

THE STATE OF PLAY ON INTERNATIONAL PIRACY AND ANTI-COUNTERFEITING STRATEGIES

Andy Y. Sun*

TABLE OF CONTENTS

I. INTRODUCTION: A GLOBAL PANDEMIC	2
II. INTERNATIONAL STRATEGIES AND CONTROVERSIES	8
A. Global Congress Combating Counterfeiting and Piracy (GCCCP)	9
B. World Health Organization(WHO)/IMPACT!	10
C. International Criminal Policy Organization (ICPO-INTERPOL)	16
D. World Customs Organization (WCO).....	18
E. The Group of Eight (G8) Summit	21
F. Anti-Counterfeiting Trade Agreement (ACTA)...	24
1. <i>The Negotiations</i>	24
2. <i>The Controversies</i>	25
a. Scope and Definition	27
b. Enforcement in the Digital Environment.....	28
c. The ACTA Committee	31
d. The Outcome	31
G. Asia-Pacific Economic Cooperation (APEC)	32
H. Trans-Pacific Partnership Agreement (TPPA).....	34
1. <i>The Background</i>	34
2. <i>The Process</i>	36
3. <i>The Negotiation Authority</i>	40
4. <i>The IP Controversies</i>	42
a. Accession Prerequisite	42
b. Complete National Treatment	43

* Andy Y. Sun is the Visiting Chair Professor, Tongji University College of Law, Shanghai, China; Executive Director, Asia Pacific Legal Institute. The viewpoints in this article only represent that of the author's and do not in any way reflect the position of the institution and/or organization he works for. J.D., University of Maryland; M.C.L. (LL.M.), the George Washington University. Professor Sun worked as a research assistant for Professor Hungdah Chiu between 1985 and 1988 and one of the very first editing works he did for Professor Chiu was on this subject. Thus, the author believes it is quite suited to revisit the very same issue as a tribute to Professor Chiu's foresight on various global developments.

c. Liability of ISPs	44
d. Fair Use	44
e. Criminal Penalties	47
f. Enforcement Proceedings	49
III. OUTLOOK AND CONCLUSION	50
GLOSSARY OF LIST OF ABBREVIATIONS	58

I. INTRODUCTION: A GLOBAL PANDEMIC

On September 8, 1989, a Partnair CV-580 double-engine passenger propeller on route from Oslo, Norway to Hamburg, Germany crashed off the Danish coast, killing 55 people onboard. It remains the deadliest Norwegian aviation disaster to date and eventually resulted in the closing of Partnair.¹ Several investigations all pointed to improper maintenance as the primary cause. Most notably, three of the bolts used to secure the tail section were found to be counterfeit products of inferior quality that could not sustain the resonant vibration that occurred in the auxiliary power unit.²

Counterfeiting is a serious problem which transcends borders, industries, and consumers. Cars and planes provide two ready examples. Unapproved or counterfeit parts³ played a role in 174 aircraft crashes or less serious accidents from May 1973 through April

1. *Plane Crashed Off Danish Coast Kills 55*, N.Y. TIMES, Sept. 9, 1989, at A12; James O. Jackson, *Time Bombs on the Tarmac*, TIME, Feb. 7, 1994, at 40.

2. The Aircraft Accident Investigation Board/Norway, *Report on the Convair 340/580 LN-PAA Aircraft Accident North of Hirtshals, Denmark, on September 8, 1989*, at 112, available at <http://www.aibn.no/rapport-02-1993-eng-pdf?pid=Native-ContentFile-File&attach=1>.

3. The Federal Aviation Administration (FAA) defines "counterfeit parts" as: "A part made or altered to imitate or resemble an approved part without authority or right, and with the intent to mislead or defraud by passing as original or genuine." FAA Advisory Circular 21-29C, *Detecting and Reporting Suspected Unapproved Parts* 3(d), updated Aug. 11, 2011, available at http://www.faa.gov/aircraft/draft_docs/media/Draft_AC-21-29C-CHG-2.pdf. Because not all substandard parts are counterfeit per se, the FAA rules often combine the term counterfeit with "unapproved parts." 3o defines "unapproved parts" as: "A part that does not meet the requirements of an approved part (refer to definition of approved parts in subparagraph 3b). This term also includes parts that may fall under one or more of the following categories: (1) Parts shipped directly to the user by a manufacturer, supplier, or distributor, where the parts were not produced under the authority of (and in accordance with) an FAA production approval for the part (e.g., production overruns where the parts did not pass through an approved quality system). (2) New parts that have passed through a PAH's quality system which do not conform to the approved design/data. (3) Parts that have been intentionally misrepresented, including counterfeit parts.

1996, resulting in 17 deaths and 39 injuries.⁴ It is estimated that there are more than half a million pieces of counterfeit aviation accessories, parts and/or devices circulating in the global market each year, accounting for approximately 2% of the relevant market.⁵ These inferior products even found their way on board Air Force One, prompting a congressional hearing and major policy adjustments by the Federal Aviation Administration (FAA) on outsourcing repair work and foreign inspection.⁶ Even more troubling, the Air Force One incident was by no means unique: counterfeit parts even made their way into the Space Shuttle Program.⁷ Turning from aviation to ground transportation, the automotive industry estimates that counterfeit parts have resulted in about \$16 billion losses in 2007 alone and the rate is likely to grow 9-11% each year; at least 20,000 jobs can be created or saved by eliminating counterfeit parts.⁸ So severe is the situation that Congress, as well as both the Bush and Obama Administrations, have taken up anti-counterfeiting efforts as one of their top policy priorities.⁹

4. Frank Bajak, *Plane Parts on Black Market Plagues Airline Industry*, Associate Press/Lodi News-Sentinel, Dec. 7, 1996, at 17, available at <http://news.google.com/news/papers?nid=2245&dat=19961206&id=7tczAAAAIBAJ&sjid=ViEGAAAAIBAJ&pg=6976,4795140>.

5. FAA Advisory Circular 21-29C, *id.*

6. *Oversight of Foreign Aviation Repair Stations: Hearing before the Subcommittee on Aviation of the Committee on Commerce, Science and Transportation*, 109th Cong. 96 (2005); see also *Danger in the Repair Shop: FAA Inspectors Are Warning About the Risks of Outsourcing Maintenance*, BUSINESS WEEK, July 30, 2007, at 36.

7. *Id.*

8. Just Auto, *Counterfeit Car Parts in the Global Auto Industry* (July 2008), at 1; Neal Zipser, *Counterfeit Auto Parts: A Growing Industry Epidemic*, 55 AUTO INC., No. 4, Apr. 4, 2007, available at <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Counterfeit%20Auto%20Parts%20-%20A%20Growing%20Epidemic.doc>.

9. For example, in the 112th Congress, Senator Patrick Leahy (D-Vt.), Chairman of Committee on the Judiciary, introduced S. 968, Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP Act of 2011). Section 8 is designed to prevent the importation of counterfeit products and infringing devices. This is on top of what Congress has just done in less than three years ago. See Prioritizing Resources and Organization for Intellectual Property Act of 2008 ("PRO IP Act"), Pub. L. No. 110-403, 122 Stat. 4256 (2008); cf., S. 3325, *Enforcement of Intellectual Property Rights Act of 2008*, 110th Cong., 2nd Sess. (2008). Note that PRO IP Act basically is the codification of the Bush Administration's Strategy for Targeting Organized Piracy (STOP!) Initiative, introduced in October 2004. Office of the U.S. IPR Coordinator, *Bush Administration Strategy for Targeting Organized Piracy, Accomplishments and Initiatives* (Sept. 2007), available at http://www.stopfakes.gov/pdf/Memo_STOP_Sheet_September_2007.pdf. See also, Office of the U.S. Intellectual Property Enforcement Coordinator, *2010 Joint Strategic Plan on Intellectual Property*

On the other hand, the prevalence of illicit medicines and vaccines has become a major global safety concern.¹⁰ For example, the U.S. Food and Drug Administration (FDA) reports that between the beginning of 2007 and the end of May 2008, 103 Americans died after experiencing an allergic reaction to heparin, a very commonly prescribed anticoagulant.¹¹ During a 1995 meningitis epidemic in Niger, 50,000 people were inoculated with fake vaccines – and 2,500 died.¹² In 2006, more than 100 Panamanian children died after ingesting cough syrup that had been mixed with diethylene glycol, a common component of antifreeze.¹³ Separately, the World Health Organization estimates that approximately 200,000 people die every year from malaria because of poorly produced and inadequately delivered drugs.¹⁴

Pirates and counterfeiters know no geographic boundaries.¹⁵ For example, in the late 1970s, farmers in Zaire (now the Democratic Republic of Congo) and Kenya purchased a significant amount of pesticides and antifungals they believed were manufac-

Enforcement (June 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf.

10. ROGER BATE, *MAKING A KILLING: THE DEADLY IMPLICATIONS OF THE COUNTERFEIT DRUG TRADE*, at 8-24 (2008).

11. U.S. Federal Food and Drug Administration, *Information on Adverse Event Reports and Heparin*, June 18, 2009, available at <http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/UCM112669>.

12. Roger Bate, *supra* note 10. Granted that it can be difficult at times to clearly identify the direct cause of death in light of other possible contributing factors, the statistics here do reflect cases attributable to inferior quality medicines.

13. *Id.*

14. *Id.*

15. In this article, the terms “piracy” and “counterfeit” are used interchangeably. Under the definition of Agreement on Trade-Related Aspects of Intellectual Property Protection (TRIPS Agreement), however, “counterfeit” applies to trademark goods only: “‘counterfeit trademark goods’ shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;” whereas “Piracy” applies to copyrighted works: “‘pirated copyright goods’ shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.” TRIPS Agreement, Annex 1C to the Agreement Establishing the World Trade Organization, art. 51, note 14, contained in WTO, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* (2007), at 342. *Cf.*, MCCARTHY’S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY, (3rd ed. 2004), at 451.

tured by the Chevron Corporation. However, they in fact received counterfeit Taiwanese products that contained only chalk.¹⁶ As a result, the harvest for one of the most important crops of those two nations – coffee – was reduced by about 67% in 1979 and 1980, causing devastating socio-economic damage to the region.¹⁷ The purchase of counterfeit agricultural products is not limited to developing countries or gullible consumers. In 2004, an almost identical episode occurred once again in Western Europe, ruining thousands of acres of farmland in southern France, Italy and Spain. So serious was the situation that the European Crop Protection Association (ECPA) called for immediate actions from the European Commission to combat counterfeit pesticides.¹⁸

In the copyright area, a survey by a copyright trade group estimated that illegal or unauthorized downloads of music exceeded more than 20 billion times in 2005, causing devastating damages to the music industry.¹⁹ It put the losses at more than \$58 billion in the U.S. market alone in 2006, destroying close to 380,000 jobs. In the computer software sector, while the rate of piracy seems to have stabilized somewhat in recent years, thanks in part to the introduction of different marketing method (such as bundling software with hardware) and anti-circumvention or technical protection mea-

16. *Catastrophic Crop Failure Caused by Fake Pesticide*, BusinessWeek, Dec. 16, 1985, at 64, cited by and at 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25.10 (4th ed. 2008).

17. *Id.*

18. *European Crop Protection Industry Strongly Supports Anti-counterfeit Measures by Authorities and Others*, EUROPEAN CROP PROTECTION ASSOCIATION NEWS RELEASE, March 29, 2007, available at <http://www.ecpa.be/website/page.asp?mi=1&cust=3&lang=en&news=16139>. For a detailed analysis, see ECPA, *Counterfeit Pesticides Across Europe – 2008: Facts, Consequences and Actions Needed* (August 7, 2008), at 11, available at http://www.ecpa.eu/files/gavin/17853_Counterfeit%20Pesticides%20across%20Europe%20-%20Facts-Consequences%20and%20Actions%20needed.pdf; Business Action to Stop Counterfeiting and Piracy (BASCAP), *International Chamber of Commerce, Perilous Pesticides*, February 1, 2008, available at <http://www.icc-ccs.co.uk/bascap/article.php?articleid=752>.

19. Stephen E. Siwek, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, INSTITUTE FOR POLICY INNOVATION POLICY REPORT NO. 189 (2007), at 11, available at http://www.copyrightalliance.org/files/siweccopyrightpiracy_study.pdf; *International Piracy – The Challenges of Protecting Intellectual Property in the 21st Century: Hearing before the Subcommittee on Courts, the Internet, and the Intellectual Property*, U.S. House of Representatives, 110th Cong. (2007) (Statement of Eric H. Smith, President, International Intellectual Property Alliance).

tures, total losses still grew significantly along with the overall market expansion, to a record \$58.8 billion in 2010.²⁰

Piracy and counterfeiting sales have become a means to finance organized crime and terrorism. In 2003, a congressional hearing established the relationship between international piracy and terrorist financing for the first time.²¹ The testimony of the General Secretary of INTERPOL provided the first confirmation that paramilitary groups in Northern Ireland, ethnic Albanian extremist groups in Kosovo, Chechen separatists, North African radical fundamentalist groups and Al-Qaeda are all involved, directly or indirectly, in piracy or counterfeiting businesses, raising millions of dollars a year.²²

With the globalization of trade and aid of modern technologies, piracy and counterfeiting can occur as soon as the original work is available on the market.²³ This allows counterfeiters to better coordinate their activities so they can avoid legal consequences in different nations, thereby posing serious challenges to the existing international intellectual property protection regime.²⁴ Ad-

20. Business Software Alliance, *2010 Eighth Annual BSA Global Software Piracy Study* (2011), at 2.

21. *Intellectual Property Crimes: Are Proceeds from Counterfeited Goods Funding Terrorism?: Hearing before the Committee on International Relations, U.S. House of Representatives*, 108th Cong. 1st Sess. (2003).

22. *Id.*, at 13-16 (Statement of Ronald K. Noble, Secretary General of INTERPOL). In the case of Al-Qaeda, the estimate is that it received between US\$300 million and US\$500 million over a ten year period, averaging US\$30 million to US\$50 million a year. Of this amount, approximately 10% of spending went on operations while 90% was used to maintain and expand the infrastructure of the group's network.

23. An example is the theatrical release of *The Star Wars: Episode I* on May 19, 1999 in the U.S. market. Pirated DVDs were discovered in Singapore on May 24, and then quickly spread through the entire Asia-Pacific region. Within a week, just when the Asian local theaters were about to have their release, the market was already flooded with various pirated versions. Mindful that this happened even before the Internet download speed was high enough to allow far more efficient copying and distribution seen today. Source of survey: Motion Pictures Association.

24. An illustration for this problem is the *Kazaa* litigation around the world. First developed in 2001 primarily for free (i.e., unauthorized or unlicensed) peer-to-peer music download, it quickly attracted a large following and not surprisingly, law suits from the music industry. Because this service had been located and relocated in Estonia, the Netherlands, Australia, and eventually in Vanuatu, together with change of ownership, they all makes a pure legal solution all the more difficult and lengthy. Different courts have indeed reached different conclusions, which only exacerbate the prospect of a more harmonized enforcement and interpretation of the law. Eliza Shardlow Clark, Note, *Online Music Sharing in a Global Economy: The U.S. Effort to Command (or Survive) the Tidal Wave*, 14 MINN. J. GLOBAL TRADE 141, 150-153 (2004-05).

justing quickly with the changing markets, piracy and counterfeiting businesses have evolved from more individualized, *ad hoc* operations some twenty or thirty years ago into a highly diverse and sophisticated underground economy today, with systemic capital injections, organized product distribution channels and profit sharing.²⁵

Given that no single country is immune from the plague of piracy and that no domestic solution will suffice to tackle this problem, one would think that a natural and proper response ought to be for the international community to forge a cohesive alliance to deal with global piracy. Indeed they tried. Ironically, the processes and the various solutions being proposed only turned into some of the most controversial flash points that further enhance conflicts and polarize the so-called North and South division, to be discussed *infra*. Arguably this creates more breeding grounds for economic pirates to flourish. This article intends to examine the current state of the play, with focus on the interactions around some of the most recent developments, such as the Anti-Counterfeiting Trade Agreement (ACTA) and the still on-going Trans-Pacific Partnership Agreement (TPPA) negotiations. The article comments that the ideological split that has plagued the international community and argues that both ACTA and TPPA are likely to cause deeper mistrust between developed and developing economies, and create huge seismic conflicts among different trade blocs. While the need for a solid legislative and enforcement regime on the protection of intellectual property rights is necessary to sustain healthy economic growth and the development of science and technology, the heavy-handed "legalistic approach" and closed-door, "country club" style negotiations, as suggested by one observer, ironically, are likely to make matters worse before the situation gets better.²⁶ This article argues that a kinder, gentler, and more incremental approach with a focus on licensing reform and on complementary managerial and

25. Organization for Economic Co-operation and Development (OECD), *The Economic Impact of Counterfeiting and Piracy (Part IV)* (2007), at 3. Stratifications on pricing based on different qualities of different counterfeit goods are now a common scene in many outlets or bazaars around the world particularly famed or notorious for selling those types of products, with finely printed catalogues available for the better quality (dubbed "AAA" or "AA" respectively) as if they are genuine goods.

26. Because the negotiations of the ACTA and TPPA are all "by invitation only," and in light of the secretive nature of the content of the negotiations, critics have referred to this style as "country club" negotiations. See Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO Journal 1 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953899.

technological measures should be a far better alternative, and the international community, especially developing and less developed economies, should focus on their long term gains as opposed to the short term losses and tackle this issue as a priority of their national policies.

