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# ACTA, Fool: Explaining the Irrational Support for a New Institution

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# ACTA, FOOL: EXPLAINING THE IRRATIONAL SUPPORT FOR A NEW INSTITUTION

*Gabriel J. Michael\**

## ABSTRACT

The key players in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations were driven to establish a new institution for intellectual property enforcement because the traditional venues for such matters, the WTO and WIPO, had become inhospitable forums. Yet given the significant division in U.S. domestic economic interests over ACTA's provisions and the lack of solid theoretical or empirical evidence supporting claims made by proponents of the agreement, it is puzzling that ACTA has commanded the support of the U.S. executive, even across two administrations from opposing political parties. I show why this support cannot be explained as a result of the aggregation of domestic economic interests, or as a result of rational policymaking. I then argue that an irrational but captivating "policy paradigm" better explains the support of the U.S. executive.

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## I. INTRODUCTION

After years of efforts by the U.S. and other advanced industrial states to consolidate international intellectual property policy within the multilateral institutions of WIPO and the WTO, the recent past has seen a concerted effort by a number of countries to devolve a subset of such policy, namely IP enforcement, to a different institution. The Anti-Counterfeiting Trade Agreement (ACTA) is the prime example of such efforts. In spite of the existence of well-established institutions such as WIPO and the WTO, which have nearly universal membership and a high degree of institutional expertise and perceived legitimacy, advanced industrial states have chosen to blaze a new path—a costly move that has attracted significant attention, both positive and negative. Why? In short, it is because the existing institutions have become inhospitable forums for these key states to advance their interests.

Recent years have witnessed a shift in the institutional character of WIPO, especially since the proposal and subsequent adoption of the Development Agenda. For example, Jeremy De Beer has called the Development Agenda “an attempted paradigm shift for IP policies in the twenty-first century. It is normatively different than the underdevelopment agenda of the last twentieth century.”<sup>1</sup> Yet from the beginning, the idea of a development agenda and the potential shift in the nature of WIPO engendered discontent among other, primarily advanced industrial, member states. These states, including the U.S., EU, Japan, Australia, Canada, New Zealand, Norway, Switzerland, and Turkey, did not believe that WIPO

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<sup>1</sup> IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA, 3 (Jeremy De Beer ed., 2009).

needed to engage with development issues.<sup>2</sup>

Margaret Chon argues that a similar “encounter” with development also took place within the WTO; frustration with the perceived inflexibility of TRIPS and the challenges of the AIDS pandemic led to a greater focus on development and public health, culminating in the Doha Declaration on TRIPS and Public Health and the ongoing Doha Development Agenda (DDA).<sup>3</sup> However, for the past several years the Doha Round has been stalled. A variety of contentious trade issues have conspired against progress in the negotiations, and the potential for placing yet another set of contentious IP issues on the table is limited.

As a result, neither WIPO nor the WTO are attractive forums for the introduction of new provisions on IP enforcement. The result has been that the key states behind the push for expanded IP enforcement have been forced to resort to limited plurilateral negotiations. Enter ACTA: according to the Office of the United States Trade Representative (USTR), parties to the ACTA negotiations currently include “Australia, Canada, the European Union and its 27 member states, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, and Switzerland.”<sup>4</sup> Unsurprisingly, there is an enormous degree of overlap between these states and the states that originally expressed opposition to the WIPO Development Agenda some years ago.<sup>5</sup>

Thus, in one sense, that these states have resorted to a new institution is entirely rational, a case fitting somewhere between the theoretical concepts of forum-shopping and regime-shifting.<sup>6</sup> What requires further explanation is why governments came to the conclusion that new policies on IP enforcement were necessary in the first place. Particularly, what explains the unabated support of the U.S. executive for ACTA, beginning with the

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<sup>2</sup> See Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2847 (2005).

<sup>3</sup> *Id.* at 2844.

<sup>4</sup> Office of the United States Trade Representative, ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), <http://www.ustr.gov/acta> (last visited Jun 12, 2010).

<sup>5</sup> The presence of some states in the ACTA negotiations that have not traditionally caucused with the highly developed, WIPO “Group B” countries is easily explained by the presence of free trade agreements (FTAs): the U.S. has already negotiated bilateral FTAs with South Korea (not yet ratified), Singapore, and Morocco, and the trilateral North American FTA (NAFTA) explains Mexico’s presence in the negotiations.

