

9-1-2011

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## Recommended Citation

Daniel Lifschitz, *The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew*, 34 Loy. L.A. Int'l & Comp. L. Rev. 197 (2011).

Available at: <http://digitalcommons.lmu.edu/ilr/vol34/iss2/2>

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# The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew

DANIEL LIFSCHITZ\*

Trade agreements are not terribly useful if other countries don't sign them. I can write up the "Harold Feld Trade Agreement" that says I am entitled to duty free liquor whenever I travel, but if no one signs it I'm still gonna pay VAT when I do the Whisky Trail. So when USTR and the other trade associations involved in negotiating ACTA let Hollywood drive the crazy train, and the rest of the world decides they don't like the crazy stuff, you don't have a trade agreement, you have a train wreck.<sup>1</sup>

Harold Feld  
Legal Director, Public Knowledge

The Anti-Counterfeiting Trade Agreement (ACTA) is an effort spearheaded by the United States and other developed nations to strengthen international protection of intellectual property (IP) rights, intended to supplement existing treaties such as the Berne Convention, the Paris Convention, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>2</sup> ACTA members and supporters have promoted it as a multilateral treaty or agreement, though this claim

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\* J.D., Loyola Law School, 2012; B.A., Washington & Jefferson College, 2009. The author would like to thank Professor Karl Manheim for his assistance in formulating this note, Professor Jay Dougherty for stoking the author's interest in international intellectual property law, and the dedicated staff of the Loyola of Los Angeles International and Comparative Law Review for their tireless efforts and helpful feedback during the editing process.

1. Harold Feld, *ACTA: If You Write a Trade Agreement No One Will Sign, What's the Point?*, PUB. KNOWLEDGE (Feb. 14, 2012), <http://www.publicknowledge.org/blog/acta-if-you-write-trade-agreement-no-one-will>.

2. SHAYERAH ILIAS, CONG. RESEARCH SERV., R41107, THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT: BACKGROUND AND KEY ISSUES 1 (Mar. 12, 2010), available at [http://assets.opencrs.com/rpts/R41107\\_20100312.pdf](http://assets.opencrs.com/rpts/R41107_20100312.pdf).

has been subject to debate.<sup>3</sup> The drafters of ACTA claim the agreement is critical both to “harmonize” national IP laws and to bridge the gap between current and necessary standards of international IP protection:

[T]he proliferation of counterfeit and pirated goods as well as the proliferation of services that distribute infringing material, undermines legitimate trade and the sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public.<sup>4</sup>

With this in mind, ACTA seeks to “provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights.”<sup>5</sup> The exact nature of those means fluctuated from draft to draft,<sup>6</sup> but the finalized version is to be overseen by the “ACTA Committee,” a new international body created solely to enforce the agreement.<sup>7</sup> The new body is independent of existing institutions such as the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and the United Nations.<sup>8</sup> This article explores whether ACTA’s particular brand of IP “harmonization” is necessary (or even desirable) and, if so, whether upending existing legal regimes is the best way to accomplish it, in light of its recent public vilification.

Due to the combination of ACTA’s protectionist measures (which the preamble of the agreement tacitly admits will go beyond the

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3. Supporters of ACTA have claimed it requires no legislative referendum and may be adopted through the powers of the executive branch. See Andrew Moshirnia, *Let's Make A Deal! Will ACTA Force an End to Executive Agreements?*, CITIZEN MEDIA LAW PROJECT (Feb. 9, 2010), available at <http://www.citmedialaw.org/blog/2010/lets-make-deal-will-acta-force-end-executive-agreements>. Detractors, meanwhile, have noted that since it deals with intellectual property law [which, in the United States, is supposed to be within the exclusive control of the legislature], it must be a treaty, or it is otherwise unconstitutional. See Letter from Brook Baker et al., 75 Law Professors, to Pres. Barack Obama (Oct. 28, 2010) [hereinafter PIJIP Letter], available at <http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta>. For the purposes of this article, whenever the term “treaty” or “agreement” is used to describe ACTA, it is done without regard for the substantive constitutional ramifications of each classification.

4. Anti-Counterfeiting Trade Agreement (May 2011 Draft) Preamble E-1 [hereinafter ACTA (May 2011 Draft)], available at [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147937.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf).

5. *Id.*

6. Rashmi Rangnath, *USTR Releases Finalized ACTA Text: Concerns Remain*, PUB. KNOWLEDGE (Nov. 15, 2010, 10:41 PM), <http://www.publicknowledge.org/blog/ustr-releases-finalized-acta-text-concerns-re>.

7. ACTA (May 2011 Draft), *supra* note 4, art. 36.

8. *Id.* ch. V, arts. 36–38.

requirements of TRIPS),<sup>9</sup> its forum-avoidant negotiations, and its establishment of the ACTA Committee, ACTA has been criticized as being part of what some have termed the “global IP ratchet”—a concerted, long-term effort by IP maximalists to leverage increased protectionism through successive rounds of strong-armed international policy making and forum-shifting.<sup>10</sup> The ratchet theory traces back to the 1980’s, when the United States shifted the subject of IP protection from WIPO (a trade-neutral forum where it lacked leverage) to the General Agreement on Tariffs and Trade (GATT) (a trade-focused forum where it had leverage) in order to increase the amount of protection it could procure from developing countries participating in the relevant negotiations.<sup>11</sup> Since then,

[t]hose who seek to ration access to IP [have been] engaged in an elaborate cat and mouse game with those who seek to expand access. As soon as one venue becomes less responsive to a high protectionist agenda, IP protectionists shift to another in search of a more hospitable venue.<sup>12</sup>

While the ratchet theory provides an interesting (if unscrupulous) model for understanding the recent efforts of IP maximalists on the global stage, it also creates fertile ground to examine the collateral damage caused by their tactics—specifically, the delegitimizing of “harmonization” as both a balanced and politically viable legal construct going forward.

By attempting to use harmonization as a blunt instrument to beat heightened and often inapposite IP standards into legal regimes without overt legislative approval or meaningful public input, ACTA diminishes respect for both intellectual property law and for international harmonization efforts in general. This long-term sacrifice for attempted short-term gain (ratcheting up IP protection another notch) contravenes the core purpose of harmonization, which is to bring nations to meaningful consensus on issues of international importance,<sup>13</sup> and reveals the true intent of ACTA: to forge protectionist policies amongst

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9. *Id.* pmb1. (“*Intending* to provide effective and appropriate means, complementing the TRIPS Agreement, for the enforcement of intellectual property rights . . .”) [emphasis in original].

10. *See generally*, Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, 1 IQSENSATO OCCASIONAL PAPERS (2008), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>.

11. *Id.* at 4.

12. *Id.* at 5.

13. *The Wittem Project: European Copyright Code*, WITTEM GROUP (Apr. 2010), [http://www.copyrightcode.eu/Wittem\\_European\\_copyright\\_code\\_21%20april%202010.pdf](http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf).

a “select group of like-minded countries,”<sup>14</sup> then foist them on “third-nations such as China, Russia, and Brazil”<sup>15</sup> that developed nations perceive to have unreasonably lax standards of IP protection. Unless civil states and citizens’ groups stand up to oppose this conflation of methods and goals, “harmonization” will become synonymous with “backroom deal,” and it will prove increasingly difficult to utilize any balanced form of the construct without immediate skepticism and distrust from both foreign governments and the public at large.

This article’s purpose is to examine the history and goals of ACTA in order to understand both how and why it abuses the harmonization construct. Part I will briefly discuss the modern history of IP harmonization leading up to the conception of ACTA. Part II will detail the basic content and secretive drafting of ACTA, contrasting both to the ideals of harmonization. Part III will step back to examine the rhetoric surrounding protection of IP to better understand how ACTA’s namesake is not congruent with its provisions. Part IV will examine ACTA’s potential to prematurely lock in developing areas of IP law as an example of harmonization abuse. Part V will examine the problems that have arisen in the negotiation rounds to further demonstrate ACTA’s disinterest in meaningful harmonization. Part VI will examine the true goal of ACTA and its likelihood of successful imposition amongst developing countries in particular. Part VII will briefly look beyond ACTA to determine how similar IP-ratcheting efforts conceived in its wake have retroactively affected its viability. Finally, Part VIII will conclude by looking at the state of IP harmonization in the aggregate, evaluating ACTA’s place (or lack thereof) within it, and suggesting what should be done moving forward.

## I. THE DELICATE ISSUE OF IP HARMONIZATION

IP is, at its core, an artificial monopoly on certain goods in the marketplace, granted to rights owners by governments.<sup>16</sup> How a

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14. *Viewing Cable 06TOKYO3567, Japan Backs Anti-Counterfeiting Trade Agreement Proposal*, WIKILEAKS (Aug. 30, 2011), <http://wikileaks.ch/cable/2006/06/06TOKYO3567.html> [hereinafter Tokyo Cable 1] (June 28, 2006 diplomatic cable VZCZCXRO2649 from the American Embassy in Tokyo to Washington, D.C.).

15. *Viewing Cable 06TOKYO4025, PM Koizumi’s Advisor Proposes Bilateral IPR Agenda*, WIKILEAKS (Aug. 30, 2011), <http://wikileaks.ch/cable/2006/07/06TOKYO4025.html> [hereinafter Tokyo Cable 2] (July 20, 2006 diplomatic cable VZCZCXRO5711 from the American Embassy in Tokyo to Washington, D.C.).

16. See Lucy Montgomery & Jason Potts, *Global Reuse and Adaptation in the Creative Industries - Three Further Arguments Against Intellectual Property Based on Lessons From China* 6, DIME Working Papers on Intellectual Property Rights, DIME Working Pack ‘The Rules, Norms and Standards on Knowledge Exchange,’ Working Paper No. 59, Apr. 2008,

government chooses to protect this property is heavily dependent on the relative values of its society, which explains the variety of approaches practiced by different countries with any given branch of IP.<sup>17</sup> A typical example in the context of copyright law is the “moral rights” doctrine, which is addressed in Article 6*bis* of the Berne Convention (one of the first major international treaties attempting to harmonize IP laws between various countries).<sup>18</sup> Under the provision, an author has the right “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to his work . . . prejudicial to [his] honor or reputation,” even if he has divested his economic rights to said work.<sup>19</sup> While both France and the United States are signatories to Berne, in practice, Article 6*bis* is largely made to conform to each country’s cultural values rather than the other way around.<sup>20</sup> As such, France provides full protection for an author’s moral rights (in line with a cultural history of indelibly linking creative work to the self),<sup>21</sup> while the United States allows for full *divestment* of such rights (in line with a historical view of IP as fully alienable in the same manner as traditional chattel).<sup>22</sup> Though moral rights are not brought up in the text of ACTA, they are helpful in illustrating the substantive differences that can arise in the context of trying to harmonize IP laws internationally, and the fluidity required for those efforts to effectively conform to cultural contours.<sup>23</sup>

The international harmonization of IP laws can be traced back well over a century to the Paris Convention in 1883 (dealing with “industrial property” such as patents and trademarks),<sup>24</sup> and the Berne

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available at <http://www.dime-eu.org/files/active/0/WP59-IPR.pdf> (describing IP as “an artificial monopoly to enable producers of ideas to capture monopoly rents that at least cover their fixed costs of production.”).

17. See Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT’L & COMP. L. REV. 127, 132 (2003) (discussing the impact of culture on the inculcation and development of copyright laws).

18. Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986) [hereinafter Berne Convention], available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html).

19. *Id.*

20. Compare *infra* notes 21, 22.

21. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PRO. INTELL.] arts. L-121-1 to L-121-8 (Fr.) available at [http://www.celog.fr/cpi/lv1\\_tt2.htm](http://www.celog.fr/cpi/lv1_tt2.htm).

22. Upon accession to Berne, the United States Congress claimed that its “moral rights” provisions were sufficiently addressed by existing domestic statutes, such as laws covering libel and false designation of origin. See S. REP. NO. 100-352, at 9 (1988).

23. See generally S. REP. NO. 100-352 (1988).

24. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, available at [http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf).

Convention in 1886 (dealing with copyrights).<sup>25</sup> Discussing the impact of the Paris Convention in particular, Cícero Gontijo has credited the longevity of these early treaties to the fact that they “did not try to level national laws,” but rather “stipulated a vast legislative freedom for each country and only required the equal treatment of nationals and foreigners (national treatment principle).”<sup>26</sup> The administrative secretariats of Paris and Berne merged in 1893 to form the United International Bureaux for the Protection of Intellectual Property, which relocated to Geneva in 1960 and was succeeded in 1967 by WIPO.<sup>27</sup> WIPO currently administers twenty-four different treaties concerning various IP issues.<sup>28</sup> Though WIPO’s guiding principle is “to promote the *protection* of intellectual property throughout the world” [emphasis added],<sup>29</sup> it allows individual countries to mix and match the treaties acceded to,<sup>30</sup> striking a pragmatic and diplomatic balance between effective harmonization and respecting both the self-determination and cultural nuances of its various member states.

Over the past two decades, however, WIPO has been slowly marginalized by developed countries dissatisfied by the deferential and bureaucratic nature of the WIPO process, which limited their ability to impose (rather than propose) strengthened IP protections.<sup>31</sup> Those countries, in turn, began a forum-shifting process to move the protection of IP into a trade-driven context, where it would be easier to leverage

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25. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html).

