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ACTA as a New Kind of International IP Law-Making

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ACTA AS A NEW KIND OF INTERNATIONAL IP LAW-MAKING¹

*Kimberlee Weatherall*²

ABSTRACT

The ACTA negotiations are important not only for the potential impact of the treaty itself, but for what they can teach us about the dynamics of intellectual property law-making and the structure of the IP treaty framework. This paper draws two broad lessons from the progress of the ACTA to date which, while not entirely new, can be understood in a new light by looking at the detailed development of the ACTA text: (1) that the global IP 'ratchet' is not inexorable; and (2) that the international IP treaty framework is very poorly adapted to developing exceptions. The relevance of these lessons for negotiators, scholars and advocates is also discussed.

¹ At the time this paper was researched and written, the July 1, 2010 draft of ACTA was the most recent draft of the text. Any references to “the most recent text” and related analysis refer to the July 1, 2010 draft. After this paper was submitted for publication, a new draft of ACTA was leaked on Aug. 25, 2010. This paper may be revised by the author to reflect changes made in the Aug. 25, 2010 draft text.

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I. INTRODUCTION

The Anti-Counterfeiting Trade Agreement, or ACTA, has all the features of the scheme of a Vaudeville Villain. We have had every possible cliché over the course of the several years of its negotiation to date. The exclusive group of negotiators, a kind of new ‘coalition of the willing.’ The secrecy. The claims that keeping a text about IP enforcement confidential was a matter of ‘national security.’³ Arguments that the whole agreement could be stitched up without any Parliamentary or Congressional input by ‘Executive Order.’⁴ Reports of iPod-searching border guards (met only with the statement that nothing in the agreement would *require* iPod-searching border guards...). Leaked texts, again, and again, and again. Dissent in the ranks of the willing as some countries complained about the secrecy. Press releases that make assertions about the text that don’t stand up to expert scrutiny. A text that, once published, contained excruciating

³ See Declan McCullagh, *Copyright Treaty is Classified for National Security*, CNET NEWS, (Mar. 12, 2009, 5:45 PM), available at http://news.cnet.com/8301-13578_3-10195547-38.html (reporting that a response letter to a Freedom of Information Act request by Knowledge Economy International from the Obama Administration had stated that a discussion draft of the Anti-Counterfeiting Trade Agreement and related materials are classified in the interest of national security pursuant to Executive Order 12958).

⁴ See Jack Goldsmith & Lawrence Lessig, *Anti-counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html>

detail on every conceivable way to strengthen enforcement—and none of the usual protections for user interests but a few placeholders saying, to paraphrase, ‘we’ll put some fuzzy soft stuff here.’ The whole process—coming on top of numerous other initiatives in IP enforcement⁵—could almost have been calculated to generate paranoia on the part of anyone who might ever be on the receiving end of an IP lawsuit. Users. Consumer representatives. Access to medicines advocates. Technology companies. Cue evil music and tie the consumers to the train tracks!

All these ludicrous trappings of the sideshow, however, are wont to distract us from taking the process seriously. By this I do not mean that people have ignored what is going on or failed to analyse the substance of the agreement: far from it. The reaction to ACTA and the analysis of the text has, if anything, been something of a testament to collective, even ‘open source’ analysis. The ongoing commentary has been informed; knowledge has been widely shared, and the text has been very closely analysed and its implications for various interests explored in a range of jurisdictions.⁶ Every strategic move in the negotiations has been analysed on the fly.⁷ I do not seek to repeat that analysis here.

What I mean, rather, is that we also need to examine the process of negotiating the ACTA for what it can tell us about the changing dynamics of IP law-making, particularly in the enforcement space. ACTA has entered the scene on the back of a decade of bilateral trade agreements, many of which include detailed provisions on intellectual property, and more than a decade of development of IP rules within Europe. It follows very closely on a newly-announced EU policy of drafting bilateral trade agreements in an ‘American style’ with detailed IP chapters. In a world where unilateral action to enforce or raise IP standards has become commonplace, the ACTA negotiations represent an important attempt post-TRIPS to undertake broad-ranging ‘North-North’ negotiations on key areas of intellectual property which are a gap in the TRIPS Agreement.⁸ We would be wrong, I

⁵ See generally Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: the State of Play 4* (IQsensato, Occasional Paper No. 1, June 9, 2008), available at http://www.iqsensato.org/wpcontent/uploads/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf (providing an excellent overview of the multiple shifting initiatives).

