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# A Critical Look at the Anti-Counterfeiting Trade Agreement

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A CRITICAL LOOK AT THE ANTI-COUNTERFEITING  
TRADE AGREEMENT

By David M. Quinn

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I. INTRODUCTION

[1] On October 23, 2007, the United States announced an initiative to strengthen intellectual property enforcement measures within the international community via the Anti-Counterfeiting Trade Agreement (“ACTA”).<sup>1</sup> During the following years, eleven rounds of negotiations among as many parties<sup>2</sup> culminated in a finalized text released on December 3, 2010.<sup>3</sup> The dialogue occurred outside the purview of

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<sup>1</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS: ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (Aug. 4, 2008), [http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset\\_upload\\_file760\\_15084.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file760_15084.pdf).

<sup>2</sup> See *ACTA Negotiations: Report on Round Eleven*, N.Z. MINISTRY OF FOREIGN AFFAIRS & TRADE, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Relationships-and-Agreements/Anti-Counterfeiting/0-acta-negotiations11.php> (last updated Oct. 4, 2010).

<sup>3</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, ANTI-COUNTERFEITING TRADE AGREEMENT (2010), *available at* [http://www.ustr.gov/webfm\\_send/2417](http://www.ustr.gov/webfm_send/2417) [hereinafter FINAL TEXT].

existing bodies such as the WIPO and WTO.<sup>4</sup> The ACTA now awaits acceptance following the March 31, 2011 commencement of the ratification period.<sup>5</sup> It will enter into force thirty days following the sixth formal approval.<sup>6</sup>

[2] The Members of the European Parliament hinted toward acceptance of the ACTA, but simultaneously expressed hesitation, when they referred to the ACTA as “a step in the right direction,” yet sought confirmation from the European Commission that the treaty would not affect current EU legislation.<sup>7</sup> The EU joined ten others as an intimate participant in ACTA negotiations, though the agreement identifies thirty-eight distinct political entities as potential signatories.<sup>8</sup> Presumably, all will ratify the agreement they helped create.

[3] The ACTA is a plurilateral agreement, meaning it binds fewer parties than that of a traditional multilateral agreement.<sup>9</sup> The ACTA attempts to establish international standards on intellectual property rights enforcement and combat the “proliferation of counterfeit and pirated goods.”<sup>10</sup> Japan and the United States created the initial momentum for

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<sup>4</sup> See Danny O’Brien, *Blogging ACTA Across The Globe: The View from France*, ELEC. FRONTIER FOUND. (Jan. 28, 2010), <https://www.eff.org/deeplinks/2010/01/acta-and-france>.

<sup>5</sup> FINAL TEXT, *supra* note 3, at ch. 6, art. 39.

<sup>6</sup> See *id.* at ch. 6, art. 40.

<sup>7</sup> See Press Release, European Parliament, Anti-Counterfeiting Accord: MEPs Set Out Content Conditions for Ratifying the Deal (Nov. 24, 2010), *available at* [http://www.europarl.europa.eu/pdfs/news/expert/infopress/20101124IPR99549/20101124IPR99549\\_en.pdf](http://www.europarl.europa.eu/pdfs/news/expert/infopress/20101124IPR99549/20101124IPR99549_en.pdf) (internal quotation marks omitted).

<sup>8</sup> See FINAL TEXT, *supra* note 3, at ch. 6, art. 39 n.17.

<sup>9</sup> See generally Michael Geist, *The ACTA Threat To The Future Of WIPO*, INTELL. PROP. WATCH (Apr. 14, 2009), <http://www.ip-watch.org/weblog/2009/04/14/the-acta-threat-to-the-future-of-wipo/> (noting that the ACTA’s plurilateral status handily circumvents potential WIPO restrictions regarding multilateral agreements).

<sup>10</sup> See FINAL TEXT, *supra* note 3, at pmbl.

the ACTA, but other countries soon joined the negotiations.<sup>11</sup> By the time official negotiations began, the parties included “Australia, Canada, the European Union, Japan, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, the United Arab Emirates, and the United States.”<sup>12</sup>

[4] The culmination of the negotiations was the eleventh round, hosted on October 2, 2010, in Tokyo, Japan.<sup>13</sup> Several countries were notably absent from this negotiation, which produced the final text. Both Jordan and the United Arab Emirates, though present during the first round, dropped out before the second.<sup>14</sup> Perhaps more significant was China’s complete absence.<sup>15</sup> China has the world’s third largest economy, but is also one of the largest sources of counterfeit goods.<sup>16</sup> India, the world’s

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<sup>11</sup> See *All You Want to Know About the Anti-Counterfeiting Trade Agreement (ACTA)*, EUR. COMMISSION, 1 (Oct. 20, 2010), [http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc\\_146792.pdf](http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146792.pdf).

<sup>12</sup> *EU, US and Others Hold Geneva Talks on Anti-Counterfeiting Trade Agreement*, EUR. COMMISSION (June 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).

<sup>13</sup> Press Release, European Commission, Joint Statement from All the Negotiating Parties to ACTA (Oct. 2, 2010), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=623>.

<sup>14</sup> *Compare EU, US and Others Hold Geneva Talks on Anti-Counterfeiting Trade Agreement, supra* note 12 (summarizing round one of ACTA negotiations), with *Anti-Counterfeiting: EU, US and Others Meet in Washington to Advance ACTA*, EUR. UNION, EU/NR 75/08 (July 31, 2008), <http://www.eurunion.org/eu/2008-News-Releases/ANTI-COUNTERFEITING-EUROPEAN-UNION-UNITED-STATES-AND-OTHERS-MEET-IN-WASHINGTON-TO-ADVANCE-ANTI-COUNTERFEITING-TRADE-AGREEMENT-ACTA.html> (summarizing round two of ACTA negotiations).

<sup>15</sup> See *Intellectual Property: Anti-Counterfeiting*, EUR. COMM’N, <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/> (last updated Dec. 20, 2010) (providing a list of countries, excluding China, that participated in negotiations).

<sup>16</sup> See *Country Comparison: GDP (Purchasing Power Parity)*, in CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2010), available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html>; see also Mark Litke, *China Big in Counterfeit Goods*, ABC NEWS (Apr. 21, 2010), <http://abcnews.go.com/WNT/story?id=130381>.

fifth largest economy, was also absent.<sup>17</sup> According to one Indian government official, they never even received an invitation to join the negotiations.<sup>18</sup>

[5] The \$272.7 million in counterfeit products seized by the U.S. Customs and Border Patrol in 2008 could explain China and India's absence from the negotiations.<sup>19</sup> China was the principal source of seized goods, making up eighty-one percent of the total value seized.<sup>20</sup> India ranked a distant second in overall number of seizures at six percent.<sup>21</sup> With so many counterfeit goods originating from China and, to a lesser extent, India, perhaps the negotiating parties viewed them with suspicion.<sup>22</sup>

[6] While the Office of the U.S. Trade Representative ("USTR") describes the ACTA as "a state-of-the-art international framework that provides a model for effectively combating global proliferation of

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<sup>17</sup> See *Country Comparison*, *supra* note 16; see also *Intellectual Property: Anti-Counterfeiting*, *supra* note 15 (providing a list of countries, excluding India, that participated in negotiations).