II. INTERNATIONAL STRATEGIES AND CONTROVERSIES

Sensing the magnitude of the counterfeit and piracy problems on hand, nations around the world are trying to come together to tackle the issues in a more cohesive manner. Many existing international organizations indeed tried to take the lead.²⁷ However, the efforts of these organizations have produced rather mixed results thus far and controversies flared up constantly between the developed and less developed economies, rendering the coordination on enforcement inefficient and arguably ineffective.²⁸

As a result, intellectual property issues were put on the agenda of the G8 Summit in 2005 and have been featured prominently ever since. During the 2005 summit, while the participants tried to figure out a more effective way to deal with the issue, perhaps even completely by-passing the existing international organizations all together, Japan first proposed the creation of a new international framework to combat counterfeit and pirated products, thus marking the beginning of the negotiations concerning the Anti-Counter-

27. For instance, WIPO held a number of diplomatic conferences covering a wide range of issues, from Internet-related copyright, industrial designs, substantive patent harmonization, among other things. Other organizations such as Interpol, WCO and WHO also engaged in addressing the piracy and counterfeit issues. See, for example, Ronald K. Noble, *Bridging Boundaries for Shared Solutions*, Remarks for the 5th Global Congress on Combating Counterfeiting and Piracy at Cancun, Mexico, December 1, 2009 available at <https://secure.interpol.int/Public/ICPO/speeches/2009/SGCounterfeitingMexico20091208.asp?HM=1> (Mr. Noble was the Secretary General of Interpol at the time).

28. The WIPO efforts produced results such as the Trademark Law Treaty in 1994, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty in 1996, Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs in 1999, Patent Law Treaty of 2000, Singapore Treaty on the Law of Trademarks in 2006 that are now all in effect. Several others, such as the 2012 Beijing Treaty on Audiovisual Performances are still waiting for nations to sign up and the draft Substantive Patent Law Treaty is still in discussions and limbo. With regard to a convention or treaty design to combat directly against piracy and counterfeit, that was never materialized. See *infra* for more discussions.

feiting Trade Agreement (ACTA).²⁹ This was particularly viewed as necessary among the developed economies, given that the WTO Doha Round multilateral trade negotiations had been (and still is) in a stalemate and many nations and/or custom unions have been engaged in negotiations for free trade agreements (FTAs) or trade and investment framework agreements (TIFAs) to ensure their respective competitiveness, protections and global positions. In this context, these nations believe a new regime such as ACTA can certainly help gain the political and economic high ground to solidify its market positions. But acting as a prelude, the following is a state of play of what has happened on the international front that eventually evolves into what it is today:

A. Global Congress Combating Counterfeiting and Piracy (GCCCCP)

The WCO and INTERPOL first jointly launched the GCCCCP in 2002 and subsequently won the support of the WIPO. The organization's first conference was held in Brussels in 2004. It is managed by a steering group composed of representatives from BASCAP Initiative of ICC, International Trademark Association (INTA), and International Security Management Association (ISMA).³⁰

Originally designed to be a forum for the exchange of viewpoints and experience-sharing, it sometimes produces quite remarkable propositions in their Outcome Statement (OS) issued at the conclusion of each Global Congress, unlike ordinary diplomatic communiqués, and, therefore, can sometimes be quite forthright and controversial. For example, in 2008, the OS (also known as Dubai Declaration) made a list of 33 specific recommendations, covering areas such as cooperation and coordination, legislation and enforcement, capacity building, awareness raising, health and safety risks, free trade zones and transshipment and sale of counterfeit and pirated products over the Internet.³¹ In particular they

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

30. For general introduction of this forum, see <http://www.ccapcongress.net/>.

31. GCCCCP, *Dubai Declaration (Outcome Statement)*, February 3-5, 2008, <http://www.ccapcongress.net/archives/Dubai/Files/Final%20Dubai%20Outcomes%20Declaration.pdf>. The Dubai Congress also marked the first time this group had its conference held outside of Europe.

called on Internet service providers (ISPs) to take more aggressive actions, including the adoption of better filtering system through technological means, to police Internet traffic and screen out infringing information.³²

In addition, GCCCP has become one of the most active organizations in sponsoring numerous educational professional training and other public awareness programs around the world. But its activities have ironically stimulated the so-called North-South dispute (more discussions *infra*).

B. World Health Organization (WHO)/IMPACT!

After more than a decade of debates and discussions, and in accordance with the World Health Assembly (WHA) Resolutions 41.16 of 1988³³ and 47.13 of 1993³⁴, WHO finally issued the *Guidelines for the Development of Measures to Combat Counterfeit Drugs* in 1999.³⁵ The guidelines specifically emphasize the shared responsibility among different government agencies, pharmaceutical industries, distributors, health professionals, consumers and the general public, as well as the international dimension that requires regional and global cooperation.³⁶

Unlike general consumer goods where there may be a "secondary market" of buyers who purchase goods knowing of their inferior quality and counterfeit nature, consumers who purchase a pharmaceutical product expect it to have the medical effect of healing their illness. In light of the more serious problems created by counterfeit pharmaceutical products and to follow-up on the implementation of the 1999 Guidelines, the WHO convened a conference entitled *Combating Counterfeit Drugs: Building Effective Interna-*

32. *Id.*

33. The World Health Assembly (WHA) in this Resolution requested the WHO Director-General, *inter alia*, "to initiate programmes for the prevention and detection of the export, import and smuggling of falsely labelled, spurious, counterfeit or substandard pharmaceutical preparations, and to cooperate with the Secretary-General of the United Nations in such cases when provisions of the international drug treaties are violated."

34. The WHA in this Resolution requested the Director-General, *inter alia*, "to support Member States in their efforts to ensure that available drugs are of good quality, and in combating the use of counterfeit drugs."

35. WHO Department of Essential Drugs and Other Medicines, *Counterfeit Drugs: Guidelines for the Development of Measures to Combat Counterfeit Drugs*, WHO/EDM/QSM/99.1 (1999), available at http://whqlibdoc.who.int/hq/1999/WHO_EDM_QSM_99.1.pdf.

36. *Id.*

tional Collaboration in Rome on February 18, 2006, and issued the *Declaration of Rome* at its conclusion³⁷ The Declaration explicitly states that:

"Counterfeiting medicines, including the entire range of activities from manufacturing to providing them to patients, is a vile and serious criminal offence that puts human lives at risk and undermines the credibility of health systems."³⁸

Building on the principles and recommendations laid out in this Declaration, the WHO Secretariat assembled the International Medical Products Anti-Counterfeiting Task Force (IMPACT!) and a Secretariat for this voluntary group to carry out the mandates from the Rome conference.³⁹ IMPACT! aims at ensuring appropriate regional representation, particularly from developing countries. Five working groups have been established to tackle legislative and regulatory infrastructure, implementation, enforcement, technology, and communication, respectively.⁴⁰ A new group on medical

37. WHO, *Conclusions and Recommendations of the Who International Conference on Combating Counterfeit Medicines: Declaration of Rome* (February 18, 2006), available at <http://www.who.int/medicines/services/counterfeit/RomeDeclaration.pdf>. With regard to the rationale for the establishment of IMPACT!, see WHO, *Combating Counterfeit Drugs: A Concept Paper for Effective International Collaboration* (January 27, 2006), available at <http://www.who.int/medicines/events/FINALBACKPAPER.pdf>.

38. *Id.*

39. WHO, *International Medical Products Anti-Counterfeiting Task Force*, <http://www.who.int/impact/en/>. The task force is composed of delegates from the following 23 governmental and non-governmental organizations: INTERPOL, OECD, WCO, WIPO, WTO, European Commission, Council of Europe, U.S. Pharmacopoeia, the Commonwealth Secretariat, Association of Southeast Asian Secretariat, International Federation of Pharmaceutical Manufacturers and Associations, International Generic Pharmaceuticals Alliance, World Self-Medication Industry, Asociación Latinoamericana de Industrias Farmacéuticas, International Federation of Pharmaceutical Wholesalers, European Association of Pharmaceutical Full-line Wholesales, International Pharmaceutical Federation, International Council of Nurses, World Medical Association, Pharmaceutical Security Institute, Pharmaciens sans frontières (ReMed), and International Alliance of Patients' Organizations. See also WHO Working Group on Substandard/Spurious/ Falsely-Labelled/Falsified/Counterfeit Medical Products, *WHO's Relationship with the International Medical Products Anti-Counterfeiting Taskforce*, A/SSFFC/WG/4 (February 7, 2011), available at http://apps.who.int/gb/ssffc/pdf_files/A_SSFFC_WG4-en.pdf.

40. WHO/IMPACT!, *International Medical Products Anti-Counterfeiting Taskforce (IMPACT) Terms of Reference*, available at http://www.who.int/entity/impact/about/IMPACT_ToR.pdf. From 2006 to 2008, the IMPACT! Secretariat's funding amounted to approximately US\$ 2.3 million. Major contributors included EU, Australia, Germany,

devices may be established in the future.⁴¹

Through these working groups, a number of principles and guidelines have been developed and issued to promote a unified approach to deal with counterfeit drugs, covering such issues as national legislation, data collection tools, sampling strategy, rapid response, good security practices for printed packaging material, good distribution practices, and single point of contact.⁴² Some of the most important guidelines are the *Principles and Elements for National Legislation against Counterfeit Medical Products*, endorsed by IMPACT! in 2007.⁴³ The principles take a very broad approach in defining what constitutes the manufacturing and distribution of counterfeit medicines in the entire supply chain: A medical product is counterfeit when there is a false representation in relation to its identity, history or source.⁴⁴ Counterfeits may include products with correct ingredients/components, with wrong ingredients/components, without active ingredients, with incorrect amounts of active ingredients, or those with fake packaging.⁴⁵

As a result, any person or legal entity that produces medical products, or engages in any step of the process of producing medical products, including purchasing of materials, processing, assembling, packaging, labeling, storing, sterilizing, as well as testing and releasing the medical product or any component or ingredient, all fall under the counterfeit definition and shall be criminally liable,

Italy and the Netherlands. See *WHO's Relationship with the IMPACT!*, *supra* note 39, at 6.

41. Summary Report of the Third IMPACT General Meeting, December 3-5, 2008 at Hammamet, Tunisia, available at: http://www.who.int/impact/resources/IMPACTthirdgeneralmeeting_%20report.pdf.

42. *WHO's Relationship*, *id.*, at 9-13 (Annex).

43. *Principles and Elements for National Legislation against Counterfeit Medical Products* (December 12, 2007), available at <http://www.who.int/impact/events/Final-PrinciplesforLegislation.pdf>.

44. *Id.*, at 4.

45. *Id.*. In comparison with the 1992 IFPMA-WHO definition of "counterfeit," the scope in this new definition is significantly broadened: the subject matter is expanded from medicines to all medical products, and no deliberate and fraudulent intent is necessary. Thus false misrepresentation in and of itself, regardless of intent, may be sufficient to establish counterfeiting. It follows that a drug with correct quality and active ingredients but incorrect label may still be deemed and liable as counterfeit drug. See WHO Division of Drug Management and Policies, *Counterfeit Drugs: Report of A WHO/IFPMA Workshop*, WHO/DMP/CFD/92 (1-3 April 1992, Geneva), at 1, available at http://whqlibdoc.who.int/hq/1992/WHO_DMP_CFD_92.pdf. Note, also, that no definition or illustration was given to the meaning of "history" in terms of false representation.

even if committed by negligence. Similar liability also applies to operators (including sales agents or representatives or wholesalers), other operators, or retailers of the supply or distribution chain.⁴⁶

Critics argue that the IMPACT! Principles did not reference the WHO 1999 Guidelines as a basis for its work.⁴⁷ While the 1999 Guidelines regarded the high price of legal drugs as an important contributing factor to the proliferation of counterfeit drugs, IMPACT! did not take drug prices into account as a factor behind counterfeiting.⁴⁸ Rather, it held that inadequate regulation and enforcement contributes to counterfeiting. Hence, there is a need for the development of a set of principles which establish appropriate legislation and penal sanctions including a clear definition of counterfeit medicines.⁴⁹

Emphasizing the need to address counterfeit medicine issues through intellectual property protection, enforcement, along with pharmaceutical and medical devices regulation and criminal law, IMPACT! adopted a one-size-fits-all model legislation as opposed to the WHO's traditional emphasis on the need for a national assessment of the current situation as the basis for a national strategy with regard to counterfeit medicines.⁵⁰ Developing economies are particularly concerned about the expanded usage of the term "counterfeit" from the trademark into the patent arena and the omission of "intent" as a prerequisite for potential liability. As a result, in 2008, the definition of "counterfeit" was revised:

A medical product is counterfeit when there is a false representation in relation to its identity and/or source. This applies to the product, its container or other packaging or labeling information. Counterfeiting can apply to both branded and generic products. Counterfeits may include products with correct ingredients/components, with wrong ingredients/ components, without active ingredients, with incorrect amounts of active ingredients, or with fake packaging.

46. *Id.*, at 9.

47. Southern Center and Center for International Environmental Law, *Counterfeit Medical Products: Need for Caution against Co-opting Public Health Concerns for IP Protection and Enforcement*, INTELLECTUAL PROPERTY QUARTERLY UPDATE (1st Quarter 2009), at 2, available at http://www.ciel.org/Publications/IP_Update_1Q09.pdf.

48. *Id.*

49. *Id.*

50. *Id.*

Violations or disputes concerning patents must not be confused with counterfeiting of medical products. Medical products (whether generic or branded) that are not authorized for marketing in a given country but authorized elsewhere are not considered counterfeit. Substandard batches of, or quality defects or non-compliance with Good Manufacturing Practices/Good Distribution Practices (GMP/GDP) in legitimate medical products must not be confused with counterfeiting.⁵¹

While the first sentence retains the same language from the 2007 text, explanatory footnote 1 was added to “false representation,” declaring that “[c]ounterfeiting is done fraudulently and deliberately. The criminal intent and/or careless behaviour shall be considered during the legal procedures for the purposes of sanctions imposed.”⁵² Critics have suggested that, while this seems to reintroduce the element of “intent” as in the 1992 IFPMA-WHO definition, when read with the main part of the definition itself, this explanation implies that any act of counterfeiting as defined here is necessarily done with deliberate and fraudulent intent. Hence, it presumes the existence of criminal intent, which has to be rebutted by the defendant, and is contrary to normal criminal procedures where the burden of proving intent lies with the prosecution.⁵³

Because of this broad definition and the expanded application of intellectual property rights, several other questions have been raised. For example:

1. Whether any off-patent generic medicine can nevertheless be treated as counterfeit if it bears a similarity to the color scheme, shape, smell or taste of another medicine, even if the generic medicine is of good quality, safe and efficacious?
2. Whether a generic formulation which contains correct ingredients and is therefore of good quality, safe and efficacious will nevertheless be considered counterfeit if it contains any misleading statement about the country of origin of the product or its ingredients?

51. WHO, *Secretariat Report to the 124th Executive Board Session*, ¶ 10 (at 2-3) available at http://www.who.int/dg/speeches/2009/executive_board_report_20090119/en/index.html.

52. *Id.*, footnote 1.

53. See *supra* note 47, at 4.

3. Whether the requirement for international cooperation under the Principles in effect amounts to giving the customs authority of any Member State the power to seize the shipment of suspected generic medicines in transit even though the destination of the shipment was not that Member State and the medicines are off-patents?

Critics have pointed out that from a short-term public health perspective, the fundamental issue is not willful misrepresentation but *whether such misrepresentation jeopardizes a patients' health*.⁵⁴ Most of the world's poor quality drugs are not classified as "counterfeit" because "deliberate" and "fraudulent" misrepresentation is extremely difficult to prove, and because many poor quality drugs are byproducts of ignorance or carelessness in manufacturing or distribution.⁵⁵ On the other hand, there is a legal distinction to be made between a substandard drug that is not the product of good manufacturing practice (GMP) and a counterfeit drug. One is the consequence of carelessness, the other of outright fraud. But the Principles somehow propose to treat them as equal and subject to the same liabilities. Criminal negligence, for example, would render substandard production "counterfeiting," whereas mere carelessness would not. Monitoring and maintaining drug quality remains the responsibility of the inspectorates and enforcement agencies of individual member states. But while IMPACT! recommends that member states pursue aggressive campaigns against counterfeiting, it is notably silent about what, if anything, should be done to combat substandard medicines.⁵⁶

In other words, the heavy-handed and expanded application of laws and/or enforcement on medical products whose patents are already expired has created controversies and may jeopardize what is supposed to be a genuine, concerted effort among all nations to effectively curtail the international proliferation of counterfeit drugs. The shifting burden of proof with respect to intent and the lack of distinction between "counterfeit" and "substandard" drugs only creates more suspicion among developing economies and

54. Roger Bate and Karen Porter, *IMPACT's Impact*, AMERICAN ENTERPRISE INSTITUTE (AEI) PUBLIC HEALTH OUTLOOK (February 2009), available at <http://www.aei.org/docLib/Impact.pdf>.

55. *Id.*

56. *Id.* Another criticism is that the lack of distinction between counterfeit and explicitly poor-quality drugs has led to some allegations of conflicts of interest, especially the involvement of several major pharmaceutical trade associations in the enforcement efforts.

makes it more difficult to present a united international front against potentially dangerous drugs.⁵⁷ Regrettably there is no credible empirical evidence on just how significant a portion this type of "good quality," patent-expired generic drug or other medical products exists that border on potential trademark infringement and how they are distributed.⁵⁸ Many developing economies cast serious doubt on the usage of intellectual property enforcement alone or as the primary tool against counterfeit drugs.⁵⁹ But one thing is clear: without sustained international cooperation, the flood of counterfeit drugs is not likely to abate, and the ones who suffer the most may well be the very nations who refused to take serious actions against this problem.⁶⁰

C. International Criminal Police Organization (ICPO-INTERPOL)

At its 69th General Assembly in 2000, the International Criminal Police Organization (ICPO-INTERPOL) formally resolved to incorporate intellectual property crimes as one of its areas of operation, and formed the INTERPOL Intellectual Property Crimes Action Group (IIPCAG).⁶¹ In May 2004, IIPCAG joined the World Customs Organization in co-sponsoring the first GCCCP in Brussels, Belgium. One of its major tasks is to develop intellectual property crime investigation training materials and modules for the

57. The viewpoints from developing economies, represented primarily by Brazil and India, can be reflected, for example, at WHO's "Counterfeit" Programme: *Legitimises IP Enforcement Agenda, Undermines Public Health*, THIRD WORLD NETWORK BRIEFING PAPER 2, available at http://www.twinside.org.sg/title2/briefing_papers/non_twn/Briefing.paper.on.WHO.Counterfeits.pdf.

