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# The Alphabet Soup of Transborder Intellectual Property Enforcement

Peter K. Yu

[peter\\_yu@msn.com](mailto:peter_yu@msn.com)

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# THE ALPHABET SOUP OF TRANSBORDER INTELLECTUAL PROPERTY ENFORCEMENT

*Peter K. Yu\**

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## I. INTRODUCTION

In the past few years, policymakers, academic commentators, consumer advocates, civil liberties groups, and user communities have expressed grave concerns about the steadily increasing levels of enforcement of intellectual property rights.<sup>1</sup> Many of these concerns relate to the “alphabet soup” of transborder intellectual property enforcement, which consists of the following: SECURE (Standards to Be Employed by

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\* Copyright © 2012 Peter K. Yu. Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School. An earlier version of this Essay was presented on the “International Perspectives on Copyright Reform” Panel at New York Law School, at the “The Access Challenge in the 21<sup>st</sup> Century: Emerging Issues in Intellectual Property Laws and Knowledge Governance” Conference at Bucerius Law School in Germany, and on the “The Future of Global Intellectual Property Protection” Panel at the University of West Indies in Barbados. The Author is grateful to Suhayb Ahmed for his invitation to contribute to the inaugural issue of the *Drake Law Review Discourse*. He would like to thank Dana Beldiman, Patricia Judd, and Molly Land for their kind invitations and hospitality; the participants of these events for their valuable comments and suggestions; and Linzey Erickson, Erica Liabo, and Lindsey Purdy for excellent research and editorial assistance. Part II of this Essay draws on research from the Author’s earlier article in the *SMU Law Review*.

1. See, e.g., Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011) [hereinafter Yu, *Six Secret Fears*]; Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* (IQsensato, Occasional Paper No. 1, 2008), available at [http://www.iqsensato.org/pdf/Sell\\_IP\\_Enforcement\\_State\\_of\\_Play-OPs\\_1\\_June\\_2008.pdf](http://www.iqsensato.org/pdf/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf).

Customs for Uniform Rights Enforcement),<sup>2</sup> IMPACT (International Medical Products Anti-Counterfeiting Taskforce),<sup>3</sup> ACTA (Anti-Counterfeiting Trade Agreement),<sup>4</sup> TPP (Trans-Pacific Partnership Agreement),<sup>5</sup> COICA (Combating Online Infringement and Counterfeits Act),<sup>6</sup> PIPA (Protect IP Act),<sup>7</sup> SOPA (Stop Online Piracy Act),<sup>8</sup> and OPEN (Online Protection and Enforcement of Digital Trade Act).<sup>9</sup>

Although I have discussed the various concerns raised by the highly controversial ACTA<sup>10</sup> and the increasingly intrusive digital copyright

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2. For discussions of the non-binding SECURE at the World Customs Organization, see generally Li Xuan, *WCO SECURE: Legal and Economic Assessments of the TRIPS-plus-plus IP Enforcement*, in *INTELLECTUAL PROPERTY ENFORCEMENT: INTERNATIONAL PERSPECTIVES* 62 (Li Xuan & Carlos M. Correa eds., 2009) [hereinafter *INTELLECTUAL PROPERTY ENFORCEMENT*]; Henrique Choer Moraes, *Dealing with Forum Shopping: Some Lessons from the SECURE Negotiations at the World Customs Organization*, in *INTELLECTUAL PROPERTY ENFORCEMENT*, *supra*, at 159; Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465, 539–40 (2009).

3. See Kaitlin Mara, *Hope for Consensus on WHO and Counterfeits Moves to May Assembly*, INTELL. PROP. WATCH (Jan. 27, 2009, 10:33 AM), <http://www.ip-watch.org/2009/01/27/hope-for-consensus-on-who-and-counterfeits-moves-to-may-assembly/> (discussing the controversy surrounding the creation of IMPACT at the World Health Organization).

4. Anti-Counterfeiting Trade Agreement, *opened for signature* May 1, 2011, 50 I.L.M. 243 (2011) [hereinafter ACTA].

5. See *Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/tpp> (last visited May 13, 2012) (providing up-to-date information about the Trans-Pacific Partnership negotiations); see also Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27 (2011) (discussing TPP).

6. Combating Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2010).

7. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA), S. 968, 112th Cong. (2011); see generally Letter from John R. Allison, Professor, Univ. of Tex. at Austin, et al. to Members of the U.S. Cong. (July 5, 2011), available at [http://cdt.org/files/pdfs/SOPA\\_House\\_letter\\_with\\_PROTECT\\_IP\\_letter\\_FINAL.pdf](http://cdt.org/files/pdfs/SOPA_House_letter_with_PROTECT_IP_letter_FINAL.pdf) (arguing against the adoption of the PROTECT-IP Act). In the interest of full disclosure, the Author has signed onto this letter.

8. Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011).

9. Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012).

10. For discussions of ACTA, see generally Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1 (2011) [hereinafter Yu, *Complex Politics*]; Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA (forthcoming 2012) [hereinafter Yu, *What Enforcement?*]; Yu, *Six Secret Fears*, *supra* note 1.

enforcement agenda,<sup>11</sup> I have yet to explore what a combination of these initiatives would mean for U.S. individuals, technology developers, and small and mid-sized firms. This Essay picks up that task by exploring whether—and if so, why—these entities should be concerned about this half-cooked alphabet soup.