<sup>18</sup> See Monika Ermert, *Indian Official: ACTA Out Of Sync With TRIPS and Public Health*, INTELL. PROP. WATCH (May 5, 2010), <http://www.ip-watch.org/weblog/2010/05/05/indian-official-acta-out-of-sync-with-trips-and-public-health/>.

<sup>19</sup> See U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., INTELLECTUAL PROPERTY RIGHTS, SEIZURE STATISTICS: FISCAL YEAR 2008 14 (2009), available at [http://www.cbp.gov/linkhandler/cgov/trade/priority\\_trade/ipr/pubs/seizure/fy08\\_final\\_stat.ctt/fy08\\_final\\_stat.pdf](http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/pubs/seizure/fy08_final_stat.ctt/fy08_final_stat.pdf).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Commencement of negotiations predated the statistics cited, but earlier data show similar trends. See *id.* at 12; see also Lawrence Liang, *We've All Got Some Baggage*, 7 TEHELKA MAG., no. 45 (Nov. 13, 2010), available at [http://www.tehelka.com/story\\_main47.asp?filename=Ne131110We\\_ve\\_All.asp](http://www.tehelka.com/story_main47.asp?filename=Ne131110We_ve_All.asp) (stating that "India and China have consistently made it to the [United States Trade Representative] priority watch list for the past ten years . . .").

commercial-scale counterfeiting and piracy,”<sup>23</sup> the ACTA has not universally received such acclaim.<sup>24</sup> This Article examines two of the more credible criticisms leveled against the ACTA and evaluates the credibility of each. First, some allege that the agreement is a treaty masquerading as an executive agreement.<sup>25</sup> The distinction is significant because treaties may modify U.S. law and require congressional approval, while executive agreements must accord with existing law and require only presidential approval.<sup>26</sup> The second criticism is the systemic lack of transparency throughout the negotiation process.<sup>27</sup> Though these are not the only criticisms – far from it – they are the two most significant and stand on the most solid ground. Yet, neither poses an insurmountable hindrance to the ACTA. To understand these arguments, this Article must first delve into the latest public text of the ACTA, published December 3, 2010.<sup>28</sup>

## II. SUMMARY OF THE FINALIZED TEXT

[7] The ACTA is organized into six chapters.<sup>29</sup> Chapter I contains introductory matters and definitions.<sup>30</sup> Chapter II, the largest, contains most of the substantive provisions.<sup>31</sup> Chapter III contains provisions on

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<sup>23</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), *available at* <http://www.ustr.gov/acta> (last visited Apr. 6, 2011).

<sup>24</sup> *See* Eddan, Katz, *Stopping the ACTA Juggernaut*, ELEC. FRONTIER FOUND. (Nov. 19, 2009), <https://www.eff.org/deeplinks/2009/11/stopping-acta-juggernaut>.

<sup>25</sup> *See infra* Part III.

<sup>26</sup> *Treaty vs. Executive Agreement*, U.S. DEP'T STATE, <http://www.state.gov/s/l/treaty/faqs/70133.htm> (last visited Apr. 6, 2011).

<sup>27</sup> *See infra* Part IV.

<sup>28</sup> *See generally* FINAL TEXT, *supra* note 3.

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at ch. 1.

<sup>31</sup> *See id.* at ch. 2.

enforcement practices.<sup>32</sup> Chapter IV encourages international cooperation.<sup>33</sup> Chapter V establishes the ACTA Committee, the administrative body overseeing and managing the ACTA framework.<sup>34</sup> Chapter VI concludes the agreement.<sup>35</sup> Earlier versions of the ACTA were narrowly focused on counterfeit trademark goods, but its scope has gradually broadened, and now matches that of TRIPS, by including copyrights, trademarks, trade secrets, and patents.<sup>36</sup>

[8] Although the ACTA will raise the minimum standard for intellectual property rights and enforcement measures among signatory countries, it does so without creating a ceiling.<sup>37</sup> Many of the provisions are flexible, using language such as the permissive “may” rather than the mandatory “shall.”<sup>38</sup> Similarly, although the ACTA encompasses all major intellectual property regimes, it treats both patents and trade secrets somewhat tangentially.<sup>39</sup> A signatory nation may exclude patents and trade secrets from the civil enforcement section<sup>40</sup> and the ACTA

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<sup>32</sup> *See id.* at ch. 3.

<sup>33</sup> *See id.* at ch. 4.

<sup>34</sup> *See* FINAL TEXT, *supra* note 3, at ch. 5.

<sup>35</sup> *See id.* at ch. 6.

<sup>36</sup> *Id.* at pmb1. (applying the ACTA to all “intellectual property rights”); *see also* Mart Kuhn, *Intellectual Property Owners Oppose Anti-Counterfeiting Agreement*, PUB. KNOWLEDGE (July 14, 2010, 10:50 AM), <http://www.publicknowledge.org/blog/ip-owners-oppose-acta> (stating that the ACTA “has expanded far beyond its stated intended purpose . . .”).

<sup>37</sup> *See* FINAL TEXT, *supra* note 3, at ch. 1, § 1, art. 2.

<sup>38</sup> *See, e.g., id.* at ch. 2, § 2, art. 8 (“[A] Party *may* limit the remedies available . . . .”) (emphasis added).

<sup>39</sup> *See id.* at ch. 2, § 2 n.2.

<sup>40</sup> *See id.* at ch 2, § 1. India, among others, opposed the inclusion of patented goods in the Civil Enforcement section, arguing that doing so would impede trade of otherwise legal generic pharmaceuticals. *See Concerns Raised over ACTA at TRIPS Council*, THIRD WORLD NETWORK (Nov. 1, 2010), *available at* [http://www.twinside.org.sg/title2/intellectual\\_property/info.service/2010/ipr.info.101102.htm](http://www.twinside.org.sg/title2/intellectual_property/info.service/2010/ipr.info.101102.htm).

affirmatively deems them “outside the scope” of the border measures section.<sup>41</sup> The sections on civil enforcement and border measures, arguably the two most substantive of all, dilute the ACTA’s strength in fighting patent infringement and trade secret misappropriation.<sup>42</sup> Conversely, the sections governing criminal enforcement, enforcement in the digital environment, enforcement practices, and international cooperation exclude neither patents nor trade secrets.<sup>43</sup>

#### A. Chapter One: Initial Provisions and General Definitions

[9] The provisions of the ACTA take into consideration superseding prior treaties, notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>44</sup> Indeed, the ACTA inherits its objectives and principles from TRIPS.<sup>45</sup> Importantly, if a signatory does not recognize a particular intellectual property right, the ACTA creates no obligation to do so.<sup>46</sup> Thus, ratifying the ACTA cannot force a signatory to create entire categories of intellectual property, nor can it force into existence an intellectual property right the signatory does not independently desire.<sup>47</sup>

[10] Trademarks tend to be geographical creatures, and the ACTA recognizes this traditional limitation.<sup>48</sup> By definition, “counterfeit trademark goods” include products or packaging bearing a mark identical

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<sup>41</sup> FINAL TEXT, *supra* note 3, at ch. 2, § 3, art. 13 n.6.

