Six Secret (and Now Open) Fears of ACTA

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SIX SECRET (AND NOW OPEN) FEARS OF ACTA

Peter K. Yu*

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"'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 Geist

"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 Anderson

"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 Doctorow


"If Hollywood could order intellectual property laws for Christmas, what would they look like? This is pretty close."
—David Fewer

INTRODUCTION

THE Anti-Counterfeiting Trade Agreement (ACTA) is a once-secret plurilateral agreement negotiated by Japan, the United States, the European Union, Switzerland, and other like-minded countries in an effort to strengthen the global protection and enforcement of intellectual property rights. It represents the latest attempt by key ACTA negotiating parties to consolidate the different protections that have already been developed through bilateral, plurilateral, and regional trade and investment agreements.

Originated more than five years ago, ACTA built on pre-existing anti-piracy and anti-counterfeiting efforts, such as the Global Congress on Combating Counterfeiting and Piracy (Global Congress), Japan’s proposal for an anti-counterfeiting treaty, the United States’ STOP! (Strategy Targeting Organized Piracy) Initiative, and the European Commission’s Strategy for the Enforcement of Intellectual Property Rights in Third

4. Proposed Secret Copyright Deal Takes Aim at iPods, Providers, OTTAWA CITIZEN (May 24, 2008), http://www.canada.com/ottawacitizen/story.html?id=bbba4f36-e632-44a7-8f58-7d2e803f1db (quoting David Fewer, Staff Counsel, Canadian Internet Policy and Public Interest Clinic, Faculty of Law, University of Ottawa).


7. As a report by the Congressional Research Service noted:

U.S. FTAs may lend themselves as models for the ACTA. The United States has stated that it seeks to model the ACTA on the IPR enforcement provisions found in the U.S. FTAs with Australia, Morocco, and Singapore and the proposed FTA with South Korea. These agreements include provisions on “criminal penalties and procedures in cases of willful trademark counterfeiting or copyright piracy on a commercial scale; border measures in cases involving trademarks and copyrights; and civil remedies for all intellectual property rights (e.g., patent, trademark, copyright), with appropriate limitations that ensure consistency with U.S. law.” These four FTAs arguably have the most stringent IPR provisions of all U.S. FTAs to date. For the United States, the ACTA represents an opportunity to expand the stronger IPR commitments found in these bilateral agreements to a broader set of countries. The proposed U.S. FTA with South Korea, in particular, may serve as a “gold standard” for the ACTA.


9. See id.

10. See discussion infra Part I.A.2.
Countries (EU IPR Enforcement Strategy). After eleven rounds of negotiations in more than three years, ACTA was finally adopted on April 15, 2011. Beginning on May 1, 2011, the agreement is opened for signature for two years. From the standpoint of international intellectual property development, ACTA is rather important, as it is likely to lock in or raise the international standards for intellectual property protection and enforcement in both developed and less-developed countries. By using a “country club” approach to international norm-setting, the agreement also threatens to undermine the multilateral intellectual property and trading systems. Notwithstanding these considerable ramifications, most of the public discussions, thus far, have primarily focused on the lack of transparency and accountability in the negotiation process. Such a focus is understandable; without the needed information, it is virtually impossible to assess the impact of this new plurilateral agreement. The provision of such information is, therefore, the logical first step in critically examining ACTA’s strengths and weaknesses.

During the early stages, the treaty negotiations were kept mostly secret. In the wake of the eighth round of negotiations in April 2010, the ACTA negotiating parties reversed their secretive position by releasing a joint consolidated draft of the proposed agreement (consolidated draft). The reluctant release of this document was precipitated by the leaks of many highly informative and revealing documents, the most important of which listed not only the provisions in the consolidated draft but also the various parties that were allegedly responsible for the bracketed texts in that draft or for other language that has since been left out.

While the release of the consolidated draft allayed some of the fears concerning the secretive negotiations and the attendant worry that the new agreement would ratchet up the already very high protections in existing international intellectual property systems in developed countries.

13. ACTA, supra note 5, art. 39.
14. See discussion infra Parts III, IV, and V.
15. See discussion infra Part VI.
16. See discussion infra Part II.
17. See discussion infra Part I.A.
the rest of the negotiation process was still far from transparent, and public, non-industry participation remained very limited. There were also questions about whether the full implementation of the agreement would require the introduction of higher or new standards for protection.

In its final text, ACTA includes six different chapters: (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. Chapter II, which is the most controversial and longest part of the agreement, is subdivided into five different sections: (a) general obligations; (b) civil enforcement; (c) border measures; (d) criminal enforcement; and (e) enforcement of intellectual property rights in the digital environment.

Although many of the provisions in these chapters were rather controversial at the negotiation stage, the final text contains more moderate versions of these provisions, thereby creating what commentators have referred to as "ACTA Lite." Nevertheless, this Article argues that ACTA is still highly problematic. It identifies six specific fears that arose during the negotiation of the agreement. Although these various fears emerged in the early days of the ACTA negotiations, many of them, by and large, have proven to be rational and justified, thanks to the official release or leak of negotiating documents and the multiple draft texts.

This Article was written with U.S. laws in mind. However, many of its arguments are equally applicable to other ACTA negotiating parties, including members of the European Union. The Article also pays special attention to the vastly different social, economic, and technological conditions in less-developed countries—which include, in the parlance of the World Trade Organization (WTO), both developing and least-developed countries. It is the goal of this Article to examine ACTA in relation to the larger global intellectual property regime.

Part I traces the development of ACTA from its origin in the Second Global Congress to the final round of negotiations in Tokyo, Japan. Part II highlights the concerns over the procedural defects of the ACTA negotiation process (Fear #1). Part III explores the potential for ACTA to ratchet up the already very high intellectual property standards within the United States (Fear #2). Part IV discusses how ACTA could lead to greater protection and enforcement of intellectual property rights abroad (Fear #3), especially in 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 required to meet the new treaty obligations (Fear #4). Part VI explains

21. See discussion infra Part II.B.
22. See discussion infra Part III.
24. Id. ch. 2.
how ACTA has resulted 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 policymakers and rights holders have anticipated. It points out the sad reality that the agreement will create a new set of unnecessary international obligations and adverse side-effects without providing meaningful protection to even the intellectual property industries (Fear #6). Given the relatively limited benefits of ACTA, one cannot help but question why countries negotiated 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. Since 2003, Japan has actively pushed for stronger intellectual property protection at both the national and international levels. In January 2003, Prime Minister Koizumi, in a speech to the Japanese diet, announced a plan to make Japan "a nation built on the platform of intellectual property." Subsequently, Japan developed an intellectual property strategy program, which has since been updated every year.

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


29. For discussions of the World Customs Organization’s recent problems in setting new intellectual property enforcement standards, known as SECURE (Standards to be Employed by Customs for Uniform Rights Enforcement), see generally Henrique C. Moraes, Dealing with Forum Shopping: Some Lessons from the Negotiation on SECURE at the World Customs Organization, in INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES 159 (Li Xuan & Carlos Correa eds., 2009) [hereinafter INTELLECTUAL PROPERTY ENFORCEMENT]; Li Xuan, WCO SECURE: Legal and Economic Assessments of the TRIPS-plus-plus IP Enforcement, in INTELLECTUAL PROPERTY ENFORCEMENT, supra, at 62; Peter K. Yu, A Tale of Two Development Agendas, 35 OHIO N.U. L. REV. 465, 539-40 (2009); Viviana Muñoz Tellez, The World Customs Organization: Setting New Standards of Intellectual Property Enforcement Through the Back Door?, S. BULL., Apr. 16, 2008, at 6; William New, World Customs Organization to Replace Contro-
intellectual Property Organization (WIPO) in partnership with the International Chamber of Commerce and its new Business Action to Stop Counterfeiting and Piracy (BASCAP) initiative, the International Trademark Association (INTA), and the International Security Management Association.  

Titled "Treaty on Non-Proliferation of Counterfeits and Pirated Goods," the proposed agreement sought to target worldwide counterfeiting and piracy, while addressing concerns over "safety and security of consumers." While many developed countries and intellectual property rights holders consider the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) inadequate and outdated, the proposed treaty did not seek to replace either the TRIPS Agreement or other international intellectual property treaties.  

At the end of the congress, the participants adopted the Lyon Declaration, which recommended the further consideration of "Japan's proposal for a new international treaty." Although some participants supported the proposal, others expressed skepticism, citing the "lukewarm welcome" the proposal had received at the G8 meeting in Gleneagles.  

Since the Second Global Congress, the treaty proposal had been resubmitted in various international fora. For example, Japan reintroduced the agreement in January 2007 in the Third Global Congress hosted by WIPO...
in Geneva.  

It also advanced the proposal in subsequent meetings within the G8. These efforts eventually culminated in the adoption of the G8 Leaders’ Statement on Combating IPR Piracy and Counterfeiting at the 2006 meeting in St. Petersburg, Russia.  

That statement “reaffirmed their commitment to strengthening individual and collective efforts to combat piracy and counterfeiting, especially trade in pirated and counterfeit goods.”

It also alluded to the need for increased cooperation among the G8 members and between these members and international organizations such as WIPO, the World Trade Organization (WTO), WCO, Interpol, the Organization for Economic Co-operation and Development (OECD), and the Council of Europe. The G8 leaders further “instructed 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 does not provide an ideal forum for negotiating an anti-counterfeiting treaty. First, the forum does not have the norm-setting capabilities found in the WTO, WIPO or other preexisting intellectual property-related fora. Second, Russia, the G8’s newest member, was excluded from the discussion of this specific treaty. Although Russia could still have been interested in supporting other G8 members, perhaps in the hope of earning greater support for its accession to the WTO or for other initiatives, the country was unlikely to proac-

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39. Id. ¶ 1; see also G8 Outcome Has IP Implications for Enforcement, Trade and Health, INTELL. PROP. WATCH (July 19, 2006), http://www.ip-watch.org/weblog/2006/07/19/g8-outcome-has-ip-implications-for-enforcement-trade-and-health/ (discussing Combating IPR Piracy and the G8 meeting in Gleneagles).

40. See Combating IPR Piracy, supra note 38, ¶ 3.

41. Id. ¶ 6.


43. See Michael Geist, Japan Wanted Canada Out of Initial ACTA Group, MICHAEL GEIST’S BLOG (Feb. 25, 2011), http://www.michaelgeist.ca/content/view/5656/125/ (reporting about a confidential U.S. government cable recently disclosed through WikiLeaks showing the USTR emphasizing that the G8 or OECD “might make it more difficult to construct a high-standards agreement”).

44. See Yu, supra note 29, at 521–22 (comparing WIPO’s norm-setting capabilities with those of the WTO).

tively push for a treaty from which it was excluded. Other G8 leaders might also have been sensitive to the inconvenient fact that they deliberately left Russia out of the negotiations, due in part to its widespread piracy and counterfeiting problems.

2. United States

Like Japan, the United States was 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 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."46

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, in 2005 Ambassador Susan Schwab “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.”47 A year later, the USTR “encouraged the interagency Trade Policy Staff Committee (TPSC), a committee representing the interests of twenty U.S. government agencies, to endorse the concept of a multi-party, ‘TRIPS-plus’ ACTA.”48 As Stanford McCoy, Assistant U.S. 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.49

46. USTR Press Release, supra note 6. As the now-defunct National Intellectual Property Law Enforcement Coordination Council stated in its final report:

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).


48. Id. at 5.

49. Id.
Building on this initiative as well as the many free trade agreements (FTAs) that the United States has negotiated since the early 2000s, ACTA began to take shape.50

3. European Union

Although the European Union was also quite active in the negotiations, many commentators and leaked documents credited Japan and the United States for being the primary movers of this treaty.51 As the country proposing the agreement, Japan became the agreement’s depositary.52

This Part therefore focuses only on developments in Japan and the United States.

Nevertheless, it is important to keep in mind the European Union’s important and proactive role in pushing for greater discussion of enforcement issues at the international level—at both the WTO and WIPO. It is also worth recalling the EU IPR Enforcement Strategy, which the European Commission’s Directorate General for Trade developed in April 2005.53 As far as criminal enforcement of intellectual property rights is concerned, the European Union might have been even more eager than the United States to establish an international standard, due in large part to its continued struggle to establish a community-wide criminal enforcement directive.54

4. ACTA Negotiations

On October 23, 2007, two weeks after WIPO adopted its Development Agenda,55 Ambassador Schwab formally announced the United States’ intent to negotiate a new anti-counterfeiting trade agreement with its key trading partners.56 The European Union and Japan made similar but independent announcements.57 In addition to this usual trilateral alliance for heightened intellectual property protection, the initial negotiating parties included Canada, Mexico, New Zealand, South Korea, and Switzerland.58 As the USTR press release declared:

[T]he goal [of ACTA] 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

50. See Iliias, supra note 7, at 6.
51. See, e.g., id. at 1.
52. See ACTA, supra note 5, art. 45.
53. See EU IPR Enforcement Strategy, supra note 11.
54. See discussion infra Part III.B.
55. See discussion infra Part I.B.2.
(3) providing a strong legal framework for IPR enforcement.\(^{59}\)

Pre-negotiation technical discussions began two weeks before the formal announcement, with the first round of these negotiations held as early as October 4, 2007, the day after the end of the 2007 WIPO General Assembly.\(^{60}\) The follow-up round occurred in January 2008.\(^{61}\) According to Michael Geist, Canada received a proposal from the United States as early as October 2006,\(^{62}\) and an internal discussion paper appeared three months later.\(^{63}\) This chronology suggests 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 when the impact of its announcement would be maximized.

The negotiation of ACTA began in earnest in June 2008. Since then, eleven rounds of negotiations have been conducted as follows:\(^{64}\)

Round 1: Geneva, Switzerland (June 2008) (border measures);
Round 2: Washington, United States (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);

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59. Id.
64. The press releases for each of the following rounds are available at European Comm'n, Anti-Counterfeiting, EUROPA.EU (May 20, 2011), http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/.
Round 9: Lucerne, Switzerland (June–July 2010) (initial provisions, general obligations, civil enforcement, border measures, criminal enforcement, enforcement measures in the digital environment, international cooperation, and institutional arrangements); Round 10: Washington, United States (August 2010) (all sections); and Round 11: Tokyo, Japan (September 2010) (all sections).

Although the negotiating parties once harbored the hope of completing the agreement by the end of the Second Bush Administration, the negotiations did not complete until the end of 2010. On April 15, 2011, ACTA was finally adopted. As of this writing, it has been signed by more than two-thirds of the negotiating parties but has yet to enter into force.

5. Reactions to ACTA

During the negotiations, ACTA received both support and criticisms in various international 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

65. See G8 Leaders' Communiqué, supra note 42, ¶ 17 (encouraging “the acceleration of negotiations to establish a new international legal framework, the Anti-Counterfeiting Trade Agreement . . . , and seek to complete the negotiation by the end of this year”); see also James Love, The Counterfeit Treaty, HUFFINGTON POST (June 3, 2008, 10:32 AM), 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.”); Erermert, supra note 25 (reporting that the U.S. administration was eager to complete ACTA before the mid-term elections in November 2010).


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.69

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.”70 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 . . . .”71

Meanwhile, the ACTA negotiations had faced serious challenges and criticisms in other fora. For instance, 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 Court of Justice of the European Union for resolution.72 Through this resolution, which was adopted 633–13 (with sixteen abstentions), the Parliament “[e]xpressed[d] its concern over the lack of a transparent process in the conduct of the ACTA negotiations.”73 The European Parliament “[c]alled on the Commission and the Council to grant public and parliamentary access to ACTA negotiation texts and summaries.”74 It further “[d]eplored 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.”75 The Parliament also noted the need to include in further ACTA negotiations “a larger number of developing and emerging countries, with a view to reaching a possible multilateral level of negotiation.”76

69. G8 Leaders’ Communiqué, supra note 42, ¶ 17 (emphasis added).
71. Id.
72. See Resolution on the Transparency and State of Play of the ACTA Negotiations, PARL. EUR. DOC. (P7 TA(2010)0058) 2 (2010) (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”).
73. Id. ¶ 2.
74. Id. ¶ 3.
75. Id. ¶ 6.
76. Id. ¶ 9.
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 international intergovernmental organization, like the WTO, WIPO, or even the WCO. Although future possibilities for greater interactions between ACTA and these organizations still exist, ACTA is likely to remain a freestanding treaty outside the multilateral framework. This Part explores why Japan, the United States, and the European Union—and, for that matter, other ACTA negotiating parties—chose to negotiate a new agreement outside the WTO and WIPO.

I. WTO

In November 2001, the WTO member states launched the Doha Development Round of Trade Negotiations (Doha Round) during the Fourth 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 led to the adoption of the 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 seeks to enable WTO members with insufficient or no manufacturing capacity to import generic versions of on-patent pharmaceuticals.

77. See discussion infra Part VI.
80. Id. at 512–13.
83. See Yu, supra note 82, at 829. Ratification of this protocol requires two-thirds of the WTO membership. Members Accepting Amendment of the TRIPS Agreement, WORLD TRADE ORG. (Mar. 15, 2011), http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm. Although the initial deadline for ratification was set at December 1, 2007, it has been extended twice to December 1, 2011. Id. As of this writing, slightly more than a third of the 153 WTO member states, including the United States, India, Japan, China, and members of the European Union, have ratified the proposed amendment. Id.
Although the Doha Round began as a development round and has subsequently led to greater accommodation of needs, interests, and conditions in less-developed countries, developed countries have actively pushed for heightened intellectual property protection and enforcement in the WTO. For example, during the TRIPS Council meeting in June 2006, the European Union called for an “in-depth discussion” of enforcement issues. Together with two earlier proposals, the EU effort to push for greater discussion of intellectual property enforcement in the TRIPS Council represented the first attempts by a WTO member to revive such discussion since 1997. That effort also reflected the directions of the new EU IPR Enforcement Strategy, which the European Commission adopted in November 2004.


87. See EU IPR Enforcement Strategy, supra note 11. 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.


In response to the EU efforts, leading developing countries such as Argentina, Brazil, China, and India registered their strong opposition, citing distractions from WTO trade talks, which they claimed were “supposed to focus on development” in the Doha Round. As noted by a Chinese official, the TRIPS Council is “not the right time or right place” to discuss intellectual property enforcement. In China’s view, those issues should be handled by the DSB instead.

In the next TRIPS Council meeting in October 2006, the European Union, with formal support from Japan, Switzerland, and the United States, submitted to the Council a joint communication seeking to strengthen the implementation of the enforcement provisions in the TRIPS Agreement. 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.”

Citing ongoing challenges in the area, the European Union 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 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 Union sought to make a formal presentation of this proposal, less-developed countries objected largely on procedural

90. Id.
93. Id.
95. Joint Communication, supra note 92, ¶ 7.
As a result, the European Union could not formally present its proposal; it made a statement instead, and the proposal was subsequently rejected. The reactions from less-developed countries were understandable. These countries were already concerned about the rather high standards required by the TRIPS Agreement, with which they had great difficulty complying following the expiration of the agreement's transitional periods. In effect, less-developed countries were dealing with what Bernard Hoekman and Petros Mavroidis have described as the "Uruguay Round 'hangover'"—to be more precise in the intellectual property context, "TRIPS veisalgia." These poorer countries were also very concerned about the growing TRIPS-plus and TRIPS-extra obligations that developed countries had pushed upon them through new bilateral and regional trade and investment agreements.