Part II of this Essay identifies six different concerns and challenges ACTA poses to U.S. consumers, technology developers, and small and mid-sized firms. Part III explores the ongoing negotiation of TPP. Although the secretive and dynamic nature of the TPP negotiations has prevented this Essay from providing a detailed analysis of the emerging agreement,<sup>12</sup> this Part explains why TPP is likely to be more dangerous than ACTA from a public interest standpoint. Part IV concludes by highlighting the challenges recently created by SOPA and PIPA—two pieces of legislation that are as problematic as, if not more problematic than, ACTA and TPP.

## II. ACTA

The negotiation of ACTA began in June 2008 and concluded close to three years later, following eleven rounds of negotiations in different parts of the world.<sup>13</sup> The Agreement aims at setting a higher benchmark for international intellectual property enforcement for the United States, Japan, members of the European Union, Switzerland, and other like-minded countries.<sup>14</sup> As Susan Schwab, the former United States Trade Representative (USTR), formally announced:

[T]he goal [of the Agreement] is to set a new, higher benchmark for enforcement that countries can join on a voluntary basis. . . . The envisioned ACTA will include commitments in three areas: (1)

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11. See generally Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 U. LOUISVILLE L. REV. 693, 701–19 (2010) (critiquing the heightened enforcement measures introduced through the digital copyright reform in Hong Kong); Yu, *What Enforcement?*, *supra* note 10 (discussing the efforts to address crossborder, digital, and transborder enforcement challenges).

12. See Mike Masnick, *USTR Claims TPP Has 'Unprecedented' Transparency, but It Won't Reveal the Details Unless You're a Big Industry Lobbyist*, TECHDIRT (Feb. 20, 2012, 7:40 AM), <http://www.techdirt.com/articles/20120218/01452217800/ustr-claims-tpp-has-unprecedented-transparency-it-wont-reveal-details-unless-youre-big-industry-lobbyist.shtml> (reporting the transparency problems concerning the TPP negotiations).

13. See Yu, *Six Secret Fears*, *supra* note 1, at 985–86.

14. See *id.* at 984–85.

strengthening international cooperation, (2) improving enforcement practices, and (3) providing a strong legal framework for [intellectual property rights] enforcement.<sup>15</sup>

Although the Agreement was ambitious in scope—with proposals calling for the introduction of the graduated response system,<sup>16</sup> the notice-and-take-down mechanism,<sup>17</sup> and criminal liability for all forms of intellectual property infringements<sup>18</sup>—the final text, which some commentators have referred to as “ACTA Lite,” contains much more moderate provisions.<sup>19</sup> Instead of elevating the intellectual property standards of both the European Union and the United States, ACTA merely provides the lowest common denominator of standards found in these two trading powers.<sup>20</sup> To alleviate intrusion on fundamental rights and to provide flexibility, the Agreement also includes some safeguard clauses<sup>21</sup> and numerous optional provisions.<sup>22</sup>

From a public interest standpoint, ACTA, therefore, may not be as dangerous as many initially claimed, at least with respect to a developed country like the United States.<sup>23</sup> After all, many of the Agreement’s

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15. Press Release, Office of the U.S. 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>.

16. See Yu, *Six Secret Fears*, *supra* note 1, at 1055–57. The graduated response system enables Internet service providers to take a wide variety of actions after giving users warnings about their potentially illegal online activities. These actions include suspension or termination of service, capping of bandwidth, and blocking of sites, portals, and protocols. See generally Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373 (2010) (providing an in-depth analysis of the graduated response system).

17. See Yu, *Six Secret Fears*, *supra* note 1, at 1029.

18. See *id.* at 1086.

19. See Monika Ermert, *Treaty Negotiators Turn to “ACTA Lite” in Hopes of Closure*, INTELL. PROP. WATCH (Sept. 8, 2010, 4:39 AM), <http://www.ip-watch.org/2010/09/08/treaty-negotiators-turn-to-%e2%80%9cacta-lite%e2%80%9d-in-hopes-of-closure/>.

20. See *id.*

21. See, e.g., ACTA, *supra* note 4, arts. 27.2–.4.

22. The most revealing example is footnote 2 of the Agreement, which stipulates that “[a] Party may exclude patents and protection of undisclosed information from the scope of [the section on civil enforcement].” *Id.* § 2 n.2.

23. It is important to note that ACTA can remain quite problematic in other countries, including those that are currently not parties to the Agreement. See Yu, *Six Secret Fears*, *supra* note 1, at 1028–44 (discussing how ACTA could lead to greater

provisions can already be found in both existing U.S. legislation and the free trade agreements the country has signed with its trading partners.<sup>24</sup> The Obama Administration has also taken the position that ACTA is a congressional–executive agreement.<sup>25</sup> By virtue of this designation, the Administration need not seek Senate approval for the Agreement or introduce implementing legislation.<sup>26</sup>

Nevertheless, ACTA, once ratified, will pose six different challenges to U.S. consumers, technology developers, and small and mid-sized firms. First, although the USTR claims ACTA will *not* modify U.S. laws,<sup>27</sup> modification could still take place in the form of changes in common law interpretation of existing laws and changing emphases on how laws are to be enforced.<sup>28</sup> Down the road, the administration could also use ACTA as a justification for statutory revision, leading to what commentators have described as “policy laundering” and “backdoor lawmaking.”<sup>29</sup>

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protection and enforcement of intellectual property rights in developing countries).

