

# COVERT INTERNATIONAL INTELLECTUAL PROPERTY LEGISLATION: THE IGNOBLE ORIGINS OF THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA)

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## INTRODUCTION

Considerable controversy was generated in the United States by the introduction into the Senate in May 2011 of the Protect IP Act (PIPA)<sup>1</sup> and by the Stop Online Piracy Act (SOPA)<sup>2</sup> which was introduced into the House of Representatives in October 2011. Both pieces of legislation sought to facilitate the capacity of the IP enforcement authorities in the U.S. to combat the online trade in pirated copyright works and counterfeit trademarked goods. Provisions included court orders to take down websites which made infringing products available and payment facilities from conducting business with infringing websites, search engines from linking to the sites, and court orders requiring Internet service providers to block access to the sites. Existing criminal laws were to be extended to penalise the unauthorized streaming of copyrighted content.

Characterizing SOPA and PIPA as attempts to introduce censorship of the Internet, notable companies such as “Tumblr, Mozilla, Techdirt, and the Center for Democracy and Technology were among many Internet companies who protested by participating in ‘American Censorship Day’ on November 16, 2011.”<sup>3</sup> They displayed black banners over their site logos with the words “STOP CENSORSHIP.”<sup>4</sup>

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1. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011) [hereinafter PIPA] (referencing the Senate bill, which may also be cited as “Protect IP Act of 2011”).

2. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) [hereinafter SOPA].

3. *Protests Against SOPA and PIPA*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Protests\\_against\\_SOPA\\_and\\_PIPA](http://en.wikipedia.org/wiki/Protests_against_SOPA_and_PIPA) (last visited June 10, 2012) (providing a comprehensive account of the protests referenced).

4. *Id.*

On January 18, 2012, Wikipedia's English language site and an estimated 7,000 other smaller websites coordinated a service blackout to raise awareness.<sup>5</sup> Over 160 million people viewed Wikipedia's banner.<sup>6</sup> "Other protests against SOPA and PIPA included petition drives, with Google stating that it had collected over seven million signatures, as well as boycotts of companies and organizations that supported the legislation."<sup>7</sup> Paradoxically, in a protest about censorship, the web sites of organizations that were considered supporters of the legislation, such as the United States Justice Department, Federal Bureau of Investigation (FBI), Universal Music Group, the Recording Industry Association of America (RIAA), and the Motion Picture Association of America (MPAA) were slowed or shut down with denial of service attacks.<sup>8</sup>

On January 18, 2012, Senate Majority Leader Harry Reid announced that a vote on PIPA would be postponed until the issues raised about the bill were resolved, and on January 20, 2012, House Judiciary Committee Chairman Lamar Smith announced that the Committee would postpone consideration of SOPA until there was wider agreement.<sup>9</sup> Although lauded as a triumph for the Internet community, the apparent demise of SOPA and PIPA was paralleled by the covert triumph of the Anti-Counterfeiting Trade Agreement (ACTA), was described on Internet blogs as being "SOPA's Pimp Daddy,"<sup>10</sup> as "SOPA and PIPA on Steroids,"<sup>11</sup> and as being "more dangerous than SOPA"<sup>12</sup> and "worse than SOPA."<sup>13</sup>

ACTA was adopted by the negotiating parties, including the U.S., on April 15, 2011.<sup>14</sup> On October 1, 2011, a special signing ceremony was held in Tokyo, with the United States, Australia, Canada, Japan, Morocco, New

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5. *Stop Online Piracy Act*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/Stop\\_Online\\_Piracy\\_Act](http://en.wikipedia.org/wiki/Stop_Online_Piracy_Act) (Last visited June 10, 2012).

6. *Id.*

7. *Id.*

8. See Molly Wood, *Anonymous Goes Nuclear; Everybody Loses?*, CNET NEWS (Jan. 19, 2012, 5:40 PM PST), [http://news.cnet.com/8301-31322\\_3-57362437-256/anonymous-goes-nuclear-everybody-loses/](http://news.cnet.com/8301-31322_3-57362437-256/anonymous-goes-nuclear-everybody-loses/).

9. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, available at <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

10. "Acta" is SOPA's Pimp Daddy, THE POLITICAL FILM BLOG (Jun. 10, 2012), <http://politicalfilm.wordpress.com/2012/01/24/acta-is-sopas-pimp-daddy/>.

11. Anomaly, *Meet ACTA; It's SOPA and PIPA on Steroids, the Global Edition*, FREAKOUTNATION (Jun. 10, 2012), <http://freakoutnation.com/2012/01/22/meet-acta-its-sopa-and-pipa-on-steroids-the-global-edition/>.

12. Lance Ulanoff, *ACTA 'Is More Dangerous Than SOPA'*, MASHABLE SOCIAL MEDIA (Jun. 10, 2012), <http://mashable.com/2012/01/26/acta-more-dangerous-than-sopa/>.

13. Erik Kain, *If You Thought SOPA Was Bad, Just Wait Until You Meet ACTA*, FORBES (Jun. 10, 2012), available at <http://www.forbes.com/sites/erikkain/2012/01/23/if-you-thought-sopa-was-bad-just-wait-until-you-meet-acta/>.

14. Press Release, Ministry of Foreign Affairs of Japan, *Anti-Counterfeiting Trade Agreement (ACTA) (Opening for Signature)*, (May 1, 2011), available at [http://www.mofa.go.jp/announce/announce/2011/5/0501\\_01.html](http://www.mofa.go.jp/announce/announce/2011/5/0501_01.html).

Zealand, Singapore, and South Korea all signing ACTA.<sup>15</sup> This article explores how ACTA was negotiated without the scale of the protests which accompanied SOPA and PIPA.

#### I. THE ROAD TO ACTA- FAILURE OF ENFORCEMENT NEGOTIATIONS IN OTHER FORA

The World Trade Organization's (WTO) Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS Agreement) had originated as a response to the frustration which principally the U.S. and the European Union (EU) shared about the inadequacy of the international intellectual property rights IPR regime to deal with the growth of counterfeiting and piracy.<sup>16</sup> The proposal made by the United States that IPR regulation be shifted to the General Agreement on Tariffs and Trade (GATT), made at the launch of the Uruguay Round in 1987,<sup>17</sup> was created because of its disillusionment with the World Intellectual Property Organization (WIPO) as an effective custodian of the international IPR system.<sup>18</sup> The creation of the World Trade Organization as the body responsible for the administration of the GATT and the TRIPS Agreement, suggested that IPR enforcement would be placed on sound footing.<sup>19</sup> However, within ten years of the commencement of the TRIPS Agreement, a more than ten-fold increase in counterfeiting and piracy from \$20 billion annually to at least \$450 billion,<sup>20</sup> together with

the difficulties that the [United States] had in raising the enforcement issue in the TRIPS Council, as well as the fairly poor result which it obtained in its complaint about the enforcement of China's copyright law, meant that

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15. See *Anti-Counterfeiting Trade Agreement (ACTA)*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, available at <http://www.ustr.gov/acta>.

16. See generally MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT (1996) (providing, within chapter 2, background regarding the origin of the TRIPS Agreement).

17. See generally *Information: The Uruguay Round: Decisions of 28 January 1987* (Feb. 5, 1987), GATT/1405 (1987).

18. See generally William N. Walker, *A Program to Combat International Commercial Counterfeiting*, 70 TRADEMARK REP. 117 (1980).

19. See generally THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terrence P. Stewart ed., 1993) (providing a comprehensive account of the negotiating history of the Uruguay Round).

20. It should be noted that there is a significant lack of agreement about the size of the annual trade in infringing products. See World Intellectual Prop. Org., Advisory Comm. on Enforcement, Dec. 1 – 2, 2010, *The Economic Effects of Counterfeiting and Piracy: A Literature Review*, 6<sup>th</sup> Sess., Dec. 1-2, 2010, ¶ 49, WIPO Doc. WIPO/ACE/6/7 (Sept. 3, 2010); See World Intellectual Prop. Org., Advisory Comm. on Enforcement, Dec. 1 – 2, 2010, *Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, 6<sup>th</sup> Sess., Dec. 1-2, 2010, ¶ 1, WIPO Doc. WIPO/ACE/6/4 (Sept. 3, 2010).

the WTO was not the effective forum which the [United States] had [sought].<sup>21</sup>

In June 2005, the EU sought to initiate discussions on IPR enforcement.<sup>22</sup> At the TRIPS Council meeting in June 2006, it called for an “in-depth discussion” of enforcement issues.<sup>23</sup> This proposal was met with strong opposition from leading developing countries such as Argentina, Brazil, China, and India, which considered the enforcement issue a diversion from the Doha Development Agenda.<sup>24</sup> At the TRIPS Council meeting in October 2006, the EU, with support from Japan, Switzerland, and the U.S., submitted a joint communication asserting that the TRIPS Council was “an appropriate forum to examine and assist Members in the implementation of enforcement provisions of the TRIPS Agreement” and that the work of the TRIPS Council “should complement Members’ efforts to use other cooperative mechanisms to address IPR enforcement.”<sup>25</sup> The co-sponsors stated that they:

- Invite other Members to engage in a constructive discussion of how to implement the enforcement provisions of TRIPS in a more effective manner.
- Invite other Members to engage in a constructive discussion of accompanying measures which could enhance the effectiveness of national implementing legislation and enforcement efforts, such as for example promoting interagency co-operation, fostering a higher public awareness, and reinforcing institutional frameworks.
- Ask the Secretariat to prepare a synopsis of Members’ contributions to the Checklist of Issues on Enforcement that would serve as a basis for the above-mentioned discussion.

