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# Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking

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# TRANSPARENCY SOUP: THE ACTA NEGOTIATING PROCESS AND “BLACK BOX” LAWMAKING

*David S. Levine*

## ABSTRACT

The negotiations of the Anti-Counterfeiting Trade Agreement (ACTA) have been marred by a level of attempted secrecy heretofore unseen in international intellectual property lawmaking. Simultaneously, the Freedom of Information Act (FOIA) has been used in several significant national contexts to prevent the disclosure of data and information in ways that call into question its efficacy as an effective regulation of governmental knowledge. This paper seeks to tie together these two recent developments in order to (a) prevent future international intellectual property law negotiations from being unduly secret and (b) encourage Congress to consider reforming FOIA in light of current public expectations and technological capabilities for transparency and accountability.

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## I. INTRODUCTION

On November 19, 2009, Dan Glickman, the then-Chairman and CEO of the Motion Picture Association of America (“MPAA”), wrote a letter to Senator Patrick Leahy of Vermont in support of a “sound and comprehensive” Anti Counterfeiting Trade Agreement (“ACTA”).<sup>1</sup> ACTA has been described by the United States Trade Representative (“USTR”), the entity representing the United States in the negotiations, as seeking to “establish a state-of-the-art international framework that provides a model for effectively combating global proliferation of commercial-scale counterfeiting and piracy in the 21st century.”<sup>2</sup> Indeed, ACTA will likely become one of the most significant international agreements regarding intellectual property laws in history, having the Group of Eight’s (“G-8”) endorsement of this “new international legal framework.”<sup>3</sup>

The existence of a major international agreement involving a significant legal problem would itself be enough to warrant significant public interest. Indeed, ACTA has garnered much public interest, but for reasons that go as much to the process of the negotiations as they do to their substance. In the same letter, Glickman also addressed the major procedural problem in ACTA, one that has nearly eclipsed any substantive questions: the lack of

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<sup>1</sup> Letter from Dan Glickman, Chairman and Chief Exec. Officer, Motion Picture Assoc. of Am., Inc. to Sen. Patrick Leahy (VT) (Nov. 19, 2009), *available at* <http://www.scribd.com/doc/22785108/MPAA-letter-re-ACTA>.

<sup>2</sup> OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Resource Center, Anti-Counterfeiting Trade Representative, <http://www.ustr.gov/acta> (last visited Nov. 17, 2010).

<sup>3</sup> *G-8 Declarations on Economy, Environment*, WALL ST. J. (Jul. 8, 2008), <http://online.wsj.com/article/SB121549460313835333.html>.

transparency and accountability in the negotiations. Glickman dismissed those public concerns about the lack of transparency in ACTA's negotiations as a "distraction."<sup>4</sup> He also labeled "opponents of ACTA" as "indifferent to [the film industry's] situation, or actively hostile toward efforts to improve copyright enforcement worldwide."<sup>5</sup>

Glickman is correct that the concern for transparency is a distraction from the substance. Indeed, he added that the concerns "distract from the substance and the ambition of the ACTA which are to work with key trading partners to combat piracy and counterfeiting across the global marketplace."<sup>6</sup> However, Glickman understates the impact of the lack of transparency on both the procedures of government and the substance of the law. This white paper seeks to address that "distraction" with reference to a basic issue: what we can learn from the secrecy efforts of the USTR, particularly through the marginal use of exemptions to the Freedom of Information Act ("FOIA") about the creation of international intellectual property law in the Internet age. Although the agreement is not yet final, we already know that the lack of transparency has caused leaked documents and hearsay to become the basis of public policy discussions, real and imagined issues to be debated, and a general erosion of public knowledge about and confidence in the ACTA process.<sup>7</sup>

The reason for these problems is that the USTR has attempted to keep the ACTA negotiations in the proverbial "black box": the public knows that a box exists and that it is doing something, but cannot open it to find and examine what's inside. This paper addresses the observation that an ACTA black box has proven impossible to maintain. Attesting to the urgency of this realization are the antiquated views of the USTR when it considered a basic question about what the public can and should know about ACTA, and when.

In September 2009, Knowledge Ecology International made a FOIA request to the USTR seeking "all records at USTR on the topic of the policy and practice of USTR regard the transparency of trade negotiations," including ACTA.<sup>8</sup> An incomplete response was received in October 2009, but among the produced documents was an email from Stan McCoy, the Assistant U.S. Trade Representative for Intellectual Property and Innovation, sent to colleagues on February 10, 2009. In the email, which

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> The concern about and impact of the continued lack of transparency has been well documented. *See generally* MICHAEL GEIST BLOG, <http://www.michaelgeist.ca>.

<sup>8</sup> James Love, *USTR's February 10, 2009 Memo on Transparency Soup*, KNOWLEDGE ECOLOGY INT'L (Sept. 8, 2010), <http://keionline.org/node/929>.

had a subject line entitled “transparency soup,” McCoy attached a draft USTR position paper on ACTA transparency, which includes the following in frequently asked questions (“FAQ”) format: “Q. What if U.S. positions evolve during negotiations? [Answer:] The public can see how the U.S. position has evolved when the final text is signed.”<sup>9</sup> If one did not know better, this could be viewed as a gallows-humor response to a legitimate question. Unfortunately, it is not a joke and, although stated in a draft document, accurately reflects the dismissive and antiquated view of transparency and accountability that has been the hallmark of USTR’s handling of the ACTA negotiations. Additionally, even if desirable to the USTR, it has proven to be an untenable and unrealistic position; thus, bad policy no matter how viewed. Policies built on significant false assumptions naturally run a high risk of failure.

As discussed below, in the case of ACTA, the effects of this failed policy have already begun to emerge. For example, the futile efforts to keep secret both the logistics of the negotiations and the substance of ACTA has resulted in an inversion of the usual benefit of secrecy—namely, a smooth and efficient process—in the lawmaking context, without necessarily giving us better law. Thus, despite Glickman’s protestations, transparency has become as important in the ACTA negotiations as the substance of ACTA precisely because the substance would likely be different if there had been transparency and accountability. Those differences would have likely improved the substance, maybe not from the MPAA’s view, but from the viewpoint that intelligently balances the interests of all concerned.

As importantly, the experience of the ACTA negotiations also reveals an emerging trend in freedom of information scenarios where the government and commercial interests, working closely together, appear to have mutual interests in keeping information of significant national concern from the public. Ultimately, this paper proposes that the MPAA, and the public generally, would have been better served by an ACTA process that was open, transparent and accountable to the public from its inception. In fact, there may have been fewer “opponents of ACTA” as a result and resources would not have been wasted on largely futile secrecy efforts. FOIA needs to be reconsidered in this context.

