, commentators have suggested how the lack of intellectual property protection may result in greater democratic reforms. As Professor Netanel explained:

> [I]mposing copyright protection for foreign works in the authoritarian state could drastically diminish the supply of such works in that country. Such protection may well put many foreign works beyond the price range of that country’s consumer public. It would also give dictatorial authorities an internationally acceptable justification for suppressing the works’ dissemination. . . . Since the vast majority of those works would continue to be created even without copyright protection in the authoritarian state, the result, at least in static terms, would be a significant welfare loss. As far as the availability of foreign democracy-inducing expression is concerned, the imposition of copyright protection for that expression in

---


327 See e.g., *ABSOLUTE POWER* (Columbia Pictures 1997); *THE PEOPLE VS. LARRY FLYNT* (Columbia Pictures 1996); *Law & Order* (NBC television broadcast 1990–Present); *The West Wing* (NBC television broadcast 1999–2006).


329 Cf. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 614 (1996) (“After the Berlin Wall fell, some said that East Germany fell because the East Germans were enthralled with the ethos and consumer goods viewed every Friday night on the U.S. television show ‘Dallas.’”).
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

When internet distribution is involved, the tension between copyright protection and free dissemination of ideas becomes even more acute. Thanks to the high speeds and low costs of reproduction and distribution, the anonymous architecture, and the many-to-many communication capabilities, the internet has become a particularly effective means of communication. As the district court recognized in Reno v. ACLU, the internet is “the most participatory form of mass speech yet developed,” and “[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought.

In fact, if one still questions the full democratic potential of the internet, all he or she needs to look at is the spirited and important public debate on ACTA that has been generated through websites, blogs, social networking tools, online publications, and other media platforms on the internet. With only a few clicks, one could obtain both the official and leaked versions of the ACTA draft. With a few more clicks, one could access authoritative academic commentaries, along with blog posts from commentators on both sides of the debate. This type of discussions on intellectual property is unheard of when the TRIPS Agreement was negotiated more than twenty years ago. In fact, the internet has now enabled the possibility for webcasting meetings at the WTO, WIPO and other fora that would further open up the debate to those outside Geneva or other negotiating venues.

In January 2010, U.S. Secretary of State Hilary Clinton declared before a crowd at the Newseum in Washington: “The private sector has a shared responsibility to help safeguard free expression. And when their business dealings threaten to undermine this freedom, they need to consider what’s right, not simply the prospect of quick profits.” While Secretary Clinton was speaking about internet freedom, and referring to companies collaborating with repressive governments, one could not help but notice how relevant her speech is with respect to the democracy-reducing potential of ACTA.

331 See A. Michael Froomkin, The Internet as a Source of Regulatory Arbitrage, in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 129, 129 (Brian Kahin & Charles Nesson eds., 1997) (contending that “the more a nation pursues a restrictive Internet policy, the less value it will derive from the network and the more it risks being left out of the information revolution”); Peter K. Yu, Bridging the Digital Divide: Equality in the Information Age, 20 CARDOZO ARTS & ENT. L.J. 1, 2 (2002) (noting that the information revolution has created a tremendous amount of political, social, economic, educational, and career opportunities).
333 Id. at 842.
334 Cf. HOEKMAN & MAVROIDIS, supra note, at 116 (“Given the internet and the low cost of telecom services, every regular WTO meeting could be taped and web cast.”).
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

In fact, if ACTA entered into effect, it could be used to block the vibrant discussion that has been developed so far on the undesirability of the agreement and the non-transparent process. Thus, if intellectual property rights holders do care about promoting internet freedom, they may, according to Secretary Clinton, “need to consider what’s right, not simply the prospect of quick profits.” After all, as she rightly noted: “Those who use the internet to recruit terrorists or distribute stolen intellectual property cannot divorce their online actions from their real world identities. But these challenges must not become an excuse for governments to systematically violate the rights and privacy of those who use the internet for peaceful political purposes.”

One of the areas in ACTA that are of great concern to free speech advocates involves the unintended consequences of anticircumvention protection. Although such protection was intended to protect copyrighted works, it is likely to provide a pretext for local authorities to remove important tools that can be used to circumvent censorship control. Through legislation, diplomatic measures, export controls, trade policy, the provision and development of technological tools, and other covert efforts, the United States has actively promoted the free flow of information and ideas in repressive countries. Problematically, the ban on circumvention and the use of other tinkering tools, as demanded by the anticircumvention provisions of ACTA, would work in the opposite direction to reduce the effectiveness of these efforts. In fact, as Ronald Deibert and Rafal Rohozinski observed, “China, Iran, Yemen, Sudan, Tunisia, Oman, and Saudi Arabia [have] all block[ed] access to a high amount of URLs in the . . . ‘anonymizers and circumvention’ category. China, for example, “blocks access not only to known circumvention sites, but sites that are known to provide information and tutorials about censorship circumvention.’

Moreover, the insistence on greater monitoring, filtering, data retention on the part of ISPs could create significant challenges for internet users in the context of free speech. If ISPs retain data about subscribers and their activities to facilitate copyright protection, they may be required to turn over such information to government authorities. Because government authorities could use the information to reconstruct the users’ activities, users are likely to become more reluctant to freely discuss matters (especially political ones) on the internet. Even worse, the retention and subsequent disclosure of information may lead to arrests and imprisonments—the heavily criticized imprisonment of a Chinese journalist following Yahoo’s disclosure of his identity to the Chinese authorities immediately comes to mind.

---

337 See Kaitlin Mara, UK Passes Internet Access-limiting Bill for Alleged IP Infringers, INTELLECTUAL PROPERTY WATCH, Apr. 8, 2010, http://www.ip-watch.org/weblog/2010/04/08/uk-isps-required-to-limit-internet-access-for-ip-infringers/ [hereinafter Mara, UK Passes Internet Access-limiting Bill] (reporting the fear that the new U.K. digital economy bill “could be used to block access to whistleblower websites such as Wikileaks, which publishes confidential (and possibly copyrighted) government material”).

338 Clinton, supra note.

339 See Clinton, supra note (“We are also supporting the development of new tools that enable citizens to exercise their right of free expression by circumventing politically motivated censorship. We are working globally to make sure that those tools get to the people who need them, in local languages, and with the training they need to access the internet safely. The United States has been assisting in these efforts for some time.”); see also Yu, Three Questions, supra note, at 424–32 (discussing the United States’ efforts to promote free flow of information and ideas in China).


342 Id.

Had ACTA included a provision requiring the so-called graduated response system—or what commentators and policymakers have called the “three strikes” rule or the “notice and termination” procedure—the impact of ACTA on free speech and free press would likely have been even more significant. Such a system would require ISPs to suspend or terminate the service of internet users or take other measures—such as capping bandwidth or blocking sites, portals, or protocols—after they have provided users with two warnings about their potentially illegal online activities. The consolidated draft, which is somewhat different from the leaked document, states that ACTA does not currently require the introduction of such a system. The omission is due in part to the widespread concern among legislators and the public and in part to the significant disagreement among the ACTA negotiating parties over how the obligation should be worded. While the United States seems to favor an approach that allows for private ordering and non-legislative measures, the European Community and Japan prefer legislative mandates.

Nevertheless, the consolidated draft includes different options that would facilitate the development of a graduated response system. In fact, given the adoption of the system in France, Taiwan, South Korea, and the United Kingdom, the existence of a repeat infringer provision in the DMCA, and the increased cooperation between intellectual property rights holders and ISPs, many countries are likely to include some version of the graduated response system or repeat infringer provision in their implementation effort should ACTA come into effect.

---

345 Compare Consolidated Draft, supra note, art. 2.18(3)(b), with Leaked Draft, supra note, art. 2.18(3)(b).
346 See Annemarie Bridy, Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement, 89 OR. L. REV. (forthcoming 2010) (discussing the U.S. copyright industries’ increasing use of approaches based on private ordering to strengthen intellectual property enforcement in the digital environment).
347 Option 1 of the draft provision, for example, conditions the ISP safe harbor on “an online service provider adopting and reasonably implementing a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights.” See Consolidated Draft, supra note, art. 2.18(3)(b) (option 1). Meanwhile, option 2, which is more aggressive, states that the provision “shall not affect the possibility for a judicial or administrative authority, in accordance with the Parties legal system, requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility of the parties establishing procedures governing the removal or disabling of access to information.” Id. art. 2.18(3)(b) (option 2). Article 2.18(3)(quater) states further that “Each Party shall promote the development of mutually supportive relationships between online service providers and right holders to deal effectively with patent, industrial design, trademark and copyright or related rights infringement which takes place by means of the Internet, including the encouragement of establishing guidelines for the actions which should be taken.” For discussions of the different paths that a graduated response system can still be introduced through ACTA, see generally Annemarie Bridy, ACTA and the Specter of Graduated Response, available at http://ssrn.com/abstract=1619006; Hinze, Preliminary Analysis, supra note.
349 See Mara, UK Passes Internet Access-limiting Bill, supra note.
350 Section 512(i) of the U.S. Copyright Act provides:
(1) ACCOMMODATION OF TECHNOLOGY.—The limitations on liability established by this section shall apply to a service provider only if the service provider . . . has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers . . . .
Finally, the need to strengthen intellectual property protection in the image of ACTA is likely to prevent human rights and civil liberties groups from criticizing governments for their repressive actions. As William Alford noted more than a decade ago with respect to China:

[It] is no wonder that stories are now circulating among well-informed observers in China that some of the more staunchly authoritarian of the PRC’s leaders were only too happy to satisfy Washington’s latest demands to crack down on printing houses and producers of films and CDs, as it provided a convenient legitimization for repressive measures they intended to take in any event while simultaneously constraining America’s capacity to complain about such actions.351

It is important to remember that copyright was introduced as a response to the printing press—a modern reprographic technology.352 In a little more than two centuries following the invention of the Gutenberg press, both the Church and the Crown used printers’ privileges to suppress heresy and dissent.353 Although the origin of the modern notion of copyright is often linked to the English statute of Anne,354 which recently celebrated its tricentennial, historians have traced the notion back to the Star Chamber and the Stationers’ Company in England.355 A strong interrelationship between copyright and censorship has existed since the inception of copyright.