Moreover, 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 of these 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

96. See Tove Iren S. Gerhardsen, WTO TRIPS Council Stumbles over Inclusion of Enforcement, INTELL. PROP. WATCH (Oct. 27, 2006), http://www.ip-watch.org/weblog/2006/10/27/wto-trips-council-stumbles-over-inclusion-of-enforcement/ (recounting the disagreement between developed and less-developed countries over how to address intellectual property enforcement in the TRIPS Council).

97. See id.


100. See Yu, supra note 98, at 383–86.

101. See Tove Iren S. Gerhardsen, Developed Countries Seek to Elevate Enforcement Measures in TRIPS Council, INTELL. PROP. 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").


103. Id.

intellectual property infringement.105 The United States also called on 
the TRIPS Council to "make a positive contribution to addressing [intel-
lectual property enforcement] problems through a constructive exchange
of views and experiences."106 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 en-
forcement issue] belong[ed] in the TRIPS Council."107 China, with the
support of Argentina, Brazil, Cuba, India, and South Africa, stated spe-
cifically that "enforcement could not be a permanent agenda item in the
council."108 The enforcement issue was particularly sensitive to China,
because the United States, at that time, was contemplating whether to file
a WTO complaint against China concerning its lack of protection and
enforcement of intellectual property rights.109

In June 2007, Switzerland introduced another paper, suggesting ways to
implement the enforcement provisions of the TRIPS Agreement and to
improve the overall enforcement of intellectual property rights.110 This
paper underscored the need to develop well-functioning communication
and coordination structures in the area of border measures.111 A few
months later, Japan introduced the last enforcement paper from the de-
veloped world, sharing its experiences on border enforcement of intellec-
tual property rights while outlining the recent trend on intellectual
property infringements.112

Shortly after the release of these papers, the ACTA negotiations were
announced.113 Since then, developed countries have not circulated any
new papers on enforcement during the TRIPS Council meetings. For the
purposes of this Article, it is worth noting that all the key ACTA negoti-
ating parties—Japan, the United States, the European Union, and Swit-
zeland—had at one time or another submitted their own papers on
enforcement to the Council.114 Thus, despite the wide criticisms over

105. See id. at 1.
106. Id.
108. Id.
109. See Peter K. Yu, The U.S.-China Dispute over TRIPS Enforcement, in IP EN-
FORCEMENT AND AWARENESS RAISING IN ASIA 239 (Christoph Antons ed., 2011) (criti-
cally examining the United States' decision to file a TRIPS enforcement complaint against
China before the WTO Dispute Settlement Body). The complaint was filed on April 16,
2007, a few months after the January 2007 TRIPS Council meeting. Request for Consulta-
tions by the United States, China—Measures Affecting the Protection and Enforcement of
110. TRIPS Council, Communication from Switzerland, IP/C/W/492 (May 31, 2007); see also Tove Iren S. Gerhardsen, Quiet TRIPS Council Meeting Expected; Enforcement Push Continues, INTELL. PROP. WATCH (June 1, 2007), http://www.
ip-watch.org/weblog/2007/06/01/quiet-trips-council-meeting-expected-enforcement-push-
continues/ (reporting Switzerland's proposal).
111. TRIPS Council, supra note 110.
112. TRIPS Council, Enforcement of Intellectual Property Rights: Communication from
114. See supra text accompanying notes 84–112.
how developed countries ignored multilateral fora in their efforts to establish ACTA, evidence does suggest their intent to open discussions on enforcement at the WTO. As these countries have claimed, the unwillingness of less-developed countries to discuss enforcement issues 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. During the WIPO General Assembly in October 2004, 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 Inter-sessional Intergovernmental Meeting on a Development Agenda for WIPO, the forty-five recommendations for action were adopted in October 2007. Recommendation 45 specifically calls on WIPO “[t]o approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns,” taking into consideration the objectives laid out in Article 7 of the TRIPS Agreement.

Although WIPO-administered treaties, like the Paris, Berne, and Rome Conventions, provide no mandatory and effective enforcement mechanisms, enforcement issues have been addressed at the organization—quite unlike the TRIPS Council. Before WIPO considered the creation of a Development Agenda, 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 and the Advisory Committee on Management and Enforcement of Copyright and Related Rights in Global Information Networks. In October 2002, these two committees were merged into a single committee, the Advisory Committee on Enforcement (ACE). As the WIPO General Assembly

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117. 45 Adopted Recommendations, supra note 116, recommendation 45.
119. When this advisory committee was first created, it was known as the Advisory Committee on Enforcement of Industrial Property Rights in Global Electronic Commerce. Id. During the 2000–2001 biennium, the committee was renamed by dropping the phrase “in Global Electronic Commerce.” Id.
120. Id.
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.122

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.123 It was against this background that the General Assembly limited the committee's mandate to technical assistance and coordination.124

The first session of the ACE was held in Geneva in June 2003, with participation from seventy-two WIPO member states, five international intergovernmental organizations, and sixteen nongovernmental organizations.125 During that meeting, members addressed various enforcement issues, including “the coordination, training and development of enforcement strategies”126 and the establishment of the Electronic Forum on Intellectual Property Issues and Strategies (the IPEIS Forum).127

A year later, the second session was held to address the role of the judicial, quasi-judicial, and prosecutorial authorities in enforcement activities, including such related issues as litigation costs.128 Shortly after this session, Brazil and Argentina introduced their proposal to establish a development agenda at WIPO.129 That proposal was subsequently adopted by the General Assembly in October 2007.130
During the third ACE session in May 2006, which focused on education, training, and awareness-building in the area of enforcement, delegates disagreed not only on the committee’s mandate but also the ability of civil liberties groups to participate in the session. While developed countries took a rather narrow view of enforcement, less-developed countries, powered by the discussions on 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 discussion 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.”

131. See ACE, Draft Agenda, item 5, at 1, WIPO/ACE/3/1 (Mar. 23, 2006).
133. See id.
134. See ACE, Conclusions by the Chair 1, WIPO/ACE/4/10 (Nov. 5, 2007).
135. Id. ¶ 8, at 2.
137. See id.
139. Id.
140. ACE, Draft Agenda, item 5, at 1, WIPO/ACE/5/1 Prov. Rev (Sept. 28, 2009).
141. Kaitlin Mara & William New, IP Enforcement Work at WIPO Gets Boost from Developing Nations, INTELL. PROP. WATCH (Nov. 6, 2009), http://www.ip-watch.org/weblog/2009/11/06/ip-enforcement-work-at-wipo-gets-boost-from-developing-nations/ (quoting an unnamed participant); see also id. ("For the first time developing countries [referring to..."
This recent turn of events and the increasingly pro-development stands taken by WIPO (including its ACE) may have forced developed countries to other fora—not only ACTA but also the WCO and the Global Congress; the Fifth Global Congress, for example, was held only a month after the fifth ACE session.\textsuperscript{142} To some extent, the developments at both WIPO and the WTO resembled the notorious stalemate between developed and less-developed countries over the Nairobi text when the Paris Convention was under revision in the early 1980s.\textsuperscript{143} 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.\textsuperscript{144}

Notwithstanding the stalemate between developed and less-developed countries on the enforcement front, there is still a possibility that the discussions will return to the WTO or WIPO. Indeed, the discussion of intellectual property enforcement has recently returned to the TRIPS Council. In the June 2010 meeting, for example, China and India made important interventions, expressing their concerns about the release of the draft ACTA text and the highly disturbing trend concerning TRIPS-plus enforcement standards.\textsuperscript{145} As these countries argued, these TRIPS-plus standards could cause a wide variety of systemic problems within the international trading system, creating legal conflicts and uncertainty while upsetting the balance struck in the TRIPS Agreement.\textsuperscript{146} India further
reminded the Council that the second sentence of Article 1.1 of the TRIPS Agreement delineates one of the Agreement's maximum standards, or the so-called "ceilings." In India's view, the TRIPS Agreement prohibits members from raising the protection levels to the extent that such protection contravenes the Agreement. India also lamented how intellectual property negotiations at the bilateral and regional levels, including the recent ACTA negotiations, have now bypassed the existing multilateral framework.

In the next TRIPS Council meeting in October 2010, less-developed countries continued to register their concerns about the impact of ACTA negotiations. As Indonesia noted, "[t]he ACTA initiative has failed to keep in line the TRIPS standards and thus undermined the safeguards provided by the TRIPS Agreement." Likewise, Brazil criticized ACTA for "propos[ing] only one remedy against counterfeiting and piracy, and that remedy is repression." While the country recognized the need for enforcement, it noted that enforcement alone "is not enough to combat a problem that results from the interplay of factors that are to be found in different economic and social realities."

In sum, given the wide divergences between developed and less-developed countries, it remains unclear what the future will hold for the development of international intellectual property enforcement standards at

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147. Article 1.1 provides: "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement." TRIPS Agreement art. 1.1.

148. As India declared:

Although [the] TRIPS Agreement is usually considered to be a minimum levels agreement, enforcement levels cannot be raised to the extent that they contravene TRIPS Agreement. TRIPS plus measures cannot be justified on the basis of Art 1:1 since the same provision also states that more extensive protection may only be granted "provided that such protection does not contravene the provisions of this Agreement". In addition to laying certain minimum standards, [the] TRIPS Agreement also provides "ceilings", some of which are mandatory and clearly specified in the TRIPS Agreement. Moreover, the TRIPS Agreement has achieved a very careful balance of the interests of the right holders on the one hand, and societal interests, including development-oriented concerns on the other. Enforcement measures cannot be viewed in isolation of the Objectives contained in Art 7.

149. See TRIPS Council Minutes, supra note 146, ¶ 267.


151. Id.

152. Id.
the WTO, WIPO, or other multilateral fora. Nor is it clear what issues will be raised at those fora or how high the standards will be, if they are to be developed at all.

II. FEAR #1: LACK OF TRANSPARENCY AND ACCOUNTABILITY

A. THE ACTA BLACK BOX

From the very beginning, the ACTA negotiations had been kept in secret. While some questioned, jokingly, whether the acronym ACTA stands for "Anti-China Trade Alliance" or "Anti-Canada Trade Agreement," others suggested sadly that the treaty may, in effect, be an "Anti-Consumer Trade Agreement." Although ACTA officially stands for "Anti-Counterfeiting Trade Agreement," these alternative labels are not too far off the mark, considering the agreement's wide implications for China, Canada, and consumers and the fact that the agreement's focus has gotten quite far away from commercial counterfeiting.

The secrecy surrounding the ACTA negotiations attracted severe criticism from 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." 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 press release or two, the USTR has provided the general public with virtually no public information about the proposed substance of ACTA.

Taken together, these comments show four sets of public interest concerns that ACTA has raised: (1) lack of transparency; (2) very limited public, non-industry participation; (3) a huge democratic deficit; and (4)

virtually no domestic or global accountability.\textsuperscript{158}

While this "cloak of secrecy" initially insulated ACTA negotiators from external pressure and outside criticism, it eventually backfired on them by fueling concerns, fears, rumors, allegations, speculations, and paranoia and by distracting them from focusing on substantive discussions. As one information technology analyst wrote somewhat exaggeratedly in the \textit{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.\textsuperscript{159}

Although ACTA is unlikely to require such draconian measures, concerns regarding overzealous border guards searching and confiscating travelers’ iPods, DVD players, and laptops struck a rare chord with the consuming public, most of whom are generally not too interested in intellectual property matters. These distractions were so bad that one of the treaty’s key proponents 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 (MPAA), 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.\textsuperscript{160}


\textsuperscript{160} Letter from Dan Glickman, Chairman & CEO, Motion Picture Ass’n of Am., Inc., to Senator Patrick Leahy (Nov. 19, 2009), available at http://www.scribd.com/doc/22785108/MPAA-letter-re-ACTA; see also Nate Anderson, \textit{Shocker: Ars, Hollywood Agree on Need
To a large extent, the wild speculations and the resulting "distractions" were sparked by the unnecessary closed-door negotiations, which made it difficult for the public to have a rational policy debate. As a student commentator colorfully noted, "[w]ith no open negotiating process, and no draft publicly available, ACTA is a black box that could contain a bomb." To alleviate this concern, ACTA negotiators repeatedly emphasized that the new agreement would not result in such draconian outcomes. They also quickly reached a consensus on the de minimis provision, notwithstanding the negotiating parties' initial disagreement over the scope of such a provision, as well as some lingering concerns from selected industry groups—most notably INTA and the U.S. Chamber of Commerce.

While Glickman's letter may have suggested a mid-way change of the

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162. See EUROPEAN COMM’N, THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA): FACT SHEET 2 (2008), available at http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf ("ACTA is not designed to negatively affect consumers: the EU legislation (2003 Customs Regulation) has a de minimis clause that exempts travelers from checks if the infringing goods are not part of large scale traffic. EU customs, frequently confronted with traffics of drugs, weapons or people, do neither have the time nor the legal basis to look for a couple of pirated songs on an i-Pod music player or laptop computer, and there is no intention to change this."); USTR, FACT SHEET: ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 4 (2008), available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset upload_file760_15084.pdf ("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 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.").

163. See ACTA, supra note 5, art. 14.2 (including a de minimis provision stipulating that "[a] Party may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travellers' personal luggage").

164. See Michael Geist, Canada's ACTA Briefing, Part Five: The Fight Over a De Minimis Exception, MICHAEL GEIST’S BLOG (Apr. 6, 2009), http://www.michaelgeist.ca/content/view/3834/125/ ("[S]ome groups are 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."); Global Organizations Provide Governments with Recommendations on Anti-Counterfeiting Trade Agreement, BUS. ACTION TO STOP COUNTERFEITING & PIRACY (June 25, 2010), http://www.iccwbo.org/bascap/index.html?id=37650 (stating in the joint recommendations and comments on ACTA submitted by BASCAP and INTA the belief that "making an explicit exception that permits travelers to bring in goods for personal use sends a wrong message to consumers that buying counterfeits is accepted by the government"); see also Shared Challenges, Common Goals, supra note 37, 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, PROTECTING INTELLECTUAL PROPERTY RIGHTS ACROSS BORDERS § 6:50, at 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)).
MPAA'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. To be certain, the United States initiated the secretive process in December 2007, a few months before the first round of negotiations. Nevertheless, that process quickly took on a life of its own and arguably backfired on the interests of both the negotiating parties and their supportive industries. Yet, because the negotiating parties invested so much in this secretive process, bearing the high political costs of such secrecy, changing the process was more complicated than adding a new item on to the meeting agenda.

To make matters worse, the secretive approach antagonized not only the public but also lawmakers, including those who have strongly supported intellectual property industries. Senators Patrick Leahy and Arlen Specter, for example, sponsored the Pro-IP (Prioritizing Resources and Organization for Intellectual Property) Act of 2008. Yet they were left in the dark and had to openly demand more transparency over the negotiating process.

It is indeed bizarre that ACTA negotiators, the industries, and their lobbyists did not think more carefully about the unintended political complications that their secretive approach would create. After all, if lawmakers were shut out of the process, the debate would no longer be over substance but rather process and trust. In Europe, for instance, the secretive process led the European Parliament to adopt a highly critical resolution. That resolution showed as much about the Parliament's concern for a lack of transparency as its demand for respect—an understandable demand following the recent entering into force of the Lisbon

165. See Letter from Dan Glickman, supra note 160, at 1.
166. See McCoy Declaration, supra note 47, at 13 (noting the United States’ proposal that “documents relating to the proposed Anti-Counterfeiting Trade Agreement...will be held in confidence”).
169. 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-drn-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 letter from Senators Leahy and Specter to the USTR)).
Treaty on the Functioning of the European Union. Immediately after the adoption of this resolution, one member of the European Parliament declared emphatically that "the European Parliament is not a doormat." In Canada, similar sentiments arose. 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, a member of the Canadian Parliament, 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 so. As much as he was concerned about the agreement’s content, he was also worried that new international obligations would create constraints that bind his Parliament’s ability to undertake future legislative reform.

To some extent, the ill-advised secretive approach urged by the ACTA negotiating parties awakened and brought together two groups of unlikely allies: ACTA’s critics and policymakers who were frustrated by the lack of information and consultation. As a result, ACTA was challenged on both substantive and procedural grounds. By raising transparency and accountability questions, the secretive approach also transformed issues that were too technical to capture public consciousness into matters lay people could understand and relate to.

I. Official Reasons

Thus far, the United States and other administrations have failed to offer satisfactory explanations for their secretive approach. As the USTR noted in its denial of the request from the Electronic Frontier Foundation (EFF) under the Freedom of Information Act (FOIA), ACTA-related documents concerned “information that [was] properly classified in the interest of national security pursuant to Executive Order 12958.” Issued in April 1995 during the Clinton administration, Executive Order 12958 allows materials to be classified when “the unauthorized disclosure of the information reasonably could be expected to result in damage to

171. Id. (reporting a European Parliament member “summing up the vote as an ‘epic win’ that showed ‘the European Parliament is not a doormat’”).
173. See id.; see also Michael Geist, ACTA Conclusion Leaves Flexibility for Made-in-Canada Approach, Michael Geist’s Blog (Oct. 12, 2010), http://www.michaelgeist.ca/content/view/5368/135/ (“[F]or many Canadians, a core concern with the agreement was the possibility that it could severely limit the ability to establish a made-in-Canada approach on copyright and intellectual property policy.”).
Six Secret Fears of ACTA

the national security.”¹⁷⁶ In this executive order, national security is broadly defined as “the national defense or foreign relations of the United States.”¹⁷⁷ Meanwhile, “foreign government information” covers a broad category of information:

(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 . . . .¹⁷⁸

Although government officials, industry groups, and academic commentators have repeatedly noted the strong link between counterfeiting and piracy on the one hand and organized crime and terrorism on the other,¹⁷⁹ 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 distinguish the documents by separating them 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 strongest protection, the other types of documents warrant much less.

Indeed, the nondisclosure 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 released by ACTA-negotiating governments shortly after President Obama’s inauguration.¹⁸⁰ As stated in the April 2009 docu-

¹⁷⁷. Id. § 1.1(a).
¹⁷⁸. Id. § 1.1(d)(1)–(2).
ment, which has 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 allows delegations to exchange views in confidence facilitating the negotiation and compromise that are necessary in order to reach agreement on complex issues.181

In a declaration submitted in the EFF's follow-up challenge to its partially denied FOIA request, Assistant USTR Stanford McCoy, who was the chief ACTA negotiator until assuming 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.182

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, many rights holders—in particular those in the music industry—have unfortunately considered the file-sharing-loving public as the new counterfeiters. Since September 2003, the industry has filed lawsuits against more than 35,000 individuals.183 At the time of the negotiations, the industry was still in the middle of a "copyright war" with the public.184 Given the industry's intent to push for an agreement targeting the file-sharing public, the industry logically might have expected the government not to disclose the draft agreement to those whom they considered adversaries or who were likely to disrupt the development of such an agreement. While it is sad that an industry took such a belligerent approach, it is particularly troublesome when government negotiators also looked at the public at large through an industry-induced bellicose lens. After all, governments are supposed to work for the public, and it is the public constituents who elect lawmakers.

In the European Union, similar explanations were given when the EU Council of Ministers denied a public access request by the Foundation for a Free Information Infrastructure (FFII) for ACTA-related documents. Cited for the denial was the need for "protection of the public interest

181. Id.
182. McCoy Declaration, supra note 47, at 6-7.
with regard to international relations."\textsuperscript{185} As the Council stated further in a draft reply to the European Ombudsman,\textsuperscript{186} the disclosure of these documents "would negatively affect the climate of confidence in the ongoing negotiations and hamper open and constructive co-operation, which is essential in this process."\textsuperscript{187} 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."\textsuperscript{188} As to documents that did not concern 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."\textsuperscript{189} The Council further warned that had the classified documents been disclosed, "the overall conduct of the ongoing negotiations would thereby be compromised, which would be prejudicial to the EU's interest in the efficient conduct of such negotiations."\textsuperscript{190}

Although both the European Union and the United States have taken more open approaches in negotiations at WIPO, WTO, WHO, and other international fora,\textsuperscript{191} negotiations at the bilateral and plurilateral levels have indeed been kept secret in the past. Given the controversial nature of intellectual property reform today, it is understandable why negotiators would rather limit the discussion to themselves.