26. Cícero Gontijo, *Changing the Patent System from the Paris Convention to the TRIPS Agreement: The Position of Brazil* GLOBAL ISSUE PAPERS NO. 26, 7 (Andrea Carina Ceschi, trans., Heinrich Böll Foundation, Dec. 2005), [http://fdcl-berlin.de/fileadmin/fdcl/Publikationen/GIP\\_Gontijo-Patente.pdf](http://fdcl-berlin.de/fileadmin/fdcl/Publikationen/GIP_Gontijo-Patente.pdf).

27. See Convention Establishing the World Intellectual Property Organization arts. 2–3, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (as amended Sept. 28, 1979) [hereinafter Convention Establishing WIPO], available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=130331](http://www.wipo.int/wipolex/en/text.jsp?file_id=130331).

28. See *WIPO-Administered Treaties*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/treaties/en/> (last visited July 11, 2012).

29. Convention Establishing WIPO, *supra* note 27, art. 3(i).

30. *Admission Criteria of WIPO*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/members/en/> (last visited July 11, 2012). A country may join WIPO by invitation or by membership to any one of a number of organizations or conventions.

31. Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 20 (2004) (“Two factors motivated the United States and the EC, in response to pressures from their respective intellectual property industries, to shift intellectual property lawmaking from WIPO to GATT. The first related to dissatisfaction with treaty negotiations hosted by WIPO. The second focused on institutional features of the GATT that facilitated adoption of more stringent intellectual property protection standards that these states favored.”).

higher levels of protection.<sup>32</sup> This began with the inclusion of IP issues in the 1986 mandate for the Uruguay Round of GATT negotiations, leading to the creation of the WTO.<sup>33</sup> From there, the passage of TRIPS in 1994 superseded a slew of WIPO treaties (many incorporated by mention)<sup>34</sup> by setting minimum requirements for signatory nations' domestic laws concerning copyright, trademark, and patent law—all congruent with harmonization efforts, but administered by the WTO instead of WIPO.<sup>35</sup> All nations wishing to join the WTO were and are required to accede to TRIPS, with very little flexibility in the process.<sup>36</sup> Essentially, any WTO nation that lagged on acceding to the protectionist treaties of WIPO was yanked up to speed by TRIPS.<sup>37</sup>

The forum-shift from WIPO to the WTO is reflective of a similar shift in the overall tone of IP harmonization, one favoring increased uniformity and greater deference to industrialized countries (through strengthened IP protections) over cultural nuance and minimalism.<sup>38</sup> According to economic scholars Braithwaite and Drahos, the United States and other developed countries were instrumental to the lobbying effort that passed TRIPS, in particular by coercing less-developed countries under Section 301 of TRIPS.<sup>39</sup> Section 301 authorizes the United States to respond to any perceived denial of rights or benefits

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32. *Id.* at 22 (“Developing nations agreed to include intellectual property within the newly created WTO in exchange for securing access to the markets of industrialized states for their agricultural products, textiles, and other goods.”).

33. *Id.* at 21.

34. BRAITHWAITE AND DRAHOS, *GLOBAL BUSINESS REGULATION* 63 (Cambridge University Press, 2000) (“TRIPS incorporates various other intellectual property conventions by reference.”)

35. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 300 (1994) [hereinafter TRIPS Agreement].

36. *Frequently Asked Questions About TRIPS in the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm) (last visited July 11, 2012) (“All the WTO agreements . . . apply to all WTO members. The members each accepted all the agreements as a single package with a single signature—making it, in the jargon, a ‘single undertaking.’ The TRIPS Agreement is part of that package. Therefore it applies to all WTO members.”)

37. BRAITHWAITE & DRAHOS, *supra* note 34, at 63 (“The post-TRIPS era has been one in which countries have had to engage in national implementation of their obligations under TRIPS. Least-developed countries have the advantage of a ten-year transitional period under the agreement, but they have been pressured by developed countries, particularly the US, to move sooner rather than later on its implementation.”).

38. *Id.* at 63 (“In the past, states have been able to steer their way through the international intellectual property framework by taking reservation on clauses in treaties or by not ratifying certain protocols or conventions. All of TRIPS is binding on all members of the WTO.”).

39. *Id.* (“Once the US had persuaded a sufficient number of countries to act on the intellectual property issue at a bilateral level, it could expect little resistance to the TRIPS proposal (in fact resistance to US negotiating objectives at a multilateral forum could and did trigger the 301 process).”).



under a trade agreement by taking action against the offending nation “to enforce such rights or to obtain the elimination of such act, policy, or practice.”<sup>40</sup> Arguably, the WTO’s dispute resolution process has replaced Section 301 as the *de facto* response to perceived IP disrespect by foreign countries, but both methods retain the same overall message: softness on IP protection will not be taken lightly.

Section 301(c) outlines the various sanctions at the Office of the United States Trade Representative’s (USTR) disposal when dealing with a foreign country’s perceived prejudicing of U.S. interests,<sup>41</sup> and Section 301(d)(3)(B) includes failure to protect IP rights as an example of the sort of unreasonable act that could provoke this retaliation.<sup>42</sup> As Braithwaite and Drahos note, “[Using Section 301] proved so effective that disputes over intellectual property issues during the Uruguay Round became disputes between the intellectual property triumvirate, the US, Europe and Japan. By the final stages of the negotiations, developing countries had long given up resisting the TRIPS proposal.”<sup>43</sup>

At this point in the negotiation process, harmonization began to look a lot more like coercion than cooperation. Where WIPO fostered a sense of deference and cultural respect between member nations, TRIPS took a blunter approach by essentially barring access to the WTO’s various international markets until a country ratcheted up its IP laws to acceptable levels.<sup>44</sup> This brought Berne-resistant states such as Russia and China to the table,<sup>45</sup> but undermined the efficacy of WIPO and the overall sense that IP rights enforcement was up for legitimate debate.<sup>46</sup> Furthermore, by moving it into a strictly trade-driven context, TRIPS began a trend of downplaying the uniquely human elements of IP while forging international agreements, one that has arguably had drastic ramifications for both current and future harmonization efforts.<sup>47</sup>

As a study in contrasts, it is worth mentioning two particular WIPO treaties passed in the immediate post-TRIPS period: the WIPO

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40. 19 U.S.C. § 2411(a) (2010).

41. *Id.*

42. *Id.* § 2411(d)(3)(B).

43. BRAITHWAITE & DRAHOS, *supra* note 34, at 63.

44. *Frequently Asked Questions About TRIPS in the WTO*, *supra* note 36.

45. Compare Berne Convention for the Protection of Literary and Artistic Works, available at <http://www.wipo.int/treaties/en/documents/pdf/berne.pdf> (accession dates of states) with *Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Sept. 27, 2011) (China acceded to Berne two weeks before signing to TRIPS, while Russia joined Berne three months after adapting TRIPS).

46. Helfer, *supra* note 31, at 4–7.

47. See TRIPS Agreement, *supra* note 35, § 3.

Performances and Phonograms Treaty and the WIPO Copyright Treaty. Finalized in 1996, “[t]he negotiating history of these two treaties is significant in that copyright owners met with organized resistance from copyright users”<sup>48</sup> as enabled by the forum. The result of this clash of interests was, ultimately, a more balanced treaty that represented the rights of both owners and users.<sup>49</sup> TRIPS, on the other hand, was drafted almost entirely with copyright owners’ interests in mind, leading to an outcry from developing nations over the narrow readings of its provisions on which the developed members of the WTO insisted.<sup>50</sup>

It is in light of this particular history of harmonization that ACTA must be understood. TRIPS was the developed world’s answer to the “failure” of WIPO to achieve a particular desired level of harmonization, implementing in one fell swoop what the latter did not achieve in decades of operating under balancing protocols that permitted selective adoption of treaties by members.<sup>51</sup> The efficacy of this maneuver marked a fundamental shift in the tone of harmonization, where the end goal was no longer to balance IP for its own sake, but to drive it in a particular, uniform direction to service exterior concerns.<sup>52</sup> By using the GATT to frame IP as a trade issue, TRIPS justified shifting the debate from WIPO to the WTO, where developed countries could draft harmonization provisions with less pressure from consumer advocacy groups or developing nations.<sup>53</sup> Harmonization as a trade method became distinct from harmonization as a legal method, and the WTO was almost exclusively concerned with servicing the former.<sup>54</sup>

ACTA represents the latest iteration of this trend, having shifted somewhat from a trade concern to a security and infringement-based concern. Though its preamble does discuss some trade concerns outright,<sup>55</sup> much of the language of ACTA is dressed up with security

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48. BRAITHWAITE & DRAHOS, *supra* note 37, at 64.

49. *Id.* (“The Copyright Treaty grants copyright owners a right of communication to the public, but recognizes the right of states to determine the extent of the copyright owner’s right of distribution.”).

50. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration], *available at* [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.pdf) (reaffirming flexibility of TRIPS member states in circumventing patent rights for better access to essential medicines).

51. See BRAITHWAITE & DRAHOS, *supra* note 37, at 63, 67.

52. See *id.* at 63–64.

53. Helfer, *supra* note 31, at 19, 22.

54. See *id.* at 23–24.

55. ACTA (May 2011 Draft), *supra* note 4, pmb1. (“[T]he proliferation of counterfeit and pirated goods as well as the proliferation of services that distribute infringing material,

rhetoric, including allegations that piracy “provides a source of revenue for organized crime and otherwise poses risk to the public.”<sup>56</sup> ACTA’s very name (“Anti-Counterfeiting . . .”) evokes trademark law, the primary purpose of which is to protect the public, even though trademark is only one of the fields of IP implicated by the agreement.<sup>57</sup> On its own, this rhetorical shift is not overly disconcerting. The procedural posture of ACTA, however, is rife with troubling differentiations from the agreements preceding it. While TRIPS was openly negotiated, ACTA was drafted almost entirely behind closed doors with select stakeholders.<sup>58</sup> TRIPS brought its debate to a known entity (the WTO), whereas ACTA seeks to take development and enforcement matters into its own hands.<sup>59</sup> Finally, while WIPO has maintained a modicum of civility with the WTO,<sup>60</sup> WIPO’s Director General has not minced words on what a “bad development” ACTA’s implementation would be for the current multilateral system.<sup>61</sup>

## II. THE INCEPTION, EVOLUTION, AND OBFUSCATION OF ACTA

To better understand the concerns stemming from ACTA, the background of the agreement must be examined. ACTA was primarily conceived in 2006 by the United States and Japan “to bring together those countries, both developed and developing, that are interested in fighting counterfeiting and piracy, and to negotiate an agreement that enhances international cooperation and contains effective international standards for enforcing intellectual property rights.”<sup>62</sup> Japan previously floated the idea of a new IP enforcement treaty at the Global Congress on Combating Counterfeiting (GCCC), and the Congress seized upon it in the 2005 Lyon Declaration and its 2006 follow-up.<sup>63</sup> The number of

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undermines legitimate trade and the sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses . . .”).

56. *Id.*

57. *See infra* Part III.

58. *See infra* Part II.

59. ACTA (May 2011 Draft), *supra* note 4, ch. 5.

60. *See WTO-WIPO Cooperation Agreement*, WORLD TRADE ORG. (Dec. 22, 1995), [http://www.wto.org/english/tratop\\_e/trips\\_e/wtowip\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/wtowip_e.htm).

61. Catherine Saez, *ACTA a Sign Of Weakness in Multilateral System*, WIPO Head Says, INTELL. PROP. WATCH (June 30, 2010, 6:18 PM), <http://www.ip-watch.org/weblog/2010/06/30/acta-a-sign-of-weakness-in-multilateral-system-wipo-head-says>.

62. *The Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion*, FOREIGN AFF. & INT’L TRADE CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/key-summary-resume-cle.aspx?lang=en> (last updated July 18, 2011) [hereinafter *ACTA Summary*].

63. SECOND GLOBAL CONGRESS ON COMBATING COUNTERFEITING AND PIRACY, THE

countries involved in the proceedings slowly increased, with Canada, the European Union (EU), and Switzerland joining preliminary talks throughout 2006 and 2007.<sup>64</sup> Official negotiations over ACTA began in June of 2008, attaching Australia, Mexico, Morocco, New Zealand, South Korea and Singapore as well.<sup>65</sup> According to reports, the October 2010 Tokyo round of negotiations brought the participating countries to “agreement in principle.”<sup>66</sup> One last round of talks (described as a “legal scrub”) took place in Sydney, Australia in early 2011.<sup>67</sup>

Under its provisions, ACTA would establish a new international legal framework with its own governing body, eschewing existing international institutions such as WIPO and the WTO.<sup>68</sup> While the European Commission has stated that ACTA “will be consistent with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and will respect the Declaration on TRIPS and Public Health,”<sup>69</sup> others have claimed that it will likely be construed to go far beyond TRIPS,<sup>70</sup> with its “ultimate objective” admittedly being to coerce large emerging economies, “where IPR enforcement could be improved, such as China, Russia or Brazil, . . . [to] sign up to the global pact.”<sup>71</sup>

The final consolidated text of ACTA contains a total of six chapters, themselves containing a total of 45 articles.<sup>72</sup> Chapter I covers initial provisions and definitions,<sup>73</sup> integrating portions of TRIPS by reference.<sup>74</sup> Chapter II provides the basic legal framework to be followed by the signatories, itself split into four subsections, the four subsections preceded by a preamble of general obligations.<sup>75</sup> Section 1

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LYON DECLARATION 1, 4, (Nov. 15, 2005) [hereinafter LYON DECLARATION], *available at* <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf>.