24. *See id.* at 1017.

25. *See* Letter from Harold Hongju Koh, Legal Adviser, Dep’t of State, to Ron Wyden, U.S. Senate (Mar. 6, 2012), *available at* <http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf> (providing the State Department’s clarification on ACTA’s treaty status). For discussions of the complications raised by the ACTA’s legal status, see generally Sean Flynn, *ACTA’s Constitutional Problem: The Treaty Is Not a Treaty*, 26 AM. U. INT’L L. REV. 903 (2011); Oona A. Hathaway & Amy Kapczynski, *Going It Alone: The Anti-Counterfeiting Trade Agreement as a Sole Executive Agreement*, ASIL INSIGHTS, Aug. 24, 2011, at 1, *available at* <http://www.asil.org/pdfs/insights/insight110824.pdf>; Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>.

26. *See* Yu, *Six Secret Fears*, *supra* note 1, at 1022.

27. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS: ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 4 (2008), *available at* [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) (“[O]nly the U.S. Congress can change U.S. law.”).

28. *See* Yu, *Six Secret Fears*, *supra* note 1, at 1044–45.

29. For discussions of “policy laundering” and “backdoor lawmaking,” see generally *id.* at 1024–28; Peter K. Yu, *The Political Economy of Data Protection*, 84 CHI.-KENT L. REV. 777, 786–89 (2010). As two commentators have defined:

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

Second, ACTA will affect those Americans who travel outside the country to visit, study, or work. It will also affect U.S. firms conducting business abroad. While the Agreement does not explicitly require border guards to search iPods, DVD players, laptops, or other electronic devices, it gives them the authority to order the seizure, confiscation, or destruction of suspected counterfeit or pirated goods.<sup>30</sup> Countries that are eager to please the U.S. government or attract foreign investors, therefore, may be tempted to provide more stringent protection than what is currently found within the United States.<sup>31</sup>

In countries with unappealing records on corruption and limited protection of human rights and civil liberties, giving Customs more discretion is highly disturbing.<sup>32</sup> Equally disconcerting is the potential challenge small and mid-sized firms will face when Customs lock up their legitimate goods in faraway places.<sup>33</sup>

Consider, for example, the confiscation of low-cost manufactured goods that look similar to their branded counterparts, but are in fact cheap products that are safe, legitimate, and widely consumed by Americans. Consider also the seizure of generic medicines that religious charities or not-for-profit organizations bring into poor countries to help the sick and needy. Once these legitimate goods are confiscated, the costs to secure their release are likely to be quite high. In many cases, such as those concerning essential medicines, the delay in securing such release could be more than a simple inconvenience.<sup>34</sup> The procedures required by a foreign court or a government agency could also be highly cumbersome, not to mention the potential lack of safeguards found in the U.S. Constitution.<sup>35</sup>

Third, ACTA will lock in some of the legal standards built into the

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the requirement of harmonization and the guise of multilateralism.”

Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 *CARDOZO ARTS & ENT. L.J.* 121, 128 (2006).

30. ACTA, *supra* note 4, art. 25.

31. See Yu, *Six Secret Fears*, *supra* note 1, at 1047.

32. See *id.* at 1048.

33. See *id.* at 1047.

34. For discussions of ACTA's impact on access to medicines, see generally SEAN FLYNN & BIJAN MADHANI, *ACTA AND ACCESS TO MEDICINES* 3 (2011), available at <http://rfc.act-on-acta.eu/access-to-medicines>; Brook K. Baker, *ACTA—Risks of Third-Party Enforcement for Access to Medicines*, 26 *AM. U. INT'L L. REV.* 579 (2011).

35. See Yu, *Six Secret Fears*, *supra* note 1, at 1049.

existing intellectual property system.<sup>36</sup> These lock-in standards, in turn, could privilege business models that rely heavily on strong intellectual property protection. For example, ACTA requires member states to offer protection against both the circumvention of technological measures used to protect copyrighted works<sup>37</sup> and the removal of copyright management information.<sup>38</sup> ACTA further requires these members to tighten regulations over Internet service providers<sup>39</sup> while creating new penalties for “aiding and abetting” intellectual property infringements.<sup>40</sup> By adopting standards embraced by incumbent industries, ACTA may “harm small and mid-sized enterprises and innovative start-ups.”<sup>41</sup>

In addition, the Agreement may “reduce consumer access to innovative products or services from abroad,” including those from Japan and South Korea.<sup>42</sup> Because the Internet is global by nature, changes in ACTA members could also affect the information U.S. users will be able to obtain.<sup>43</sup> In fact, “if firms are eager to develop a transnational policy that will satisfy the laws and policies of all the major markets, the more restrictive laws and policies other countries have, the more these laws will eventually dictate the type of policy to which U.S. internet users are subject.”<sup>44</sup>

Fourth, by locking in the existing high protection and enforcement standards, ACTA may foreclose the opportunity for Congress to revise laws in the near future.<sup>45</sup> While Congress can always ratchet *up* intellectual property standards beyond what ACTA requires, the Agreement may prevent Congress from ratcheting *down* those standards. ACTA, therefore, may prevent countries from experimenting with new regulatory and economic policies at a time when the Internet and new communications technologies have created many new opportunities.<sup>46</sup>

Fifth, ACTA will undermine the longstanding interests of the United

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36. *See id.* at 1045.  
37. ACTA, *supra* note 4, arts. 27.5, .6.  
38. *Id.* art. 27.7.  
39. *Id.* art. 27.  
40. *Id.* art. 23.4.  
41. Yu, *Six Secret Fears*, *supra* note 1, at 1045 (footnote omitted).  
42. *Id.* at 1045–46.  
43. *See id.* at 1046.  
44. *Id.*  
45. *See id.* at 1066–70.  
46. *See id.* at 1037.