Even in countries that the United States have considered allies in the ACTA negotiations, the laws could limit the freedom of American internet users. One may still remember the highly controversial case against Yahoo! concerning the sale of Nazi memorabilia in the early days of the internet.356 Most recently, in Italy, three Google executives have been found criminally liable for their failure to quickly remove a widely-viewed video on an autistic boy being harassed by a group of teenage boys, notwithstanding the fact that Google’s assistance has resulted in the arrest of the perpetrator.357 As a group of internet companies and industry associations wrote to the USTR after the second round of the ACTA negotiations:

[T]here is a very real possibility that an agreement that would require signatories to increase penalties for “counterfeiting” and “piracy” could be used to challenge American companies engaging in online practices that are entirely legal in the U.S., that bring enormous benefit to U.S. consumers, and that increase U.S. exports.358

353 See id. at 17.
354 An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, c. 19 (1709) (Eng.).
355 For comprehensive discussions of the Star Chamber and the Stationers’ Company, see generally AUGUSTINE BIRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1899); CYPRIAN BLAGDEN, THE STATIONERS’ COMPANY: A HISTORY, 1403–1959 (1960); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 28–77 (1968).
358 Letter from Amazon.com et al. to Susan Schwab, USTR (Aug. 7, 2008), available at http://www.ipjustice.org/wp/wp-content/uploads/ACTA-ltr-US-Tech-Co-aug-7-2008.pdf. In addition to Amazon.com, the signatories to this letter included AT&T; Computer & Communications Industry Association; Consumer Electronics Association; eBay Inc.; Information Technology Association of America; Internet Commerce Coalition; NetCoalition; U.S. Internet Service Provider Association; USTelecom Association; Verizon Communications; and Yahoo! Inc.
Even worse, because of the heightened protection and the criminal remedies it demands, ACTA would prevent the United States from complaining about how those laws in foreign countries that fail to protect the interests of its citizens and businesses in conducting what they normally would consider protected under the First and Fourth Amendments or other important U.S. constitutional provisions. While Professor Alford referred to China in the previous quote, the point about how the United States’ push for greater intellectual property protection would undermine its own interests in promoting free speech, human rights, civil liberties, and the rule of law is equally valid in this case.

After all, it is hypocritical for any country to demand others to increase protection while complaining about such increased protection when the provisions did not serve its interests. In fact, the potential for political repression and human rights violations in China has raised so much concern that the USTR decided not to press for criminal penalties for intellectual property piracy in China in the early-to-mid 1990s. Although many in the U.S. administration at that time considered that approach appropriate, such an approach has made the problems of intellectual property enforcement more difficult to tackle a decade later.

C. Locked-in Protective Standards Without Corresponding Safeguards

While ACTA would entrench the present protective standards both at home and abroad, it fails to offer equal protection to corresponding safeguards. In its current draft, ACTA offers very few limitations and exceptions, with all of them being only permissible. The view of the negotiators is short-sighted, and it narrowly focuses on only half of the enforcement issues. As Henning Grosse Ruse-Khan noted:

IP users often benefit from certain exceptions to IP protection and therefore have a specific interest that these exceptions can be given effect. IP enforcement here may require offering remedies against a contractual curtailment of these exceptions or against the use of technological protection measures that frustrate the exercise of exceptions in copyright.

Even worse, the ACTA negotiators seem to have assumed that the safeguards under existing U.S. law, such as fair use, the first sale doctrine, or the Bolar exception, will always be in place. Such assumption, however, is questionable, especially in light of the increasing scrutiny of domestic legislation under the WTO process and the constantly evolving technological environment.

Consider, for example, the Fairness in Music Licensing Act, which expanded the unauthorized use of music by restaurants, bars, retail stores, and other small business establishments. Although that particular provision has been enacted as a means to offer a balance to the extension of the copyright term in the Sonny Bono Copyright Term Extension Act, the WTO dispute settlement panel found the provision inconsistent with the United States’ TRIPS obligations. Had the United States sought to comply with the panel decision by

---


360 Ruse-Khan, supra note, at 44 (footnote omitted).


362 Id. § 304.

amending the Copyright Act—as compared to ignoring it—\textsuperscript{364} the balance in the U.S. copyright system would tilt greatly toward rights holders, if it is not already tilted in that direction.

Indeed, the WTO process has raised questions about the expediency and sustainability of the development of package legislation that includes strengthened protection and public interest offsets. As Professors Graeme Dinwoodie and Rochelle Dreyfuss explained:

\begin{quote}
Th[e] “discrete” approach to adjudication (by which we mean that discrete parts of legislative compromises are broken out for individual assessment) can produce perverse consequences. Not only does it unravel carefully negotiated legislative deals, it does so in a systematic way. Because TRIPS sets only minimum standards, WTO dispute resolution operates as a one-way ratchet: complaints can lead to the invalidation of measures that reduce the level of intellectual property protection, but they never reach measures that increase protection. Thus, compromises will always unravel in the same direction, requiring nations to change those features of their legislation that benefit user groups while protection-enhancing provisions stay in place.\textsuperscript{365}
\end{quote}

Thus, according to Professors Dinwoodie and Dreyfuss, the discrete approach taken by the WTO dispute settlement panels would have the perverse effect of encouraging intellectual property rights holders and their supportive governments “to agree to provisions that reduce the level of protection in exchange for the protection-enhancing legislation that they want, knowing that the reductions will be successfully challenged at the international level.”\textsuperscript{366}

Likewise, technological measures have altered the protections offered by limitations and exceptions under existing law. Commentators, for example, have widely discussed the adverse impact of digital rights management tools and the gradual erosion of the first sale doctrine in the digital environment.\textsuperscript{367} It is also worth remembering that the current technological environment remains highly dynamic, and there is wide uncertainty over its evolution. Recent research, indeed, has questioned whether the existing system tends to favor the intellectual property industries at the expense of other economic sectors that contribute to the U.S. economy. As the Government Accountability Office (“GAO”) noted in a recent report, although piracy and counterfeiting may affect a selected group of industries, such as the music, movie, software, and game industries, other economic sectors, as well as those that have been affected, may obtain offsetting benefits:

\begin{quote}
There are ... certain instances when IP rights holders in some industries might experience potentially positive effects from the knowing consumption of pirated or counterfeit goods. For example, consumers may use pirated goods to “sample” music, movies, software, or electronic games before purchasing legitimate copies, which may lead to increased sales of legitimate goods. In addition, industries with products that are
\end{quote}

\textsuperscript{364} In lieu of amending its TRIPS-non-compliant law, the United States paid the European Community a one-time sum of $3.3 million. \textit{See Fair Play?}, \textsc{Copyright World}, July/Aug. 2004 (“As part of the Wartime Supplemental Appropriations Act, signed into law on 16 April 2003, the US Congress approved the $ 3.3 million appropriation for European music right holders; the sum was subsequently paid to the representative body of European right holders (GESAC).”). Although the WTO arbitration panel determined the penalty amount to be €1,219,900 per year, \textit{see Recourse to Arbitration Under Article 25 of the DSU, United States—Section 110(5) of the US Copyright Act ¶ 5.1, WT/DS160/ARB25/1 (Nov. 9, 2001), the United States had not paid ever since.}

\textsuperscript{365} Dinwoodie & Dreyfuss, \textit{supra} note, at 99–100 (emphasis omitted).

\textsuperscript{366} Id. at 100.

\textsuperscript{367} \textit{See Yu, Anticircumvention and Anti-anticircumvention, supra} note, at 34–37 (discussing how the DMCA and the deployment of digital rights management tools have made it difficult for users and future creators to exercise legitimate rights under existing copyright law).
characterized by large “switching costs,” may also benefit from piracy due to lock-in effects. For example, some experts we spoke with and literature we reviewed discussed how consumers after being introduced to the pirated version might get locked into new legitimate software because of large switching costs, such as a steep learning curve, reluctance to switch to new products, and search costs incurred by consumers to identify a new product to use.

Some authors have argued that companies that experience revenue losses in one line of business—such as movies—may also increase revenues in related or complementary businesses due to increased brand awareness. For instance, companies may experience increased revenues due to the sales of merchandise that are based on movie characters whose popularity is enhanced by sales of pirated movies. One expert also observed that some industries may experience an increase in demand for their products because of piracy in other industries. This expert identified Internet infrastructure manufacturers (e.g., companies that make routers) as possible beneficiaries of digital piracy, because of the bandwidth demands related to the transfer of pirated digital content. While competitive pressure to keep one step ahead of counterfeiters may spur innovation in some cases, some of this innovation may be oriented toward anticounterfeiting and antipiracy efforts, rather than enhancing the product for consumers.368

Although the GAO report did not go further, one could raise questions about whether these benefits would indeed cancel out some of the losses suffered by the intellectual property industries, assuming the reported losses are accurate—and have not been misstated by a factor of three (as revealed in a recent study conducted by the motion picture industry)369 or even more (as in the case when seizure of single cigarettes were confused with figures that count packets of twenty).370 If the benefits, in fact, outweigh the losses suffered by these industries, the country arguably would have received a net economic gain. The only questions then remain: (1) why intellectual property industries have to subsidize others for those gains and (2) how gains and losses should be properly allocated through the legislative process.

Similarly, the Computer and Communications Industry Association (“CCIA”) released two reports documenting the gains made by the fair use industries.371 Using the methodological guidelines established by WIPO for surveying the economic contribution of copyright-based industries,372 the latest report pointed out that the U.S. fair use industries generated $4.7 trillion in revenue in 2007 and have “accounted for 23 percent of U.S. real economic growth” from 2002

368 U.S. GOV’T ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 15 (2010), available at http://www.gao.gov/new.items/d10423.pdf [hereinafter GAO STUDY]; see also Fink, supra note, at 2 (“[D]ifferent types of intellectual property infringements have different welfare effects, depending on underlying market failures and market characteristics.”).

369 See Mike Nizza, Movie Industry Admits It Overstated Piracy on Campus, http://thelede.blogs.nytimes.com/2008/01/23/movie-industry-admits-it-overstated-piracy-on-campus/ (Jan. 23, 2008) (reporting the MPAA’s admission that its statistics were “wrong by a factor of three” and that the new estimate for illegal movie downloading committed by college students is now reduced to 15 percent from 44 percent).

370 See Li, Ten General Misconceptions, supra note, at 41 n.4 (describing the European Commission’s need to correct misreported figures due to the fact that some figures reflected single cigarettes, as opposed to the agreed standard of packets of twenty).

371 COMPUTER & COMM’NS INDUS. ASS’N, FAIR USE IN THE U.S. ECONOMY (2010), available at http://www.cccianet.org/CCIA/files/ccLibraryFiles/Filename/0000000354/fair-use-study-final.pdf [CCIA STUDY]. As the report stated, examples of these industries included “manufacturers of consumer devices that allow individual copying of copyrighted programming; educational institutions; software developers; and Internet search and web hosting providers.” Id. at 7.

to 2007.  This new report provided a timely update on its pioneering study on the economic contribution of U.S. fair use industries.

Although one could always argue about assumptions and methodologies of economic surveys, both the GAO and CCIA studies successfully challenged the many assumptions policymakers have made in developing intellectual property laws and policies—including the negotiation of ACTA. As noted in the European Commission’s 2008 fact sheet, “The OECD estimates that infringements of intellectual property traded internationally (excluding domestic production and consumption) account for more than €150 billion per year (higher than the GDP of more than 150 countries).” Although the OECD figures have been included to support ACTA, they were questioned by Carsten Fink, WIPO’s chief economist:

Close inspection of the methodology applied to arrive at this figure reveals that it is more an “educated guess” than a true estimate. Essentially, OECD staff made use of seizure rates across different product categories and exporting nations to extrapolate what a given share of IPRs-infringing trade in one individual product category means for the overall share of trade in counterfeit and pirated goods. However, the share in the relevant “fix-point” product categories—wearing apparel, leather articles and tobacco products—underlying the 200 USD billion estimate is not based on any hard data, but rather reflects the best guess of OECD staff.