⁶ See generally *Anti-Counterfeiting Trade Agreement (ACTA)*, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, available at <http://www.wcl.american.edu/pijip/go/acta> [hereinafter PIJIP].

⁷ Peter Yu, *Six Secret (and now open) Fears of ACTA*, 63 SMU L. REV. (forth coming 2010), available at <http://ssrn.com/abstract=1624813>.

⁸ I am leaving to one side here, of course, the ongoing negotiations within the TRIPS Council over matters such as the Geographical Indications Register. ACTA is also

think, to simply dismiss the ACTA as ‘yet more forum-shifting.’⁹ This is where we get to see how much agreement there is the developed country powers historically dominant in IP law-making: Japan, Europe, U.S.—and friends—outside of the known contentiousness of the various multilateral fora. This is also where we get to assess the impact of the bilateral agreements—are they really a stepping stone to new international standards?

This paper is a contribution to the analysis of ACTA as part of the dynamics of international IP law-making. Since comprehensiveness is a dreamer’s goal, I have picked up on two questions, drawing heavily on the various versions of the ACTA text that have been both leaked, and published, over time.¹⁰ First, I explore what ACTA can tell us about the famed ‘global one-way IP ratchet’ and the impact of the last decade’s worth of bilateral agreements on the negotiations. As will become clear, the picture is, I think, a mixed one. Undoubtedly the mere fact that the U.S.’s bilateral free trade agreement partners are part of the ACTA negotiations is an indication of the role those agreements are playing, and, looking in more detail at Australia in particular, I think it is clear that where Australia would have been in opposition to some ACTA proposals, Australia’s Free Trade Agreement with the U.S. removed that opposition. On the other hand, while both the U.S. and the EU may have started ACTA with the intention of elevating detailed aspects of their law to the level of international agreement, the process of ACTA has been a gradual watering-down of those provisions. This is important, because it suggests limits to the ‘one-way ratchet.’ The second issue I explore is what ACTA can teach us about

not the only time all these parties have sought to negotiate another treaty: there has, since TRIPS, been multilateral negotiations, both successful (in the form of the WIPO COPYRIGHT TREATY and WIPO PERFORMANCES AND PHONOGRAMS TREATY of 1996) and unsuccessful (the proposed WIPO TREATY FOR THE PROTECTION OF BROADCASTING ORGANIZATIONS—which was deferred in 2007 although still on the agenda of WIPO). There have also been multilateral ‘administrative’ negotiations leading to the SINGAPORE TREATY ON THE LAW OF TRADEMARKS of 2006.

⁹ See generally Laurence Helfer, *Regime-shifting: the TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004); Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125 (2003); Peter K. Yu, *Currents and Cross-Currents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 395-96 (2004).

¹⁰ See generally Anti-Counterfeiting Trade agreement January 2010 Draft, available at <https://docs.google.com/a/student.american.edu/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnpaXBBlbmZvcmlbWVudHxneDozNWJiMzU4ODljYjIzNWQ1> [hereinafter January leaked text], Anti-Counterfeiting Trade Agreement April 2010 Draft, available at <http://www.wcl.american.edu/pijip/go/acta04212010> [hereinafter April public text], Anti-Counterfeiting Trade Agreement July 2010 Draft, available at

the negotiation of exceptions in international IP law: a critical issue for user representatives and advocates of all stripes as well as for negotiators. The course of negotiations in ACTA over the online service provider safe harbours clearly follows historical patterns: everyone puts their version on the table and then everyone has trouble reconciling the differences. This is a bad sign both for the agreement itself, and for any attempt hereafter to draw up an international instrument on exceptions. In the course of discussing this issue, I lay out how recent academic literature and advocates' attempts to conceive such an instrument hold lessons for negotiators, but what is eminently clear is that those lessons are not, yet, making their way into the negotiating tents.