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<sup>9</sup> By February 2009, there had only been four rounds of ACTA negotiations but two leaks of ACTA negotiating documents had already occurred, *see* <http://www.michaelgeist.ca/content/view/4611/125/>, and their details were being discussed on the Internet, *see* <http://keionline.org/blogs/2009/02/03/details-emerge-of-secret-acta;> <http://www.michaelgeist.ca/content/view/3660/125/>. This fact alone suggests that the USTR’s cavalier position was already fantastical. Also, an excerpt from this email forms the title of this paper.

## II. THE FREEDOM OF INFORMATION ACT

In order to understand the context in which the bulk of the ACTA negotiations have transpired, it's important to note the current trends in federal government transparency. During his first day as President of the United States, Barack Obama issued a "memorandum for the heads of executive departments and agencies" regarding the federal Freedom of Information Act ("FOIA"), the federal act that mandates open government with certain exceptions. In the first sentence of the memorandum, President Obama noted that a "democracy requires accountability, and accountability requires transparency." The memorandum went on to state that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." As part of the directive, President Obama ordered the Attorney General to issue new FOIA guidelines and the Office of Management and Budget to "update guidance" to the agencies to effect his directive.<sup>10</sup> The Attorney General issued his memorandum on March 19, 2009, in which he laid out two primary implications for how federal agencies should respond to FOIA requests based upon President Obama's memorandum: "First, an agency should not withhold information simply because it may do so legally. ... Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make a partial disclosure."<sup>11</sup> As discussed in more detail below, this is a fundamental reorientation of how agencies respond to FOIA requests.

The Office of Management and Budget took a bit more time to present its guidance to agencies, but it did so on December 8, 2009 in a potentially groundbreaking way, issuing its Open Government Directive (the "OMB Memorandum").<sup>12</sup> The OMB Memorandum requires federal agencies to "take specific actions to implement the principles of transparency, participation, and collaboration" set forth in the President's memorandum. This effort has been hailed as having the potential to be a "watershed moment for democracy, the likes of which can forever change the

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<sup>10</sup> Freedom of Information Act, Memorandum for Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009), *available at* <http://www.scribd.com/doc/19030725/Obama-FOIA-directive-74-FR-4683>.

<sup>11</sup> Memorandum from Attorney General Eric Holder for the Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* [www.justice.gov/ag/foia-memo-march2009.pdf](http://www.justice.gov/ag/foia-memo-march2009.pdf).

<sup>12</sup> Memorandum from Peter Orzag, Director of the Office of Management and Budget, for the Heads of Executive Departments and Agencies (Dec. 8, 2009), *available at* [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

relationship between the government and the public it serves.”<sup>13</sup> Indeed, it has already resulted in agencies moving for the first time towards releasing data on the Internet, making data available for download for no charge, and disclosing previously unreleased documents for public inspection.<sup>14</sup> In fact, every cabinet department is supposed to unveil a new open government project.<sup>15</sup>

To understand the significance of these developments, it is important to note the general trend since the terrorist attacks of September 11, 2001. Commentators have found that, as a general matter, the United States government errs on the side of secrecy, especially post 9/11.<sup>16</sup> Moreover, there has been increased use of the designation “Sensitive but Unclassified” by United States government agencies. This designation is often found on research and science/technological information generated by the government post-9/11, and allows for it to be held from public view.<sup>17</sup> Thus, the FOIA memorandum has the potential not only to begin reversing the excessive, post-9/11 secrecy, but also to allow for a re-imagining of the relationship between government and its citizens at the federal, state and local level.<sup>18</sup>

Unfortunately, in the ACTA negotiations, the federal government has taken positions in favor of secrecy that undermine optimism for fundamental change. Indeed, as reflected in the positions taken by the US government concerning the commercial interests of the industries most

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<sup>13</sup> Ellen Miller, *A Watershed Moment in Transparency and Accountability*, SUNLIGHT FOUNDATION BLOG (Dec. 11, 2009, 5:48 pm), <http://blog.sunlightfoundation.com/2009/12/11/a-watershed-moment-in-transparency-and-accountability/>.

<sup>14</sup> Miranda Fleschert, *White House Announces 20 Agency Open Government Initiatives*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Dec. 10, 2009), <http://www.rcfp.org/newsitems/index.php?i=11165>.

<sup>15</sup> Norm Eisen & Beth Noveck, *Why an Open Government Matters*, OPEN GOVERNMENT INITIATIVE (Dec. 9, 2009), <http://www.whitehouse.gov/blog/2009/12/09/why-open-government-matters>.

<sup>16</sup> See Peter Swire, *A Theory of Disclosure for Security and Competitive Reasons: Open Source, Proprietary Software, and Government Agencies*, 42 HOUS. L. REV. 1333, 1337-38 (2006). This does not always mean that information remains secret, but administrative errors cannot form the basis of a disclosure regime. See Iain Thomson, *US army posted secrets on the web*, VNUNET.COM (Jul. 12, 2007), <http://www.vnunet.com/vnunet/news/2194072/army-posting-secrets-web> (reporting that the United States Army and its contractors accidentally posted military secrets on the web).

<sup>17</sup> See GENEVIEVE J. KNEZO, CONG. RESEARCH SERV., RL 33303, SENSITIVE BUT UNCLASSIFIED: INFORMATION AND OTHER CONTROLS: POLICY AND OPTIONS FOR SCIENTIFIC AND TECHNICAL INFORMATION (2006).

<sup>18</sup> See also Andrew Malcolm, *A Little Secret About Obama's Transparency*, L.A. TIMES, Mar. 21, 2010, available at <http://articles.latimes.com/2010/mar/21/nation/la-na-ticket21-2010mar21> (“An Associated Press examination of 17 major agencies' handling of FOIA requests found denials 466,872 times, an increase of nearly 50% from the 2008 fiscal year under Bush.”).

impacted by ACTA as well as the other scenarios discussed below, a disturbing trend may be emerging where the government aggressively asserts the commercial interests of a private entity in denying a FOIA request regarding issues of national importance and/or gives commercial interests a favored position over the public in accessing otherwise-secret information.

But very importantly, in each situation discussed below, the initial efforts to withhold information have been overcome by, in large measure, public interest and/or pressure. While full disclosure has not been the result, significant information has eventually reached the public or its disclosure is currently being litigated. This reality should cause policymakers to consider whether fights over secrecy are worth the battle if some or all of the information sought will eventually be disclosed—or, in the case of ACTA, leaked—in ways far from optimal for those otherwise seeking secrecy. The following three examples illustrate the problem.