Other states that have bilateral FTAs with the U.S. are thus likely to be candidates for accession to ACTA once the agreement is completed. These include Bahrain, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Nicaragua, Oman, Panama, and Peru.

<sup>6</sup> See Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT’L ORG. 735-761 (2007); JOHN BRAITHWAITE, *GLOBAL BUSINESS REGULATION* 571-577 (2000); Laurence R. Helfer, *Regime Shifting in*

Republican Bush administration in 2007, and continuing without a hitch into the Democratic Obama administration in 2009? Two common explanations are that this support can be explained as a result of the aggregation of domestic economic interests, or that it is the result of rational policymaking.

## II. EXPLAINING SUPPORT FOR ACTA BY DOMESTIC ECONOMIC INTERESTS

A large literature in political science is devoted to explaining the possibility and conditions of various forms of international cooperation. One major strand within this literature argues that the preferences of domestic actors are a critical component in determining whether international cooperation will emerge and what form and substance it will have. That is, domestic actors—such as special interest groups or industry trade associations—will have a profound effect on the success or failure of an international agreement like ACTA.<sup>7</sup>

Consider one standard presentation of this domestic preferences argument. Helen Milner argues that the “likelihood and terms of international cooperation depend on the preferences of the interest groups involved in the policy area... the structure of domestic preferences is of critical importance.”<sup>8</sup> She simplifies the domestic arena down to three basic actors: the executive, the legislature, and societal actors or interest groups. The interests of the executive and legislature are similar: both wish to retain office, although given that they have different constituencies, their preferences may diverge. The interest of societal actors such as businesses is to maximize income.<sup>9</sup>

How well does ACTA fit this model? One immediately apparent difference is that in large part the debate over ACTA has excluded the legislature as an actor. With the exception of a few members of Congress, we have not witnessed extensive Congressional involvement.<sup>10</sup> This can be readily explained by the nature of ACTA: as a sole executive agreement,

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*the International Intellectual Property System*, 7 PERSPECTIVES ON POLITICS 39-44 (2009).

<sup>7</sup> See DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES 39 (2007)(offering a related theoretical description that “government preferences on regulatory issues have their origins in the domestic political economy”).

<sup>8</sup> HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 60 (1997).

<sup>9</sup> See *Id.* at 33. That Milner chooses to use the word “income” rather than the more general “utility” may indicate the relative importance she assigns to interest groups motivated by non-financial purposes.

<sup>10</sup> Aside from letters sent by Senators Bernie Sanders, Sherrod Brown, and Ron Wyden to the USTR, Congressional involvement has been limited.

approval by the Senate is not required. The only remaining governmental actor is the executive.

Executives, interested in reelection, have two primary concerns: performance of “the overall economy and the preferences of interest groups that support them.”<sup>11</sup> Regarding economic performance, although economic competitiveness and job retention and creation have been cited as reasons for supporting ACTA by the Obama administration, the empirical effect of stronger IP enforcement on the economy will be entirely overshadowed by the larger macroeconomic doldrums of the past few years. This leaves one major concern for the executive: how best to respond to the preferences of interest groups willing to support it. In order to determine this, the executive must ask the question: what are the economic preferences of domestic interest groups regarding ACTA?

Given that both the Bush and Obama administrations’ positions on ACTA have been characterized by unmitigated support, one would predict that domestic interest groups are substantially unified in their support for ACTA; alternatively, there might be a core group of strong supporters, and a peripheral group with a more ambivalent attitude. Neither is this case. When it comes to ACTA, the U.S. domestic arena is in upheaval. While there is a predictable list of groups that support ACTA for readily identifiable reasons, there are also a significant number of groups that oppose it. In between the two camps are some powerful players with shifting allegiances.

Domestic actors that have expressed support for ACTA include the usual suspects: the International Trademark Association, various copyright associations, the Business Software Alliance (BSA), the Motion Picture Association of America, the Pharmaceutical Manufacturers of America, and others.<sup>12</sup> The somewhat simplistic question “will this policy increase the domestic actor’s net income” predicts the direction of preferences in these cases quite well.

Similarly, those actors whose bottom line clearly stands to be harmed by ACTA have expressed their opposition. The Computer and Communications Industry Association (CCIA), Consumer Electronics Association, and TechAmerica (a technology industry group with about

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<sup>11</sup> See MILNER, *supra* note 8. at 34-35.