<sup>42</sup> *See generally id.* at ch. 2, §§ 2-3.

<sup>43</sup> *See id.* at ch. 2, §§ 4-5, ch. 3-4.

<sup>44</sup> *See id.* at ch. 1, § 1, art. 1.

<sup>45</sup> *See id.* at ch. 1, § 1, art. 2.

<sup>46</sup> *See id.* ch. 1, § 1, art. 3.

<sup>47</sup> *See* FINAL TEXT, *supra* note 3, at ch. 1, § 1, art. 3.

<sup>48</sup> *See id.* at ch. 1, § 1, art. 3 (“This Agreement shall be without prejudice to provisions in a Party’s law governing the availability, acquisition, scope, and maintenance of intellectual property rights.”).



to or “which cannot be distinguished in its essential aspects from” a trademark registered in the signatory country.<sup>49</sup> While the standard articulated by this definition differs in literal form from the “identical with, or substantially indistinguishable from” standard normally applied under U.S. trademark law,<sup>50</sup> it seems functionally equivalent. “[P]irated copyright goods” means, in essence, goods created by unauthorized copying, thereby infringing a copyright.<sup>51</sup>

[11] Curiously, the definition for “right holder” explicitly “includes a federation or an association,” but conspicuously omits the author or inventor.<sup>52</sup> The fact that corporate interests apparently eclipse those of individual content creators does nothing to assuage criticism from groups alleging that, though “the Agreement has huge implications for the public, few substantive steps have been taken to inform, engage, or even consider the public interest.”<sup>53</sup>

#### B. Chapter Two: Legal Framework for Enforcement of Intellectual Property Rights

[12] Chapter II is the longest, most substantive segment of the document.<sup>54</sup> As TRIPS has already established, each signatory must have general legal measures in place for enforcement of intellectual property rights.<sup>55</sup> Civil remedies in each country must follow the structure

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<sup>49</sup> *Id.* at ch. 1, § 2, art. 5(d).

<sup>50</sup> *See* 18 U.S.C. § 2320(e)(1)(A)(ii) (2006).

<sup>51</sup> *See* FINAL TEXT, *supra* note 3, at ch. 1, § 2, art. 5(k).

<sup>52</sup> *See id.* at ch. 1, § 2, art. 5(l).

<sup>53</sup> *See, e.g., Anti-Counterfeiting Trade Agreement*, PUB. KNOWLEDGE, <http://www.publicknowledge.org/anti-counterfeiting-trade-agreement> (last visited Apr. 16, 2011).

<sup>54</sup> *See generally* FINAL TEXT, *supra* note 3, at ch. 2.

<sup>55</sup> *See* WORLD TRADE ORGANIZATION, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, pt. 3, § 1, art. 41, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) [hereinafter TRIPS]; *see also* FINAL TEXT, *supra* note 3, at ch. 2, § 1, art. 6.

provided by the ACTA.<sup>56</sup> While preliminary injunctions must remain available “to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce,” there is no universal standard for remedy.<sup>57</sup> Therefore, standards will likely continue to vary by locality. Furthermore, all signatories are required to adopt a statutory system for calculating damages in copyright and trademark infringement cases.<sup>58</sup> Prior to the ACTA, not all signatory countries made statutory damages available.<sup>59</sup> Comparatively, U.S. law previously provided for statutory damages.<sup>60</sup> The ACTA requires attorney’s fees for at least copyright and trademark infringement suits, but the qualifier “where appropriate” renders the requirement somewhat impotent.<sup>61</sup> Additional remedies include confiscation and destruction of infringing goods.<sup>62</sup>

[13] Section three of Chapter II provides for border measures to combat infringement of copyrights and trademarks but specifically excludes patents and trade secrets.<sup>63</sup> Signatories must enable their customs agents to act on their own accord or at the request of a rights holder to search incoming goods for infringing material.<sup>64</sup> Analysis of earlier drafts of the ACTA raised fears of “iPod searching border guards” – fears later allayed

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<sup>56</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 7.

<sup>57</sup> *Id.* at ch. 2, § 2, art. 8.

<sup>58</sup> See *id.* at ch. 2, § 2, art. 9.

<sup>59</sup> For example, the U.K. currently awards damages “on a case-by-case basis based on the actual damages incurred.” See *ACTA in the UK*, TECHNOLLAMA (Oct. 16, 2010), [http://www.technollama.co.uk/acta-in-theuk?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=acta-in-the-uk](http://www.technollama.co.uk/acta-in-theuk?utm_source=rss&utm_medium=rss&utm_campaign=acta-in-the-uk).

<sup>60</sup> See generally 15 U.S.C. § 1117(c)-(d) (2006); 17 U.S.C. § 504(c) (2006).

<sup>61</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 9.

<sup>62</sup> See *id.* at ch. 2, § 2, art. 10.

<sup>63</sup> See *id.* at ch. 2, § 3, art. 13 & n.6.

<sup>64</sup> See *id.* at ch. 2, § 3, art. 16.

by the addition of a *de minimis* carve-out.<sup>65</sup> Yet, perhaps that carve-out provides only hollow comfort in light of its permissive, rather than mandatory, nature.<sup>66</sup> Furthermore, the signatory's "competent authorities" may begin their own investigation to determine "whether the suspect goods infringe an intellectual property right."<sup>67</sup> That is, signatory countries may allow their customs agents: (1) to search an individual's personal electronic device; (2) confiscate the device upon suspicion of infringing goods; (3) perform an internal investigation; (4) determine that the device in fact contains infringing goods; (5) and charge the individual with civil liability.<sup>68</sup> According to Canadian law professor Michael Geist, throughout the ACTA negotiations, the United States "push[ed] for broad provisions that cover import, export, and in-transit shipments," while other countries advocated softening the border-searching provision.<sup>69</sup>

[14] Section four of Chapter II, titled "Criminal Enforcement," does not exclude patents and trade secrets, as did the previous two sections.<sup>70</sup> Signatories must provide criminal repercussions for at least commercial willful infringement, including either fines or jail time.<sup>71</sup> The country's authorities can seize and destroy counterfeit trademark goods and pirated

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<sup>65</sup> See Michael Geist, *ACTA's De Minimis Provision: Countering the iPod Searching Border Guard Fears*, MICHAEL GEIST (Mar. 23, 2010), <http://www.michaelgeist.ca/content/view/4900/125/>.