As Dr. Fink noted further with respect to industry-supplied figures that the USTR and other government officials have used often:

Industry associations representing copyright-holders regularly publish estimates of lost revenues due to piracy. However, such estimates often rely on questionable assumptions about market demand. For example, BSA . . . simply assumes that, in the absence of piracy, all consumers of pirated software would switch to legitimate copies at their current prices. This outcome is unrealistic—especially in developing countries where low incomes would likely imply that many consumers would not demand any legitimate software at all. Accordingly, estimated revenue losses by software producers are bound to be overestimated.

Because it is hard to imagine how sales would be lost when consumers cannot afford the product, these figures are more correctly described as the retail value of pirated or counterfeit goods based on foreign prices, or whatever prices the researchers set. While the figures may still show the
existence of a major problem, they fail to accurately discuss the extent of the problem and other offsetting welfare benefits.

Finally, there have been widespread calls for greater reforms of the intellectual property systems in the developed world. In the United States, for example, commentators have repeatedly questioned the appropriateness, effectiveness, and relevance of the copyright regime since the early days of Napster. Technology developers, consumer advocates, and academic commentators have also called into the question the expediency and sustainability of the DMCA, which Jessica Litman has described as “long, internally inconsistent, difficult even for copyright experts to parse and harder still to explain.” Because ACTA has the potential to “cement the DMCA’s status at home, making it harder to fix its user-hostile provisions,” commentators are understandably very concerned about the agreement.

As shown in the recent debate about the Google Book search and Web 2.0, many new issues, such as the protection of orphan works, the treatment of user-generated content, and the need to develop publicly accessible digital libraries, have also emerged. While lawmakers in different countries are working hard to address these new issues, it is quite clear that no international consensus has emerged yet. ACTA, therefore, would likely short-circuit the solution-development process by forcing consensus upon its signatories, including the United States, before each country locates an optimal solution based on its own needs, interests, and conditions and adequate information about future development of the technological environment.

Like copyright, commentators have also widely criticized the existing patent system. As John Thomas explained a few years ago, “[b]udgetary limitations, an exploding filing rate, and the increasing range of patentable subject matter are among the reasons that U.S. patent quality appears to be on the decline.” Indeed, the problems in the U.S. system are so widespread and notorious that Keith Maskus and Jerome Reichman have called for a

On the Reliability of Software Piracy Statistics, 9 ELEC. COM. RES. & APPLICATIONS (forthcoming 2010) (contending that the Business Software Alliance’s change of consultant from International Planning and Research Corporation to International Data Corporation, and their respective methodology for measurement of software piracy, had systematic effects on published piracy rates).


For criticisms of the DMCA, see generally TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE (2007); LITMAN, supra note, at 122–45; Ian R. Kerr, Alana Maurusat & Christian S. Tacit, Technical Protection Measures: Tilting at Copyright’s Windmill, 34 Ottawa L. Rev. 7, 13 (2002); Yu, Anticircumvention and Anti-anticircumvention, supra note.

Litman, supra note, at 145.

Pegoraro, supra note.

See Yu, Digital Copyright Reform, supra note.


“moratorium on stronger international intellectual property standards” to prevent the transplant of problems abroad.\textsuperscript{387} As they lamented:

the drive to further harmonize the international minimum standards of patent protection . . . has occurred at the very time when the domestic standards of the United States and the operations of its patent system are under critical assault . . . . How, under such circumstances, could it be timely to harmonize and elevate international standards of patent protection—even if that were demonstrably beneficial—when there is so little agreement in the US itself on how to rectify a dysfunctional apparatus that often seems out of control? . . . Further harmonization efforts in this climate thus amount to a gamble from which bad decisions and bad laws are far more likely to emerge than good laws that appropriately balance public and private interests.\textsuperscript{388}

Similar concerns were registered across the Atlantic. In the United Kingdom, for example, the Gowers Review of Intellectual Property was commissioned to explore possible reforms in the intellectual property field, including both the copyright and patent areas.\textsuperscript{389} The Commission on Intellectual property Rights was also formed in the early 2000s to examine ways to integrate development into the intellectual property system.\textsuperscript{390} Its final report touched on a wide variety of topics, including intellectual property and development; health; agriculture and genetic resources; traditional knowledge geographical indications; copyright, software and the internet; patent reform; institutional capacity; and the international architecture.

In light of these reform proposals on both sides of the ocean, it is highly ill-advised to lock in current intellectual property standards, especially when there is no indication that the ACTA-induced reforms would not roll back some of these protections. It is even worse when these standards were locked in without giving equal protection to corresponding safeguards, limitations and exceptions.

D. Foreclosed Opportunities for Legislative Reform

By locking in the existing high standards, ACTA may further foreclose the opportunity for Congress to revise laws in the near future—a direct by-product of the lock-in effects described in the previous section. While Congress can always ratchet up the intellectual property standards, using ACTA as the floor, the agreement may prevent Congress from ratcheting down those standards. As Senator Ron Wyden (D–Ore.) wrote to the USTR: “I understand that the office of the USTR has indicated that no agreement would be made that would require a statutory change to U.S. law. However, are you also reviewing negotiating proposals to ensure that no agreement would constrain the ability of the Congress to reform our IP laws?”\textsuperscript{391} To this question, Ambassador Kirk responded: “We do not view the ACTA as a vehicle for changing U.S. law. We are also cognizant of the desire in Congress for flexibility in certain areas, and have worked to shape relevant U.S. proposals to provide appropriate flexibility.”\textsuperscript{392}

\begin{flushleft}
\textsuperscript{387} Maskus & Reichman, \textit{supra} note, at 36–39.  \\
\textsuperscript{388} \textit{Id}. at 24–25.  \\
\textsuperscript{390} IPR COMMISSION REPORT, \textit{supra} note.  \\
\textsuperscript{391} Letter from Senator Ron Wyden to Ron Kirk, USTR (Jan. 6, 2010).  \\
\textsuperscript{392} Letter from Ron Kirk, USTR, to Senator Ron Wyden (Jan. 28, 2010).
\end{flushleft}
When pressed further over whether ACTA would lock the United States into the existing DMCA model, the USTR, however, was more hesitant. As he wrote: “We envision that the provisions of the DMCA would be relevant to U.S. compliance with future ACTA obligations. However, we are aware of concerns about retaining flexibility to legislate in the future in this field, and have written our proposals with those concerns in mind.” This response, therefore, reveals clearly the potential challenges in locking all the ACTA negotiating parties into the current high standards of intellectual property protection and enforcement while at the same time retaining flexibilities and autonomy to allow each country to undertake future legislative reforms that may lower the protection or create additional limitations and exceptions. Countries will always have flexibility and autonomy to increase protection even with ACTA, but the agreement would take away this flexibility and autonomy when they want to reduce the protection levels.

In fact, this concern is not only limited to ACTA. It was raised during the negotiation of other bilateral and regional FTAs. As Senators Patrick Leahy and Arlen Specter of the Senate Judiciary Committee reminded the USTR, “ACTA, if not drafted with sufficient flexibility, could limit Congress’s ability to make appropriate refinements to intellectual property law in the future is institutional and one that we raised when the United States Senate implemented the US–Peru Free Trade Agreement.” Although the United States has actively exported its high protective standards, many of its existing limitations and exceptions have been questioned by its trading partners—in part due to different legislative approaches. While the United States takes the inside-out approach by drafting legislation broadly with flexible limitations and exceptions, other countries, such as those in the European Community, take the opposite route by introducing narrowly-drafted legislation with clearly defined limitations and exceptions.

Consider, for example, section 107 of the U.S. Copyright Act, which codified the fair use privilege. To determine whether a use is considered acceptable under the copyright law, American courts will consider factors such as the following:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

393 Id.
394 Letter from Senators Leahy and Specter, supra note; accord JANICE T. PILCH, THE ANTI-COUNTERFEITING TRADE AGREEMENT 3 (Library Copyright Alliance, Issue Brief, 2009), http://www.librarycopyrightalliance.org/bm~doc/issuebriefactafinalrev102609.pdf (“Intellectual property law is dynamic, constantly being shaped by social and economic needs and technological advances. A rigid plurilateral system of enforcement could hinder the flexibility of the U.S., as well as other nations, to adapt their intellectual property laws to future needs and scenarios.”); Katz & Hinze, supra note, at 34 (“[U]sing an international agreement to lock in a particular interpretation of issues that are in dispute in U.S. courts precludes future policy options by creating foreign obligation barriers to domestic legislative reform.”).
395 See JOHN CROSS ET AL., GLOBAL ISSUES IN INTELLECTUAL PROPERTY LAW 148 (2010).
397 Id.
Although these nonexhaustive factors have since been incorporated into the Hong Kong Copyright Ordinance,\(^\text{398}\) the Singapore Copyright Act,\(^\text{399}\) and most recently the Israel Copyright Law,\(^\text{400}\) many countries remain troubled by the incongruence between the U.S. fair use provision and the limitations permissible under the three-step test.\(^\text{401}\) In fact, during the TRIPS Council’s review of enforcement legislation in 1997, “several trading partners [have] requested clarification of the fair use doctrine” from the United States.\(^\text{402}\)

In her article, Ruth Okediji explained in detail why the U.S. fair use provision would meet the three-step test, and in any event would have been grandfathered into the TRIPS Agreement.\(^\text{403}\) However, the disagreement over the provision suggests the strong likelihood that existing limitations and exceptions in the U.S. system may be challenged in a multilateral process by the country’s trading partners. By discouraging other countries from introducing new limitations and exceptions, ACTA may therefore make the United States an odd country out within the international community. Eventually, such an outcome would raise the country’s burden to justify laws in front of the international community.

Even worse, if other ACTA negotiating parties misinterpret the agreement as a treaty that constricts existing limitations and exceptions, the treaty may lead to practices that will eventually form part of customary international law. To be clear, customary international law would not come into existence unless two conditions are met: (1) when a sufficient number of countries have made such interpretation and consequently adopted provisions that follow such an interpretive approach; and (2) when these countries have expressly and consistently recognized these provisions as legal norms governing their state conduct. In addition, Congress may override customary norms through legislation. As a key negotiating party, the United States could also push for a clarification or modification of the treaty language.