58. E.g., Rama Lakshmi, *India's Market in Generic Drugs Also Leads to Counterfeiting*, Washington Post, September 11, 2010, at A9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091003435.html> (Estimates vary on the number of these drugs made in India. The government puts the country's counterfeit drugs at 0.4 percent and estimates substandard drugs account for about 8 percent, but independent estimates range from 12 to 25 percent).

59. See *supra* note 54.

60. *Id.* See also *India Leads the Way with Generic Drugs But as a Sad Side Effect They Are Also Leading the Way with Illegal Counterfeit Drugs*, MEDICAL QUACK, September 19, 2010, available at 2010 WLNR 18615303.

61. As of 2011, this group consists of 33 representatives, ranging from 15 law enforcement authorities in Europe, North America, and China, 2 international organizations (WCO and WIPO), 10 industry groups or intellectual property protection entities and 3 individual companies (Microsoft Corporation, Procter & Gamble and Underwriters Laboratories), respectively.

INTERPOL Intellectual Property Crime Investigators College.⁶² It also serves to promote government-private industry and regional enforcement cooperation against intellectual property crimes by organizing regional conferences and training programs.⁶³

In February 2008, INTERPOL formally launched a Database on International Intellectual Property (DIIP) to integrate with and expand on, but not to replace or substitute, all relevant and existing intellectual property databases.⁶⁴ Data contained in the database will be subjected to criminal analysis to identify links between transnational and organized cross-industry sector IP criminal activity. The database will also facilitate criminal investigations and aid in developing regional and global strategic IP crime reports.⁶⁵ The database also serves as a central point for private industry worldwide to provide information on intellectual property crimes. Together with the Recommended Minimum Global Standard for the Collection of Information on Counterfeiting and Piracy by the Private Sector,⁶⁶ it should ensure better enforcement cooperation among its members.⁶⁷ The management and maintenance of this database is in the hands of the Intellectual Property Crime Unit under INTERPOL. INTERPOL does not disclose information contained in DIIP. Participating industries receive feedback in the form of referrals indicating that two or more industries are being targeted by the same transnational organized criminals.⁶⁸

62. INTERPOL, *Fact Sheet on Intellectual Property Crime*, available at <http://www.interpol.int/content/download/804/6655/version/9/file/FHT01.pdf>.

63. *Id.*

64. INTERPOL Media Release, *INTERPOL Launches Intellectual Property Crime Database at Conference in India*, February 26, 2008, <http://www.interpol.int/News-and-media/News-media-releases/2008/PR006>. Note, however, this system is separated and independent from the traditional INTERPOL Criminal Information System (ICIS). In the actual enforcement, data retrieved from these two systems can be cross-referenced and matched to aid the identification of potential targets and the direction of investigation.

65. *Id.*

66. INTERPOL, *Recommended Minimum Global Standard for the Collection of Information on Counterfeiting and Piracy by the Private Sector* (2008), available at <https://www.interpol.int/Public/FinancialCrime/IntellectualProperty/DIIP/ExplanNotes.asp>.

67. It has often occurred in the past that companies or stakeholders of intellectual property rights failed to provide critical information while engaging in cross-border enforcement efforts, rendering the necessary collaboration all the more difficult. This Recommended Standard should help reduce the redundancy and/or the reconstruction of information.

68. See *supra* note 64.

In addition to the database, in 2006 INTERPOL launched a long-term, worldwide anti-counterfeiting campaign (with respect to trademarks) dubbed "Operation Jupiter." As of September 30, 2010, a total of 340 operations have been conducted, resulting in 629 arrests and seizure of goods worth more than US\$50 million.⁶⁹ The campaign is continuing and will be focusing on the fight against transnational organized intellectual property crime.

D. World Customs Organization (WCO)

The WCO does not have international enforcement authority. Therefore, its primary function is to coordinate and assist its members to improve the effectiveness of their enforcement efforts and achieve a balance between control and facilitation.⁷⁰ The WCO also developed instruments for international co-operation in the form of the revised Model Bilateral Agreement on Mutual Customs Assistance (MBA)⁷¹, the Nairobi Convention,⁷² which provides for mutual administrative assistance in the prevention, investigation and repression of Customs offenses, and the Johannesburg Convention,⁷³ which provides for mutual administrative assistance in customs matters. The WCO's Customs Control and Enforcement Program aims to promote effective enforcement practices and encourage co-operation among its members and with its various competent partners and stakeholders. In the area of intellectual property, two permanent units were established to expand border

69. INTERPOL Intellectual Property Rights Programme, *Operation Jupiter – The Results Keep Rising*, IPR NEWS (Autumn 2010), at 1-2, available at https://www.interpol.int/Public/FinancialCrime/IntellectualProperty/IPRnews/2010/news2010_02.pdf.

70. WCO, *Enforcement and Compliance – Overview*, available at http://www.wcoomd.org/home_epoverviewboxes_epoverview.htm.

71. WCO, *Model Bilateral Agreement on Mutual Administrative Assistance in Customs Matters: Introduction, Text and Commentary* (revised as of June 2004), available at <http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Recommendations/Model%20agreement.pdf>.

72. International Convention on Mutual Administrative Assistance for the Prevention, Investigation, and Repression of Customs Offences, concluded at Nairobi, Kenya on June 9, 1977, 1547 U.N.T.S. 444 (1989), available at <http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Conventions/naiireng%5B1%5D.pdf>.

73. International Convention on Mutual Administrative Assistance in Customs Matters, concluded at Brussels, Belgium on June 27, 2003, available at http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Conventions/Johannesburg_Convention_eng.pdf.

control collaborations: The IPR Strategic Group and the IPR Customs Experts Group.⁷⁴

In 2006, the WCO attempted to implement a set of Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE) as the basis for further expanded partnership among its members.⁷⁵ However, this process almost immediately ignited serious concerns and doubts from several developing countries who questioned the neutrality of the WCO Secretariat and the lack of prior consultation before the draft was put out "on a very politically sensitive issue."⁷⁶ They pointed out the lack of Terms of Reference within the SECURE Working Group before that Group proposed the text of SECURE for consideration, and insisted that the word "consensus" should not be used.⁷⁷ On substantive issues, they argued that some of the proposed measures exceeded not only the authority of WCO but the scope of the TRIPS Agreement.⁷⁸ For example, TRIPS does not require customs authorities to seize goods that may contain components which breach a patent.⁷⁹ Another example is the requirement of border measures on not only imports but also exports and transit.⁸⁰ Moreover, they believed SE-

74. Through these two units, WCO built up an intellectual property enforcement mechanism within its Customs Enforcement Network. However, among the 173 existing Members or Customs Territories, less than 50 have utilized the system for its intended purpose. See Larry L. Burton, *IPR and the Customs Enforcement Network (CEN)*, <http://www.oecd.org/dataoecd/42/29/35650471.pdf>

75. Also known as Provisional Global Customs Standards to Counter Intellectual Property Rights Infringements, as part of the Report of the SECURE Working Group, SP0269E1, June 2007, available at http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Enforcement/SECURE_E.pdf.

76. These countries are: Argentina, Brazil, China, Cuba, Ecuador, and Uruguay. They jointly submitted a critique "Document on the 'Report of the SECURE Working Group'" (SP0269E1), available at <http://www.ip-watch.org/files/Document%20on%20SECUREwg%20Report.pdf>.

77. *Id.*

78. David Cronin, *Clash Over World Customs Organization Efforts on IP Enforcement*, INTELLECTUAL PROPERTY WATCH, April 25, 2008, available at <http://www.ip-watch.org/weblog/2008/04/25/clash-over-world-customs-organization-efforts-on-ip-enforcement/>; see also Kaitlin Mara, *Member Nations Balk at World Customs Organization IP Enforcement Push*, INTELLECTUAL PROPERTY WATCH, June 27, 2008, available at <http://www.ip-watch.org/weblog/2008/06/27/member-nations-balk-at-world-customs-organization-ip-enforcement-push/>.

79. See *supra* note 15. The provision specifically identified the subject matter of border measures to be the importation of counterfeit trademark or pirated copyright goods. Thus, for components that may infringe a patent, it is apparently outside of the realm of those measures.

80. See *supra* note 75, Section 1(10).

CURE breached the flexibility for international negotiations under the WIPO Development Agenda and dubbed it an attempt to create a "TRIPS-plus-plus" regime.^{81,82}

As a result of heavy pressure from the developing economies, the WCO finally gave in and disbanded the controversial SECURE Working Group during its June 2009 Annual Council Sessions.⁸³ Taking its place is a newly established Counterfeiting and Piracy Group (CAP), which would limit its role to dialogue and exchanges of national experiences and would have no policymaking authority.⁸⁴ In line with the TRIPS Agreement, it would also restrict its definition of counterfeiting to trademark violations and of piracy to copyright violations, thereby removing concerns that its jurisdiction

81. The "Development Agenda" was initiated by Argentina and Brazil at the WIPO General Assembly in 2004, requiring future reform of international intellectual property system should take into consideration the relevant concerns and issues of developing economies. See WIPO Secretariat, *Proposal by Argentina and Brazil for the Establishment of A Development Agenda for WIPO*, WO/GA/31/11 (31st (15th Extraordinary) Session, August 27, 2004), available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf. In October 2007, the WIPO General Assembly formally adopted a set of 45 recommendations (out of 111 being proposed) to enhance the development dimension of the Organization's activities and divided them into 6 clusters: (A) technical assistance and capacity building; (B) norm-setting, flexibilities, public policy and public domain; (C) technology transfer, information and communication technologies (ICT) and access to knowledge; (D) assessment, evaluation and impact studies; (E) institutional matters including mandate and governance; and (F) other issues. See WIPO Secretariat, *Report of the Provisional Committee on Proposals Related to A WIPO Development Agenda (PCDA)*, A/43/13 Rev. (43rd Series of Meetings, September 17, 2007), available at <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>; for its formal adoption, see WIPO, *General Report of the Assemblies of the Member States of WIPO*, A/43/16 (43rd Series of Meetings, November 12, 2007), ¶ 334 (at 151), available at http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf.

82. "TRIPS-plus" specifically refers to the TRIPS Agreement plus the two so-called WIPO Internet Treaties, i.e., WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), but may be generally referred to a state's commitments that go beyond those already included or consolidated in the TRIPS Agreement.

83. Those Members forged a so-called "South-South Coalition," then disputed and boycotted the proposed Terms of Reference for the SECURE Working Group, making the works of this group impossible to continue. See Xuan Li, *WCO SECURE: Lessons Learnt from the Abortion of the TRIPS-Plus-Plus IP Enforcement Initiative*, South Center Research Paper No. 19, available at http://www.southcentre.org/index.php?option=com_docman&task=doc_download&gid=1231&lang=en.

84. WCO Policy Commission, *Combating of Counterfeiting and Piracy (Item VIII on the Agenda)*, SP0299E1a, June 11, 2009, available at <http://www.ip-watch.org/weblog/wp-content/uploads/2009/06/item-viii-policy-comm-sp0299e1a-1.pdf>.

may cover patents and other forms of intellectual property infringement.⁸⁵

E. The Group of Eight (G8) Summit

In addition to the work undertaken by various international and inter-governmental organizations, the issue of combating counterfeiting and piracy was brought on the agenda at the 2005 G8 Summit Meeting for the first time.⁸⁶ The Joint Declaration of the 33rd G8 Summit at Heiligendamm, Germany in 2007, leaders of the 13 leaders acknowledged the necessity of protecting intellectual property rights:

We encourage a positive exchange of views on international experiences related to the crucial role and economic value of intellectual property rights (IPR) protection and implementation of agreed international IPR protection standards. In this exchange we also need to consider the protection of IPRs in conjunction with the common good of human kind for the purposes of protecting the environment and supporting public health. We affirm our commitment for further cooperation in capacity building, human resource development and public awareness programmes in the field of intellectual property.⁸⁷

85. William New, *WCO Kills "SECURE" Group, But Creates Health Enforcement Mandate*, INTELLECTUAL PROPERTY WATCH, July 9, 2009, available at <http://www.ip-watch.org/weblog/2009/07/09/wco-kills-%E2%80%9Csecure%E2%80%9D-group-but-creates-health-enforcement-mandate/>. Note that not all the developing economies/states are completely opposed to the content of SECURE. Most, if not all, of them were appalled by the more autocratic style of former Director-General Michel Danet (1998-2008) and the non-transparent process by which only representatives from developed countries were appointed to the working group in drafting the proposal. For a detailed description and analysis from the "South-South Coalition" perspective, see Xuan Li, *supra* note 83.

86. G8 Gleneagles Summit, *Reducing IPR [Intellectual Property Rights] Piracy and Counterfeiting Through More Effective Enforcement* (July 8, 2005), available at http://www.g8.utoronto.ca/summit/2005gleneagles/ipr_piracy.pdf.

87. *Joint Statement by the German G8 Presidency and the Heads of State and/or Government of Brazil, China, India, Mexico and South Africa on the occasion of the G8 Summit in Heiligendamm, Germany* (June 8, 2007), available at http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/o5-erklaerung-en.templateId=raw.property=publicationFile.pdf/o5-erklaerung-en. Since 2005, leaders of Brazil, China, India, Mexico and South Africa have been invited to participate and join the issuance of the final declaration. Therefore, the forum has since been referred to as "G8+5."

Note that right before the summit meeting, the G8 Justice and Interior Ministers Meeting was held in Munich, Germany. In its Concluding Declaration, a specific section entitled Enforcing Intellectual Property Rights was created. Here, the ministers declared that “[c]omplex global criminal networks are becoming increasingly involved with IP crime. For these reasons, the fight against product piracy and counterfeiting is a crucial element of criminal law, regulatory and economic policy as well as consumer protection.”⁸⁸ As a result, in terms of civil remedies, “[s]tates should consider establishing legal regimes where right holders are able to pursue the civil enforcement of their rights through *expedited proceedings*. Such proceedings may be designed to ensure that right holders can obtain court decisions solely on the basis of substantiated submissions and without hearing the opposing party, or at a hearing with an abbreviated notice period. As a rule, such court decisions should be enforceable on the day of their issuance. At the same time, opposing parties must be protected against the misuse of such expedited proceedings.” [Emphasis added]⁸⁹ In other words, the ministers were advocating that nations around the world adopt *ex parte* proceedings whereby stakeholders of intellectual property rights can secure completely enforceable default judgment against alleged infringer(s).

In terms of criminal investigation and prosecution, the Concluding Declaration indicated that “there must be effective methods for law enforcement agencies to share information and to develop cooperative investigations across borders in order to combat piracy and counterfeiting offences. In this respect our experts have produced ‘Principles and Recommendations for Cooperative Investigation and Prosecution of Serious and Organized Intellectual Property Rights Crimes’ and have identified national points of contact in our countries to facilitate international cooperation in these cases. We endorse this work and agree to continue and increase the targeting of international intellectual property crime.”⁹⁰ What is unique about this G8 summit was the beginning of a systematic outreach, exchange and dialogue with G5 members in the hope that

88. G8 Justice and Interior Ministers Meeting, *Concluding Declaration* (May 23-25, 2007), available at <http://www.g-8.de/Content/EN/Artikel/2007/05/Anlagen/2007-05-25-g8-justiz-innenministertreffen-concluding-declaration-en.property=publicationFile.pdf>.

89. *Id.*

90. *Id.* The “expert group” mentioned here referred to the G8 Lyon-Roma/Anti-Crime and Terrorism Group and the principles referred to the work product of this group in November 2006.

concrete results would be achieved within two years. Hence the formation of the so-called "Heiligendamm Dialogue Process (HDP)"⁹¹

Building on this basis and momentum, the issue of combating counterfeit and pirated goods once again turned up on the agenda of the 34th G8 Summit at Tōyako, Hokkaido in 2008. Contrary to previous declarations that only laid out general ideas or principles, the Leaders' Declaration this time provided a specific blueprint on what should be done and when it should be accomplished: development of SECURE at the WCO, accelerating and concluding the negotiations of ACTA within a year and enhancing the WIPO Substantive Patent Law Treaty (SPLT) discussions on patent harmonization, as well as promoting information exchange systems among different authorities.⁹²

While the Heiligendamm Process has apparently impacted INTERPOL and WCO, and the conclusion of ACTA negotiations, it has also met strong resistance from developing economies, as described above, thus the result so far can best be described as mixed.⁹³

91. G8 Summit, *Heiligendamm Process*, available at http://www.g-8.de/nn_92452/Content/EN/Artikel/_g8-summit/2007-06-08-heiligendamm-prozess_en.html. Since G8 Summit itself does not have a permanent secretariat, its members organized a steering committee and request OECD to take charge of the administrative affairs concerning this process.

92. G8 Hokkaido Tōyako Summit, *Leaders Declaration* (July 8, 2008), ¶¶ 17, 18, available at http://www.g8summit.go.jp/eng/doc/doc080714_en.html. For the current status and analysis on ACTA, see *infra*; as for SPLT, see WIPO, *Report of the 15th Session of the Standing Committee on the Law of Patents*, SCP/15/6 (October 11-15, 2010), available at http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_6.pdf. Discussions on the draft SPLT started at the 5th session of the Standing Committee on the Law of Patents (SCP) in May 2001. While discussions led to some agreement in principle on a number of issues, other topics have generated more difficulties in terms of reaching agreement. As a result, the SPLT negotiations were put on hold in 2006. The work of the SCP was resumed in June 2008 by convening the 12th session of the SCP. The main focus since that session has been on building a technical and legal resource base from which to hold informed discussions in order to develop a work program. Therefore, a series of documents elaborating various aspects of patent law were produced and discussed at the subsequent sessions of the SCP.