#### A. *Bloomberg v. the Board of Governors of the Federal Reserve System*

A startling example analogous to the ACTA situation occurred towards the end of the administration of President George W. Bush. On November 7, 2008, a complaint (“the Complaint”) was filed in the United States District Court for the Southern District of New York by Bloomberg L.P. (“Bloomberg”) against the Board of Governors of the Federal Reserve System (the “Fed”) (collectively, the “Action”).<sup>19</sup> The action involves a FOIA request made by Bloomberg to the Fed in May 2008 to “disclose the recipients of more than \$2 trillion of emergency loans from U.S. taxpayers and the assets the central bank is taking as collateral.”<sup>20</sup>

In May 2008, Bloomberg sent a FOIA request (the “Request”) to the Fed requesting a variety of information regarding the terms of 11 Federal lending programs. After months of not receiving a substantive response to the Request, Bloomberg brought the Action. In the Complaint, Bloomberg alleges that the

government documents that Bloomberg seeks are central to understanding and assessing the government’s response to the most cataclysmic financial crisis in America since the Great Depression. The effect of that crisis on that American public has

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<sup>19</sup> Complaint for Declaratory and Injunctive Relief, *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, No. 08-CV-9595 (S.D.N.Y. Nov. 7, 2008).

<sup>20</sup> Mark Pittman, *Fed Refuses to Disclose Recipients of \$2 Trillion (Correct)*, BLOOMBERG.COM (Dec. 12, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGvwttDayiiM>.



been and will continue to be devastating. Hundreds of corporations are announcing layoffs in response to the crisis and the economy was the top issue for many Americans in the recent elections.

Bloomberg, in its Request, sought a variety of documents including, in its seventh itemized request, “records sufficient to show the terms of the loans and the rates that borrowers must pay.” In the Complaint, Bloomberg explained the significance of the information sought from a transparency perspective:

In response to the crisis, the Fed has vastly expanded its lending programs to private financial institutions. To obtain access to the public money and to safeguard the taxpayers’ interests, borrowers are required to post collateral. Despite the manifest public interest in such matters, however, none of the programs themselves make reference to any public disclosure of the posted collateral or of the Fed’s methods of valuing it. Thus, while the taxpayers are the ultimate counterparty for the collateral, they have not been given any information regarding the kind of collateral received, how it was valued, or by whom.

After the Complaint was filed but before it was answered, the Fed responded to the Request in a five page letter (the “Letter”).<sup>21</sup> With specific regard to the above noted request, the Fed advised that it had located responsive “documents (daily reports) containing certain information (specifically, the names of participants, originating Federal Reserve Bank district, names of borrowers, individual loan amounts and origination and maturity dates).” However, the Fed decided to withhold this “approximately 231 full pages of information” because, *inter alia*, they contained confidential commercial information.

Although FOIA can properly protect privately-held commercially valuable information,<sup>22</sup> the disturbing element is that the government seemingly went out of its way to protect commercial interests in the context of an unprecedented bank loan program where the taxpayers had an exposure of \$2 trillion. For example, the Fed noted that it “has to be and is mindful of the commercial and financial interests of borrowers, the institutions whose collateral secured the borrowings.” It explained that “institutions that may potentially borrow [from the Fed] recognize that counterparts and market analysts may draw adverse inferences about their

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<sup>21</sup> Letter from Jennifer J. Johnson, Secretary of the Board, Board of Governors of the Federal Reserve System to Mark Pittman, BLOOMBERG, Dec. 9, 2008 (on file with author).

<sup>22</sup> 5 U.S.C. § 552(b)(4) (2010).

financial health if the institutions do turn to [the Fed] and, for that reason, such institutions can be extremely concerned about the stigma of borrowing [from the Fed].” Thus, disclosure would “harm individual borrowers’ competitiveness.”

While also arguing that such secrecy protects the interests of the taxpayer and the Fed in administering the loan program, it is clear that the Fed is asserting, in part, the commercial interests of its borrowers in denying the Request. However, as Bloomberg explains in the Complaint, the “public’s interest is particularly pronounced in light of the new expansive powers of the Fed, the new risks that the Fed is taking with public money, and the ongoing financial crisis and its effects on the American economy.” The conflict is clear: the commercial interests of the private entities versus the public’s “right to know.” In other words, as in ACTA, the commercial entities have found proxies, the federal government and FOIA, to control the flow of information regarding their interests to the public.<sup>23</sup> Here, the commercial entities get favored treatment by virtue of their commercial dealings with the government and hence know far more about the operations of the Fed than the public that funds it. Indeed, in a related Bloomberg FOIA request to the Fed which resulted in the production of 560 pages of marginally (at best) relevant and heavily redacted emails some 20 months after they were requested, one commentator summed up FOIA as

honorable and useful if:

- A) You’re not asking for information about the bank bailout.
- B) You’re happy to wait years for the requested information.
- C) You don’t mind if the requested documents are 95% blacked out when you finally get them.<sup>24</sup>

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<sup>23</sup> Importantly, Bloomberg was ultimately successful in court. See Opinion and Order, *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, No. 08-CV-09595 (S.D.N.Y. Aug. 24, 2009), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7CC61ZsieV4> (follow “Attachment: Court Document” hyperlink); *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143 (2d Cir. 2010). However, as of this writing, the Fed has not produced the requested documents.

<sup>24</sup> Katya Wachtel, *Fed Gives Bloomberg the Lamest FOIA Document Ever, as Everything That Matters is Blacked Out*, BUSINESS INSIDER (Oct 25, 2010), <http://www.businessinsider.com/fed-protects-citi-and-itself-from-foia-request-sends->

Thus, the impact of such a partnership raises disturbing issues about the role of government as simultaneously a commercial lender and a protector of the public's interests, and should cause policymakers to question whether the government can play those dual roles, especially where there is strong public interest in timely disclosure of the information, without undermining the public's right to know.

### B. *British Petroleum and Corexit*

In the wake of the massive British Petroleum ("BP") Gulf oil spill, Nalco Co.'s ("Nalco") Corexit dispersants have been used to mitigate the damage associated with the spill.<sup>25</sup> The problem: massive use of the dispersant could cause unknown health and safety risk to human and marine life.<sup>26</sup> After requests for Nalco to publically release information about the chemical formula so that researchers could attempt to ascertain the potential impact of this unprecedented use<sup>27</sup>, Nalco released the ingredients to the public but shielded the exact concentration formula of the chemicals, stating that they are trade secrets.<sup>28</sup>

The exact formula for Corexit, whose use has been banned in the United Kingdom,<sup>29</sup> is held by the Environmental Protection Agency ("EPA"). Because of a general dearth of information regarding the impact of Corexit, the Gulf Restoration Network and the Florida Wildlife Federation made a FOIA request to the EPA for information regarding health and safety data regarding the dispersants. After failing to receive a response to the requests, these parties brought an action against the EPA seeking "data and studies submitted to EPA pursuant to [relevant law] regarding dispersants

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hundreds-of-blacked-out-pages-to-bloomberg-reporter-2010-10#ixzz1430hkFG0.