States in promoting human rights, civil liberties, and the rule of law throughout the world.<sup>47</sup> Unless explicit safeguards are included in the Agreement to protect free speech, free press, and privacy, there is a very good chance that ACTA will provide a pretext for other countries to tighten information control.<sup>48</sup> Even worse, ACTA would “make it difficult for the United States to complain about those highly intrusive foreign laws that are introduced in the name of implementing ACTA or complying with its higher enforcement standards.”<sup>49</sup>

Finally, in negotiating ACTA, the USTR has wasted considerable time, energy, and resources on developing a highly ineffective plurilateral agreement.<sup>50</sup> The resulting agreement not only excludes countries that constitute the major sources of piracy and counterfeiting, such as China, Paraguay, Russia, and Ukraine,<sup>51</sup> but it also fails to remedy the many enforcement-related defects<sup>52</sup> in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>53</sup> Worse still, by using a “country club” approach to international norm-setting, ACTA takes away the opportunity to strengthen enforcement norms in current multilateral regimes—whether under the World Trade Organization or the World Intellectual Property Organization.<sup>54</sup>

On April 15, 2011, ACTA was finally adopted, after more than five years of planning, pre-negotiations, negotiations, and debates.<sup>55</sup> A few months later, eight countries—Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States—signed the

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47. *See id.* at 1050–59.

48. *See id.* at 1050.

49. *Id.* at 1059.

50. *See id.* at 1083–93.

51. *See id.* at 1089.

52. *See Yu, What Enforcement?*, *supra* note 10; *see also* Peter K. Yu, *TRIPS and Its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 483–504 (2011) (examining why the TRIPS Agreement fails to provide effective global enforcement of intellectual property rights).

53. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 (1994).

54. *See Yu, Six Secret Fears*, *supra* note 1, at 1080.

55. 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); *see also* Yu, *Six Secret Fears*, *supra* note 1, at 980–98 (providing a brief history of ACTA).

Agreement in a ceremony in Japan.<sup>56</sup> Thus far, Mexico, Switzerland, and five members of the European Union (Cyprus, Estonia, Germany, the Netherlands, and Slovakia) have refrained from signing the Agreement.<sup>57</sup> Because ACTA will not enter into force until six countries have deposited their instruments of ratification,<sup>58</sup> it remains interesting to see if and when the Agreement will enter into force.

### III. TPP

While the Obama Administration was actively completing the ACTA negotiations, it also began the TPP negotiations with Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam.<sup>59</sup> It is anticipated that TPP will include an intellectual property chapter, similar to those intellectual property chapters found in existing U.S. free trade agreements.<sup>60</sup> As the USTR stated in his recent update on the TPP negotiations:

TPP countries have agreed to reinforce and develop existing [TRIPS] rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha

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56. Press Release, Office of the U.S. Trade Representative, Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties (Oct. 1, 2011), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>.

57. Press Release, Gov't Comm'ns Unit (Fin.), Time Out for Finland in Ratifying ACTA (Mar. 9, 2012), *available at* <http://valtioneuvosto.fi/ajankohtaista/tiedotteet/tiedote/fi.jsp?oid=352766>.

58. ACTA, *supra* note 4, art. 40.1.

59. Office of the U.S. Trade Representative, *Outlines of the Trans-Pacific Partnership Agreement*, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement> (last visited May 13, 2012) [hereinafter *TPP Outlines*].

60. *See generally* SEAN FLYNN ET AL., PUBLIC INTEREST ANALYSIS OF THE U.S. TPP PROPOSAL FOR AN IP CHAPTER (2011), *available at* <http://infojustice.org/wp-content/uploads/2011/12/TPP-Analysis-12062011.pdf> (providing a recent analysis of the leaked U.S. proposal for TPP's intellectual property chapter).

Declaration on TRIPS and Public Health.<sup>61</sup>

When the TPP negotiations were first announced, one could not help but wonder whether such negotiations would call for development of intellectual property protection and enforcement standards that go beyond those aspired to by the ACTA negotiators. Indeed, many commentators have described TPP as “ACTA-plus.”<sup>62</sup> Although it is hard to predict which provisions the final text will eventually adopt, it is not difficult to explain why TPP could become more dangerous than ACTA from a public interest standpoint. There are at least five reasons.

First, unlike in the ACTA negotiations, the United States has more political and economic leverage over the other parties in the TPP negotiations. Although the ACTA negotiations brought together two major intellectual property powers—the European Union and the United States—the continuous disagreements between these two powers resulted in the adoption of a more moderate agreement.<sup>63</sup> As Kimberlee Weatherall points out, ACTA tells us as much about the disagreement between the negotiating parties as it does about what higher standards these countries wanted to adopt.<sup>64</sup>

For example, the United States wanted to have stronger mandates concerning digital enforcement; yet, the European Union was not ready to agree to provisions that had yet to be harmonized within the Union, such as the graduated response system and safe harbors for online service providers.<sup>65</sup> Similarly, although the European Union pushed hard for the inclusion of criminal liability for *all* forms of intellectual property rights (including most notably geographical indications), the United States was reluctant to provide such broad coverage.<sup>66</sup> In fact, many U.S. companies expressed concern over the potential criminal liability for trademark and

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61. *TPP Outlines*, *supra* note 59.