Nevertheless, the potential of the influence of these customary norms on the domestic legislative and judicial processes and their ability to shape international discussion are not to be ignored. ACTA may also affect the country’s international obligations by “form[ing] the context for” the interpretation of treaties the United States has ratified.\(^\text{404}\) Because of the growing overlap between intellectual property and other policy arenas, like international trade, human rights, public health, biological diversity, food and agriculture, and information and communications, governments and international organizations have increasingly looked to these agreements as part of a larger overall framework.\(^\text{405}\) In *United States—Section 110(5) of the US Copyright Act*, for example, the WTO dispute settlement panel noted the need “to seek

---

398 Hong Kong Copyright Ordinance § 38, (1997) Cap. 528 (H.K.).
399 Copyright Act § 35 (Sing.)
401 See Berne Convention, supra note, art. 11; TRIPS Agreement, supra note, arts. 13, 30; WCT, supra note, art. 10; WPPT, supra note, art. 16(2).
403 See id. at 115–23.
contextual guidance . . . when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations.”

Although commentators rightly point out that the WIPO Development Agenda may provide “an important platform for checking the ACTA proposal against the societal interests to foster sustainable development and to promote technological innovation and transfer of technology,” the power asymmetry in the international system unfortunately may mean that ACTA sometimes would have greater influence in international intellectual property negotiations than pro-development instruments in other fora. After all, ACTA involves 37 countries that are eager to set a high benchmark for intellectual property protection and enforcement outside the WTO and WIPO. Together, these countries “represent about half of all global trade.”

Finally, as Anupam Chander reminded us in the context of the anticircumvention protection under the U.S. FTAs:

FTA obligations, it must be remembered, generally apply equally to the United States. Thus, it is possible that the United States could run afoul of its own FTAs. The FTAs are not term-limited, though they do permit withdrawal. Should we conclude in the future that the DMCA anti-circumvention rules are too constricting, we will have to renegotiate the FTA, flout the FTA, or conform to an uncongenial rule. Our FTA partners may often lack the internal economic incentive to seek to enforce the FTA’s strict anti-circumvention terms (though they may take it as a license to reduce their own anti-circumvention excess), yet they may seek to enforce the FTA once partnered with interested multinational corporations engaged in rent-seeking.

Professor Chander’s observation is equally applicable to the ACTA context. There is no doubt that the treaty would make it difficult and costly for its signatories to reduce protection later when it finds excessive the level of protection under ACTA—either because the built-in safeguards have been struck down by the WTO or because the technological environment has changed to the point that greater limitations and exceptions are now needed. Even if the United States is able to convince its trading partners to adjust the protection of ACTA in the future, the costs of such adjustment are likely to be substantial. The time it takes to agree on and implement such adjustment might also lead to the loss of innovative products and services both at home and abroad. If Congress failed to make the needed adjustments, the consequences could be even direr.

VI. FEAR #5: A NEW INFRASTRUCTURE FOR RATCHETING UP IP PROTECTION

A. Self-Reinforcing Architecture

As shown in Chapter Five, the second lengthiest part of the agreement, ACTA seeks to create a new infrastructure that can be used to facilitate the future ratcheting up of international intellectual property protection. Although this chapter is still under debate, and has been ignored

\[\text{Panel Report, United States—Section 110(5) of the US Copyright Act, § 6.70, WT/DS160/R (June 15, 2000).}\]
\[\text{Anupam Chander, Exporting DMCA Lockouts, 54 CLEV. ST. L. REV. 205, 207 (2006).}\]
by most commentators,\textsuperscript{410} it is likely to be the most far-reaching and dangerous of all the chapters in the agreement.

The ACTA provisions serve the institution-building objective in two different ways. First, ACTA would provide a free-standing, self-reinforcing agreement that can be incorporated by reference into other international agreements. Indeed, it would be no surprise if future international agreements include a reference to ACTA, similar to how the TRIPS Agreement incorporates by reference selected provisions of the Paris and Berne Conventions and the Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits.\textsuperscript{411} Many U.S. FTAs already required signatories to ratify the Patent Cooperation Treaty\textsuperscript{412} and the WIPO Internet Treaties.\textsuperscript{413} Although an earlier discussion paper, presumably from the United States, included among other provisions “[s]pecial measures for developing countries in the initial phase,” those provisions do not exist in the consolidated draft.\textsuperscript{414}

To be certain, countries are free to join the agreement on a voluntary basis. As the discussion paper described:

In the initial phase, it is important to join a number of interested trading partners in setting out the parameters for an enforcement system that will function effectively in today’s environment. As a second phase, other countries will have the option to join the agreement as part of an emerging consensus in favor of a strong IPR enforcement standard.\textsuperscript{415}

The optional nature of this two-step process is true only in theory, however. In reality, “few countries will have the muscle to refuse an ‘invitation’ to join,”\textsuperscript{416} especially if the trade or development aid carrot was dangling in front of them. As noted in the IP Justice White Paper:

ACTA takes a remarkably imperialistic worldview in that it attempts to regulate global IPR enforcement from the perspective of the world’s wealthiest and to the detriment of the needs of developing nations and the global public interest. Developing countries are not permitted to participate in the negotiation of ACTA’s terms, although they will be expected to abide by them.

Through trade agreements like ACTA, IPR-exporting countries are able to impose policies that favor them onto the domestic legislation of IPR-importing countries. A clear

\textsuperscript{410} Some of the exceptions are Michael Geist, 
\textit{Toward an ACTA Super-Structure: How ACTA May Replace WIPO}, 
http://www.michaelgeist.ca/content/view/4910/125/ (Mar. 26, 2010) [hereinafter Geist, ACTA Super-Structure]; Sara Bannerman, 
\textit{WIPO and the ACTA Threat}, 


\textsuperscript{412} See, e.g., CAFTA-DR, supra note, at 15.1.2; USAUSFTA, supra note, at 17.1.4; USSINGFTA, supra note, at 16.1.2(a)(iii)–(iv).


\textsuperscript{414} Id.

\textsuperscript{415} IP JUSTICE WHITE PAPER, supra note, at 2.
example of neo-colonialism, ACTA will, at best, benefit a few private interests at the expense of the many.\footnote{Id. at 8–9; accord IQsensato, supra note, at 4 (“What appears as plurilateral in the beginning [referring to ACTA] will quickly become a global standard through FTAs and EPAs and through political and economic pressure.”); Li Xuan, WCO SECURE, supra note, at 74 (“[I]t has been a pattern for developed countries to promote new international regulations first on a voluntary basis before transforming them into compulsory regulations.”).}

Indeed, many of these countries would fear that they would be left out.\footnote{Second, through the creation of an oversight committee—\footnote{As Michael Moore, former director-general of the WTO, noted: “Despite all I’ve written about the perils of unilateralism and bilateralism, I’d be doing it if I were in government. There’s a terrible cost to being left out.” Michael Moore, Preferential, Not Free Trade Deals, GULF NEWS, Apr. 23, 2007, quoted in Meredith Kolsky Lewis, The Prisoners’ Dilemma and FTAs: Applying Game Theory to Trade Liberalization Strategy, in CHALLENGES TO MULTILATERAL TRADE: THE IMPACT OF BILATERAL, PREFERENTIAL AND REGIONAL AGREEMENTS 21, 31 (Ross Buckley et. al., eds., 2008); see also Lewis, supra note (discussing how the WTO member states “are experiencing a prisoner’s dilemma, in which their dominant strategy is to pursue FTAs even though their payoff would improve by pursuing a more focused multilateral strategy”).} or whatever mechanism its final form would take—ACTA introduces a new architecture that would help facilitate the future evolution and reinforcement of the agreement. While commentators have widely focused on the present draft of the agreement, it is likely that the agreement, if adopted, would continue to evolve following the revision process laid out in the agreement.\footnote{See Consolidated Draft, supra note, arts. 5.1.2(b), 6.4.} Such revision would enable countries to develop protection that is in excess of even what the draft agreement has already laid out.

Second, through the creation of an oversight committee—or whatever mechanism its final form would take—ACTA introduces a new architecture that would help facilitate the future evolution and reinforcement of the agreement. While commentators have widely focused on the present draft of the agreement, it is likely that the agreement, if adopted, would continue to evolve following the revision process laid out in the agreement.\footnote{While Canada proposed the establishment of an “oversight committee” (which is also indicated as the “ACTA Oversight Council” in the general definitions), Mexico preferred the term “steering committee.” See Leaked Draft, supra note, art. 5.1.} Such revision would enable countries to develop protection that is in excess of even what the draft agreement has already laid out.

From the standpoint of the ACTA negotiating parties and intellectual property rights holders, the development of a self-evolving infrastructure would be highly efficient. It would help strengthen intellectual property protection without the procedural constraints in existing multilateral processes. By bringing together like-minded countries, such a process is likely to provide a more satisfying outcome. By creating a new freestanding forum, countries could also discuss issues that are likely to face serious resistance at the multilateral level. To some extent, ACTA provides a “safe space” for negotiating new enforcement norms and strengthened protections without reopening the TRIPS Agreement and other international agreements.\footnote{Cf. Laurence R. Helfer, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 YALE J. INT’L L. 1, 58 (2004) [hereinafter Helfer, Regime Shifting] (discussing how regime shifting helps generate “a ‘safe space’ in which [governments] analyze and critique those aspects of [the international agreements] that they find to be problematic.”).} Such a safe space is important to many countries, because the TRIPS Agreement were inadequate and

\footnotesize{"\textsuperscript{417} Id. at 8–9; accord IQsensato, supra note, at 4 (“What appears as plurilateral in the beginning [referring to ACTA] will quickly become a global standard through FTAs and EPAs and through political and economic pressure.”); Li Xuan, WCO SECURE, supra note, at 74 (“[I]t has been a pattern for developed countries to promote new international regulations first on a voluntary basis before transforming them into compulsory regulations.”). \textsuperscript{418} Indeed, many of these countries would fear that they would be left out. \textsuperscript{419} There may also be other tangible benefits that come with stronger intellectual property protection and enforcement, which range from technical assistance to conference and travel support and from the provision of latest equipment and technology to the ability to make internal demands for more personnel and a larger institutional budget. \textsuperscript{420} Second, through the creation of an oversight committee—or whatever mechanism its final form would take—ACTA introduces a new architecture that would help facilitate the future evolution and reinforcement of the agreement. While commentators have widely focused on the present draft of the agreement, it is likely that the agreement, if adopted, would continue to evolve following the revision process laid out in the agreement. \textsuperscript{422} Such revision would enable countries to develop protection that is in excess of even what the draft agreement has already laid out. \textsuperscript{423} From the standpoint of the ACTA negotiating parties and intellectual property rights holders, the development of a self-evolving infrastructure would be highly efficient. It would help strengthen intellectual property protection without the procedural constraints in existing multilateral processes. By bringing together like-minded countries, such a process is likely to provide a more satisfying outcome. By creating a new freestanding forum, countries could also discuss issues that are likely to face serious resistance at the multilateral level. To some extent, ACTA provides a “safe space” for negotiating new enforcement norms and strengthened protections without reopening the TRIPS Agreement and other international agreements. Such a safe space is important to many countries, because the TRIPS Agreement were inadequate and

\textit{SIX SECRET (AND NOW OPEN) FEARS OF ACTA}
badly outdated. Adopted in 1994 with protection levels locked in the levels of the early 1990s, the TRIPS Agreement failed to anticipate the latest developments in the digital environment, as well as the increasingly sophisticated network of piracy and counterfeiting.