<sup>12</sup> See Office of the United States Trade Representative, *supra* note 4; Motion Picture Association of America, LETTER TO CHAIRMAN LEAHY (2009), available at <http://www.publicknowledge.org/pdf/mpaa-acta-letter-20091119.pdf> (last visited Sep. 13, 2010); Pharmaceutical Manufacturers of America, PHARMA SUPPORTS NEW AGREEMENT DESIGNED TO ENFORCE ANTI-COUNTERFEITING LAWS (Oct. 3, 2007), <http://www.phrma.org/phrma-supports-new-agreement-designed-enforce-anti-counterfeiting-laws> (last visited Aug 26, 2010).

1500 members of various sizes) have all indicated strong opposition to ACTA in its current form.<sup>13</sup> Should ACTA be adopted, members of these groups could experience either increased costs of business or slackened sales.

In between these two poles, however, lies a morass. Although some internet service providers may view ACTA's internet provisions as burdensome, the interests of large businesses that have a hand in both internet service provision and media distribution, such as Verizon and Comcast, are harder to predict.<sup>14</sup> Recently, the Intellectual Property Owners Association, an umbrella group that includes a number of U.S. pharmaceutical, chemical, software, and industrial firms, submitted a letter detailing its concern that "ACTA goes far beyond the subject matter of counterfeiting;" this comes after the same group filed a letter in support of ACTA a year before.<sup>15</sup> In some cases the same businesses are members of both a group that supports and a group that opposes ACTA (e.g., Microsoft and Intuit are members of both the BSA and the CCIA). Debate over the inclusion of geographical indications in ACTA threatens to draw U.S. food, wine, and spirits trade groups into the fray, as observers have raised the possibility of Kraft Parmesan Cheese being seized at the EU border.<sup>16</sup>

Given these divisions, the aggregation of U.S. domestic economic preferences does not offer clear support for ACTA. An alternative explanation for the steadfast support of the U.S. executive is that this support is the result of rational policymaking.

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<sup>13</sup> See CCIA, DETAILS OF SECRET IP AGREEMENT CONFIRM TECH INDUSTRY FEARS (April 21, 2010), <http://www.ccianet.org/index.asp?sid=5&artid=154> (last visited Jun 15, 2010); Press Release, Consumer Electronics Association, Computer & Communications Industry Association, and TechAmerica, CCIA, CEA AND TechAmerica Urge Obama Administration to Pursue a More Focused Anti-Counterfeiting Trade Agreement (June 4, 2010), [http://www.ce.org/Press/CurrentNews/press\\_release\\_detail.asp?id=11913](http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=11913) (last visited Jun 15, 2010).

<sup>14</sup> See Michael Geist, ROGERS: WE'RE CONCERNED WITH THE ACTA NEGOTIATIONS AND THREE STRIKES (May 12, 2010), <http://www.michaelgeist.ca/content/view/5030/125/> (last visited Aug 26, 2010).

<sup>15</sup> Intellectual Property Owners Association, IPO COMMENTS TO USTR KIRK RE: ANTI-COUNTERFEITING TRADE AGREEMENT PUBLIC PRE-DECISIONAL/DELIBERATIVE DRAFT APRIL 2010 2 (2010), <http://www.ipo.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=26212>; Intellectual Property Owners Association, LETTER FROM IPO TO USTR RON KIRK REGARDING NEGOTIATIONS RELATED TO THE ANTI-COUNTERFEITING TRADE AGREEMENT (2009), <http://www.ipo.org/AM/Template.cfm?Section=Search&Template=/CM/ContentDisplay.cfm&ContentID=23141>.

<sup>16</sup> See EU-US food fight hampers ACTA talks, EURACTIV (Aug. 19, 2010), [http://www.euractiv.com/en/trade/eu-us-food-fight-hampers-acta-talks-news-496958?utm\\_source=EurActiv+Newsletter&utm\\_campaign=370bb02be0-my\\_google\\_analytics\\_key&utm\\_medium=email](http://www.euractiv.com/en/trade/eu-us-food-fight-hampers-acta-talks-news-496958?utm_source=EurActiv+Newsletter&utm_campaign=370bb02be0-my_google_analytics_key&utm_medium=email) (last visited Aug 25, 2010).

### III. EXPLAINING SUPPORT FOR ACTA AS RATIONAL POLICYMAKING

If the U.S. executive's support for ACTA were the result of rational policymaking, one would expect substantial theoretical and empirical evidence supporting the undertaking. Yet the theory and empirics of IP enforcement, as well as IP policy generally, are highly contested.