64. *ACTA Summary*, *supra* note 62.

65. *EU, US and Others Hold Geneva Talks on Anti-Counterfeiting Trade Agreement*, EUR. COMMISSION (Jun. 5, 2008), [http://trade.ec.europa.eu/doclib/docs/2008/june/tradoc\\_139086.pdf](http://trade.ec.europa.eu/doclib/docs/2008/june/tradoc_139086.pdf).

66. Elaine Lies et al., *Countries Reach Tentative Anti-Counterfeiting Pact*, REUTERS, Oct. 2, 2010, *available at* <http://www.reuters.com/article/2010/10/02/us-trade-counterfeiting-USTRE6910AO20101002>.

67. IP POL’Y COMMITTEE BLOG (Nov. 8, 2010), <http://tacd-ip.org/archives/270>.

68. ACTA (May 2011 Draft), *supra* note 4, ch. V.

69. *ACTA Summary*, *supra* note 62, at 2.

70. Jonathan Lynn, *States Clash over Anti-Counterfeiting Enforcement*, REUTERS (Jun. 9, 2010), <http://in.reuters.com/article/idINIndia-49179920100609>.

71. *ACTA Fact Sheet (March 2010)*, OFF. U.S. TRADE REPRESENTATIVE, *available at* <http://www.ustr.gov/acta-fact-sheet-march-2010> [hereinafter Fact Sheet].

72. ACTA (May 2011 Draft), *supra* note 4, arts. 1.1–1.X.

73. *Id.* ch. I.

74. *Id.* art. 1, n.4.

75. *Id.* ch. II, art. 2.X.

(in which patents and trade secrets are optional) covers civil enforcement, including damage awards and injunctive relief,<sup>76</sup> Section 2 (which does not cover patents by party agreement)<sup>77</sup> deals with border measures and suggests (but does not require) *de minimis* exceptions for personal affects (e.g., imported goods for personal use),<sup>78</sup> Section 3 covers criminal enforcement standards,<sup>79</sup> and Section 4 covers digital enforcement (including anti-circumvention provisions).<sup>80</sup>

After establishing the bulk of its substance in the first two chapters, ACTA moves on to more ministerial issues. Chapter III urges transparency, public consultation, and public awareness, but only insofar as it communicates the need for protecting IP and educating on the available methods for doing so.<sup>81</sup> Chapter IV lays the groundwork for international cooperative efforts in enforcing the agreement.<sup>82</sup> And while Chapters V and VI of ACTA provide the possibility for subsequent amendments to the agreement,<sup>83</sup> it does so without offering public or judicial review of them, only extending the elective possibility of third-party consultation.<sup>84</sup>

The closed nature of ACTA's amendment process (which, as previously noted, eschews public and judicial scrutiny) is consistent with the lack of transparency that had marked the entire negotiation process. The existence of the agreement was first brought to mainstream public attention when a 2008 discussion paper concerning preliminary drafting was published on the website Wikileaks.<sup>85</sup> The website noted that the paper had been distributed only to pro-copyright lobbyists for comment, with consumer rights groups excluded from the discussion.<sup>86</sup> In the wake of the leak, many such groups banded together to demand

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76. *Id.* ch. II, § 1.

77. *Id.* ch. II, § 2.

78. *Id.*

79. *Id.* ch. II, § 3.

80. *Id.* ch. II, § 4.

81. *Id.* ch. III.

82. *Id.* ch. IV.

83. *Id.* chs. V–VI.

84. *Id.* ch. V, art. 5.5.

85. *Wikileaks Runs ACTA Proposal*, P2PNET (May 24, 2008), <http://www.p2pnet.net/story/16026>.

86. *The Anti-Counterfeiting Trade Agreement*, IP JUST., available at <http://ipjustice.org/wp/campaigns/acta/> (last visited Sept. 27, 2011) (“[A] ‘Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement’ was reportedly provided to select lobbyists in the intellectual property industry, but not to public interest organizations concerned with the subject matter of the proposed treaty (Wikileaks posted the leaked ACTA discussion paper on 22 May 2008).”).

the negotiations be opened up to them,<sup>87</sup> and the Electronic Frontier Foundation filed a federal lawsuit to expedite the process.<sup>88</sup> Both efforts were summarily rebuffed by the USTR, first on the grounds that such release could “implicate national security or expose the USTR’s deliberative processes,”<sup>89</sup> then by unconvincingly claiming the documents were “classified in the interest of national security pursuant to Executive Order 12958.”<sup>90</sup> Efforts to obtain further information outside the United States met similar fates: when the Foundation for a Free Information Infrastructure filed a request to the EU Council to release documents related to the ACTA negotiations, the Council simply refused to do so.<sup>91</sup>

As it became apparent that any substantive information concerning ACTA’s content was being held close to the drafters’ chests, voices of concern began to emanate from the U.S. Congress: Senators Patrick Leahy and Arlen Specter sent a letter to the USTR expressing worries that ACTA “could limit Congress’s ability to make appropriate refinements to intellectual property law in the future.”<sup>92</sup> A subsequent letter from Senators Bernie Sanders and Sherrod Brown, directed towards the United States Patent and Trademark Office (USPTO), noted that “ACTA involves dozens if not hundreds of substantive aspects of intellectual property law and its enforcement, including those that have

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87. Press Release, Essential Action, Secret Counterfeiting Treaty Public Must Be Made Public, Global Organizations Say (Sept. 15, 2008) [hereinafter Essential Action Press Release], available at [http://wikileaks.org/wiki/Secret\\_Counterfeiting\\_Treaty\\_Public\\_Must\\_be\\_Made\\_Public\\_Global\\_Organizations\\_Say](http://wikileaks.org/wiki/Secret_Counterfeiting_Treaty_Public_Must_be_Made_Public_Global_Organizations_Say).

88. *U.S. Trade Office Withholds Documents on Secret IP Enforcement Treaty*, ELECTRONIC FRONTIER FOUND. (Sept. 18, 2008), <http://www.eff.org/press/archives/2008/09/17>.

89. *Government Blocks Release of Documents on Secret IP Enforcement Treaty*, ELECTRONIC FRONTIER FOUND. (Jan. 29, 2009), <https://www.eff.org/press/archives/2009/01/29>.

90. James Love, *White House Says ACTA Text a State Secret. EU Parliament Says Time for More Transparency*, KNOWLEDGE ECOLOGY INT’L (Mar. 12, 2009), <http://www.keionline.org/blogs/2009/03/12/acta-state-secret/> [hereinafter EU Parliament: Time for More Transparency]. It should be noted that Executive Order 12958 allows material to be classified only if disclosure would do “damage to the national security and the original classification authority is able to identify or describe the damage.” See Classified National Security Information, 60 FED. REG. 19825 (Apr. 17, 1995), available at <http://www.fas.org/sgp/clinton/eo12958.html>. Yet the text of the FOIA request which prompted the invocation of 12958 noted that the texts requested “are being widely circulated to corporate lobbyists in Europe, Japan, and the U.S.” See James Love, *Obama Administration Rules Texts of New IPR Agreement Are State Secrets*, HUFFINGTON POST (Mar. 12, 2009), [http://www.huffingtonpost.com/james-love/obama-administration-rule\\_b\\_174450.html](http://www.huffingtonpost.com/james-love/obama-administration-rule_b_174450.html).

91. Ante Wessels, *EU Council Refuses to Release Secret ACTA Documents*, FOUND. FOR FREE INFO. INFRASTRUCTURE, [http://press.ffii.org/Press\\_releases/EU\\_Council\\_refuses\\_to\\_release\\_secret\\_ACTA\\_documents](http://press.ffii.org/Press_releases/EU_Council_refuses_to_release_secret_ACTA_documents) (last modified Aug. 15, 2009).

92. Stephanie Condon, *Pro-IP Senators Concerned Anti-Counterfeiting Treaty May Be Too Broad*, CNET NEWS (Oct. 2, 2008), [http://news.cnet.com/8301-13578\\_3-10057100-38.html](http://news.cnet.com/8301-13578_3-10057100-38.html).

nothing to do with counterfeiting . . . [and] the public has a right to monitor and express informed views on proposals of such magnitude.”<sup>93</sup> Yet another letter from Senator Ron Wyden demanded that the USTR confirm the veracity of leaks surrounding the then-unfinished agreement, noting that the “objectives behind [ACTA’s] negotiations still remain inadequately clear to the American public.”<sup>94</sup>

Similar reactions could be seen across the international community’s legislative and diplomatic bodies. The EU Parliament voted 663 to 13 against validating ACTA, proclaiming: “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.”<sup>95</sup> Individual countries also balked: Brazil plainly described ACTA as illegitimate,<sup>96</sup> the Mexican Senate voted unanimously to withdraw from its negotiations,<sup>97</sup> and India voiced serious concerns on the floor of the WTO:

While India is committed to dealing with IPR enforcement issues in line with its TRIPS obligations, the introduction of intrusive IPR enforcement rules in international trade does not represent a reasonable or realistic response. Agreements such as ACTA have the portents to completely upset the balance of rights and obligations of the TRIPS Agreement. They could also potentially undermine serious decisions taken multilaterally such as the Doha Declaration on Public Health in WTO and the Development Agenda in WIPO. An enforcement response, if required, has to emerge from a multilateral and transparent process, as is available in the WTO TRIPS Council, and should fully conform to the Objectives and Principles (Art 7, 8) of TRIPS agreement and the balance of rights and obligations enshrined in the Agreement.<sup>98</sup>

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93. James Love, *Senators Sanders and Brown Ask White House to Make ACTA Text Public*, KNOWLEDGE ECOLOGY INT’L (Nov. 3, 2009), <http://www.keionline.org/node/698>.

94. David Kravets, *Senator Demands IP Treaty Details*, THREAT LEVEL (Jan. 7, 2010), <http://www.wired.com/threatlevel/2010/01/senator-demands-details/>.

95. *Parliament Threatens Court Action on Anti-Piracy Treaty*, EURACTIV.COM (last updated Mar. 12, 2010), <http://www.euractiv.com/en/health/meps-defy-commission-internet-piracy-agreement-news-326215>.

96. Jamil Chad, *Brasil Ataca Acordo de Ricos Contra Falsificação [Brazil Attacks Deal Against Aounterfeiting]*, ESTADÃO (Oct. 7, 2010), [http://www.estadao.com.br/estadaoodehoje/20101007/not\\_imp621618,0.php](http://www.estadao.com.br/estadaoodehoje/20101007/not_imp621618,0.php).

97. *What Exactly Mexican Senators Voted?*, OPENACTA (Oct. 5, 2010), <http://www.openacta.org/?p=539>.

98. *Extracts of India’s Intervention to the WTO TRIPS Council: ACTA*, KNOWLEDGE ECOLOGY INT’L (Oct. 28, 2010), <http://keionline.org/node/998>.

India's multi-pronged analysis of ACTA's disruptive potential warrants particular attention, especially its mention of the Doha Declaration on Public Health, as the latter is highly instructive of the tunnel-vision developed nations often have when dealing with critical aspects of international IP. The Doha Declaration emerged from the WTO Ministerial Conference of 2001, proclaiming that:

The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.<sup>99</sup>

The provisions therein sought to ensure that developing countries could circumvent certain international patent obligations by obtaining compulsory licenses for essential medicines,<sup>100</sup> as well as establish criteria for exhaustion of IP rights concerning the same.<sup>101</sup> In 2005, members of the WTO pushed to directly incorporate Doha into TRIPS.<sup>102</sup> All the while, the United States opposed Doha, claiming there was nothing wrong with the text of TRIPS as it stood.<sup>103</sup> Whether a sincere belief of its representatives at the time or not, the United States' dismissive attitude during Doha now seems symptomatic of a pervasive disinterest in the unpleasant ramifications of stringent IP enforcement.

It took the pressures of the international community to pass Doha, much as it took public outcry and an unauthorized Wikileaks release to bring ACTA to public light,<sup>104</sup> and those in charge of ACTA have taken on a similarly blasé attitude concerning agreement's ability to upset existing legal regimes and principles. Though ACTA negotiators repeatedly insisted that passage of the agreement would not require changes to domestic law in particular territories, commentators singled

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99. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration], available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

100. *Id.* ¶ 5(b).

101. *Id.*

102. World Trade Organization, Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC [hereinafter Doha Work Programme], available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_text\\_e.htm#public\\_health](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#public_health).

103. Ian F. Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda*, CONG. RES. SERVICE (Jan. 18, 2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL32060.pdf> ("Before the Doha meeting, the United States claimed that the current language in TRIPS was flexible enough to address health emergencies, but other countries insisted on new language.").