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21. Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26 2009) (interpretation of Article 61 was raised in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, which arose on a complaint by the U.S. about the enforcement of China’s copyright law).

22. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Communication from the European Communities*, IP/C/W/448 (June 9, 2005).

23. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcing Intellectual Property Rights: Border Measures: Communication from the European Communities*, IP/C/W/471 (June 9, 2006).

24. Tove Iren S. Gerhardsen, ‘EU Gets Little Support for Enforcement Proposal at WTO; CBD Issue Unresolved’, IP-WATCH (June 16, 2006, 2:52 PM), <http://www.ip-watch.org/weblog/2006/01/25/ustr-clarifies-demand-for-details-on-chinas-ipr-enforcement-cases/>.

25. Council for Trade-Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Joint Communication from the European Communities, Japan, Switzerland and the United States*, ¶ 4, IP/C/W/485 (Nov. 2, 2006).

- Stand ready, in cooperation with recipients of technical assistance and with relevant international organizations, to better focus the technical assistance they provide in favour of developing countries in order to facilitate the implementation of enforcement provisions.<sup>26</sup>

A number of Least Developed Countries (LDCs) objected to this proposal on procedural grounds and it was rejected.<sup>27</sup> The LDCs apparently interpreted the joint communication as an “implied threat that countries failing to provide ‘adequate’ protection of intellectual property rights ultimately could be found not to be in compliance with TRIPS.”<sup>28</sup> Taking a more capacity-building approach, the U.S., at the next TRIPS Council meeting in January 2007, circulated a paper sharing its experience on border enforcement of intellectual property rights, and called on the TRIPS Council to “make a positive contribution to addressing [IPR enforcement] problems through a constructive exchange of views and experiences.”<sup>29</sup> Although the LDCs found this approach to be procedurally acceptable, they reiterated that the issue of enforcement did not belong in the TRIPS Council.<sup>30</sup> China, with the support of Argentina, Brazil, Cuba, India, and South Africa, declared that “enforcement could not be a permanent agenda item in the council.”<sup>31</sup> In June 2007, Switzerland introduced a paper suggesting ways to implement the enforcement provisions of the TRIPS Agreement and to improve the overall enforcement of IPRs, particularly in the area of border measures.<sup>32</sup> Finally, on October 11, 2007, Japan introduced a paper on border enforcement of IPRs that outlined the recent trend on IPR infringements.<sup>33</sup> Less than two weeks later, on October 23, 2007, each of these countries

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26. *Id.* ¶ 7.

27. See Tove Iren S. Gerhardsen, ‘WTO TRIPS Council Stumbles over Inclusion of Enforcement’, IP-WATCH (Oct. 27, 2006, 12:23 PM), <http://www.ip-watch.org/weblog/2006/10/27/wto-trips-council-stumbles-over-inclusion-of-enforcement/>.

28. See Peter K. Yu, *TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 383-86 (2006).

29. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from the United States: Enforcement of Intellectual Property Rights (Part III of the TRIPS Agreement): Experiences of Border Enforcement*, IP/C/W/488 (Jan. 30, 2007).

30. Tove Iren S. Gerhardsen, *TRIPS Meeting: Boost to IP Issues as Part of Resumed Trade Talks, US Submits Enforcement Proposal*, IP-WATCH (Feb. 14, 2007, 11:54 AM), <http://www.ip-watch.org/2007/02/14/trips-meeting-boost-to-ip-issues-as-part-of-resumed-trade-talks-us-submits-enforcement-proposal/>.

31. *Id.*

32. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Switzerland: Enforcement of Intellectual Property Rights: Communication and Coordination as a Key to Effective Border Measures*, IP/C/W/492 (May 31, 2007).

33. Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Japan, Enforcement of Intellectual Property Rights*, IP/C/W/501 (Oct. 11, 2007).

joined in the announcement of commencement of the ACTA negotiations.<sup>34</sup> Although, as we will see below, the proponents of ACTA would be criticised for ignoring multilateral fora such as the WTO and WIPO in their efforts to establish ACTA, they unsuccessfully attempted to initiate discussions on IPR enforcement in the TRIPS Council. Thus, Peter K. Yu points out that as “these countries have claimed, the unwillingness of less-developed countries to discuss enforcement issues gave them no choice but to explore discussions in another forum.”<sup>35</sup>

Interestingly, after the ACTA negotiations were well under way and it seemed that an agreement was likely to be forthcoming, the issue of IPR enforcement was again placed on the TRIPS Council’s agenda, but this time on the initiative of China and India. At a meeting of the TRIPS Council in June 2010, the representative from China expressed concern “about the TRIPS-plus enforcement trend” embodied in ACTA, which might cause at least the following problems:

First were potential legal conflicts and unpredictability. Though TRIPS required only minimum standards of IP protection and allowed Members to implement in their laws more extensive protection, it also provided certain conditions for applying such extensive protection. First, such protection should “not contravene the provisions” of TRIPS. Secondly, it required Members to ensure that measures and procedures to enforce intellectual property rights did not themselves become barriers to legitimate trade. Thirdly, these extensive protections should not inappropriately restrict the inbuilt flexibilities and exceptions in the TRIPS Agreement. Fourthly, according to the chapeau of Article 20 of GATT 1994, if applied as border measures, they should not violate other covered agreements under the WTO and not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination among Members or a disguised restriction on international trade, and only measures necessary to secure compliance with laws or regulations could be applied, which was the so-called necessity test.<sup>36</sup>

The Chinese delegate expressed her country’s concern that ACTA would break the delicate balance “between the three pillars of GATT, GATS and TRIPS . . . between developed and developing countries, rights and obligations, technology innovation and transfer and dissemination of

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34. Press Release, Office of the United States Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), available at <http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes>.

35. Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA* 64 SMU L. REV. 975, 993 (2011) [hereinafter *Six Secret (and Now Open) Fears of ACTA*].

36. Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*, ¶ 252, IP/C/M/63, (Oct. 4, 2011) (hereinafter *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*).

technology, the advantage of producers and interests of users of technology . . . [and between] economic welfare and social welfare including public health and nutrition.”<sup>37</sup> She noted the “imbalance of interests between the developed and developing world in IP protection caused by the digital divide and the impact of TRIPs-plus enforcement on the allocation of public resources in developing countries.”<sup>38</sup> She concluded that IPR infringement “was largely a problem during the process of development. Therefore, development was the crux of the matter.”<sup>39</sup>

The representative from India supported China’s statement that the high levels of protection envisaged in ACTA were likely to disturb the balance of rights and obligations in the TRIPS Agreement and could restrain TRIPS flexibilities.<sup>40</sup> He suggested that the released ACTA text “showed a general shift in the focus of enforcement which enhanced the power of IP holders beyond reasonable measure . . . shifting the enforcement forum towards customs administrative authorities and away from civil courts.”<sup>41</sup> The U.S. representative said that the notion that TRIPs-plus enforcement standards were somehow a trend “was a problematic one and was misplaced” “[as] every national IP enforcement regime . . . was TRIPs-plus- “in the sense that national implementing measures for IP enforcement were necessary to address numerous procedural and substantive issues for which there was no TRIPS requirement.”<sup>42</sup> He mentioned the attempts of the U.S., together with the EU, Japan, and Switzerland, to support a dialogue in the Council for TRIPS on the implementation of the existing enforcement obligations under the TRIPS Agreement, and to identify solutions to implementation deficiencies. However, he noted “through the course of past meetings of the Council, that Members of the WTO had widely divergent views on the nature of the enforcement provisions of the TRIPS Agreement and even, regrettably, on the appropriateness of discussing those provisions in the Council,” and that “members should not be surprised to see the concerned Members seeking to combat this threat elsewhere.”<sup>43</sup>

Among the other ACTA negotiators, the representative of Korea referred to the right of WTO Members under Article 1.1 of TRIPS to implement in their domestic law more extensive protection than was required by the Agreement and that the public text of ACTA, stating that “[n]othing in this Agreement shall derogate from any international obligation of a Party with respect to any other Party under existing agreements to which both Parties

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37. *Id.* ¶ 255.

38. *Id.* ¶¶ 255-58.

39. *Id.* ¶ 262.

40. *Id.* ¶¶ 264, 270.

41. *Id.* ¶ 271.

42. *Id.* ¶ 279.