<sup>66</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 3, art. 14 ("A party *may* exclude from the application of this Section small quantities of goods of a non commercial nature contained in travellers' [sic] personal luggage.") (emphasis added).

<sup>67</sup> *Id.* at ch. 2, § 3, art. 19.

<sup>68</sup> See *id.* at ch. 2, § 3, art. 16. It is entirely unclear to the Author how a customs agent would be able to have any reasonable basis to suspect that a particular song on an individual's iPod was obtained without the right holder's authorization. *Cf. id.* (describing the actions customs authorities may take "upon their own initiative").

<sup>69</sup> See Michael Geist, *Putting Together the ACTA Puzzle: Privacy, P2P Major Targets*, MICHAEL GEIST (Feb. 3, 2009), <http://www.michaelgeist.ca/content/view/3660/125/>.

<sup>70</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 4.

<sup>71</sup> See *id.* at ch. 2, § 4, art. 24 & n.12.

copyright goods “without compensation of any sort to the infringer.”<sup>72</sup> As in the civil enforcement section, the ACTA also would have countries authorize their officials to initiate their own investigation *ex officio*.<sup>73</sup>

[15] The fifth section, titled “Enforcement of Intellectual Property Rights in the Digital Environment,” is known colloquially as the “Internet Chapter.”<sup>74</sup> It extends the provisions of sections two and four to the context of the Internet.<sup>75</sup> In a move that may target both commercial and non-commercial peer-to-peer file-sharing, the ACTA requires parties to take measures against “unlawful use of means of widespread distribution for infringing purposes.”<sup>76</sup> Parties are authorized to order Internet service providers to reveal a user’s identity to a rights holder upon the filing of an infringement claim.<sup>77</sup> Finally, this chapter includes provisions consistent with the anti-circumvention provisions of the Digital Millennium Copyright Act (“DMCA”), which spreads rights management protections abroad.<sup>78</sup>

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<sup>72</sup> *See id.* at ch. 2, § 4, art. 25. These provisions explicitly reference the confiscation and destruction of counterfeit and pirated goods, thereby inferring by omission that a signatory need not permit the confiscation and destruction of goods that merely infringe rather than counterfeit. *See id.*

<sup>73</sup> *See id.* at ch. 2, § 4, art. 26.

<sup>74</sup> *See id.* at § 5; Mike Masnick, *ACTA's Internet Chapter Leaks; And, Now We See How Sneaky The Negotiators Have Been*, TECHDIRT (Feb. 22, 2010, 11:40 AM), <http://www.techdirt.com/articles/20100222/0215038248.shtml>.

<sup>75</sup> *See* FINAL TEXT, *supra* note 3, at ch. 2, § 5, art. 27 (referring to the Internet has the “digital environment”).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.* This process mirrors the litigation strategy regularly employed by the Recording Industry Association of America (“RIAA”). *See* Eric Bangeman, *Leaked Letter Shows RIAA Pressuring ISPs, Planning Discounts for Early Settlements*, ARSTECHNICA, <http://arstechnica.com/old/content/2007/02/8832.ars> (last updated Feb. 13, 2007, 11:59 AM).

<sup>78</sup> *See* FINAL TEXT, *supra* note 3, at ch. 2, § 5, art. 27; *see also* Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2006).

### C. Chapter Five: The ACTA Committee

[16] Chapter V creates the ACTA Committee, an international administrative body existing separately from WIPO, the WTO, or any other pre-existing entity.<sup>79</sup> The Committee reviews the ACTA's implementation and operation, considers amendments, and oversees the accession of new signatories.<sup>80</sup>

### III. EXECUTIVE AGREEMENT OR TREATY?

[17] Some offices within the U.S. federal government refuse to define the ACTA as a treaty, but rather see it as an executive agreement.<sup>81</sup> Courts apply an easier ratification standard to executive agreements, requiring only the signature of the President, not congressional approval.<sup>82</sup> However, such agreements should not override federal or state law unless "the President has independent constitutional or statutory authority to do so."<sup>83</sup> Conversely, the agreement can properly bypass requirements for congressional review or approval if it contains no discrepancies with existing U.S. law.<sup>84</sup> Thus, if the ACTA requires the reform of any U.S. law, it would be precluded from sole executive agreement status and

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<sup>79</sup> See *id.* at ch. 5, art. 36; *cf.* O'Brien, *supra* note 4 (noting that "ACTA [was] negotiated outside of the traditional and relatively transparent IPR policy-making arenas, such as the WTO or WIPO").

<sup>80</sup> See FINAL TEXT, *supra* note 3, at ch. 5, art. 36.

<sup>81</sup> See, e.g., Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT'L. L. ONLINE 24, 27, 30 (2009), <http://www.yjil.org/docs/pub/o-35-katz-hinze-ACTA-on-knowledge-economy.pdf>.

<sup>82</sup> See Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1576, 1580 (2007).

<sup>83</sup> *Id.* at 1655.

<sup>84</sup> See *id.* at 1597-98, 1660-61 (stating that executive agreements are constitutional so long as "such agreements--in and of themselves--[are not used by the President] as a basis for altering preexisting legal rights.").

would have to come before Congress for approval.<sup>85</sup> Though this would slow the ACTA's already glacial pace, any added infusion of scrutiny, oversight, and transparency would undoubtedly meet a warm reception with the public interest groups currently opposed to the ACTA. As the Electronic Frontier Foundation contends, "congressional advice and approval . . . is integral to the [C]onstitution's delicate balance of executive and legislative powers."<sup>86</sup>

[18] Earlier versions of the ACTA contained provisions conflicting directly with U.S. law.<sup>87</sup> Over the numerous iterations, certain provisions were subject to a disproportionate amount of opposition from both private industry and the public at large.<sup>88</sup> The four provisions drawing the most fire were either removed or diluted.<sup>89</sup> The first provision under fire required an international notice-and-takedown procedure similar to that currently existing under the DMCA.<sup>90</sup> The second provision imposed third-party liability.<sup>91</sup> The third provision instituted a graduated response, or "three strikes" rule, which would have required laws permanently

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<sup>85</sup> *See id.* ("Unless a sole executive agreement is adopted as a 'Treaty' or as a 'Law' using these procedures, the Supremacy Clause does not recognize it as a basis for overriding existing law.")

<sup>86</sup> Katz, *supra* note 24.