104. *Wikileaks Runs ACTA Proposal*, *supra* note 85.



out many areas of apparent conflict that called into question the honesty of that proclamation.<sup>105</sup>

In the United States, the typical response to such skepticism proved to be an oblique “stay the course” mantra; for example, three weeks after Senators Sanders and Brown asked USPTO Director David Kappos to address specific concerns concerning the legality of ACTA’s provisions, Kappos responded with a five-sentence letter that did anything but.<sup>106</sup> James Love put it tersely:

The November 12, 2010 Kappos letter was described by Senator Sanders’ office as “a non-response,” and that’s polite. Senators Sanders and Brown asked Kappos to compare the text in ACTA, highlighting in particular the articles on damages, injunctions, other remedies and border measures, against U.S. law, including but not limited to one supreme court decision and several selected statutes in the area of patents, copyrights and trademarks. The Kappos response contained no analysis, no cites to U.S. law, no cites to the ACTA text; only a thank you and a promise that “our USPTO issue experts will continue to work with USTR as they finalize the results achieved in Tokyo.”<sup>107</sup>

While the European response to ACTA criticism proved more open (in that actual responses were offered),<sup>108</sup> it made the drawbacks of keeping ACTA under lock and key even more apparent. EU Commissioner Karel De Gucht, for example, had been the principal authority promoting ACTA within the EU Parliament, making his statements a key source of information for both the members of parliament and the public at large to understand the ramifications of the treaty.<sup>109</sup> As a result, when he claimed that ACTA “does not oblige any of its signatories to create new, substantive rights or to change existing

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105. See, e.g., James Love, *The October 2, 2010 Version of the ACTA Text*, KNOWLEDGE ECOLOGY INT’L (Oct. 6, 2010) [hereinafter *Oct. 2, 2010 ACTA Text*], available at <http://keionline.org/node/962>.

106. Letter from David J. Kappos, Under Secretary and Director, U.S. Patent and Trademark Office, to Sens. Bernard Sanders and Sherrod Brown (Nov. 12, 2010) [hereinafter Letter from David J. Kappos], available at [http://keionline.org/sites/default/files/kappos\\_sanders\\_brown\\_acta\\_12nov2010.pdf](http://keionline.org/sites/default/files/kappos_sanders_brown_acta_12nov2010.pdf).

107. James Love, *Non-Responsive Letter from David Kappos of USPTO to Senators Sanders and Brown Regarding ACTA Consistency with US Law*, KNOWLEDGE ECOLOGY INT’L (Nov. 17, 2010), available at <http://keionline.org/node/1022> [hereinafter *Kappos Letter to Sen. Sanders & Brown*].

108. See, e.g., Press Release, Karel De Gucht, European Commissioner for Trade, Transparency and State of Play of the ACTA Negotiations (Anti-Counterfeiting Trade Agreement), Speaking Points for Debate on Anti-Counterfeiting Trade Agreement (ACTA), European Parliament (Mar. 9, 2010) [hereinafter De Grucht Speaking Points], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/83>.

109. *Id.*

ones,”<sup>110</sup> it was reasonable to believe (as German MEP Daniel Caspary did) that ACTA would be fully compliant with existing EU law.<sup>111</sup> De Gucht was later forced to admit, however, that the truth is far more nuanced: “[Where] there is no EU *acquis*,<sup>112</sup> i.e. penal enforcement, it is possible that some Member States may need to adapt domestic legislation to comply with commitments they have undertaken in the negotiation of the ACTA section on penal enforcement.”<sup>113</sup> Given that criminal liability for infringement was one of the most contentious issues underlying ACTA’s negotiations,<sup>114</sup> this sort of hair-splitting seemed disingenuous at best, highlighting the danger of designating the words of a handful of ACTA spokespeople as “everything non-negotiators needed to know” between drafting rounds.

Furthermore, the duality of ACTA’s public face (clandestine negotiations followed by jarring public revelations) proved to be one of its greatest weaknesses.<sup>115</sup> As working drafts of the agreement regularly leaked over the Internet, handlers such as De Gucht became mere apologists for both its content and drafting methodologies, whereas if the negotiations had been open to the public to begin with, substance would have been the focus, with greater goodwill tempering the discussions. Instead, however, negotiators doubled down on their tactics, claiming the agreement had to be kept under lock and key as a matter of principle.<sup>116</sup> Yet diplomatic cables subsequently revealed that

110. Anti-Counterfeiting Trade Agreement (ACTA) Debate, 2010 O.J. 16 (Oct. 20, 2010) [hereinafter ACTA Debate], available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20101020+ITEM-016+DOC+XML+V0//EN> (European Parliament debates).

111. *Id.* at 3 (German MEP Daniel Caspary stating, “I think it is a good thing that the *acquis* communautaire remains unchanged”).

112. “Acquis,” short for “*acquis communautaire*,” refers to the accumulated body of current EU law.

113. James Love, *De Gucht Responds to MEP Françoise Castex. Says ACTA Is Binding Agreement, Consistent with EU ‘Acquis,’* KNOWLEDGE ECOLOGY INT’L (Feb. 7, 2011), <http://keionline.org/node/1073> [hereinafter *De Grucht Response to Castex*].

114. *See infra* Part III.

115. INST. FOR GLOBALISATION AND INT’L REGULATION ET AL., THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA): AN ASSESSMENT 6 (2011) available at <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=43731#search=%20anti-counterfeiting> (“Efforts to maintain secrecy did not prevent a heated debate on ACTA generated by leaked texts of proposals, evaluations and draft treaties and fuelled the suspicion that ACTA would entail a significant shift in the laws of ACTA countries and go significantly beyond the TRIPS Agreement.”).

116. *The Anti-Counterfeiting Trade Agreement - Summary of Key Elements Under Discussion*, FOREIGN AFF. & INT’L TRADE CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/key-summary-resume-cle.aspx?lang=en> (last updated July 18, 2011) (“A variety of groups have shown their interest in getting more information on the substance of the negotiations and have requested that the draft text be disclosed. However, it is

“[t]he level of confidentiality in these ACTA negotiations has been set at a higher level than is customary for non-security agreements . . . it is impossible for member states to conduct necessary consultations with IPR stakeholders and legislatures under this level of confidentiality.”<sup>117</sup> This revelation raised a salient question: if the opaque drafting process of ACTA was both unusual *and* counterproductive (according to its own negotiating members), why was it so insistently kept in place?

### III. THE SCHISM BETWEEN “COUNTERFEITING” AND THE INTELLECTUAL PROPERTY CLAUSE

The explanation to the preceding question is two-fold, requiring discussion of both the nature of intellectual property itself and the nature of legislation in general. The latter issue is effectively summarized by Kimberlee Weatherall of The Beirne School of Law:

Laws, like objects in physics, have a tendency to remain where they are and take the application of ‘force’ to bring about change. Legal change disrupts existing industry practice and once the prospect of copyright or patent reform is raised it is difficult to confine the issues that become ‘open for debate.’<sup>118</sup>

Thus, each time IP maximalists call for greater levels of protection through legislative channels, they are sure to be met by IP reformists seeking to match or exceed their force—the drafting of the 1996 WIPO treaties being a perfect example of this negotiation in practice.<sup>119</sup> The problem is that (to borrow phrasing from Susan K. Sell), IP maximalists will often “assert their rights without recognizing their obligations”<sup>120</sup> by seeking to ratchet up protection of their interests without opening the Pandora’s Box of wholesale debate, utilizing what economic and legal pundit Michael Masnick describes as “a geopolitical game of leapfrog”:

The [IP] industry gets its diplomats to claim that a treaty is needed to ‘harmonize’ international laws on things like copyright, because one country has less stringent laws than another. Of course, the treaty always focuses on bringing the less stringent rules up to the level of the nation with the more stringent rules. Then, the industry works on

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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.”).

117. *US Embassy Cables: Italy, the EU and the Anti-Counterfeit Trading Agreement*, THE GUARDIAN (Dec. 22, 2010), [http://www.guardian.co.uk/world/us-embassy-cables-documents/176810?CMP=tw\\_t\\_gu](http://www.guardian.co.uk/world/us-embassy-cables-documents/176810?CMP=tw_t_gu).

118. Kimberlee Weatherall, *ACTA as a New Kind of International IP Lawmaking*, 26 AM. U. INT’L L. REV. 839, 880 (2011).

119. See BRAITHWAITE & DRAHOS, *supra* note 34, at 64.

120. Sell, *supra* note 10, at 4.

getting local laws made stronger again . . . and then claims that the international partners all have to boost the levels of protection again to ‘harmonize’ things. What happens is you get an escalating system where the laws keep getting more stringent as each side tries to ‘catch up’ with the other, while leapfrogging them each time they do. This gets even worse, because whenever people talk of reducing intellectual property protection, the same groups that lobbied for stronger intellectual property laws then start saying that we could never do that because it would violate these all important international treaties . . .<sup>121</sup>

Masnick’s lay summary of what is essentially the ratchet theory illustrates two distinct advantages seized by maximalists: it allows them to reframe the issue of IP harmonization to treat it as an almost exclusively economic issue, then bind legislatures to increasingly high predicate levels of harmonization, robbing them of their supervisory functions. By shifting harmonization efforts from optional treaties like the Paris and Berne Conventions to mandatory implementations such as TRIPS, the construct itself becomes one of stringency rather than respect for different cultures and property rights regimes. IP is moved further away from nuance and closer to literality (i.e. treatment as actual property). By helping to facilitate this shift, maximalists encourage conflation of physical and intellectual property, equating copyright infringement with physical counterfeiting, and thus birth the rhetorical argument for extending harmonization of trademark protection (the logical focus of ACTA)<sup>122</sup> to cover copyrights and patents as well.

The elephant in the room concerning the aforementioned rhetoric is, of course, that IP is a purely legal construct. The fundamental purpose of property rights is to better manage the allocation of scarce resources; those who have it may buy, sell, and exchange it as they please, guided by principles of market efficiency.<sup>123</sup> *Intellectual* property, however, is an *infinite* resource, incapable of exhaustion—hence why copyrights and patents are protected in the United States by

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121. Mike Masnick, *Big Content Goes Back to Sneaking Bad Rules in Through Treaties*, TECHDIRT (May 2, 2006, 12:28 PM), <http://www.techdirt.com/articles/20060502/1217204.shtml>.

122. “Counterfeiting” is defined by the U.S. Department of State as the “act of producing or selling a product containing a sham mark that is an intentional and calculated reproduction of the genuine mark,” otherwise known as providing a false source of origin for a good—a hallmark of trademark law. See *Glossary of Intellectual Property Terms*, AMERICA.GOV (Apr. 29, 2008), available at <http://www.america.gov/st/econ-english/2008/April/20080429233718eaifas0.3043067.html>.

123. Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1, 7–8 (2001), available at [http://mises.org/journals/jls/15\\_2/15\\_2\\_1.pdf](http://mises.org/journals/jls/15_2/15_2_1.pdf).

the Constitution's Intellectual Property Clause,<sup>124</sup> while only trademarks are protected under the Commerce Clause.<sup>125</sup> This split between trademark law and the rest of IP law is critical to understanding the proper role of ACTA, and why its current form betrays its potential. While no IP is capable of exhaustion, trademarks *are* capable of inefficient allocation, and thus retain a modicum of similarity to actual property.<sup>126</sup> In this regard, consumers can and should be protected from unscrupulous purveyors of counterfeit products when they market their wares as those of another. If the purpose of ACTA is to prevent counterfeiting by inferior producers, trademark law has a place within it. However, no similar harm is caused to consumers when they purchase pirated DVDs or medicines manufactured in violation of a patent. Absent deception as to the origin of a product, the only perceptible harm caused, if any, is to the *holders* of the copyright or patent. Once this premise is accepted, ACTA is no longer a security agreement, but a trade agreement in security's clothing.

It is clear that copyrights and patents do not meet the same criterion as trademarks when explaining what motivates the government to grant exclusive controls over them to individuals. The purpose of most IP, as spelled out in the Intellectual Property Clause of the U.S. Constitution, is "To promote the Progress of Science and useful Arts"<sup>127</sup>—in other words, IP rights are provided as an incentive to create new works. The method of incentive is "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"<sup>128</sup>—an artificial monopoly on what is otherwise capable of being infinitely reproduced. It is especially important to take note of the particular locution of the Constitution: the goal of the Intellectual Property Clause is to "promote the Progress."<sup>129</sup> The natural question is: who benefits from progress? And the natural

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124. U.S. CONST. art. I, § 8, cl. 8.

125. *The USPTO: Who We Are*, U.S. PAT. & TRADEMARK OFF., <http://www.uspto.gov/about/index.jsp> (last visited Sept. 27, 2011) ("The USPTO registers trademarks based on the Commerce Clause of the Constitution (Article I, Section 8, Clause 3).").

126. The purpose of trademark law is to designate the source of goods or services in the marketplace for consumer benefit; without efficient allocation (limited to the trademark holder's offerings), the mark loses its meaning. *See, e.g.,* *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163–64 (1995) ("[T]rademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's cost's of shopping and making purchasing decisions,' for it quickly and easily assures a potential customer that . . . the item with this mark . . . is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.").

127. U.S. CONST. art. I, § 8, cl. 8.

128. *Id.*

129. *Id.*

answer is the citizenry.<sup>130</sup> Were the chief goal to benefit the creators of IP, the clause would read along the lines of “to secure the Livelihood of Authors and Inventors.” Instead, the goal of the clause’s grant is the progress made, while the incentive (a temporary grant of artificial monopolization) is merely a means to facilitate that progress.<sup>131</sup>

Even in this balance of rights and incentives, however, the history of American jurisprudence has shown that a complete monopoly on the works produced under the Intellectual Property Clause is intolerable.<sup>132</sup> Products of the mind are subject to far greater philosophical and utilitarian concerns than real property when it comes to abuse. This is why so many protections are built into IP law for its various shades of grey—what *real* property sees as trespass to chattels, *intellectual* property may call fair use. This balancing act of rights and obligations, integral to understanding what drives principled protection of IP, is at the core of what ACTA threatens in the eyes of IP reformists. TRIPS has already demonstrated how much easier it is to lock down IP’s shades of grey when they are framed as impediments rather than safety valves.<sup>133</sup> ACTA, with its heated rhetoric on the threats posed by piracy to both trade and security, seems well-poised to leapfrog it.