<sup>25</sup> Erick Kraemer, *What Is COREXIT and Why Is It Still Being Used in the Gulf*, DISASTER ACCOUNTABILITY BLOG (Jul. 28, 2010), <http://blog.disasteraccountability.com/2010/07/28/what-is-corexit-and-why-is-it-still-being-used-in-the-gulf/>.

<sup>26</sup> Anne Mulkern, *Maker of Controversial Dispersant Used in Gulf Oil Spill Hires Top Lobbyists*, N.Y. TIMES, Jun. 25, 2010, <http://www.nytimes.com/gwire/2010/06/25/25greenwire-maker-of-controversial-dispersant-used-in-gulf-94328.html>.

<sup>27</sup> Press Release, Earthjustice, Conservation Groups Act to Uncover What's in Gulf Oil Dispersants (Jul. 14, 2010), <http://www.earthjustice.org/news/press/2010/conservation-groups-act-to-uncover-what-s-in-gulf-oil-dispersants> ("Well over 1 million gallons of dispersants have been used so far, and for the first time, dispersants are being applied under the ocean, where the oil is pouring into the Gulf.")

<sup>28</sup> David Biello, *Is Using Dispersants on the BP Gulf Oil Spill Fighting Pollution with Pollution?*, SCIENTIFIC AMERICAN, Jun. 18, 2010, <http://www.scientificamerican.com/article.cfm?id=is-using-dispersants-fighting-pollution-with-pollution>.

<sup>29</sup> *Id.*

and their constituents, and unredacted copies of communications between EPA and BP concerning the use of dispersants during the response to the BP Deepwater Horizon oil spill.”<sup>30</sup> As of this writing, the action is ongoing.

Presumably, the EPA would take the position that the requested information is a trade secret and/or confidential commercial information under FOIA.<sup>31</sup> Indeed, the EPA would likely be correct, revealing a separate problem in FOIA.<sup>32</sup> But, even if FOIA operates as an impediment to disclosure of much information, it is not an impediment to disclosure of all information unless the administrative agency holding the information willfully slows down the process. Such was the case here, where the delay in releasing the components that make up Corexit was a direct result of the EPA’s willingness to protect Nalco and BP’s interests over that of the public. As the public interest group OMB Watch explained upon the release of the components of Corexit,

After weeks of gallon after gallon pouring into the Gulf, finally the public is given the most basic information crucial to monitoring the fate and impacts of these chemicals. EPA had the authority to act all along; its decision to now disclose the ingredients demonstrates this. Yet it took a public outcry and weeks of complaints for the agency to act and place the public's interest ahead of corporate interests.<sup>33</sup>

Here, as in Bloomberg and as has been seen in ACTA, continual public pressure on EPA forced it to release information that it would have preferred to keep secret. The confluence of intense public pressure and distribution of knowledge, beyond that found in the Bloomberg and ACTA scenarios, impelled the EPA to offer some information to the public so that research into its health and safety effects could proceed. In doing so, it risked the ire of corporate interests, and legitimately causes the public to question where the EPA’s loyalties and political interests lie.<sup>34</sup> Yet, FOIA

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<sup>30</sup> *Id.*; Complaint for Declaratory and Injunctive Relief, Fla. Wildlife Fed’n, Inc. v. Johnson (No. 4:2008cv00324) (N.D. Fla. Jul. 17, 2008), *available at* <http://emerginglitigation.shb.com/Portals/f81bfc4f-cc59-46fe-9ed5-7795e6eea5b5/complaint-and-exhibits-fwf-v-usepa-07-17-08.pdf>.

<sup>31</sup> *See* 5 U.S.C. § 552(b)(4) (2010).

<sup>32</sup> This is a separate problem in FOIA that I have addressed in David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007).

<sup>33</sup> Brian Turnbaugh, *EPA Finally Discloses What’s in the Oil Spill Dispersants*, OMB WATCH (Jun. 8, 2010), <http://www.ombwatch.org/node/11062>.

<sup>34</sup> *See* Mulkern, *supra* note 26 (former EPA employee now lobbyist for Balco).

remains an impediment to much information, as public pressure alone cannot change the language of the law.

### C. ACTA

FOIA has been interpreted to exist, in part, to prevent the development of “secret law.”<sup>35</sup> Yet the ACTA negotiations’ lack of transparency heightens the concerns that “secret law” is precisely what is being developed. Here, the focus is not the power of the purse or public health and safety concerns, but another fundamental role of government, lawmaking. Unfortunately, a similar response to that of Bloomberg’s request occurred with FOIA requests made by KEI to the United States Trade Representative, the office representing the United States in the ACTA negotiations, in the early days of the Obama administration. In January 2009, KEI sought seven specific documents that reflected proposals for the substantive text of ACTA.<sup>36</sup> In a summary response in March 2009, around the same time as the OMB Memorandum, the UTSR denied the request under 5 U.S.C. § 552(b)(1), an exemption to FOIA for information “to be kept secret in the interest of national defense or foreign policy.”<sup>37</sup> As James Love, KEI’s Director, explained upon receipt of the denial letter:

The texts are available to the Japanese government. They are available to the 27 member states of the European Union. They are available to the governments of Canada, Mexico, New Zealand, Australia. They are available to Morocco, and many other countries. They are available to “cleared” advisers (mostly well connected lobbyists) for the pharmaceutical, software, entertainment and publishing industries. But they are a secret from you, the public.<sup>38</sup>

Again, while the law may support such a denial by the USTR, a disturbing reality has emerged. Just as the Fed asserted the commercial interests of commercial borrowers in fighting Bloomberg’s FOIA request and thereby maintaining the borrowers’ superior knowledge about the program, the USTR has elevated the commercial interests of a variety of

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<sup>35</sup> Dep’t of Air Force v. Rose, 425 U.S. 352, 369 (1976).

<sup>36</sup> See James Love, *Obama Administration Rules Texts of New IPR Agreement are State Secrets*, HUFFINGTON POST (Mar. 12, 2009), [http://www.huffingtonpost.com/james-love/obama-administration-rule\\_b\\_174450.html](http://www.huffingtonpost.com/james-love/obama-administration-rule_b_174450.html).

<sup>37</sup> *Id.* This conclusory response makes the Fed’s response to Bloomberg’s FOIA request seem verbose by comparison.

<sup>38</sup> *Id.*

commercial entities over the general interests of the public. The result has been distribution of information, not otherwise public and utilizing non-disclosure agreements (“NDA”), to (primarily) corporate entities and their proxies.<sup>39</sup> These special groups apparently have their own freedom of information rules; the public has no opportunity to sign an NDA and are not “cleared advisors,” thus the public cannot get the real-time information to which these special groups are privy.<sup>40</sup> The result is that these NDA-signing entities and/or “cleared advisors” are far better positioned to offer meaningful, real-time input than the public—an odd result given the existence of FOIA. Information disparities fueled rather than rectified by an open government law should give us pause.