62. *See, e.g.*, Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447, 464 (2011).

63. *See* Yu, *Complex Politics*, *supra* note 10, at 11.

64. *See* Kimberlee Weatherall, *ACTA as a New Kind of International IP Lawmaking*, 26 AM. U. INT'L L. REV. 839, 841–42 (2011).

65. *See* Yu, *Six Secret Fears*, *supra* note 1, at 1055–57.

66. *See* Monika Ermert, *European Commission on ACTA: TRIPS Is Floor Not Ceiling*, INTELL. PROP. WATCH (Apr. 22, 2009, 7:18 PM), <http://www.ip-watch.org/2009/04/22/european-commission-on-acta-trips-is-floor-not-ceiling/> (quoting Luc Devigne, the European Union's lead ACTA negotiator, as stating “all IP rights are equal”).

patent infringement, as opposed to mere piracy and counterfeiting.<sup>67</sup>

Compared with the ACTA negotiations, the dynamics of the TPP negotiations are rather different. Without the European Union at the negotiation table, the United States is able to rely more on its sheer economic and geopolitical strengths to push for provisions that are in the interest of its intellectual property industries. From increased enforcement in the digital environment to greater protection of pharmaceutical products, TPP is likely to track more closely to the high U.S. standards of intellectual property protection than the compromised provisions in ACTA. In fact, if the United States needs to make compromises, those compromises are likely to be found in other trade-related areas, not in the intellectual property area.

Second, the United States has more and better items to offer to trading partners in the TPP negotiations. Unlike ACTA, which focuses narrowly on intellectual property protection and enforcement, the TPP negotiations are trade-based and have a much broader scope.<sup>68</sup> Because the negotiations involve more cross-cutting issues, the U.S. negotiators will be able to offer “carrots” that they otherwise could not provide during the ACTA negotiations.<sup>69</sup>

For instance, New Zealand may find it beneficial to make greater concessions in the intellectual property area if the United States is willing to allow for more exports in lamb, wool, and other sheep products. Indeed, compared with ACTA, TPP is likely to provide a fairer bargain among the negotiating parties. Although the usual disparity in bargaining power remains, the availability of other trade items could facilitate constructive bargaining among the participants, including even those with limited resources and bargaining chips.

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67. The Intellectual Property Owners Association, for example, sent a strongly worded letter to the USTR, asking for a limitation on the scope of the treaty's coverage of counterfeiting. See Monika Ermert, *U.S. Rightsholders Seek Narrower Scope of ACTA, Clarity on Trademark Infringement vs. Counterfeiting*, INTELL. PROP. WATCH (July 10, 2010, 11:09 PM), <http://www.ip-watch.org/weblog/2010/07/10/us-rightsholders-seek-narrower-scope-of-acta-clarity-on-trademark-infringement-vs-counterfeiting>. This letter is available at <http://ipo.informz.net/z/cjUucD9taT04NTk2MTQmcD0xJnU9NzUxNzUyMzYwJmxpPTM0Mzg4OTM/index.html>.

68. See *TPP Outlines*, *supra* note 59 (outlining the key trade and trade-related areas covered by TPP).

69. See Yu, *Complex Politics*, *supra* note 10, at 8–9 (criticizing ACTA for not offering any carrots).

From the standpoint of protecting due process, free speech, and other civil liberties, however, TPP is likely to be more dangerous. Because of the different value negotiating parties place on trade and trade-related items, some parties may be willing to concede more on intellectual property protection and enforcement in exchange for greater benefits in other trade or trade-related areas. TPP, therefore, could include more stringent obligations in the intellectual property area.

Third, although the ACTA negotiations already concluded, the TPP negotiations are still in progress.<sup>70</sup> Being later in time, the latter negotiations may incorporate matters that did not have much traction during the ACTA negotiations. The TPP negotiators could also revive proposals that were rejected by the ACTA negotiators, especially the EU delegates. More importantly, should new issues arise, the TPP negotiators will be able to include those new items in the negotiations.

Fourth, although both ACTA and TPP have raised similar concerns about transparency and accountability,<sup>71</sup> these concerns are somewhat different. While it is hard to support the categorical nondisclosure of draft treaty texts, especially with respect to proposals advanced solely by the U.S. government,<sup>72</sup> it is more acceptable to refrain from disclosing complicated and sensitive information, such as tariffs, quotas, and financial data.<sup>73</sup> Thus, the USTR may have a stronger justification for refusing to

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70. The twelfth round of TPP negotiations completed only recently in Dallas, Texas on May 8–18, 2012. Press Release, Office of the U.S. Trade Representative, *Trans-Pacific Partnership (TPP) Talks Advance in Texas (May 16, 2012)*, available at <http://www.ustr.gov/about-us/press-office/press-releases/2012/may/trans-pacific-partnership-tpp-talks-advance-texas>. The next round of the negotiations will be held in San Diego two months later. *Trans-Pacific Partnership*, *supra* note 5.