43. *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*, *supra* note 36, ¶ 282.

are party” and that “there was nothing more than this to clarify the concerns raised.”<sup>44</sup> A similar point was made by the Japanese representative, who added that discussion on enforcement practices “should be conducted in a fact-based and analytical manner taking into account concrete situations and the types of measures to be considered.”<sup>45</sup> The representative of Canada pointed out that “effective enforcement of IPRs was a fundamental aspect of the TRIPS Agreement that was not only a matter of establishing procedural remedies, but also of improving cooperation, capacity building and communication” and that “the objective of ACTA was not to undermine the TRIPS Agreement but to complement it by focusing on improving aspects of enforcement, including legal procedures, cooperation and communication, that the Council for TRIPS had so far been prevented from considering.”<sup>46</sup> The representative of Australia also referred to the previous difficulty in discussing enforcement within the Council for TRIPS and explained that “[s]tandards in ACTA were largely built upon those negotiated within the WTO, and reflected the TRIPS consistent measures already in place in many WTO Member countries.”<sup>47</sup> The Swiss representative also explained that the ACTA initiative was being undertaken because “thus far, attempts to even only discuss issues relating to the growing problem of counterfeiting and piracy in an open and constructive spirit in multilateral forums such as the Council for TRIPS had met with absolute rejection by some delegations, including China and India “[and that it]“considered its participation in the ACTA negotiations “as additional to its commitment and efforts at the multilateral level, particularly the WTO and WIPO.”<sup>48</sup> The representative of New Zealand explained its participation in ACTA because it believed that ACTA would be an important, effective to combat the “increasingly prolific trade in counterfeit and pirated goods, through better enforcement mechanisms for intellectual property rights, including through international co-operation.”<sup>49</sup> Finally, the representative from the EU explained that with the tenfold increase of counterfeiting and piracy fifteen years after the commencement of the TRIPS Agreement,

[H]e failed to understand why Members who rightly enjoyed the flexibilities under the TRIPS Agreement had to prevent other Members from also enjoying the flexibilities under the TRIPS Agreement to tackle a growing problem, the consequences of which in terms of risks for safety and health, and in terms of criminal organizations, were even worse in

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44. *Id.* ¶ 287.

45. *Id.* ¶¶ 294-95.

46. *Id.* ¶¶ 301-02.

47. *Id.* ¶ 303.

48. *Id.* ¶¶ 314-15.

49. *Minutes of Meeting: Held in the Centre William Rappard on 8-9 June 2010*, *supra* note 36, ¶ 323.

developing countries that had less means, and were more exposed to traffic of spurious medicines.<sup>50</sup>

Of the major developing countries, the representative of Brazil said his country “had always taken the position that enforcement was essentially a matter of domestic policy making and priority setting that had no place on the agenda of the Council . . . [and] preferred that the sharing of national experiences on enforcement . . . at WIPO’s Advisory Committee on Enforcement that had been specifically designed for that purpose.”<sup>51</sup> In addition to supporting the concern of China and India about the impact of ACTA upon the delicate balance of TRIPS, he expressed the concern that the ACTA negotiating process “lacked the legitimacy of initiatives conducted in multilateral organizations” and that it might “end up being TRIPS-minus to the extent that it contributed to narrowing down the scope for flexibilities.”<sup>52</sup> The representative of Nigeria, speaking on behalf of the African Group, expressed concern “about the erosion of policy space that might curtail Members’ ability to access medicines critical for the African continent” but he reported that the African Group was also concerned about the issue of counterfeiting and piracy “which had an economic impact in Members countries as many industries were closing down.”<sup>53</sup>

When the 2 October 2010 of ACTA became available in the public domain, the Indian and Indonesian delegations took the opportunity to revisit the implications of ACTA for WTO Members at the October 26 -27, 2010 TRIPS Council meeting.<sup>54</sup> The delegate from India noted the broad reach of the border measures and that in scaling up the minimum enforcement level enshrined in the TRIPS Agreement, through its Most Favored Nation (MFN) provisions, ACTA would have a direct impact on exports, even of Members which were not involved in ACTA negotiations, “contrary to one of the main principles of the WTO rules based system, which was to liberalize trade.”<sup>55</sup> He alleged that ACTA negotiators “decided among themselves to overturn the decision of the WTO dispute settlement panel in the recent *China-IPRs* case by reinterpreting the phrase ‘commercial scale’ with respect to willful trademark counterfeiting and copyright piracy so as to refer to any activity carried out for a direct or indirect economic or commercial advantage.”<sup>56</sup> He said that ACTA would

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50. *Id.* ¶ 326.

51. *Id.* ¶ 316.

52. *Id.* ¶¶ 317-18.

53. *Id.* ¶ 319.

54. Council for Trade Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010*, ¶ 440, IP/C/M/64, (Feb. 17, 2011), available at [http://docsonline.wto.org/gen\\_search.asp?language=1](http://docsonline.wto.org/gen_search.asp?language=1) (hereinafter *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010*).

55. *Id.* ¶ 444.

56. *Id.* ¶ 445.

substantially increase customs authorities' *ex officio* activity in enforcing intellectual property rights, limit the protection otherwise available to accused infringers under the TRIPS Agreement by potentially lowering knowledge thresholds and limiting due process requirements, and expressed concern that ACTA would set up "a plurilateral intellectual property enforcement body outside the purview of either WIPO or the WTO, which might undermine the role of the multilateral organizations."<sup>57</sup> After reiterating the arguments about interference with the delicate balance of the TRIPS Agreement, he concluded that "to find an effective and enduring solution to the problem, Members needed to step back from a purely mercantilist approach and needed to avoid exaggerating the issue of counterfeiting and piracy in view of the lack of empirical data."<sup>58</sup> The representative of Indonesia "urged WTO Members to refrain from supporting this TRIPS-plus initiative as it could create a new type of non-tariff barrier, particularly for developing and least-developed country Members."<sup>59</sup>

Among the other major developing countries, the Brazilian representative added the concern that ACTA might be converted "into a truly international organization dealing with the enforcement of intellectual property rights, whose impact on WIPO and the WTO, especially on capacity building and technical assistance, was unpredictable at this stage."<sup>60</sup> The representative of China said that excessive or unreasonably high standards for intellectual property protection could unfairly increase monopolistic profits of right holders, eating into the consumer surplus and further broadening the gap between the rich and the poor in the world. She also pointed out that as ACTA did not have any multilateral WTO mandate, any negative spill-over effects of ACTA on WTO Members which were not party to ACTA would "be subject to review in various WTO councils and committees, but also subject to the WTO dispute settlement mechanism and possible counter measures in accordance with the DSU, the TRIPS Agreement, GATT, GATS, and other WTO Agreements."<sup>61</sup>

Of the ACTA signatories, the representative of the U.S. (or United States representative?) outlined the provisions which were contained in the final draft of the ACTA highlighting the fact that "ACTA would []be the first agreement of its kind to promote several key best practices that contributed to effective enforcement of intellectual property rights" and he welcomed all Members who were interested in enhancing IPR enforcement to consider joining the agreement.<sup>62</sup> The representative of Japan reiterated that ACTA

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57. *Id.* ¶ 446.

58. *Id.* ¶¶ 449-50.

59. *Id.* ¶ 454.

60. *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010, supra* note 54, ¶ 451.

61. *Id.* ¶ 459.

62. *Id.* ¶¶ 460-63.

was consistent with WTO obligations and would be implemented in such a manner as to avoid the creation of barriers to legitimate trade.<sup>63</sup> The representative of Canada “said that ACTA was consistent with the TRIPS Agreement . . . [A]nd that the objectives and principles of the TRIPS Agreement applied *mutatis mutandis* to ACTA.”<sup>64</sup> Nor did ACTA create or alter rights relating to the protection of intellectual property rights, but rather “it set new standards for the enforcement of existing intellectual property rights which were complementary to those provided in the TRIPS Agreement.”<sup>65</sup> This was supported by Australia.<sup>66</sup> The representative of the EU claimed “a clear preference for dealing with enforcement within the WTO or WIPO” but that this had been frustrated by the refusal of a number of WTO Members to engage in any discussion on IP enforcement in the TRIPS Council obliging it to pursue such discussions outside this forum<sup>67</sup> The representative of Mexico explained that his country had suffered from counterfeiting and piracy in its new economic sectors such as clothing, tobacco, medical drugs, music, books etc. and that Mexico was a party to ACTA “because it was important to have effective border measures to combat counterfeiting and piracy.”<sup>68</sup> In a written statement, Singapore focused its comments on the “value that [it saw] in participating in the ACTA process,” which included “the encourage[ment] of innovation, creativity and the growth of industry and commerce” and “strengthening cooperation to better protect the interests of consumers and industries alike.”<sup>69</sup> It saw ACTA as complementing and strengthening the role of the multilateral institutions and their processes.

On October 17, the final text of ACTA was circulated to WTO Members at the request of the delegations of Australia, Canada, the European Union, Korea, Japan, New Zealand, Singapore, Switzerland, and the U.S.<sup>70</sup>

## II. PLURILATERAL ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) PROPOSED

The idea of establishing a new agreement on IPR enforcement has its origins in the Global Congress on Combating Counterfeiting and Piracy,

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63. *Id.* ¶ 464.

64. *Id.* ¶ 466.

65. *Id.* ¶ 466.

66. *Minutes of Meeting Held in the Centre William Rappard, Oct. 26-27, 2010, supra* note 54, ¶ 468.

67. *Id.* ¶ 469.

68. *Id.* ¶ 473.

69. *Id.* ¶ 481.

70. Council for Trade Related Aspects of Intellectual Property Rights, *Enforcement of Intellectual Property Rights: Communication from Australia, Canada, the European Union, Korea, Japan, New Zealand, Singapore, Switzerland and the United States*, IP/C/W/563 (Oct. 17, 2011), available at [http://docsonline.wto.org/gen\\_search.asp?language=1](http://docsonline.wto.org/gen_search.asp?language=1).

organised for the first time in 2004 by the World Customs Organization (“WCO”) in collaboration with Interpol with the participation of a number of business organizations, which was concerned with “the rampant theft of intellectual property.”<sup>71</sup> At the Second Global Congress on Combating Counterfeiting and Piracy hosted by Interpol at Lyon in November 2005, Japan had proposed a Treaty on Non-Proliferation of Counterfeits and Pirated Goods. The twin central features of this proposed treaty were proposals for the confiscation of the proceeds of IP crimes and the extradition of IP criminals.