93. Concluding Report of the Heiligendamm Process, ¶¶ 23-25 (2009), as Annex 1 to the L'Aquila G8 Summit *Joint Declaration: Promoting the Global Agenda*, available at http://www.g8italia2009.it/static/G8_Allegato/06_Annex_1_HDP_Concluding.pdf. For details, see *Report of Discussions of the G8 Intellectual Property Experts Group Meeting*, available at http://www.g8italia2009.it/static/G8_Allegato/ITALY%20G8%20IPEG%20Final%20Report%20c0.pdf. It is in this report that the pursuance of ACTA is formally discussed and endorsed by the participating members. For further comments,

F. Anti-Counterfeiting Trade Agreement (ACTA)

On October 1, 2011, representatives from eight nations signed the final instrument of the ACTA in Tokyo, Japan.⁹⁴ This marked the end of almost four years of negotiation and the beginning of a first-of-its-kind, subject-matter specific multilateral trade (or more accurately, enforcement harmonization) agreement that may have a profound global impact on the substantive legislative and enforcement protection of intellectual property rights as well as regional and bilateral free trade agreements.⁹⁵

1. The Negotiations

As indicated *supra*, it was at the G8 Gleneagles Summit in 2005 that Japan first initiated the creation of a new international framework against counterfeit and pirated products “in the context of the heightened awareness of the need for a higher degree of intellectual

see Katharina Gnath, *The G8 and the Heiligendamm Process: A Group's Architecture in Flux*, contained in C. Herrmann and J.P. Terhechte (eds.), *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* (2010), at 405-415, available at <http://www.springer-professional.de/spmblob/2194310/bodyRef/018—the-g8-and-the-heiligendamm-process253a-a-groups-architecture-in-flux.pdf>.

94. The signatories are: United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore. EU, Mexico and Switzerland also participated in the negotiations but did not sign the final instrument, all citing reason for not being able to conclude their respective domestic proceedings before the signing ceremony. In reality, however, the Mexican Parliament has already indicated to its President that it would not ratify the treaty, and the EU Commission needed to conduct further studies on whether major legislative actions are required to existing EU laws to comply with ACTA, e.g., the added obligations to Internet service providers and criminal liabilities on circumvention of technical measures, among other things. In addition, the EU Council of Ministers still needs to authorize a representative to sign on the document and the EU Parliament would also need to ratify it. All three parties have until May 1, 2013 to sign the Agreement. See David Meyer, *EU to Stay Away from ACTA Signing Ceremony*, ZD NET BLOG, September 29, 2011, available at <http://www.zdnet.co.uk/blogs/communication-breakdown-10000030/eu-to-stay-away-from-acta-signing-ceremony-10024455/>; European Commission, *Commission Services Working Paper: Comments on the “Opinion of European Academics on Anti-Counterfeiting Trade Agreement,”* April 27, 2011, available at http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf.

95. ACTA will enter into force 30 days following the ratification and deposit of the sixth instrument among its signatories. See ACTA, Article 40.1, available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf. Because several major ongoing trade initiatives involve the same parties of ACTA, such as the Trans-Pacific Partnership (TPP) initiated by the United States, the text and spirit of this agreement is likely to impact on the other negotiations.

property protection.”⁹⁶ On October 23, 2007, the Office of the U.S. Trade Representative (USTR) and the Japanese Ministry of Foreign Affairs (MOFA) jointly announced the initiative and invited the European Union to join in.⁹⁷ The first round of negotiations began on June 3, 2008 in Geneva, Switzerland and the final (11th round) was concluded on October 1, 2010 in Tokyo, Japan.⁹⁸ While 13 parties initially participated in the first round of negotiations, two of them quit since the second round and never re-joined.⁹⁹

2. *The Controversies*

What should have been just another routine negotiation turned out to be quite controversial from the beginning. Against the backdrop of the stalemate at the Doha Round negotiations at the WTO, the breakdown of SPLT talks and the passage of the “Development Agenda” at the WIPO, the negotiating parties decided to simply take the form of a plurilateral coalition (contrary to the traditional, multilateral approach as in the WTO negotiations) and start afresh, largely out of growing disappointment and disillusion with both organizations as the norm-setting venues.¹⁰⁰ This frustration is fur-

96. Office of the USTR, *Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties*, October 1, 2011, available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/joint-press-statement-anti-counterfeiting-trade-ag>.

97. USTR Press Release, *Ambassador Schwab Announces U.S. will Seek New Trade Agreement to Fight Fakes*, October 23, 2007, available at http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab_Announces_US_Will_Seek_New_Trade_Agreement_to_Fight_Fakes.html?ht=:; European Commission Press Release, *European Commission Seeks Mandate to Negotiate Major New International Anti-Counterfeiting Pact*, IP/07/1573, October 23, 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1573&format=HTML&aged=0&language=EN&guiLanguage=en>; Ministry of Foreign Affairs of Japan Announcement, *Framework of the Anti-Counterfeiting Trade Agreement (ACTA)*, October 23 2007, available at http://www.mofa.go.jp/announce/announce/2007/10/1175848_836.html.

98. U.S. Trade Representative, *Anti-counterfeiting Trade Agreement*, available at <http://www.ustr.gov/acta>.

99. I.e., Jordan and United Arab Emirates.

100. Eddan Katz and 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 (2009), available at <http://www.yjil.org/docs/pub/o-35-katz-hinze-ACTA-on-knowledge-economy.pdf> (note that the co-authors are directors of international Affairs and Policy, respectively, for Electronic Frontier Foundation, in general critical of both the processes and contents of the ACTA). See also Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* (June 9, 2008), available at <http://>

ther evidenced by the eventual establishment of an ACTA Committee to administer and manage the issues concerning the agreement.¹⁰¹ The decision by the U.S. government to classify all information concerning the negotiation process under the rubric of "national security" because it contained confidential "foreign government information" even before negotiations began raised many eyebrows both inside and outside the negotiations.¹⁰² The USTR's subsequent decision to treat ACTA solely as an executive agreement rather than a treaty, therefore bypassing U.S. Senate ratification and congressional oversight further heightened suspicion among many critics.¹⁰³

Despite several attempts by public interest groups and a lawsuit, the USTR still refused to release any substantive information concerning the ACTA negotiations.¹⁰⁴ A resolution by the Euro-

[www.twinside.org.sg/title2/intellectual_property/development.research/SusanSell_final version.pdf](http://www.twinside.org.sg/title2/intellectual_property/development.research/SusanSell_final%20version.pdf); Tim Davis, *ACTA – Anti-Counterfeiting Trade Agreement* (2010), available at http://www.timdavis.com.au/Papers/ACTA_A_Review_from_Australia.pdf.

101. ACTA, art. 36. The Final Text (May 2011) of this Agreement is deposited at the Ministry of Foreign in Japan, available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

102. Exec. Order No. 12,958, 60 FED. REG. 76 (April 17, 1995), amended by Exec. Order No. 13,292, 68 FED. REG. 60 (March 25, 2008). The USTR did so by first having all parties signed a non-disclosure agreement before the negotiations were to begin. See Katz and Hinze, *supra* note 100, at 31. See also Eric Pfanner, *Quietly, Nations Grapple with Steps to Quash Fake Goods*, N.Y. Times, February 16, 2010, at B6; Nate Anderson, *Anti-Counterfeiting Trade Agreement Slouches toward Signing on Saturday*, ARTS TECHNICA – TECH POLICY AND LAW IN THE DIGITAL AGE, September 27, 2011, available at <http://arstechnica.com/tech-policy/news/2011/09/anti-counterfeiting-trade-agreement-slouches-toward-signing-this-saturday.ars>; Monika Ermert, *ACTA: Negotiations Advance "Behind the Curtain"; Many Concerns*, Intellectual Property Watch, 2 August 2008, <http://www.ip-watch.org/weblog/index.php?p=1186>.

103. This is because the USTR claims that none of the existing domestic laws need to be amended. In the case of Uruguay Round multilateral trade negotiations (1986-1993) under the General Agreement on Tariffs and Trade (GATT) that led to the establishment of WTO, the USTR was under the so-called "Fast Track" authority (later changed to "Trade Promotion Authority (TPA)") by Congress to engage in negotiations with other trade partners. Sometimes referred to as a "congressional-executive agreement," the entire process was still under the oversight of the House Ways and Means Committee and Senate Finance Committee, and the final instruments along with the implementing legislative bill would have to be approved by Congress in its entirety with a simple majority vote. See 19 U.S.C. §§ 2191-2194 (2010); for detailed analysis, see Katz and Hinze, *supra* note 100, at 29-30.

104. The lawsuit yielded only 159 pages of information, while 1,362 pages were withheld for national security reasons. See *Electronic Frontier Foundation v. Office of the U.S. Trade Representative*, Civil Action No. 08-1599 (RMC)(D.C. Cir., 2008). The government's stance did not sway even after the change of administration in 2009. Ironically, a memorandum on the Freedom of Information Act calling for more openness

pean Parliament, a series of document leaks, including the availability of a full "consolidated" draft in March 2010, and a public petition signed by 6,645 individuals coincided with the Eighth Round of negotiations in Wellington, New Zealand (thus also known as the "Wellington Declaration"¹⁰⁵) and eventually prompted the USTR, the EU and many other parties to fundamentally change their attitude and position.¹⁰⁶ The WikiLeaks disclosures rendered the secrecy issue moot and further exposed the serious squabbling and confusion among the negotiators.¹⁰⁷

a. Scope and definition

The ACTA aims to protect *all* types of intellectual property rights, with focus primarily on enforcement measures against counterfeit trademark and pirated copyright goods. A Contracting Party may take the option to exclude the protection of patents and undisclosed information (trade secrets) from civil enforcement and border measures under the Agreement, however.¹⁰⁸ As a result, it can be argued that the strength of the ACTA *may* be significantly diluted if any Contracting Party chooses to opt out of the obligations in these two areas. In terms of criminal enforcement or enforcement in the digital environment, enforcement practices and interna-

and transparency was signed by President Barack Obama right after he took office. See *Memorandum for the Heads of Executive Department and Agencies on Freedom of Information*, January 21, 2009, 74 FED. REG. 4683-84 (January 26, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1773.pdf#page=1>. After counsels for the government informed the court of the Executive Branch's position and realized how little discretion the court may have to overrule that decision, EFF and other co-plaintiffs dropped the case on June 17, 2009.

105. Stephen Bell, *PublicACTA Hammers Out "Wellington Declaration": Critics of Intellectual Property Call for Independent National Impact Analysis*, April 12, 2010, COMPUTERWORLD, available at <http://computerworld.co.nz/news.nsf/news/publicacta-hammers-out-wellington-declaration>.

106. European Parliament, *Resolution of 10 March 2010 on the Transparency and State of Play of the ACTA Negotiations* (March 10, 2010), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN>. The series of earlier leaks offered only bits and pieces of the discussions, whereas the March 2010 leak, apparently done by someone(s) from inside, offered by then the most significant and major revelation of all the details, including the full text of the draft agreement.

107. E.g., *WikiLeaks Cables Shine Light on ACTA History*, LA QUADRATURE DU NET, February 3, 2011, available at <http://www.laquadrature.net/en/wikileaks-cables-shine-light-on-acta-history>.

108. ACTA, art. 2, note 2; art. 13, note 6.

tional cooperation, the ACTA excludes neither patents nor trade secrets.¹⁰⁹

Counterfeit trademark goods is defined as “any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country . . .”¹¹⁰ Pirated copyright goods is defined as “any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country . . .”¹¹¹ They are essentially the same as the definitions provided in the TRIPS Agreement.¹¹²

Critics point out that the definition of a “right holder” explicitly “includes a federation or an association having the legal standing to assert rights in intellectual property,” but conspicuously omits the author or inventor.¹¹³ Given that few substantive steps have been taken to inform, engage, or even consider public interest, the ACTA seems to put corporate interests before those of individual content creators and neglect the essential need to balance the two.¹¹⁴

b. Enforcement in the Digital Environment

Perhaps the most controversial aspect of the entire Agreement, Section 5 extends both the civil (Section 2) and criminal (Section 4) enforcement to the Internet (hence this section is sometimes re-

109. The U.S. patent system does not have criminal liability or criminal enforcement measures against patent infringers, other than punitive treble damages in case of willful infringement. See 35 U.S.C. § 284 (2010). In the trade secret area, criminal liability may be imposed at the federal level (*i.e.*, the Federal Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (1996), 18 U.S.C. §§ 1831-32 (2010)) or if the accused satisfied the legal requirement of stealing or theft under a state's criminal statutes. .

110. ACTA, art. 5 (d). While the text is a bit different from the U.S. Trademark (Lanham) Act standard (“identical with, or substantially indistinguishable from”), they should be functionally equivalent. See 18 U.S.C. § 2320(c)(1)(A)(ii)(2010).

111. ACTA, art. 5 (k).

112. See *supra* note 15.

113. ACTA, art. 5 (l).

114. David M. Quinn, *A Critical Look at the Anti-Counterfeiting Trade Agreement*, 17 RICHMOND J. L. TECH. 16 (2011).

ferred to as the "Internet Chapter") and covers both commercial and non-commercial activities, *i.e.*, individual peer-to-peer file sharing.¹¹⁵ All Contracting Parties are permitted to take all *effective* actions (civil, criminal and/or administrative) against infringing activities in the digital environment to create a deterrent while avoiding the creation of barriers to legitimate activity and preserving the fundamental principles.¹¹⁶ The ACTA apparently refrains from using terms such as fair use or other affirmative defenses, yet Article 27 is by far the only area that the entire Agreement touches on the subject.

On the ISP liability, Contracting Parties must allow the enforcement authority to order the "expeditious disclosure" to the right holder(s) the identity of the suspected subscriber engaged in infringing activities, as long as a legal infringement claim is filed and the information is only used for the enforcement of the intellectual property rights.¹¹⁷

Note that the far more controversial "graduated response" or "three strikes" rule that would have imposed an affirmative duty for the ISPs to actively eradicate online infringing materials, including, among other things, cutting off access and accounts of the suspected subscriber(s), was dropped at the end of the negotiations. So is the "safe harbor" on the so-called "notice-and-take-down" rules for ISPs because the negotiating parties cannot agree on the exact, technical steps that an ISP should take to immunize them from liability.¹¹⁸

115. ACTA, art. 27.2: "... each Party's enforcement procedures *shall* apply to infringement of copyright or related rights over digital networks, which *may* include the unlawful use of means of *widespread distribution for infringing purposes*." [Emphasis added]

116. ACTA, art. 27.2. In light of different treatment on *ordre public* (public policy) issues, questions remain as to whether a court in one state will provide full faith and credit to the judgment of another. For example, the U.S. allows the selling of Nazi memorabilia online but that is prohibited in EU. Thus, whether a derivative work bearing Nazi symbols can receive copyright protection or, conversely, whether a ban on these sales by the EU court can be honored and enforced in the U.S. remained to be clarified.

117. ACTA, art. 27.4. *Cf.*, article 11.

118. Different versions/options of these rules were on the various earlier drafts during the negotiations process. *E.g.*, Draft ACTA, art. 2.18 (Public Predecisional/Deliberative Draft, April 2010), available at http://www.ustr.gov/webfm_send/1883. Note that the proposed "graduated response" rules received vehement opposition before the European Parliament. As a compromise, the European Parliament in the end adopted a report entitled *Cultural Industries in Europe* instead on April 10, 2008, and urged all parties involved to "strike the balance between the impact of illegal file sharing on

On the protection of technological measures or anti-circumvention, the ACTA adopts the same approach found in the U.S. Digital Millennium Copyright Act of 1998 (DMCA)¹¹⁹ and requires all Contracting Parties protect against (1) *the act of circumvention itself*, (2) the marketing of a device or product or a service as a means of circumventing an effective technological measure, *i.e., providing means for access*, or (3) the manufacturing, importation or distribution of a device or product or a service primarily for the purpose of circumventing or has only a limited commercially significant purpose other than circumventing an effective technological measure, *i.e., providing means for copying*. In other words, like DMCA, the statute distinguishes between access control (anti-trafficking) and copy technologies.¹²⁰ But unlike DMCA that treats them differently, with *direct prohibition* on the act of circumvention being imposed with respect to access control technologies only, the ACTA does not make such distinctions but only calls for effective protection of all three types of circumstances.¹²¹

On digital rights management (DRM) information, the ACTA requires all Contracting Parties to provide protection against the removal or alteration of any such information or the distribution, importation, broadcasting, communicating or making available to the public of the copyright works knowing the DRM has been removed or altered without authorization.¹²² Interestingly, here for the first time the ACTA requires that “any person . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related rights” may also be liable.¹²³ In other words, the ACTA is using the DRM issue to have all Contracting Parties formally adopt indirect (or secondary) liability such as inducement, contributory and vicarious liability

creators and on the creative industries and the need to safeguard fundamental rights, including privacy and freedom of expression.” See *European Parliament Report on Cultural Industries in Europe*, 2007/2153 (INI), at 8, 14 (March 4, 2008), <http://www.europarl.europa.eu/oecil/FindByProcnum.do?lang=2&procnum=INI/2007/2153>.

119. Pub. L. No. 105-304, 112 Stat. 2860 (1998). This legislation marks the most sweeping reform of the U.S. copyright regime since the enactment of the Copyright Act of 1976. See Pub. L. No. 94-553, 90 Stat. 2541 (1976).

120. 17 U.S.C. § 1201 (a)(2)(2010).