There are lessons in this analysis, I think, on all sides. For advocates, the analysis highlights the importance of developing alternative models for international provisions, particularly at a domestic level but also in conceptual instruments. For scholars in the field, I hope this work can be part of a discussion, beyond the vaudeville, of how ACTA fits into the broader sweep of international IP law development. And for those at the negotiating table, it's a plea—to take a step back from the nitty-gritty of elevating domestic law to international treaty, and to see the process of negotiation for what it ought to be—a process of abstraction and reaching a compromise of interests and principles.

II. LESSON ONE FROM THE PROCESS OF NEGOTIATING ACTA: TESTING THE GLOBAL IP RATCHET THEORY

A. Can We Explain ACTA as Part of a Broader Strategy to Raise IP Standards?

The first set of lessons we can learn from developments to date in ACTA concerns the relationship between IP chapters in recent bilateral trade agreements and subsequent multiparty¹¹ negotiations. ACTA is a testament both to the impact of bilateral agreements on countries' positions in later multiparty negotiations, and to the 'endless upward spiral' of international IP obligations. It is also, as I explore in the next subsection, evidence of the limits on this upward spiral and the way the strategy of using bilateral agreements to 'create international standards' is failing. But first, we need to acknowledge the strategy's success.

<http://wcl.american.edu/pijip/go/acta07012010> [hereinafter July leaked text].

¹¹ The term 'multiparty' will be used here to refer to both plurilateral (small group) and multilateral (international or large group) negotiations; 'plurilateral' and 'multilateral' will be used where the more specific meaning is intended.

A matter of particular concern to commentators and non-government organisations interested in IP issues has been the inclusion of increasingly detailed IP chapters, enforcing IP standards well beyond those required by TRIPS, in numerous bilateral and regional trade agreements since the turn of the twenty-first century.¹² Among them, the U.S. free trade agreements have been the most exhaustive—extending to thirty-plus pages of detailed provisions modelled closely on U.S. law;¹³ in more recent times it seems that the EU has shifted to a similar approach.¹⁴ Some commentators have argued that the detailed IP provisions in these agreements represent only the first stage of a conscious strategy on the part of right holder groups, the U.S. government, or perhaps both that has, as a longer-term goal, the eventual incorporation of those same higher intellectual property standards in multilateral treaties that will bind third-party countries as part of a ‘global IP ratchet.’¹⁵ As one commentator has put it, “if enough FTAs are

¹² United States-Singapore Free Trade Agreement (signed May 6, 2003; in force January 1, 2004); U.S.-Chile Free Trade Agreement (signed June 6, 2003; in force January 1, 2004); U.S.-Morocco Free Trade Agreement (signed June 15, 2004; in force January 1, 2006); U.S.-CAFTA (signed May 28, 2004; in force March 1, 2006 (El Salvador), April 1, 2006 (Honduras and Nicaragua), July 1, 2006 (Guatemala), March 1, 2007 (Dominican Republic) and January 1, 2009 (Costa Rica); U.S.-Bahrain Free Trade Agreement (signed September 14, 2004; in force August 1, 2006); U.S.-Oman Agreement (signed January 19, 2006; in force January 1, 2009); U.S.-Peru Free Trade Agreement (signed April 12, 2006; in force February 1, 2009); U.S.-Colombia Free Trade Agreement (signed February 27, 2006, amendments agreed June 28, 2007); U.S.-Panama Free Trade Agreement (signed June 28, 2007); U.S.-Republic of South Korea Free Trade Agreement (signed June 30, 2007).

¹³ See Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL’Y 259, 319.

¹⁴ See Strategy for the Enforcement of Intellectual Property Rights in Third Countries, 2005 O.J. (C 129) (noting that in the European Commission’s strategy, there were a number of actions apparently modeled on U.S. practices, including an indication of the intention to ‘revisit the approach to the IPR chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses’ using EU Directives as ‘an important source of inspiration and a useful benchmark.’); see also European Union-Republic of South Korea Free Trade Agreement (signed Oct. 15, 2009) [hereafter ‘EU-Korea Agreement’] (describing the first completed bilateral free trade agreement of the new generation, which includes a chapter with extensive obligations on geographical indications and enforcement).