From the standpoint of less developed countries and consumers in developed countries, however, the lack of constraints can be quite problematic. After all, many of these constraints—whether procedural or substantive—are important safeguards that ensure not only the balance within the international intellectual property system, but also congruence between such protection and local needs, interests, and conditions. By going outside the multilateral process, ACTA ignores many of the important safeguards that the TRIPS negotiators put into the agreement to promote the public interest and to ensure that the agreement meets the objectives laid out in article 7.

To some extent, ACTA endorses a “pick and choose” approach where developed country members of the WTO and a few emerging countries get together to select the best part of the TRIPS Agreement while abandoning others that they adopt reluctantly out of compromise. ACTA, in short, is a revision of the TRIPS Agreement without going through the carefully-designed multilateral amendment process. It throws away the many hard-earned bargains less developed countries have won through the TRIPS negotiation process.

B. The ACTA “Country Club”

1. Forum Proliferation

At the macro level, the “country club” approach that has been used to negotiate the agreement has created great resentment among less developed countries. Although countries that

---

424 See, e.g., EC STRATEGY FOR IPR ENFORCEMENT, supra note, at 3 (“Violations of intellectual property rights (IPR) continue to increase, having reached, in recent years, industrial proportions. This happens despite the fact that, by now, most of the WTO members have adopted legislation implementing minimum standards of IPR enforcement.”); TRAINER & ALLUMS, supra note, at 4 (noting that “it has become apparent to some national governments and regional organizations that the ‘aggressive’ enforcement provisions of TRIPS, particularly the border measures, have fallen short of expectations of providing an effective system of thwarting international movement of infringing goods.”); Timothy P. Trainer, Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation), 8 J. MARSHALL REV. INT’L PROP. L. 47 (2008) (discussing the inadequacies of the enforcement provisions of the TRIPS Agreement and explaining the need for TRIPS-plus bilateral and regional free trade agreements in the area of border enforcement).

425 See Gervais, supra note, at 43 (“TRIPS adjusted the level of intellectual property protection to what was the highest common denominator among major industrialized countries as of 1991.”); see also id. at 29 (“The 1992 text was not extensively modified and became the basis for the TRIPS Agreement adopted at Marrakesh on April 15, 1994.”).


427 See McCoy Declaration, supra note, at 4 (considering “the growing sophistication and resources of international counterfeiters” as a new challenge to enforcing intellectual property rights); TRAINER & ALLUMS, supra note, at 618 (stating that “greater enforcement efforts are needed given the increasing sophistication of counterfeiters and pirates”)

428 See Letter from James Love, Knowledge Ecology International, and Gigi Sohn, Public Knowledge, to Senator Patrick Leahy (Nov. 9, 2009), available at http://www.keionline.org/node/684 (expressing concern that the undisclosed ACTA might not include the safeguards embodied in articles 1, 6, 7, 8, 40 and 44.2 of the TRIPS Agreement).

429 Article 7 states:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

430 TRIPS Agreement, supra note, at 7. For an in-depth discussion of articles 7 and 8 of the TRIPS Agreement, see generally Yu, The Objectives and Principles, supra note.

had been put on the Special 301 Watch list—such as Canada, South Korea, and a few EU member states—were invited to join the negotiation.\textsuperscript{432} the four biggest middle-income developing countries—Brazil, Russia, India, and China (the so-called BRIC countries)—were all left out. When the ACTA negotiations began in 2008, Brazil was on the Watch List, like some of the ACTA negotiating parties, while China, India, and Russia were on the Priority Watch List.\textsuperscript{433} Within the G8, Russia is currently a member. While China is a strong candidate for membership if the group expands to form G9,\textsuperscript{434} and Brazil and India have been actively engaged through the Heiligendamm Process.\textsuperscript{435}

In addition to these four major developing countries that are omitted from the negotiations, virtually all of the ACTA negotiating parties are from the OECD. Out of the 39 countries that have been involved thus far, the non-OECD participants include only Jordan, Mexico, Morocco, Singapore (which is rather developed), the United Arab Emirates, and non-OECD members of the European Union. Jordan and the United Arab Emirates left the negotiation after the first round.\textsuperscript{436} Meanwhile, Mexico and Morocco were handsomely rewarded with the chance to host the fifth and seventh negotiating rounds.\textsuperscript{437}

To some extent, the effort to create ACTA resembles the earlier effort to shift the intellectual property standard-setting forum from WIPO to GATT/WTO.\textsuperscript{438} Such a shift plays into what commentators have widely described as “forum proliferation,”\textsuperscript{439} “forum shifting,”\textsuperscript{440} or “multiple forum capture.”\textsuperscript{441} As Susan Sell noted, ACTA “would create an additional international intellectual property governance layer atop an already remarkably complex and increasingly incoherent intellectual property regime.”\textsuperscript{442} More importantly, this agreement

\textsuperscript{433} See USTR, supra note, at 98.
\textsuperscript{434} The Heiligendamm Process institutionalized a high-level dialogue between G8 and five highly important emerging economies—China, Mexico, India, Brazil, and South Africa.
\textsuperscript{435} See EU ACTA Negotiator Confirms EU Wants Patent Provisions in ACTA, INSIDE U.S. TRADE, May 8, 2009, at 11. The article also mentioned Uruguay, which may have been involved in the pre-negotiation discussions.
\textsuperscript{436} Charles McManis suggested that these two countries may have additional reasons to join ACTA:

\textsuperscript{437} [E]ach border on one of the world’s two largest economic markets, and have become conduits for smuggling of all sorts from less developed parts of the world, with all of the attendant adverse consequences thereof, and thus might have their own autonomous reasons for wanting to combat international trade in counterfeit and pirated goods.

\textsuperscript{439} See Yu, Currents and Crosscurrents, supra note, at 357–66.
\textsuperscript{441} See generally JOHN BRAITHWAITE & PETER DRAHOFS, GLOBAL BUSINESS REGULATION 564–71 (2000) (discussing the use of forum shifting); Helfer, Regime Shifting, supra note (discussing the use of regime shifting).
\textsuperscript{443} Sell, Global IP Upward Ratchet, supra note, at 9; Shaw, supra note, at 3, http://kestudies.org/ojs/index.php/kes/article/view/34/59 (“Instead of merely shifting the debate from one forum to another, the ACTA
would lead to what Kal Raustiala has described as “strategic inconsistencies,” which “occur[] when actors deliberately seek to create inconsistency via a new rule crafted in another forum in an effort to alter or put pressure on an earlier rule.”

In doing so, ACTA would successfully “pave the way for future rule or regime changes.” For example, the agreement, in its current draft form, is inconsistent with Recommendation 45 of the adopted WIPO Development Agenda, which calls for the WIPO “[t]o approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns.” The negotiation process behind ACTA is also inconsistent with the intention of the World Summit on Information Society, and later the Internet Governance Forum, to promote a “multilateral, multi-stakeholder, democratic and transparent” policy dialogue on Internet governance.

Even worse, despite the negotiating parties’ lip service to the Doha Declaration, ACTA, under close inspection, also threatens the much-needed access to essential medicines in less developed countries. As it stands, the agreement is somewhat inconsistent with the Doha Declaration and the proposed article 31bis of the TRIPS Agreement. It is therefore no surprise that civil society organizations, like Essential Action, Knowledge Ecology International, Oxfam, and Médecins Sans Frontières, have all expressed grave concern about the agreement’s impact on access to essential medicines in less developed countries.

2. Coalition of the Willing

While the above forum manipulative activities have raised important questions about the impact of ACTA on the growing fragmentation of the international system, the “country club” approach adopted by ACTA negotiators raise additional issues.

---

443 Kal Raustiala, Density & Conflict in International Intellectual Property Law, 40 U.C. DAVIS L. REV. 1021, 1027–28 (2007); see also Heller, Regime Shifting, supra note (discussing the legal inconsistencies generated by the development of counter-regime norms).
444 Yu, Regime Complex, supra note, at 17.
445 45 Adopted Recommendations, supra note, recommendation 45.
447 See Summary of Key Elements, supra note, at 2 (stating that ACTA “will respect the Declaration on TRIPS and Public Health.”).
448 Doha Declaration, supra note.
449 TRIPS Amendment, supra note.
SIX SECRET (AND NOW OPEN) FEARS OF ACTA

From the standpoint of the negotiating parties, the “country club” approach is important because it will lead to the development of a “coalition of the willing.”452 Because of the members’ like-mindedness, the rules developed from this coalition will not be watered down to meet the lowest common denominator of less developed countries, which is often found in multilateral negotiations.453 As Eric Smith of the International Intellectual Property Alliance noted: “The ACTA’s objective should be an ambitious agreement that addresses today’s challenges, including strengthened legal regimes and strengthened and effective copyright enforcement in both the hard goods and online environments.”454 Indeed, by crafting what the negotiating parties now call a “state-of-the-art agreement,”455 the rules may set an example for other countries that aspire to strengthen intellectual property protection and enforcement (or to earn the privilege to become a country club member).456

However, such an approach has also raised serious questions about self-selection and legitimacy. To some extent, these questions resemble those confronting the now-failed Multilateral Agreement on Investment,457 which began in the OECD with the hope of being extended to other non-OECD countries. There are also strong resemblances to such G8 initiatives458 as the Financial Action Task Force that was created to combat money laundering and terrorist financing.459

In addition, by developing intellectual property protection outside the traditional forums, like WIPO and the WTO, ACTA would undermine the stability of the international trading system and the preference for the multilateral process. The agreement would also alienate the ACTA negotiating parties’ trading partners, making it more difficult to undertake future multilateral discussions.