For the past twenty years, protection of IP has been in a perpetual upward spiral, with slivers of anti-protection carved out to appease non-rights holders along the way.<sup>134</sup> The outpouring of criticism concerning ACTA (what Weatherall has characterized as a “collective, even ‘open source’ analysis”<sup>135</sup> by academics, pundits, and concerned citizens) is evidence of widespread dissatisfaction with not only the character of the

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130. See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”).

131. See, e.g., *Berlin v. E.C. Pubs.*, 329 F.2d 541, 543–44 (2d Cir. 1964) (“[C]opyright protection is designed ‘[t]o promote the Progress of Science and useful Arts,’ and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself.”).

132. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges [of intellectual property] that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”).

133. See TRIPS Agreement, *supra* note 35, art. 13; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) (TRIPS operates as a *ceiling* on fair use while almost everything else in the treaty acts as a *floor* for protection. “Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”).

134. For both national and international examples, see Digital Millennium Copyright Act, 17 U.S.C. § 512 (1998) (safe harbors provision); Berne Convention, *supra* note 25, art. 9(2) (three-step test for “fair use”); TRIPS Agreement, *supra* note 35.

135. Weatherall, *supra* note 118, at 840.

global ratchet, but the direction in which it has been taking IP as a whole. Maximalists may claim this perception is the result of an echo chamber effect, amplifying what is, in reality, simply the cacophonous drone of a handful of academics, likely infringers, and politicians pandering to both. If true, the same maximalists should be pushing for ACTA to go through a legislative vote as with any other IP treaty, allowing Congress to vet the text and put faces and careers to its approval or rejection. After all, if the voices of dissent are truly a minority, then obtaining majority passage after a debate should not be a difficult task. Were ACTA to be subjected to a legislative diagnosis, however, maximalists would be deprived of their second major advantage in utilizing the harmonization construct through ACTA (as alluded to by Masnick): the ability to not only bypass the legislative branch entirely, but permanently tie its hands on various issues by unilaterally installing new glass floors on IP protection.<sup>136</sup> This is one of the most onerous possible outcomes of ACTA's passage, and the language allowing it to occur is already in place.<sup>137</sup>

#### IV. SECONDARY LIABILITY AND THE HARMONIZATION GLASS FLOOR

In October of 2010, a group of over seventy-five prominent law professors released an open letter to President Obama, urging him to “halt [his administration’s] public endorsement of ACTA and subject the text to a meaningful participation process that can influence the shape of the agreement going forward.”<sup>138</sup> The letter warned that ACTA “would establish new intellectual property rules and norms without systematic inquiry into effects of such development on economic and technical innovation in the United States or abroad. These norms [would] affect virtually every American and should be the subject of wide public debate.”<sup>139</sup> More worrisome, the letter noted, was the prospect that ACTA could unconstitutionally usurp congressional authority:

The President may only make sole executive agreements that are within his independent constitutional authority. The President has no independent constitutional authority over intellectual property or communications policy, the core subjects of ACTA. To the contrary, the Constitution gives primary authority over these matters to

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136. Masnick, *supra* note 121.

137. *See infra* Part IV.

138. PIJIP Letter, *supra* note 3.

139. *Id.*

Congress, which is charged with making laws that regulate foreign commerce and intellectual property.<sup>140</sup>

It is for this very reason that members of Congress have voiced serious concern with the ACTA drafting protocols,<sup>141</sup> and is likely why maximalists have supported those same protocols. The letter to Obama critically notes that “[a]cademics and other neutral intellectual property experts have not had time to sufficiently analyze the current text and are unlikely to do so as long as there is no open public forum to submit such analysis in a meaningful process.”<sup>142</sup> In truth, many of ACTA’s provisions are likely there *precisely because* the merits have been contested in the past, and to the marked dissatisfaction of ACTA’s primary beneficiaries.

Secondary liability, for example, is one of the most hotly debated subjects in modern copyright law.<sup>143</sup> Sometimes referred to as indirect, contributory, or vicarious liability, it arises when a party is found to have materially contributed to, facilitated, induced, or is otherwise responsible for directly infringing acts carried out by another party.<sup>144</sup> The basis for it in the United States stems from the common law of agency<sup>145</sup> and is entirely case-driven, as the Copyright Act contains no explicit provision establishing liability for acts committed by a party other than the direct infringer.<sup>146</sup> One of the more recent developments of the doctrine occurred in the 2005 case of *MGM Studios, Inc. v. Grokster, Ltd.*, where the United States Supreme Court held a popular file sharing service that allowed users to trade copyrighted music files was secondarily liable for inducing infringement of those songs from said users:

[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.<sup>147</sup>

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140. *Id.* (internal citations omitted)

141. *See supra* Part II.

142. PIJIP Letter, *supra* note 3, at 3.

143. *See, e.g.*, Matthew Helton, *Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1, 2 (2006–07).

144. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 (2003).

145. *See, e.g.*, *M. Witmark & Sons v. Calloway*, 22 F.2d 412, 414 (E.D. Tenn. 1927).

146. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). The Supreme Court has itself noted, “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another.”

147. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).



At the same time that *Grokster* was being considered, a bill proposing a statutory amendment similar to the Supreme Court's holding was introduced to Congress as "The Inducing Infringement of Copyrights Act" (INDUCE).<sup>148</sup> The bill sought to amend federal copyright law to state: "Whoever intentionally induces any violation [of copyright] shall be liable as an infringer."<sup>149</sup> The bill went on to define "intentionally induces" as referring to anyone who "intentionally aids, abets, induces, or procures, and intent may be shown by acts from which a reasonable person would find intent to induce infringement based upon all relevant information about such acts then reasonably available to the actor, including whether the activity relies on infringement for its commercial viability."<sup>150</sup>

While the *Grokster* ruling and the INDUCE language are quite similar, one glaring difference between the two is that INDUCE sought to extend secondary liability to not only a party who "induces" infringement, but who "aids" or "abets" infringement as well.<sup>151</sup> This is doctrinally problematic for a number of policy reasons: As law professor Michael Carrier explains, aiding and abetting is a not a civil standard, but a criminal one,

used to punish those who assisted in the crime. The getaway driver. The fraudulent check presenter. The cocaine distributor. In the criminal law arena, such liability reaches broadly to deter true criminal conduct. In the context of secondary copyright liability, in contrast, such a standard is not appropriate. Not when copyright is subject to competing public policies. Not when technologies could be held criminally liable for allowing search, performance, or retrieval. Not when these monumentally significant issues—which would dramatically expand U.S. liability—were never even debated.<sup>152</sup>

Perhaps it is for this very reason that INDUCE was never passed by Congress<sup>153</sup>—they may have understood the prescience of allowing the doctrine of vicarious liability in copyright law to be slowly shaped and applied by the courts in response to a changing world, rather than locking it into legislation in its most nascent form. Professor Carrier's

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148. CARE Act of 2003, S. 2560, 108th Cong. §1 *et seq.* (2003).

149. *Id.*

150. *Id.*

151. *Id.*

152. Michael A. Carrier, *The Proposed New Copyright Crime of "Aiding and Abetting,"* OXFORD U. PRESS BLOG (Oct. 28, 2010, 2:30 PM), <http://blog.oup.com/2010/10/copyright-crime/>.

153. Bill Summary & Status, S.2560, 108th Congress (2003–04) [hereinafter S.2560 Summary & Status], available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.02560:>.

words would certainly have been persuasive in the debate over INDUCE's passage, but alas, he did not write them in reference to INDUCE; he was writing about ACTA.

Article 23.4 of ACTA requires signatory nations to “ensure that criminal liability for aiding and abetting is available,”<sup>154</sup> applying it to “willful” infringement on a “commercial scale” (which is defined as “commercial activities for direct or indirect economic or commercial advantage”).<sup>155</sup> The totality of this article allows for a finding of secondary liability if an entity “aids or abets” activity indicative of “indirect” commercial advantage, folding in terminology that ACTA representatives insisted would not be part of the agreement's final draft.<sup>156</sup> Due to the nebulous definitions within ACTA and the shifting liabilities involved, third party intermediaries such as internet service providers may face a simple choice under the agreement: risk prosecution for inadvertently “aiding or abetting” infringers, remove their services from the market, or institute draconian procedures to ensure that the first option can never come to manifest. The United States' preferred route was made clear by language formerly contained in Section 3 of ACTA, which intimated that the only surefire way for a service provider to receive “safe harbor” protections from potential secondary liability would be by terminating the service of repeat infringers.<sup>157</sup> It should be noted that this provision surfaced *after* the USTR claimed that the United States would not be pursuing a “three strikes” approach to safe harbor protection, which “termination of repeat infringers” is in all but strict numerics.<sup>158</sup>

Congress has good reason to be worried about a purported executive agreement that skirts their approval while mandating legal standards they themselves have rejected in legislative form (i.e., INDUCE), especially when the agreement's subject matter is supposed

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154. ACTA (May 2011 Draft), *supra* note 4, art. 23.4.

155. *Id.* art. 23.1.

156. Malini Aisola, *ACTA Briefing by De Gucht in the European Parliament*, KNOWLEDGE ECOLOGY INT'L, (July 13, 2010, 12:45), <http://www.keionline.org/node/886> (“In an exchange with MEP Lambrinidis, De Gucht indicated that the definition of “commercial scale” would not be in the final version of ACTA. In implementing ACTA, Member States would have to rely on national laws and court rulings.”).

157. Michael Geist, *ACTA Internet Chapter Leaks: Renegotiates WIPO, Sets 3 Strikes as Model* (Feb. 21, 2010), <http://www.michaelgeist.ca/content/view/4808/125/>.

158. Sherwin Siy, *U.S. Government Denies that ACTA Mandates Filtering or Three Strikes, But Questions on Its Contents Remain*, PUB. KNOWLEDGE (Feb. 10, 2010, 10:02 AM), <http://www.publicknowledge.org/node/2893>.

to be within their exclusive purview.<sup>159</sup> Even if ACTA is fully compliant with existing U.S. law (the questionable go-to justification for treating it as an executive agreement at all),<sup>160</sup> it still abrogates Congress's authority on IP issues by only allowing them to push forth stronger protections to avoid placing the United States in violation of its new international obligations.<sup>161</sup> This is a serious problem with ratcheting up harmonization efforts within contentious pockets of law—signatory nations may find themselves unable to properly address dynamic legal issues that arguably call for laxer restrictions or new systems entirely.

## V. INFIGHTING BEHIND ACTA

The preceding analysis is not something that has been lost on the negotiating parties of ACTA—diplomatic cables from 2009 reveal awareness that “the secrecy around the negotiations has led to that [sic] the legitimacy of the whole process being questioned.”<sup>162</sup> Outside the negotiation rounds, the agreement has been repeatedly referred to by countries within the WTO as a “TRIPS-plus” measure, with China and Brazil reportedly worried that its passage would “constrain flexibilities and undermine the balance of rights in the TRIPS Agreement.”<sup>163</sup> The USTR has danced around the issue by insisting that the plain language of ACTA can be ignored or softened under the flexibility of Article 1.2.1, which advises that “[e]ach Party shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice.”<sup>164</sup> This claim is problematic in two respects: First, it ignores the fact that Article 1.1 of TRIPS has the same boilerplate language, and countries have been found liable

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159. See generally Andrew Moshirnia, *Let's Make A Deal! Will ACTA Force an End to Executive Agreements?*, CITIZEN MEDIA L. PROJECT (Feb. 9, 2010), <http://www.citmedialaw.org/blog/2010/lets-make-deal-will-acta-force-end-executive-agreements>.

160. *ACTA: Meeting U.S. Objectives*, OFF. U.S. TRADE REPRESENTATIVE, available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/september/acta-meeting-us-objectives>.

161. Ooana A. Hathaway & Amy Kapzynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, 15 AM. SOC. INT'L LAW INSIGHTS, Aug. 2011, at 2–3, available at <http://www.asil.org/pdfs/insights/insight110824.pdf>.

162. *Viewing Cable 09STOCKHOLM736, Concerns About ACTA Negotiations and IPR Update*: IPRED, WIKILEAKS (Nov. 24, 2009), <http://wikileaks.ch/cable/2009/11/09STOCKHOLM736.html> [hereinafter “Stockholm Cable”] (Nov. 24, 2009 diplomatic cable VZCZCXRO7102 from the American Embassy in Stockholm to Washington, D.C.).

163. William New, *China, India to Raise Concerns at WTO About “TRIPS-plus” Measures*, ACTA, INTELL. PROP. WATCH (June 3, 2010), <http://www.bilaterals.org/spip.php?article17479>.

164. James Love, *USTR's Implausible Claim That ACTA Article 1.2 Is An All Purpose Loophole, and the Ramifications If True*, KNOWLEDGE ECOLOGY INT'L (Oct. 22, 2010), <http://keionline.org/node/990> [hereinafter *USTR's Implausible Claim Art. 1.2 a Loophole*].

through the WTO dispute resolution process for failing their responsibilities under TRIPS even after invoking 1.1 as an affirmative defense.<sup>165</sup> Second, if ACTA were truly so malleable, then it stands to reason that its provisional history would not be so tumultuous, which the record clearly establishes it was.