The Treaty also proposed to address a number of matters that had been omitted from the border control provisions of the TRIPS Agreement. These provisions focus upon the imports of infringing products. It also proposed controls over the export and transshipment of counterfeit and pirated goods. The Japanese Treaty also proposed the removal of the *de minimis* exception contained in TRIPS of importation for private use. An area of enforcement the Treaty addressed was the deterrence of the distribution and sale of counterfeit and pirated goods on the Internet. Finally, a dispute settlement mechanism was proposed, together with deterrent sanctions. At the end of the Congressional session, the participants adopted the Lyon Declaration, which recommended the further consideration of “Japan’s proposal for a new international treaty.”<sup>72</sup> The Japanese Treaty proposal was reiterated at the Third and Fourth Global Congresses on Counterfeiting and Piracy in Brussels 2006 and Geneva 2007.

Paralleling the Japanese initiative the U.S. contemplated collaborating with its trading partners to develop an international strategy to fight counterfeiting and piracy. In 2005, pursuant to its Strategy Targeting Intellectual Property (“STOP!”) Initiative, the United States Trade Representative (USTR), Susan Schwab, “led interagency teams to meet with key trading partners to advocate closer cooperation in fighting piracy and counterfeiting, and to advocate sharing of ‘best practices’ for strong legal frameworks.”<sup>73</sup> “In 2006 the USTR encouraged the interagency Trade Policy Staff Committee (TPSC), representing the interests of twenty U.S. government agencies, to endorse the concept of a multi-party, ‘TRIPS-plus’ ACTA.”<sup>74</sup> In explaining the origins of ACTA, in a Freedom of Information proceeding, Assistant USTR, Stanford McCoy, explained:

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71. *About the Global Congress*, GLOBAL CONGRESS COMBATING COUNTERFEITING & PIRACY, <http://www.ccapcongress.net/about.htm> (last visited Sept. 22, 2012).

72. *Second Global Congress on Combating Counterfeiting & Piracy, Lyon Declaration*, (Nov. 15, 2005), at 4, available at <http://www.ccapcongress.net/archives/Lyon/files/OutcomesStatement20051115.pdf>.

73. *Six Secret (and Now Open) Fears of ACTA*, *supra* note 35, at 110 (quoting Declaration of Stanford McCoy at 4-5, Elec. Frontier Found. v. Office of the U.S. Trade Representative, No. 08-1599 (RMC) (D.D.C. May 29, 2009)).

74. *Id.*

USTR proposed that a group of leading IPR-protecting nations could work together to set a new standard for IPR enforcement that was better suited to contemporary challenges, both in terms of strengthening the relevant laws and in terms of strengthening various frameworks for enforcing those laws. The interagency TPSC concurred with USTR's recommendation that USTR begin contacting trading partners to join a plurilateral ACTA.<sup>75</sup>

From 2006, the U.S. and Japan had begun joint discussions on a new multilateral treaty to combat counterfeiting and piracy.<sup>76</sup> During 2006 and 2007 these discussions were extended to include Canada, the EU and Switzerland. The Japanese treaty proposal was superseded by the announcement on October 23, 2007, by the U.S., EU, Japan, South Korea, Mexico, New Zealand, Switzerland, and Canada of negotiations for a Plurilateral Anti-Counterfeiting Trade Agreement (ACTA). The use of the word "plurilateral" was presumably to distinguish ACTA from existing multilateral trade agreements, such as TRIPS and the various bilateral free trade agreements negotiated between various trading partners subsequent to the establishment of the WTO and the regional free trade agreements such as the North American Free Trade Agreement (NAFTA) and the trade agreements of the EU; specifically, U.S. announcement stated that the "ACTA will not involve any changes to the TRIPS Agreement, rather, the goal is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis."<sup>77</sup>

The European Commission indicated that it would use the ACTA "to create a new layer of intellectual property protections because it mandates from EU Member States to negotiate the ACTA with a list of specific countries, including the U.S., Japan, Korea, Mexico and New Zealand."<sup>78</sup> One of its aims is described as "[c]reating a strong modern legal framework which reflects the changing nature of intellectual property theft in the global economy . . . ."<sup>79</sup> A statement by METI Minister Akira Amari, stated that "it is essential to establish a new international framework aimed at strengthening the enforcement of intellectual property rights" to deal with

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75. *Id.*

76. *ACTA – Summary of Key Elements Under Discussion*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 2009), <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion>.

77. C.R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 HOUS. L. REV. 1235, 1236 n.3 (2009).

78. Pinsent Masons, *European Commission asks for new IP protection layer*, OUT-LAW.COM (Oct. 25, 2007), <http://www.out-law.com/page-8578>.

79. Press Release, European Comm'n, *European Commission Seeks Mandate to Negotiate Major New International Anti-Counterfeiting Pact* (Oct. 23, 2007), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1573&format=HTML&aged=1&language=EN&guiLanguage=en>.

“serious and significant threat to the world economy” caused by the proliferation of pirate and counterfeit goods.<sup>80</sup>

### III. TRANSPARENCY OF THE ACTA NEGOTIATIONS

In December 2007, before formal negotiations commenced, the USTR requested that its negotiating partners agree to be bound by a confidentiality agreement it had prepared.<sup>81</sup> Subsequently, this was used by the USTR to classify all correspondence between ACTA negotiating countries as “national security” information on the grounds that it was confidential “foreign government information.”<sup>82</sup> Similarly, its negotiating partners justified their failure to divulge information about ACTA to their confidentiality obligation. Thus for more than two years, no official drafts of the treaty were released for public scrutiny and the specific terms under discussion in the negotiations were not identified. This lack of information, as well as the restricted participation of states in the negotiation of the ACTA and the exclusion of public interest groups from the negotiating process was the subject of widespread criticism, particularly by civil society groups.<sup>83</sup> Exacerbating this criticism was the revelation that certain favoured bodies were obtaining access to documents.

In September 2008, the Electronic Frontier Foundation and Public Knowledge, two U.S. civil society organizations, filed a lawsuit under the Freedom of Information Act (FOIA) requesting the release of records concerning ACTA “as a matter of public interest” to acquire documents such as “participant lists, agendas, presentations and documents distributed at, or received at, meetings of USTR staff with” representatives of the entertainment, luxury, and pharmaceutical industries, “agents, representatives and officials of international entities dealing with the enforcement of intellectual property,” and any other “agency memoranda,

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80. Japan Minister of Economy, Trade, and Industry, *Regarding “Anti-Counterfeiting Trade Agreement (ACTA) [tentative]”* (Oct. 23, 2007), available at [http://warp.ndl.go.jp/info:ndljp/pid/286890/www.meti.go.jp/press/20071023001/004\\_danwa=eng.pdf](http://warp.ndl.go.jp/info:ndljp/pid/286890/www.meti.go.jp/press/20071023001/004_danwa=eng.pdf).

81. 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, 30-31 (2009); <http://www.yjil.org/docs/pub/o-35-katz-hinze-ACTA-on-knowledge-economy.pdf>.

82. See Exec. Order No. 12958, 3 C.F.R. 333 (1995), amended by Exec. Order No. 12958, 3 C.F.R. 196 (2003).

83. See generally ROBIN GROSS, IP JUSTICE, IP JUSTICE WHITE PAPER ON THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) (2008), available at <http://ipjustice.org/wp/2008/03/25/ipj-white-paper-acta-2008/>; *Anti-Counterfeiting Trade Agreement*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/issues/acta> (last visited Sept. 26, 2012); Robert Weissman, *Secret Counterfeiting Treaty Public Must be Made Public*, *Global Organizations Say*, WIKILEAKS (Sept. 15, 2008), [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).

briefing notes, and analysis concerning ACTA. “However, the two organizations dropped the lawsuit in June 2009 after the Obama administration classified the ACTA negotiations a matter of national security.”<sup>84</sup>

In November 2008, the Foundation for a Free Information Infrastructure (FFII) applied to the Council of the European Union for access to documents concerning ACTA. This request was refused by the Council on the ground that “unauthorised disclosure . . . could be disadvantageous to the interests of the European Union or of one or more of its Member States,” as the negotiations are still in progress and their disclosure “could impede the proper conduct of the negotiations.”<sup>85</sup>

In September 2009, another U.S. civil society organization, Knowledge Ecology International (KEI),<sup>86</sup> reported that the USTR was using nondisclosure agreements “to selectively share copies of the ACTA Internet text outside of the USTR formal advisory board system.”<sup>87</sup> On September 11, 2009, KEI submitted a Freedom of Information request to the USTR, asking for the names of persons who had signed these agreements, as well as copies of them. On October 9, 2009, it received copies of these agreements identifying a total of 32 persons who received the Internet texts.<sup>88</sup> These included representatives from: the Business Software Alliance (3), eBay (4), Google (3), News Corporation (2), a law firm, Wilmer Hale (2), Intel (2) Dell, Verizon, Sony Pictures Entertainment, Time Warner, Consumer Electronics Association (2), the International Intellectual Property Alliance (IPI), and four persons from two civil society organizations: Public Knowledge (3) and the Centre for Democracy and Technology. The USTR also informed KEI that seven persons received the ACTA Internet text as members of the Industry Trade Advisory Committees on Intellectual Property Rights (ITAC 15),<sup>89</sup> as well as three persons from

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84. Emily Ayoob, Note, *Recent Development: The Anti-Counterfeiting Trade Agreement*, 28 CARDOZO ARTS & ENT. L. J. 175, 188 (2010).