More strikingly, this broad power of the USTR to control the flow of information via FOIA is not an accident. Rather, the general derivation of this power in the USTR comes from the Obama administration’s choice to continued designating ACTA as an Executive Agreement, thereby bypassing Congress and the traditional transparent format for negotiating international agreements.<sup>41</sup> This choice has been largely responsible for a stunning lack of transparency as compared to a variety of international institutions that facilitate international agreements, including WIPO (World Intellectual Property Organization), WTO (World Trade Organization), OECD (Organization for Economic Cooperation and Development), CSTD (Commission on Science and Technology for Development), and IGF (Internet Governance Forum).<sup>42</sup> Indeed, with the exception of official released drafts late in the negotiating process in April and October 2010, the public has had to rely on guesswork and speculation based upon leaked texts and rumors to ascertain the state of play.

The result is a mutation of what would otherwise be a largely public debate about the merits and terms of ACTA into what has been, until

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<sup>39</sup> See James Love, *White House Shares the ACTA Internet Text with 42 Washington Insiders, under Non-Disclosure Agreements*, KNOWLEDGE ECOLOGY INT’L (Oct. 13, 2009), <http://keionline.org/node/660>. Indeed, when KEI requested the names of the entities that had signed an NDA and received a copy of the ACTA text, the USTR’s initial response was to deny it, again on the grounds that “the release of the names of persons who had seen the text would undermine the national security of the United States.” *Id.*

<sup>40</sup> KEI was one of the very few non-commercial entities that was given an opportunity to sign an NDA. *Id.* That, however, is not the same as public disclosure of information.

<sup>41</sup> See Eddan Katz, *Stopping the ACTA Juggernaut*, ELECTRONIC FRONTIER FOUNDATION (Nov. 19, 2009), <http://www.eff.org/deeplinks/2009/11/stopping-acta-juggernaut> for detailed discussion of this issue; see also *infra* note 42.

<sup>42</sup> See Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions* 13-17 (American Univ. Washington College of Law PIJIP Research Paper Series, Paper No. 6, 2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1006&context=research>.

recently, mostly a hearsay-laden speculative debate. This is a policy choice on the part of the Obama administration that has given corporate entities a “most favored nation” status with, as will be discussed below, limited real benefits to the negotiation process or the public. The result of these activities can be summarized by stating succinctly that intellectual property law agreements have apparently become issues of national security that require the input of commercial interests but not the public at large. As Peter Yu points out, this “national security” concern is “more correctly identified with the maintenance of good foreign or diplomatic relations with ACTA negotiating partners.”<sup>43</sup> Even if this concern has some merit, as negotiating partners may want to be free of public relations concerns as they negotiate,<sup>44</sup> FOIA has allowed that concern to trump those of a public that has legitimate concerns about the impact of ACTA on domestic law. Thus, this designation has allowed the USTR to deny many ACTA-related FOIA requests and, in combination with an apparent trend maintaining secrecy despite promising statements from the early days of the Obama administration, has created an environment in which ACTA may very well go down as the least transparent international agreement in living memory.

Compounding the problem, similar to the Fed’s denial of FOIA requests regarding \$2 trillion in loans to banks, the USTR does not seem particularly concerned that the public will not get information about an agreement that could impact every U.S. citizens’ rights under copyright law.<sup>45</sup> The terms surrounding \$2 trillion in federal loans, public health and safety in the Gulf of Mexico, and lawmaking about basic IP protections are significant issues of national importance, if not security, involving close interactions between government and the effected private interests. All are situations where private commercial interests in secrecy have been given higher priority than the public’s interest in basic information—and the government, ironically aided by FOIA, has amplified the detrimental impact on public transparency and accountability through its close interactions with the interested commercial entities. Therefore, while three examples, albeit very significant, do not a trend make, they do suggest an emerging mode of response to major issues of national importance when a meaningful segment of the public may differ with the official position taken by the government and/or commercial interests—if they knew what the exact position was. This emerging trend of decreased information flow warrants further exploration and monitoring.

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<sup>43</sup> Peter Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) at 20, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1624813](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1624813).

<sup>44</sup> *Id.* at 20-21.

<sup>45</sup> See *infra* note 51 and accompanying text.

In sum, the examples of Bloomberg/Fed, BP and ACTA, indicate that FOIA needs to be reconsidered. Especially because of the strong mutuality of interest that exists when significant public interest concerns a major joint effort of government and business, as in the government's reliance on BP to clean up the Gulf oil spill, the government's multi-trillion dollar loans to financial entities, and the government's close consultation with primarily corporate entities on matters of international lawmaking in ACTA, one may legitimately question whether FOIA is up to the task of balancing the public's interest with that of the government and its corporate partners.<sup>46</sup> More specifically, FOIA seems to assume an *ability* to keep and maintain secrets about matters of significant public concern that may not be realistic in an Internet-dominated 2010. Indeed, as the authors of *Millennial Makeover* suggest, we are due for such a reassessment of law as "in every [political] realigning era the nation has also experienced a growth and success of new communication technologies."<sup>47</sup> Thus, along the lines of the Obama administration's early admonitions to make government more transparent, FOIA needs to be reconceptualized to reflect the broad information sharing powers and expectations that the Internet has established. Facilitation of this analysis by policymakers, with reference to the ongoing ACTA negotiations, is the focus of the remainder of this paper.

### III. ACTA AND THE INTERNET: SECRECY AND ITS PRIMARY THEORETICAL BENEFIT UPENDED

Despite the efforts at secrecy, some ACTA information has leaked to an eager public and, to a lesser extent, has been officially released. This information, perhaps because it is so unusual to receive, has been rapidly disseminated by the Internet.<sup>48</sup> Thus, the related question is whether attempts at secrecy, and any theoretical benefits of secrecy, can be maintained in the face of an international negotiation that has broad public interest, namely, the state of IP law, and a public that has a robust and pervasive tool with which to communicate and share information, namely, the Internet. While the downsides of ACTA secrecy have been well-documented,<sup>49</sup> the more challenging question is whether, in 2010, the *benefits* of secrecy are even possible when there is a strong public interest in

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<sup>46</sup> The government may not have perfect mutuality of interest in these scenarios, but are clearly operating as partners to achieve a mutually identified goal. The exact parameters of this balancing are beyond the scope of this paper, but a subject of current research.

<sup>47</sup> MORLEY WINOGRAD & MICHAEL D. HAIS, *MILLENNIAL MAKEOVER* 49 (2008).