<sup>87</sup> *See* Gwen Hinze, *Preliminary Analysis of the Officially Released ACTA Text*, ELEC. FRONTIER FOUND. (Apr. 22, 2010), <https://www.eff.org/deeplinks/2010/04/eff-analysis-officially-released-acta-text>.

<sup>88</sup> *See id.*

<sup>89</sup> *See generally* OFFICE OF THE U.S. TRADE REPRESENTATIVE, ACTA –SUMMARY OF KEY ELEMENTS UNDER DISCUSSION (2009), *available at* <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion>.

<sup>90</sup> *See* Michael Geist, *EU ACTA Analysis Leaks: Confirms Plans For Global DMCA, Encourage 3 Strikes Model*, MICHAEL GEIST (Nov. 30, 2009), <http://www.michaelgeist.ca/content/view/4575/125/>.

<sup>91</sup> *See* Hinze, *supra* note 81.

revoking a user's right to Internet access after three copyright violations.<sup>92</sup> Finally, the fourth provision imposed mandatory criminalization of non-commercial copyright infringement,<sup>93</sup> as well as “inciting, aiding and abetting” such infringement.<sup>94</sup> None of these provisions survived to the ACTA's final draft.

[19] A blanket statement allowing exceptions could eliminate the possibility of conflict, but perhaps at the cost of reducing the entire agreement to impotency. One commentator suggests circumventing any inconsistencies with an article that allows signatories to create exceptions “necessary to address the objectives and principles of the TRIPS agreement.”<sup>95</sup> Indeed, the USTR, which represented the United States in ACTA negotiations, argued that Chapter I, Article 2 allows lawmakers to ignore any provisions of the agreement that might require reform, thereby removing any need for the United States to change domestic law.<sup>96</sup> The USTR refers to the same language used in TRIPS: “[Members] shall be free to determine the appropriate method of implementing the provisions of this Agreement within its own legal system and practice.”<sup>97</sup> The fatal

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<sup>92</sup> See Gwen Hinze, *Leaked ACTA Internet Provisions: Three Strikes and a Global DMCA*, ELEC. FRONTIER FOUND. (Nov. 3, 2009), <https://www.eff.org/deeplinks/2009/11/leaked-acta-internet-provisions-three-strikes-and->.

<sup>93</sup> *Leak: EU Pushes for Criminalizing Non-Commercial Usages in ACTA*, LA QUADRATURE DU NET (June 24, 2010), <http://www.laquadrature.net/en/leak-eu-pushes-for-criminalizing-non-commercial-usages-in-acta>.

<sup>94</sup> *Id.*

<sup>95</sup> See James Love, *Areas Where the Oct 2, 2010 ACTA Text Is Inconsistent with U.S. Law*, KNOWLEDGE ECOLOGY INT'L (Oct. 9, 2010, 9:59 AM), <http://keionline.org/node/970> (internal quotation marks omitted).

<sup>96</sup> See 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, 2:23 PM), <http://keionline.org/node/990>; see also FINAL TEXT, *supra* note 3, at ch. 1, § 1, art. 2.

<sup>97</sup> Compare FINAL TEXT, *supra* note 3, at ch. 1, § 1, art. 2; with TRIPS, *supra* note 55, at pt. 1, art. 1.

flaw to the strategy is that, in the context of TRIPS, the language has been found to *not* be a free pass from compliance.<sup>98</sup>

[20] In fact, on October 8, 2010, Senator Wyden asked a branch of the Library of Congress for an analysis of the October 2 ACTA text to evaluate whether any conflicts existed with then-current U.S. law.<sup>99</sup> The USTR had previously assured Senator Wyden that the ACTA does not provide “a vehicle for changing U.S. law,” but instead would “provide appropriate flexibility.”<sup>100</sup> Shortly thereafter, on October 19, 2010, Senators Bernard Sanders and Sherrod Brown requested a similar analysis from the United States Patent and Trademark Office (“USPTO”),<sup>101</sup> which advises the executive branch on intellectual property policy.<sup>102</sup> Director David Kappos replied with a letter dated November 12, 2010<sup>103</sup> that Senator Sanders described as a “non-response” for its lack of any firm

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<sup>98</sup> See Carlos Correa, *Developing Countries and the TRIPS Agreement*, THIRD WORLD NETWORK (1999), <http://www.twinside.org.sg/title/correa-cn.htm> (Any deviation from the standards set forth by the Agreement may lead to a dispute settlement procedure within the WTO . . . .).

<sup>99</sup> Letter from Ron Wyden, Senator, U.S. Senate, to Karen Lewis, Assistant Dir., Am. Law Div., Cong. Research Serv./Library of Cong. (Oct. 8, 2010), *available at* <http://wyden.senate.gov/imo/media/doc/Sen%20Wyden%20Request%20for%20Legal%20Review%20of%20ACTA%20Oct%202010.pdf>.

<sup>100</sup> Letter from Ron Kirk, Ambassador, U.S. Trade Representative, to Ron Wyden, Senator, U.S. Senate (Jan. 28, 2010), *available at* <http://wyden.senate.gov/imo/media/doc/USTR%20Response%20to%20ACTA%20Letter.pdf>.

<sup>101</sup> Letter from Bernard Sanders, Senator, U.S. Senate, and Sherrod Brown, Senator, U.S. Senate, to David Kappos, Dir., U.S. Patent & Trademark Office (Oct. 19, 2010), *available at* [http://keionline.org/sites/default/files/senator\\_sanders\\_brown\\_kappos\\_19oct2010.pdf](http://keionline.org/sites/default/files/senator_sanders_brown_kappos_19oct2010.pdf).

<sup>102</sup> U.S. PATENT & TRADEMARK OFFICE, OFFICE OF THE ADMINISTRATOR FOR EXTERNAL AFFAIRS (EA), *available at* <http://www.uspto.gov/about/offices/ip/index.jsp> (last updated Jan. 13, 2011).

<sup>103</sup> See Letter from David Kappos, Dir., U.S. Patent & Trademark Office, to Bernard Sanders, Senator, U.S. Senate, and Sherrod Brown, Senator, U.S. Senate (Nov. 12, 2010), *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).



answer or analysis.<sup>104</sup> Meanwhile, the “USPTO provided technical advice on the enforcement of intellectual property rights to USTR.”<sup>105</sup> Others argue that whether the ACTA can successfully “color within the lines of existing U.S. laws” is ultimately of little consequence.<sup>106</sup> Regardless of the ACTA’s requirements for legal reform, it might simply be too expansive to fit within the constitutionally permitted exercise of the President’s executive power.<sup>107</sup> By committing the United States to a new international framework for intellectual property enforcement, it opens the door to as-yet undetermined amendments.<sup>108</sup> Indeed, an open letter from nearly eighty legal scholars vehemently opposes the agreement on this ground, among others.<sup>109</sup> The USTR continues to characterize the agreement as an executive agreement rather than a treaty; a characterization described by scholars as possibly “unlawful.”<sup>110</sup>

[21] Two existing provisions commonly argued as inconsistent with U.S. law are the sections on civil enforcement, addressing injunctions,

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<sup>104</sup> See 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, 12:56 PM), <http://keionline.org/node/1022>.