85. Letter from Ramón Jiménez Fraile, on behalf of the Gen. Secretariat of the Council of the European Union, to Ante Wessels (Nov. 5, 2008), available at <http://action.ffii.org/acta/Analysis?action=AttachFile&do=get&target=08-1835en.wes.wsjj.pdf>.

86. KEI was created as an independent legal organization in 2006, assimilating the staff and work program of the Consumer Project on Technology (CPTech) to engage inter alia in global public interest advocacy, and to enhance the “transparency of policy making.” See KNOWLEDGE ECOLOGY INTERNATIONAL, <http://keionline.org> (last visited Sept. 28, 2012).

87. KNOWLEDGE ECOLOGY INTERNATIONAL, <http://keionline.org/node/660> (last visited Nov. 6, 2012).

88. *Id.*

89. *Id.* (including Anissa S. Whitten, Vice President, International Affairs and Trade Policy, Motion Picture Association of America, Inc; Eric Smith, President, International Intellectual Property Alliance; Neil I. Turkewitz Executive Vice President, International Recording Industry Association of America; Sandra M. Aistars, Assistant General Counsel, Intellectual Property, Time Warner Inc.; Stevan D. Mitchell, Vice President, Intellectual Property Policy, Entertainment Software Association; Thomas J. Thomson, Executive Director, Coalition for Intellectual Property Rights; Timothy P. Trainer, President, Global

the Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce (ITAC 8).<sup>90</sup> These are two of a number of committees established by the U.S. Department of Commerce and the Office of the USTR to “engage business leaders in formulating U.S. trade policy.”<sup>91</sup> The role of the business community in the formulation of United States IPR trade policy has been the subject of extensive analyses in relation to the negotiation of the TRIPS Agreement,<sup>92</sup> and so it is unexceptional that similar business representatives have been involved in contributing to U.S. policy on the formulation of the ACTA. As will be seen below, criticism was leveled about the lack of transparency by those persons within and outside the U.S. who were denied access to negotiating texts.

Indeed, the official position taken by the negotiating parties until April 2010 was that draft texts did not exist. Yu suggests that on the basis of the history of the way in which the TRIPS Agreement evolved, this may well have been the case, as the earlier sessions may have been taken up with amassing information.<sup>93</sup> In any event, as the USTR noted in its denial of the Electronic Frontier Foundation’s request under the Freedom of Information Act, ACTA-related documents concerned “information that is properly classified in the interest of national security pursuant to Executive Order 12958.”<sup>94</sup> This Executive Order, issued in April 1995, allowed documents to be classified as confidential when their unauthorized disclosure “reasonably could be expected to result in damage to the national security.”<sup>95</sup> It is difficult to see how information about an agreement concerned with intellectual property enforcement could have national security implications.

The first intimation of the content of the ACTA was a “Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement” which was posted to

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Intellectual Property Strategy Center, P.C., Zippo Manufacturing Company (also former president of the IIPA).

90. *Id.* (including Jacquelynn Ruff, Vice President, International Public Policy, and Regulatory Affairs Verizon Communications Inc.; John P. Goyer, Vice President, International Trade, Negotiations and Investment, U.S. Coalition of Service Industries; Mark F. Bohannon, General Counsel and Senior Vice President, Public Policy, Software and Information Industry Association).

91. INDUSTRY TRADE ADVISORY CENTER, <http://www.trade.gov/itac/index.asp> (last visited Sept. 26, 2012).

92. *See generally* PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (Oxford Univ.2003); SUSAN SELL, *PRIVATE POWER, PUBLIC LAW- THE GLOBALIZATION OF IPRS* (2003).

93. *Six Secret (and Now Open) Fears of ACTA*, *supra* note 35, at 1008.

94. *See* Letter from Carmen Suro-Bredie, Chief FOIA Officer, USTR, to James Love, Director, Knowledge Ecology Int’l (Mar. 10, 2009), *available at* [http://www.keionline.org/misc-docs/3/ustr\\_foia\\_denial.pdf](http://www.keionline.org/misc-docs/3/ustr_foia_denial.pdf).

95. 3 C.F.R. 333.

the Wikileaks website.<sup>96</sup> Other sources include the websites of negotiating parties which identified the matters under discussion in the ACTA negotiations, from which the content of the ACTA could be inferred.<sup>97</sup> Responding to an increasing crescendo of calls for the publication of the ACTA, in February 2009 the USTR issued a “Summary of Key Elements Under Discussion.”<sup>98</sup> The USTR’s Summary stated that “ACTA delegations are still discussing various proposals for the different elements that may ultimately be included in the agreement. A comprehensive set of proposals for the text of the agreement does not yet exist.”<sup>99</sup> It provided “an overview of the elements suggested under the different headings and highlights the main issues.”<sup>100</sup> The USTR noted that “discussions are ongoing; new issues might come up and other issues may finally not be included in the agreement.”<sup>101</sup>

Calls for greater transparency were made even by supporters of ACTA. For example, Dan Glickman, the CEO of the Motion Picture Association of America wrote to Senator Patrick Leahy, chairman of the Senate Judiciary Committee, and to USTR Ron Kirk, that “outcries on the lack of transparency in the ACTA negotiations . . . distract from the substance and the ambition of the ACTA which are to work with key trading partners to combat piracy and counterfeiting across the global marketplace.”<sup>102</sup> In March 2010, a fact sheet was published informing on the content and the objectives of the agreement.<sup>103</sup> It addressed the transparency issue by stating that the steps negotiating parties had taken to provide more information to the public included: “issuing a summary of the issues under discussion, publishing agendas ahead of each negotiating round and issuing press

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96. Proposed US ACTA Multi-Lateral Intellectual Property Trade Agreement (2007), WIKILEAKS (May 22, 2008), [http://wikileaks.org/wiki/Proposed\\_US\\_ACTA\\_multi-lateral\\_intellectual\\_property\\_trade\\_agreement\\_\(2007\)](http://wikileaks.org/wiki/Proposed_US_ACTA_multi-lateral_intellectual_property_trade_agreement_(2007)).

97. See, e.g. AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, <http://www.dfat.gov.au/> (last visited Sept. 26, 2012); THE DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE, CANADA, [http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect\\_property.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx), and the Swiss Federal Institute of Intellectual Property: <https://www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html> (last visited Sept. 26, 2012).

98. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion> (last visited Sept. 26, 2012).

99. *Id.*

100. *Id.*

101. *Id.*

102. Letter from Dan Glickman, Chairman & CEO, Motion Picture Ass’n of Am., Inc., to Senator Patrick Leahy (Nov. 19, 2009), available at <http://www.scribd.com/doc/22785108/MPAA-letter-re-ACTA>.

103. See *Anti-Counterfeiting Trade Agreement (ACTA): Fact Sheet*, EIDGENÖSSISCHES INSTITUT FÜR GEISTIGES EIGENTUM (Mar. 2010), [https://www.ige.ch/fileadmin/user\\_upload/Juristische\\_Infos/e/acta\\_factsheet.pdf](https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/acta_factsheet.pdf).

104. *Id.*

releases shortly after the conclusion of each round.”<sup>104</sup> However, the press releases did little more than list the participating countries and the subjects which were addressed.

The problem with this lack of transparency was that various versions of the alleged ACTA have been made available, causing concern to those who consider themselves to be adversely affected. For example, the French civil rights organisation La Quadrature du Net, on January 18, 2010, placed a fifty-six page consolidated version of the text of an EU stakeholder dialogue meeting shortly after its conclusion.<sup>105</sup> This version was of particular concern to NGOs and organizations concerned with the Internet freedom.

Probably the most strident calls for transparency were made by politicians. Michael Geist lists legislators from Canada, France, Germany, New Zealand, Sweden, and the U.S. who called for the ACTA to be made public.<sup>106</sup> “On January 21, 2010 UK Junior Business Minister David Lammy was quoted as saying that he could not put documents about ACTA in the House of Commons Library because other countries wanted to maintain secrecy.”<sup>107</sup> However, on March 17, 2010, he was reported as being in favour of placing the draft text in the public domain.<sup>108</sup> This change of heart was no doubt attributed to a resolution of the European Parliament on Transparency and State of Play of the Anti Counterfeiting Trade Agreement that “[the European] Commission should immediately make all documents related to the ongoing international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) publicly available.”<sup>109</sup> The Resolution stated that

The Anti-Counterfeiting Trade Agreement (ACTA) will contain a new international benchmark for legal frameworks on what is termed intellectual property right enforcement. The content as known to the public is clearly legislative in character. Further, the Council confirms that ACTA

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105. See *ACTA 20100118 Version Consolidated Text*, LA QUADRATURE DU NET (Jan. 18, 2010), [http://www.laquadrature.net/wiki/ACTA\\_20100118\\_version\\_consolidated\\_text](http://www.laquadrature.net/wiki/ACTA_20100118_version_consolidated_text).

106. MP Charlie Angus, Canada; Senators Bernie Sanders and Sherrod Brown, Reps. Mike Doyle, Zoe Lofgren, United States; Nicolas Dupont-Aignan, France; Tom Watson (Labour), John Whittingdale (Conservative), Lindsay Hoyle (Labour), and Don Foster (Lib Democrats), United Kingdom, Minister Åsa Torstensson, Sweden, MEPs Jens Holms, Sweden, Axel Voss, Germany; MPs Clare Curran, and Peter Dunne, New Zealand. Michael Geist, *ACTA Guide, Part Three: Transparency and ACTA Secrecy*, MP3NEWSWIRE.NET (Jan. 27, 2009), <http://www.mp3newswire.net/stories/0102/acta-guide-3.htm>.