To some extent, it reminds one of the many shortcomings of the unilateral approach embodied in the section 301 process. As Helen Milner wrote of Special 301 and Super 301 two decades ago:

453 See Yu, Currents and Crosscurrents, supra note, at 394–95 (discussing the differences between bilateral and multilateral agreements).
455 USTR, Anti-Counterfeiting Trade Agreement (ACTA), supra note (stating that ACTA is “a new, state-of-the-art agreement to combat counterfeiting and piracy”).
458 Commentators have widely divided about the desirability of the G8 forum. Michael Hodges, for example, have noted that G8 “is useful as a closed international club of capitalist governments trying to raise consciousness, set an agenda, create networks, prod other institutions to do things that they should be doing, and, in some cases, help create institutions that are suited to a particular task.” Michael R. Hodges, The G8 and the New Political Economy, in The G8’s Role in the New Millennium 69, 69 (Michael R. Hodges et al., eds., 1999), quoted in HUGO DOBSON, THE GROUP OF 7/8, at xv (2007). By contrast, others hold the perception that G8 “is little more than a cabal—an un-elected and self-appointed gathering constructed to further a narrow set of economic and political interests.” Thomas G. Weiss & Rorden Wilkinson, Foreword to DOBSON, supra note, at ix, x.
459 Information about the Financial Action Task Force is available at http://www.fatf.govi.org/pages/0.2987.en_32250379_32235720_1_1_1_1_1_1_00.html. For criticism of the supranational governance structure of this taskforce and its operations vis-à-vis non-members, see generally Shams, supra note.
Aggressive, bilateral reciprocity violates central tenets of the postwar international trading system. GATT upholds the principles of multilateralism, nondiscrimination, and neutral dispute settlement. . . . Violations of international law by leading powers will induce other states to violate those laws as respect for them declines. Disregarding GATT norms will bring the entire system into question and may lead to its breakdown, as U.S. actions did to the Bretton Woods monetary regime in the early 1970s. Since GATT has helped provide a stable, prosperous trading environment for forty years, ending it should not be done lightly. Moving from a system of multilateral negotiation and dispute settlement to a bilateral one will increase the costs of negotiating trade liberalization and will greatly politicize the process. Undermining the GATT system in exchange for marginal improvements in the U.S. trade balance does not seem to be a rational strategy.  

Likewise, Assafa Endeshaw expressed concern within the TRIPS context:

[The] United States approach will work towards overthrowing any measure of success that the United States has achieved in placing intellectual property on an arguably “international” pedestal (the TRIPs) after passing through long periods of bilateral arrangements. Consequently, the quiet overhaul that the international IP system has been subjected to through the TRIPS may now be in danger of collapse by the American insistence that it will interpret IP treaties and take any measures it deems appropriate, unilaterally and from its own national perspective. Each move of the United States to take IP matters throughout the world in its own hands will increasingly reduce the global significance of the TRIPs formula to a national system that has been outdated for quite some time.

Although both Professors Milner and Assafa made their observations on the ill-advised section 301 sanctions, which have been found to be inconsistent with the WTO Agreement if taken before exhausting all remedies permissible under the WTO rules, these observations are highly relevant to the discussion of ACTA today and remind us of the high costs of the “pick and choose” approach. It took the European Community, Japan, and the United States a tremendous amount of time, effort, and energy to create the WTO and the TRIPS Agreement. Such creation entailed a considerable amount of coordination, negotiation, and compromises between and among developed and less developed countries. Although the WTO remains far from satisfactory, and the TRIPS Agreement has yet to provide up-to-date protection to meet the needs of many developed countries and their intellectual property rights holders, the costs of undermining such a well-built system is not to be ignored.

To be certain, the European Community and the United States have complained about the unwillingness by less developed countries to play ball. As stated in Part I.B, the former has tried hard to advance discussion of enforcement issues at both the TRIPS Council and the ACE. The

---


74
frustration of these countries and their government officials is understandable. However, if countries always abandon the forum when others refuse to play ball, the international trading system is unlikely to be developed the way it is today. In fact, the system owes much of its success to those great statesmen that work hard to create a diplomatic dialogue and to strike compromises among the parties. Diplomacy, after all, is as important as, if not more important than, bargaining.

It is also ironic that developed countries are now complaining about the limited ability of WIPO in setting international intellectual property enforcement norms when they are the ones who pushed such norm-setting discussions away from this particular organization to the GATT/WTO in the mid-1980s. To those who are familiar with the TRIPS negotiating history, the developed countries’ criticism of WIPO for its failure to take on a bigger role in enforcement seem rather disingenuous.

Moreover, by creating a new forum for intellectual property enforcement, ACTA would take away the opportunity to strengthen enforcement norms in the current regimes—whether under the WTO or WIPO. In fact, the creation of multiple fora with overlapping jurisdictions has created serious challenges for national governments. As Kimberlee Weatherall reminded us:

There is a risk of confusion and fragmentation in this process, particularly, one would think, for government departments and enforcement bodies subject to multiple overlapping requirements found in multiple overlapping agreements. In a context where we want government to be more efficient, subjecting them to multiple sources of regulation is not likely to lead to happy results. What would we rather government be doing—actually encouraging innovation, or box ticking on their customs processes to check compliance with the multiple different obligations in different treaties? What should money be spent on—grants for artists or yet forms and bodies and meetings about counterfeiting?

It is important to remember that, given the limited resources, not every country will have the ability to undertake discussions in multiple fora. The more fora there are, the more difficult it is for less developed countries to dedicate their efforts to strengthen enforcement norms in a particular forum.

Finally, the “country club” approach that results in the creation of an agreement among like-minded treaties would raise a set of new issues. To begin with, such an approach is not unheard of at the international level. For example, like-minded countries have joined together to form coalitions. A lot of times, such coalitions are formed at the regional level, such as the African Group in the WTO, ASEAN (Association of Southeast Asian Nations), APEC (Asia Pacific Economic Cooperation), the Andean Community, CARICOM (Caribbean Community), CARIFORUM (Caribbean Forum of African, Caribbean and Pacific States), COMESA (Common Market for East and Southern Africa), the European Union, GRULAC (Group of Latin America and Caribbean Countries), the Gulf Cooperation Council, and MERCOSUR or MERCOSUL (Southern Cone Common Market). At other times, however, such coalitions are formed based on mutual interests, such as the Group of N (G8, G9, G10, G20, G24, G48, and G77), the Group of Friends of X (Friends of Development, Friends of Fish, Friends of Geographical Indications, and Friends of Services), the Café Au Lait Group, the CAIRNS Group,

462 See Yu, Currents and Crosscurrents, supra note, at 357–66.
463 Weatherall, ACTA, supra note, at 4.
Coalition-building strategies also are not bad per se. By bringing together countries, especially those in the less developed world, coalitions can achieve leverage that does not exist for each less developed country on its own. If used strategically, coalitions will enable countries to shape the negotiating agenda, articulate more coherent positions, or establish a united negotiating front. The coalitions will also help less powerful countries establish a louder voice in the international debates on public health, intellectual property, and international trade. They will even help them combat the external pressure each country will face on a one-to-one basis. In fact, as I have argued elsewhere, there is a strong need for less developed countries and sympathetic policymakers, NGOs, academics, and medias in developed countries to join together to establish what I called “IPC4D”—an acronym for “intellectual property coalitions for development.”

Nevertheless, given the ability by key ACTA negotiating parties to go it alone—for example, through the section 301 process—and the fact that they are strong enough even without building coalitions, it remains highly troubling that they now seek to undermine the multilateral process through the creation of a new and untested alternative forum in the form of ACTA. To some extent, this forum reflects the ill-advised “can do, won’t do” mentality laid out by the Second Bush administration. As then-USTR Robert Zoellick wrote in the Financial Times, the United States will separate the “can do” countries from the “won’t do,” and it “will move towards free trade with [only] can-do countries.” Such an approach has led to the proliferation of bilateral and regional FTAs, such as those with Jordan, Singapore, Chile, Australia, Morocco, Bahrain, Oman, Peru, Colombia, South Korea, Panama, and the Central America-Dominican Republic Free Trade Agreement (CAFTA–DR).

Although intellectual property protection remains a key national interest of the United States—regardless of whether the administration is Republican or Democratic—it remains troubling that the current administration would continue the “can do, won’t do” mentality laid out by the previous administration. Such continuation is particularly troubling when the present administration has worked so hard to mend its relationship with its trading partners and restore the credibility and integrity of the international system.

At the multilateral level, Professor Geist also argues that ACTA may threaten WIPO, an organization that has recently been rejuvenated by a number of important initiatives and the establishment of the new Development Agenda. As he pointed out:

---


468 See ACTA Super-Structure, supra note.

469 See MAY, supra note, at 104; Yu, A Tale of Two Development Agendas, supra note, at 521.
ACTA is far more than a simple trade agreement. Rather, it envisions the establishment of a super-structure that replicates many of the responsibilities currently assumed by the World Intellectual Property Organization. Given the public acknowledgement by negotiating countries that ACTA is a direct response to perceived gridlock at WIPO, some might wonder whether ACTA is ultimately designed to replace WIPO as the primary source of international IP law and policy making.\(^{470}\)

Likewise, the Wellington Declaration, which was drafted by the participants of the PublicACTA Conference in New Zealand, proclaimed:

We note that the World Intellectual Property Organisation has public, inclusive and transparent processes for negotiating multilateral agreements on (and a committee dedicated to the enforcement of) copyright, trademark and patent rights, and thus we affirm that WIPO is a preferable forum for the negotiation of substantive provisions affecting these matters.\(^{471}\)

The points raised by Professor Geist and the Wellington Declaration are interesting. To a great extent, it has shown how much the public perception of WIPO has changed. Only a few years ago, it was widely criticized by commentators as an organization that has been captured by rights holders and that interprets its mandate too narrowly.\(^{472}\)

VII. FEAR #6: CREATION OF AN INEFFECTIVE, SUPERFLUOUS TREATY

Despite all of these new provisions, the heightened standards, and the rather unpleasant potential side effects, there is no guarantee that the agreement would provide rights holders with meaningful protection for their intellectual property rights. It is important to remember that the United States, with strong support from Levi Strauss, pushed unsuccessfully for the development of the anti-counterfeiting code toward the end of the Tokyo Round of Trade Negotiations (“Tokyo Round”).\(^{473}\) To some extent, the current negotiation represents the continuation of this early failed attempt.

Although the United States’ proposal for a new anti-counterfeiting code was introduced too late in the Tokyo Round to lead to a new intellectual property agreement within the GATT framework, the TRIPS Agreement did, for the first time, include comprehensive multilateral norms on the enforcement of intellectual property rights.\(^{474}\) Articles 41 to 61, for example, spell

\(^{470}\) Geist, ACTA Super-Structure, supra note.


\(^{472}\) See, e.g., May, supra note, at 4 (“At the center of the Development Agenda is a critique of the WIPO that suggests it represents a narrowly focused set of political economic interests that seek to expand the realm of commodified knowledge and information for their own commercial advantage.”); Siule F. MUSUNGU & GRAHAM DUTFIELD, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) 4 (Quaker United Nations Office, TRIPS Issues Paper No. 3, 2003), available at http://www.quno.org/genova/pdf/economic/issues/Multilateral-Agreements-in-TRIPS-plus-English.pdf (“There are perceptions that the Bureau is acting not as the servant of the whole international community but as an institution with its own agenda. That agenda seems more closely attuned to the interests and demands of some Member States than to others, and more to pro-strong intellectual property protection interest groups and practitioner associations, which are ostensibly observers but sometimes behave and are treated like Member States, than to the interest of developing countries.”); Maskus & Reichman, supra note, at 18 (criticizing WIPO for “interpret[ing] its legislative mandate as one of progressively elevating intellectual property rights throughout the world”).