<sup>48</sup> See ACTAwatch.org, kei.org, eff.org generally.

<sup>49</sup> *Id.*



the information? Apart from the transparency concerns, which are a normative basis for more disclosure, is this behavior nonetheless defensible from a practical perspective as a preferred mode of lawmaking? In this section, I propose that the answer is likely no.

Commentators have roundly criticized the lack of disclosure and accountability since the beginning of the ACTA negotiations. The primary concerns have been (1) general erosion of deliberative democracy, (2) one-sided input that reflects primary commercial perspectives, (3) speculation and guesswork replacing real discussion of the issues, and (4) erosion of the legitimacy of the process and eventual law. All of these concerns have all played a part in the public condemnation of the negotiators' positions on transparency and accountability.<sup>50</sup> But what about the primary benefit of secrecy, namely, smooth and efficient negotiations free from external influences, be they "political complications in the capitals to opposition from civil society groups?"<sup>51</sup> As the Internet exists as a pervasive means to disseminate information on issues of significant public concern, the remainder of this paper suggests that this benefit is difficult, and in some cases impossible to maintain when (a) an issue of significant national interest is receiving national attention, and (b) there is an organized and technologically-savvy group of interested members of the public that are not receiving the desired information. Therefore, under these circumstances, governmental policies formulated with an assumption of the ability to maintain strong secrecy run a risk of failure to the extent that secrecy is fundamental to achieving the given goals.

#### A. *Problems with the Secrecy Assumption*

There are several problems with the assumption of an ability to maintain strong secrecy in the context of ACTA. From the beginning of information leaking about the mere existence of ACTA negotiations, concerns were raised that ACTA was locked inside the proverbial black box. As Professor Michael Geist, arguably Canada's leading copyright scholar, noted in an early commentary, ACTA

could ultimately prove bigger than WIPO—without the

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<sup>50</sup> Yu, *supra* note 43, at 22.

<sup>51</sup> *Id.*; see also *Fact Sheet: Anti-Counterfeiting Trade Agreement*, EUROPEAN COMMISSION (Oct. 23, 2007) (Updated Nov. 2008), [http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_140836.11.08.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf) ("For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion.").

constraints of consensus building, developing countries, and civil society groups, the ACTA could further reshape the IP landscape with tougher enforcement, stronger penalties, and a gradual eradication of the copyright and trademark balance.<sup>52</sup>

Thus were the antecedents of a concerted effort to grab the most useful information about the state of the ACTA, namely, actual drafts of the agreement. The results of this effort were startling and form the main reason for questioning the possibility that McCoy could get what he proscribed in his FAQ: despite coordinated international efforts to maintain the security of negotiating drafts, at least six full or partial drafts were leaked and widely disseminated on the Internet by highly-read technology information websites including Boing Boing and Wikileaks.<sup>53</sup>

To be clear, leaks are not a system of public transparency, and the information adduced cannot usually be used to offer much meaningful input to policymakers. Indeed, not surprisingly, the USTR did not offer any formal ways for the public to offer input on leaked information. Nonetheless, while the public was not able to get a perfect picture of the United States' position, it was simply wishful thinking—from the beginning—for the USTR to assert that the public would find out the United States' evolution only when the agreement was signed. Indeed, a week before the date of McCoy's email, the second leak of an ACTA draft had been publicly discussed and analyzed.<sup>54</sup> The USTR, Ambassador Ron Kirk,

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<sup>52</sup> Michael Geist, *Is ACTA the New WIPO?*, MICHAEL GEIST BLOG (Oct. 24, 2007), <http://www.michaelgeist.ca/content/view/2318/99999/>.

<sup>53</sup> The first leak occurred on May 22, 2008 and was reported by Wikileaks. *Proposed U.S. ACTA Plurilateral Intellectual Property Trade Agreement (2007)*, [http://wikileaks.org/wiki/Proposed\\_US\\_ACTA\\_plurilateral\\_intellectual\\_property\\_trade\\_agreement\\_%282007%29](http://wikileaks.org/wiki/Proposed_US_ACTA_plurilateral_intellectual_property_trade_agreement_%282007%29). The second, a more modest leak, occurred in February 2009. *Putting Together the ACTA Puzzle: Privacy, P2P Major Targets*, MICHAEL GEIST BLOG (Feb. 3, 2009), <http://www.michaelgeist.ca/content/view/3660/125/>. The third leak occurred in April 2009 and was again published on Wikileaks. *Classified US, Japan, and EU ACTA Trade Draft Agreements, 2009*, [http://wikileaks.org/wiki/Classified\\_US%2C\\_Japan\\_and\\_EU\\_ACTA\\_trade\\_agreement\\_drafts%2C\\_2009](http://wikileaks.org/wiki/Classified_US%2C_Japan_and_EU_ACTA_trade_agreement_drafts%2C_2009). The fourth, focusing on Internet issues, occurred in November 2009, *The ACTA Internet Chapter: Putting the Pieces Together*, MICHAEL GEIST BLOG (Nov. 3, 2009), <http://www.michaelgeist.ca/content/view/4510/99999/>, and the fifth, a full text, was leaked in March 2010. *ACTA's De Minimus Provision: Countering iPod Searching Border Guard Fears*, MICHAEL GEIST BLOG (Mar. 23, 2010), <http://www.michaelgeist.ca/content/view/4900/125/>. The most recent leak occurred in September 2010. *Latest Leaked Draft of Secret Copyright Treaty: U.S. Trying To Cram DRM Rules Down the World's Throats*, BOING BOING (Sept. 6, 2010), <http://boingboing.net/2010/09/06/latest-leaked-draft.html>.

<sup>54</sup> Michael Geist, *Putting Together the ACTA Puzzle: Privacy, P2P Major Targets*, MICHAEL GEIST BLOG (Feb. 3, 2009), <http://www.michaelgeist.ca/content/view/3660/125/>; James Love, *Details Emerge of Secret ACTA Negotiation*, KNOWLEDGE ECOLOGY INT'L

also maintained this position in December 2009, telling KEI's James Love that the ACTA text would be made public "when it is finished."<sup>55</sup> However, at that time, at least four leaks had occurred. Policymaking based upon wishful thinking cannot lead to good law, and the realities of the USTR's limited ability to maintain such secrecy might explain why negotiators finally caved and released an "official" draft text in April 2010.<sup>56</sup>

Aside from the basic fact that draft texts and portions thereof were being leaked despite this official stance, part of the problem with the USTR's failure to maintain such secrecy is that the USTR's support and encouragement of ironclad secrecy over the negotiations stands in stark contrast to other international bodies charged with lawmaking in the intellectual property law sphere. For example, the World Health Organization, WTO, which includes the TRIPS Council, and the United Nations Commission on International Trade Law, all major IP treaty entities, publish agendas, participants, meeting minutes, and draft documents on their respective web sites.<sup>57</sup> Indeed, as Jeremy Malcolm noted in his recent study of a number of international institutions, including WIPO and WTO, "even the WTO, the least participatory of the organizations studied, posts all of its official documents online, and most of the other institutions [including WIPO] also make available negotiating texts."<sup>58</sup> Malcolm concludes that "ACTA meets none of the basic best practices for transparency of the existing institutions of the intellectual property policy regime."<sup>59</sup> Thus, the USTR had virtually no precedent for such an extreme maneuver, and the public rightly expected more information based upon past precedents.