To begin with, there already exists robust debate over the economic effectiveness, appropriateness and value of most of the IP rights for which ACTA seeks stronger enforcement. There is significant disagreement over the optimal level and length of IP protection, if and how that protection ought to vary from one economic sector to another, and the extent to which IP protection is helpful or harmful to economic development.<sup>17</sup> A large literature discusses whether copyright is a necessary incentive for creative activity at all, and if so, what the appropriate term length of copyright ought to be.<sup>18</sup> Another related literature raises questions about the value and effectiveness of trademarks and geographical indications.<sup>19</sup> As for patents, their value appears to be critical in the pharmaceutical and chemical manufacturing industries, but much less so in the aerospace and computer technology manufacturing sectors; furthermore, despite being ostensibly targeted at rewarding and encouraging innovation, patents are also used as a legal weapon against competitors and new market entrants.<sup>20</sup>

Turning to the specific reasoning used to justify ACTA, supporters have cited connections between IP infringement and organized crime, and argue that IP infringement endangers consumers. Yet the GAO's recent analysis of counterfeiting and piracy notes that a 2009 RAND study on the connection between organized crime, terrorism, and film piracy provided

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<sup>17</sup> See Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the U.S. Semiconductor Industry, 1979-1995*, 32 THE RAND J. OF ECON. 101, 101-128 (2001); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 698-701 (1998); KEITH E MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY [no page cite included] (2000).

<sup>18</sup> See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Raymond Shih Ray Ku, *Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002); William M Landes & Richard A Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003).

<sup>19</sup> See Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759 (1989); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010).

<sup>20</sup> See Carlos A. Primo Braga, Carsten Fink & Claudia Paz Sepulveda, *Intellectual Property Rights and Economic Development*, in THE WTO, INTELLECTUAL PROPERTY RIGHTS AND THE KNOWLEDGE ECONOMY 267, 276 (Keith E. Maskus ed., 2004).



only “anecdotal evidence” of a link; furthermore, the study in question clearly states that online film piracy, one of the targets of ACTA’s Internet chapter, has no apparent connection to organized crime or terrorism.<sup>21</sup> To the extent that there exists a real connection between large-scale manufacture and distribution of counterfeit goods and organized crime, the RAND report portrays the activity of counterfeiting as one illegal activity among many others engaged in by such groups, with the implication that in order to combat organized crime, more law enforcement resources should be targeted directly at organized crime, rather than peripheral illegal activities such as IP infringement.

As for the connection between IP infringement and consumer safety, consumers may be as likely or even more likely to be harmed by substandard quality products that do not infringe any IP rights as they are by IP infringing products. Several well-publicized incidents involving the introduction of diethylene glycol into imported toothpaste have occurred both with products falsely labeled with the “Colgate” brand name, as well as generic brands that do not appear to have infringed any trademarks.<sup>22</sup> Likewise, in one of the largest medicine contamination incidents in recent years, during March 2008 a large amount of contaminated supplies of the blood thinner heparin were linked to more than eighty deaths in the U.S.<sup>23</sup> Investigators traced the source of the contamination back to Chinese plants substituting or diluting the active ingredient with a cheaper and more widely available—but ineffective—alternative. However, as Baxter was legitimately importing the contaminated material for distribution in the U.S., no intellectual property issues were implicated. If concern over consumer safety is truly paramount, it would make more sense to target regulation at low-quality, substandard, or potentially toxic products directly, perhaps by increasing funding to the chronically underfunded FDA, rather than peripherally through the enforcement of trademarks, which may not

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<sup>21</sup> See GOVERNMENT ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 13 (April 12, 2010), <http://www.gao.gov/new.items/d10423.pdf> (last visited Jun 15, 2010); TREVERTON, GREGORY F. ET AL., FILM PIRACY, ORGANIZED CRIME, AND TERRORISM 38 (2009), available at <http://www.rand.org/pubs/monographs/MG742/> (last visited Sep. 14 2010).

<sup>22</sup> See Stephanie Bodoni, Hugo Miller & Naweem Mangi, *Asian counterfeiters shift focus to consumer goods from luxury goods*, N.Y. TIMES, June 15, 2007, <http://www.nytimes.com/2007/06/15/business/worldbusiness/15iht-fake.4.6159215.html> (last visited Jun 15, 2010); Walt Bogdanich, *Toxic Toothpaste Made in China Is Found in U.S.*, N.Y. TIMES, June 2, 2007, <http://www.nytimes.com/2007/06/02/us/02toothpaste.html> (last visited Jun 15, 2010).