<sup>105</sup> VICTORIA A. ESPINEL, 2010 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT 36 (2011), available at [http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec\\_annual\\_report\\_feb2011.pdf](http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_report_feb2011.pdf).

<sup>106</sup> See Rob Pegoraro, *Copyright Overreach Goes on World Tour*, WASH. POST (Nov. 15, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111300852\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111300852_pf.html).

<sup>107</sup> See Sean Flynn, *ACTA’s Constitutional Problem*, AM. U. (Nov. 15, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/acta-s-constitutional-problem>.

<sup>108</sup> See FINAL TEXT, *supra* note 3, at ch. 5, art. 36; see also FINAL TEXT, *supra* note 3, ch. 6, art. 42.

<sup>109</sup> See Letter from Brook Baker, Ne. Univ. Sch. of Law, et al. to Barack Obama, President, U.S. (Oct. 28, 2010), available at <http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta> [hereinafter Letter to Obama].

<sup>110</sup> See *id.*; see also Sherwin Sly, *The Trouble with ACTA*, Am. Const. Soc. (Apr. 6, 2010), <http://www.acslaw.org/node/15774>.

damages, and other remedies, and the section on border measures.<sup>111</sup> Although critics raised these arguments upon the release of earlier drafts of the agreement, the provisions remain in the finalized December 3 version of the text.<sup>112</sup> However, none of the inconsistencies actually require legal change. Rather, the permissive language of the agreement allows enough flexibility that the legislature could enact new laws and remain in compliance.

### A. Injunctions

[22] If applied to patents, the injunction provision could conflict with current U.S. law. The ACTA requires the availability of injunctive relief “to prevent goods that involve the infringement of an intellectual property right from entering into the channels of commerce,” except when adequate remuneration or compensation for infringement is available.<sup>113</sup> This infringement provision appears in the civil enforcement section, which would apply to patents at the signatory’s discretion.<sup>114</sup> If the United States does not exclude patents, the injunction requirements would exceed current U.S. law. Currently, physicians performing best-practice medical procedures, though they may infringe a patent claim, are not liable for any damages or subject to an injunction against further use.<sup>115</sup> Thus, the patent holder is denied both injunctive and monetary relief, contrary to the ACTA’s requirements.<sup>116</sup> Similarly, a patent holder’s recovery is often significantly limited when the infringer is a state government.<sup>117</sup>

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<sup>111</sup> See Love, *supra* note 104; see also FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 8-10; see also FINAL TEXT, *supra* note 3, at ch. 2, § 3.

<sup>112</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 8-10; see also FINAL TEXT, *supra* note 3, at ch. 2, § 3.

<sup>113</sup> *Id.* at ch. 2, § 2, art. 8.

<sup>114</sup> See *id.* at ch. 2, § 2 n.2.

<sup>115</sup> See 35 U.S.C. § 271(e) (1); 35 U.S.C. § 287(c) (1).

<sup>116</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 7-9.

<sup>117</sup> See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 641-44 (1999). Sovereign immunity under the Eleventh Amendment protects state

[23] Michèle Rivasi of the European Parliament submitted a formal inquiry to the European Commission regarding whether the ACTA's language would negatively impact access to generic medicine, especially in developing countries.<sup>118</sup> The Commission responded by noting that the civil enforcement chapter's provisions are permissive rather than obligatory, therefore do not require any country to impose restrictions on the trade of patent-protected goods.<sup>119</sup> As noted, this provision will comply with current U.S. law only if its parent section is denied any application to patent law.<sup>120</sup> For the ACTA to succeed as an executive agreement, the United States must choose to exclude patents from the section on injunctions.

#### B. Damages and Other Remedies

[24] Under the ACTA, a court must have the authority to grant monetary damages to a rights holder as compensation for willful infringement.<sup>121</sup> In determining damages, a court should consider "any legitimate measure of value the right holder submits, which may include lost profits, the value of the infringed goods or services measured by the market price, or the suggested retail price."<sup>122</sup>

[25] These requirements do not incorporate or allow for the exceptions currently in place under domestic law. For example, U.S. law exempts the

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governments against patent infringement suits in federal courts, so long as the state provides remedies that satisfy the due process provisions of the Fourteenth Amendment. *Id.*

<sup>118</sup> See Michèle Rivasi, *Parliamentary Questions: ACTA and Access to Medicine*, EUR. PARLIAMENT (Nov. 8, 2010), <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2010-9346&format=XML&language=EN>.

<sup>119</sup> See *Parliamentary Questions: Answer Given by Mr. De Gucht on Behalf of the Commission*, EUR. PARLIAMENT (Dec. 14, 2010), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-9346&language=EN>.

<sup>120</sup> See 35 U.S.C. § 271(e) (2006).

<sup>121</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 9.

<sup>122</sup> *Id.*

National Archives and Records Administration from liability for any infringement of copyrights or related rights arising out of their official business of archival.<sup>123</sup> Various other exemptions exist both in liability and in limitations on exclusive rights in the contexts of certain performances, secondary transmissions by satellite carriers, and secondary transmissions of network stations.<sup>124</sup> Though it seems unlikely the ACTA intends to overwrite and eliminate these provisions, the text makes no explicit provision for them.<sup>125</sup>

[26] Although critics claim that this omission creates an insolvable conflict,<sup>126</sup> the ACTA does not require a court to *always* grant monetary damages, but merely *authorizes* it to do so.<sup>127</sup> Awarding monetary damages for copyright infringement is well within the court's available remedies, so the ACTA's damages provision creates no conflict with U.S. law.<sup>128</sup>

[27] The debate continues over whether to define the ACTA as a treaty or executive agreement.<sup>129</sup> As distinguished by the U.S. Department of State, the principal difference between the two definitions is the

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<sup>123</sup> See 44 U.S.C. § 2117 (2006).

<sup>124</sup> See, e.g., 17 U.S.C. § 110 (2006); 17 U.S.C. § 122 (2006); 17 U.S.C. § 119 (a).

<sup>125</sup> See generally FINAL TEXT, *supra* note 3.

<sup>126</sup> See Grant Gross, *New Version of ACTA Copyright Pact Gets Mixed Reviews*, PCWORLD (Oct. 7, 2010, 5:30 PM), [http://www.pcworld.com/businesscenter/article/207227/new\\_version\\_of\\_acta\\_copyright\\_pact\\_gets\\_mixed\\_reviews.html](http://www.pcworld.com/businesscenter/article/207227/new_version_of_acta_copyright_pact_gets_mixed_reviews.html); Declan McCullagh, *Google Attorney Slams ACTA Copyright Treaty*, CNET NEWS (May 7, 2010, 10:58 AM), [http://news.cnet.com/8301-13578\\_3-20004450-38.html](http://news.cnet.com/8301-13578_3-20004450-38.html).