121. ACTA, art. 27.5, 27.6.

122. ACTA, art. 27.7.

123. *Id.*

ity, an issue that has stirred up major controversies in Europe in the past.¹²⁴

c. The ACTA Committee

Another noticeable development from this Agreement is the creation, completely separate from the WTO and WIPO, of the ACTA Committee to review the implementation and operation, consider amendments, and oversee the accession of new signatories.¹²⁵ Among the several tasks the ACTA Committee may choose to do, one is to "seek the advice of non-governmental persons or groups."¹²⁶ This should assure the continuous influences from various trade associations and/or rights groups which have already demonstrated their strong impact in shaping up the negotiations and current version of the ACTA. The successfulness or failure of this type of arrangement can also determine the future direction of international trade agreements, be they multilateral or regional and the respective roles of the WTO and WIPO.

d. The Outcome

Ironically, on July 4, 2012, the Independence or National Day of the United States, the European Parliament rejected ACTA.¹²⁷

124. E.g., on 12 July 2005, in the wake of the U.S. Supreme Court decision on *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the European Commission issued a proposal for the European Council and Parliament to adopt a *Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights* and a *Council Framework Decision to Strengthen the Criminal Law Framework to Combat Intellectual Property Offences*, COM (2005) 276 final (July 12, 2005), amended COM (2006) 168 final (April 24, 2006), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0168en01.pdf. A focal point was whether there was the need to recognize indirect liability. Not surprisingly, this proposal immediately generated significant controversies across both sides of the Atlantic Ocean, with discussions mostly centered on the vague language of the proposed statute, such as what exactly constitutes "inciting" and what amounts to "a commercial scale," among other things. At the hearing in the European Parliament on November 22, 2005, it became clear that a consensus may be very difficult to reach among the various organizations and associations participated. See Marius Schneider and Olivier Vrins, *The EU Offensive against IP Offences: Should Right-holders Be Offended?*, 1 J. IP LAW & PRACTICE 173 (2006).

125. ACTA art. 36.2.

126. ACTA art. 36.3 (b).

127. The final tally was 478 against 39, with 165 abstentions. Under EU Treaty articles 207 and 218, most international agreements need Parliament's consent to enter into force. Equally, all EU countries need to ratify them. *European Parliament Rejects ACTA*, EUROPEAN PARLIAMENT PRESS RELEASE, July 4, 2012, available at http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120703IPR48247/20120703IPR48247_

This means that neither the EU as a whole nor its individual member states can join the agreement. This no doubt, dealt a significant blow to the outcome of ACTA, rendering other nations much less incentivized to accede to the agreement.¹²⁸

G. Asia-Pacific Economic Cooperation (APEC)

A special chapter exclusively devoted to the protection of intellectual property rights first appeared in the legal text of the 1993 North American Free Trade Agreement (NAFTA).¹²⁹ It was negotiated during the time the TRIPS Agreement negotiations were deadlocked, almost a parallel to the background of ACTA negotiations. Ever since then, similar arrangements have become routine in almost every FTA the U.S. Government is a party to, be it bilateral or regional.¹³⁰

A unique regional development since November 1989 has been the Asia-Pacific Economic Cooperation (APEC).¹³¹ Although it only serves primarily as a consultative forum for economic and trade dialogues and its current 21 member economies (deliberately

en.pdf. For the text of the resolution, see European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0287%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

128. William New and Monika Ermert, *European Parliament Rejection Puts ACTA Future In Doubt*, INTELLECTUAL PROPERTY WATCH, July 4, 2012, available at <http://www.ip-watch.org/2012/07/04/european-parliament-rejection-puts-acta-future-in-doubt/>.

129. NAFTA, ch. 17, available at <http://www.nafta-sec-alena.org/en/view.aspx?conID=590>.

130. E.g., Dominican Republic–Central America–United States FTA (CAFTA-DR), ch. 15, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; United States–Korea FTA (KORUS FTA, approved by Congress on October 12, 2011), ch. 5 and 18, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

KORUS FTA provides arguably the most extensive legal protection of intellectual property rights in any given treaty thus far, despite the fact that Korea is already a party to the ACTA. The EU takes a more streamlined approach by having the signatories of a given agreement simply pledge their commitment in adequate and effective intellectual property rights protection. See, e.g., EU–Mediterranean Agreement Establishing an Association between the European Communities and Their Member States and Jordan, Annex VII, [2002] O.J. L 129/3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:129:0003:0165:EN:PDF>.

131. Hadi Soesastro, *APEC's Overall Goals and Objectives, Evolution and Current Status*, contained as ch. 2 of RICHARD E. FEINBERG, ED., *APEC AS AN INSTITUTION: MULTILATERAL GOVERNANCE IN THE ASIA-PACIFIC* (2003), at 31-44.

not referred to as states to cover the political reality) do not engage in formal negotiations or enter into legally binding agreements, its *de facto* institutional authority, albeit in the forms of "best practice," "guidelines," "initiatives," "models," or "non-binding principles," are without question. It manages to carry out various tasks and meet its objectives through the adoption of Collective Action Plans (CAPs) or Individual Action Plans (IAPs).¹³²

In the area of intellectual property, APEC's trade ministers in June 2005 adopted an Anti-Counterfeiting and Piracy Initiative (ACPI), and subsequently proposed a series of region-wide IPR Model Guidelines to reduce the trade and sale of counterfeit and pirated goods, and to secure supply chains against those goods.¹³³ In addition, the 2007 IPR Guidelines on Capacity Building, Cooperation Initiative on Patent Acquisition Procedures, and a proposed Best Practices Paper on Innovative Techniques for IPR Border Enforcement were developed to assist Member Economies in dealing with a wide range of issues concerning counterfeit and pirated goods.¹³⁴ In hindsight, they served as a prelude to the subsequent ACTA and TPP trade negotiations (to be discussed *infra*). Since all of these "guidelines" are not legally binding and most of them touch on procedural aspects or capacity building only, they have

132. *Id.*; see also APEC, How APEC Operates, available at <http://www.apec.org/About-Us/How-APEC-Operates.aspx>.

133. They are: Model Guidelines to Protect against Unauthorized Copies, Model Guidelines to Reduce Trade in Counterfeit and Pirated Goods, Model Guidelines to Prevent the Sale of Counterfeit and Pirated Goods over the Internet, adopted in November 2005. In June 2006, two more were adopted: Model Guidelines for Effective Public Awareness Campaigns on Intellectual Property Rights, and Model Guidelines to Secure Supply Chains against Counterfeit and Pirated Goods. See APEC Press Release, *Trade Ministers Endorse Anti-Counterfeiting and Piracy Initiative*, June 3, 2005, available at http://www.apec.org/apec/news_media/2005_media_releases/030605_jpr.html. See also APEC, *Effective Practices for Regulations related to Optical Disc Production*, 2003/AMM/025 (October 17-18, 2003), and *Three Model Guidelines APEC Anti-Counterfeiting and Piracy Initiative*, 2005/AMM/002anx4rev1 (November 15-16, 2005), available at http://www.apec.org/content/apec/apec_groups/committee_on_trade/intellectual_property_MediaLibDownload.v1.html?url=/etc/mediaLib/apec_media_library/downloads/committees/cti/ipeg/misc.Par.0003.File.v1.1.

134. APEC/SCCP, *Best Practices Paper on Innovative Techniques for IPR Border Enforcement*, 2007/SOM3/SCCP/016 (June 23-25, 2007), available at http://aimp.apec.org/Documents/2007/SCCP/SCCP2/07_sccp2_016.doc; APEC CTI, *Cooperation Initiative on Patent Acquisition Procedures*, http://aimp.apec.org/Documents/2007/SOM/SOM3/07_som3_020.doc (September 2, 2007).

generated far less controversies than what was happening at the WCO, WHO, WIPO and WTO.¹³⁵

On the other hand, despite its potential influence, APEC in recent years seems to have lost steam for a wide variety of reasons, ranging from an inadequate management structure, an increasingly low funding level stretched thin by commitments, and most of all, the lack of political commitment by certain member economies in the absence of a legally binding mandate.¹³⁶ The very reasons for its earlier success and significant outreach may well be the same reasons for its current lack of progress and direction. The diversity among its members and mistrust between developed and developing economies certainly do not help.¹³⁷ As a result, many of the guidelines remained mere paperwork without substantive implementation.¹³⁸

H. Trans-Pacific Partnership Agreement (TPPA)

1. The Background

With the future of ACTA in limbo, the negotiations of TPPA intensified. From a geopolitical perspective, when the idea of having the U.S. and China forging a "G2" role in dealing with global issues fell on deaf ears of the leadership of both sides,¹³⁹ it became more apparent and necessary for the U.S. to strengthen ties with its trade partners in the Pacific region in order to carry out its "pivot to

135. Traditionally the United States, Canada, and Japan have been able to exert tremendous influence over the agenda and direction of APEC.

136. See FEINBERG, *supra* note 131, at 3-5. A recent example is the missing of President Barack Obama of the United States at the 2012 APEC Leadership Meeting in Vladivostok, Russia. Ostensibly for reason of scheduling conflict with the Democratic National Convention, many believe the U.S. President is also playing tic-for-tac with the Russian President Vladimir Putin for declining Obama's invitation to attend the G8 Summit only days before, held at Camp David, Maryland. Ironically, it was at the initiative of President William J. Clinton that APEC had its first leadership summit at Seattle, Washington in 1993.

137. Ambassador Ronald D. Palmer, *Globalism vs. Economic Nationalism: The Southeast Asian Case*, AMERICAN DIPLOMACY, June 1999, available at http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_12/palmer_global1.html.

138. Assafa Endeshaw, *Do Asian Nations Take Intellectual Property Rights Seriously?*, 4 SCRIPT-ED., Issue 2, at 166-179 (2007), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-2/endeshaw.asp>.

139. Francois Godement, Mathieu Duchâtel, and Thibaud Voïta, *No Rush into Marriage: China's Response to the G2*, EUROPEAN COUNCIL ON FOREIGN RELATIONS CHINA ANALYSIS NO. 22, June 2009, available at http://www.centreasia.eu/sites/default/files/publications_pdf/china_analysis_n22_no_rush_into_marriage_chinas_response_to_the_g2_0.pdf.

Asia" policy strategy,¹⁴⁰ as well as to leverage and compete against the possible forming of a Regional Comprehensive Economic Partnership (RCEP) involving the ten ASEAN members, Australia, China, India, Japan, South Korea and New Zealand (also known as the "ASEAN Plus Six").¹⁴¹ For example, during the third Presidential Debate at Lynn University, Boca Raton, Florida on October 22, 2012, President Barack Obama stated:

"[W]e believe China can be a partner, but we're also sending a very clear signal that America is a Pacific power, that we are going to have a presence there. We are working with countries in the region to make sure, for example, that ships can pass through, that commerce continues. And we're organizing trade relations with countries other than China so that China starts feeling more pressure about meeting basic international standards."¹⁴²

The Chinese government publicly shrugged off this bashing statement, viewed it only as political rhetoric during the American presidential campaign and tried to focus on the positives of Sino-American bilateral relations.¹⁴³ In private, however, there were

140. President Barack Obama announced, in his speech before the Australian Parliament on November 17, 2011, that "as a Pacific nation, the United States will play a larger and long-term role in shaping this region and its future, by upholding core principles and in close partnership with our allies and friends." Thus the birth of the so-called U.S. pivot to Asia strategy by which the U.S. tries to re-balance its national security priorities and reassert its leadership role in the Asia-Pacific region. Office of the Press Secretary of the White House, *Remarks By President Obama to the Australian Parliament*, November 17, 2011, PRESS RELEASE, available at <http://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>.

141. Jeju Peace Institute, *Diplomats' Roundtable ASEAN and East Asian Cooperation*, PROCEEDINGS OF THE 7TH JEJU FORUM FOR PEACE & PROSPERITY, available at http://www.jejupeaceforum.or.kr/skyboard/download.sky?fid=2403&gid=301&code=sky_eng_annou. See also K. Shanmugam, *Keynote Speech at the 2013 annual Turkish Ambassador's Conference at Ankara, Turkey*, SINGAPORE MINISTRY OF FOREIGN AFFAIRS PRESS RELEASE, January 4, 2013, ¶ 40, available at http://www.mfa.gov.sg/content/mfa/media_centre/press_room/sp/2013/Jan/speech_20130104.html; Brookings Institution, *Understanding the U.S. Pivot to Asia*, at 51-53 (Remarks of Claude Barfield, Resident Scholar, American Enterprise Institute), January 31, 2013, transcript available at http://www.brookings.edu/~media/events/2012/1/31%20us%20asia/20120131_pivot_asia.pdf.

142. Office of the Press Secretary of the White House, *Remarks by the President and Governor Romney in the Third Presidential Debate*, PRESS RELEASE, October 23, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/10/23/remarks-president-and-governor-romney-third-presidential-debate>.

143. According to a statement by HONG Lei, the spokesperson of the Chinese Ministry of Foreign Affairs, "the sustained, sound and stable development of China-US

signs of growing concerns over the U.S. attempt to lay more political, economic and military obstacles to the growing influence of China or even deploying what may be considered a *de facto*, outright economic blockade.¹⁴⁴ Thus China suddenly became more interested in pursuing the RCEP or “ASEAN Plus Six” initiative which would pave the way for the escalation of potential conflicts between two emerging trade blocs.¹⁴⁵

2. The Process

TPP started from a 2002 APEC “sideline meeting” among the leaders of Chile, New Zealand and Singapore, known as the “Pacific Three Closer Economic Partnership” or P3-CEP at the time.¹⁴⁶ When Brunei Darussalam joined the negotiations in April 2005, it was renamed the “Pacific Four” or “P4”.¹⁴⁷ Although not formally authorized or sanctioned by APEC, and unlike APEC that only serves as a non-binding forum among its members, it was an attempt to create the first formalized and a model free trade arrange-

relations serves the fundamental interests of both countries and peoples, and is conducive to peace, stability and prosperity of the Asia-Pacific region and the world at large. US politicians, no matter which party they represent, should view China's development in an objective and sensible light, and do more to promote China-US mutual trust and cooperation in a responsible manner. This is also in the interest of the US.” Ministry of Foreign Affairs of the PRC, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference*, October 23, 2012, available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t982088.shtml>.

144. WANG Zhaokun, *China an adversary: Obama*, GLOBAL TIMES, October 24, 2012, available at <http://www.globaltimes.cn/content/740060.shtml>; Carlos Tejada and Josh Chin, *Don't Get Mad: China Reaction to Obama 'Adversary' Comment*, WALL STREET JOURNAL/CHINA REAL TIME REPORT., October 24, 2012, available at <http://blogs.wsj.com/chinarealtime/2012/10/24/dont-get-mad-china-shrugs-off-obama-adversary-comment/>.

145. Petchanet Pratrungkrai, *ASEAN+6 Set To Launch World's Biggest Free-Trade Market*, Thailand the Nation, February 7, 2013, available at <http://www.nationmultimedia.com/business/Asean+6-set-to-launch-worlds-biggest-free-trade-ma-30192768.html>.

146. It was during the 10th APEC Leadership (or Summit) Meeting at Los Cabos, Mexico and at the joint initiation of President Ricardo Lagos of Chile, Prime Minister Helen Clark of New Zealand and Prime Minister GOH Chok Tong of Singapore. On June 3, 2005, the three nations concluded a Trans-Pacific Strategic Economic Partnership Agreement, effective May 28 the next year. For full text, see New Zealand Ministry of Foreign Affairs and Trade (MFAT), Trans-Pacific Strategic Economic Partnership Agreement, available at <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/main-agreement.pdf>.

147. New Zealand MFAT, *Understanding the P4 – The Original P4 Agreement*, available at <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/2-P4.php>.

ment that bridges Asia, the Pacific and the Americas to promote resource sharing and cooperation, thereby enhancing the competitiveness of all the regions involved – ideally a win-win strategy for all.¹⁴⁸ It strives for transparency and ultimately sets a vision towards the eventual establishment of a “Free Trade Area of the Asia-Pacific” or FTAAP.¹⁴⁹ For the latter, however, complex political and economic factors simply rendered it too difficult to yield any significant progress and the process is more or less paralyzed to this date.¹⁵⁰

On the other hand, the “Free Trade Area of the Americas” or FTAA negotiations under the U.S. auspices also ran into a snag by 2005, and there is no indication that the process is likely to be revived in the foreseeable future.¹⁵¹ Meanwhile, the respective trade

148. *Id.* In accordance with the P4 Agreement, more than 90% of goods now enjoys tariff-free treatment and a comprehensive tariff reduction shall be realized by 2017. In addition, any vendor of the participating states is qualified to participate in bidding competition of any government procurement project at another participating state.

149. FTAAP was first initiated by the Canadian business representatives at the second meeting of the APEC Business Advisory Council (ABAC) in 2004. This proposal was then submitted to the Trade Policy Forum of the Pacific Economic Cooperation Council (PECC), a business consultancy to APEC for further discussions. By 2006, leaders of the APEC economies formally stated in their Ha Noi Declaration: “We shared the APEC Business Advisory Council’s views that while there are practical difficulties in negotiating a free Trade area of the Asia-Pacific at this time, it would nonetheless be timely for APEC to seriously consider more effective avenues towards trade and investment liberalization in the Asia-Pacific region.” APEC Secretariat, *2006 Leaders’ Declaration - Towards A Dynamic Community for Sustainable Development and Prosperity*, November 18-19, 2006, available at http://www.apec.org/Meeting-Papers/Leaders-Declarations/2006/2006_aelm.aspx. For related comments, see C. Fred Bergsten, *Towards A Free Trade Area of the Asia-Pacific*, PETER C. PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS: POLICY BRIEFS IN INTERNATIONAL ECONOMICS No. PB07-2, February 2007, available at <http://www.iie.com/publications/pb/pb07-2.pdf>.