Indeed, the strategy led to a letter penned by Senator Ron Wyden of Oregon to the USTR in late 2009 asking for the USTR's specific ACTA negotiation positions. Upon receiving a response, Wyden issued a press release in January 2010 where he noted that he was attempting to "shed light" on ACTA's "secret negotiations" and sought to "encourage [the USTR] to give the public a say over issues that so profoundly affect their

(Feb. 3, 2009), <http://keionline.org/blogs/2009/02/03/details-emerge-of-secret-acta>.

<sup>55</sup> James Love, *Ambassador Kirk: People Would be "Walking Away from the Table" if the ACTA Text is Made Public*, KNOWLEDGE ECOLOGY INT'L (Dec. 3, 2009), <http://keionline.org/node/706>.

<sup>56</sup> Michael Geist, *The ACTA Timeline: Tracing the Secret Copyright Treaty*, MICHAEL GEIST BLOG (Dec. 10, 2009), <http://www.michaelgeist.ca/content/view/4611/125/>.

<sup>57</sup> *ACTA is Secret. How Secret are Other Global Norm Setting Exercises?*, KNOWLEDGE ECOLOGY INT'L (Jul. 21, 2009), [http://www.keionline.org/misc-docs/4/attachment1\\_transparency\\_ustr.pdf](http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf); see also Jeremy Malcolm, *supra* note 42.

<sup>58</sup> Malcolm, *supra* note 42 at 15, 17.

<sup>59</sup> *Id.* at 20.

lives, as trade policies often do.”<sup>60</sup> The highly unusual action of a Democratic senator challenging an appointee of a Democratic President on a major international negotiation, combined with the stark differences in negotiation transparency and accountability between ACTA and all other major international intellectual property agreements of recent vintage, suggest that the USTR’s apparent strategy of extreme secrecy was a non-starter.

Additionally, despite the possibility of a streamlined process where public input is virtually non-existent and a hand-picked group of advisors periodically offer counsel to the USTR, evidence suggests that ACTA has actually taken longer to negotiate than many similar international IP agreements. Assuming that ACTA negotiations began in June 2008 and of this writing have not concluded, the ACTA negotiations have taken two and a half years. While this is not an excessive amount of time to negotiate a multi-lateral international agreement, KEI notes that it is longer than negotiations for nine of sixteen multilateral IP agreements.<sup>61</sup> For example, the 1996 WIPO Internet treaties were negotiated in less than two years, whereas WTO’s TRIPS, concluded in 1993 and arguably the most significant IP treaty, took three and a half years to negotiate. Thus, while there are many factors that enter into the speed with which a treaty is negotiated, it is at least questionable whether the efforts at secrecy, however flawed, have actually streamlined the negotiation process. Especially as WIPO and WTO are more transparent but have been able to conclude major recent international IP agreements in comparable or less time than ACTA, the received wisdom that secrecy inevitably leads to a streamlined and efficient negotiation process in IP lawmaking should be challenged.

Aside from the questionable practical impact of excessive secrecy, the USTR’s position is rendered even more untenable simply because it does not meet current expectations of a transparent and accountable government. The Internet has raised public expectations of what transparency and accountability look like, and policymakers ignore this shift at their peril. Indeed, as illustrated in ACTA, interested parties can force transparency where little or none is officially desired. Once transparency is forced by the public, any administrative efforts to realistically control disclosure becomes tainted at best and futile at worst. Hence, the USTR’s largely unsuccessful efforts to maintain black box secrecy can be reasonably explained and

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<sup>60</sup> Malini Aisola, *USTR Responds to Senator Wyden’s Letter on ACTA*, KNOWLEDGE ECOLOGY INT’L (Mar. 2, 2010), <http://keionline.org/node/791>.

<sup>61</sup> Alberto Cerda, *How Much Time is Necessary to Negotiate the Text of a Multilateral Agreement on Intellectual Property?*, KNOWLEDGE ECOLOGY INT’L (Jun. 4, 2010), <http://keionline.org/node/861>.

dismissed as little more than an effort to prevent the public from knowing about the lawmaking activities of its representatives.

Indeed, as KEI explained to Ambassador Kirk in December 2009 while KEI's Love was sitting next to Ambassador Kirk on an airplane, getting the text when it was concluded "was too late, and the public wanted the text out now, before it is too late to influence anything."<sup>62</sup> Because of the public outcry regarding the lack of transparency and the rapid dissemination and analysis of the leaked texts<sup>63</sup>, which presumably has distracted the USTR somewhat from focusing on the substance of the agreement, time will tell whether the final draft reflects indirect input offered by the public recipients of the leaked and "official" texts. Nonetheless, it seems clear that despite the USTR's efforts, this has not been a process wholly devoid of public input. At a minimum, the public has compelled some disclosure and forced the USTR and other negotiating parties to defend the official policy of not releasing drafts and other valuable information.<sup>64</sup>

Reflecting current public expectations on transparency is an anonymous comment to the December 2009 KEI story. Reacting to Ambassador Kirk's statement to KEI's Love that the issue of transparency "was about as complicated as it can get," the commenter summed up a general public reaction when secrecy is maintained regarding issues of national concern where the perception is that interested private industry has more access to information than the public: "Transparency is only complicated when you're being dishonest."<sup>65</sup> When extreme efforts exist to keep secret a major international negotiation designed to create new law and international enforcement institutions on a hot-button issue like copyright piracy, one can expect negative public reaction once the existence of the negotiations are revealed. Therefore, whether this view reflects reality is secondary to the fact that it is a logical reaction to the USTR's efforts.

The failure of the USTR to maintain the black box, you'll-find-out-when-it's done method of lawmaking has proven its weakness as a lawmaking modality. Real-time disclosure of information is expected and key to a deliberative democracy, and the USTR's efforts reflect a policy that

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<sup>62</sup> See Love, *supra* note 55. This interaction between KEI's Love and Ambassador Kirk was reported in a number of major Internet news outlets, including Tech Dirt, Wired, Boing Boing and Slashdot, further attesting to the ability of the Internet to quickly disseminate information to an interested community. *Id.*

<sup>63</sup> See American University Washington College of Law's PIJIP ACTA paper series, available at <http://digitalcommons.wcl.american.edu/research/>.