107. *MPs Frozen Out of Super-Secret Copyright Talks*, THE REGISTER (Jan. 21, 2010), [http://www.theregister.co.uk/2010/01/21/acta\\_lammy/](http://www.theregister.co.uk/2010/01/21/acta_lammy/).

108. *UK IP Minister Lammy Backs EU Release of ACTA Text*, INTELLECTUAL PROPERTY WATCH (Mar. 17, 2010), <http://www.ip-watch.org/2010/03/17/uk-ip-minister-lammy-backs-eu-release-of-acta-text/>.

109. Resolution on the Transparency and State of Play of the Anti-Counterfeiting Trade Agreement ACTA Negotiations, EUR. PARL. DOC. P7\_TA(2010)0058, (Mar. 10, 2010), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0058>.

110. *Id.*

includes civil enforcement and criminal law measures. Since there can not be secret objectives regarding legislation in a democracy, the principles established in the ECJ *Turco* case must be upheld.<sup>110</sup>

The *Turco* case concerned a request by Mr. Maurizio Turco, the Italian Radical MP and former MEP, to the European Council for access to documents appearing on the agenda of a Justice and Home Affairs Council meeting, including an opinion of the Council's legal service on a proposal for a directive laying down minimum standards for the reception of applicants for asylum in Member States. The Council had refused to disclose the legal opinion on the ground that it deserved special protection so as not to create uncertainty regarding the legality of the measure adopted further to that opinion; the Court of First Instance upheld the Council's refusal<sup>111</sup> but the decision was reversed by the European Court of Justice (ECJ).<sup>112</sup> Regarding the fear expressed by the Council that disclosure of an opinion of its legal service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, the ECJ held that it was precisely this openness which contributed to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing different points of view to be openly debated.

On April 15, 2010, a number of European Members of Parliament from the Green Party wrote to the WIPO Director General, drawing his attention to the EU Resolution of March 10, 2010 "showing the growing concern of European citizens regarding ACTA" and requesting "an expert assessment and analysis of the current provisions of ACTA" from WIPO's institutional viewpoint "as one the two specialised organisations entrusted with the issue of norm-setting in the field of intellectual property rights and related issues."<sup>113</sup> The letter noted "with disappointment that ACTA has bypassed the multilateral WTO and WIPO institutions which have structured and practised processes to assure participation, information sharing and transparency in international norm-setting negotiations" and it commended WIPO's practices of making negotiating texts available, when distributed to all members of the negotiation as well as procedures which allow accredited non-governmental organisations to attend meetings and organise side-events. This was contrasted with the negotiations for the 8<sup>th</sup> round of ACTA being negotiated in New Zealand, which was characterised as "secret from the public and consumers, and in defiance of the principles of democratic

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111. Case T-84/03, *Turco v. Council*, 2004 E.C.R. II-4061.

112. Joined Cases C-39/05 P & C-52/05 P, *Sweden v. Council*, 2008 E.C.R. I-4723.

113. Letter from Jan Philipp Albrecht, MEP, et al., Greens/European Free Alliance to Pascal Lamy, Director General, WTO (Apr. 15, 2010), available at <http://www.erikjosefsson.eu/sites/default/files/WTO-letter-from-Greens-EFA.html>.

114. *Id.*

decision making.”<sup>114</sup> The letter then sought answers to a number of questions about the negotiation of international IP norms. There is no formal record of an answer to this letter, although in a joint statement issued by the ACTA negotiating partners it was suggested that “it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation.”<sup>115</sup> Although the word “trade” appears in the title of the ACTA, it is questionable whether the Agreement can properly be characterised as a “trade agreement” given that it is largely concerned with IP enforcement and contains no provisions that facilitate or promote trade.<sup>116</sup>

In anticipation of the ACTA negotiators’ meeting in Wellington in April 2010, participants at a “PublicACTA Conference” April 10, 2010 promulgated the Wellington Declaration for the consideration of the negotiators.<sup>117</sup> This Declaration appears to have been actuated by concerns about possible attacks on Internet freedoms. In relation to transparency, it called for full transparency and public scrutiny of the ACTA process including release of the text after each round of negotiations.<sup>118</sup>

On April 16, 2010, following the 8<sup>th</sup> round of negotiations, a Joint Statement was issued by participants explaining that “negotiations have now advanced to a point where making a draft text available to the public will help the process of reaching a final agreement” and that “the consolidated text coming out of these discussions” would be made available to the public on April 21, 2010.<sup>119</sup> On that day a “Consolidated Text” prepared for public release was made available, described as a “PUBLIC Predecisional/Deliberative Draft.”<sup>120</sup> Most of the text was in square brackets, indicating a lack of agreement on those provisions. In a press release, EU Trade Commissioner Karel De Gucht declared that the ACTA “will be fully in line with current EU legislation. . . . The agreement will not

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115. *The Anti-Counterfeiting Trade Agreement: Summary of Key Elements Under Discussion*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/key-summary-resume-cle.aspx?lang=en> (last modified Jan. 1, 2012). *But see* Geist, *supra* note 106 (commenting on this statement by annexing two schedules of international the negotiating committees of international organizations, including: WTO, WIPO, WHO, UNCITRAL, UNIDROIT, UNCTAD, OECD, Hague Conference on Private International Law, in which negotiating documents are freely available).

116. Kimberlee Weatherall, *Politics, Compromise, Test and the Failures of the Anti-Counterfeiting Trade Agreement*, 33 SYDNEY L. REV. 229, 233-34 (2011).

117. *Wellington Declaration*, ACTA (Apr. 10, 2010), available at <http://acta.net.nz/the-wellington-declaration>.

118. *Id.*

119. Press Release, ACTA, Joint Statement on Anti-Counterfeiting Trade Agreement (ACTA) (Apr. 16, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/437&format=HTML&aged=0&language=EN&guiLanguage=en>.

120. *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).

include provision which modify substantive intellectual property law, create new rights or change their duration.”<sup>121</sup> The publication of the consolidated text was described as a partial victory for transparency, which would not have happened without the agitation of civil society organizations and the various leaked documents.<sup>122</sup> The victory was described as partial because the published text was “decided without any input from consumer organisations or ordinary people.”<sup>123</sup>

Responding to these concerns, meetings were held between ACTA negotiators and civil society representatives at the time of the 9th round of negotiations in Lucerne in July 2010 and civil society and business representatives at the time of the Tokyo round in October 2010. Consolidated texts of ACTA were issued in August, October and November 2010. The final text was released on December 6, 2010 after a meeting of negotiators in Sydney for what they called “legal scrubbing.” It was noted that “in fitting form” this final meeting was “performed behind closed doors” and that the host Australian Ministry for Foreign Affairs and Trade “did not answer press inquiries on the agenda or a list of discussed changes.”<sup>124</sup>

The negotiation of ACTA by a select group of invited countries, in negotiations attended by a lack of transparency will inevitably taint its acceptance as an international IP enforcement standard, particularly on the part of the uninvited. In an early account of the ACTA a commentator wrote that “the activity envisaged by the plan is more usually undertaken by trade bodies such as the WTO, the G8 group of industrialised nations and WIPO” but that a statement by the European Commission “said that it felt it needed more room to maneuver than those bodies provided.”<sup>125</sup> It was pointed out that the “European Commission wants to create a new layer of intellectual property protections because it says that existing structures such as WIPO are not flexible enough.”<sup>126</sup> As the Director General of WIPO pointed out, at the time of the Lucerne round, it is “a bad development for a multilateral agency, that member states start to do things outside. Either the machinery works, or it doesn’t,” and he concluded that “[I] think [that this] is the real

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121. Press Release, European Comm., Anti-Counterfeiting Trade Agreement: European Commission Welcomes Release of Negotiation Documents (Apr. 21, 2010), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=552>.

122. Glyn Moody, *One Act is Over for ACTA: How Will the Drama End?*, COMPUTERWORLD UK (Apr. 21, 2010), <http://www.computerworlduk.com/community/blogs/index.cfm?blogid=14&entryid=2922>.

123. *Id.*

124. Monika Ermert, ‘Final Final’ ACTA Text Published: More Discussion Ahead for EU, INTELLECTUAL PROPERTY WATCH (June 16, 2010), <http://www.ip-watch.org/2010/12/06/‘final-final’-acta-text-published-more-discussion-ahead-for-eu/>.

125. *European Commission Asks for New IP Protection Layer*, OUT-LAW.COM (Oct. 25, 2007), <http://www.out-law.com/page-8578>.