According to Weatherall, the story of ACTA has essentially been a test case for the global ratchet theory of IP protection itself.<sup>166</sup> Weatherall's analysis begins with the premise that ACTA is essentially a "TRIPS-plus agreement,"<sup>167</sup> which, based on the ratchet theory, should be lubricated by the many free-trade agreements between the involved countries that have preceded it.<sup>168</sup> Speaking to her own jurisdiction of Australia, she states that "the A.U.S.FTA bilateral agreement has been a 'stepping stone' in that it removed Australia as a potential opponent to certain provisions" of ACTA,<sup>169</sup> particularly those affecting copyright law.<sup>170</sup> The United States has been noted as a prolific negotiator of Free Trade Agreements (FTAs) in recent years, having struck them with over a dozen countries in the run-up to ACTA's negotiations<sup>171</sup> in order to raise their overall levels of IP protection.<sup>172</sup> Yet despite this predicate level of harmonization, many provisions of ACTA still required extensive scaling back during the negotiation rounds:

The European Union, Japan and New Zealand—parties not already bound by U.S. FTAs—all expressed doubt about the inclusion of access controls and criminal penalties. The text publicly released in April 2010 clearly demonstrates that these differences continued in

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165. *Id.*

166. Weatherall, *supra* note 118, at 848 ("The negotiation of ACTA is an interesting case study to test the assumption of inevitable one-way 'ratcheting up' of IP obligations and the role of bilateral agreements in this process.")

167. *Id.* at 850.

168. *Id.* at 10–11 ("What is more, it seems clear that the negotiating position of these FTA-bound countries on controversial issues within the ACTA have been influenced by their FTAs.")

169. *Id.* at 16.

170. *Id.* at 11 ("Pre-FTA Australia applied criminal penalties where infringement was related to trade or commerce, and in non-commercial cases only where it could be shown that the distribution of copies had a substantial prejudicial impact on the copyright owner. Post-FTA, Australia also applies criminal law to non-commercial acts of copying that have such an impact: thus extending the criminal law to prolific downloaders, for example, as well as people uploading (and hence distributing).")

171. Ralph Fischer, *The Expansion of Intellectual Property Rights by International Agreement: A Case Study Comparing Chile and Australia's Bilateral FTA Negotiations With the U.S.*, 28 *LOY. L.A. INT'L & COMP. L. REV.* 129, 135 (2006).

172. *Id.* at 134–35 ("Since the signing of TRIPS, bilateral agreements have been the most active international intellectual property forum . . . Most commentators believe that the less developed countries agree to provide stronger IPRs, or TRIPS-plus, protections in exchange for greater access to the developed country's markets and investors.") (internal quotation marks omitted).

the Wellington round of negotiations, with square brackets separating out any reference to access controls or criminal penalties. The leaked text dated July 2010—after the round in Luzern, Switzerland in June-July 2010—shows a further shift away from the U.S.'s preferred model to a form of language that can accommodate a range of anti-circumvention laws.<sup>173</sup>

Amongst many other tweaks, the reference to criminal penalties eventually disappeared from the text altogether, and language indicating the overall scope of the laws was reduced.<sup>174</sup> Based on these concessions, Weatherall concludes that “we are not seeing multilateralisation of the FTA standards nor are they the ‘starting point’ from which standards can only go up. In fact, at all times the standards embodied in the ACTA draft have been considerably weaker than we have seen in the U.S. FTAs or in U.S. or EU internal rules.”<sup>175</sup> Essentially, while ACTA began with a far more ambitious agenda, the ratchet appeared to collapse under its own weight.

While the preceding analysis may be touted as demonstrative of a flaw in the ratchet theory, it may also be seen as a last gasp from the core of the harmonization construct. The current crop of proposals comprising ACTA is a patchwork of watered down provisions, principally whatever was left after all proposals were bled and defanged to satisfaction. On the one hand, this is a mixed victory for IP reformists (for whatever consolation they may take from “two steps ratcheted, one step scaled back”)—on the other hand, it is an abysmal failure to bring the negotiating countries to a *meaningful* consensus on issues of IP enforcement. It is reminiscent of the recent Information Society Directive negotiated within Europe, which Weatherall notes “has not led to good outcomes for user or, arguably, right holder interests”—rather, it has simply led to Member States interpreting the Directive according to their own traditions, “leading to a mosaic of different rules across Europe.”<sup>176</sup> In short, it has been *antithetical* to harmonization.

Similarly, the end result of ACTA's negotiations has been a document rife with nebulous language, as confirmed by the Congressional Research Service (whose findings were initially suppressed by the USTR,<sup>177</sup> perhaps due to the fact that they arguably

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173. Weatherall, *supra* note 118, at 862.

174. *Id.* at 865.

175. *Id.* at 870.

176. *Id.* at 881–82.

177. See generally James Love, *KEI to Appeal USTR Rejection of FOIA of Congressional Research Service (CRS) Study of ACTA*, KNOWLEDGE ECOLOGY INT'L (Mar. 23, 2011, 2:42 PM), <http://keionline.org/node/1103> [hereinafter *KEI Appeal FOIA on CRS Study*].

contradicted assurances that ACTA would not require changes to domestic law).<sup>178</sup> According to the report, “[d]epending on how broadly or narrowly several passages from the ACTA draft text are interpreted, it appears that certain provisions of federal intellectual property law could be regarded as inconsistent with ACTA.”<sup>179</sup> Even more troubling is the fact that despite the existence of caveat clauses that allow signatories to be flexible in their implementations of the agreement, “Members of Congress might be reluctant to consider legislative approaches that would alter federal law in a manner that might make the United States in default of its ACTA obligations.”<sup>180</sup> This allows ACTA to potentially cripple legislative oversight of IP while also providing little assurance that the agreement would result in any semblance of uniform application; success in the latter realm will depend on both the ACTA Committee’s ability to effectively sanction its members and members’ ability to coerce non-members to join the agreement.

#### VI. ACTA’S MEMBERSHIP AND “HARMONIZING WITHOUT A CARROT”

While early literature released by negotiating parties emphasized hopes that developing countries would eventually join ACTA,<sup>181</sup> leaked diplomatic cables clarified that ACTA was meant to be *imposed* on developing countries after setting “high-standards . . . among a select group of like-minded countries.”<sup>182</sup> Furthermore, the goal of ACTA was “not to negotiate the different interests of [those] like-minded countries,”<sup>183</sup> but to “solve” the problems of developing countries<sup>184</sup> while not actually having them at the negotiating table. As a consequence, ACTA reflects few of the most critical internal concerns of Brazil, Russia, India, and China (the BRIC countries), but rather those of developed nations *regarding* those countries’ allegedly weak IP regimes. The question then becomes how to entice such countries to “aspire” to join such an asymmetrical and non-beneficial agreement.

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178. James Love, *US Congress Is Not Bound by ACTA, According to White House Answers to Senate Finance on ACTA and TPP Negotiations*, KNOWLEDGE ECOLOGY INT’L (Apr. 19, 2011), <http://keionline.org/node/1115> [hereinafter *White House: Congress Not Bound By ACTA*].

179. Memorandum from Brian T. Yeh, Legislative Attorney, American Law Division, Cong. Research Serv. to Sen. Ron Wyden (Oct. 29, 2010) (entitled Potential Implications for Federal Law Raised by the October 2010 Draft of the Anti-Counterfeiting Trade Agreement (ACTA)) [hereinafter CRS Letter to Sen. Wyden], available at <http://infojustice.org/wp-content/uploads/2011/05/CRS10292010.pdf>.

180. *Id.*

181. Fact Sheet, *supra* note 71.

182. Tokyo Cable 1, *supra* note 14.

183. Tokyo Cable 2, *supra* note 15.

184. *Id.*

As previously noted, ACTA's provisions go far beyond what is required by TRIPS<sup>185</sup> while not embodying its balancing mechanisms.<sup>186</sup> Developing countries have already expressed serious concerns with the agreement's procedural posture<sup>187</sup> and will likely be even less receptive to its substantive protectionism, which may impact their access to knowledge, technology, and other valuable resources.<sup>188</sup> For many such countries, protecting IP simply is not a major priority when its primary beneficiaries are a handful of industries in developed nations.<sup>189</sup> TRIPS was able to leverage IP protection onto developing nations by "dangling a carrot" in front of them, so to speak—access to the WTO.<sup>190</sup> The many bilateral FTAs that the United States forged with other countries, while setting precedent for IP ratcheting, presumably benefitted the domestic economies of those countries as well. ACTA, meanwhile, seems to be an agreement without a carrot. It simply exhorts nations to join the collective and alter their domestic legislation to the benefit of IP right holders and the detriment of many others.

There is always the possibility that the carrot, instead of being fed to developing nations, will be used as a bludgeoning tool. The United States has proven in the past that it is not beyond utilizing legislative coercion to grease the wheels of trade negotiations,<sup>191</sup> and more frequently employs methods of "soft" coercion (such as its Special 301 Report)<sup>192</sup> to call for greater IP enforcement in various nations (although some have lambasted these methods as "petty" and "lacking reliable and

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185. Oct. 2, 2010 ACTA Text, *supra* note 105.

186. See, e.g., General Agreement on Tariffs and Trade: Uruguay Round, Annex 1C, arts. 7–8, Apr. 15, 1994, 33 I.L.M. 1125, 1197 [hereinafter GATT Annex 1C], available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (covering technology transfer and laws to promote public health/development and curtail IP abuse).

187. See *supra* Part II.

188. Peter Drahos, *IP Word - Made by TNC Inc.*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY, 197, 198–202, 212 (Gaelle Krikorian and Amy Kapczynski eds., 1972).

189. Ferris K. Nesheiwat, *The Adoption of Intellectual Property Standards Beyond TRIPS - Is It a Misguided Legal and Economic Obsession by Developing Countries?*, 32 LOY. L.A. INT'L & COMP. L. REV. 361, 394 (2010) ("[Developing] nations stand to benefit little from heightened levels of TRIPS and TRIPS-plus intellectual property standards that protect content they neither produce nor possess.").

190. *Frequently Asked Questions About TRIPS in the WTO*, *supra* note 36.

191. See *supra* Part I (discussing Section 301 of the Trade Act).

192. See, e.g., OFF. U.S. TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT (Apr. 30, 2010) [hereinafter 2010 SPECIAL 301 REPORT], available at [http://www.ustr.gov/webfm\\_send/1906](http://www.ustr.gov/webfm_send/1906) (an annual review of the global state of intellectual property rights protection and enforcement conducted by the USTR which purports to identify "the ongoing systemic IPR enforcement challenges in many countries around the world").

objective analysis”).<sup>193</sup> The private sector has weighed in as well: A consortium of entertainment trade groups have directly lobbied the European Parliament to ratify ACTA as well, by urging that a delay in doing so would “weaken the position of the EU *vis-à-vis* its international trading partners.”<sup>194</sup> Other groups have taken a less threatening tone: the EU Council has championed ACTA as a “balanced agreement” that “fully respects the rights of citizens and the concerns of important stakeholders such as consumers, internet providers and partners in developing countries.”<sup>195</sup> In doing so, the Council skirts concerns that accession would circumvent parliamentary procedures for regulating criminal enforcement measures.<sup>196</sup> The European Commission has largely duplicated these positions, calling for speedy ratification and reaffirming an allegedly unsullied *acquis*.<sup>197</sup>

Despite their best efforts, however, the ACTA lobby was unable to make a perceptible dent in converting many non-believers; even Mexico, whose negotiators stressed “their willingness to join the . . . negotiations and push-back against Brazilian efforts to

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193. Adam Smith, *United States - Is the Special 301 Report Out of Date?*, WORLD TRADEMARK REV., (Apr. 30, 2010), <http://www.worldtrademarkreview.com/daily/detail.aspx?g=D58D7553-F36E-41BA-8E9C-9AD6B8818326>.

194. Letter from The Anti-Counterfeiting Group Campaigning Against the Trade in Fakes et al., to Jerzy Buzek, President of the European Parliament (Apr. 20, 2011) [hereinafter Letter to Jerzy Buzek], available at <http://www.scribd.com/doc/54799890/Acta-Lobby-Letter>.

195. *Commission Proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement Between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America*, at 3, COM (2011) 380 final (June 28, 2003) [hereinafter *E.U. Commission Proposal for Council Decision on ACTA*].

196.

Regarding the signature and conclusion of ACTA, the Commission has opted not to propose that the European Union exercise its potential competence in the area of criminal enforcement pursuant to Article 83(2) TFEU. The Commission considers this appropriate because it has never been the intention, as regards the negotiation of ACTA to modify the EU *acquis* or to harmonise EU legislation as regards criminal enforcement of intellectual property rights.

*Id.* The wording of the Council looks only to the purported “intention” of ACTA without considering whether or not such enforcement standards will nonetheless be impacted. See Oct. 2, 2010 *ACTA Text*, *supra* note 105.