¹⁵ See Peter Drahos, *The Global Ratchet for Intellectual Property Rights: Why it Fails as Policy and What Should be Done About It* (The Open Soc’y Inst., 2003), PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM* (2003), Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 215 (Lorand Bartels & Federico Ortino eds., 2006), Ruth Mayne, *Regionalism, Bilateralism, and “TRIP [sic] Plus” Agreements: The Threat to Developing Countries*, (UNDP Human Dev. Report, Office Occasional Paper, 2005), Peter Drahos, *BITs and BIPs – Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791 (2001); but see Jagdish Bhagwati, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* (2008), Ruth Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U.

negotiated containing [multilateral-plus] provisions, these provisions will essentially become the new minimum standard from which any future WTO trade round will proceed.”¹⁶ As evidence of the ratcheting process, commentators point to the use of bilateral mechanisms to break down resistance, particularly amongst developing countries, to the negotiation of the TRIPS agreement.¹⁷

Certain aspects of the international IP regime create a legal framework conducive to such a strategy. The first is the way in which key multilateral IP agreements of adopt ‘minimum standards’: contracting parties agree to enact standards embodied in the agreement, but they also agree that they can enact additional, more extensive IP protection if they so choose: but *not* lower levels of protection.¹⁸ The second feature, national treatment, refers to provisions requiring that a contracting party accord to foreign authors or other right holders (from other contracting parties) the same protection that it accords to its own authors or right holders.¹⁹ TRIPS contains an even stronger principle in the form of a most favoured nation (MFN) clause which requires that ‘any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other

OTTAWA L. & TECH. J. 125 (2003), Sell, *supra* note 5, Peter K. Yu, *Currents and Cross-Currents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 395 (2004).

¹⁶ Mercurio, *supra* note 15, at 223.

¹⁷ See DRAHOS & BRAITHWAITE, *supra* note 15, Ch.6 (noting that although the TRIPS MFN obligation did not strengthen the effect of pre-TRIPS bilateral agreements, a similar, but much weaker effect would have been in place at least for those countries party to the Berne or Paris Conventions, both of which require a country to offer the same treatment to nationals of other contracting parties as they do to their own nationals in the areas of IP covered by those conventions including copyright, patent, designs, trade mark and unfair competition).

¹⁸ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 1(1), 33 I.L.M. 81 (1994) [hereinafter TRIPS]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, art. 22, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]; Berne Convention for the Protection of Literary and Artistic Property, art. 20, Sept. 9, 1886, revised July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention], Paris Convention for the Protection of Industrial Property, art. 19, March 20, 1888, as revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, T.I.A.S. No. 6903, 828 U.N.T.S. 305 [hereinafter Paris Convention], Annette Kur & Henning Grosse Ruse-Khan, *Enough is enough: the notion of binding ceilings in international intellectual property protection* 9 (Max Planck Inst. for Intellectual Prop., Competition and Tax Law Research Paper Series No. 09-01, 2009); see also EU-Korea Agreement, *supra* note 14, arts. 10(5), 10(16), 10(33), 10(39), United States-Australia Free Trade Agreement, arts. 17(1)(2)-17(1)(5), (signed May 18, 2004; in force January 1, 2005) (hereafter AUSFTA), Singapore-Australia Free Trade Agreement, art. 2, (signed February 17, 2003; in force July 28, 2003).

¹⁹ See TRIPS, *supra* note 18, art. 3, Berne Convention, *supra* note 18, art. 5(1), Paris Convention, *supra* note 18, art. 2.

Members.²⁰ Thus, where A, B and C are party to TRIPS, and A and B agree to extend protection in copyright or patent, then authors or inventors from C will receive the benefits.²¹ Assuming that A is an IP-importing nation which sees higher IP standards as imposing net costs,²² the combination of minimum standards plus national treatment or MFN increases the cost to A of raising IP standards through a bilateral agreement with B, but, perhaps more importantly, *reduces* the cost of later agreeing to the same standards in a multilateral agreement.²³ Thus the inclusion of higher standards in bilaterals ought to increase the chance of those provisions securing broader acceptance in a multilateral agreement.

Sometimes the story of this global IP ratchet is presented as if to suggest we can expect a future of repeating cycles of bilateral negotiations, followed periodically by consolidation of the bilateral standards at a multilateral level,²⁴ followed by new domestic standards, then bilateral standards . . .