71. For criticisms of the transparency and accountability problems surrounding ACTA and TPP, see generally David S. Levine, *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law*, 30 *CARDOZO ARTS & ENT. L.J.* 105 (2012); David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 *AM. U. INT’L L. REV.* 811 (2011); Yu, *Six Secret Fears*, *supra* note 1, at 998–1019.

72. For example, Senator Ron Wyden recently introduced an amendment to the Jumpstart Our Business Startups Act that would require the United States to disclose documents “describing a position of, or proposal made by, the United States with respect to intellectual property, the Internet, or entities that use the Internet, including electronic commerce, not later than 24 hours after the document is shared with other parties to negotiations for a Trans-Pacific Partnership Agreement.” 158 *CONG. REC.* S1798 (daily ed. Mar. 19, 2012) (Senate Amendment 1869 to H.R. 3606 by Sen. Wyden).

73. See Yu, *Six Secret Fears*, *supra* note 1, at 1007.

disclose the draft TPP text.

Finally, the highly technical and trade-oriented nature of the TPP negotiations may greatly reduce the interest of the public at large in the negotiations.<sup>74</sup> In fact, without the controversial issues surrounding the Internet and digital communications technologies, one has to wonder whether the TPP negotiations could find their way to the mainstream media. The public at large is simply not interested in trade tariffs or trade remedies. Even ACTA did not receive much coverage in the mainstream media, notwithstanding the fact that it is mostly about intellectual property protection and enforcement, as opposed to trade issues.<sup>75</sup>

In sum, TPP may not receive the same amount of public scrutiny as ACTA. Without such scrutiny, the provisions from TPP are likely to favor private rights holders more than they otherwise would have. From a public interest standpoint, TPP, therefore, could be more dangerous than ACTA.

#### IV. SOPA/PIPA

Both ACTA and TPP focus on creating intellectual property protection and enforcement standards at the international level. SOPA and PIPA, by contrast, are domestic bills submitted to the U.S. Congress. They seek to impose new obligations on Internet intermediaries to block access to websites that facilitate online piracy and counterfeiting.<sup>76</sup> SOPA specifically focuses on four groups of intermediaries: Internet service providers, search engines, payment networks, and advertising networks.<sup>77</sup>

Because SOPA and PIPA implicate websites that are located abroad or are accessed through domain names registered overseas, the potential extraterritorial reach of the proposed legislation has sparked major concern not only within the United States, but also in other parts of the world. In a joint letter to U.S. policymakers, members of the European Parliament remind them of “the need to protect the integrity of the global internet and freedom of communication by refraining from unilateral

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74. The legalese and technical nature of intellectual property issues was one of the reasons why the public at large was not interested in these issues until recently. See ANDREW GOWERS, *GOWERS REVIEW OF INTELLECTUAL PROPERTY 1* (2006), available at [http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 99* (2003).

75. See Yu, *Complex Politics*, *supra* note 10, at 13.

76. PIPA, S. 968, 112th Cong. (2011); SOPA, H.R. 3261, 112th Cong. (2011).

77. SOPA, H.R. 3261.

measures to revoke [Internet protocol] addresses or domain names.”<sup>78</sup>

On November 16, 2011, which was popularly christened as the “American Censorship Day,” Tumblr, Mozilla, Reddit, Techdirt, and other companies staged a major protest on SOPA.<sup>79</sup> Although this protest did not receive much public attention, the public (and policymakers) began paying greater attention following the service blackout launched by Wikipedia, Reddit, WordPress, and other Internet companies two months later.<sup>80</sup> As Senator Ron Wyden reminded USTR Ronald Kirk in a recent trade policy hearing of the Senate Finance Committee, “The norm changed on Jan. 18, 2012, when millions and millions of Americans said we will not accept being locked out of debates about Internet freedom.”<sup>81</sup>

To be fair, SOPA and PIPA serve a very important goal—that is, to protect the valuable intellectual property assets of American rights holders. One could further argue that protecting intellectual property rights is critical to the U.S. economy.<sup>82</sup> Nevertheless, the proposed bills are poorly drafted, relying on flawed enforcement designs. Although this Part focuses primarily on SOPA, most of its analysis is equally valid for PIPA or other similar legislation.

In its current form, SOPA has at least five shortcomings. First, some of the proposed correction measures are highly disproportional to the wrong. As noted constitutional law scholar Laurence Tribe observes:

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78. Letter from Marietje Schaake, Member of the European Parliament, et al., to Members of [the U.S.] Congress (Dec. 12, 2011), available at <http://euletter-sopa-pipa.tumblr.com/> (emphasis omitted).

79. Hayley Tsukayama & Cecilia Kang, *SOPA Opposition Goes Viral*, WASH. POST, Nov. 22, 2011, [http://www.washingtonpost.com/business/economy/sopa-opposition-goes-viral/2011/11/22/gIQAZX7OmN\\_story.html](http://www.washingtonpost.com/business/economy/sopa-opposition-goes-viral/2011/11/22/gIQAZX7OmN_story.html).

80. See Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, at A1, available at [http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?\\_adxnnl=1&pagewanted=all&adxnnlx=1338668900-679STGMFBV21ugDugDhtJnQ QW](http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?_adxnnl=1&pagewanted=all&adxnnlx=1338668900-679STGMFBV21ugDugDhtJnQ QW).