197. *A Single Market for Intellectual Property Rights Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, at 20–21, COM (2011) 287 final (May 24, 2011) [hereinafter *A Single Market for Intellectual Property Rights*], available at [http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf).



undermine IPR in international health organizations,”<sup>198</sup> ultimately saw its Senate come out against the agreement.<sup>199</sup> A report commissioned by members of the EU Parliament warned of potentially severe negative impacts on public health as a result of ACTA’s patent provisions,<sup>200</sup> simultaneously slamming the ACTA negotiators for having ignored nine specific Parliamentary demands for transparency.<sup>201</sup> Furthermore, questions regarding the legality of the agreement continue to percolate in the U.S. Congress<sup>202</sup> and the EU<sup>203</sup>, with the American Society for International Law warning that ACTA’s intent to avoid the need for legislative ratification whenever possible “has consequences not only for intellectual property law, but for any area in which an international agreement may be concluded—which is to say, nearly any area of law.”<sup>204</sup>

Clearly, the same concerns that plagued ACTA since its first draft have not dissipated, and now that the dust has settled on the negotiation rounds, there is no more room for hope that its flaws will ultimately end up on the cutting room floor. By October of 2011, eight countries officially acceded to ACTA,<sup>205</sup> with notable holdouts from the initial signing ceremony including the EU, Mexico, and Switzerland.<sup>206</sup> While initially entertained as merely indicative of a vetting period, it also gave

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198. *Viewing Cable 07MEXICO6229, Mexico IPR: 301 Update: International Posture; USG, WIKILEAKS* (Aug. 30, 2011), <http://wikileaks.ch/cable/2007/12/07MEXICO6229.html> [hereinafter “Mexico Cable”] (Dec. 19, 2007 diplomatic cable VZCZCXRO6069 from the American Embassy in Mexico City to Washington, D.C.).

199. *Dictamen Con Punto De Acuerdo Por El Que Por El Que Se Exhorta Al Titular Del Poder Ejecutivo Federal Para Que Instruya A Las Secretarías Y Dependencias Negociadoras Del Acuerdo Comercial Anti Falsificación, A No Firmar Dicho Acuerdo* [Decree Calling for the Federal Executive Office to Instruct the Departments and Agencies Not to Sign the Anti-Counterfeiting Trade Agreement], GACEDA DE SENADO (June 22, 2011) [hereinafter Decree Against Signing ACTA], <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=9376&lg=61>.

200. Sean Flynn, *ACTA and Access to Medicines*, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, AM. UNIV. WASH. C. L., 6–8 (Sept. 2, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1980865](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1980865).

201. *Id.* at 3–5.

202. Letter from Sen. Ron Wyden to President Barack Obama (Oct. 11, 2010), available at <http://www.docstoc.com/docs/99038329/Wyden-Letter-to-Obama-ACTA-Oct-2011>.

203. *European Parliament Legal Service Confirms: ACTA May Or May Not Be Legal*, EDRI-GRAM (Oct. 19, 2011), <http://www.edri.org/edriagram/number9.20/acta-ep-legal-service-opinion>.

204. Hathaway & Kapzynski, *supra* note 161.

205. Derek Abma, *Canada Signs International Anti-Piracy Agreement*, MONTREAL GAZETTE, Oct. 1, 2011 (listing the signatories as including Canada, The United States, Australia, Japan, Morocco, New Zealand, South Korea and Singapore).

206. *EU Will Not Join Countries in Signing ACTA This Weekend*, OUT-LAW.COM, Sept. 28, 2011, <http://www.out-law.com/en/articles/2011/september/eu-will-not-join-countries-in-signing-acta-this-weekend/>.

those countries the ability to observe some telling statements from ACTA's "eager beavers:" Canada (whose Industry Minister said ACTA will be "subservient" to domestic copyright law)<sup>207</sup> and New Zealand (who claimed "ACTA will not change existing standards")<sup>208</sup> both admitted that they would have to change their domestic laws to be in compliance with the agreement.<sup>209</sup> Given Knowledge Ecology International's analysis demonstrating that the United States is also not in compliance with ACTA in at least two key areas (injunctions and damages),<sup>210</sup> one can assume its unapologetic *mea culpa* is coming shortly.

## VII. LOOKING BEYOND ACTA AND BACK AGAIN

Despite the miasma of concern surrounding ACTA, IP maximalists have continued to push forward. Soon after finalizing ACTA, the USTR unveiled details of a new Asia-Pacific trade agreement known as the Trans-Pacific Partnership (TPP),<sup>211</sup> which Public Knowledge has described as "ACTA the Sequel."<sup>212</sup> Even before its text had been drafted, right holders already began to push for it to leapfrog ACTA in terms of IP protection,<sup>213</sup> and the USTR has stated that its IP chapter is intended to "harmonize IPR obligations strictly upwards."<sup>214</sup>

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207. *Canadian Copyright Law to Trump ACTA, Clement Says*, CBC NEWS (Dec. 1, 2009), <http://www.cbc.ca/news/technology/story/2009/12/01/clement-copyright-acta-ndp.html>.

208. *Anti-Counterfeiting Trade Agreement: Frequently Asked Questions*, New Zealand Minister of Economic Development, <http://www.med.govt.nz/business/intellectual-property/intellectual-property-enforcement/anti-counterfeiting-trade-agreement/faqs/will-acta-change-existing-standards-of-the-protection-for-international-intellectual-property-rights> (last updated Sept. 15, 2011).

209. Abma, *supra* note 205 ("Fast's office said the government still needs to create and pass legislation to implement the anti-counterfeiting agreement in Canada."); Stephen Bell, *Law Changes Required Before NZ Ratifies ACTA*, COMPUTER WORLD (Sept. 30, 2011), <http://computerworld.co.nz/news.nsf/news/law-changes-required-before-nz-ratifies-acta>.

210. James Love and Krista Cox, *ACTA Is Not Consistent with US Laws on Injunctions and Damages*, KNOWLEDGE ECOLOGY INT'L (Sept. 30, 2011), <http://keionline.org/node/1289>.

211. *Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tp> (last visited July 14, 2012).

212. Rashmi Rangnath, *ACTA the Sequel: The Transpacific Partnership Agreement*, PUB. KNOWLEDGE (Jan. 4, 2011, 2:51 PM), <http://www.publicknowledge.org/blog/acta-sequel-transpacific-partnership-agreemen>.

213. *Id.* ("A paper prepared by the U.S. Business Coalition for TPP (reported to be drafted by the Pharmaceutical Research and Manufactures of America, the US Chamber of Commerce, and the Motion Picture Association of America) and leaked on the Internet, indicates that right holders are urging the USTR to include in TPP IP protections more extensive than those present in ACTA.")

214. James Love, *Notes from Meeting with USTR on the TPP IPR Chapter*, KNOWLEDGE ECOLOGY INT'L (Dec. 13, 2010) [hereinafter *Notes from Meeting with USTR*], <http://keionline.org/node/1035>.

Furthermore, the negotiations of the TPP “[would] not involve any commitments to sharing the text with the general public, even after it has been given to all member countries in the negotiation and to hundreds of corporate insiders on the USTR advisory board system.”<sup>215</sup> In fact, all TPP-related documents but the final consolidated text will be kept secret for four years after the agreement comes into force or the negotiations collapse.<sup>216</sup> There are few conclusions to reach in light of this information other than that the United States has largely shrugged off the criticism concerning ACTA’s handling, as it seeks to *leapfrog* its questionable conduct and content with its new trade agreement.<sup>217</sup>

Elsewhere in the ratchet, however, cracks are forming. In 2011, U.S. Representative Lamar Smith and U.S. Senator Patrick Leahy introduced the Stop Online Piracy Act (SOPA) and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PROTECT IP, or PIPA) to the House and Senate, respectively.<sup>218</sup> The bills were offered up with the stated goal of giving both the U.S. government and private copyright holders new tools to attack so-called “rogue websites dedicated to the sale of infringing or counterfeit goods”<sup>219</sup>—essentially domestic analogues to ACTA. The two bills received widespread criticism from technology experts,<sup>220</sup> legal scholars,<sup>221</sup> venture capitalists,<sup>222</sup> and many others for their overly

215. *Id.*

216. Jane Kelsey, *Trans-Pacific Partnership Papers Remain Secret for Four Years After Deal*, TPP WATCH (Oct. 16, 2011), <http://tppwatch.org/2011/10/16/trans-pacific-partnership-papers-remain-secret-for-four-years-after-deal/>.

217. See, e.g., Mike Masnick, *Public Interest Groups Speak Out About Next Week's Secret Meeting In Hollywood To Negotiate TPP (Think International SOPA)*, TECHDIRT (Jan. 26, 2012, 11:00 AM), <http://www.techdirt.com/articles/20120126/03162017547/> (“Unlike ACTA, where at least the negotiators would admit where and when negotiations were happening (though, not always with much time for others to get there in time), the TPP negotiations are kept entirely in the dark from the public.”).

218. Bill Summary & Status, H.R.3261, 112th Congress (2011–12), available at [http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.3261](http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.3261;); Bill Summary & Status, S.968, 112th Congress (2011–12), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.968>.

219. Press Release, Leahy, Hatch, Grassley Unveil Targeted Bill to Counter Online Infringement (May 12, 2011), available at [http://www.leahy.senate.gov/press/press\\_releases/release/?id=a18ddcc4-8da6-4cb9-b46e-104c21537d50](http://www.leahy.senate.gov/press/press_releases/release/?id=a18ddcc4-8da6-4cb9-b46e-104c21537d50).

220. Paul Vixie, *Refusing REFUSED*, CIRCLEID (Jan. 11, 2012), [http://www.circleid.com/posts/20120111\\_refusing\\_refused\\_for\\_sopa\\_pipa/](http://www.circleid.com/posts/20120111_refusing_refused_for_sopa_pipa/).

221. Letter from Mark Lemley et al., Open Letter to the House of Representatives (Nov. 15, 2011) and Letter from John R. Allison et al., Professors' Letter in Opposition to "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011" (PROTECT-IP Act of 2011, S. 968) (July 5, 2011), available at <https://www.eff.org/document/law-professors-letter-sopa>.

222. Greg Sandoval, *VCS to Congress: Antipiracy Bill Will 'Chill' Tech Investment*, CNET (June 24, 2011), [http://news.cnet.com/8301-31001\\_3-20074110-261/vcs-to-congress-antipiracy-bill-will-chill-tech-investment/](http://news.cnet.com/8301-31001_3-20074110-261/vcs-to-congress-antipiracy-bill-will-chill-tech-investment/).

broad language<sup>223</sup> and potential chilling effects on both commerce<sup>224</sup> and free speech.<sup>225</sup> The response from the bills' advocates was largely dismissive, refusing to directly address the specific areas of concern brought to their attention<sup>226</sup> and (much as was seen with ACTA) treating the protests as the actions of a vocal minority.<sup>227</sup> Seeing no reason to slow down, SOPA and PIPA's sponsors pushed forth in the legislative process despite widespread pleas not to do so.<sup>228</sup>

Finally, IP maximalists had overplayed their hand. Grassroots protest efforts swelled, with major Internet players and their users banding together for a trickle-up coordinated strike against what they perceived as an attempt to censor the Internet itself.<sup>229</sup> On January 18, 2012, hundreds of websites went "dark" to demonstrate the effect that SOPA and PIPA would have on not just "rogue websites," but legitimate web-based companies.<sup>230</sup> The protests dominated news cycles,<sup>231</sup> edifying millions on the dangers of the bills in question<sup>232</sup> and resulting in a deluge of communiqués to elected officials in Washington D.C..<sup>233</sup> The results were palpable: according to ProPublica, the shift in

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223. Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNNMONEY (Jan. 20, 2012), [http://money.cnn.com/2012/01/17/technology/sopa\\_explained/index.htm](http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm).

224. Brett Greene, *SOPA and PIPA Bills Threaten Job Creation and Innovation*, HUFFINGTON POST (Jan. 13, 2012), [http://www.huffingtonpost.com/brett-greene/sopa-and-pipa-bills-threa\\_b\\_1204825.html](http://www.huffingtonpost.com/brett-greene/sopa-and-pipa-bills-threa_b_1204825.html).

225. See, e.g., Laurence Tribe, *The "Stop Online Piracy Act" (SOPA) Violates the First Amendment* (2011), available at <http://www.net-coalition.com/wp-content/uploads/2011/08/tribe-legis-memo-on-SOPA-12-6-11-1.pdf>; see also Rob Bluey, *Morning Bell: The Unintended Consequences of Internet Regulation*, FOUNDRY (Dec. 28, 2011 : 9:58 AM), <http://blog.heritage.org/2011/12/28/morning-bell-the-unintended-consequences-of-internet-regulation/>.

226. Jonathan Strong, *Online Piracy Measure Brings Out Hard Feelings*, ROLL CALL (Jan. 2, 2012), [www.rollcall.com/news/online\\_piracy\\_measure\\_brings\\_out\\_hard\\_feelings-211304-1.html](http://www.rollcall.com/news/online_piracy_measure_brings_out_hard_feelings-211304-1.html).

227. *Id.*

228. Mike Masnick, *Harry Reid Says He's Concerned PIPA Will Break the Internet, But We Must Move Forward with It, Because of 'Jobs'*, TECHDIRT (Jan. 16, 2012), <http://www.techdirt.com/articles/20120116/02442717414/>.

229. Grant Gross, *Who Really Was Behind the SOPA Protests?*, PCWORLD (Feb. 2, 2012), available at [http://www.pcwORLD.com/businesscenter/article/249270/who\\_really\\_was\\_behind\\_the\\_sopa\\_protests.html](http://www.pcwORLD.com/businesscenter/article/249270/who_really_was_behind_the_sopa_protests.html).

230. Ryan Grim, *SOPA Blackout Aims to Block Internet Censorship Bill*, HUFFINGTON POST (Jan. 18, 2012), [http://www.huffingtonpost.com/2012/01/18/sopa-blackout-internet-censorship\\_n\\_1211905.html](http://www.huffingtonpost.com/2012/01/18/sopa-blackout-internet-censorship_n_1211905.html).