126. *Id.*

significance of ACTA.”<sup>127</sup> He said that the challenge is first, to “make the multilateral system relevant” because international problems require an international solution, as opposed to a partial one.<sup>128</sup> Secondly, the most vulnerable countries are the ones that most need the inclusiveness of the international system in which all countries have a voice.<sup>129</sup> Thirdly, it is bad public policy for solutions to happen by default.<sup>130</sup>

A study by Jeremy Malcolm of a number of international institutions observed that “[e]ven the WTO, the least participatory of the organizations studied, posts all of its official documents online, and most of the other institutions also make available negotiating texts.”<sup>131</sup> He concluded that “ACTA meets none of the basic best practices for transparency of the existing institutions of the intellectual property policy regime.”<sup>132</sup> This study was referred to in the submission to the USTR of thirty U.S. legal academics cautioning against the acceptance of the Agreement by the President as an executive act.<sup>133</sup> They pointed out that “ACTA was drafted under unusual levels of secrecy for a legislative minimum standards agreement.”<sup>134</sup> They concluded that the “kind of secrecy envisioned and practiced by the USTR needlessly created and fostered an adversarial relationship with the public that reinforced the worst fears and criticism about international intellectual property lawmaking” and that “[t]his has further undermined the legitimacy of the ACTA negotiating process, and ACTA itself.”<sup>135</sup>

Despite the criticisms about the ACTA negotiating process, concerns about the lack of transparency continue. In March 2011, a request under the U.S. Freedom of Information Act by the NGO Knowledge Ecology International (KEI) to study a Congressional Research Service study of

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127. Catherine Saez, *ACTA A Sign of Weakness in Multilateral System*, WIPO Head Says, INTELLECTUAL PROPERTY 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/>.

128. *Id.*

129. *Id.*

130. *Id.*

131. Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions*, PIJIP, 17 (Sept. 1, 2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1006&context=research>.

132. *Id.* at 20.

133. Sean M. Flynn et al., *ACTA Public Comments: Submission of Legal Academics*, Docket No. USTR-2010-0014, *ACTA's Constitutional Problem*, INFOJUSTICE.ORG, 9 (Feb. 18, 2011), <http://infojustice.org/wp-content/uploads/2011/02/ACTA-Comment-Thirty-Professors-USTR-2010-0014.pdf>.

134. *Id.* at 8. See also David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, PIJIP (Feb. 08, 2011), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1020&context=research>.

135. Flynn et al., *supra* note 133, at 12-13.

ACTA and its legality that was undertaken for the U.S. Senate and shared with the USTR was denied.<sup>136</sup>

#### IV. POST NEGOTIATION DEVELOPMENTS

ACTA was submitted to the respective authorities in participating countries to undertake relevant domestic processes. Article 39 provides for ACTA to remain open for signature by participants in its negotiation<sup>137</sup> and by any other WTO Members the participants may agree to by consensus, from March 31, 2011 until March 31, 2013. Article 40 provides that ACTA enters into force thirty days after the date of deposit of the sixth instrument of ratification, acceptance, or approval. “The Government of Japan will receive signatures as the nominated Depositary of the Agreement.”<sup>138</sup>

The Office of the United States Trade Representative (USTR) sought written comments from the public on the final text of the ACTA in connection with consideration of U.S. signature of the agreement, by February 15, 2011.<sup>139</sup> In response to this request, Public Knowledge urged that the USTR should “[s]eek to include, as part of the agreement, an agreed statement reflecting the understanding that ACTA would not require changes to U.S. law,” that it would “[n]ot coerce non-ACTA countries to accede to the agreement” and “employ a more open and inclusive process as it negotiates the proposed Transpacific Partnership (TPP) agreement.”<sup>140</sup>

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136. See Mike Masnick, *USTR Refuses to Release Congressional Research Service Study on Legality of ACTA*, TECHDIRT (Mar. 28, 2011, 7:27 AM), <http://www.techdirt.com/articles/20110325/04480513628/ustr-refuses-to-releasecongressional-research-service-study-legality-acta.shtml>.

137. Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, 50 I.L.M. 243, 256. The participants are identified as:

Australia, the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, Canada, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Union, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, Ireland, the Italian Republic, Japan, the Republic of Korea, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the United Mexican States, the Kingdom of Morocco, the Kingdom of the Netherlands, New Zealand, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Singapore, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. *Id.* at 257 n.17.

138. Press Release, Ministry of Foreign Affairs of Japan, Anti-Counterfeiting Trade Agreement (ACTA) (Opening for Signature) (May 1, 2011) ([http://www.mofa.go.jp/announce/announce/2011/5/0501\\_01.html](http://www.mofa.go.jp/announce/announce/2011/5/0501_01.html)).

139. Anti-Counterfeiting Trade Agreement: Request for Comments From the Public, 75 Fed. Reg. 79,069 (Dec. 17, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-12-17/pdf/2010-31763.pdf>.

140. Rashmi Rangnath, Pub. Knowledge, *In the Matter of the Anti-Co[un]terfeiting Trade Agreement*, Docket No. USTR-2010-0014, *Comments of Public Knowledge*,

The International Trademark Association (INTA), responding to this invitation, in a letter dated February 15 2011, recommended that the ACTA Committee, established under the Agreement, “should help other countries develop assessments of the economic, social and other benefits of participating in ACTA or at a minimum adopting its principles” and that the Committee “should also ‘recruit’ other non-signatories to sign and implement this agreement.”<sup>141</sup>

It had been pointed out that “[t]he US Government has made clear that it intends to conclude ACTA as a ‘sole executive agreement,’ meaning that it will enter into effect upon the signature of the President or his representative, without being formally presented for approval to either house of Congress.”<sup>142</sup> In a submission to the USTR, thirty U.S. legal academics wrote a submission calling “on the Obama administration to comply with the Constitution by submitting the Anti-Counterfeiting Trade Agreement (ACTA) to Congress for approval” pointing out that “the executive branch lacks constitutional authority to enter international agreements on intellectual property without congressional consent.”<sup>143</sup> A Global Congress on Intellectual Property and the Public Interest, held between August 25-27, 2011, “convened over 180 experts from 32 countries and six continents to “help re-articulate the public interest dimension in intellectual property law and policy.”<sup>144</sup> It issued the Washington-Declaration on Intellectual Property and Public Interest which made a plea for reasonableness and proportionality of legal penalties, processes, and remedies to the acts of infringement they target and to preserve the right of countries to “retain the rights to implement flexibilities to enforcement measures and to make independent decisions about the prioritization of law enforcement resources to promote public interests.”<sup>145</sup> The Declaration was a response to the passage of ACTA.

On November 24, 2010 the European Parliament adopted a resolution on ACTA, which stressed, *inter alia*, that any agreement reached by the EU on ACTA must comply fully with the *acquis communautaire* and noted that as a result of the entry into force of the Lisbon Treaty in December 2009, the

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INFOJUSTICE.ORG, 1 (Feb. 17, 2011), <http://infojustice.org/wp-content/uploads/2011/02/Public-Knowledge1.pdf>.

141. Letter from Gerhard Bauer, President, INTA, to Ron Kirk, Ambassador, United States Trade Representative (Feb. 15, 2011) (<http://www.inta.org/Advocacy/Documents/INTA%20Response%20to%20USTR%20FRN%20Docket%20USTR-2010-0014.pdf>).

142. Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS (Aug. 24, 2011), <http://www.asil.org/pdfs/insights/insight110824.pdf>.

143. Flynn et al., *supra* note 133, at 2.

144. See The Global Congress on Intellectual Property and the Public Interest, *The Washington Declaration on Intellectual Property and the Public Interest*, INFOJUSTICE.ORG (Aug. 27, 2011), <http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf>.

145. *Id.*

Parliament will have to give consent to the ACTA text prior to the agreement's entry into force in the EU. In November 2010, the Policy Department of the EC's Directorate-General for External Policies issued the terms of reference for an external Study on ACTA to "provide a concise and comprehensive overview" of the Agreement and to "respond to certain key questions which have been raised by the MEPs during the negotiation of the agreement."<sup>146</sup> In February 2011, an Opinion was issued by a group of European academics on ACTA which claimed that certain ACTA provisions were not entirely compatible with EU law particularly in relation to criminal enforcement.<sup>147</sup> In response to the criticisms made in the Opinion in March 2011, the European Commission held a meeting with representatives of non-governmental organisations, as part of its DG Trade Civil Society Dialogue.<sup>148</sup> At this meeting the Commission rejected the Academics Opinion stating that no legislative changes would be required as ACTA went no further than the existing EU enforcement rules. On April 27, 2011, the European Commission released a Working Paper in which it took issue with this Opinion.<sup>149</sup> In June 2011, the Study which the Policy Department of the EC's Directorate-General for External Policies had commissioned on ACTA was published.<sup>150</sup> The primary recommendation of the assessment was that "unconditional consent would be an inappropriate response from the European Parliament . . ."<sup>151</sup> It proposed that if the European Parliament decided to give its consent "this should be conditional on the inclusion of statements that provide interpretation and guidance on how member states should apply ACTA in a way that complies with EU member states international obligations."<sup>152</sup> It found that "the letter of the agreement is not incompatible with the Acquis but that there are no

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146. Directorate-General for External Policies of the Union, *External Study on the ACTA Anti-counterfeiting Trade Agreement*, PEOPLE.FFII.ORG (Nov. 15, 2010), <http://people.ffii.org/~ante/acta/EXPO-Terms-of-Reference.pdf>.

147. See Roberto D'Erme et al., *Opinion of European Academics on Anti-Counterfeiting Trade Agreement*, STATEWATCH.ORG, available at <http://www.statewatch.org/news/2011/jul/acta-academics-opinion.pdf>.

148. See generally European Comm'n, Directorate-General for Trade (DG Trade), *Civil Society Meeting Anti-Counterfeiting Trade Agreement (ACTA)*, EC.EUROPA.EU (Mar. 25, 2011, 10:30 AM), available at [http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc\\_147497.pdf](http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc_147497.pdf).

149. Anselm Kamperman Sanders et al., Directorate-General for External Policies of the Union, *The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment* (June 2011), [http://www.erikjosefsson.eu/sites/default/files/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment.pdf](http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf).