81. Joseph J. Schatz, *Technology Groups Worry About Trade Pact*, CO TODAY ONLINE NEWS (Mar. 13, 2012, 11:47 PM), <http://public.cq.com/docs/news/news-000004045563.html?ref=corg>.

82. See generally ECON. & STATISTICS ADMIN. & U.S. PATENT & TRADEMARK OFFICE, *INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS* (2012), available at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf) (discussing the importance of intellectual property to the U.S. economy).

[Under SOPA, c]onceivably, an entire website containing tens of thousands of pages could be targeted if only a single page were accused of infringement. Such an approach would create severe practical problems for sites with substantial user-generated content, such as Facebook, Twitter, and YouTube, and for blogs that allow users to post videos, photos, and other materials.<sup>83</sup>

Indeed, it is hard to explain why legitimate industries and Internet users should pay the price—economically or technologically—when the online community has some inevitable bad apples.

Second, U.S. Customs has already actively seized piratical and counterfeiting websites, including those providing live streams of sporting events.<sup>84</sup> The U.S. government has also initiated extradition proceedings against massive infringers from abroad, including most recently Kim Dotcom, the owner of Megaupload.<sup>85</sup> Successful, past extradition efforts have even sent the Australian leader of the warez group DrinkOrDie, Hew Raymond Griffiths, to jail in Virginia for fifteen months.<sup>86</sup>

Third, SOPA fails to take into consideration the many new technological and business models that have become popular among Internet users. Consider YouTube, for example. Displaying billions of videos a day in more than fifty languages,<sup>87</sup> this service is exciting not because it facilitates copyright infringement, but because it provides an attractive platform for Internet users to locate legitimate content

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83. LAURENCE H. TRIBE, THE “STOP ONLINE PIRACY ACT” (SOPA) VIOLATES THE FIRST AMENDMENT 2 (2012), *available at* <http://www.net-coalition.com/wp-content/uploads/2011/08/tribe-legis-memo-on-SOPA-12-6-11-1.pdf>.

84. *See* Chad Bray, *Black Sunday: U.S. Attorney, ICE Seize Illegal Sports Sites*, WALL ST. J. L. BLOG (Feb. 2, 2012, 12:57 PM), <http://blogs.wsj.com/law/2012/02/02/black-sunday-us-attorney-ice-seize-illegal-sports-sites/> (reporting the seizure of “16 Web sites that provided access to illegal live streams of copyrighted sporting events” before the Super Bowl).

85. *See* Ben Sisario, *7 Charged as F.B.I. Closes a Top File-Sharing Site*, N.Y. TIMES, Jan. 19, 2012, at B1, *available at* [http://www.nytimes.com/2012/01/20/technology/indictment-charges-megaupload-site-with-piracy.html?\\_r1&ref=bensisario](http://www.nytimes.com/2012/01/20/technology/indictment-charges-megaupload-site-with-piracy.html?_r1&ref=bensisario) (reporting the seizure of the website Megaupload and the arrest of seven people connected with its operation).

86. *See* Brian Corrigan, *Long Arm of Copyright Law*, FIN. REV. (July 6, 2011, 11:26 AM), [http://www.afr.com/p/business/technology/long\\_arm\\_of\\_copyright\\_law\\_KvHCTN8j10KV3Zj0FbdWPN](http://www.afr.com/p/business/technology/long_arm_of_copyright_law_KvHCTN8j10KV3Zj0FbdWPN).

87. *See Statistics*, YOUTUBE, [http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics) (last visited May 19, 2012).



unavailable on the market.<sup>88</sup>

Unfortunately, SOPA does not appreciate the social benefits brought about by these new websites and services. As the Center for Democracy and Technology acknowledges, “The new de facto duty to track and control user behavior [as required by the proposed legislation] would significantly chill innovation in social media and undermine social websites’ central role in fostering free expression.”<sup>89</sup>

Fourth, while SOPA would not “break the Internet”—as some have claimed in exaggeration<sup>90</sup>—it does inflict some serious collateral damage. From erosion of free speech<sup>91</sup> to creation of cybersecurity concerns,<sup>92</sup> the statute’s benefits do not always compensate for its unintended harms. As the U.S. Public Policy Council of the Association for Computing Machinery points out in its analysis of SOPA:

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88. See generally Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 897–99 (2011) (discussing the benefits of YouTube).

89. Ctr. for Democracy & Tech., *The Stop Online Piracy Act: Summary, Problems & Implications*, <http://cdt.org/files/pdfs/SOPA%202-pager%20final.pdf> (last visited May 13, 2012).

90. For example, the comedian Jon Stewart said SOPA would “break the Internet,” drawing on the catchy slogan widely used by the technology community. See *Late Night: Jon Stewart Says SOPA Would ‘Break the Internet’*, L.A. TIMES (Jan. 19, 2012, 9:56 AM), <http://latimesblogs.latimes.com/showtracker/2012/01/late-night-jon-stewart-sopa-internet.html>. Similarly, Mark Lemley, David Levine, and David Post call on policymakers not to “break the Internet.” See Mark Lemley et al., *Don’t Break the Internet*, 64 STAN. L. REV. ONLINE 34 (Dec. 19, 2011), <http://www.stanfordlawreview.org/online/dont-break-internet>. There is no doubt that legislation such as SOPA and PIPA will change the way the Internet operates. However, as we learn from the Chinese experience, the Internet does not break easily; it can accommodate different types of regulation. Whether one finds the outcome appealing is, of course, a very different question.