231. See Dominic Rushe & Ryan Devereaux, *SOPA Blackout and Day of Action - As It Happened*, GUARDIAN (Jan. 18, 2012), <http://www.guardian.co.uk/technology/2012/jan/18/sopa-blackout-day-of-action-live>.

232. Deborah Netburn, *Wikipedia: SOPA Protest Led 8 Million to Look Up Reps in Congress*, L.A. TIMES (Jan. 19, 2012), <http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html>.

233. Josh Peterson, *SOPA Protests Caused Panic, Crashed Government Websites*, DAILY CALLER (Jan. 19, 2012), <http://dailycaller.com/2012/01/19/sopa-protests-caused-panic-crashed-government-websites/>.

stated positions on SOPA and PIPA by members of Congress had gone overnight from 80 for and 31 against to 65 for and 101 against,<sup>234</sup> and all then-four Republican candidates for the 2012 Presidential Election had come out against the bills.<sup>235</sup> Within two days of the protests, both SOPA and PIPA were listed as indefinitely postponed—in a word, dead.<sup>236</sup>

While there is every chance that SOPA and PIPA will be revived in the future and subjected to a paring-down process similar to ACTA, IP maximalists must now contend not only with the classic entrenched opposition to their efforts (academics and citizens' rights activists), but also with a galvanized public that has finally awoken to the perceived overreaches of industry lobbying—including ACTA.<sup>237</sup> Less than a month after the SOPA protests, tens of thousands of EU citizens took to the streets against ACTA (which had been signed by the EU in January of 2012<sup>238</sup>), sending a shockwave through the region that resulted in multiple member countries withdrawing their support for the agreement.<sup>239</sup> Most striking were the statements made by Lithuanian Justice Minister Remigijus Simasius, who expressed great skepticism not only of ACTA, but the entire state of play in current IP law:

[O]ur life is more and more dependent on R&D, new inventions, creativity. Existing IP protection system, however, is more about protecting the IP protection industry than a protection of inventors and authors. Current debate worldwide is a clear sign that we have to re-evaluate the existing IP rights system.<sup>240</sup>

Responding to this backlash, Karel De Gucht agreed to refer ACTA to the European Court of Justice in order to determine whether or not the

234. Dan Nguyen, *SOPA Opera Update: Opposition Surges*, PROPUBLICA (Jan. 19, 2012), <http://www.propublica.org/nerds/item/sopa-opera-update>.

235. See James Crugnale, *GOP Candidates Roundly Condemn SOPA During Debate*, MEDIAITE (Jan. 19, 2012), <http://www.mediaite.com/tv/gop-candidates-roundly-condemn-sopa-during-debate/>.

236. Brendan Sasso, *GOP chairman shelves Stop Online Piracy Act*, THE HILL (Jan. 20, 2012), <http://thehill.com/blogs/hillicon-valley/technology/205345-gop-chairman-postpones-piracy-legislation>.

237. Adam Clark Estes, *SOPA Stopped for Now, Anti-Censorship Activists Turn to ACTA*, THE ATLANTIC WIRE (Jan. 26, 2012), <http://www.theatlanticwire.com/technology/2012/01/sopa-stopped-now-anti-censorship-activists-turn-acta/47892/>.

238. Olivia Solon, *The EU Signs up to ACTA, but French MEP Quits in Protest*, WIRED UK (Jan. 26, 2012), <http://www.wired.co.uk/news/archive/2012-01/26/eu-signs-up-to-acta>.

239. Juliette Terzoeff, *ACTA Protests Take Europe by Storm*, FUTURE500 (Feb. 16, 2012), <http://www.future500.org/blog/acta-protests-take-europe-by-storm/> (“Authorities in several countries—including Germany, Latvia, Poland, the Czech Republic, and Slovakia—have now said they will delay signing on to the treaty.”).

240. Stephan Kinsella, *Lithuanian Minister of Justice Condemns ACTA and Calls for Re-evaluation of IP*, CENTER FOR STUDY OF INNOVATION FREEDOM (Feb. 10, 2012), <http://c4sif.org/2012/02/lithuanian-minister-of-justice-condemns-acta-and-calls-for-re-evaluation-of-ip/>.

agreement is compatible with "fundamental EU rights and freedoms."<sup>241</sup> Unfortunately for ACTA, the prospect of a judicial affirmation was not enough to stem the tide of public mistrust that had been triggered; even the EU Rapporteur on ACTA, David Martin, declined to wait for the ECJ to chime in before announcing that he would recommend the European Parliament reject the treaty,<sup>242</sup> and EU Commissioner Neelie Kroes plainly stated that "[w]e are now likely to be in a world without SOPA and without ACTA."<sup>243</sup> In July of 2012, the European Parliament made good on Kroes' prediction by flatly rejecting ACTA, 478 votes to 39:

The majority in the European Parliament is of the opinion that ACTA is a wrong solution, a sentiment shared by millions of citizens. The majority in the European Parliament is of the opinion that ACTA is too vague, leaving the room for abuses and raising concern about its impact on consumers' privacy and civil liberties, on innovation and the free flow of information.<sup>244</sup>

Martin, who was charged with administering the vote, speculated that its defeat was likely to be the global death knell for the treaty (given that just the week prior, Australia had been vocally contemplating withdrawal from ACTA).<sup>245</sup> Critics of the treaty noted that this combination of events could very well leave the agreement with a dearth of signatory nations able to breathe life into it (as at least six countries must accede for ACTA to take effect).<sup>246</sup>

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241. Catrin Turner, *Commission Asks ECJ to Rule on ACTA Compatibility*, OUT-LAW.COM (Feb. 23, 2012), <http://www.out-law.com/en/articles/2012/february/commission-asks-ecj-to-rule-on-acta-compatibility/>.

242. David Martin, *Draft Recommendation on the Draft Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement Between the European Union and Its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America*, 2011/0167(NLE), (Dec. 4, 2012), <http://www.statewatch.org/news/2012/apr/ep-draft-acta-report.pdf>.

243. Press Release, Neelie Kroes, Vice-President of the European Commission Responsible for the Digital Agenda Internet Freedom Re:publica Conference "The European Public on the Net" (May 4, 2012), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/326&format=HTML&ageId=0&language=EN&guiLanguage=en>.

244. Press Release, *ACTA Wrong Solution to Protect Intellectual Property*, European Parliament (July 7, 2012), [http://www.europarl.europa.eu/the-president/en/press/press\\_release\\_speeches/press\\_release/2012/2012-july/press\\_release-2012-july-3.html](http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/press_release/2012/2012-july/press_release-2012-july-3.html).

245. Monika Ermert, *European Parliament Rejection Puts ACTA Future in Doubt* (July 4, 2012), <http://www.ip-watch.org/2012/07/04/european-parliament-rejection-puts-acta-future-in-doubt/>.

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Clearly, a divide has begun to appear between what proponents of increased IP protection can craft and what they can deliver in practice. Traditional lobbying efforts were not able to keep SOPA viable in the face of massive public scrutiny, and ACTA's numerous procedural and substantive deficits have provided similar fuel for activist fire. Already, this opposition appears to be having an impact on the direction of future legislation: in the wake of the EU protests, the Dutch government indicated a desire to move in the *opposite* direction of ACTA by providing greater *exceptions* to copyright law.<sup>247</sup> It seems odd, then, that in the face of one massive public defeat (SOPA) and staring down the barrel of another (ACTA), the TPP negotiators have doubled down on their clandestine methods while still managing to convey the appearance (if not the actual presence) of impropriety.<sup>248</sup> This suggests that, in the eyes of developed nations, harmonization is still an entirely trade-driven construct (initial leaks of the TPP's text appearing to confirm this),<sup>249</sup> and perhaps that all ACTA needed to stave off criticism was a few more rounds of small-scale FTAs to buttress the framework of a plurilateral agreement. There is little to no concern for public welfare, legal nuance, or basic comity; only industry and income. And perhaps that is why early indications are that, despite best maximalist efforts, the TPP is falling apart as well.<sup>250</sup>

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In theory, ACTA could still come into force between the United States and a number of smaller states. Ten states have been negotiating it, and six of those need to ratify it to have it come into force. In theory, this could become a treaty between the United States, Morocco, Mexico, New Zealand, Australia, and Switzerland. (But wait, the Mexican Senate has already rejected ACTA. As has Australia and Switzerland in practice. Oh well... a treaty between the United States and Morocco, then, in the unlikely event that the United States will actually and formally ratify it. You can see where this is going.) As described before on TorrentFreak, without the support of the European Union, ACTA is dead. Doesn't exist.

Rick Falkvinge, *Victory! ACTA Suffers Final Humiliating Defeat in European Parliament* (July 4, 2012), <http://falkvinge.net/2012/07/04/victory-acta-suffers-final-humiliating-defeat-in-european-parliament/>.

247. Robert Chesal, *Loosen Up Copyright Law, Says Dutch Government*, RADIO NETHERLANDS WORLDWIDE (Feb. 13, 2012), <http://www.rnw.nl/english/node/615152>.

248. Mike Masnick, *Hollywood Gets To Party with TPP Negotiators; Public Interest Groups Get Thrown out of Hotel*, TECHDIRT (Feb. 1, 2012), <http://www.techdirt.com/articles/20120131/23161417605.shtml>.

249. See *Leaked Trans-Pacific FTA Texts Reveal U.S. Undermining Access to Medicine*, CITIZENS TRADE CAMPAIGN (Oct. 22, 2011), available at <http://www.citizenstrade.org/ctc/blog/2011/10/22/leaked-trans-pacific-fta-texts-reveal-u-s-undermining-access-to-medicine/>.

250. Clyde Prestowitz, *Is the Trans-Pacific Partnership Foundering?*, FOREIGN POL'Y (Apr. 27, 2012), [http://prestowitz.foreignpolicy.com/posts/2012/04/27/is\\_the\\_trans\\_pacific\\_partnership\\_foundering](http://prestowitz.foreignpolicy.com/posts/2012/04/27/is_the_trans_pacific_partnership_foundering) ("Chile had been considered a slam dunk supporter [of the TPP]. So its raising of questions [as to

## VIII. CONCLUSION

As WIPO Director General Francis Gurry stated back in 2010, ACTA is a sign of weakness in our current multilateral system of law.<sup>251</sup> The urge to solve legitimate questions of IP protection through jarring forum shifts and backroom deals may help to mitigate the usual protracted nature of international diplomacy and negotiation, but does nothing to service the goals of proper harmonization. In fact, by further decentralizing the administration of international IP law and undermining the efficacy of existing institutions, it degrades the very system it purports to augment. Canadian law professor Michael Geist made this very point while speaking before the European Parliament in March of 2012:

All countries and stakeholders benefit from a well-functioning international intellectual property governance model led by WIPO and the WTO. Ratification of ACTA will undermine the authority of those institutions, causing immeasurable harm to the development of global IP norms. ACTA countries avoided WIPO due to gridlock concerns, but ratifying ACTA would perversely increase the likelihood of gridlock. For those countries participating in ACTA, the successful completion of the plurilateral model will only increase the incentives to by-pass WIPO as a forum for challenging, global issues. For those countries outside of ACTA, the relevance of WIPO will gradually diminish, as achieving consensus on their concerns may prove increasingly difficult.<sup>252</sup>

Because the shifts underpinning ACTA are motivated almost exclusively by commercial entities' wants, they lack any semblance of nuance, preferring disingenuous caveat clauses and nebulous language over legitimate and significant carve-outs, disenchanting both the public at large and developing nations in particular. While the ratchet was a viable (if somewhat unscrupulous) model for raising international standards of IP protection within the GATT, ACTA lacks both the procedural transparency and the substantive rewards that make traditional trade agreements viable. This is beyond the basic fact that in becoming a catch-all IP treaty, by dipping into areas of law where there

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the agreement's value] is a red flag danger signal. Beyond that it seems that the Malaysians are also questioning whether any benefits they may be getting are worth the trouble of further liberalization of their domestic economy. And just to put the icing on the cake, it is becoming ever clearer that the Vietnamese, whose economy resembles that of China with large segments controlled by state owned companies, are going to have great difficulty in actually meeting the high standards being proposed.").

251. Saez, *supra* note 61.

252. Michael Geist, *Assessing ACTA: My Appearance Before the European Parliament INTA Workshop on ACTA* (Mar. 1, 2012), available at <http://www.michaelgeist.ca/content/view/6350/125/>.



is already substantial harmonization through other organizational efforts, and by attempting to bypass all the proper channels for international trade agreements, ACTA is trying to bite off more than a backroom executive agreement can reasonably chew.

Given how nebulous and difficult to track ACTA has been over the course of its life, and because of the incredible systemic tumult that has been set in motion in the aftermath of the SOPA protests, it is difficult to ascertain what the ultimate fate of the agreement will be. At time of writing, it is set to remain open for signatures until May of 2013, two years after its final release.<sup>253</sup> Ideally, it will be rethought for lack of willing signatories and the core text shifted to an organization such as WIPO or the WTO, where it can be converted to proposals native to that forum. At the very least, any further attempts to forge such agreements should be subject to the highest level of transparency possible, involving not just narrow “stakeholder consultations,” but true outreach to the public at large. Then and only then will its substance have procedural merit. There is simply no excuse for injecting yet another layer of bureaucracy to the international IP framework when bureaucracy is what has slowed down the ability of countries to adapt to evolving IP issues in the first place. Validating the ACTA drafters’ shell games can only set a bad precedent for harmonization efforts to come.

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253. ACTA (May 2011 Draft), *supra* note 4, art. 39.