<sup>127</sup> See FINAL TEXT, *supra* note 3, at ch. 2, § 2, art. 9.

<sup>128</sup> See 17 U.S.C. § 504(a) (2006).

<sup>129</sup> See Mike Masnick, *BSA Falsely Claims ACTA Is A Treaty That Has Already Been Signed By 37 Countries*, TECHDIRT (Oct. 12, 2010, 9:47 AM), <http://www.techdirt.com/articles/20101011/00590611356/bsa-falsely-claims-acta-is-a-treaty-that-has-already-been-signed-by-37-countries.shtml>.

requirement of Senate approval.<sup>130</sup> Some ACTA supporters describe it as a treaty,<sup>131</sup> while others persist with the executive agreement characterization.<sup>132</sup> The European Commissioner for Trade refers to the ACTA as a treaty, but perhaps the distinction is lost outside of U.S. borders.<sup>133</sup>

#### IV. A LACK OF TRANSPARENCY

[28] The ACTA's negotiations have been "subject to intense but needless secrecy."<sup>134</sup> Leaked communications between the negotiating parties reveal prohibitively high secrecy.<sup>135</sup> "The level of confidentiality in these ACTA negotiations has been set at a higher level than is customary for non-security agreements. . . . [I]t is impossible for member states to conduct necessary consultations with IPR stakeholders and legislatures under this level of confidentiality."<sup>136</sup>

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<sup>130</sup> See *Treaty vs. Executive Agreement*, *supra* note 26.

<sup>131</sup> See, e.g., *Countries Representing More than Half of World Trade Agree to Criminalize Copyright Piracy, Including Software License Infringement by End Users*, BUS. SOFTWARE ALLIANCE (Oct. 6, 2010), available at <http://www.bsa.org/country/News%20and%20Events/News%20Archives/en/2010/en-10062010-acta.aspx>.

<sup>132</sup> See, e.g., Thomas Sydnor, *ACTA: USTR Was Right, and the Histrionics Were Wrong-- Again*, PROGRESS & FREEDOM FOUND. (Apr. 23, 2010, 10:37 AM), [http://blog.pff.org/archives/2010/04/acta\\_ustr\\_was\\_right\\_and\\_the\\_histrionics\\_were\\_wrong.html](http://blog.pff.org/archives/2010/04/acta_ustr_was_right_and_the_histrionics_were_wrong.html).

<sup>133</sup> See Love, *supra* note 104.

<sup>134</sup> Letter to Obama, *supra* note 109.

<sup>135</sup> Even ACTA's name obfuscates information. Indeed, it is something of a misnomer. At its heart, "ACTA is not a counterfeiting treaty, but a copyright treaty." Michael Geist, *The ACTA Internet Chapter: Putting the Pieces Together*, MICHAEL GEIST (Nov. 3, 2009), <http://www.michaelgeist.ca/content/view/4510/99999/>.

<sup>136</sup> *Viewing Cable 08ROME1337, BERLUSCONI GOVERNMENT AND IPR -- FIRST SIGNS OF LIFE*, WIKILEAKS (Feb. 3, 2011), <http://wikileaks.ch/cable/2008/11/08ROME1337.html>.

[29] The United States and the European Union have likely been the most influential players upon the agreement's development.<sup>137</sup> Indeed, these parties have drafted the majority of changes between iterations.<sup>138</sup> Some commentators speculate that the finalized text compromises between the staunchly opposing views of these two parties.<sup>139</sup> Though those with the most political and economic clout dominated the negotiations, other parties' influences also influenced the outcome. Leaked agreements revealed commentary attributed to various other parties.<sup>140</sup> Myriad lobbying groups provided input, but not all gained access to the secret negotiating drafts.<sup>141</sup> In fact, the USTR provided drafts of the ACTA generated during negotiations to several U.S. corporations in advance of any authorized public access.<sup>142</sup> A Swedish cable communication attributed statements to the European Union's ACTA negotiator describing this imbalance of disclosure: "[T]he European Commission is concerned that the [U.S. government] has close

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<sup>137</sup> See Michael Geist, *ACTA Coming Down to Fight Between U.S. and Europe*, MICHAEL GEIST (July 15, 2010), <http://www.michaelgeist.ca/content/view/5199/125/> (stating that "most of the agreement boils down to the U.S. v. the E.U.").

<sup>138</sup> See *id.*

<sup>139</sup> See, e.g., Drew Wilson, *ACTA Negotiations – US-EU Divide Being Settled, Text Being Finalized*, ZEROPAID (Aug. 23, 2010), <http://www.zeropaid.com/news/90363/acta-negotiations-us-eu-divide-being-settled-text-being-finalized/>; see also *EU-US Food Fight Hampers ACTA Talks*, EURACTIV (Aug. 19, 2010), <http://www.euractiv.com/en/trade/eu-us-food-fight-hampers-acta-talks-news-496958>.

<sup>140</sup> See, e.g., ANTI-COUNTERFEITING TRADE AGREEMENT (Informal Predecisional/Deliberative Draft July 1, 2010), available at [http://www.publicknowledge.org/files/docs/ACTA\\_consolidatedtext.pdf](http://www.publicknowledge.org/files/docs/ACTA_consolidatedtext.pdf).

<sup>141</sup> See James Love, *White House Shares the ACTA Internet Text with 42 Washington Insiders, Under Non Disclosure Agreements*, KNOWLEDGE ECOLOGY INT'L (Oct. 13, 2009, 16:10), <http://keionline.org/node/660> (listing all "[p]ersons who received the ACTA Internet text who are members of ITAC 15 – the Industry Trade Advisory Committee on Intellectual Property Rights").