From a tactical standpoint, a secretive approach would make the negotiations smoother and much more successful. Such an approach would also help insulate the negotiations from external influences, which range from political complications in the capitols to opposition from civil society groups at both the national and international levels. In addition, by concealing the positions of each party, a secretive approach would greatly


\textsuperscript{186} 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).

\textsuperscript{187} EU Council Reply, supra note 185, at 3.

\textsuperscript{188} Id. at 3-4; see also EUROPEAN COMM'N, supra note 162, 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.").

\textsuperscript{189} EU Council Reply, supra note 185, at 4.

\textsuperscript{190} Id.

\textsuperscript{191} See Essential Action Comment, supra note 156, at 1-3; see also Memorandum from Elec. Frontier Found. et al. to Ron Kirk, USTR, attachment 1 (July 22, 2009), available at http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf (discussing the openness in these and other international fora).
reduce the pressure faced by the negotiators while at the same time promoting an amicable long-term negotiating relationship. Such a relationship may benefit these negotiators in the long run, as it may go beyond the negotiation of this particular agreement or this particular version of the agreement. For example, the benefits of an amicable relationship during the ACTA negotiations could be easily extended to cover the ongoing negotiation of the Trans-Pacific Partnership Agreement (TPP), which thus far have included among its negotiating parties Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam.

Even more beneficial, a secretive approach would allow a country to complete their negotiations and then decide whether they want to walk away from the treaty they helped shape and negotiate. Powerful countries have indeed taken such an approach in international negotiations in the past, earning frustrations from their weaker negotiating partners. For instance, while the United States was heavily involved in the negotiation of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions under the auspices of UNESCO and demanded significant concessions from other negotiating parties, it (along with Israel) eventually voted against the adoption of the Convention. As of this writing, the United States still has no intention to become a signatory of the Convention.

192. For example, although Australia already has an FTA with the United States, it is now negotiating the Trans-Pacific Partnership Agreement with the United States as well as with other countries in the Pacific Rim. Overview of Australia’s Participation in Trans-Pacific Partnership Agreement Negotiations, Austl. Dep’t of Foreign Aff. & Trade, http://www.dfat.gov.au/fta/tpp/index.html (last visited Nov. 11, 2010).

193. See id. As the New Zealand Ministry of Foreign Affairs and Trade described:

The Trans-Pacific Strategic Economic Partnership Agreement (TPP—better known as ‘P4’) between Brunei Darussalam, Chile, New Zealand and Singapore was signed in 2005. Negotiations for an expanded agreement including the United States, Australia, Peru and Viet Nam began in March 2010. Malaysia joined the negotiations during the third round in Brunei in October 2010.


195. See 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”).
If these benefits are not enough, policymakers have a deep worry that the disclosure of ACTA would create a slippery slope where the public would demand disclosure of negotiations concerning other bilateral and plurilateral trade and investment agreements. As a leaked document indicated in the EU context: "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."196

Notwithstanding these potential concerns, it is worth noting that the United States indeed managed to release documents covered by the December 2007 confidential agreement after consulting with other ACTA negotiating parties.197 Unlike trade agreements, which can include tariffs, quotas, financial data, number of shipments, or other sensitive information, ACTA focuses primarily on intellectual property enforcement and does not deserve the same type of protection as a trade agreement.198

196. 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-CE97003E8DC06B00.

197. See McCoy Declaration, supra note 47, at 10. 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.

Id. 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 156, at 2.

198. See Sherwin Siy, The Trouble with ACTA, AM. CONST. SOC’Y’S BLOG (Apr. 6, 2010, 5:33 PM), http://www.acslaw.org/node/15774; see also IIAS, supra note 7, at 6 ("While the title of the agreement denotes it as a ‘trade agreement,’ the ACTA—as currently being fashioned—differs in nature from other U.S. regional and bilateral trade agreements. Traditionally, U.S. trade agreements have been rules-based arrangements where the United States and trading partners agree to trade liberalization measures, including eliminating tariff and nontariff barriers to trade among the countries participating in the free trade area. In contrast, the USTR has portrayed the ACTA as a leadership and standards-setting agreement. Another way that the ACTA would differ from traditional trade agreements is in its coverage of issues. Trade agreements negotiated by the United States tend to be broadly focused, covering a range of issues of which IPR is one. Other issues covered include market access, tariff barriers, government procurement, services,
To some extent, calling ACTA a trade agreement is more a pretext for secrecy than identifying 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."  

2. Additional Reasons

While negotiation strategy and foreign relations were offered as the two official reasons behind the secretive process, a careful analysis of the negotiation context reveals a few additional reasons. First, if one revisits the early stages of the TRIPS negotiations, one could not help but notice the lack of substantive negotiations in the early sessions of the TRIPS Negotiating Group. In those sessions, the negotiators spent a tremendous amount of time, energy, and resources 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 may never be, one can only imagine how much information there actually was in the first few negotiating rounds. As the leaks have shown, many of the early documents were negotiation tables that merely collected provisions or negotiation points. Moreover, as the negotiations continued, new issues came up and likely were incorporated into the negotiating agenda. For example, in the middle of the negotiations, the discussion of the seizure of in-transit generic drugs became a very hot issue due to new developments in Germany, the Netherlands, and the United Kingdom. Thus, the ACTA negotiating parties could very well have been telling the truth when they insisted during the early stages that “[a] comprehensive set of proposals for the text of the agreement d[id] not yet exist.”

Second, while the United States and the European Union 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 might have been equally, if not more, concerned about the disclosure of their negotiating positions. Given how much the draft provisions resembled those of U.S. or EU laws and given the harsh criticisms these governments had received in the past following the negotiation of FTAs with the United States, negotiators from these countries were understandably concerned about criticisms at home—over their incompetence, inadequate representation of their countries, their kowtowing to powerful foreign interests, or, worse, betrayal of their own people. Indeed, a leaked Dutch document identified Singapore and South Korea—along with Belgium, Denmark, Germany, Portugal, and the United States—as opponents to the disclosure of the draft text.

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204. See Leaked Draft, supra note 19.


207. USTR, supra note 180, at 1 (emphasis added). 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 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.

E U R O P E A N C O M M’N, supra note 162, at 4.


209. See Michael Geist, Talks on Anti-Counterfeiting Treaty Spring a Leak, TORONTO STAR, Apr. 12, 2010, at B2; Geist, supra note 208. As stated in Computer World:
In retrospect, the concerns for emerging countries were generally somewhat different from those of the United States and the European Union. While the former feared that such disclosure would have serious political ramifications at home, the latter feared that such disclosure would result in parties walking away from the negotiation table (in addition to protesting 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 those countries. The relationships between capitols and diplomatic outposts (usually Brussels, Geneva, New York, or Washington) are complicated to say the least. The policymakers’ increasing, and sometimes blind, focus on using intellectual property protection to attract foreign direct investment might have also led them to agree 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 negotiations in Wellington, the USTR spokesperson stated (with implicit signals to other negotiating parties):

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

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212. See Deere, supra note 210, at 314 (“Developing country diplomats working on IP issues in Geneva frequently expressed frustration with IP reforms underway at home that sacrificed TRIPS flexibilities.”).
213. See Yu, supra note 82, at 892–901 (discussing the “incentive-investment divide”).
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.\textsuperscript{215}

As Professor Geist noted, reading between the lines, one could 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' preferences—would be a condition for disclosure of the draft agreement.\textsuperscript{216} After all, although the United States faced pressure from lawmakers and civil society organizations, it still might have faced less pressure at home than many of its negotiating partners. At the very least, U.S. negotiators might have been less concerned about such pressure than the others. Their lack of concern thereby gave them a stronger bargaining position.

Meanwhile, the "transparency" bargaining chip could also be played in the opposite direction. For example, those countries that would obtain gains in a much more transparent environment could use leaks or the threat of loosening up the secret veil to secure concessions. In the case of ACTA, those countries that took advantage of these opportunities were generally less powerful within the group and therefore needed public support at home or elsewhere to fight back demands from their more powerful negotiating partners. Nevertheless, these countries might have been concerned about the potential retaliations by the more powerful negotiating parties, which could range from ejection from the ACTA negotiations, to greater demands during the negotiating rounds, to other trade or diplomatic repercussions outside ACTA.

3. Secretive, Undemocratic Approach

Although these five reasons, combined together, help 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 remained highly problematic in a democratic society. Without the release of the draft text, it was indeed hard for lawmakers and the public at large to debate whether the treaty reflected appropriate standards and policies.

In addition, a secretive, undemocratic approach resulted in the creation of "a process that necessarily has an artificially constrained view of the


\textsuperscript{216} See Michael Geist, U.S.: No ACTA Transparency Unless Other Countries Cave on Substance, MICHAEL GEIST'S BLOG (Apr. 12, 2010), http://www.michaelgeist.ca/content/view/4949/125/ ("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.").
values at stake." 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." During the negotiations, the U.S. administration provided key briefings to selected industry groups, even though it had kept the public in the dark. Under the confidential agreement among the negotiating parties, each party could disclose selected information to a small group of individuals outside the government. In the United States, these individuals included: (1) government advisors and (2) those with "a need to review or be advised of the information in [ACTA-related] documents" (a designation determined unilaterally by the administration). Because industry leaders and corporate lobbyists typically serve on the administration's industry trade advisory committees, they had access to key ACTA information while most consumer advocates and civil liberties groups did not. As a result, the administration's selective disclosure of

217. Siy, supra note 198.
220. See McCoy Declaration, supra note 47, at 6.
221. See id. (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").
222. See Advisory Committees, USTR, 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.

McCoy Declaration, supra note 47, at 8. For a criticism of the role, structure, and operation of the ITACs, see Trade Advisory Committee System: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means, 111st Cong. (2009) (testimony of Gigi B. Sohn, President, Public Knowledge).
223. The Center for Democracy and Technology and Public Knowledge constituted the very rare exceptions; despite not being able to sit on any advisory committee, they had access to a small portion of the draft agreement after they agreed to sign a nondisclosure agreement. See Love, supra note 219; see also McCoy Declaration, supra note 47, 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 negotiating documents created an additional problem of "unequal access by stakeholders."\textsuperscript{224} As Gwen Hinze of the EFF 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 into the negotiation process. This can hardly be described as transparent or balanced policy-making.\textsuperscript{225}

Worse still, while some industries had access to the "confidential" documents, or portion thereof, other industries did not. As Professor Geist has shown through a freedom of access request in Canada, the Canadian government, in its now-aborted plan to develop an Intellectual Property and Trade Advisory Group, sought to invite fourteen industry groups (such as those representing the recording, movie, software, and game industries) while leaving out key industries in the telecommunications, technology, and internet sectors.\textsuperscript{226}


\textsuperscript{226} See Michael Geist, Mexican Senate Votes Against ACTA, MICHAEL GEIST's BLOG (July 22, 2011), available at http://www.michaelgeist.ca/content/view/5945/196; see also Mexican Senate Urges
Furthermore, the current negotiating process also overlooked the need for governmental agencies to have access to the negotiating documents. Under the pre-negotiated arrangement, ACTA negotiators could determine on their own whether they wanted to share confidential information with those colleagues who were 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 competent government agencies to prepare for changes that would be required under the new agreement. The secretive approach also took away the opportunity for these agencies to share their experiences and best practices and to warn about potential unintended consequences in areas outside the intellectual property field.

To complicate matters, both the Second Bush and Obama Administrations chose to negotiate the agreement as a sole executive agreement. 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 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.

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228. See McCoy Declaration, *supra* note 47 at 6.

229. See id. at 30. 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. *Id.* For an excellent overview of fast track trade authority, see generally TODD TUCKER & LORI WALLACH, THE RISE AND FALL OF FAST TRACK TRADE AUTHORITY 1–7 (2009), available at http://www.fasttrackhistory.org/TheRiseAndFallOfFastTrack.pdf.

230. Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Constitutional Concerns, WASH. POST*, Mar. 26, 2010, at A23; see also ILLAS, *supra* note 7, at 3 (“The use of an executive agreement to conduct the ACTA negotiations is a departure from the way that the United States has pursued IPR goals in other international trade negotiations. In general, the United States has advanced IPR goals internationally as part of congressional-executive trade agreements or treaties, subject to congressional approval.”); Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting
Such a “go-it-alone” approach, according to Professors Goldsmith and Lessig, would violate President Obama’s pledge for greater transparency during his first electoral campaign.\textsuperscript{231} Such an approach would also have serious implications for other areas of international law.\textsuperscript{232} 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{233}

Finally, if ACTA ultimately is to be accepted by the public as fair and legitimate, completing the agreement 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{234}

It is indeed ironic that the agreement includes a transparency provision.\textsuperscript{235} If the ACTA negotiating parties want to teach others how to honor commitments under the transparency provision, teaching by example is unlikely to be feasible. How can one expect others to respect transparency when the negotiating parties do not even respect transparency in the first place? Moreover, if a lack of transparency is the key to the success of these negotiations, why would ACTA members give up this formula of success after completing their negotiations?

B. LEAKS AND CONSOLIDATED TEXT

Despite the initial secretive, nontransparent approach, the barrage of criticisms and public access requests from lawmakers, academics, con-
sumer advocates, and civil liberties groups 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. 236 With close coordination, trade ministries or foreign affairs departments also posted information on specially-created websites that were dedicated to the negotiation of the agreement. 237 In addition, from time to time, countries solicited comments from the public about different parts of the agreement. 238 They also provided briefings to the public about the state of the negotiations. 239 Although countries had clear and often unrevealed differences in their negotiating positions, the contours of the agreement slowly emerged.

While disclosure of official information remained sparse at this stage of negotiations, civil liberties groups had been active in providing information to help the public understand the agreement’s potential impact. For example, in March 2008, more than a couple of months before the first round of negotiations, IP Justice published a pioneering and very informative white paper discussing the potential negotiation items on ACTA. 240 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. 241 Many of them even managed to obtain “leaked” information or documents, which were quickly posted onto the Internet via WikiLeaks and other websites. 242 In addition, commentators—most notably Professor Geist—offered concise yet valuable commentary on the potential provisions while keeping the public up-to-date

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236. USTR, *supra* note 180.
237. These documents can be accessed through the following URLs:
241. Examples of these academics and organizations are Michael Geist, the Electronic Frontier Foundation, the Foundation for a Free Information Infrastructure, IPIeft, Knowledge Ecology International, and Public Knowledge, among others. See, e.g., FOIA: Anti-Counterfeiting Trade Agreement (ACTA), ELECTRONIC FRONTIER FOUND., http://www.eff.org/cases/eff-and-public-lknowledge-v-ustr.
about the state of the negotiations.243

Finally, because ACTA relied heavily on the provisions of the FTAs negotiated by the United States and the economic partnership agreements (EPAs) advanced by the European Union, researchers and commentators were able to gain important insight into the possible treaty language by carefully studying the provisions in those agreements, which arguably provided good proxies for the possible ACTA provisions.244 By closely watching the call for comments in countries such as Australia and New Zealand, these scholars and commentators were also able to get a good sense of what provisions would be included in the agreement.245

In March 2010, a draft dated January 2010 was leaked to the public, indicating the different positions that the negotiating parties had allegedly taken.246 This document indicated who the demandeurs were with respect to each particular provision or negotiating item.247 While this draft likely had created embarrassment for officials involved in the ACTA negotiations, especially those that had been less than forthright or truthful about the negotiations, it also raised questions among other government officials who did not have access to the negotiating documents. In addition, the leaked document confirmed or denied many of the concerns and fears that had been registered thus far.

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.248 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.”249 The text was released on April 21, 2010, in the United States, the European Union, and Japan (and on April 22, 2010, in Australia and New Zealand). While the officially released version was very similar to the earlier leaked version, some of the provisions and footnotes in the leaked version had been removed or altered.250 The official draft also failed to include any attribution to the bracketed texts, which made the official version less attractive than the unauthorized version.

To some extent, the negotiators seemed to have failed to learn from the mistakes made by the recording industry, which provided consumers with

243. See, e.g., Geist, supra note 62.
244. See, e.g., Kaminski, supra note 161, at 251 (surmising on ACTA’s potential terms by closely examining the FTA texts).
245. See Suzor, supra note 239 (noting that even “without disclosing the draft text, [people] could ascertain the boundaries of the agreement by ‘reading between the lines’ of the calls for comments posted on the DFAT website in preparation of each round”).
246. Leaked Draft, supra note 19.
247. See id. (disclosing countries’ positions on various provisions).
250. Compare ACTA, supra note 5, with Leaked Draft, supra note 19.
only tethered downloads despite the superior copies available from file-sharing services.\textsuperscript{251} The ACTA negotiators' lack of foresight is particularly disappointing. After all, how can one expect them to develop solutions that successfully adapt to the changing technological environment if they could not even foresee the potential problems created by providing a draft text that was far inferior to what had already been leaked online?

Following the disclosure of the consolidated draft in April 2010, the negotiation process has become more transparent. Nevertheless, there remained lingering questions concerning how transparent the negotiation process would be from that point forward; how much public input there would be in the remaining months of the negotiations; and whether the agreement's “oversight committee,”\textsuperscript{252} if created, would eventually be open to participation by civil society organizations.

Moreover, since the release of the consolidated draft, the negotiating parties—most notably, the United States—refused to provide further disclosure of ongoing discussions until the end of the negotiations.\textsuperscript{253} It is indeed disappointing that the negotiating parties had taken the highly unappealing position that an international agreement as broad and important as ACTA could be negotiated behind closed doors with minimal non-industry input. Although the ACTA negotiations are now complete, the debate concerning the need for greater transparency in intellectual property negotiations lingers as countries negotiate the TPP and other bilateral, plurilateral, or regional trade and investment agreements.\textsuperscript{254}

The fears arising from ACTA, therefore, will continue if policymakers

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\item[\textsuperscript{252} See discussion infra Part VI.
continue to ignore the public demand for transparency and accountability.

III. FEAR #2: UPWARD RATCHET AT HOME

Although the public discussions of ACTA, thus far, have focused primarily on the lack of transparency and accountability, a related fear induced by the secretive process concerned the potential upward ratchet of intellectual property standards in those countries that already had very high standards, such as the United States and members of the European Union.255

When the draft negotiation documents were leaked in bits and pieces, consumer advocates, civil liberties groups, and academic commentators began to confirm some of their worst fears. The documents also raised concerns among those less-developed countries that had not been invited to negotiate ACTA but that most likely would be "coerced" into joining the agreement or adopting its standards in the near future.256

Interestingly, despite the leaked documents, officials from the European Union and the United States continued to insist that the agreement would not require changes in the existing laws within their countries.257 Other countries, by contrast, made much weaker statements that could potentially include some revision of their laws. For instance, Australia indicated that it did not "seek to drive change in domestic law through ACTA."258 Canada insisted that ACTA would be "subservient" to domestic copyright law.259 Meanwhile, New Zealand noted that the agreement "[would] not change [its] ability to set its own standards for the protection of copyright and trade marks."260 Other than the European Union and the United States, none of these parties was willing to state that ACTA would not require legislative changes at the domestic level.