150. In fact, even some of the very individuals involved in the promotion of FTAAP foresaw the enormous obstacles lying ahead. See Robert Scollay, *Preliminary Assessment of the FTAAP Proposal*, presented at the PECC Trade Forum and ASCC Joint Meeting, May 22-24, 2005, available at <http://www.apec.org.au/docs/koreapapers2/SX-RS-Slides.pdf>. See also APEC Secretariat, *Further Analytical Study on the Likely Economic Impact of An FTAAP*, Paper submitted by Australia, China, Korea, and New Zealand for Concluding Senior Officials’ meeting, 2009/CSOM/R/010, Agenda Item: 6.3, October 2009, available at http://aimp.apec.org/Documents/2009/SOM/CSOM-R/09_csom_r_010.pdf. Another unspeakable, and yet perhaps major concern among many APEC economies is that the U.S. is perceived to have too dominant a role in the direction of APEC, thus a fresh round of negotiations towards an FTAAP may provide a leverage to balance the U.S. influence.

151. FTAA was formally launched by the 34 heads of states at the first Summit of the Americas on December 9-11, 1994 in Miami, Florida, on the heel of the successful conclusion of NAFTA. The U.S. government clearly wanted to take the leadership role and

negotiations between China, the ASEAN member states, Korea and Japan seemed to be off to a relatively smoother start.¹⁵² To leverage and counter-balance this development, the U.S. government set its eyes on the TPP and seized the initiative.¹⁵³

Once the leadership role changes hands, in a process resonant to that of ACTA, negotiators and “stakeholders”, i.e., businesses who have registered with the USTR in advance to be briefed on the progress of the TPPA are now sworn to secrecy, even some key members of U.S. Congress are “stonewalled” by the USTR.¹⁵⁴ Not

expand the momentum built from NAFTA to the entire Western Hemisphere. See First Summit of the Americas, *Declaration of Principles*, December 9-11, 1994, ¶ 11, available at <http://www.state.gov/p/wha/rls/59673.htm>. Formal negotiations did not begin until the second summit on April 18, 1998 in Santiago, Chile, and set a goal to conclude by January 2005. Later developments, however, completely sidetracked this process. Major differences of opinions on intellectual property, labor and environmental protection issues, together with anti-dumping and agricultural subsidies create significant divisions and distrust among the many participating nations. In one public display of outburst, negotiators and stakeholders engaged in a rowdy shouting match, causing the chair to call in armed security guards to maintain order and cancel the meeting early. See Institute for Agriculture and Trade Policy, *Looking toward the Free Trade Area of the Americas*, 3 NAFTA & INTER-AMERICAN TRADE MONITOR, no. 7, April 5, 1996, available at <http://www.hartford-hwp.com/archives/40/212.html>. See also Mario E. Carranza, *Mercosur and the End Game of the FTAA Negotiations: Challenges and Prospects After the Argentine Crisis*, 25 THIRD WORLD QUARTERLY 319, (2004), available at <http://www.e.uni-magdeburg.de/evans/Journal%20Library/Trade%20and%20Countries/Mercosur%20and%20the%20end%20of%20the%20FTAA.pdf>.

152. This primarily refers to the so-called “ASEAN Plus One” and “ASEAN Plus Three” processes, respectively, all centered on China. For the former, a Comprehensive Economic Cooperation Framework Agreement between China and ASEAN was concluded and came into effect on January 1, 2010. For the latter, Japan and Korea are invited to join in the hope that the Regional Comprehensive Economic Partnership Agreement will truly take shape. See ASEAN, *Chairman's Statement of the 13th ASEAN Plus Three Foreign Ministers' Meeting*, July 10, 2012, available at <http://www.asean2012.mfa.gov.kh/?page=detail&article=302&lg=en>.

153. USTR, *Trade Facts: United States to Negotiate Participation in Trans-Pacific Strategic Economic Partnership*, September 2008, available at http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file660_15116.pdf; The White House, *Remarks by President Barack Obama at Suntory Hall*, PRESS RELEASE, November 14, 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-suntory-hall>.

154. Copied from the ACTA negotiations, the practice of the USTR is that all negotiators, supporting staff, and the 600 or so “stakeholders”, domestic and international, must sign a non-disclosure agreement. No draft text of any kind will be made available to the public at all. The legislators being “stonewalled” include Senate Finance Committee's Subcommittee on International Trade, Customs and Global Competitiveness chairman Ron Wyden (D-Oregon) and House Oversight Committee Chairman Darrell Issa (R-California). For Senator Wyden, the USTR simply denied his request to access any documents, including the draft text of the agreement, concerning TPP; for Con-

unexpectedly, it immediately generated strong criticisms from both houses of U.S. Congress, calling for more transparency of the process and prior consultation with Congress.¹⁵⁵ Several watchdog groups and legal scholars also weighed in, expressing their disappointment over the direction the negotiation process has taken, arguing that the present process was “a stealth attack on democratic governance,” and urging the U.S. government to allow more public input instead of keeping a tight lid within an inner circle of interest groups.¹⁵⁶ Internationally, the more secretive process also results in

gressman Issa, the USTR politely rejected his request to participate as an observer in the 13th round of TPP negotiations, held in June 2012 in San Diego, which happens to be his prescient. See Zach Carter, *Obama Trade Document Leaked, Revealing New Corporate Powers and Broken Campaign Promises*, HUFFINGTON POST, June 13, 2012, available at http://www.huffingtonpost.com/2012/06/13/obama-trade-document-leak_n_1592593.html.

155. A bipartisan group of 134 members of the House of Representatives jointly issued a letter to the USTR on June 27, 2012. In addition to raising serious concerns over the lack of transparency, it further states: “Specifically, we write to urge you and your staff to engage in broader and deeper consultations with members of the full range of committees of Congress whose jurisdiction touches on the wide-ranging issues involved, and to ensure there is ample opportunity for Congress to have input on critical policies that will have broad ramifications for years to come.” See Vicki Needham, *House Democrats Press for Details on Asia-Pacific Trade Deal*, THE HILL, June 27, 2012, available at <http://thehill.com/blogs/on-the-money/1005-trade/235181-house-democrats-press-for-details-on-asia-pacific-trade-deal>. Realizing the letter apparently fell on deaf ears, eight frustrated members of Congress wrote another letter to the USTR in August but still to no avail. See Office of Congresswoman Rosa deLauro, *House Democrats Call on Administration to Open Trade Talks*, PRESS RELEASE, August 28, 2012, available at http://delauo.house.gov/index.php?option=com_content&view=article&id=1057:house-democrats-call-on-administration-to-open-trade-talks&catid=2:2012-press-release&Itemid=21; for text of the letter, see <http://delauo.house.gov/images/08%2029%2012%20TPP%20Letter%20to%20Ron%20Kirk.pdf>. On the Senate side, four members issued a letter to the USTR, suggesting that the non-transparent nature of the negotiations will result in the legitimacy of the final agreement being called into question. Noticeably they are all Democrats holding key positions in the Senate. See Office of Senator Sherrod Brown, *With Trans-Pacific Partnership Negotiations Set to Continue in California Next Week, Senators Call for Increased Transparency, Including Broader Consultation on Internet Freedom*, PRESS RELEASE, June 25, 2012, available at <http://www.brown.senate.gov/newsroom/press/release/with-trans-pacific-partnership-negotiations-set-to-continue-in-california-next-week-senators-call-for-increased-transparency-including-broader-consultation-on-internet-freedom>.

156. Program of Information Justice and Intellectual Property, American University Washington College of Law, *Law Professors Calling for Trans-Pacific Partnership (TPP) Transparency*, INFOJUSTICE.ORG, May 9, 2012, available at <http://infojustice.org/archives/21137>. Thirty-six law professors from the Pacific Rim countries jointly signed a letter sent to the USTR. Although Ambassador Kirk, the incumbent USTR, did send a “preliminary response” immediately, it was received rather negatively. See Mike Masnick, *USTR Insults the Intelligence of Legal Scholars after They Challenge Him on Lack*

frustration and criticism from participating members such as New Zealand, arguing that the lack of transparency and public input in such a massive undertaking will negatively impact a very large portion of global trade.¹⁵⁷

3. *The Negotiation Authority*

In addition to the issue of transparency, another potential risk to this U.S.-led trade negotiation is that, as in the case of ACTA negotiations, the U.S. negotiators came to the table again without the "Fast Track" or "Trade Promotion Authority" authorization from Congress. Thus the USTR adopted the same strategies as in NAFTA and ACTA negotiations, hoping that the TPPA will be, at best, treated as a congressional-executive or statutory trade agreement rather than as a treaty, hence requiring the approval by the *majority vote of each house* rather than by two-thirds vote of the Senate, thereby avoiding a much more difficult congressional scrutiny and legislative process.¹⁵⁸ Major controversies also surround the USTR proposal to further expand the so-called investor-state

of TPP Transparency, TECHDIRT BLOG, May 9, 2012, available at <http://www.techdirt.com/articles/20120509/09450518847/ustr-insults-intelligence-legal-scholars-after-they-challenge-him-lack-tpp-transparency.shtml>.

157. *ACTA v. TPP: The Case for Transparency in International Treaty Negotiations*, TECH LIBERTY NZ, December 5, 2010, available at <http://techliberty.org.nz/acta-vs-tpp-the-case-for-transparency-in-international-treaty-negotiations/>. Among some of the leaked documents, one paper submitted by the New Zealand delegation clearly shows the nation's reservation for going beyond the regime provided by the TRIPS Agreement. It was particularly concerned about imposing legal liability for DRM infringements. See *TPP: Intellectual Property Chapter: Horizontal Issues/Overall Structure, General Provisions and Cooperation*, Paper submitted by the New Zealand Delegation, available at <http://www.citizen.org/documents/NZleakedIPPaper-1.pdf>.

158. Here the executive branch enjoys tremendous discretion as long as it fulfills certain notification and consultation requirement under a given statute. *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), cert. denied, as *United Steelworkers of America, et. al. v. United States*, 534 U.S. 1039 (The 11th Circuit held that whether an international commercial agreement such as the NAFTA is a treaty that must be approved by two-thirds of the Senate was a nonjusticiable political question, thereby upholding the constitutionality of the majority vote of two houses in passing the NAFTA Implementing Act); Omnibus Trade and Competitiveness Act of 1988, § 1103, Pub.L. No. 100-418, 102 Stat. 1107, codified as 19 U.S.C. §2903. For the development and analysis of the statutory trade agreements program, see Jeanne J. Grimmett, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, CONGRESSIONAL RESEARCH SERVICE REPORT TO CONGRESS 97-896, July 13, 2012, at 2-5, available at <http://www.fas.org/sgp/crs/misc/97-896.pdf>.

dispute settlement mechanism (ISDS or ISDM)¹⁵⁹ and intellectual property rights protections, demonstrated in the leaked documents, including the draft agreement text and some discussion noted, much like what had happened during the ACTA negotiations.¹⁶⁰

Despite the on-going controversies, the negotiations are apparently intensifying and forging ahead.¹⁶¹ Although no conclusion was reached before the self-imposed deadline corresponding with the opening of the 2011 APEC Leaders' Meeting in Honolulu, Hawaii on November 12 and 13, 2011, the anticipated participation of Japan at the time provided added momentum to the process.¹⁶²

159. ISDS finds its origin in Chapter 11, Section 2 of the NAFTA, particularly Article 1121, which allows an investor to completely bypass the domestic adjudication system in the host nation and submit the investment-related dispute to arbitration. Initial design as a mechanism to avoid biased treatment and counter-measure in dealing primarily with nationalization policy, the expanded use of this mechanism in recent years has ignited significant global controversies, often times encroaching on the effective exercise and/or adjudication of a nation's sovereignty. See Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L L. 727 (1993); Note (Samrat Ganguly), *Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANS-NAT'L L. 113 (1999-2000).

160. *Big Pharma Lobbying Intensifies as USTR Signals IP Proposal Deadline*, TRANS-PACIFIC PARTNERSHIP DIGEST, May 1, 2011, available at http://tpd Digest.org/index.php?option=com_content&view=article&id=291%3Abig-pharma-lobbying-intensifies-as-ustr-signals-ip-proposal-deadline&catid=1%3Alatest-news&Itemid=1; for an observer's report, see Krista Cox, *Notes from the Seventh Round of TPPA Negotiations in Vietnam*, KNOWLEDGE ECOLOGY INTERNATIONAL BLOG, June 27, 2011, available at <http://keionline.org/node/1175> (the negotiations on intellectual property issues seem to be dominated by the delegations from Australia, New Zealand and the U.S., and the U.S. proposed text is the most aggressive).

161. The 15th round of negotiations was conducted in December 2012, with Canada and Mexico participating for the first time. No official word yet as to when the process is likely to conclude.

162. With the Liberal Democratic Party (LDP) regained majority in the Japanese Diet (lower house of the parliament) and Shinzo Abe as the Prime Minister in December 2012, the prospect of Japan becoming a full participant is now highly uncertain. The LDP platform rejects TPP outright. However, a spokesperson for the Abe Cabinet has given a somewhat positive answer to the question, raising the possibility that Japan may consider some level of involvement short of full participation to balance the pressure from within and without, while also using the process as a hedge on its territorial disputes over the Diaoyu/Senkaku Islands with China. It is also widely expected that Abe is not likely to make any formal announcement on this issue during his first visit to the United States as the Prime Minister. See Kyodo News, *LDP Will Support Abe on TPP Talks: Takaichi*, JAPAN TIMES, January 13, 2013, available at <http://www.japantimes.co.jp/news/2013/01/07/national/ldp-will-support-abe-on-tpp-talks-takaichi/>. For a critical analysis of the TPP in its entirety (not just the intellectual property portion) and from the economic perspective, see Henry Gao, *The Trans-Pacific Strategic Economic Part-*

4. *The IP Controversies*

Based on the leaked text of the draft TPP Agreement, it is fundamentally an attempt to create an elevated or “upgraded” version of the ACTA and, if adopted as is, a reflection of the utmost “right protection maximalism” the world has seen thus far.¹⁶³ For example:

a. Accession Prerequisite

ACTA expressly states that “[n]othing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement.”¹⁶⁴ While it clarifies the relationship between ACTA and other existing international conventions or treaties, it does not require the accession into any such other convention or treaty as a prerequisite before a nation qualifies for ACTA. The TPP draft, however, takes it one step further and does just that. Article 1.2 specifically lays out 10 existing conventions and treaties that a participating nation must have already acceded or ratified by the date of entry into force of the TPP Agreement.¹⁶⁵ In addition, each participating nation shall make all reasonable efforts to ratify or accede to the Patent Law Treaty (2000) and the Hague Agreement Concerning the International Registration of Industrial Designs (1999).

nership Agreement: High Standard or Missed Opportunity?, November 2, 2009, presented at the UNESCAP ASIA-PACIFIC TRADE ECONOMIST'S CONFERENCE, available at <http://www.unescap.org/tid/artnet/mtg/2-1Henry%20Gao.pdf>.

163. The leaked text apparently was the version proposed by the USTR on February 10, 2011 and its authenticity has been verified, although USTR would neither confirm nor deny it publicly. See Trans Pacific Partnership Document Library (TPPDL), INFORMATION JUSTICE, available at <http://infojustice.org/download/tpp/tpp-texts/tpp%20IP%20chapter%20feb%20leak.pdf>

164. ACTA, art. 1.

165. They are: Patent Cooperation Treaty (PCT) 1979 Text, Paris Convention for the Protection of Industrial Property 1967 Stockholm Text, Berne Convention for the Protection of Literary and Artistic Works 1971 Paris Text, Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure 1980Text, International Convention for the Protection of New Varieties of Plants, Singapore Treaty on the Law of Trademarks, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

b. Complete National Treatment

By mandating that all participating nations adhere to the principle of complete national treatment, Article 1.7 of the Draft Agreement leaves no room for exceptions to this rule. Not even ACTA have such a mandatory requirement. In contrast, earlier international norms such as the Berne Convention, while also adopting the national treatment principle, allows the "material reciprocity" exception.¹⁶⁶ From economic perspective, this exception can indeed potentially have a significant adverse impact on nations having weaker protection and/or enforcement, and the healthy development of their indigenous cultural and entertainment industries.¹⁶⁷ Thus by changing to complete national treatment, the drafters apparently hope to level the playing field for all parties, eliminate the "hidden" domestic trade barriers and "lock in" all signatories at the highest possible level of protection, at least in theory. Mindful, however, that material reciprocity is allowed in cases where the legal situations among different states are quite diverse and the application of national treatment would have resulted in strong imbalances between countries, it remains to be seen whether the underlining imbalances will indeed be significantly reduced through such a leap-forward measure.¹⁶⁸

166. Also known as the doctrine of mutuality, it means an agreement by which a state who makes the agreement agrees to extend to foreign nationals who are domiciled in their state the same legal rights that the foreign government extends to the host state citizens inside the foreign country. Thus Article 7.8 of the Berne Convention permits comparison of terms. As a result, while the EU now generally affords natural persons a term of copyright protection for the life of author plus 70 years, a foreign citizen whose country provides a term of life of author plus 50 years can only receive that same term of protection even in EU. See Council Directive 93/98/EEC, Harmonizing the term of protection of copyright and certain related rights, 1993 O.J. (L 290) 9; Directive 2006/116/EC, Term of protection of copyright and certain related rights, art. 7, 2006 O.J. (L 372) 12.

167. When Congress acted to extend the term of copyright protection in 1998 to match that of the EU, one of the main reasons was precisely to avoid potential economic losses to the U.S. economy, as many in the film, software and other copyright-related industries were mulling the feasibility of shifting the "first publication" of their works to Europe from the U.S., thereby altering the existing supply chain, causing significant revenue losses to the U.S. market. See House Report 105-452, Copyright Term Extension Act (1998), at 4, available at <http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt452/pdf/CRPT-105hrpt452.pdf>.