<sup>23</sup> See Gardiner Harris, *U.S. Identifies Tainted Heparin in 11 Countries*, N.Y. TIMES, April 22, 2008, <http://www.nytimes.com/2008/04/22/health/policy/22fda.html> (last visited Aug 26, 2010).

always be implicated.

Finally, from a purely economic perspective, consumers who are aware they are purchasing knockoff items may in fact benefit, either from direct consumer surplus or from access to items they would otherwise have been unable to afford.<sup>24</sup> For example, according to some purchasers, trademark-infringing handbags mimicking the fashion season's newest (and most expensive) styles make great gifts; and in China, so-called "shanzhai" (black market) cell phones that mimic the style of legitimate phones but add new features and sell for a fraction of the cost are popular with consumers.<sup>25</sup>

Thus, neither the aggregation of domestic economic interests nor rational policymaking offer convincing explanations for the U.S. executive's consistent support of ACTA. This support can in large part be better explained by a firm, and potentially misplaced, faith amongst U.S. policymakers of the importance of IP to economic growth, development, and competition. Undergirding this faith is a set of related norms and values that together constitute what is called a "policy paradigm."

#### IV. EXPLAINING SUPPORT FOR ACTA ANOTHER WAY: POLICY PARADIGMS

As discussed, the theory and empirics of intellectual property and its economic effects are complicated. In order to cope with this complexity, policymakers, bureaucrats and administrators filter information through what have been called "policy paradigms": frameworks that allow them to simplify complex economic relationships into ones that are more easily understandable, if not entirely accurate.<sup>26</sup> A policy paradigm is "a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing."<sup>27</sup>

There is evidence of a distinct policy paradigm operating at the USTR,

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<sup>24</sup> See Richard S. Higgins & Paul H. Rubin, *Counterfeit Goods*, 29 J. L. & ECON. 211 (1986).

<sup>25</sup> See Ruth La Ferla, *Carried Away With Imitation Luxury*, N.Y. TIMES, December 13, 2007, [http://www.nytimes.com/2007/12/13/fashion/13FAKES.html?ref=counterfeit\\_merchandise](http://www.nytimes.com/2007/12/13/fashion/13FAKES.html?ref=counterfeit_merchandise) (last visited Jun 17, 2010); David Barboza, *In China, Knockoff Cellphones Are a Hit*, N.Y. TIMES, April 27, 2009, [http://www.nytimes.com/2009/04/28/technology/28cell.html?ref=counterfeit\\_merchandise](http://www.nytimes.com/2009/04/28/technology/28cell.html?ref=counterfeit_merchandise) (last visited Jun 17, 2010).

<sup>26</sup> See Brian C. Rathbun, *Uncertain about Uncertainty: Understanding the Multiple Meanings of a Crucial Concept in International Relations Theory.*, 51 INT'L STUD. Q. 533, 546 (2007).

<sup>27</sup> Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 25 COMP. POL. 275, 279 (1993).

and evidence of attempts by certain domestic actors to support that paradigm. Specifically, there are several recurring motifs present in the various ACTA-related documents produced by the USTR and in communications filed in support of ACTA.<sup>28</sup> These include claims that infringement of intellectual property or counterfeiting and piracy: 1) result in a loss of jobs and revenue to businesses; 2) hinder economic growth and development, both in developed and developing countries; 3) pose a threat to public health and safety, endangering both American consumers and consumers in the developing world; 4) support organized crime; 5) discourage innovation and creativity; 6) result in lost tax revenue; and 7) pose a national security risk.

For one example among the many available, consider the USTR's primary public webpage for ACTA. It states that the agreement is:

intended to assist in the efforts of governments around the world to more effectively combat the proliferation of counterfeit and pirated goods, which undermines legitimate trade and the sustainable development of the world economy, and in some cases contributes to organized crime and exposes American families to dangerous fake products.<sup>29</sup>

This colorful description emphasizes connections between IP infringement and development, crime, and safety. A similar paradigm may be at work with other negotiating parties. For example, the Swiss Institut für Geistiges Eigentum (federal intellectual property agency) offers the following answer to questions about the effect of ACTA on citizens:

The main goal of ACTA is to combat the large counterfeiting and piracy activities which present big risks