255. See discussion infra Part V.
256. See discussion infra Parts VI.A–B.
257. See EUROPEAN COMM'N, supra note 162, 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, supra note 162, at 4 (proclaiming that ACTA will not rewrite U.S. law and that “[o]nly the U.S. Congress can change U.S. law”).
258. 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 for 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 Australian Department of Foreign Affairs and Trade)).
259. See Canadian Copyright Law to Trump ACTA, Clement Says, CBC News (Dec. 1, 2009), http://www.cbc.ca/technology/story/2009/12/01/clement-copyright-acta-ndp.html ("The ACTA negotiations are in fact subservient to any legislation put forward in [the Canadian House of Commons].") (quoting Tony Clement, Canadian Minister of Industry)).
A careful reading of the leaked documents as well as the official draft texts has raised serious doubt about the accuracy of the positions of virtually all of these parties, especially when one takes into account the many significant differences between EU and U.S. intellectual property laws, not to mention the additional differences among the ACTA negotiating parties.\textsuperscript{262} Consider the United States, for example. As Gwen Hinze observed in her preliminary analysis of the consolidated draft:

\begin{quote}
[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, 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 2.25).\textsuperscript{263}
\end{quote}

Indeed, when her EFF colleague Eddan Katz pressed Assistant USTR Stanford McCoy further over whether his office could assure the rejection of those proposals that are in direct conflict with U.S. law, McCoy punted the question by “answer[ing] that ACTA will focus on large-scale intellectual property infringement and ‘in no way requires search of per-
sonal 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 at all.

To be certain, many of the differences at the time of the negotiations were still in square brackets, and these brackets were eventually removed. Given the United States' strong bargaining position and its role as one of the agreement's primary drafters, one could assume that the United States might have expected to obtain a treaty that would not require substantial changes in its domestic law.

Nevertheless, treaty negotiation is a two-way street that requires give and take. If no country is going to change anything in its own laws, what is the point of having treaty negotiations in the first place? While there are still benefits to having a lower-common-denominator treaty that lays down the common standards of the negotiating parties with the hope that such an agreement would eventually send a useful "signal" to induce other non-parties to raise their standards, it is unlikely that the EU and U.S. industries would have been content with such a barebones treaty, given the positions they took before and during the negotiations and the comments they filed with their governments.

A. LIES, DAMN LIES, AND ACTA

There are four plausible scenarios. First, as Cory Doctorow pointed out in the copyright context, "since 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 need for change in domestic laws. Such a scenario would raise serious accountability questions. Even if we assumed the government officials had been truthful and sincere, there would still be tough questions on why the officials were that ignorant about the intention of other negotiating parties or why they were so naive to believe they could achieve a treaty in which only their
negotiating partners would need to change their laws. Either way, the questions would signify serious competence issues.

Second, none of the officials was lying, and the draft text was much, much more ambitious than the consensus the negotiating parties could eventually achieve. Thus, the negotiators might have expected that the agreement would become a heavily watered-down, lower-common-denominator treaty by the time it was completed. If this scenario were true, all the time, energy, and resources that negotiators put into the process would have been wasted. More disturbing, these scarce resources could have been used elsewhere at a time when the global economic crisis had created an acute shortage of resources throughout the world. This scenario therefore would raise puzzling questions about why countries engaged in the negotiation of this treaty in the first place.

Third—and the reason why many people hate lawyers—conflicts between the agreement and domestic law will not arise based on how laws operate in the participating countries. For example, in a so-called dualist jurisdiction like the United States, international agreements are rarely self-executing—that is, treaties can rarely be enforced in courts without the support of prior implementing legislation from Congress. Because ACTA was negotiated as a sole executive agreement, it virtually guarantees that it will not modify any domestic law. 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 correct legal conclusion that a sole executive agreement cannot change U.S. law.

In this scenario, if conflicts exist between the agreement and domestic law, domestic law will prevail and will remain intact until Congress chooses to amend the law. In fact, the United States can always choose not to fully implement an international agreement, its reputation and standing in the international community notwithstanding. 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 yet to amend section 211(a)(2) of the U.S. Omnibus Appropriations Act of 1998, which prohib-

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268. In jurisdictions where treaties are self-executing, courts will directly apply the treaties as if they are domestic laws. See Peter K. Yu, Anticircumvention and Anti-anticircumvention, 84 Den. U. L. Rev. 13, 34 (2006).


270. USTR, supra note 162, at 4.

its the registration or renewal of trademarks previously abandoned by trademark holders whose business and assets have been confiscated under Cuban law.\footnote{See Appellate Body Report, United States—Section 211 Omnibus Appropriations Act of 1998, ¶ 6, WT/DS176/AB/R (Jan. 2, 2002).} In both situations, Congress refused to change its laws even though the United States is in breach of WTO rules.\footnote{See Dinwoodie, supra note 271, at 763–64; Peter K. Yu, From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China, 55 Am. U. L. Rev. 901, 939–40 (2006).}

Obviously, if the United States chooses not to honor its commitments, there is an additional question concerning what other countries could do under ACTA. Unlike the WTO, ACTA does not possess any enforcement mechanism. Instead, Article 38 merely outlines the consultation process between the signatory parties over matters affecting the implementation of the agreement.\footnote{See ACTA, supra note 5, art. 38.} Thus, structurally, the agreement is closer to an organized, treaty-based dialogue than a plurilateral trade agreement (although the U.S. administration thus far has remained reluctant to admit ACTA's very limited legal effect on U.S. law).\footnote{See Flynn, supra note 269, at 904 (declaring that “ACTA is not a binding international agreement under U.S. law” and yet a treaty under international law).}

Finally—and the reason why people hate politicians—the negotiators might have taken the oft-used diplomatic position that "nothing is agreed until everything is agreed."\footnote{Moraes, supra note 29, at 176.} In short, the negotiators might have had a good-faith belief that they could succeed in convincing their negotiating partners to remove those brackets that required modification of domestic law in their specific country. Such beliefs were not entirely unfounded from negotiators from countries with very strong bargaining power, such as the United States and members of the European Union. Nevertheless, the strong disagreement between these two trading powers over various intellectual property areas has raised serious competence issues. Indeed, many of these disagreements—such as the scope of coverage of the section on border measures—last until the very end.\footnote{For discussions of the divide between the European Union and the United States over ACTA, see Michael Geist, Could the EU Walk Away From ACTA?, Michael Geist’s Blog (July 22, 2010), http://www michaelgeist ca/content/view/5224/125/; Michael Geist, Could the EU Walk Away from ACTA, Redux, Michael Geist's Blog (Sept. 8, 2010), http://www michaelgeist ca/content/view/5292/125/.}

Regardless of which of the four scenarios one finds the most plausible, ACTA has raised justified fears that it will 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 will affect the common law interpretations of existing laws\footnote{See Siy, supra note 198 (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”).} and whether and how the laws will 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." 

**B. Policy Laundering and Backdoor Lawmaking**

If the claim that ACTA will 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 will 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 both on American soil and abroad. The controversial nature of these protections was indeed partly the reason why the negotiation of the agreement had to be kept mostly secret in the first place. Notwithstanding their unpopularity at home, these controversial protections had been received much more favorably by industries, among policymakers, and at

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279. 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.”).  
280. Goldsmith & Lessig, supra note 230; see also Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”).  
283. See Opinion of the European Data Protection Supervisor on the Current Negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 2010 O.J. (C 147) 1, 3 (by Peter Hustinx) [hereinafter Opinion of the European Data Protection Supervisor]; Siy, supra note 198.
the intergovernmental level, with many considering them necessary.\footnote{See Greg Sandoval, *Obama to ‘Aggressively Protect’ Intellectual Property*, CNET News (Mar. 12, 2010, 9:10 AM), http://news.cnet.com/8301-3101_3-20000347-261.html (reporting President Obama’s pledge to use “the full arsenal of tools” to combat intellectual property infringement).} As a result, those policymakers who wanted to get these protections implemented at home had a strong incentive to take the provisions outside to a more favorable, and largely unaccountable, international forum.\footnote{See *Yu*, supra note 282, at 788–91 (discussing policy laundering and backdoor lawmaking).}

Once the provisions had 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 newfound need for international harmonization, the laundering process had helped improve the perception of the unpopular and ill-advised provisions at home, thereby making them look more legitimate in the public policy debate.\footnote{Cf. *Hosein*, supra note 281, at 188 (acknowledging 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”).}

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.\footnote{Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int’l L. 369, 374 (1997).}

Policy laundering is dangerous because it will upset the dynamics of the domestic lawmaking process.\footnote{See *Introduction: The Problem of Policy Laundering*, supra note 281.} When Congress deliberates the needed legislation to implement a treaty or to ensure full compliance with that treaty, 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.\footnote{See *id.; Yu*, supra note 282, at 787.}

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.\footnote{See *Hosein*, supra note 281, at 190.} 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." 291

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. 292 The agreement could also forestall pending efforts to reform the intellectual property system. 293 Such a form of lawmaking represents rent seeking at its best, and the laws created through the process will eventually haunt the American people.

ACTA and the backdoor lawmaking it initiated pose similar dangers to the European Union. For example, the agreement would bring into the Union criminal provisions that have been resoundingly rejected during the deliberation of the EU Intellectual Property Rights Enforcement Directive 294 (IPRED) in 2004. 295 Because of the complications raised by harmonizing criminal laws within the Union, the discussion of the follow-up directive on criminal enforcement (IPRED2) remains stalled in the legislative process. 296

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292. Other commentators have made similar observations. See, e.g., Katz & Hinze, supra note 142, at 33 ("U.S. law renders ACTA a target vehicle for policy laundering."); Aaron Shaw, The Problem with the Anti-Counterfeiting Trade Agreement (And What to Do About It), 2 KNOWLEDGE ECOCY STUD. 1, 4 (2008), available at http://www.kestudies.org/ojs/index.php/kes/article/view/34/57 (stating that ACTA "threaten[s] to overturn the existing balance of rights and regulations established through global governance institutions"); Siy, supra note 198 (suggesting that "ACTA might be a form of 'policy laundering'").

293. See Kaminski, supra note 161, 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."); Letter from Charlie Angus, supra note 172 (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 reform legislation" and that "[i]t is a hollow claim to suggest that ACTA would be subservient to Parliament when the commitments for ACTA are being hammered out before Parliament has had a chance to see the new legislation"); Monika Ermert, Embattled ACTA Negotiations Next Week in Geneva; US Sees Signing This Year, INTELL. PROP. 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/ (stating that "criminal law sanctions were rejected during the legislative process for the IP Enforcement Directive (IPRED) in 2004").


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,” the Commission’s advocate-like summary on criminal enforcement in its fact sheet arguably betrayed its mixed intentions:

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 counterfeiting. 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 . . . .

It is therefore understandable why the European Parliament was rather 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.”

Indeed, some commentators suggested that the European Union sought to use ACTA as a policy laundering exercise to revive the discussion of IPRED2. They also noted the potential EU-related competency problems ACTA had raised concerning the agreement’s criminal enforcement provisions. It is indeed interesting to explore whether the European Union sought to use ACTA to export its enforcement measures to the United States—and, for that matter, Australia, Canada, New Zealand, and other non-EU countries.

Despite strong denial by both the European Commission and other ACTA negotiating parties, the push by the European Union for greater criminal enforcement and border controls for all forms of intellectual property rights seemed to have paralleled the push by the United

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297. EUROPEAN COMM’N, supra note 162, at 2.
298. Id. at 4 (emphasis added).
300. Id. (quoting Stavros Lambrinidis, member of the European Parliament).
303. See EUROPEAN COMM’N, supra note 162, at 2.
States to globalize the equally unpopular Digital Millennium Copyright Act\(^\text{304}\) (DMCA).\(^\text{305}\) In both cases, the negotiating parties seek to push on to others legislation that is highly unpopular at home, yet unavailable in the other country. This is policy laundering at its best, and it is hard to find a more unpleasant, quid pro quo bargain!

IV. FEAR #3: UPWARD RATCHET ABROAD

A. TRIPS-Plus Protection

While ACTA may have a limited impact on the European Union and the United States, as well as those other countries that have already raised their intellectual property enforcement standards by virtue of new bilateral or regional trade agreements, it will require much more substantial changes in other countries. After all, the ACTA’s key objective is to develop high common standards for the protection and enforcement of intellectual property rights\(^\text{306}\)—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 requires participating countries to offer protection against both the circumvention of technological measures used to protect copyrighted works\(^\text{307}\) and the removal of copyright management information,\(^\text{308}\) at times beyond what is required by the WIPO Internet Treaties.\(^\text{309}\) A greater push for anti-circumvention laws and digital rights management tools is likely to have serious implications for system interoperability\(^\text{310}\) and free and open source software.\(^\text{311}\)

ACTA also requires participating countries to tighten their regulations
over internet service providers (ISPs). Although the negotiating parties could not agree on the adoption of a DMCA-style notice-and-takedown procedure or provide active deterrents against repeat infringement, ACTA states explicitly that “each Party’s enforcement procedures shall apply to infringement of copyright or related rights over digital networks, which may include the unlawful use of means of widespread distribution for infringing purposes.” The Agreement further provides:

A Party may provide . . . its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of trademark or copyright or related rights infringement, and where such information is being sought for the purpose of protecting or enforcing those rights.

In addition, despite the potential for quick technological obsolescence, the agreement facilitates the introduction of anti-camcording laws, which have sent one young American woman to jail for two days after taping her sister’s birthday party in a cinema.

In the area of border control, ACTA states that “[e]ach Party shall encourage the development of specialized expertise within its competent authorities responsible for the enforcement of intellectual property rights.” The agreement thereby could “entail significant change in agency structure and legal authority.” In addition, greater criminal enforcement could shift costs, responsibility, and risks from private rights holders to that of national governments. Depending on one’s interpre-

312. See ACTA, supra note 5, art. 27. For a critique of some of these regulatory measures, see generally Peter K. Yu, Digital Copyright Reform and Legal Transplants in Hong Kong, 48 U. LOUISVILLE L. REV. 693, 701–19 (2010).
313. In lieu of a DMCA-style safe harbor, Article 27.2 provides: “These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party’s law, preserves fundamental principles such as freedom of expression, fair process, and privacy.” ACTA, supra note 5, art. 27.2. Footnote 13 lists as an example “a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of right holder.” Id. art. 27.2 n.13.
314. Id. art. 27.2.
315. Id. art. 27.4.
316. See Yu, supra note 312, at 727 (discussing technology neutrality and the ill-advised nature of technology-specific legislation).
317. See ACTA, supra note 5, art. 23.3 (“A Party may provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public.”).
318. 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”).
319. ACTA, supra note 5, art. 28.1.
320. TRAINER & ALLUMS, supra note 164, § 6:52, 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”).
321. As Carlos Correa noted:
The burden in the enforcement area is likely to be very 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 law enforcement and customs resources away from public security and towards private profit.

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.

Carlos M. Correa, The Push for Stronger Enforcement Rules: Implications for Developing Countries, in ICTSD, ISSUE PAPER No. 22, THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES 27, 42 (2009) (footnote omitted); see also Li Xuan, Ten General Misconceptions About the Enforcement of Intellectual Property Rights, in INTELLECTUAL PROPERTY ENFORCEMENT, supra note 29, at 14, 28 (“[R]esponsibility of enforcement has cost implications. . . . By 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 29, 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”).

322. See TRAINER & ALLUMS, supra note 164, § 6:53, 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. § 6:54, at 709 (“The added undertaking [of criminal enforcement] could be expensive because law enforcement officers have to buy special equipment and training needs to conduct criminal investigations.”); Correa, supra note 321, 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.”); Carston Fink, Enforcing Intellectual Property Rights: An Economic Prospective, in ICTSD, supra note 321, at xiii, 15 (“[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.”); Li, supra note 321, at 28 (“Establishing and strengthening the enforcement of intellectual property rights is a costly exercise both in terms of scarce financial resources and the employment of skilled human resources.”); Sell, supra note 158, at 9 (“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.”); Timothy P. Trainer, Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?, 8 J. MARSHALL REV. INT’L PROP. L. 47, 74 (2008) (“If ACTA is to be meaningful and welcoming to developing countries (or developed countries that are having implementation problems) that voluntarily agree to new and higher standards, there must be an assistance program that is better developed than what has been available in the past.”); Peter K. Yu, Enforcement, Economics and Estimates, 2 WIPO J. 1, 2-6 (2010) (discussing the costs of strong intellectual property enforcement norms and the resulting trade-offs).

Indeed, because ACTA does not require rights holders to post bond or other forms of security that could be used to defray potential damages, its encouragement of ex officio actions “not only [could] 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.” Even worse, these claims could frighten investors, thus defeating what some less-developed countries see as a main purpose of improving intellectual property protection and enforcement in the first place. These claims might also lead to bilateral actions, if not retaliation, from usually more powerful states, creating a “double whammy” which they would not face had the risks not been transferred from private rights holders to state authorities.

Even in the United States, there are significant trade-offs between increased enforcement and other public policy goals. As Carsten Fink, WIPO’s first-ever chief economist, 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...”

(“[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).” (footnote omitted)); Li Xuan & Carlos M. Correa, Towards a Development Approach on IP Enforcement: Conclusions and Strategic Recommendations, in INTELLECTUAL PROPERTY ENFORCEMENT, supra note 29, 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 29, 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.”); Frederick M. Abbott & Carlos M. Correa, World Trade Organisation Accession Agreements: Intellectual Property Issues 31 (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 be, a national priority. Financial resources are better invested in public infrastructure projects, such as water purification and power generation.”); Biadgleng & Muñoz Tellez, supra note 136, at 3 (“Police raids and the use of criminal law enforcement mechanisms . . . require extensive use of public funds and in developing countries may entail pulling resources away from other law enforcement efforts when there are other means, particularly via civil law, that may be strengthened to allow private parties to enforce their rights and which do not require extensive use of public funds.”).

324. See ACTA, supra note 5, art. 18 (giving parties the authority to collect bonds, but not requiring them to do so).

325. Grosse Ruse-Khan, supra note 321, at 52.

326. See generally ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT (1990) (discussing the importance of intellectual property protection for economic development in less-developed countries).

327. See generally Yu, supra note 322, at 2–6 (noting that high intellectual property enforcement standards often come with a hefty price tag and difficult tradeoffs).
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 [New York Police Department’s] anti-counterfeiting budget and taking officers off other duties." Even the European Commission recognized its macro-level resource challenges in the EU IPR Enforcement Strategy:

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.

To date, 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—and, I would add, incorrectly—that the lack of protection in these countries shows a lack of political will. As Fink rightly observed:

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.

It is therefore no surprise that less-developed countries specifically demanded during the TRIPS negotiations the inclusion of Article 41.5 in

328. Fink, supra note 322, at 2; see also Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.–China Econ. & Sec. Review Comm’n, 109th Cong. 9 (2006) (prepared statement of Chris Israel, U.S. Coordinator for International Intellectual Property Enforcement, U.S. Department of Commerce) (“With finite resources and seemingly infinite concerns, how [the United States] focus[es its] efforts is crucial.”); Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.–China Econ. & Sec. Review Comm’n, 109th Cong. 183 (2006) (testimony of Peter Pitts, President, Center for Medicine in the Public Interest, New York) (“When I was at the [Food and Drug Administration], people asked me why don’t you stop people at the border and arrest them coming in from Canada? The answer is that’s not the best bang for the regulatory dollar. What government needs to do is go after the big time criminals.”).