²⁰ See discussion in SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND, 301-305 [6.80] – [6.82] (2006) (discussing this long-established principle in IP Treaties, as evident from the Berne and Paris Conventions); *but cf.* The General Agreement on Tariffs and Trade, arts. 1, 24(5), 24(8), (opened for signature Oct. 30, 1947), 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT] (noting that it is unusual under the GATT to require advantages offered in an FTA to be generalized since the WTO champions the ‘most favoured nation.’ Although there is an exception when it comes to obligations undertaken in a customs union or free trade area, this exception does not have effect in relation to IP, because Article 4 in TRIPS establishes a stricter most favoured nation principle, or requirement of national treatment, for intellectual property rights).

²¹ See TRIPS, *supra* note 18, art. 4. (describing the following situation: imagine that Countries A, B and C are all party to the Berne Convention. In theory, A could agree with B to provide B’s citizens with certain additional minimum standards, but such an agreement might not require that A’s citizens receive the same standard of protection. In this case, Country C could only demand national treatment: what A provides A’s citizens, less than what A provides B’s citizens. Most Favoured Nation treatment, on the other hand, would require that C’s citizens receive the same treatment as B’s citizens. Thus MFN is stronger than national treatment plus minimum standards).

²² See generally KEITH MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY (2000), J. Revesz, *Trade-Related Aspects of Intellectual Property Rights* (Austl. Productivity Comm’n, Staff Research Paper, 1999), available at <http://www.pc.gov.au/research/staffres/trips/trips.pdf> (conducting an analysis of Australia’s IP ‘interests’ and concluding that ‘in most cases gains would be maximized).

²³ See *Bilateral and Regional Trade Agreements* 13.14-13.15, (Austl. Productivity Comm’n, Draft Research Report, 2010).

²⁴ See Ruth Okediji, *TRIPs Dispute Settlement and the Sources of (International) Copyright Law* 49 J. COPYRIGHT SOC’Y U.S. 585, 602–04 (2001) (noting that formal multilateralisation is not the only mechanism by which the influence of FTA provisions could influence the obligations of third parties as bilateral agreements may also affect third countries’ international obligations by ‘form[ing] the context for the interpretation of treaties’ such as the WIPO Internet Treaties or TRIPS. The argument is based on Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 which states that ‘‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’’ shall be taken into account.); *see also* Ruth Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest*

and so on. The potential consequences are serious. As Kur and Ruse-Khan state, for example, ‘once a substantial portion of trading partners have agreed to observe the same standards as those enshrined in present U.S./EU legislation, *there is no way back* to a meaningful lessening of what appear as widely accepted rules... creating a *spiral endlessly moving upwards*.’²⁵

The negotiation of the ACTA is an interesting case study to test this assumption of inevitable one-way ‘ratcheting up’ of IP obligations and the role of bilateral in facilitating this process. If the U.S. and EU FTAs are indeed ‘stepping stones’ to multilateralisation, it is appropriate to ask how that ‘project’ is going at an intermediate (plurilateral) setting. Clearly, the goal of the ACTA is to strengthen the provisions on enforcement beyond those presently found in the TRIPS Agreement; as numerous commentators have noted, the various texts of ACTA clearly demonstrate an intention to elaborate on TRIPS standards and remove flexibilities. ‘TRIPS-plus’ aspects of the ACTA include proposals to prescribe factors a court must consider in calculating damages;²⁶ a proposal to require statutory or additional damages or at least presumptions for calculating damages;²⁷ extensive powers to require infringers to provide information;²⁸ and extensions to the powers of customs officials at the border.²⁹ The ACTA text also proposes the removal of certain flexibilities found in TRIPS: for example, Article 44.2 which allows a country to make injunctions

Considerations for Developing Countries 4 (ICTSD ISSUE PAPER NO. 15, 2006) (referring to a ‘common law’ established by treaties. These kinds of influence however could only operate at a high level of generality, and would require more than a series of FTAs involving one dominant country. So, *e.g.*, U.S. bilateral agreements might be *part* of a case for interpreting the WIPO Internet Treaties as requiring both a prohibition on circumvention of technological protection measures *and* a prohibition on the circulation of circumvention devices. However, the U.S.’ FTAs alone would not be *sufficient*: an international tribunal would seek evidence that other countries supported that view).

²⁵ Annette Kur & Henning Grosse Ruse-Khan, *supra* note 18 at 13-14.