91. For contrasting views on SOPA’s conflict with the First Amendment, compare TRIBE, *supra* note 83, with Letter from Floyd Abrams, Partner, Cahill Gordon & Reindel LLP, to Lamar Smith & John Conyers, Comm. on the Judiciary, U.S. House of Representatives (Nov. 7, 2011), *available at* <http://www.mpa.org/Resources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf>.

92. For discussions of the cybersecurity concerns raised by SOPA and PIPA, see generally ACM [ASS’N FOR COMPUTING MACHINERY] U.S. PUB. POLICY COUNCIL, ANALYSIS OF SOPA’S IMPACT ON DNS AND DNSSEC (2012) [hereinafter USACM SOPA ANALYSIS], *available at* <http://usacm.acm.org/images/documents/DNSDNSSEC.pdf>; ACM, U.S. PUB. POLICY COUNCIL, ANALYSIS OF PIPA’S IMPACT ON DNS AND DNSSEC (2012), *available at* <http://usacm.acm.org/images/documents/DNSDNSSEC-Senate.pdf>.

[W]e do not believe that attempts to block or alter DNS [domain name system] or DNSSEC [DNS Security Extensions] look-ups will be particularly effective in stopping individuals who wish to connect to criminal sites outside the U.S., and will be less effective over time for all users. However, the costs and overhead associated with maintaining blocks and responding to orders will remain.<sup>93</sup>

Finally, like ACTA, SOPA could provide repressive governments with an internationally acceptable blueprint for developing Internet censorship regulations.<sup>94</sup> The legislation “would . . . set the dangerous international precedent that governments seeking to block online content that violates domestic law should look to online communications platforms as points of control.”<sup>95</sup> Should SOPA be adopted, it would indeed be hypocritical for the U.S. government to complain about similar laws enacted abroad.

Given the bill’s many shortcomings, and the political complications massive Internet protests will create in an election year, it is no surprise that the Obama Administration was willing to distance itself from the controversial legislation.<sup>96</sup> The weekend before the massive Internet service blackout in January 2012, the Administration released a carefully drafted statement declaring that “it will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet.”<sup>97</sup>

Immediately following the blackout, several congressional members also quickly withdrew their support for SOPA and PIPA.<sup>98</sup> More importantly, Representative Lamar Smith and Senator Harry Reid announced the postponement of consideration of these bills, bowing to

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93. USACM SOPA ANALYSIS, *supra* note 92, at 7.

94. See discussion *supra* Part II.

95. Ctr. for Democracy & Tech., *supra* note 89, at 2.

96. VICTORIA ESPINEL ET AL., COMBATING ONLINE PIRACY WHILE PROTECTING AN OPEN AND INNOVATIVE INTERNET (2012), reprinted in Macon Phillips, *Obama Administration Responds to We the People Petitions on SOPA and Online Piracy*, WHITEHOUSE.GOV (Jan. 14, 2012), <http://www.whitehouse.gov/blog/2012/01/14/obama-administration-responds-we-people-petitions-sopa-and-online-piracy>.

97. *Id.*

98. See Guy Adams, *Is Wikipedia Winning the War? U.S. Senate Slips into Reverse After Blackout Day*, THE INDEP. (Jan. 20, 2012), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/is-wikipedia-winning-the-war-us-senate-slips-into-reverse-after-blackout-day-6292206.html>.

pressure from Internet companies and the user community.<sup>99</sup> In retrospect, the developments concerning SOPA and PIPA may have shown us how to mobilize individuals and communities to protest against international agreements such as ACTA and TPP.<sup>100</sup>

## V. CONCLUSION

For the past few years, policymakers, with strong support from the entertainment and pharmaceutical lobbies, have been cooking alphabet soup in the legislative cauldron. Large and small, homemade or otherwise, time-tested or experimental, a wide variety of alphabet pasta has been added to this soup. While the pasta may look fun and attractive, and it could even fill up one's stomach, strong evidence suggests that the fully cooked soup will unlikely nourish society.

Although it is undeniably important to address intellectual property piracy and counterfeiting, most of the proposed initiatives are badly designed. The development of ACTA, TPP, SOPA, and PIPA is unlikely to provide private rights holders with much-needed protection. Even worse, such development may harm the public interest by violating due process while at the same time stifling free speech, free press, and other civil liberties.

It is high time policymakers start inquiring about what they are really cooking in that legislative cauldron. It is also important that they explore whether alternative ingredients can be used to prepare better enforcement soup. After all, legislators have made election promises to carefully deliberate over what gets served at our table. It is only fair that we hold them accountable for what they cook.

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99. Hayley Tsukayama, *Action to be Postponed on House Bill Targeting Online Piracy*, WASH. POST (Jan. 20, 2012), [http://www.washingtonpost.com/business/economy/action-to-be-postponed-on-house-bill-targeting-online-piracy/2012/01/20/gIQARqEvEQ\\_Story.html](http://www.washingtonpost.com/business/economy/action-to-be-postponed-on-house-bill-targeting-online-piracy/2012/01/20/gIQARqEvEQ_Story.html).

100. See Jonathan Band, *The SOPA-TPP Nexus* (Program on Info. Justice & Intellectual Prop., Research Paper No. 2012-06, 2012), available at <http://digitalcommons.wcl.american.edu/research/28/>.