330. EU IPR Enforcement Strategy, supra note 11, at 5 (citation and footnote omitted).

331. See Fink, supra note 322, at 16; Yu, supra note 322, at 2-6.


333. Fink, supra note 322, at 16.
the Agreement, 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. A similar provision can also be found in 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." In the chapter on international cooperation, Article 33.3 states further: "Cooperation under this Chapter shall be conducted consistent with relevant international agreements, and subject to the laws, policies, resource allocation, and law enforcement priorities of each Party."

While the agreement does not explicitly require border guards to search one's iPod, DVD player, laptop, or other electronic devices, it gives them the authority to order the seizure, confiscation, or destruction of the suspected counterfeit or pirated goods. The agreement also facilitates the provision of ex officio authority to suspend the allegedly infringing goods, which at times could exceed what is available in the European Union or the United States. Indeed, if border guards in these countries choose to conduct more intrusive searches, ACTA will provide the needed support for such draconian measures as well as a defense against the potential civil liberty intrusions or human rights viola-

334. See Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, Annex B-4, ¶ 33, WT/DS362/R (Jan. 26, 2009) ("Articles 1.1 and 41.5 were key concessions to the developing world, which the United States and other developed third parties seek now to dismiss and disregard."); CARLOS CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 417 (2007) ("[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) (noting that Article 41.5 "was in fact one of the few provisions in Part III where developing countries' views made a difference").

335. TRIPS Agreement art. 41.5; see also Peter K. Yu, TRIPS Enforcement and Developing Countries, 26 AM. U. INT'L L. REV. 727, 778–81 (2011) (discussing Article 41.5 in relation to the recent U.S.—China TRIPS enforcement dispute).

336. ACTA, supra note 5, art. 2.

337. Id. art. 33.3.

338. See id. art. 29.

339. See id. art. 16.1(a)—2(a); see also Frederick M. Abbott, Trading's End: Is ACTA the Leading Edge of a Protectionist Wave?, INTELL. PROP. WATCH (May 6, 2011, 2:48 PM), http://www.ip-watch.org/weblog/2011/05/06/trading%e2%80%99s-end-is-acta-the-leading-edge-of-a-protectionist-wave/ ("Probably the most problematic provisions mandate that customs authorities be enabled to act ex officio to seize 'suspect goods' at the border, without definition of the basis for suspicion, and without mandating that a determination be made regarding the offense the suspect goods allegedly commit.").

340. See Correa, supra note 321, 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").

341. See TRAINER & ALLUMS, supra note 164, § 5:1, 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.").
tions. After all, it is very likely that ACTA will be exported to countries that have yet to show respect for human rights and civil liberties.\footnote{342}

Finally, with respect to remedies, ACTA lumps together infringements in different forms of intellectual property rights—including copyright, patent, and trademark—although that approach remains highly controversial\footnote{343} and necessitates the carving out of exceptions in sensitive areas.\footnote{345} Indeed, many of the remedial provisions, which range from those concerning pre-established or statutory damages\footnote{346} to criminal penalties on copyright-related activities that have only “indirect economic or commercial advantage,”\footnote{348} are troublesome even in developed countries.\footnote{349} To some extent, ACTA could globalize the No Electronic Theft (NET) Act,\footnote{349} which is rather controversial in the United States. In addition, the agreement could affect how injunctions are to be granted and damages calculated.\footnote{350} Disturbingly, the agreement could also result in the creation of new penalties for “aiding and abetting” intellectual property infringements.\footnote{351}

In fields adjacent to intellectual property, ACTA could have serious negative implications on the protection of personal data and individual privacy, an issue that is of great concern to the Europeans,\footnote{352} although

\footnote{342. See discussion \textit{infra} Part IV.B.}
\footnote{343. See ACTA, supra note 5, art. 5(h) (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”); \textit{see also} Sell, supra note 158, 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).}
\footnote{344. See Hinze, supra note 263; Ermer, supra note 296 (quoting Luc Devigne, the European Union’s lead ACTA negotiator, as stating that “all IP rights are equal”).}
\footnote{345. See ACTA, supra note 5, n.2 (allowing a party to “exclude patents and protection of undisclosed information from the scope of [the section on civil enforcement]”); \textit{id.} n.5 (“It is understood that there shall be no obligation to apply the procedures set forth in [the section on border measures] to goods put on the market in another country by or with the consent of the right holder.”); \textit{id.} n.6 (“The Parties agree that patents and protection of undisclosed information do not fall within the scope of [the section on border measures].”).}
\footnote{346. See ACTA, supra note 5, art. 9.3. Article 9.3 specifically provides: At least with respect to infringement of copyright or related rights protecting works, phonograms, and performances, and in cases of trademark counterfeiting, each Party shall also establish or maintain a system that provides for one or more of the following: (a) pre-established damages; or (b) presumptions for determining the amount of damages sufficient to compensate the right holder for the harm caused by the infringement; or (c) at least for copyright, additional damages. \textit{Id.} (footnote omitted).}
\footnote{347. \textit{id.} art. 23.1.}
\footnote{348. See Yu, supra note 312, at 701–09, 716–19.}
\footnote{349. Pub. L. No. 105-147, § 2(b), 111 Stat. 2678 (1997).}
\footnote{350. See generally JAMES LOVE, KNOWLEDGE ECOLOGY INT’L, COMMENTS ON ACTA PROVISIONS ON INJUNCTIONS AND DAMAGES (2010), http://keionline.org/sites/default/files/kei rn 2010_l.pdf (discussing the ACTA provisions on injunctions and damages).}
\footnote{351. See ACTA, supra note 5, art. 23.4 (“With respect to the offences specified in [Article 23] for which a Party provides criminal procedures and penalties, that Party shall ensure that criminal liability for aiding and abetting is available under its law.”).}
\footnote{352. See, e.g., \textit{Opinion of the European Data Protection Supervisor, supra} note 283, at 1, 11–13 (discussing ACTA’s shortcomings in protecting personal data in the area of data}
ACTA does contain a safeguard provision to protect personal privacy. As Peter Hustinx, the European Data Protection Supervisor, noted, 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 Union, the United States, and other cooperating governments.

Given the growing volume of academic literature and public commentaries that deal with the proposed ACTA provisions and intellectual property reforms induced by new bilateral and regional trade and investment agreements, this Part does not analyze further the specifics of each of these provisions. Instead, the rest of this Section delves into how ACTA-induced protections could harm countries abroad, in particular those in the less-developed world. Because many of the provisions were drawn directly from the FTAs or EPAs and seek to transplant laws literally from the developed world, they could harm less-developed countries in at least four different ways.

First, as we learn from the failed “law and development” movement, legal transplants tend to be insensitive to the local environment. Because of the differences in economic conditions, imitative or innovative capacity, and research and development productivities, an innovative model that works well in one country does not always suit the needs and sharing and the potential inclusion of a graduated response mechanism and noting the European Data Protection Supervisor’s “regrets that he was not consulted by the European Commission on [ACTA’s] content”).

353. See ACTA, supra note 5, art. 4.1(a) (“Nothing in this Agreement shall require a Party to disclose . . . information, the disclosure of which would be contrary to its law, including laws protecting privacy rights, or international agreements to which it is party . . . .”).
354. See id. art. 34.
356. See id. at 10–11 (arguing that EU should only share data with countries that adopt certain data protection measures).
357. See discussion infra Part V.B.
360. See IILAS, supra note 7, at 6,
361. See Yu, supra note 82, at 890.
362. 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”).
Unquestioned adoption of foreign intellectual property laws therefore may not only fail to result in greater innovative efforts, industrial progress, and technology transfer, but 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 would exacerbate the dire economic plight of many less-developed countries, as the new laws would enable foreign rights holders to crush local industries through threats, or even actual use, of litigation. Even if the new laws would be beneficial in the long run, many of these countries might 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 population dying due to a lack of access to essential medicines, the realization of the hope for a brighter long-term future seems far away, if not unrealistic. If protection is strengthened beyond the point of appropriate balance, the present population undoubtedly would greatly suffer.

Second, the transplanted laws could stifle local development, because the interests and players that the new laws would benefit, or are designed to protect, might be absent from the local communities. Most of the time, the laws could favor foreign rights holders at the expense of the local constituents. Although commentators and policymakers have explained at length why stronger intellectual property protection in less-developed countries could 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.

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366. 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 321, at 59.

367. See generally Sherwood, supra note 326.

368. See Yu, supra note 98, at 382.
ators 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.\textsuperscript{369}

Third, although promoting uniform rules may be beneficial, greater harmonization of legal standards could take away the valuable opportunities for experimentation with new regulatory and economic policies.\textsuperscript{370} The creation of diversified rules could also facilitate competition among jurisdictions, thus rendering the lawmaking process more accountable to the local populations by allowing them to decide for themselves what rules and systems they want to adopt.\textsuperscript{371} In the Digital Age, when laws are introduced quickly and often without convincing empirical evidence,\textsuperscript{372} greater experimentation and competition are indeed badly needed.\textsuperscript{373}

Finally, and most importantly, legal transplants—especially those involving controversial laws and policies—could bring to the recipient countries problems from the source countries, similar to the introduction of diseases from the metropolitan areas to the colonized world a few centuries ago.\textsuperscript{374} Examples include the anti-circumvention provision and the notice-and-take-down procedure of the DMCA, which are non-prescient, flawed, and prone to abuse.\textsuperscript{375} The fact that legal transplants could bring problems with them is particularly troubling for less-developed countries, which have very limited expertise in assessing the potential problems and unintended consequences that these ill-advised transplants will cause.\textsuperscript{376} Even worse, many of these countries do not have the needed resources to put in place mechanisms that will help them correct the system, should the transplants upset its balance.\textsuperscript{377} Because reforms based on foreign

\begin{thebibliography}{99}
\bibitem{369} See id.
\bibitem{371} See id. at 706–07.
\bibitem{372} See Yu, supra note 268, at 50–54.
\bibitem{373} See id. at 40–58.
\bibitem{374} See Kelley Lee, Globalization and Health: An Introduction 42 (2004) (discussing the introduction of infectious diseases to the New World by Europeans settlers).
\bibitem{376} See Yu, supra note 82, at 889.
\bibitem{377} 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), available at http://www.iprcommision.org/papers/pdfs/final_report/CIPRfullfinal.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”); Maskus, supra note 365, at 237 (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”).
\end{thebibliography}
models always incur political costs on those pushing for reforms, policymakers also may have limited political capital to put in place further correction mechanisms once their initial intellectual property reforms fail.\textsuperscript{378}

To be certain, law-transplanting international agreements, like ACTA, generally lay out the \textit{minimum} standards for intellectual property protection and enforcement.\textsuperscript{379} 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.\textsuperscript{380} In the area of anti-circumvention protection, the agreement states that "a Party may adopt or maintain appropriate limitations or exceptions to measures implementing the provisions."\textsuperscript{381} That provision further states that the obligations "are without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement under a Party's law."\textsuperscript{382}

Nevertheless, 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:

[I]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.\textsuperscript{383}

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."\textsuperscript{384}

One may wonder how big an impact ACTA would have in a post-FTA world, where countries are increasingly committed to TRIPS-plus standards. While ACTA, as a TRIPS-plus agreement,\textsuperscript{385} will undoubtedly

\textsuperscript{378} See Yu, supra note 82, at 890.
\textsuperscript{379} See ACTA, supra note 5, pmbl. (stating the intent to "provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in their respective legal systems and practices").
\textsuperscript{380} See Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, \textit{revised at Paris}, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]; TRIPS Agreement arts. 13, 27.2, 30; WCT, supra note 309, art. 10; WPPT, supra note 309, art. 16(2).
\textsuperscript{381} ACTA, supra note 5, art. 27.8.
\textsuperscript{382} Id.
\textsuperscript{384} Mara, supra note 226.
\textsuperscript{385} See ACTA, supra note 5, pmbl. (stating the intent to "provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights, taking into account differences in their respective legal systems and practices").
raise the standards of many countries, it remains fair to question whether ACTA will be any different from the many bilateral or plurilateral agreements these countries have already entered into or are likely to do so in the future.\textsuperscript{386} Because these countries will have already raised their standards to ACTA levels, in part to comply with their FTA or EPA obligations, ACTA might neither raise their intellectual property standards nor introduce new ones.\textsuperscript{387}

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.\textsuperscript{388} First, when countries sign on to bilateral or regional trade and investment agreements, they usually obtain concessions in areas outside the intellectual property field, such as in agriculture or textiles.\textsuperscript{389} 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.\textsuperscript{390}

Second, it is one thing to have a bilateral agreement—even an agreement with one of the most powerful trading partners, like the European Union or the United States—but it is quite another thing to have multiple agreements (or a plurilateral agreement) with many different trading partners.\textsuperscript{391} As Professor Weatherall continued:

Although [those countries that have signed on to FTAs with the United States or EPAs with the European Union] 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 . . . .\textsuperscript{392}

**B. ACTA-PLUS PROTECTION**

While the unquestioned transplantation 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. Even if we assume that the transplanting countries have good intentions and sincerely push for stronger protection as "a difficult but essential measure to jumpstart global economic development" in less-developed countries, the outcome could be rather different from what these countries have envisioned.

First, as mentioned earlier, countries may not have the knowledge and capacity to correctly implement the provisions 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 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." Like the TRIPS Agreement, ACTA focuses primarily on laying out the minimum standards for intellectual property protection and enforcement. Because countries may not be aware of the different limitations and exceptions reserved in ACTA, unquestioned transcription of the treaty language could likely lead to higher protection than 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. Even if the limitations and exceptions may be found in one of the powerful trading partners, those limitations and exceptions...
exceptions may raise concerns among other equally powerful trading partners. For example, the European Union has questioned the compliance of the fair use provision in U.S. copyright law with the TRIPS Agreement, despite the fact that many consider fair use a key 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 EU 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 will be considered one of the key factors in determining whether a country has adequately protected intellectual property rights. As the U.S. Trade Act stipulates, the USTR can take Section 301 actions against 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 that logic, it will 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

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401. See ACTA, supra note 5.
405. 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, . . . [O]ne 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), Ars Technica (Apr. 21, 2010), http://arstechnica.com/tech-policy/news/2010/04/acta-is-here.ars/ (*"How will ACTA be used? Probably in the same way that the DMCA has been used: as a worldwide stick to
the Section 301 Watch List, citing the country's failure to ratify the WIPO Internet Treaties, among other reasons.\textsuperscript{406} Likewise, before China acceded to the WIPO Internet Treaties, the USTR stated in the 2005 \textit{National Trade Estimate Report on Foreign Trade Barriers}, "[t]he United States considers the WIPO treaties to reflect many key international norms for providing copyright protection over the Internet," and "China's accession to the WIPO treaties is an increasingly important priority for the United States. . . ."\textsuperscript{407}

Moreover, countries may be dissuaded from introducing exceptions through either lobbying efforts by foreign rights holders or technical assistance efforts initiated by both the rights holders and their supportive governments.\textsuperscript{408} At the very least, the template created by ACTA will be presented by some technical assistance "experts" as best practices around the world—or even the gold standard for 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!

The third reason why limitations and exceptions may not be introduced is because policymakers in less-developed countries have developed a maximalist mindset, which assumes more is always better.\textsuperscript{409} This mindset is deeply inspired by the oft-presumed linkage between intellectual property protection and foreign direct investment.\textsuperscript{410} While the attraction of foreign direct investment has always been used as a beat through a US-centric version of copyright and IP law.

\textsuperscript{406} See USTR, 2010 \textit{Special 301 Report} 25 (2010) (stating that "Canada will remain on the Priority Watch List in 2010" and "should fully implement the WIPO Internet Treaties, which Canada signed in 1997.")


\textsuperscript{408} See Dreyfuss, supra note 396, at 26.


macroeconomic justification for stronger intellectual property protection, economists have shown a rather ambiguous relationship between the two.\textsuperscript{411} Economists have also questioned whether foreign direct investment is always desirable.\textsuperscript{412} Even more problematic, there is a complicated inverse relationship between stronger intellectual property protection and greater foreign direct investment.\textsuperscript{413} As intellectual property protection strengthens, some rights holders may consider other means of investment—such as licensing.\textsuperscript{414} Under that scenario, the volumes of foreign investment will actually 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."\textsuperscript{415} Policymakers in these countries, therefore, fail to "treat intellectual property as an integral part of national or regional sys-

\begin{itemize}
  \item \textsuperscript{412} As economists have shown: 
    \begin{quote}
    [I]ntellectual property protection is more likely to attract FDI only when two additional conditions are met. First, the country needs to have a strong capacity to imitate foreign products and technologies. If local competitors are unable to copy these products and technologies, the business interests of foreign firms are unlikely to be threatened, and intellectual property protection will be unnecessary. Second, the country needs to have a sufficiently large market to enable foreign firms to capture economies of scale or scope. In a country that lacks such a market, foreign firms are unlikely to find it advantageous to move their productions abroad.
    \end{quote}
  \item \textsuperscript{413} As Keith Maskus observed:
    \begin{quote}
    It seems increasingly to be taken for granted that FDI and the acquisition of new technologies through FDI and licensing are beneficial for the recipient country. . . . [Although] there is a strong presumption in this direction, . . . it is not a necessary outcome in all situations. Rather, it is important that such flows result in stronger competition, in order to ensure these gains for the long term.
    \end{quote}
  \item \textsuperscript{414} See Maskus, \textit{supra} note 410, at 66; see also \textit{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.").
  \item \textsuperscript{415} See \textit{id.} at 177.
  \item \textsuperscript{416} As Keith Maskus observed:
    \begin{quote}
    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.”
    \end{quote}
  \item \textsuperscript{417} See Maskus, \textit{supra} note 365, at 123 ("As IPRs in a particular nation become stronger, firms will tend to choose more technology licensing and joint ventures and less FDI."); Primo Braga & Fink, \textit{supra} note 410, at 172 (stating that “higher levels of protection may cause [transnational corporations] to switch their preferred mode of delivery from foreign production to licensing”).
\end{itemize}
Indeed, as I noted 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 investment that they ignore one of the primary reasons 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 is required under the agreement and 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 intellectual property protections—standards that “were well in advance of their TRIPS deadlines.” As she rightly questioned, “Why did some of the poorest countries adopt some of the highest IP standards?” 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.” Avoiding foreign pressure, therefore, was not the reason why those countries introduced high intellectual property standards.

Given the state of economic development 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.” 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: THE ACTA BOOMERANG

Part III discussed how ACTA is likely to modify U.S. laws despite what the USTR and other government officials have claimed. Such modifi-
cation could take the form of statutory revision, changes in common-law interpretation of existing laws, or changing emphasis on how laws are to be enforced.\footnote{See discussion supra Part III.B.} Part IV explored how ACTA is likely to result in changes in the less-developed world.\footnote{See discussion supra Part IV.} This Part looks at the interface between the two and examines how the changes identified in Part IV could also backfire on U.S. consumers and businesses, creating what some commentators have described as the “boomerang effect.”\footnote{E.g., Harold C. Wegner, \textit{TRIPS Boomerang—Obligations for Domestic Reform}, 29 \textit{VAND. J. TRANSNAT’L L.} 535 (1996).}

\section{A. Impact on Local Consumers and Businesses}

As discussed earlier, ACTA will undoubtedly raise the standards of many other countries, including those that negotiated the agreement as well as those others that join the agreement after its completion.\footnote{See discussion supra Part IV.} At the international level, ACTA, therefore, will lock in some of the existing legal standards, which, in turn, could privilege those business models that rely heavily on strong intellectual property protection.\footnote{See Gross, supra note 158, at 8 (“Market competition will . . . be discouraged by ACTA because device manufacturers will need licenses just to build interoperable devices.”); Katz & Hinze, supra note 142, at 32–33 (“ACTA will constrain national legislation governing domestic networks and physical infrastructure. It will also restrict the global flow of information by regulating, and potentially criminalizing, the next generation of innovative network technologies.”); see also Yu, supra note 268, at 57–61 (discussing entrenched standards and lock-in effects).} The agreement may also lead to both TRIPS-plus and ACTA-plus protections—as a result of the push by either local policymakers or customs authorities.\footnote{See discussion supra Part IV.} While policymakers may call for protection in excess of what is required under the international obligations, customs authorities may increase the actual protection through either overzealous protection or confusion caused by the complex agreement.