<sup>142</sup> See *id.* (citing Table 1, which lists the "names of persons [and their respective companies] who received the documents under the NDA, or as members of the USTR advisory board . . .").

consultation with U.S. industry, while the EU does not have the same possibility . . . .”<sup>143</sup>

[30] The USTR shared incomplete drafts with the upper crust of private industry, but refused to match this transparency with consumer rights groups, small businesses, or the general public.<sup>144</sup> Freedom of Information Act requests targeting the negotiating drafts were denied, but they did uncover a list of names of those who received the ACTA Internet text either under Nondisclosure Agreement or as part of a USTR Advisory Board.<sup>145</sup> These corporate members “included Google, eBay, Dell, Intel, Business Software Alliance, Rupert Murdoch’s News Corporation, Sony Pictures, Time Warner, the Motion Picture Association of America, and Verizon.”<sup>146</sup> The insight granted to and feedback gathered from these business giants undoubtedly provides them superior ammunition with which to lobby than that afforded to small businesses and individuals. Public Knowledge, one of only two non-commercial entities included on the special advisory committee, described the experience as a “minuscule glimpse” with “any suggestions [it] made go[ing] into a black box of a process.”<sup>147</sup> Further compounding the agreement’s obscurity, the governmental offices responsible for negotiating the process failed to

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<sup>143</sup> *Viewing Cable 09STOCKHOLM736, CONCERNS ABOUT ACTA NEGOTIATIONS AND IPR UPDATE: IPRED, PIRATE BAY, AND VODDLER Ref: A) STOCKHOLM 733, B) STOCKHOLM 676 STOCKHOLM 00000736 001.2 OF 002*, WIKILEAKS (Feb. 3, 2011), <http://wikileaks.ch/cable/2009/11/09STOCKHOLM736.html>.

<sup>144</sup> *See Love, supra* note 141.

<sup>145</sup> *See id.*

<sup>146</sup> Ian Grant, *ACTA Talks Focus on Three Strikes, No Appeal Deal for Software Pirates*, COMPUTERWEEKLY.COM (Nov. 4, 2009, 3:29 PM), <http://www.computerweekly.com/Articles/2009/11/04/238414/Acta-talks-focus-on-three-strikes-no-appeal-deal-for-software.htm>.

<sup>147</sup> Sherwin Siy, *ACTA Remains Closed: The Difference Between Inclusion and Transparency*, PUB. KNOWLEDGE (Oct. 20, 2009), <http://www.publicknowledge.org/node/2710>.

release a draft until several years later.<sup>148</sup> In fact, the first official public draft of the agreement released on April 20, 2010 – over three years since negotiations first began.<sup>149</sup>

[31] Those in the public sector also experienced frustration over the transparency of the ACTA negotiations. In August of 2010, the European Parliament passed a “[w]ritten declaration on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement.”<sup>150</sup> Though non-binding, the declaration was still a victory for the transparency critics.<sup>151</sup> Since that time, negotiations have begun to open to the public eye.<sup>152</sup> Four months later, in December of 2010, negotiations concluded.<sup>153</sup> That month, the USTR requested from the public written commentary on the completed text.<sup>154</sup> Yet, the request described the ACTA as “[c]onsistent with the Administration’s strategy for intellectual property enforcement” and “the highest-standard plurilateral agreement yet achieved concerning the enforcement of intellectual property rights . . . .”<sup>155</sup> This language

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<sup>148</sup> See ANTI-COUNTERFEITING TRADE AGREEMENT (PUBLIC Predecisional/Deliberative Draft Apr. 2010), available at [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf).

<sup>149</sup> See *id.*

<sup>150</sup> See Written Declaration on the Lack of a Transparent Process for the Anti-Counterfeiting Trade Agreement (ACTA) and Potentially Objectionable Content, EUR. PARL. DOC. PE439.564v01-00 (2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+WDECL+P7-DCL-2010-0012+0+DOC+PDF+V0//EN&language=EN>.

<sup>151</sup> See Nate Anderson, *European Parliament Passes Anti-ACTA Declaration*, ARS TECHNICA, <http://arstechnica.com/tech-policy/news/2010/09/european-parliament-passes-anti-acta-declaration.ars> (last visited Apr. 10, 2011).

<sup>152</sup> See Michael Geist, *The Trouble with the Anti-Counterfeiting Trade Agreement (ACTA)*, SAIS REV., Summer-Fall 2010, available at [http://muse.jhu.edu/journals/sais\\_review/v030/30.2.geist.html](http://muse.jhu.edu/journals/sais_review/v030/30.2.geist.html).

<sup>153</sup> See FINAL TEXT, *supra* note 3.

<sup>154</sup> See Anti-Counterfeiting Trade Agreement: Request for Comments from the Public, 75 Fed. Reg. 79,069, 79,069 (Dec. 17, 2010).

<sup>155</sup> *Id.*



makes it seem that the USTR has already plotted its course and is not open to deviation. If so, perhaps asking for commentary is merely an empty gesture, in which case the improved transparency is merely illusory. While little can be done to remedy past indiscretions and the lack of openness, perhaps the public dissatisfaction with the negotiation process will provide lessons moving forward.

## V. CONCLUSION

[32] Despite apparent enthusiasm from certain segments of big-industry and government entities,<sup>156</sup> the ACTA elicits skepticism from some and outright vehemence from others.<sup>157</sup> Both official and unofficial leaked versions of the text have shed scarce insight to the otherwise taciturn developmental history of the agreement.<sup>158</sup> The criticism targeting the ACTA stems not just from the shroud of secrecy enveloping its evolution, but also the substantive provisions advocated by the negotiating parties.<sup>159</sup> Indeed, a statement endorsed by “over 90 academics, practitioners and public interest organizations from six continents” noted the “public criticism of the unusually closed process and widespread disquiet over the negotiations’ presumed substance.”<sup>160</sup> The group concluded “that the terms of the publicly released draft of [the] ACTA threaten numerous public interests, including every concern specifically disclaimed by negotiators.”<sup>161</sup>

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<sup>156</sup> See Barry Sookman, *Support for ACTA Urged by Over 20 Leading Organizations*, BARRY SOOKMAN (Nov. 20, 2009), <http://www.barrysookman.com/2009/11/20/support-for-acta-urged-by-over-20-leading-organizations/>.

<sup>157</sup> See, e.g., *What is ACTA?*, ANTI-ACTA, <http://www.anti-acta.com/> (last visited Apr. 10, 2011).

<sup>158</sup> See Michael Geist, *ACTA Guide, Part Two: The Documents (Official and Leaked)*, MICHAEL GEIST (Jan. 26, 2010), <http://www.michaelgeist.ca/content/view/4730/125/>.

<sup>159</sup> See *id.*; see also *Text of Urgent ACTA Communique – English*, AM. U. (June 23, 2010), <http://www.wcl.american.edu/pijip/go/acta-communique>.

<sup>160</sup> *Text of Urgent ACTA Communique - English*, *supra* note 159.

<sup>161</sup> *Id.*

[33] At an extreme, some doubt the very constitutionality of the agreement.<sup>162</sup> Yet the tides of iteration have washed away those provisions that would have required changes in U.S. law. The remaining problem with the ACTA cannot be remedied so easily. The pervasive lack of transparency has left the public feeling hoodwinked, now left only with the opportunity to provide an impotent critique of a finished product. Nonetheless, the ACTA forges on. Indeed, by the time this Article reaches print, the ratification process will have begun.

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<sup>162</sup> See, e.g., Sean Flynn, *ACTA's Constitutional Problem*, AM. U. (Nov. 15, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/acta-s-constitutional-problem>.