168. For detailed analyses, see Silke von Lewinski, *Intellectual Property, Nationality, and Non-Discrimination*, presented to the WIPO PANEL DISCUSSION TO COMMEMORATE THE 50TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, November 9, 1998, available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/lewisinski.pdf>; Edward J. Ellis, *National Treatment Under the Berne Convention and the*

c. Liability of ISPs

Building on already one of the most controversial components of ACTA, the TPP Draft provides that without first “expeditiously removing or disabling access, on receipt of an effective notification of claimed infringement, to cached material that has been removed or access to which has been disabled at the originating site,” an ISP will not be eligible for exemption of liabilities or enter the “safe harbor”.¹⁶⁹ This goes clearly above and beyond the scope stipulated in ACTA.

Side Letter One attached to the TPP Draft Text further lists detailed formality and procedural requirements on “notification” and “counter-notification” concerning the handling of potential on-line copyright infringement, again something that has never been stipulated before, not even in the ACTA.¹⁷⁰ They are by and large a wholesale export of the relevant provisions from the U.S. Digital Millennium Copyright Act of 1998 (DMCA).¹⁷¹ Learning from the major controversies developed over the adoption of secondary liabilities, *i.e.*, contributory, vicarious and inducement liability, during the ACTA negotiations, the USTR this time apparently did not use any language associated with these liabilities directly in the draft text, yet tactically and effectively embedded and covered the concepts anyway through the “notice and take down” requirement to exempt from ISP liabilities.¹⁷²

d. Fair Use

Prior to the 13th round of the TPP negotiations, the focus in the intellectual property area has been lopsided towards further expansion of right holders’ protection. In a surprise move, on July 3, 2012, the Office of USTR suddenly announced that “[f]or the first

Doctrine of Forum Non Conveniens, 36 IDEA 327 (1996), available at http://ipmall.org/hosted_resources/IDEA/6.Ellis.pdf.

169. TPP Draft Text, art. 16.3 (b)(v)(B).

170. A Side Letter is a set of separate agreements that serve to clarify the meanings of certain terms in the main agreement. Its function is similar to that of the Agreed Statements found in recent treaties such as the WCT and WPPT and has a binding effect on the signatory states.

171. Pub.L. No. 105-304, § 202 (a), 112 Stat. 2860 (1998), codified as 17 U.S.C. § 512 (a)(3)(2006, Supp. IV)(this portion is also known as the Online Copyright Infringement Liability Limitation Act).

172. Michael R. Morris, *ACTA’s Abandoned Third-Party Liability Provisions and What They Mean for the Future*, PIJIP RESEARCH PAPER NO. 10, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1010&context=research>.

time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized '3-step test,' that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research."¹⁷³

Ironically, just less than six months earlier, two similar bills backed by the entertainment industry, i.e., the "Stop Online Piracy Act (SOPA)"¹⁷⁴ in the House and "PROTECT IP Act (PIPA)"¹⁷⁵ in the Senate, called for broader and expanded enforcement of intellectual property rights and arguably less scope for fair use. Both bills eventually ran into strong opposition from grassroots Internet users and companies like Google, Reddit, Twitter and Wikipedia, among others.¹⁷⁶ In light of the massive firestorm from Internet organizations and users, what seemed to be a fast and smooth legislative sail initially ground to a squeaking halt.¹⁷⁷

173. USTR, *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, PRESS RELEASE, July 3, 2012, available at <http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.

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

175. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. (2011). This bill was the re-introduction of a bill in 2010 that failed to pass the Senate. See Combating Online Infringement and Counterfeits Act (COICA), S. 3804, 111th Cong. (2010).

176. David A. Fahrenthold, *SOPA Protests Shut Down Web Sites*, WASHINGTON POST, January 17, 2012, available at http://articles.washingtonpost.com/2012-01-17/politics/35439450_1_web-sites-english-wikipedia-reddit.

177. Office of Senator Harry Reid (D-Nevada, Majority Leader), *Reid Statement on Intellectual Property Bill*, PRESS RELEASE, January 20, 2012, available at http://www.reid.senate.gov/newsroom/pr_012012_reidstatementonintellectualpropertybill.cfm; U.S. House of Representatives Committee on the Judiciary, *Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act*, January 20, 2012, PRESS RELEASE, available at <http://judiciary.house.gov/news/01202012.html?scp=2&sq=larmer%20smith&st=cse>. The oppositions as well as the subsequent online and physical protests primarily argue that, if enacted, the bills would have encroached on the freedom of expression (a *de facto* censorship by allowing the right holders to show down a blog or website with bare suspicion that the site may contain infringing materials), users' privacy (compulsory disclosure of identity of users suspected for copyright infringement) and established in effect an online police-state. The oppositions successfully pit the high-tech industries against the entertainment industries, hence greatly reducing the effectiveness of Hollywood lobbying, as no legislators want to get caught in the middle. See also Stephanie Condon, *PIPA, SOPA Put on Hold in Wake of Protests*, CBS NEWS, January 20, 2012, available at http://www.cbsnews.com/8301-503544_162-57362675-503544/pipa-sopa-put-on-hold-in-wake-of-protests/.

With that victory in hand, the opposition shifted its attention to the TPP and called for further action to sidetrack the on-going negotiations.¹⁷⁸ Facing pressure back and forth, the USTR announcement may not be seen as a complete surprise after all, at least it seems to suggest that the USTR may be finally heeding the public outcry (regardless of whether the arguments are true or false) and would not want to see the negotiations floundered because of what happened domestically and/or the second thoughts some negotiators may start having on whether they should continue to support the U.S. proposal.¹⁷⁹

A subsequent leaked TPP Discussions Draft shows that a joint Australia/U.S. proposal did inject the "three-step test," using language identical to Article 13 of the TRIPS Agreement and Article 10(2) of the WCT.¹⁸⁰ However, it also creates a new paragraph, and can potentially extend to areas traditionally not subject to this test.¹⁸¹ Critics have given mixed comments. Some argue that it is actually more restrictive than the language appears and in effect encroaches on areas that are traditionally exempt from copyright infringement, others praise it as a step in the right direction although more needs to be done.¹⁸² The Discussions Draft shows that

178. Edward Black, *SOPA, ACTA and the TPP: Lessons for a 21st Century Trade Agenda*, FORBES, February 29, 2012, available at <http://www.forbes.com/sites/edblack/2012/02/29/sopa-acta-and-the-tpp-lessons-for-a-21st-century-trade-agenda/> (Edward Black is the CEO of the Computer and Communications Industry Association).

179. Clyde Prestowitz, *Is the Trans-Pacific Partnership Foundering?*, FOREIGN POLICY, April 27, 2012, available at http://prestowitz.foreignpolicy.com/posts/2012/04/27/is_the_trans_pacific_partnership_foundering.

180. With respect to copyright and related rights, "each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder." See James Love, *Leak of TPP Text on Copyright Limitations and Exceptions*, KNOWLEDGE ECOLOGY INTERNATIONAL, August 3, 2012, available at <http://keionline.org/node/1516>.

181. "Subject to and consistent with paragraph (1), each Party shall seek to achieve an appropriate balance in providing limitations or exceptions, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to, criticism, comment, news reporting, teaching . . ." As a result, the proposal in effect places what are already copyright exceptions such as "criticism, comment, news reporting, teaching, scholarship and research" back under a restrictive three-step test, thus creating more uncertainties to the balance that the negotiations seek to achieve. See Love, *id.*; cf., Berne Convention arts. 10, 10bis, and 11bis(2).

182. Love, *Id.*; Peter Jaszi, *Public Statement on the U.S. Proposal for A Limitations and Exceptions Clause in the Trans-Pacific Partnership*, AMERICAN UNIVERSITY PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, August 2, 2012, available at <http://infojustice.org/wp-content/uploads/2012/08/PIJIP-Statement-08022012>.

New Zealand, Chile, Malaysia, Vietnam and Brunei have tried to propose more open-ended exceptions but to no avail thus far.¹⁸³

e. Criminal Penalties

While both ACTA and TPP Draft Text mandates criminal penalties against acts of copyright piracy and trademark counterfeit that have reached "commercial scale," TPP, again, takes one significant step further. Under ACTA, commercial scale means "at least those carried out as commercial activities for direct or indirect economic or commercial advantage."¹⁸⁴ Under the TPP Draft Text, in addition to activities for financial gain, it further incorporates "significant . . . willful infringements that have no direct or indirect motivation of financial gain."¹⁸⁵ So are intentional trade (import and export) of pirated or counterfeit goods.¹⁸⁶

It is not clear whether the mere trade of generic products, *i.e.*, products that have not yet been labeled or packaged as certain name brand(s), will suffice to be treated as trafficking counterfeit goods.¹⁸⁷ If the answer is in the affirmative, then the market of

pdf. See also Mike Palmedo, *Joint Statement on U.S. Trans-Pacific Partnership (TPP) Proposal on Exceptions and Limitations*, INFOJUSTICE, August 29, 2012, available at <http://infojustice.org/archives/27049> (Arguing that "the language in Paragraph 1 of the US proposal, specifically the excerpt 'shall confine'", limits nations' ability to seek a flexible exceptions and limitations system. This language would cause numerous potential problems for the kind of balance in copyright systems that the new USTR proposal claims to advance").

183. Love, *id.*

184. ACTA art. 23.1.

185. TPP Draft Text art. 15.1.

186. *Id.* Even ACTA does not have such a broad scope of acts subject to criminal penalties. It is primarily a reflection of what has been recommended by WHO IMPACT and designed to cope with the worsening condition of falsified and substandard medicines on the global market. See WHO, *IMPACT Principles and Elements for National Legislation*, presented at IMPACT REGIONAL CONFERENCE ON COMBATING COUNTERFEIT MEDICAL PRODUCTS (2009), available at <http://www.who.int/entity/impact/resources/IMPACTPrinciplesAndElementsForNationalLegislation.ppt>.

187. Article 15.2 of the TPP Draft Text provides a mandatory requirement of criminal enforcement against users of counterfeit or "illicit" labels, even without willful infringement, as long as they are intended to be affixed to a phonogram, or a copy of a computer program, motion picture or audio work and is likely to cause confusion. In comparison, under U.S. law, whoever "intentionally traffics in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services, . . . shall be fined not more than \$2,000,000 or imprisoned not more than 10 years, or both, and, if a person other than an individual, shall be fined not more than \$5,000,000." 18 U.S.C. § 2320 (2006, Supp. IV). Here the U.S. Congress sought to close a loophole in 2006 that counterfeiters transport or ship unmarked, generic goods and counterfeit la-

such goods such as generic medicines will likely be significantly impacted: delay in custom inspection, insurance premium, higher transactional costs to meet the added burden of proof as well as other administrative compliance and/or legal measures.¹⁸⁸

This naturally leads to concerns over the added risk for search and seizure. While ACTA provides that the competent authorities have the authority to order the seizure of “assets derived from, or obtained directly or indirectly through, the alleged infringing activity[.]”¹⁸⁹ the TPP Draft Text seeks to expand the scope of seizure to “any assets traceable to the infringing activity.”¹⁹⁰ As a result, should this rule become final, many original equipment manufacturers (OEMs) of the TPP signatory states who tend to procure existing components from the spot market and reassemble them into semi-finished or final products will have to invest on better and more sophisticated systems to filter and verify the source of their components. In other words, they will have to establish (if none are in existence) or enhance (if they already exist) a due diligence program and engage in a thorough review of their supply chain, or facing the outcome of likely delays, seizures and costly legal proceedings, on the transportation of their merchandise, be they automobiles, computers or pharmacies. Such investment will not be cheap, and will inevitably eat into the already slim gross margin for most of the OEMs, thus ironically raise the bar of entry barriers for legitimate products.¹⁹¹

bels or packages separately to avoid custom inspection, seizure and subsequent damages and/or other liabilities. See Stop Counterfeiting in Manufactured Goods Act, Pub.L. No. 109-181, 120 Stat. 285 (2006); Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO IP Act), Pub.L. No. 110-403, §§ 205, 206, 122 Stat. 4256 (2008).

188. Charles Clift, *Combating Counterfeit, Falsified and Substandard Medicines: Defining the Way Forward?*, CHATHAM HOUSE BRIEFING PAPER CHBP No. 2010/01, November 2010, at 4 (sidebar) and 9, available at http://www.chathamhouse.org/sites/default/files/public/Research/Global%20Health/1110bp_counterfeit.pdf.

189. ACTA art. 25.1.

190. TPP Draft Text art. 15.5.

191. Gross margins varies due to different categories of products, consumer demand, competition, product life cycle, new product introductions, unit volumes, commodity and supply chain costs, the complexity and functionality of new product innovations, among other factors. In the PC or smartphone manufacturing sector, OEMs tend to have single-digit gross margins, while brand names such as Apple can pull in around 50%. See Adrian Kingsley-Hughes, *Court filing: iPhone Is A Gross Margins Powerhouse*, ZDNET, July 30, 2012, available at <http://www.zdnet.com/court-filing-iphone-is-a-gross-margins-powerhouse-7000001747/>.

f. Enforcement proceedings

In addition to granting stronger, substantive protections for right holders, the TPP Draft Text also tries to provide speedier procedure and more tools to help enforce their rights. For example, presumption of ownership and validity of intellectual property rights (Article 10.2), sufficient minimum legal (or pre-established) damages (Article 12.4), right of the prevailing party (presumably the right holders in most cases) to be reimbursed for attorney fees and court costs (Article 12.5, without the need to prove willful infringement in copyright or related rights), criminal penalties (pecuniary fines and imprisonment) sufficient to ensure a deterrent effect (Article 15.5 (a)), seizure, forfeiture and destruction of "suspected counterfeit or pirated goods, any related materials and implements used in the commission of the offense, any assets traceable to the infringing activity, and any documentary evidence relevant to the offense" (Article 15.5 (b)).

They are indeed ultrahigh standards, many of which even U.S. domestic laws do not meet. Unquestionably for those who choose to accede to this agreement as-is, they will have to substantially amend their domestic laws and policies. As in any free trade agreement, it is probably inevitable that some nations will feel that the TPPA as a whole or any free trade agreement as such is encroaching on their "free will" or "sovereignty." It can be expected that the integration process, *i.e.*, the accession, ratification, compliance and enforcement by each participant will invite quite a bit of socio-economic adjustments, even for the more industrialized nations, and, if not managed carefully, result in instability and unrest.¹⁹² In the long run, however, if the integration can truly occur as planned, arguably it is likely to bring forth convergence of income and, therefore, more even distribution of wealth.¹⁹³

192. Major incidents include the protests in Seattle, WA (WTO Ministerial Meeting, 1999) and Seoul, Korea (U.S.-South Korea Free Trade Agreement, 2011). *Cf. see* RAVEENDRA NATH "RAVI" BATRA, *THE MYTH OF FREE TRADE: A PLAN FOR AMERICA'S ECONOMIC REVIVAL* (1993) (The author opposes free trade agreements, arguing, instead, the adoption of "competitive protectionism" which would increase tax revenues, resurrect the manufacturing base, raise real earnings for the great majority of the work force, trim inequality, reduce the rate of poverty, enhance the growth of productivity, cripple the abuse of monopoly power by big business, revitalize the economy, and, above all, restore the U.S. economic leadership in the world – a highly controversial position).

193. *THE WORLD BANK, TRADE BLOCS* 90, 124-128 (2000) (The report is generally in favor of regional integration, especially the so-called North-South type of integration, with focus on competition and scale as well as trade and location effects).

III. OUTLOOK AND CONCLUSION

Counterfeit and pirated goods have become major problems in the daily socio-economic fabric of every society, rich and poor alike, damaging the foundation of our economic lives and even the very health of every human being. There is also a strong consensus that all nations must come together to address the root causes of the problem. The passage of TRIPS Agreement more or less represented this urgent sense and marked a historic high mark for that cooperative spirit.

Ironically, this high watermark has also formed the boundary of the major ideological divide between two massive blocs in the world: the developed (North) and the less developed (South) economies. The North, represented primarily by Canada, the EU, US and Japan (also known as the "Quad"), takes a maximalist view and considers the protection standards in the TRIPS Agreement only as the threshold or the "floor."¹⁹⁴ The South, mainly represented by the so-called BRICS nations, *i.e.*, Brazil, Russia, India, China, and South Africa takes a minimalist view and considers the TRIPS standards a ceiling — the highest level of protection a nation needs to comply with.¹⁹⁵ As both sides become more suspicious of the intentions and actions of the other, the ideological split often tends to blur and overly simplifies the substantive issues, and make it all the

194. For the U.S., such view is clearly and expressly reflected in its TRIPS Agreement implementing statute: "A foreign country may be determined to deny adequate and effective protection of intellectual property rights, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act." See Uruguay Round Agreements Act of 1994, § 313, Pub. L. No. 103-465, 108 Stat. 4809 (1994), *codified as* 19 U.S.C. § 2242 (d)(4)(2010). See also, Global Intellectual Property Center, *TRIPS: Floor or Ceiling?*, January 2010, available at http://www.theglobalipcenter.com/sites/default/files/reports/documents/TRIPS_FloorVsCeiling_WP_1_10_2.pdf (GIPC is affiliated with the U.S. Chamber of Commerce).

195. Henning Grosse Ruse – Khan, *Ceilings' in International IP Regimes: Assessing Binding Limits to TRIPS-plus IP Protection within TRIPS and EU FTAs*, presented at the ICTSD/WBI GLOBAL DIALOGUE ON TRIPS AND PUBLIC POLICY CHALLENGES, April 16, 2009, available at http://www.ip.mpg.de/files/ppt1/ceilings_presentation_grkhan_16_04_20093.ppt; Henning Grosse Ruse – Khan and Annette Kur, *Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection*, MAX PLANCK INSTITUTE FOR INTELLECTUAL PROPERTY, COMPETITION & TAX LAW RESEARCH PAPER SERIES No. 09-01, December 8, 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326429#.

more difficult to find common solutions, especially when empirical data does not clearly support one side over the other.¹⁹⁶

To make matters worse, given that some of the most serious sources of counterfeit and pirated products apparently originate from the very nations considered to have more lax legal protections, it naturally encourages the argument for a tougher enforcement regime to curtail the problems.¹⁹⁷ For many years, the U.S. has taken the lead role in advocating more rigorous rules than what TRIPS Agreement calls for at different inter-governmental organizations. Once the North felt that none of the existing fora, be it WCO, WHO, WIPO or WTO, were functioning the way they prefer, the North quickly switched their strategy, and took what a scholar referred to as the "country club" style negotiations amongst themselves in concluding the ACTA, meaning by invitation only, with all negotiations taking place behind closed doors.¹⁹⁸ This seems to suggest that the North will continue to pursue a predominantly legalistic approach in tackling global counterfeiting and piracy problems, at least within certain "premium markets" for intellectual property. In other words, the strategy of the North is to build up a "legal containment" with very little tolerance for other, more accommodating attitudes.