By adopting standards that have been widely used by the existing industries, ACTA may also harm small and mid-sized enterprises and innovative start-ups.\footnote{See Correa, supra note 334, at 450 (“In many developing countries criminal penalties apply in cases of patent infringement as well. This may constitute an important deterrent for companies, especially small and medium enterprises, willing to operate around patented inventions.”); Leah Chan Grinvald, \textit{ACTA’s Trademark Implications for Small Businesses} (unpublished manuscript, on file with Author); Peter K. Yu, \textit{Don’t Rush into Anti-counterfeiting Trade Agreement}, \textit{DESMOINES REG.}, Sept. 21, 2010 (discussing how ACTA can harm small and mid-sized firms in the United States).} The agreement may further reduce consumer access to innovative products or services from abroad.\footnote{See discussion supra Part IV.B.} Thanks to globalization, consumers today can have easy access to a wide variety of products and services. While some foreign products or services are unavailable in the United States or the European Union, due to strong lobbying from the domestic industries or conscious business choices made on the part of

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\item \footnote{See discussion supra Part III.B.} See discussion supra Part III.B.
\item \footnote{See discussion supra Part IV.} See discussion supra Part IV.
\item \footnote{E.g., Harold C. Wegner, \textit{TRIPS Boomerang—Obligations for Domestic Reform}, 29 \textit{VAND. J. TRANSNAT’L L.} 535 (1996).} See discussion supra Part IV.
\item \footnote{See Gross, supra note 158, at 8 (“Market competition will . . . be discouraged by ACTA because device manufacturers will need licenses just to build interoperable devices.”); Katz & Hinze, supra note 142, at 32–33 (“ACTA will constrain national legislation governing domestic networks and physical infrastructure. It will also restrict the global flow of information by regulating, and potentially criminalizing, the next generation of innovative network technologies.”); see also Yu, supra note 268, at 57–61 (discussing entrenched standards and lock-in effects).} See Gross, supra note 158, at 8 (“Market competition will . . . be discouraged by ACTA because device manufacturers will need licenses just to build interoperable devices.”); Katz & Hinze, supra note 142, at 32–33 (“ACTA will constrain national legislation governing domestic networks and physical infrastructure. It will also restrict the global flow of information by regulating, and potentially criminalizing, the next generation of innovative network technologies.”); see also Yu, supra note 268, at 57–61 (discussing entrenched standards and lock-in effects).
\item \footnote{See discussion supra Part IV.B.} See discussion supra Part IV.B.
\item \footnote{See Correa, supra note 334, at 450 (“In many developing countries criminal penalties apply in cases of patent infringement as well. This may constitute an important deterrent for companies, especially small and medium enterprises, willing to operate around patented inventions.”); Leah Chan Grinvald, \textit{ACTA’s Trademark Implications for Small Businesses} (unpublished manuscript, on file with Author); Peter K. Yu, \textit{Don’t Rush into Anti-counterfeiting Trade Agreement}, \textit{DESMOINES REG.}, Sept. 21, 2010 (discussing how ACTA can harm small and mid-sized firms in the United States).} See Correa, supra note 334, at 450 (“In many developing countries criminal penalties apply in cases of patent infringement as well. This may constitute an important deterrent for companies, especially small and medium enterprises, willing to operate around patented inventions.”); Leah Chan Grinvald, \textit{ACTA’s Trademark Implications for Small Businesses} (unpublished manuscript, on file with Author); Peter K. Yu, \textit{Don’t Rush into Anti-counterfeiting Trade Agreement}, \textit{DESMOINES REG.}, Sept. 21, 2010 (discussing how ACTA can harm small and mid-sized firms in the United States).
local manufacturers, 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.432

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 firms 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, the more these laws will eventually dictate the type of policy to which U.S. internet users are subject.

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 the efficiency created by economies of scale or scope, they will have to develop policies to take this major market into account. At times, a policy that effectively accommodates the more restrictive information-control policy in China will lead to sacrifice abroad—such as a reduction of coverage of politically sensitive information.

Although China has always been used as the poster boy of censorship,433 it is important to remember that many other countries also have restrictive policies.434 As Google has recently 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.435 In their book, Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain have also documented information-control policies in different parts of the world.436

432. See John Alderman, Sonic Boom: Napster, MP3, and the New Pioneers of Music 57 (2001) (noting that, before the arrival of Diamond Multimedia's Rio, "the only portable, Walkman-like devices that would play MP3s were manufactured in either Korea or Germany"); Steven Levy, The Perfect Thing: How the iPod Shuffles Commerce, Culture, and Coolness 27 (2006) (discussing the various mp3 technologies that have been available in South Korea before their wider adoption in the United States).


434. See Rebecca Mackinnon, The Green Dam Phenomenon, WALL ST. J. AsIA, June 18, 2009, available at http://online.wsj.com/article/SB124525992051023961.html ("The Internet censorship club is expanding and now includes a growing number of democracies. Legislators are under growing pressure from family groups to ‘do something’ in the face of all the threats sloshing around the Internet, and the risk of overstepping is high."); Christopher Rhoads & Loretta Chao, Iran's Web Spying Aided by Western Technology, WALL ST. J., June 22, 2009, at A1, available at http://online.wsj.com/article/SB124562668777335653.html (discussing internet control in Britain, Germany, United States, and Australia).


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 improve their country’s standing with the United States or ensure better ratings in next year’s Section 301 report. As we have vivid memories from the days of heightened security following September 11, 2001, and as today’s air travelers unfortunately still experience on occasion, powerful laws sometimes can lead to overzealousness, if not overreaching, on the part of law enforcement officers.437

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.”438 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.439

The additional protection may also lead to greater confusion on the part of border and customs authorities. For example, generic drugs developed or distributed by a U.S. pharmaceutical manufacturer can be locked up by customs authorities that fail to make distinctions between two arguably different forms of packaging.440 As Sean Flynn pointed out convincingly in the Transatlantic Consumer Dialogue meeting at the U.S. Department of Commerce in April 2010, the labels for many drugs look quite similar to each other by virtue of public health regulations and the use of names derived from international nonproprietary names for pharmaceutical substances or active pharmaceutical ingredients.441 In those cases, heightened protection required by ACTA could encourage law enforcement authorities to err on the side of protection.

To be certain, the affected businesses can always seek help from their governments—in the case of the United States, the American embassy or the USTR. However, such a mishap would not have taken place had the protection and enforcement levels not been raised without careful consid-

438. Katz & Hinze, supra note 142, at 34.
439. Hinze, supra note 263.
441. See id.
eration of the corresponding legislative and policy changes that may be
needed to implement the agreement.

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 will always be
interpreted and implemented as intended. Given the stiff competition
abroad and the limited procedural safeguards and inadequate rule-of-law
developments in many less-developed countries, it is also misguided to
assume that it will be easy for U.S. firms to contest wrongful judgments
made by local customs authorities. Indeed, customs measures, if unrea-
sonable or unreasonably implemented, could ultimately become a
nontariff barrier to trade—a concern that has dominated international
trade discussions in the past.442

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 authori-
ties to take ex officio actions imposes greater responsibilities on the
enforcement officials. The government officials, whether police, cus-
toms, or others, would have to be able to recognize the possible exis-
tence of an IPR violation in order to take any enforcement action.
The ability of enforcement authorities to identify suspect goods re-
quires 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.443

To date, many enforcement authorities in less-developed countries do not
have the needed financial resources, human capital, administrative capac-
ity, or legal expertise to make the implementation of ACTA successful.444
Moreover, in places with high risks of corruption, giving customs authori-
ties a considerable amount of discretion authority seems to be a rather
bad idea.445 It is also unlikely that U.S. citizens or businesses will be

442. See MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND
THE POLITICS OF INTELLECTUAL PROPERTY 105 (1998) (listing “unreasonable customs pro-
cedures” as a nontariff barrier).
443. TRAINER & ALLUMS, supra note 164, § 6:43, at 685 (footnote omitted).
444. See id. § 6:53, 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.”).
445. See Letter from Stewart Baker, Asst. Sec’y for Policy, Dep’t of Homeland Sec., to
steward_baker_schwab_7aug2008.pdf (“In essence, [the ACTA] language would encourage
foreign customs authorities to bar imports and exports if the authorities concluded on their
own initiative that the goods might violate copyright or be confusingly similar to trade-
marked goods. These are sweeping powers to act against suspected IP violators, and the
powers can easily be misused either intentionally or unintentionally. Misuse could even
harm small U.S. exporters competing with foreign companies favored by local govern-
ments. Generally speaking, the customs agencies of the other participating countries do
not possess the same level of authority as [U.S. Customs and Border Protection]—many of
them are not designated competent authorities to make determinations on IPR infringe-
ments. This substantially increases the risk that the sweeping powers will be misused.”); 
Peter K. Yu, The TRIPS Enforcement Dispute, 89 NEB. L. REV. 1046, 1092–95 (2011) (criti-
cizing the United States’ use of the WTO dispute settlement process to push for greater
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 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 U.S. Patent and Trademark Office later invalidated the Enola patent 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.”

discretionary power within Chinese customs authorities without taking serious consideration of the corruption and local protectionism problems confronting American businesses); see also NAIM, supra note 179, at 192 (discussing the corruption problems with a new drug squad in Russia and the elite federales in Mexico).

Within the ACTA negotiating parties, for example, Mexico and Morocco have rather disappointing records of corruption and transparency. See Kimberlee Weatherall, ACTA as a New Kind of International IP Lawmaking, 26 Am. U. Int’l L. Rev. 839, 855 (2011) (“Two ACTA negotiating countries, Mexico and Morocco, for example, are 98th and 85th (out of 178), respectively, on Transparency International’s 2010 Corruption Perceptions Index.”).


448. See Rattray, supra note 446, at 11.


450. TRAINER & ALLUMS, supra note 164, § 5:1 n.3, 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 par-
Indeed, "[c]ustoms IPR branch attorneys and field officers typically lack technical and scientific backgrounds." Given the problems in maintaining 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 Enola beans.

Similar challenges can be found in the copyright field. As an Australian judge recently noted in Roadshow Films v. iiNet Ltd., a case involving ISP liability:

Copyright 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.

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

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 throughout the world. 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 on 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. Consider copyright protection, for example. Commentators...
have widely discussed the tension between intellectual property protection and the protection of free speech and free press.\textsuperscript{455} In a recent book, Neil Netanel described this copyright–free speech conflict as the "copyright's paradox."\textsuperscript{456} Although the U.S. Supreme Court described copyright as the "engine of free expression"\textsuperscript{457} and pointed out that the U.S. copyright scheme "incorporates its own speech-protective purposes and safeguards,"\textsuperscript{458} significant tension exists between the protection of copyright and that of free speech and free press in many less-developed countries.\textsuperscript{459}

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.

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 the blogging context, "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."\textsuperscript{460} 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 pre-existing materials would help develop a participatory culture in China that in turn would help promote democratic transition.\textsuperscript{461}

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 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, trade protectionism is not the only reason why countries ban Hollywood movies from their domestic markets.

Indeed, commentators have suggested how the lack of copyright 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

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462. See, e.g., *Absolute Power* (Columbia Pictures 1997); *Law & Order* (NBC television broadcast 1990–2010); *The People vs. Larry Flynt* (Columbia Pictures 1996); *The West Wing* (NBC television broadcast 1999–2006). As Neil Netanel explained:

> The same is true with regard to works of popular culture. Our public discourse comprises a rambunctious, effervescent brew of spectacle, prurient appeal, social commentary, and political punditry. It is part entertainment, but as it entertains, it often reveals contested issues and deep fissures within our society, just as it may reinforce widely held beliefs and values. To be understood by their audiences, films, songs, and television programs must deal in the currency of prevailing practices, ideologies, and stereotypes, and in so doing must either reinforce or challenge them. Even seemingly innocuous cartoon characters, like Bart Simpson and Mickey Mouse, may be used to subvert (or reinforce) prevailing cultural values and assumptions—and with greater social impact than the most carefully considered Habermasian dialogue. The words, images, and sounds of commercial entertainment have a profound influence on our social mores and collective sense of reality. As such, the realm of popular culture serves, to a considerable extent, as both a resource and a playing field for the exercise of democratic culture and civic association.


464. Cf. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 *Vanderbilt Journal of Transnational Law* 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.’”).
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 authoritarian states would seem to have a detrimental, not positive, effect on democratic transition.\textsuperscript{465}

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.\textsuperscript{466} As the U.S. District Court for the Eastern District of Pennsylvania recognized in \textit{ACLU v. Reno}, the internet is “the most participatory form of mass speech yet developed,”\textsuperscript{467} and the content on this medium is “as diverse as human thought.”\textsuperscript{468}

In fact, if one still questions the full democratic potential of the internet, he or she just needs to look at 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 can obtain both the official and leaked versions of the ACTA draft text.\textsuperscript{469} With a few more clicks, one can obtain access to authoritative academic commentaries along with blog posts from commentators on both sides of the debate.\textsuperscript{470} These types of discussions on intellectual property were unheard of when the TRIPS Agreement was negotiated more than twenty years ago. In fact, the internet has now made possible the webcasting of meetings at the WTO, WIPO and other fora that would further open up the debate to those outside Geneva or other negotiating venues.\textsuperscript{471}


\textsuperscript{466} See A. Michael Froomkin, \textit{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, \textit{Bridging the Digital Divide: Equality in the Information Age}, 20 \textit{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).


\textsuperscript{468} \textit{Id.} at 842; \textit{see also} 47 U.S.C. § 230(a)(3) (2006) (“The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”); Jessica Litman, \textit{Sharing and Stealing}, 27 \textit{HASTINGS COMM. & ENT. L.J.} 1, 50 (2004) (stating that “the idiosyncratic interests of large numbers of individuals who want to share is directly responsible for the wealth and incredible variety of information we can find when we go looking for it”).

\textsuperscript{469} \textit{See, e.g.,} Consolidated Draft, \textit{supra} note 18; Leaked Draft, \textit{supra} note 19.


\textsuperscript{471} Cf. \textit{HOEKMAN & MAVROIDIS}, \textit{supra} note 99, at 116 (“Given the internet and the low cost of telecom services, every regular WTO meeting could be taped and web cast.”).
In January 2010, U.S. Secretary of State Hillary 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, referring to companies collaborating with repressive governments, one could not help but notice how equally relevant her speech is regarding ACTA’s democracy-reducing potential.

If ACTA entered into effect, it could be used to silence the vibrant discussion that has been developed so far regarding the agreement’s undesirability and the non-transparent process. Thus, if intellectual property rights holders do care about promoting internet freedom, they, according to Secretary Clinton, may “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 of great concern to free speech advocates involves the unintended consequences of anti-circumvention 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

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472. Clinton, supra note 433.
473. This analogy is pointed out by a New Zealand parliament member. See Clare Curran, We Need Greater Transparency and Freedom, RED ALERT (Jan. 26, 2010), http://blog.labour.org.nz/index.php/2010/01/26/we-need-greater-transparency-and-freedom/. Other commentators share this concern. See, e.g., Rebecca MacKinnon, Are China’s Demands for Internet ‘Self-Discipline’ Spreading to the West?, McClatchy (Jan. 18, 2010), http://www.mcclatchydc.com/2010/01/18/82469/commentary-are-chinas-demands.html (expressing concern that the ACTA negotiations may push the world in a direction that fails to “consider[ ] the full global context of free expression and censorship”); Mike Masnick, The Similarity Between ACTA and Chinese Internet Censorship, TECHDIRT (Jan. 20, 2010, 11:46 AM), http://www.techdirt.com/articles/20100120/0216537828.shtml (noting the “worrisome parallels between what is being pushed via ACTA and other methods and ongoing internet censorship in China”).
474. See Kaitlin Mara, UK Passes Internet Access-Limiting Bill for Alleged IP Infringers, INTELL. PROP. WATCH (Apr. 8, 2010, 12:11 PM), http://www.ip-watch.org/weblog/2010/04/08/uk-isps-required-to-limit-internet-access-for-ip-infringers/ (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”).
475. Clinton, supra note 433.
476. Id. (emphasis added).
repressive countries.\footnote{477} Problematically, the ban on circumvention and the use of other tinkering tools, as demanded by the anti-circumvention provisions of ACTA,\footnote{478} 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.”\footnote{479} China, for example, “blocks access not only to known circumvention sites, but sites that are known to provide information and tutorials about censorship circumvention.”\footnote{480}

Moreover, the insistence on greater monitoring, filtering, and data retention on the part of ISPs could create significant challenges for internet users in the free speech context. 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.\footnote{481}

Had ACTA required the introduction of 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 have been even more significant.\footnote{482} Such a system would require ISPs to suspend or terminate

\footnote{477. See id. ("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, supra note 332, at 424–32 (discussing the United States’ efforts to promote free flow of information and ideas in China).

478. See Consolidated Draft, supra note 18, arts. 27.5–.6.


480. Id.


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.483

In its final form, ACTA does not require the introduction of such a system,484 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 the treaty language used to introduce such an obligation.485 While the United States seems to favor an approach that allows for private ordering and non-legislative measures, the European Union and Japan prefer legislative mandates.486

Nevertheless, ACTA does not prevent the introduction of the graduated response system. The consolidated draft, in fact, includes different options that could facilitate the development of a graduated response system.487 Given the adoption of the system in Chile,
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.

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 about China more than a decade ago:

[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.]

Professor Netanel also observed that "imposing copyright protection for foreign works in the authoritarian state . . . would also give dictatorial authorities an internationally acceptable justification for suppressing the works' dissemination." It is important to remember that copyright was introduced as a response to the printing press—a modern reprographic technology. In a little more than two centuries following the invention of the Gutenberg

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490. 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 . . .


492. Netanel, supra note 465, at 255.

press, both the Church and the Crown used printers’ privileges to suppress heresy and dissent. 494 Although the origin of the modern notion of copyright is often linked to the English statute of Anne, 495 which recently celebrated its tricentennial, 496 historians have traced the notion back to the Star Chamber and the Stationers’ Company in England. 497 A strong interrelationship between copyright and censorship has existed since the inception of copyright.

Even in those countries that the United States considered allies during the ACTA negotiations, the laws could limit the freedom of American internet users. One might still remember the highly controversial case against Yahoo! concerning the sale of Nazi memorabilia in the early days of the internet. 498 Most recently, in Italy, three Google executives were found criminally liable for their failure to quickly remove a widely-viewed video showing an autistic boy being harassed by a group of teenagers, notwithstanding the fact that Google’s subsequent assistance resulted in the arrest of the perpetrators. 499 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. 500

494. See id. at 17.

495. 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 Ann., c. 19 (1709) (Eng.).

496. For recent symposia celebrating the tricentennial of the Statute of Anne, see Symposium, Copyright © 300, 25 BERKELEY TECH. L.J. 1145 (2010); Symposium, The ©©© Conference: Celebrating Copyright’s Tri-Centennial, 47 Hous. L. Rev. 779 (2010).

497. For comprehensive discussions of the Star Chamber and the Stationers’ Company, see generally AUGUSTINE BIRRELL, 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).