\(^{474}\) See GERVais, supra note, at 440 (stating that the TRIPS Agreement “is a first true multilateral instrument on domestic enforcement of intellectual property rights”); Carlos M. Correa, The Push for Stronger Enforcement Rules: Implications for Developing Countries, in GLOBAL DEBATE ON THE ENFORCEMENT, supra note, at 27, 34 (“The TRIPS Agreement is the first international treaty on IPRs that has included specific norms on the enforcement of IPRs.”) (footnote omitted); Adrian Otten & Hannu Wager, Compliance with TRIPS: The Emerging World View, 29 VAND. J. TRANSNAT’L L. 391, 403 (1996) (“[The enforcement] rules constitute the first time in
out important standards for intellectual property enforcement. It is under article 59 (and by extension article 46) that the United States successfully challenged the Chinese customs regulations,\(^{475}\) which failed to result in the proper disposal of confiscated infringing products outside the channels of commerce.\(^{476}\)

Nevertheless, because the international enforcement provisions represent the first time intellectual property enforcement norms are being included at the multilateral level, they are rather primitive, and their effectiveness and clarity can hardly be compared to those of similar provisions in the Paris and Berne Conventions, many of which have existed for more than two centuries. As Jerome Reichman and David Lange noted, the enforcement procedures “on closer inspection appear to constitute a set of truly minimum standards of due process on which future legislation will have to build.”\(^{477}\) To some extent, the major strength of the TRIPS Agreement\(^ {478}\)—that is, the provision of enforcement at the multilateral level—is also its major weakness. It is no wonder that Professors Reichman and Lange have described the Part III of the TRIPS Agreement as its “Achilles’ heel.”\(^{479}\)

Even more problematic, because the TRIPS negotiators focused primarily on the comparatively easy task of negotiation or standard-setting, the WTO members now have to address the much more difficult tasks of both implementation and enforcement. As Professor Okediji noted:

\(^{475}\) See TRIPS Agreement, supra note, at 46, 59.


\(^{478}\) See GERVAIS, supra note, at 440 (“The enforcement section of the TRIPS Agreement is clearly one of the major achievements of the negotiation.”); TRIPS RESOURCE BOOK, supra note, at 629 (“The introduction of a detailed set of enforcement rules as part of TRIPS has been . . . one of the major innovations of this Agreement.”); William J. Davey, The WTO Dispute Settlement System: The First Ten Years, 8 J. INT’L ECON. L. 17, 32 (2005) (“Dispute settlement is one of the great successes of the WTO.”); Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together, 37 VA. J. INT’L L. 275 (1997) (noting that the two achievements of the Uruguay Round are, as the title suggests, “Putting TRIPS and Dispute Settlement Together”); Okediji, Toward an International Fair Use Doctrine, supra note, at 149–50 (“One of the most celebrated accomplishments of the WTO system is the dispute resolution mechanism which adds legitimacy to the overall design of the new trading system.” (footnote omitted)).

\(^{479}\) Reichman & Lange, supra note, at 34–40 (explaining why the enforcement provision are the “Achilles’ heel of the TRIPS Agreement”). As Professors Reichman and Lange observed further:

\[\text{The enforcement provisions are crafted as broad legal standards, rather than as narrow rules, and their inherent ambiguity will make it harder for mediators or dispute-settlement panels to pin down clear-cut violations of international law. . . . We predict that the level of enforcement under the TRIPS Agreement will greatly disappoint rightsholders in the developed countries, and that recourse to coercive measures will not appreciably improve the situation in the short and medium terms.}\]

\text{id. at 35, 39.}
Having accomplished the primary goal of binding developing countries to high standards of intellectual property protection, developed countries must now deal with the costs of “winning” the first stage game. These include constraints on sovereign discretion in the area of policy development, and battles over extant policy differences between the member states.480

Because the development of protection under the TRIPS Agreement is a multi-stage game that involves negotiation, implementation, and enforcement, the strategies that were used to complete the first-stage game in the late 1980s and early 1990s—effective as they might have been—have now left developed countries with a much harder game to play—both among themselves and vis-à-vis less developed countries.

Given the limited effectiveness of the TRIPS Agreement in setting international intellectual property enforcement norms, one therefore logically would question whether ACTA would, in fact, do a much better job. The answer, unfortunately, is likely to be negative.

First, like the TRIPS Agreement, ACTA focuses so much on creating new standards of intellectual property protection that it has largely forgotten its original mission, or its claimed original mission 481—that is, to target commercial-scale counterfeiting and piracy while promoting public health and safety. According to the U.S. administration, “ACTA would focus on border measures and enforcement practices, rather than creating new regulation standards.”482

As the consolidated draft reveals, however, the agreement has now veered off its path. Instead of focusing on setting enforcement norms for a narrow category of intellectual property violations—such as genuine counterfeit and pirated goods, ACTA now has the potential of covering virtually every category of intellectual property rights, especially if the European Community succeeds in convincing other negotiating parties that “all IP rights are equal”483.


481 As Professor Geist pointed out, “according to a document [he] recently obtained under the Access to Information Act, Canadian Heritage officials [initially] referred to [ACTA] as a Trade Agreement on Copyright Infringement.” Michael Geist, DFAIT Launches Consultation on Anti-Counterfeiting Trade, http://www.michaelgeist.ca/content/view/2815/125/ (Apr. 6, 2008). While counterfeiting no doubt refers to trademarked products, copyright infringement is technically in the piracy realm. By calling the agreement ACTA, as compared to Anti-Piracy Trade Agreement (or APTA), the proponents of the treaty sought to frame the negotiations in a way that would help earn support from both policymakers and the public at large. After all, as one commentator noted: “It is hard to argue against increased enforcement against terrorist financing and deadly drugs. It is significantly easier, however, to argue that teenagers downloading music should not be subject to similarly increased sanctions.” Kaminski, supra note, at 250.

Footnote 14 of the TRIPS Agreement made explicit the distinction between “counterfeit trademark goods” and “pirated copyright goods”:

(a) “counterfeit trademark goods” shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

(b) “pirated copyright goods” shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

TRIPS Agreement, supra note, art. 51 n.14. Nonetheless, it is worth noting that the European Community, through the 2003 Regulation, has broadened the scope of these definitions. See Council Regulation 1383/2003, Concerning Customs Actions Against Goods Suspected of Infringing Certain Intellectual Property Rights, art. 2(1), 2003 O.J. (L 196) 7; see also Kevin Outterson & Ryan Smith, Counterfeit Drugs: The Good, the Bad and the Ugly, 16 ALB. L.J. SCi. & TECH. 525, 531 (2006) (lamenting how the pharmaceutical industry has defined “counterfeit” drugs broadly to include not only fake or counterfeit products, but also “safe and effective drugs from Canada”).

482 Condon, supra note.

483 Ermert, European Commission on ACTA, supra note (quoting Luc Devigne, the European Community’s lead ACTA negotiator).
As stated in the consolidated draft, “intellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the [TRIPS] Agreement.” In addition to copyright and trademarks, these categories include geographical indications, industrial designs, patents, plant variety protection, layout designs of integrated circuits, and undisclosed information—and perhaps utility models, trade names, and other forms of unfair competition, as incorporated into the TRIPS Agreement by reference to the Paris Convention.

Even worse, while ACTA was initially created with an arguably laudable goal, it has now been captured by intellectual property rights holders to target ordinary consumers. As shown in the disclosed text, ACTA is as much “a regime for global Internet regulation” as it is an international intellectual property agreement. Interestingly, with this text and other leaked documents, the ACTA negotiating parties continue to insist that the agreement “does not focus on private, non-commercial activities of individuals, nor will it result in the monitoring of individuals or intrude in their private sphere.” Without the usual hair-splitting nuances, this statement, on its face, seems to be rather incompatible with the consolidated draft—or at least, the agreement is so badly drafted that it does not even reflect the intent of its negotiators.

Second, like the TRIPS Agreement, ACTA fails to target the crux of the enforcement problems. It largely ignores the need to create what I have described as an “enabling environment for effective intellectual property protection.” Many of the key preconditions for successful intellectual property law reforms are not found in the TRIPS Agreement or the TRIPS-plus bilateral and regional agreements. Nor are the reforms directly related to intellectual property protection. Examples of these preconditions include a consciousness of legal rights, respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, sufficiently-developed basic infrastructure, established business practices, and a critical mass of local stakeholders.

As Robert Sherwood reminded us in an aptly titled article, Some Things Cannot Be Legislated, “until judicial systems in developing and transition countries are upgraded, it will matter little what intellectual property laws and treaties provide.” Likewise, Keith Maskus, Sean Dougherty, and Andrew Mertha wrote:

Upgrading protection for IPRs alone is a necessary but not sufficient condition for the purpose [of maximizing the competitive gains from additional innovation and technology acquisition over time, with particular emphasis on raising innovative activity by domestic entrepreneurs and enterprises]. Rather, the system needs to be strengthened within a comprehensive and coherent set of policy initiatives that optimize the effectiveness of IPRs.

---

484 Consolidated Draft, supra note, at 1.X.
487 Comm’n of the European Communities, The Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet 2, http://trade.ec.europa.eu/doclib/docs/2010/march/tradoc_145958.pdf (Mar. 2010). But see HUSTINX, supra note, at 3 (stating that “even if the intended objective of ACTA is to pursue only large-scale infringements of IPR, it cannot be excluded that activities of ordinary citizens might be captured under ACTA, especially as enforcement measures take place in the digital environment”).
488 See Yu, The China Puzzle, supra note, at 213–16 (discussing the importance of an “enabling environment” for effective intellectual property protection).
Among such initiatives are further structural reform of enterprises, trade and investment liberalization, promotion of financial and innovation systems to commercialize new technologies, expansion of educational opportunities to build human capital for absorbing and developing technology, and specification of rules for maintaining effective competition in Chinese markets.\textsuperscript{490}

To some extent, enforcement facilitation—that is, to provide for measures that help facilitate enforcement—is just as important as enforcement. While countries have explored the need for greater trade facilitation to support trade, they have yet to fully understand the importance of enforcement facilitation. Nor have they the political will to push for measures to make such facilitation possible.\textsuperscript{491}

The idea of the need for such an “enabling environment” was recently explored in the fifth session of the ACE, which sought to “[i]dentify[] elements for creating an enabling environment for promoting respect for intellectual property in a sustainable manner and future work.”\textsuperscript{492} As noted in Pakistan’s submission to the ACE, which was entitled “Creating an Enabling Environment to Build Respect for IP”:

[A] very limited approach to combating infringement of IP rights, in which, in essence, stricter laws and capacity building of enforcement agencies is seen as the primary means to ensure enforcement . . . can temporarily reduce IPR infringements levels, but cannot address the challenge in a sustainable manner. A broader strategy is urgently needed to allow the establishment of conditions in which all countries would have shared understanding of the socio-economic implications of enforcement measures, and direct economic interest in taking such measures. In such an environment, countries’ choice to enforce IPRs will be derived from their internal rather than external factors.\textsuperscript{493}

Likewise, Brazil pointed out in its paper: “Violations of intellectual property rights do not take place in the void. They are not disconnected from concrete political and social variables.”\textsuperscript{494} That paper also heavily criticized the one-size-fits-all model of intellectual property enforcement while at the same time calling for a change in the committee’s focus from enforcement of to respect for intellectual property.\textsuperscript{495}

Sadly, despite all the interests and analytical support, ACTA does not even touch on efforts to create this enabling environment. Instead, it pays only lip service by including provisions on raising consumer awareness, building capacity, facilitating technical assistance, and “[p]romoting the culture of intellectual property.”\textsuperscript{496} Many still wonder what the term means,


\textsuperscript{491} MOHES NAIM, ILICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 257–58 (2005); Yu, Three Questions, supra note.