On the other hand, the South has been sticking to their traditional line, arguing that the standards of the TRIPS Agreement would have to be the very goal, *i.e.*, the "ceiling," that every WTO Member needs to accomplish within the timeline corresponding to their respective status or classification.¹⁹⁹ Otherwise these agreed standards would have been completely meaningless if they are treated only as the minimum threshold while the goals remain open ended. The South also tries to seize the high ground by attacking

196. Peter K. Yu, *A Tale of Two Development Agendas*, 34 OHIO N. U. L. REV. 465 (2009).

197. In the case of China, for a thorough analysis on the complexity of the problems, see Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (2005).

198. See *supra* note 26.

199. They often cite Article 41.5 of the TRIPS Agreement as a basis of support: "[The Part on intellectual property enforcement] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general." See also Peter Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA 239 (2011).

the secretive processes for lack of transparency and public input, strongly hinting that these negotiations are the result of backdoor business influence and lobbying, therefore unduly tilting what should have been a delicate balance between the right holders and the public. On the other hand, China has put forward the policy of "indigenous innovation" to sustain its economic growth with solid research and development capabilities in technologies and to drastically reduce its reliance on foreign technologies to 30% by 2020.²⁰⁰ Many international technology companies, however, cast a suspicious light on this policy and call it "a blueprint for technology theft on a scale the world has never seen before."²⁰¹ The U.S. International Trade Commission also did a full-scale study on this and how that may impact counterfeit trade and the U.S. economy as a whole.²⁰²

While these two titanic masses are clashing against each other, creating fault lines from one international forum to another, the flood of international counterfeit and pirated goods continues unabated. Assuming the various trade associations and government survey statistics hold true, the trend is indeed alarming.²⁰³ Stronger legal protection has not been able to reduce the counterfeit and

200. This policy formally originates from The State Council (Cabinet) of the People's Republic of China, *The Outline of National Medium- and Long- Term Science and Technology Development Plan (2006–2020)* (commonly known as MLP), [2005] GUO Fa No. 44, available at http://www.gov.cn/jrzq/2006-02/09/content_183787.htm (full text in Chinese only); for an introduction and basic analysis of this policy, see WANG Yan, *China's National Innovation System and Innovation Policy* (2006), presented at the 2ND ASIA-PACIFIC FORUM ON NIS FOR HIGH-LEVEL POLICY-MAKERS, available at http://nis.apctt.org/PDF/CSNWorkshop_Report_P2S2_Wang.pdf. Mr. Wang was the Director of Regulations and Intellectual Property Rights (IPR) Division, Department of Policy and Regulations, Office of Innovation System Construction of the Ministry of Science and Technology, China at the time.

201. James McGregor, China's Drive for "Indigenous Innovation": A Web of Industrial Policies (September 2, 2011), at 4, available at http://www.uschamber.com/sites/default/files/reports/100728china-report_0.pdf.

202. USITC, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy* (May 2011), available at <http://www.usitc.gov/publications/332/pub4226.pdf> ("Indigenous innovation policies are relatively new and evolving; only a small percentage of U.S. IP-intensive firms that conduct business in China reported that they had already experienced material losses due to such policies in 2009. Going forward, most firms either are unsure how their revenues will be affected by indigenous innovation or anticipate that their revenues will fall").

203. *Id.*; see also, e.g., International Intellectual Property Alliance (IIPA), *Special 301: Written Submission Regarding the Identification of Countries Under Section 182 of the Trade Act of 1974* (February 15, 2011), available at <http://www.iipa.com/rbc/2011/2011SPEC301COVERLETTER.pdf>.

piracy trade. On the contrary, the problem is worsening. The rapid development of technologies, for instance, especially those concerning the Internet, has been identified as a major contributing factor. However, experiences suggest that a single factor can hardly be the only cause of problems of this magnitude and it clearly shows the industry's lagging reaction to the new world order. It also suggests that legal containment alone will not do the work. This counterfeit and piracy "flood," just like flood water, would have to go somewhere (most likely underground) if not properly drained and guided.

An important short-term solution is the reform of licensing or subscription mechanisms, especially for massive online reproduction, distribution and performances of copyrighted materials. The market has already shown that different content is moving rapidly into portable or mobile digital formats and data processing is shifting to so-called "cloud computing." This means the convergence and integration of audio-video files, graphics, digital books or libraries, social media and other interactive applications into a highly personalized and unique format tailored to the need and preference of each individual user.²⁰⁴ Therefore, the definition of certain copyright terms and their relevant licensing mechanisms clearly requires innovative reforms so that people are *truly* incentivized to acquire and enjoy copyrighted content through legitimate licenses or subscriptions.²⁰⁵ In this regard, the current one-size-fits-all approach that has been more or less applied by most multinational companies may not be the right solution after all.

Before the negotiations of the ACTA, one of the primary objectives among the participating parties was the hope to develop

204. Mark R. Nelson, *Digital Content Delivery Trends in Higher Education*, CENTER FOR APPLIED RESEARCH (ECAR) RESEARCH BULLETIN (April 25, 2006), available at <http://net.educause.edu/ir/library/pdf/ERB0609.pdf>; Lauren Indvik, *5 Fresh Digital Media Trends to Watch*, MASHABLE BUSINESS, March 3, 2011, available at <http://mashable.com/2011/03/03/digital-media-trends/>.

205. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2nd Cir. 2008), *cert. denied*, 561 U.S. ___, 129 S.Ct. 2890, 174 L.Ed.2d 595 (2009), the U.S. appellate court held that to determine whether a work is "fixed" in a given medium, the court will ask not only (1) whether a work is "embodied" in that medium, but also (2) whether it is embodied in the medium "for a period of more than transitory duration." In other words, time or duration is now an element the court must inquire in determining whether reproduction has indeed taken place. Note that the court dealt with direct infringement issue only in this case. Had the court ruled otherwise, the entire business model of Cablevision (the defendant) and the future of cloud computing may be in serious jeopardy.

a new plurilateral (not traditional multilateral) model with common appeal that cuts across all regions and economic states so that it can also be attractive to states such as China and India, traditionally the major sources of global piracy.²⁰⁶ With the conclusion of the ACTA, however, it appears to have created just the opposite result, driving developing nations away and making them even more suspicious or outright hostile, at least for now.²⁰⁷ The phenomena of growing patent and copyright litigation involving so-called "trolls"²⁰⁸ and the staggering costs has generated further hostilities toward the legalistic approach and rendered the adoption of a "TRIPS plus" regime by developing economies all the more difficult, if not impossible.

In addition to licensing reform, other managerial and technical means should also be applied and complimented, albeit very carefully, to achieve a more comprehensive, more multi-faucet solution, such as tackling the production, distribution, finance and organizational aspects of a counterfeiter's supply chain.²⁰⁹ In the area of online piracy, various technical measures have been implemented to ensure users are using legitimate copies or to protect unauthorized circumvention. However, one has to be particularly mindful

206. Andrew Willis, *EU Defends Final ACTA Text on Counterfeiting*, July 10, 2010, EUOBSERVER.COM, available at <http://euobserver.com/871/30976>; Dave Neal, *ACTA Is Worthless Without Chinese Involvement, Was Always Worthless Anyway*, INQUIRER, October 7, 2010, available at <http://www.theinquirer.net/inquirer/news/1741186/acta-worthless-chinese-involvement>.

207. WTO TRIPS Council, Minutes of Meeting on June 8-9, 2010, IP/C/M/63, October 4, 2010, at ¶¶ 248-336, available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/M63.doc>.

208. A troll is originally a supernatural being in Norse mythology and Scandinavian folklore, generally used as a negative synonym for a *jötunn*, an obnoxious or even dangerous being to human lives. In the intellectual property area, the term was used pejoratively since the 1990s for people engage in aggressive law suits but the metaphor was popularized in 2001 by Peter Detkin, former assistant general counsel of Intel, in describing an entity or individual who does not engage in research or development but only purchase or license patents or other intellectual property rights to acquire financial gains through litigation or the threat of litigation. Although these type of entities and individuals do exist, a precise definition has been difficult, if not impossible, due to its uncertain nature. For detailed discussions, see *Patent Trolls: Fact or Fiction?*, Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee of the Judiciary, U.S. House of Representatives, 109th Cong. (June 15, 2006).

209. Martin J. Schneider and Michael Stephen, *Exploring the Supply Side of Counterfeiting: Strategies, Instruments and Capabilities of Counterfeiters*, presented to the 6th Annual Conference of the European Policy for Intellectual Property Association, September 8-9, 2011, available at <http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Papers/SCHNEIDER%20Martin.pdf>.

and careful about applying them on *access control*. For example, Sony's placement of highly intrusive DRM software on all of its musical CDs in 2005 created a disastrous worldwide backlash against that company before long.²¹⁰ The music industry quickly learned from this error and the four major record labels eventually and completely abandoned DRM on all the optical disks they released.²¹¹ Book publishers soon followed suit by abandoning DRM on all audio books.²¹²

No matter how good the intention may be, any type of "stop and check" process on the identity or legitimacy of users is likely to be filled with trials and errors. Given the speed of distribution and demand, any online measure that tends to burden a product's or service's legitimate end users can easily create unforeseen backlash.²¹³ Consequently, the product or service providers should

210. Since August 1, 2003, Sony BMG began to sell some of its musical CD titles with the so called "content protection software" being packaged in. Specifically, Sony BMG adopted the MediaMax and "extended copy protection," or XCP software in those CDs which only allows users to make a limited number of copies from the disk and also rip the music into a digital format to be used by a computer or portable music player. When an XCP CD is inserted into a computer, for example, an End User License Agreement (EULA) appears automatically on the screen and the XCP software installs itself on the user's computer. Allegedly this software contains a potentially harmful "rootkit" which monitors the user's activities and signals back to the manufacturer. It, therefore, opens up the computer's "backdoor" and render it much more vulnerable to third party hacking (either with "malware," "spyware," "Trojan horses" or other types of hacking devices/software). Sony BMG eventually identified 52 titles using the XCP software and more than 20 million of CDs have been recalled. All parties eventually settled by the end of 2005 with Sony agreed to provide a significant cash payout and free downloads from its musical archive, but serious damages to Sony's reputation were already done. The stock price for Sony also fell sharply as a result. See *In re Sony BMG CD Technologies Litigation*, No. 05-CV-09575 (NRB)(S.D.N.Y. 2005). For the text of the settlement agreement, see <http://www.girardgibbs.com/sonysettlementagreement.pdf>.

211. Catherine Holahan, *Sony BMG Plans to Drop DRM: The last major label will throw in the towel on digital rights management and prepared to fight Apple for valuable download revenues*, BUSINESSWEEK, January 4, 2008, available at http://www.businessweek.com/technology/content/jan2008/tc2008013_398_775.htm. Many companies also learned that the technology was not very effective after all and can often be circumvented within relatively short period of time, causing more embarrassment.

212. Brad Stone, *Publishers Phase Out Piracy Protection on Audio Books*, N.Y. TIMES, March 3, 2008, at , available at <http://www.nytimes.com/2008/03/03/business/media/03audiobook.html>.

213. E.g., Chinese Rage Against Microsoft's Black Screen Counterfeit Notice, KOMAXIS INTELLIGENCE CONNECTED, November 9, 2008, available at <http://www.konaxis.com/index.php/20081109215/news/high-tech-computer-software-internet-china/chinese-rage-against-microsofts-black-screen-counterfeit-notice.html>.

learn from past experiences and try very hard not to “rock the boat,” so to speak, *i.e.*, avoid disturbing the very foundation and source of their support and focus on the management of their supply chain instead.

History has clearly shown that whenever there is a new technology or technological platform emerging, showing strong potential to replace the existing one(s), making copying and distribution easier and more perfect than ever, instead of embracing the changes and meeting the challenges for the uncertainties, content providers based on existing technologies or platform(s) tend to hold on to their base, panic and then pursue the legal route (through legislation or litigation) to preserve their vested interests and sometimes stymied the progress on the new technologies.²¹⁴ In that process, the legislature or courts from time to time breaks the fundamental principle of technology neutrality and start regulating the technology itself. This tends to dichotomize and ideologize the position of both sides, and create more confrontation and mistrust instead of reconciliation. Thus the South views the ACTA and the on-going TPPA negotiations as the U.S. government's wholesale effort to export its legal system, and has launched strong resistance and counter-measures to battle these efforts every step of the way, covering every major international forum.

This backlash apparently hit home when the EU Parliament rejected ACTA by a large margin. With the apparent foundering of ACTA, international attention has now shifted to TPP. Together with the China-led RCEP and the recently announced Transatlantic Trade and Investment Partnership (TTIP) negotiations between the U.S. and EU,²¹⁵ a three-way clash involving these three titanic trade blocs may be forming. An alarming possibility is that, through these intensifying regional integration efforts and with the WTO Doha Round in limbo, a premium market will be created within the global economy, undermining the U.S. and EU's willingness to par-

214. Benton J. Gaffney, Notes and Comments, *Copyright Statutes That Regulate Technology: A Comparative Analysis of the Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611 (2000).

215. The White House, *Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso*, PRESS RELEASE, February 13, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/02/13/statement-united-states-president-barack-obama-european-council-president>.

ticipate in the multilateral system, and reduce the overall effectiveness of the WTO.²¹⁶

While major content providers and technology developers are constantly locked in the classic legal warfare in the late 1990s and early this century, Apple, on the other hand, managed to successfully bring the two together and completely revolutionize the distribution of music and the way of life for the human being. Hilary B. Rosen, former president of RIAA (1998-2003) and the initiator of the record industry's hard line legal campaign against thousands of online copyright infringers, offered what may well be one of the most sobering yet enlightening observations:

"... knowing we were right legally really still isn't the same thing as being right in the real world. We had that euphoria with the first *Napster* decision. ... The result was lots of back and forth and leverage hunting on both sides and continued litigation and then a great service shut down to make room for less great services. And more legal victories didn't bring more market control no matter how many times it was hoped it would. ... The euphoria of this decision does not and should not change the need for the entertainment industry to push forward and embrace these new distribution systems. ... I hope all sides will take a deep breath and realize that this Supreme Court decision doesn't change one bit their responsibility to move forward together on behalf of their consumer."²¹⁷

Thus, regardless of what is happening on the legal front, with technology and content development not necessarily on a collision course, it is important to note that one way or another, it is the market and our attitude, not the courts or the legislature or major trade blocs, which will ultimately decide the shape of our future.

216. See *supra* note 193, at 104.

217. Hilary B. Rosen, *The Wisdom of the Court, Part II*, THE HUFFINGTON POST, June 27, 2005, available at http://www.huffingtonpost.com/hilary-rosen/the-wisdom-of-the-court-p_b_3259.html (reflecting and commenting on the music industry's victories in the cases of *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) and *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), involving unauthorized peer-to-peer file share).

LIST OF ABBREVIATIONS

ABAC	APEC Business Advisory Council
ACPI	Anti-Counterfeiting and Piracy Initiative under APEC
ACTA	Anti-Counterfeiting Trade Agreement
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BASCAP	Business Action to stop Counterfeiting and Piracy Initiative of the International Chamber of Commerce
“BRICS”	Brazil, Russia, India, China and South Africa
DIIP	Database on International Intellectual Property of INTERPOL
DMCA	Digital Millennium Copyright Act of 1998 (United States)
DRM	digital rights management
ECPA	European Crop Protection Association
EU	European Union
FAA	Federal Aviation Administration
FTAA	“Free Trade Area of the Americas”
FTAAP	“Free Trade Area of the Asia-Pacific”
FTAs	free trade agreements
G8	Group of Eight
GCCCP	Global Congress Combating Counterfeiting and Piracy
GMP	good manufacturing practice
HDP	Heiligendamm Dialogue Process under G8
ICC	International Chamber of Commerce
IIPCAG	Intellectual Property Crimes Action Group of INTERPOL
IMPACT!	International Medical Products Anti-Counterfeiting Task Force
INTA	International Trademark Association
INTERPOL	International Crime Police Organization (a/k/a ICPO)
IP	intellectual property
IPR	intellectual property right
ISDS/ISDM	investor-state dispute settlement mechanism
ISMA	International Security Management Association
LDP	Liberal Democratic Party of Japan
MBA	Model Bilateral Agreement on Mutual Customs Assistance

MOFA	Japanese Ministry of Foreign Affairs
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
P3-CEP	Pacific Three Closer Economic Partnership
P4	Pacific Four
PECC	Pacific Economic Cooperation Council
PIPA	"PROTECT IP Act"
RCEP	Regional Comprehensive Economic Partnership
RIAA	Recording Industry Association of America
SECURE	Customs for Uniform Rights Enforcement
SOPA	"Stop Online Piracy Act"
SPLT	WIPO Substantive Patent Law Treaty
STOP!	Strategy for Targeting Organized Piracy (STOP!) Initiative
TIFAs	trade and investment framework agreements
TIIP	Transatlantic Trade and Investment Partnership
TPPA	Trans-Pacific Partnership Agreement
UN ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UN	United Nations
USTR	United States Trade Representative
WCP	World Customs Organization
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Phonograms and Performance Treaty
WTO	World Trade Organization