500. 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, ACTA could make it difficult for the United States to complain about those highly intrusive foreign laws that are introduced in the name of implementing ACTA or complying with its higher enforcement standards. Such introduction, to some extent, can be analogized to the Russian authorities' recent confiscation of the computers of an outspoken Siberian environmental activist group (as well as those of other advocacy groups and opposition newspapers) in the name of protecting Microsoft's copyrighted software.\textsuperscript{501} Reported first in \textit{The New York Times} and covered widely throughout the Internet,\textsuperscript{502} the incident not only reminds us of the challenges in enforcing intellectual property rights in countries with strong information control, but also confirms Professor Alford's earlier observation about how the United States' push for greater intellectual property protection could undermine its human rights agenda.\textsuperscript{503} After all, it would be hypocritical to demand that other countries increase intellectual property enforcement while complaining when such increased enforcement does not serve the \textit{demeandaueur}'s interests.

\section{Locked-in Protective Standards Without Corresponding Safeguards}

While ACTA is likely to entrench the present protective standards both at home and abroad, it fails to ensure the continued existence of corresponding safeguards. As shown in the final text, ACTA offers very few limitations and exceptions; all of them are either permissive or included as safeguard provisions.\textsuperscript{504} The view of the negotiators is indeed shortsighted, 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

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See Alford, \textit{supra} note 491, at 144–45.
\item See ACTA, \textit{supra} note 5, art. 27.2 (requiring enforcement procedures related to obligations in the digital enforcement section "be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and . . . preserves fundamental principles such as freedom of expression, fair process, and privacy"); \textit{id.} art. 27.3 ("Each Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and . . . preserving fundamental principles such as freedom of expression, fair process, and privacy."); \textit{id.} art. 27.4 (requiring the procedures for the disclosure of subscriber information, if available, "be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and . . . preserves fundamental principles such as freedom of expression, fair process, and privacy"); \textit{id.} art. 27.8 ("In providing adequate legal protection and effective legal remedies [related to anti-circumvention protection and copyright management information], a Party may adopt or maintain appropriate limitations or exceptions to measures implementing the provisions . . . The obligations set forth . . . are without prejudice to the rights, limitations, exceptions, or defences to copyright or related rights infringement . . . .").
\end{enumerate}
\end{footnotesize}
technological protection measures that frustrate the exercise of exceptions in copyright.505

More disturbing, the ACTA negotiators seemed 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 stay in place under domestic law. Such assumptions, however, are 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.506 Although that particular provision was enacted as a means to balance the extension of the copyright term in the Sonny Bono Copyright Term Extension Act,507 the WTO dispute settlement panel found the provision inconsistent with the United States' TRIPS obligations.508 Had the United States sought to comply with the panel decision by amending the Copyright Act—as compared to ignoring it509—the balance in the U.S. copyright system would tilt further toward rights holders.

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 Graeme Dinwoodie and Rochelle Dreyfuss explained:

The '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.510

505. Grosse Ruse-Khan, supra note 321, at 44.
507. Id. at § 304.
509. In lieu of amending its TRIPS-non-compliant law, the United States paid the European Union a one-time sum of $3.3 million. See Florian Koempel, Fair Play?, Copyright World, July-Aug. 2004, at 23, 24 (“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, see Recourse to Arbitration Under Article 25 of the DSU, Award of the Arbitrators, 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.
510. Dinwoodie & Dreyfuss, supra note 508, at 99–100.
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." 511

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. 512 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. 513 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, these industries as well as other economic sectors may obtain offsetting benefits:

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 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

511. Id. at 100.
512. See Yu, supra note 268, 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).
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.\footnote{14}

Although the GAO report did not go further, one could question 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)\footnote{15} or even more (as in the case when the count of seizure of single cigarettes was confused with figures that count packets of twenty).\footnote{16} 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 should intellectual property industries have to subsidize others for those gains? and (2) how should gains and losses be properly allocated through the legislative process?

Similarly, the Computer and Communications Industry Association (CCIA) released three reports documenting the gains made by the fair use industries,\footnote{17} examples of which include “manufacturers of consumer devices that allow individual copying of copyrighted programming; educational institutions; software developers; and Internet search and web hosting providers.”\footnote{18} Using the methodological guidelines established

\footnote{14}{Id. at 15; see also Fink, supra note 322, at 2 (“[D]ifferent types of [intellectual property] infringements have different welfare effects, depending on underlying market failures and market characteristics.”).}

\footnote{15}{See Mike Nizza, Movie Industry Admits It Overstated Piracy on Campus, THE LEBE (Jan. 23, 2008, 9:38 AM), http://theledeblogs.nytimes.com/2008/01/23/movie-industry-admits-it-overstated-piracy-on-campus/ (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 from 44% to 15%).}

\footnote{16}{See Li, supra note 321, 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).}


\footnote{18}{2010 CCIA STUDY, supra note 517, at 7.}
by WIPO for surveying the economic contribution of copyright-based industries, 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 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 question the data supplied by these 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 in a paper written before he joined WIPO:

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 regarding industry-supplied figures that the USTR and other government officials have often used:

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. Ac-

520. 2010 CCIA STUDY, supra note 517, at 8.
521. See id.
522. EUROPEAN COMM’N, supra note 162, at 5.
523. Fink, supra note 322, at 13.
524. See GAO STUDY, supra note 513, at 16 (“Commerce and FBI officials told us they rely on industry statistics on counterfeit and pirated goods and do not conduct any original data gathering to assess the economic impact of counterfeit and pirated goods on the U.S. economy or domestic industries.”).
Accordingly, estimated revenue losses by software producers are bound to be overestimated.\footnote{525} Because it is hard to imagine how sales would be lost when consumers could not afford the products, these figures are more correctly described as the retail value of pirated or counterfeit goods based on foreign prices or whatever prices the researchers have set.\footnote{526} While the figures may still show the existence of a major problem, they fail to accurately state the extent of the problem and the existence of 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.\footnote{527} Technology developers, consumer advocates, and academic commentators have also called into question the expediency and sustainability of the DMCA,\footnote{528} which Jessica Litman has described as “long, internally inconsistent, difficult even for copyright experts to parse and harder still to explain.”\footnote{529} Because ACTA has the potential to “cement the DMCA’s status at home, making it harder to fix its user-hostile provisions,”\footnote{530} commentators are understandably very concerned about the incorporation of the DMCA into 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 accessi-
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, will likely short-circuit the policymaking process by forcing its signatories, including the United States, to develop a common policy before each country has the opportunity to explore policy options based on its own needs, interests, conditions, and priorities as well as information about the future development of the technological environment.

Like their concerns about an unbalanced copyright system, 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 “moratorium on stronger international intellectual property standards” to prevent the transplant of U.S. problems abroad. As they lamented:

[T]he 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.

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. The Commission

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531. See Yu, supra note 312.
535. Id. at 24–26.
on Intellectual Property Rights was also formed in the early 2000s to examine ways to integrate development into the intellectual property system. Its final report touched on a wide variety of topics, including intellectual property and development, health, agriculture and genetic resources, traditional knowledge and geographical indications, computer software and the internet, patent reform, institutional capacity, and the international architecture.

In light of these reform proposals on both sides of the Atlantic, 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 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 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?” 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.”

When pressed further about 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 for intellectual property protection and enforcement while at the same time retaining flexibility and autonomy to allow each country to undertake future legislative reform that may lower the protection or

537. See IPR Commission Report, supra note 377, at i.
538. See generally id.
541. Id.
create additional limitations and exceptions. Countries will always have flexibility and autonomy to increase protection even with ACTA, but the agreement, if entered into effect, could take away the flexibility and autonomy to reduce the protection levels.

In fact, this concern is not only limited to ACTA. It has been raised during the negotiation of other bilateral and regional FTAs. As Senators Patrick Leahy and Arlen Specter 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"—an institutional concern raised by the Senators earlier in relation to the implementation of the U.S.–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 continental Europe, 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 the following four factors:

(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

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543. Letter from Senators Leahy and Specter, supra note 168; see also Gross, supra note 158, at 8 (“Given the nature of digital technology and the rapid social change it can create, policymakers need to be free to respond in unanticipated ways to the needs of the public. But ACTA will not provide local or national policymakers with the freedom or flexibility to respond and alter the information policy choices set by Hollywood and Basel via ACTA.”).

544. See id.; 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 142, 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.”).


(4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{547}

Although these nonexhaustive factors have since been incorporated into the Hong Kong Copyright Ordinance,\textsuperscript{548} the Singapore Copyright Act,\textsuperscript{549} and most recently the Israel Copyright Law,\textsuperscript{550} many countries remain troubled by the incongruence between the U.S. fair use provision and the limitations permissible under the three-step test as enunciated in the Berne Convention, the TRIPS Agreement, and the WIPO Internet Treaties.\textsuperscript{551} In fact, during the TRIPS Council’s review of enforcement legislation in 1997, “several trading partners requested clarification of the fair use doctrine” from the United States.\textsuperscript{552}

In her article, Ruth Okediji explained in detail why the U.S. fair use provision would meet the three-step test, and would have been grandfathered into the TRIPS Agreement in any event.\textsuperscript{553} However, the disagreement over the provision suggests the strong likelihood that existing limitations and exceptions in the U.S. intellectual property system could 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 its limitations and exceptions 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 influence of these customary norms on the domestic legislative and judicial processes and their ability to shape international discussions are not to be ignored. ACTA could also affect the country’s international obligations by “form[ing] the context for” the in-

\textsuperscript{547} Id.
\textsuperscript{548} Copyright Ordinance, (1997) Cap. 528, 22, § 38(3) (H.K.).
\textsuperscript{549} Copyright Act § 35 (Sing.).
\textsuperscript{551} See Berne Convention, supra note 380, art. 9(2); TRIPS Agreement arts. 13; WCT, supra note 309, art. 10; WPPT, supra note 309, art. 16(2).
\textsuperscript{552} Okediji, supra note 399, at 115.
\textsuperscript{553} See id. at 115–23.
terpretation of treaties that the United States has ratified.\textsuperscript{554} Because of the growing overlap between intellectual property and other policy arenas, such as 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.\textsuperscript{555} In United States—Section 110(5) of the US Copyright Act, for example, the WTO dispute settlement panel noted the need "to seek contextual guidance . . . when developing interpretations that avoid conflicts within this overall framework, except where these treaties explicitly contain different obligations."\textsuperscript{556}

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,"\textsuperscript{557} the power asymmetry in the international system unfortunately may mean that ACTA could have greater influence in international intellectual property negotiations than pro-development instruments in other fora. After all, ACTA involves thirty-seven 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."\textsuperscript{558}

Finally, as Anupam Chander reminded us in the context of the anti-circumvention 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

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\textsuperscript{556} Panel Report, United States—Section 110(5) of the US Copyright Act, ¶ 6.70, WT/DS160/R (June 15, 2000).
\end{flushright}
partnered with interested multinational corporations engaged in rent-seeking.\footnote{559}

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 in ACTA in the future, the costs of such adjustments are likely to be quite substantial. The time it takes to agree on and implement such adjustments 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 PROTECTION

A. A SELF-REINFORCING ARCHITECTURE

As shown in Chapter Five of ACTA, the second-lengthiest part, the agreement seeks to create a new infrastructure that can be used to facilitate the future ratcheting up of international intellectual property protection. Although this chapter has been ignored by most commentators,\footnote{560} 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 provides a free-standing, self-reinforcing agreement that can be incorporated by reference into other international agreements. Indeed, it will 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 Washington Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits.\footnote{561} Many U.S. FTAs already require signatories to ratify the Patent Cooperation Treaty\footnote{562} and

\footnote{560. Some of the exceptions are Michael Geist, \textit{Toward an ACTA Super-Structure: How ACTA May Replace WIPO}, \textit{MICHAEL GEIST'S BLOG} (Mar. 26, 2010), \url{http://www.michaelgeist.ca/content/view/4910/125/}; Sara Bannerman, \textit{WIPO and the ACTA Threat} (Program on Information Justice and Intellectual Property, American University, Research Paper Series No. 4 2010), available at \url{http://digitalcommons.wcl.american.edu/research/4/}.}
\footnote{561. See TRIPS Agreement arts. 2, 9, 35.}
the WIPO Internet Treaties. Although an earlier discussion paper that was leaked online, 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 either the consolidated draft or the final text.

To be certain, countries are free to join this plurilateral 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.

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," especially if the carrot of trade benefits or development aid is 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 their favorable policies onto the domestic legislation of IPR-importing countries. A clear example of neo-colonialism, ACTA will, at best, benefit a few private interests at the expense of the many.

Indeed, many of these countries would fear being left out. There may
also be other tangible benefits (and therefore incentives) for strengthening intellectual property protection and enforcement, which range from technical assistance to conference and travel support and from the provision of latest equipment and technology\textsuperscript{569} to the ability to make internal demands for more personnel and a larger institutional budget.\textsuperscript{570}

Second, through the creation of the ACTA Committee\textsuperscript{571} and the empowerment of this committee to further establish ad hoc committees,\textsuperscript{572} 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 text, the agreement, once adopted, will likely continue to evolve following its own revision process.\textsuperscript{573} Such revision would enable countries to develop protections in excess of what is laid out in the final text.

From the standpoint of the ACTA negotiating parties and intellectual property rights holders, the development of a self-evolving infrastructure is highly efficient. It will help strengthen intellectual property protection without the procedural constraints in existing multilateral processes. By bringing together like-minded countries, such a process will provide a more satisfying outcome. By creating a new freestanding forum, countries could also discuss issues that are likely to face significant resistance at the multilateral level. To some extent, ACTA provides a “safe space” for negotiating new enforcement norms and strengthened protections.

\textsuperscript{569}See Drahos, supra note 27, at 136 (recounting his trip to Laos where the local patent office was waiting for the arrival of some new personal computers from WIPO); see also Deere, supra note 210, at 200 ("The high degree to which IP offices relied on external support rendered them vulnerable to financial influence from donors. The constant supply of training, advice, and capacity-building from international donors bolstered the dominance of IP offices in national IP decision-making, and thereby reinforced a compliance-plus approach to TRIPS implementation.").

\textsuperscript{570}See Andrew C. Merttha, The Politics of Piracy: Intellectual Property in Contemporary China 16 (2005) ("Side payments provided [in China] by . . . foreign companies and the investigative firms on their behalf can take many forms, including solicited 'case fees,' the allocation of legitimate expenses for enforcement actions, the provision of banquets and other entertainment for local cadres charged with anticounterfeiting enforcement, or even the construction of recreation facilities for individual local government offices."); Daniel C.K. Chow, Counterfeiting in the People's Republic of China, 78 Wash. U. L.Q. 1, 30-31 (2000) ("Some local enforcement officials ask for payments, case fees, or gifts such as mobile phones from trademark owners in exchange for conducting enforcement actions.").

\textsuperscript{571}See ACTA, supra note 5, art. 36. Before the negotiating parties settled on its final name, they disagreed over how the committee was to be named. 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 19, art. 5.1.

\textsuperscript{572}See ACTA, supra note 5, art. 36.3(a) (empowering the ACTA Committee to “establish ad hoc committees or working groups to assist the Committee in carrying out its responsibilities”).

\textsuperscript{573}See id. arts. 36, 42.
without reopening the TRIPS Agreement and other international treaties.\textsuperscript{574} Such a safe space is important to those countries that consider the TRIPS Agreement inadequate and badly outdated.\textsuperscript{575} Adopted in 1994 with protection levels locked at those set around 1991,\textsuperscript{576} the TRIPS Agreement failed to anticipate the latest developments in the digital environment\textsuperscript{577} as well as the increasingly sophisticated network of piracy and counterfeiting.\textsuperscript{578}

From the standpoint of less-developed countries and consumers in developed countries, however, the absence 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 in 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 negotiators put into the TRIPS Agreement to promote the public interest\textsuperscript{579} and to ensure that the agreement meets the objectives laid out in Article 7.\textsuperscript{580}

\textsuperscript{574} 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) (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").

\textsuperscript{575} See, e.g., EU IPR Enforcement Strategy, supra note 11, 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 164, § 1:1, 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"); Trainer, supra note 322, at 47 (discussing the inadequacies of the enforcement provisions of the TRIPS Agreement and explaining the need for TRIPS-plus bilateral and regional FTAs in the area of border enforcement).

\textsuperscript{576} See Gervais, supra note 395, 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.").


\textsuperscript{578} See McCoy Declaration, supra note 47, at 4 (considering "the growing sophistication and resources of international counterfeiters" as a new challenge to enforcing intellectual property rights); TRAINER & ALLUMS, supra note 164, § 6:3, at 618 (stating that "greater enforcement efforts are needed given the increasing sophistication of counterfeiters and pirates").

\textsuperscript{579} See Letter from James Love, Knowledge Ecology Int'l, and Gigi Sohn, Public Knowledge, to U.S. Sen. Patrick Leahy (Nov. 9, 2009), available at http://www.keionline.org/node/684 [hereinafter Letter from James Love et al.] (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).

\textsuperscript{580} 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.
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 those provisions they adopted 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 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 negotiations, 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. Meanwhile, China, India, and Russia were on the Priority Watch List. Within the G8, Russia is a current member, and China is a strong candidate for membership if the group expands to form G9. The G8 members have also actively engaged Brazil and India.

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For further reading:
- TRIPS Agreement art. 7. See generally Yu, supra note 203 (providing an in-depth discussion of Articles 7 and 8 of the TRIPS Agreement).
- See TRIPS Agreement art. 71.2 (laying out the amendment process).
- As the USTR explained in a fact sheet: “Some of the ACTA participants are still working toward important and necessary IPR reforms, which we hope to see completed as soon as possible. Participation in the ACTA may help these countries to carry out their goals of enhancing IPR enforcement.” USTR, supra note 162, at 3.
- See HUGO DOBSON, THE GROUP OF 7/8, at 98 (2007) (discussing China’s potential to become a G9 member).
through the Heiligendamm Process.\textsuperscript{586}

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 thirty-nine 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 negotiations after the first round.\textsuperscript{587} Meanwhile, Mexico and Morocco, which stayed behind despite their less-developed economic conditions, were rewarded handsomely with the chance to host the fifth and seventh negotiating rounds.\textsuperscript{588}

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{589} Such a shift plays into what commentators have widely described as "forum proliferation,"\textsuperscript{590} "forum shifting,"\textsuperscript{591} or "multiple forum capture."\textsuperscript{592} 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{593} More importantly, this agreement 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

\textsuperscript{586} The Heiligendamm Process institutionalized a high-level dialogue between G8 and five highly important emerging economies—Brazil, China, India, Mexico, and South Africa.

\textsuperscript{587} An article in \textit{Inside U.S. Trade} suggested that Uruguay might have also been involved in the pre-negotiation discussions. \textit{EU ACTA Negotiator Confirms EU Wants Patent Provisions in ACTA, Inside U.S. Trade}, May 8, 2009, at 11.

\textsuperscript{588} Charles McManis suggested that these two countries may have additional reasons to join ACTA:

\begin{quote}
[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.
\end{quote}


\textsuperscript{589} See Yu, supra note 144, at 357-66.


\textsuperscript{591} See \textit{generally} JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 564-71 (2000) (discussing the use of forum shifting); Helfer, supra note 574 (discussing the use of regime shifting).


\textsuperscript{593} Sell, supra note 158, at 9; Shaw, supra note 292, at 3 ("Instead of merely shifting the debate from one forum to another, the ACTA supporters . . . seek to create an entirely new layer of global governance."). For discussions of the enforcement agenda in various international fora, see generally MATTHEWS, supra note 87; Biadgleg & Muñoz Tellez, supra note 136; Correa, supra note 321, at 34-39; Sell, supra note 158.
earlier rule."  