\textsuperscript{492} ACE, Draft Agenda, WIPO/ACE/5/1 Prov. Rev, Sept. 28, 2009.


\textsuperscript{495} Id.

\textsuperscript{496} See Consolidated Draft, supra note, art. 3.3. For discussion of technical assistance, see generally MAY, supra note, at 61–66 (discussing WIPO’s technical assistance and capacity-building efforts); Duncan Matthews & Viviana Muñoz-Tellez, Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective, 9 J. WORLD INTELL. PROP. 629 (2006).
in what form this “culture” would take, how balanced the culture would be, and whether this culture actually exists!

Third, as an enforcement-inducing treaty, ACTA, which has yet to include, or may not even have, a dispute settlement process, is structurally inferior to the TRIPS Agreement. As a result, countries are likely to have to fall back on the enforcement standards provided by the TRIPS Agreement, thus raising serious questions about the need and effectiveness of the new agreement in the first place. Although Canada, thus far, has advanced proposals in the area, other ACTA negotiating parties, notably New Zealand, is somewhat reluctant to develop such a mechanism. Even if a later version of ACTA does include such a mechanism, it is unlikely that the newly-established mechanism would earn as much legitimacy as the decade-and-a-half-old WTO dispute settlement process. Nor is the mechanism likely to have the same amount of experience and expertise among those involved in resolving disputes.

Fourth, by using a “country club” approach, ACTA fails to include countries that are either the major source or target countries of piracy and counterfeiting. It fails to target the crux of the problems that the negotiators identified at the beginning of the negotiation. Given the lack of participation by major developing countries, like Brazil, China, and India, in the negotiation process, it would also be rather difficult for ACTA to be extended to other WTO members that are not participants in the current negotiations (although the original intention was to have the treaty agreed first and then gradually extended to other non-ACTA negotiating parties in “a second phase”).

To be certain, the plurilateral discussions that are being used to create ACTA are rather similar to those trilateral discussions between the European Community, Japan, and the United States during the early negotiation of the TRIPS Agreement. Through the TRIPS Agreement, a global intellectual property regime has now been created to replace the patchwork quilt of international intellectual property conventions used in the pre-TRIPS days.

Nevertheless, it remains difficult to understand how ACTA could induce other countries that are not current parties to the U.S. FTAs or the EC EPAs, especially those that are emerging or quite powerful, to take up new obligations under this agreement. Consider, for example, China, whose piracy and counterfeiting problems have provided a major impetus for the negotiation of this new enforcement-based instrument. Oft-criticized for its inadequate protection and enforcement of intellectual property rights, the country was recently involved in a WTO dispute on intellectual property enforcement with the United States.

---

497 A key question concerns whether this culture would accurately reflect the current intellectual property regime, where the rights are as important as the limitations and exceptions. As David Lange rightly noted, it is “fundamentally wrong to insist that children internalize the proprietary and moral values of the copyright system.” David Lange, The Public Domain: Reimagining The Public Domain, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 463, 471. For discussion of education and public awareness programs, see generally Peter K. Yu, The Copyright Divide, 25 CARDozo L. REV. 331, 428–31 (2003).
498 See Geist, ACTA Super-Structure, supra note.
499 ACTA Discussion Paper, supra note, at 1.
500 For discussion of the trilateral discussions between the United States, the European Community, and Japan, see generally Sell, supra note, at 96–120.
501 See Yu, The International Enclosure Movement, supra note, at 901–06.
lot of incentives to join the WTO, and in fact considered WTO accession a matter of national pride,⁵⁰³ it is hard to imagine China feeling the same way toward ACTA.

Moreover, countries tend to adhere to norms that they have helped to shape.⁵⁰⁴ As Senator Sam Nunn noted in his address to the American Assembly in the late 1990s, “China will more likely to adhere to international norms that it has helped to shape.”⁵⁰⁵ Indeed, during the debate about China’s accession to the WTO, commentators repeatedly noted, “[T]he international trading system can ill afford to have a player as major as China not playing by the rules of the game. Involving China in the WTO and obtaining deadlines for compliance therefore is preferable to having China outside the organization with no deadlines whatsoever.”⁵⁰⁶ The same is true not only for ACTA and China, but also for all the other major less developed countries that have been left out intentionally.

In today’s age, the increasing powerful developing countries are unlikely to buy into the system they did not help to shape. With the greater leverage and economic power these countries have amassed over the past decade, those days where a system can be created in the West and then thrust down the throats of less developed countries are long gone. In fact, if the goal is to facilitate greater cooperation between developed and less developed countries in an effort to combat piracy and counterfeiting, it is ill-advised not to include these crucial partners in the negotiation in the first place.⁵⁰⁷ “Unclubability” by virtue of lack of like-minded thinking is simply short-sighted.

Even if ACTA did not alienate these countries—and some countries, like Brazil, indeed have expressed interest in joining the agreement⁵⁰⁸—ACTA would make discussion of future international intellectual property norms more difficult. The current negotiation, in fact, has betrayed the futility, or even danger, in giving in to demands of the United States, the European Community, Japan, and other ACTA negotiating parties at the multilateral level. ACTA would also provide the highly unwanted guideline on what items these countries need to think hard about before they begin to accept greater future international intellectual property obligations.

Even worse, the agreement would create unintended consequences that results in a major setback for some of the poorest countries in the world—especially in the areas of public health, sustainable agriculture, and food security. Consider public health, for example. During the

⁵⁰³ See Yu, The China Puzzle, supra note, at 192 (describing how Chinese leaders “longed for China’s regaining its rightful place following centuries of humiliation and semi-colonial rule); Samuel S. Kim, China in World Politics, in DOES CHINA MATTER? A REASSESSMENT: ESSAYS IN MEMORY OF GERALD SEGAL 37, 49 (Barry Buzan & Rosemary Foot eds., 2004) (noting China’s willingness “to gain WTO entry at almost any price”).
⁵⁰⁴ See Yu, From Pirates to Partners, at 200–01 (discussing the need to “encourage Chinese membership and active participation in international organizations”).
Fourth WTO Ministerial Meeting in Doha, Qatar, the Doha Declaration was adopted to underscore the importance of less developed countries’ access to essential medicines. The first two paragraphs of the Declaration explicitly “recognize[d] the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics . . . [and] the need for the [TRIPS Agreement] to be part of the wider national and international action to address these problems.”

With TRIPS-plus terms, ACTA is likely to greatly restrict the flexibilities in the TRIPS Agreement that is explicitly recognized by paragraph 5 of the Doha Declaration. As Frederick Abbott pointed out, despite the entering into force of the TRIPS Agreement, less developed countries still have the following flexibilities in the public health area:

The TRIPS Agreement . . . does not . . . restrict the authority of governments to regulate prices. It . . . permits [compulsory or government use licenses] to be granted. It permits governments to authorize parallel importation. The TRIPS Agreement does not specify that new-use patents must be granted. It allows patents to be used for regulatory approval purposes, and it does not require the extension of patent terms to offset regulatory approval periods. The TRIPS Agreement provides a limited form of protection for submissions of regulatory data; but this protection does not prevent a generic producer from making use of publicly available information to generate bioequivalence test data. The TRIPS Agreement provides substantial discretion for the application of competition laws.

The introduction of ACTA unfortunately would greatly restrict many of these flexibilities. It might even help facilitate strategic litigation that harasses the legitimate trade in generic drugs.

Even more disturbing, ACTA might lead to provisions that would make it difficult for generic pharmaceuticals to be delivered to these countries, despite the parties’ insistence that the agreement “will respect the Declaration on TRIPS and Public Health.” In the past few months, there have already been serious discussions about how the seizure of generic drugs by the Dutch customs authorities is in violation of the WTO Agreement. As Professor Abbott reminded us:

The Doha Declaration is an agreement among WTO members on interpretation of the TRIPS Agreement and provides that the Agreement does not and should not interfere with the right of members to protect public health. It further recognises the objective of promoting “access to medicines for all”. Seizure of generic drugs moving legitimately in transit is a frontal assault by the European Union on the object and purpose of the Doha Declaration. It is an effort to prevent developing countries from relying on the security of supply from Indian generic manufacturers, and to put them out of business (or force them into mergers with major originator companies). This cannot be justified as a means to control counterfeiting. If legitimate generic drugs are treated as counterfeit drugs the entire global public will suffer. Regrettably, the international patent system will again suffer a blow to its legitimacy.
To make its point, India recently filed a complaint against the European Union and the Netherlands over the repeated seizure of in-transit generic drugs from India.\textsuperscript{516} Although ACTA, in its current draft form, does not require the seizure of “in transit” goods, it does include provisions that will have serious ramifications for access to essential medicines in less developed world, such as those concerning civil and criminal patent infringement. While the ACTA negotiating parties have repeatedly emphasized the need for great international cooperation to deal with counterfeiting drugs, the greatest challenge seems not to be “IP infringement, but the health risks created for patients by adulterated products.”\textsuperscript{517} If that is the case, it might be a better policy to focus on sub-standard products, rather than their imperfect proxy—intellectual property infringement.

CONCLUSION

The development of ACTA was announced shortly after the adoption of the recommendations for the WIPO Development Agenda. Although the origin of this agreement can be traced back to much earlier days of cooperation among developed countries and other like-minded countries in their effort to combat commercial piracy and counterfeiting, the agreement and its negotiation have posed serious challenges to the multilateral process and the international trading system. ACTA also militates against domestic legislative reforms and the development of future intellectual property laws and policies. While the lack of transparency has instilled, and sometimes even exaggerated, fears among consumer advocates, civil liberties groups, commentators, as well as policymakers in less developed countries, the fears of this ill-advised agreement are both rational and highly justified. Whether it is within the developed world or without, ACTA would alter the balance in the existing intellectual property system. And for most people, especially consumers, ACTA would provide more harm than good. The agreement should be completely revamped, even if not abandoned entirely.

\textsuperscript{516} Request for Consultations by India, \textit{European Union and A Member State—Seizure of Generic Drugs in Transit}, WT/DS408/1 (May 19, 2010).

\textsuperscript{517} Correa, \textit{supra} note, at 56.