150. Directorate-General for External Policies of The Union, Directorate B, Policy Department, *Study The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment*, Brussels, European Parliament, June 2011, [http://www.erikjosefsson.eu/sites/default/files/DG\\_EXPO\\_Policy\\_Department\\_Study\\_ACTA\\_assessment.pdf](http://www.erikjosefsson.eu/sites/default/files/DG_EXPO_Policy_Department_Study_ACTA_assessment.pdf)

151. *Id.* at 66.

152. *Id.*

guarantees that its implementation will be.”<sup>153</sup> Consequently, it was recommended that the European Parliament “may therefore wish to consider a need for a clarification of and guidance on how ACTA will be implemented especially the border and criminal enforcement measures as well as the in-transit procedures.”<sup>154</sup>

On June 28, 2011, the European Commission circulated a Proposal for a Council Decision on the conclusion of the ACTA with the country parties to the negotiation.<sup>155</sup> At the request of the Greens/European Free Alliance group in the European Parliament an Opinion was prepared on whether the final version of ACTA and its foreseen legislative procedure was in line with the European Convention on Human Rights and/or the EU Charter of Fundamental Rights.<sup>156</sup> This opinion concluded that the current draft of ACTA “seriously threatens fundamental rights in the EU and in other countries, at various levels.”<sup>157</sup> Specifically, it asserted that “an explicit *de minimis* rule and an explicit public interest defence are the minimum that are required” to bring the criminal enforcement provisions into conformity with the European Convention and Charter.<sup>158</sup> The overall assessment was that.

ACTA tilts the balance of IPR protection manifestly unfairly towards one group of beneficiaries of the right to property, IP right holders, and unfairly against others. It equally disproportionately interferes with a range of other fundamental rights, and provides or allows for the determination of such rights in procedures that fail to allow for the taking into account of the different, competing interests, but rather, stack all the weight at one end.<sup>159</sup>

In September 2011, the Committee on International Trade (INTA) of the European Parliament filed a request to its Legal Services to advise on the compliance of ACTA with the EU *acquis*.

Mindful of the controversy generated by the ACTA negotiations on February 22, 2012, the European Commission announced that it would seek an advisory opinion from the European Court of Justice before moving

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153. *Id.* at 8.

154. *Id.*

155. *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*, COM (2011) 380 final (June 24, 2011).

156. Douwe Korff & Ian Brown, *Opinion on the Compatibility of ACTA with the ECHR and the EU Charter of Fundamental Rights*, THE GREENS/EUROPEAN FREE ALLIANCE, <http://rfc.act-on-acta.eu/fundamental-rights>.

157. *Id.* at 58.

158. *Id.*

159. *Id.* at 61.

forward with the ratification of the ACTA. This was explained as a means of easing the concerns of European citizens about whether the agreement could lead to censorship.<sup>160</sup> A reflection of this concern was a petition received on February 28, 2012 by the European Parliament signed by more than 2.4 million Internet users against ACTA.

Australia and New Zealand reported that their respective parliamentary committees would be scrutinizing ACTA before action is taken.<sup>161</sup> On October 16, 2010, the Australian Minister for Trade commended the Agreement, stating that the Government would make a final decision on ratifying the ACTA treaty after it was examined by the Joint Standing Committee on Treaties.<sup>162</sup> This examination does not yet appear to have taken place, but in March 2011 the Australian Government released the *Intellectual Property Laws Amendment (Raising The Bar) Bill 2011*, which proposed to make a number of significant amendments to the major Australian industrial property statutes.<sup>163</sup> In addition, the Bill contained a suite of measures for enhancing trademark and copyright enforcement, including measures for the confiscation of counterfeit and pirate goods in line with ACTA. The Bill was introduced into the Senate on June 22, 2011.

On January 31 and February 7, 2011 the House of Commons Standing Committee on Canadian Heritage held hearings to determine the status of negotiations on the free trade agreement with the EU and to find out the position of Canada's negotiators in talks to sign ACTA. The Minister of International Trade reported that the Copyright Modernization Bill had been introduced to the Canadian Parliament to support Canada's obligations under ACTA. The Standing Committee called on the Government of Canada to ensure that Canada's commitments to the implementation of ACTA "are limited to the agreement's focus on combating international counterfeiting and commercial piracy efforts; and that the Government of Canada retains the right to maintain domestic copyright policies that have been developed within the framework of its commitments to the World Intellectual Property Organization and the Berne Convention."<sup>164</sup>

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160. Press Release, European Comm'n, Statement by Comm'r Karel De Gucht on ACTA (Anti-Counterfeiting Trade Agreement) (Feb. 22, 2012) (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=778>).

161. Monika Ermert, *Still a Long Way to Go for Anti-Counterfeiting Trade Agreement*, (Sept. 8, 2011, 9:23 PM), <http://www.ip-watch.org/weblog/2011/09/08/still-a-long-way-to-go-for-anti-counterfeiting-trade-agreement/>.

162. Craig Emerson, *Anti-Counterfeiting Agreement to Benefit Creative Industries*, (Nov. 16, 2010), [http://www.trademinister.gov.au/releases/2010/ce\\_mr\\_101116](http://www.trademinister.gov.au/releases/2010/ce_mr_101116).

163. Explanatory Memorandum from The Parliament of the Commonwealth of Austl., *Intellectual Prop. Laws Amendment (Raising The Bar) Bill 2011 (2010-2011)* ([http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s837\\_ems\\_561ef790-9811-43d0-b14f-04c924723c94/upload\\_pdf/356916em.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s837_ems_561ef790-9811-43d0-b14f-04c924723c94/upload_pdf/356916em.pdf;fileType=application%2Fpdf)).

164. HOUSE OF COMMONS, 40th PARLIAMENT, 3d SESS., STANDING COMM. ON CANADIAN HERITAGE, THE CANADA-EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT, THE ANTI-COUNTERFEITING TRADE AGREEMENT, AND ISSUES REGARDING

ACTA has had a chequered history in Mexico. A Working Group of the Senate conducted hearings which resulted in a resolution of the Senate on September 28, 2010, requesting that the President stop the process of negotiations for Mexico to sign the agreement.<sup>165</sup> This was largely based on objections to the lack of transparency in the negotiating process.<sup>166</sup> After publication of the final version of the ACTA, the Working Group again recommended rejection of ACTA by Mexico.<sup>167</sup> A resolution of the Senate in July 2011 requested the President not to proceed with signature of ACTA.<sup>168</sup>

In Switzerland, it was reported in September 2011 that “the internal process preparing the decision for signature is ongoing” and that “[t]here is no timeline . . . .”<sup>169</sup>

To some extent, the implementation of ACTA by a number of signatory countries is being overshadowed by their participation in the negotiations for the Trans Pacific Partnership Agreement. This is being negotiated between Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the U.S., and Vietnam. President Obama set the APEC summit in November 2011 as the target for the settlement of negotiations. This Agreement is described by some commentators as the “Son of ACTA”<sup>170</sup> or as “everything the U.S. wanted in ACTA but didn’t get.”<sup>171</sup>

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CULTURAL DIVERSITY (Mar. 2011), available at [http://publications.gc.ca/collections/collection\\_2011/parl/XC61-403-1-1-04-eng.pdf](http://publications.gc.ca/collections/collection_2011/parl/XC61-403-1-1-04-eng.pdf).

165. *Point Proposed Agreement with the Federal Executive will Remove the Trade Negotiations or Anti-Counterfeit ACTA*, SENADO DE LA REPÚBLICA (Oct. 5, 2010), <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=26924>.

166. Mike Masnick, *Mexican Senate Unanimously Votes To Remove Mexico from ACTA Negotiations*, TECHDIRT.COM (Oct. 6, 2010, 7:37 AM), <http://www.techdirt.com/articles/20101005/17320811304/mexican-senate-unanimously-votes-to-remove-mexico-from-acta-negotiations.shtml>.

167. Letter from Eloy Cantú Segovia et al., Senator, Comm. on Trade and Indus. Promotion, to Manlio Fabio Beltrones Rivera, Chairman of the Bd. of the Senate of the Rep. (July 20, 2011) ([http://www.senado.gob.mx/sgsp/gaceta/61/3/2011-09-06-1/assets/documentos/GrupoPlural\\_ACTA.pdf](http://www.senado.gob.mx/sgsp/gaceta/61/3/2011-09-06-1/assets/documentos/GrupoPlural_ACTA.pdf)).

168. Mike Masnick, *Mexican Senate Calls on President To Reject ACTA*, TECHDIRT.COM (July 28, 2011, 10:07 PM), [www.techdirt.com/articles/20110727/23163815295/mexican-senate-calls-president-to-reject-acta.shtml#comments](http://www.techdirt.com/articles/20110727/23163815295/mexican-senate-calls-president-to-reject-acta.shtml#comments).

169. Ermert, *supra* note 161.

170. Nate Anderson, *Son of ACTA: Meet the Next Secret Copyrighting Treaty*, ARSTECHNICA.COM (Mar. 11, 2011, 12:20 PM), <http://arstechnica.com/tech-policy/news/2011/03/son-of-acta-meet-the-next-secret-copyright-treaty.ars>.

171. Michael Geist, *U.S. Intellectual Property Demands for TPP Leak: Everything it Wanted in ACTA But Didn't Get* (Mar. 11, 2011), <http://www.michaelgeist.ca/content/view/5686/125/>.