In so doing, ACTA would successfully "pave the way for future rule or regime changes." For example, the agreement 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, 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 31 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

594. Kal Raustiala, Density & Conflict in International Intellectual Property Law, 40 U.C. Davis L. REV. 1021, 1027–28 (2007); see also Helfer, supra note 574, at 1027 (discussing the legal inconsistencies generated by the development of counter-regime norms).

595. Yu, supra note 555, at 17.

596. Adopted Recommendations, supra note 116, recommendation 45.


598. See USTR, supra note 180, at 2 (stating that ACTA "will respect the Declaration on TRIPS and Public Health").

599. See Kamperman Sanders et al., supra note 261, at 66 ("In the international arena, especially with respect to access to medicines, ACTA itself is not incompatible with EU member states obligations under or support for the Doha Declaration . . . However, the manner in which member states implement the ACTA may pose problems.").

600. TRIPS Amendment, supra note 82.

international system, the “country club” approach adopted by ACTA negotiators raises additional issues.

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.” 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. 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.” Indeed, by crafting what the negotiating parties now call a “state-of-the-art agreement,” 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).

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, which began in the OECD with the hope of being extended to other non-OECD countries. There are also strong resemblances to the OECD-driven Multilateral Agreement on Investment, see generally Peter T. Muchlinski, The Rise and Fall of the Multilateral Agreement on Investment: Where Now?, 34 INT’L LAW. 1033 (2000); James Salzman, Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development, 21 MICH. J. INT’L L. 769, 804–31 (2000).

As Professor Salzman noted: The OECD is, first and foremost, an exclusive club whose members produce two-thirds of the world’s goods and services. The OECD provides a closed setting for wealthy industrialized governments to share experiences, identify issues of common concern, and coordinate domestic and international policies. In simple terms, the OECD’s various standing intergovernmental com-


604. See Yu, supra note 144, at 394–95 (discussing the differences between bilateral and multilateral agreements).


such G8 initiatives as the Financial Action Task Force that was created to combat money laundering and terrorist financing.

In addition, by developing intellectual property protection outside the traditional fora, like WIPO and the WTO, the negotiation of ACTA undermined the stability of the international trading system and the preference for the multilateral process. It also alienated the trading partners of the ACTA negotiating parties, making it more difficult to undertake future multilateral discussions.

To some extent, it reminds us of a major shortcoming of the unilateral approach embodied in the Section 301 process. As Helen Milner wrote two decades ago of Special 301 and Super 301:

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 ra-

Salzman, supra note 608, at 776 (footnote omitted).

610. Commentators have been widely divided about the desirability of the G8 forum. Michael Hodges, for example, has 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, to 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 *Dobson, supra* note 585, at xv. By contrast, others hold the perception that G8 "is little more than a cabal—an unelected 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 585, at ix, x.

611. Information about the Financial Action Task Force is available at [http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html](http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html) (last visited Jan. 28, 2010). For criticisms of the supranational governance structure of this taskforce and its operations vis-à-vis non-members, see generally Shams, *supra* note 582.

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 all remedies permissible under the WTO rules have been exhausted, 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 Union, 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 compromise 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.


615. See generally sources cited supra note 201.
616. See id.
To be certain, the European Union and the United States have complained about the unwillingness of 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, at least in the image of its own laws. The frustrations of these countries and their government officials are understandable. However, if countries always negotiate outside 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 who work hard to create a diplomatic dialogue and to strike compromises among the parties. Diplomacy and statesmanship, after all, are as important as, if not more important than, bargaining.

It is also ironic that developed countries are now complaining about WIPO's limited ability to set 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 seems 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, 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 will be for less-developed countries to dedicate their efforts to strengthening enforcement norms in a particular forum.

617. See id.
618. See id.
619. See Yu, supra note 144, at 357–66.
620. Weatherall, supra note 224, at 4.
Finally, the "country club" approach that was developed to facilitate the creation of an agreement among like-minded countries would raise a new set of 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, ASEAN (Association of Southeast Asian Nations), APEC (Asia Pacific Economic Cooperation Forum), the Andean Community, CARICOM (Caribbean Community), CARIFORUM (Caribbean Forum of African, Caribbean and Pacific States), COMESA (Common Market for East and Southern Africa), ECOWAS (Economic Community of West African States), the European Union, GRULAC (Group of Latin American 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 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, the Like-Minded Group, the Group of Small and Vulnerable Economies, NATO (North Atlantic Treaty Organization), and OPEC (Organization of the Petroleum Exporting Countries).

Coalition-building strategies 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 media 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."623 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).624

Although intellectual property protection remains a key national interest of the United States—regardless of whether the administration is Republican or Democrat—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 multilateral regulatory system.

At the multilateral level, ACTA may also threaten WIPO,625 an organization that has recently been rejuvenated by a number of important initiatives and the establishment of the new Development Agenda.626 As Professor Geist pointed out:

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.627

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.628

624. See Yu, supra note 144, at 392–400 (discussing the growing use of bilateral, plurilateral, and regional trade agreements to push for higher intellectual property standards).
625. See Geist, supra note 560.
626. See MAX, supra note 590, at 104; Yu, supra note 29, at 521.
627. Geist, supra note 560.
The points raised by Professor Geist and the Wellington Declaration are interesting. To a great extent, they show how much the public perception of WIPO has changed. Only a few years ago, commentators widely criticized the organization for being captured by rights holders and having too narrow an interpretation of its own mandate.629

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

Despite ACTA’s new provisions, heightened standards, and its rather unpleasant potential side effects, there is no guarantee that the agreement would provide rights holders with meaningful protection of intellectual property rights. It is important to remember that the United States, with strong support from Levi Strauss, pushed unsuccessfully for the development of a new anti-counterfeiting code toward the end of the Tokyo Round of Trade Negotiations (Tokyo Round).630 To some extent, the current negotiations represent the continuation of this early failed attempt.

Although the United States’ proposal for this new code was introduced too late in the Tokyo Round to lead to a new intellectual property agreement within the GATT framework,631 the TRIPS Agreement did, for the first time, include comprehensive multilateral norms on the enforcement of intellectual property rights.632 Articles 41 to 61, for example, spell out

629. See, e.g., May, supra note 590, 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.”); Sisule 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/geneva/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 practitioners’ 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 415, at 18 (criticizing WIPO for “interpret[ing] its legislative mandate as one of progressively elevating intellectual property rights throughout the world”).


632. See Gervais, supra note 201, at 440 (stating that the TRIPS Agreement “is a first true multilateral instrument on domestic enforcement of intellectual property rights”); Correa, supra note 321, 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 any area of international law that such rules on domestic enforcement procedures
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, which failed to result in the proper disposal of confiscated infringing products outside the channels of commerce.

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 a century. 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." To some extent, the major strength of the TRIPS Agreement—that is, the provision of enforcement at the multilateral

and remedies have been negotiated.

Nevertheless, it is worth noting that the pre-TRIPS international intellectual property conventions contain some isolated enforcement provisions. As Professor Correa noted in the UNCTAD–ICTSD Resource Book on the TRIPS Agreement:

The Paris Convention includes Article 9 (seizure upon importation of goods bearing infringing trademarks and trade names), Article 10 (false designation of source or geographic origin), Article 10bis (protection against unfair competition), and Article 10ter (general requirement for "appropriate legal remedies effectively to repress" acts prohibited under Articles 9, 10, and 10bis).

The Berne Convention also contains some provisions on enforcement (Articles 13(3) and 15), while they are absent in other important treaties such as the Rome Convention, the Geneva Phonograms Convention, the Universal Copyright Protection and the Washington Treaty.


See TRIPS Agreement arts. 46, 59.


See Panel Report, United States—Section 211 Omnibus Appropriations Act of 1998, ¶ 8.97, WT/DS176/R (Aug. 6, 2001) ("The inclusion of this Part on enforcement in the TRIPS Agreement was one of the major accomplishments of the Uruguay Round negotiations as it expanded the scope of enforcement aspect of intellectual property rights. Prior to the TRIPS Agreement, provisions related to enforcement were limited to general obligations to provide legal remedies and seizure of infringing goods."); GERVAIS, supra note 201, at 440 ("The enforcement section of the TRIPS Agreement is clearly one of the major achievements of the negotiation."); UNCTAD–ICTSD, supra note 334, 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, supra note 399, at 149–50 ("One of the most celebrated accomplishments of the WTO system is
level—is, oxymoronically, also its major weakness. It is no wonder that Professors Reichman and Lange have described Part III of the TRIPS Agreement as its “Achilles’ heel.”

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:

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.

Because the development of protection under the TRIPS Agreement is a multistage game that involves negotiation, implementation, and enforcement, the strategies employed 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 will, in fact, do a much better job. The answer, unfortunately, is mostly negative.

First, like the TRIPS Agreement, ACTA focuses so much on creating new standards for intellectual property protection that it has largely forgotten its original mission, or its initially publicly announced mission—the dispute resolution mechanism which adds legitimacy to the overall design of the new trading system.” (footnote omitted)).

637. Reichman & Lange, supra note 635, at 34–40 (explaining why the enforcement provision are the “Achilles’ heel of the TRIPS Agreement”); accord Yu, supra note 33, at 483–504 (explaining why the TRIPS Agreement fails to provide effective global enforcement of intellectual property rights). As Professors Reichman and Lange observed further:

[T]he 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. . . . [W]e 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.

Reichman & Lange, supra note 635, at 35, 39.


639. 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, MICHAEL GEIST’S BLOG (Apr. 6, 2008), http://www.michaelgeist.ca/content/view/2815/125/. 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 treaty’s proponents 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 commenta-
that is, to target commercial-scale counterfeiting and piracy while promoting public health and safety. As the U.S. administration stated during the negotiations, "ACTA would focus on border measures and enforcement practices, rather than creating new regulation standards."\textsuperscript{640} As the final text reveals, however, the agreement has veered off its original path. Instead of focusing on setting enforcement norms for a narrow category of intellectual property violations—such as counterfeiting and piracy—ACTA now has the potential of covering virtually every category of intellectual property rights, in part to meet the European Union's expectation that all intellectual property rights are treated as equal.\textsuperscript{641}

Article 5(h) of ACTA now provides: "[I]ntellectual property refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPS Agreement."\textsuperscript{642} In addition to copyrights and trademarks, these categories include geographical indications, industrial designs, patents, plant variety protection, layout designs of integrated circuits, and the protection for 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.\textsuperscript{643}

Even worse, while ACTA was initially created with an arguably laudable goal of targeting criminal counterfeiters, it has now been captured by intellectual property industries to target ordinary consumers. In its current form, ACTA is as much "a regime for global Internet regulation" as

\textsuperscript{640} Condon, \textit{supra} note 264.

\textsuperscript{641} See Ermert, \textit{supra} note 296 (noting the European Union's all-inclusive position).

\textsuperscript{642} ACTA, \textit{supra} note 5, art. 5(h).

it is an international intellectual property agreement. Disturbingly, the ACTA negotiating parties insisted through the negotiations 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 seems to be rather incompatible with the final text. If the parties were telling the truth, the agreement was indeed so badly drafted that it did 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 trade agreements. Nor are the reforms directly related to intellectual property protection. Examples of these preconditions include a consciousness of legal rights, a respect for the rule of law, an effective and independent judiciary, a well-functioning innovation and competition system, a sufficiently developed basic infrastructure, a critical mass of local stakeholders, and established business practices.

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. 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

645. Comm’n of the European Communities, The Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet 2 (Mar. 2010), http://trade.ec.europa.eu/doclib/docs/2010/march/tradoc_145958.pdf. But see Opinion of the European Data Protection Supervisor, supra note 283, at 2 (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”).
646. See Yu, supra note 411, at 213–16 (discussing the importance of an “enabling environment” for effective intellectual property protection).
rules for maintaining effective competition in Chinese markets. 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.

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.” 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.

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.” That paper also heavily criticizes 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 to respect for intellectual property. 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,
Third, as an enforcement-inducing treaty, ACTA is structurally inferior to the TRIPS Agreement. Because it does not include a dispute settlement process, 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 advanced proposals in the area, other ACTA negotiating parties, notably New Zealand, were somewhat reluctant to develop such a mechanism. In the end, the negotiating parties merely settled on a consultation process.

Fourth, by using a "country club" approach, ACTA fails to include countries that are the major sources of piracy and counterfeiting. Consequently, the agreement fails to target the crux of the problems that the negotiators identified at the beginning of the negotiations. 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 Communities, Japan, and the United States during the early stages.
of the TRIPS negotiations. 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 EU EPAs, especially those that are emerging and 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 new international enforcement norms. 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. While China has ample incentives to join the WTO, and in fact considered WTO accession a matter of national pride, it is hard to imagine China feeling the same toward ACTA.

Moreover, countries tend to adhere to norms they helped to shape. As Senator Sam Nunn noted in his address to the American Assembly in the late 1990s, "China will be more likely to adhere to international norms if she helped to shape them."

For discussion of the trilateral discussions among the United States, the European Union, and Japan, see generally Sell, supra note 631, at 96–120.

See Yu, supra note 82, at 901–06.

For earlier discussions on piracy and counterfeiting problems in China, see generally Yu, supra note 398; Yu, supra note 273; Yu, supra note 411.

See Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009); see also Yu, supra note 445 (examining the WTO panel decision and its ramifications).

See Yu, supra note 411, 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").

The same is true for other big developing countries, such as India and Brazil. As Anand Sharma, the Indian commerce and industry minister, noted: "If [the TRIPS Agreement] has to be revisited in any stage in future, it will be only in multilateral forum—the WTO, it cannot be done outside." India Will Not Accept Any Intellectual Property Talks Outside WTO: Anand Sharma, ECON. TIMES (Apr. 9, 2011, 4:01 AM), http://articles.economictimes.indiatimes.com/2011-04-09/news/29400634_1_intellectual-property-trips-agreement-anand-sharma; see also Michael Geist, Brazil, India Speak Out Against ACTA, MICHAEL GEIST'S BLOG (Oct. 12, 2010), http://www.michaelgeist.ca/content/view/5362/196/ ("Brazilian officials say they do not recognize the legitimacy of the treaty, while Indian officials say they have other priorities and do not see what they would gain from ACTA.").

See Kaitlin Mara & Monika Ermert, ACTA Risks Long-Term Damage to Democratic Public Policymaking, NGOs Say, INTELL. PROP. WATCH (June 30, 2010, 11:02 PM), http://www.ip-watch.org/weblog/2010/06/30/acta-risks-long-term-damage-to-democratic-public-policymaking-ngos-say/ ("At the 'end of the day, ACTA is about Brazil, India' and other emerging economies, [Michael] Geist said. If those countries 'who are the targets [and] who have for too long sat on the sidelines and said they weren't part of the process . . . are willing to stand up and be more aggressive,' then ACTA could be turned into something that would not risk upsetting a balanced IP regime."); see also Yu, supra note 398, at 200–01 (discussing the need to "encourage Chinese membership and active participation in international organizations").
norms that it has helped to shape.”667 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.”668 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, increasingly powerful developing countries are unlikely to buy into a system that 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 developed countries and then shoved 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 to ignore these crucial partners in the negotiations in the first place.669 It is simply short-sighted to consider countries unclubbable by virtue of their lack of like-mindedness.

Even if the ACTA negotiations have not alienated these countries—and some countries, like Brazil, indeed expressed interest in joining the negotiations670—ACTA could make discussion of future international intellectual property norms more difficult. The current negotiations, in fact, have betrayed the futility, or even danger, of giving in to demands of the United States, the European Union, Japan, and other ACTA negotiating parties at the multilateral level. ACTA could also provide the highly unwanted guidelines 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 could create unintended consequences that result in a major setback for some of the poorest countries in the world—especially in the areas of public health, sustainable agriculture, and food

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669. Accord Weatherall, supra note 224, at 4–5 (“To the extent that it is cooperation with these countries which is most likely to achieve the long-term goal of countering counterfeiting, it makes little sense to draft a treaty that will never include these crucial partners.”); see also IQsensato, supra note 557, at 3 (stating that ACTA “seeks confrontation, particularly with developing countries as opposed to cooperation and ignores the efforts by the latter group of countries to implement TRIPS in resource-poor settings”).
670. See Michael Geist, ACTA Update: New Meetings, New Partners, New Issues, Michael Geist’s Blog (June 30, 2009), http://www.michaelgeist.ca/content/view/4092/125/ (reporting that “Canadian officials confirmed that Brazil has approached one ACTA participant about the prospect of joining”). By contrast, India was not invited. See Monika Ermert, Indian Official: ACTA Out of Sync with TRIPS and Public Health, Intell. Prop. Watch (May 5, 2010), http://www.ip-watch.org/weblog/2010/05/05/indian-official-acta-out-of-sync-with-trips-and-public-health/ (reporting that an adviser from the Indian embassy to the EU “said that according to his information India had not been asked to join”).
security. Consider public health, for example. During the fourth WTO ministerial conference 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 are 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 entering into effect 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 agreement’s recognition of the principles set forth in the Doha Declaration and the objectives and principles laid out in Articles 7 and 8 of the TRIPS Agreement. 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:

671. Doha Declaration, supra note 81.
672. Id. ¶¶ 1–2.
673. Id. ¶ 5.
675. See ACTA, supra note 5, pmbl.
676. See id. art. 2.3.
677. See generally Abbott, supra note 206 (discussing the seizure of in-transit generic drugs in Europe).
Six Secret Fears of ACTA

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 recognizes 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.\(^6\)

To make a point, India and Brazil recently filed complaints against the European Union and the Netherlands over the repeated seizure of in-transit generic drugs.\(^7\)

Although ACTA does not require the seizure of “in transit” goods, it authorizes such seizure\(^8\) and includes other provisions that could have serious ramifications for access to essential medicines in the less-developed world, such as those concerning border measures and civil and criminal enforcement.\(^9\) While the ACTA negotiating parties have repeatedly emphasized the need for great international cooperation to deal with counterfeit drugs, the greatest challenge seems not to be “IP infringement, but the health risks created for patients by adulterated products.”\(^10\) From the standpoint of public health and consumer safety, much better will be a policy that focuses on substandard drugs as opposed to one that relies on such imperfect proxies as counterfeiting or intellectual property infringement.

\(^6\) Id. at 50.

\(^7\) Request for Consultations by India, European Union and a Member State—Seizure of Generic Drugs in Transit, WT/DS408/1 (May 19, 2010); Request for Consultations by Brazil, European Union and a Member State—Seizure of Generic Drugs in Transit, WT/DS409/1 (May 19, 2010). Most recently, India and the European Union reached an interim settlement. See India, EU Ink Deal to End Drug Seizure for Now, TIMES OF INDIA (July 29, 2011, 1:21 AM), http://articles.timesofindia.indiatimes.com/2011-07-29/india-business/29828750_1_generic-drugs-consignments-of-generic-medicines-eu-parliament. It remains to be seen whether India will withdraw its complaint from the WTO and whether Brazil will follow suit.

\(^8\) See ACTA, supra note 5, art. 16.2 (“A Party may adopt or maintain procedures with respect to suspect in-transit goods . . . .”).


\(^10\) Correa, supra note 321, at 56.
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 efforts to combat commercial piracy and counterfeiting, the agreement and its negotiations have posed serious challenges to the multilateral 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, academic 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 will alter the balance in the existing intellectual property system. And for most people, especially consumers, ACTA will provide more harm than good. The agreement should be completely revamped.