<sup>64</sup> See Love, *supra* note 55. Aside from forcing draft releases, public outcry has also resulted in changes to meeting agendas. See *ACTA to Meet Sept. 23: Locking Out Civil Society?*, PIJIP, <http://www.wcl.american.edu/pijip/go/blog-post/acta-to-meet-sept-23-locking-out-civil-society>.

<sup>65</sup> See Love, *supra* note 55.

is opposed to such disclosure. Indeed, offering input on drafts at the end of a negotiation process is not as valuable as having input when the document is being initially drafted and its core goals and terms negotiated. That primary opportunity for substantively meaningful real-time input was denied by the USTR's efforts. Therefore, putting aside the reality of organized citizens with access to the greatest system of information sharing ever invented, the USTR's position is difficult to defend simply because it curtails democratic legitimacy and public buy-in on the laws enacted.

The Internet exacerbates the failings of this policy. Once we engraft the reality of the Internet and an organized and technologically savvy interested public onto these legitimacy problems, the USTR's position becomes not only damaging to democracy, but nearly impossible to achieve. Indeed, as seen in ACTA, increased public condemnation and outcry forcing some begrudging disclosure leads to something less than a smooth and efficient process. In sum, the USTR's statements have proven little more than wishful thinking regarding a bad idea. Such thinking should be abandoned in future international negotiations.

#### IV. CONCLUSION

Going back to Jeremy Bentham and even earlier, the theoretical bases against secrecy in a democracy have been known and articulated.<sup>66</sup> In the ACTA negotiations, secrecy's modern practical limitations in a democracy have been shown. In 2010 it should be received wisdom that the kind of secrecy possible before the advent of the Internet—the proverbial “black box”—is increasingly difficult to maintain and therefore, from a practical perspective, should not be part of lawmakers' considerations in deciding how best to create and enact law. Indeed, the mainstream media understands this point well. In its promotion of its political comedy series *The Thick of It*, the BBC noted that if:

24 hours is “a long time in politics,” the two decades since *Yes, Prime Minister* [a 1980s BBC show] now seem like light years ago. So when *The Thick of It* first appeared in 2005, it was well overdue. Secrets are harder to keep in this age of cell phone cameras, blogs and Tweets.<sup>67</sup>

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<sup>66</sup> See Levine, *supra* note 32 at 158-159.

<sup>67</sup> Putting you “In the Loop” about the *Thick of It*, BBC AMERICA (Apr. 29, 2010), <http://www.bbcamericashop.com/blog/dvds-in-the-works/2010/04/29/putting-you-%E2%80%9Cin-the-loop%E2%80%9D-about-the-thick-of-it/>.

Especially regarding a hot-button and controversial issue like piracy enforcement in the international context,<sup>68</sup> absolute secrecy cannot be maintained. The ACTA negotiations have, in Glickman's word, been marred by "distraction" as the public clamored for information. This paper seeks to advance the discussion by pointing out that the leaks and resulting opaque "transparency soup"—or, put another way, partial, uncontrolled and haphazard secrecy—upends the main benefit associated with secrecy generally, streamlining and efficiency. That benefit can only be achieved by maintaining the black box, an outcome proven difficult and in many cases, like ACTA, impossible in 2010.

Rather than amplifying public buy-in and input, disclosure of information authorized or by leak, after a policy decision has been made, seems to primarily discredit the withholding institutions without allowing for the benefit of meaningful real-time public input at the critical point when policy is being formulated and law written. For example, the kind of secrecy envisioned by the USTR needlessly created and fostered an adversarial relationship with the public that reinforced the worst fears and criticism about lawmakers in 2010. Simultaneously, leaks and/or official drafts were released in the midst of the purported black box policy. Therefore, the level of secrecy necessary to create a smooth and efficient negotiation environment proved impossible to attain. Thus, the public was afforded something less than an efficient mode of lawmaking while at the same time losing faith in the institutions involved.

Combined with the reality that governments, particularly administrative agencies, and private industry may often have a strong mutuality of interest in keeping information regarding matters of significant national concern from the public, we also have a scenario where the structure of FOIA needs to be reconsidered. As economist Alfred E. Kahn explained,

When a commission is responsible for the performance of an industry, it is under never completely escapable pressure to protect the health of the companies it regulates, to assure a desirable performance by relying on those monopolistic chosen instruments and its own controls rather than on the unplanned and unplannable forces of competition.<sup>69</sup>

As the examples discussed in this paper illustrate, limiting transparency can be seen as broadly part of the "controls" used to shield commercial entities and their regulators from public scrutiny, second-guessing and

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<sup>68</sup> See Jonathan Lynn, *States Clash over Anti-Counterfeiting Enforcement*, REUTERS, Jun. 9, 2010, available at <http://in.reuters.com/article/idINIndia-49179920100609>.

<sup>69</sup> ALFRED E. KAHN, *THE ECONOMICS OF REGULATION* 12 (1971).

input, as well as accountability. If prevailing opinion within commercial and administrative entities is that a lack of public input in relevant policy decisions maintains or increases the commercial “health” of the regulated industries, as may be indicated by the above examples, then we have a problem of competing values and capture of administrative entities by commercial interests that is long-overdue to be addressed.

In sum, it is both damaging to democracy and untenable to maintain a FOIA that allows fundamental information about the expenditure of taxpayer dollars, health and safety risks associated with a clean-up of a major oil spill, and lawmaking itself, to be withheld from the public in an environment where the sharing of information is getting increasingly simple, pervasive and expected. While a certain level of secrecy is necessary and even desirable in the functioning of government, as reflected generally (if not perfectly) in the exemptions to FOIA,<sup>70</sup> excessive and/or unjustified secrecy, as seen in the above examples, is problematic and concerning. Indeed, the ACTA negotiations have proven that lawmaking on issues of significant national concern becomes bogged down, rather than streamlined and improved, when antiquated laws and assumptions about transparency and secrecy merge. This paper seeks to advance that simple, but important point, so that policymakers can move on to the next, more challenging, question: how to update FOIA by acknowledging the close partnership between government and the private sector and its impact on what information is and is not disclosed to the public. If this issue is taken up by the new Congress, the unfortunate experience of the ACTA negotiations might be an impetus to meaningful change in how the United States conceives its version of democracy. We’ll have fewer “distractions,” and, by virtue of policymakers getting the benefit of meaningful, real-time public input, we might get better, more balanced and legitimate IP laws—and laws generally—as a result.

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<sup>70</sup> 5 U.S.C. § 552(b); for criticism of FOIA in the context of trade secrets, *see* Levine, *supra* note 32.