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<sup>28</sup> See Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, (2007), <http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes> (last visited Jun 12, 2010); Fact Sheet: Anti-Counterfeiting Trade Agreement, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, (2007), [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file122\\_13414.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file122_13414.pdf); ACTA - Summary of Key Elements Under Discussion, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, (2009), <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion> (last visited Jun 12, 2010); Office of the United States Trade Representative, *supra* note 4; Letter from Ron Kirk, Ambassador, to Senator Ron Wyden (2010), [http://www.ustr.gov/webfm\\_send/1700](http://www.ustr.gov/webfm_send/1700); Letter from the International Trademark Association to Barak Obama, President of the United States (2010), [http://www.ustr.gov/webfm\\_send/1737](http://www.ustr.gov/webfm_send/1737).

for public safety and health... The consequences of counterfeiting and piracy touch everyone and are daily hazards. Counterfeiting and piracy do not only infringe on intellectual property rights and cause enormous economic losses. They present a direct threat to consumer and patient health and safety.<sup>30</sup>

Again, a document made available by the European Commission, the executive body of the EU, sounds remarkably similar:

ACTA is about tackling activities pursued by criminal organisations, which frequently pose a threat to public health and safety. It is not about limiting civil liberties or harassing consumers. The gangs behind this traffic are often the same that do drug trafficking or money laundering.<sup>31</sup>

Clearly, these connections are oversimplified. As the previous section notes, many of these justifications do not have clear theoretical or empirical foundations. Even where evidence of a connection between IP infringement and harmful effects exists, the evidence is often disputed or balanced with alternative evidence. Yet these connections provide an attractive narrative and simple interpretation of the economic effects of intellectual property enforcement. The policy paradigm frames the evidence, structures the problem, and offers a simple solution: more and better enforcement. In contrast, evidence-based rational policymaking complicates the entire matter and offers no clear path forward. For the U.S. executive, whether Republican or Democratic, Bush or Obama, policymaking that relies on a policy paradigm is easier, and has the advantage of a historical legacy.

## V. CONCLUSION

The current states negotiating ACTA clearly envision the expansion of the agreement to include more countries.<sup>32</sup> As suggested above, the first

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<sup>29</sup> Office of the United States Trade Representative, *supra* note 4.

<sup>30</sup> Institut für Geistiges Eigentum, ACTA (2010), <https://www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html#c4032> (last visited Aug 26, 2010).

<sup>31</sup> EUROPEAN COMMISSION, Q&AS ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), <http://trade.ec.europa.eu/doclib/html/142040.htm> (last visited Aug 26, 2010).

<sup>32</sup> See Trade Facts: Anti-Counterfeiting Trade Agreement (ACTA), OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (2008), [http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset\\_upload\\_file760\\_1508](http://www.ustr.gov/sites/default/files/uploads/factsheets/2008/asset_upload_file760_1508)

push for expansion of ACTA will likely occur in countries with which the U.S. already has an existing FTA, and present an IP enforcement problem from the U.S. perspective. This might include countries such as Chile and Israel, both of which have made recent appearances on the USTR's Special 301 Priority Watch List. Accession to ACTA may be made a condition of future FTAs negotiated between the U.S. or E.U. and other countries. Recent press coverage of the Trans-Pacific Partnership suggests that the U.S. may be taking a similar approach to negotiating IP provisions there as it did with ACTA. But before expansion of ACTA or the duplication of its provisions in other agreements, we should ask two questions. First, why, if stronger IP enforcement is critical to economic growth and development, combating organized crime, and ensuring public health and consumer safety, is there a dearth of consistent, peer-reviewed evidence demonstrating these connections?<sup>33</sup> Second, to the extent that serious problems of development, organized crime and terrorism, and public health and consumer safety do exist, why should we not target these problems directly, making effective use of limited resources, rather than peripherally through the mechanism of IP enforcement?

Although policy paradigms are often simpler and more attractive than evidence-based policymaking, and although they often possess the advantage of historical legacy suggesting a kind of path dependency, it is not impossible for a paradigm to shift. Hall suggests that repeated failures of policy, combined with pressure from outsiders presenting alternative understandings of how policy ought to be made, can eventually result in a radical shift, altering both the instruments of policy and its fundamental goals.<sup>34</sup>

Academics and others involved in public interest analyses of ACTA and the broader enforcement agenda will thus have a continued role to play in this debate.

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4.pdf (last visited Sep. 14, 2010).

<sup>33</sup> See Government Accountability Office, *supra* note 21, at 15., (noting that “Most experts we spoke with and the literature we reviewed observed that despite significant efforts, it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.”)

<sup>34</sup> See Hall, *supra* note 27, at 283-287.