²⁶ *Cf.* TRIPS, *supra* note 18, art. 45 (noting that unlike TRIPS art. 45 which specifies no factors at all, factors specified in the April Public Text are ‘any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price, or [the profits of the infringer that are attributable to the infringement]’).

²⁷ *See generally* TRIPS, *supra* note 18, art. 45.2 (describing the measures that are allowed but not required under TRIPS).

²⁸ *Cf.* TRIPS, *supra* note 18, art. 47 (stating that only Members *may* provide that their judicial authorities can require an infringer to reveal ‘the identity of third persons involved in the production and distribution of the infringing goods and of their channels of distribution.’ The ACTA April Public Draft makes this mandatory and elaborates on the kinds of information that may be required).

²⁹ *See* Kimberlee G. Weatherall, ACTA - AUSTRALIAN SECTION BY SECTION ANALYSIS (2010), available at <http://works.bepress.com/kimweatherall/21> (analyzing the April text); *see also* PIJIP, *supra* note 6.

unavailable, so long as adequate remuneration is provided for.³⁰ In this most basic sense, as a TRIPS-plus agreement, ACTA is consistent with the pattern of ever-increasing standards and hence a part of the general global IP one-way ratchet.

The more interesting story, however, is how ACTA relates to the various bilateral agreements of the last decade. At first glance it looks like the evidence backs the theory. Several of the countries participating in the ACTA negotiations are party to a U.S. FTA (Singapore, Morocco, and Australia, with Korea also a signatory to an FTA pending before the U.S. Congress³¹) or an EU agreement (Korea).³² What is more, it seems clear that the negotiating position of these FTA-bound countries on controversial issues within the ACTA have been influenced by their FTAs.

Australia is one example. Australia's FTA with the U.S. required a range of changes to Australian IP law.³³ Importantly, prior to her FTA with the U.S.,³⁴ Australia's IP enforcement laws differed the draft provisions of ACTA on key issues. For example, two of the most controversial areas in the ACTA to date have been the digital chapter and the criminal provisions. On the former, Australia's pre-FTA copyright law embodied its own 'Australian-grown' implementation of the WIPO Copyright Treaty. It did not prohibit the act of circumventing a technological protection measure,³⁵ on the basis that the real harm to copyright owners occurred through the creation of a market for circumvention devices and services, and that a ban on circumvention could not be effectively enforced and intruded too significantly into the private sphere.³⁶ It included no safe harbours for

³⁰ See generally *Comments on ACTA Provisions on Injunctions and Damages* (Knowledge Ecology Int'l, Research Note 2010:1), available at <http://keionline.org/node/826>.

³¹ Jordan, which has an (earlier model) FTA with the U.S., and the United Arab Emirates, which has held some FTA negotiations with the U.S., were also part of the first round of negotiations but did not continue their involvement. *EU ACTA Negotiator Confirms EU Wants Patent Provisions in ACTA*, INSIDE U.S. TRADE, May 8, 2009, at 11. Mexico too is a party to the North American Free Trade Agreement (NAFTA), which includes some higher standards than are found in TRIPS. However, most of the key concerns in ACTA are not reflected in the NAFTA text which predates, for example, the WIPO Internet Treaties.

³² It may be cynical, but nevertheless accurate to note that drafts of the ACTA to date have provided that five instruments of ratification will be sufficient to bring the Agreement into force: April Public Draft Article 6.2.

³³ See Robert Burrell & Kimberlee Weatherall, *supra* note 13.

³⁴ AUSFTA, *supra* note 18.

³⁵ Australia's *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

³⁶ Joint Submission from the Attorney-General's Department and the Department of Communications, Information Technology and the Arts to the HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE *COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999*, available at <http://www.aph.gov.au/house/committee/laca/digitalagenda/Sub75.pdf>, at paragraphs

online service providers, leaving it to the courts to develop the law of secondary liability as it related to online intermediaries, and, while it is fair to say that Australia would, even without the FTA, have considered introducing some kind of safe harbours or at least a code of conduct for online service providers, there is reason to doubt they would have matched either the U.S. or EU provisions.³⁷ On criminal provisions, too, Australia's law was narrower than initial U.S. proposals for ACTA. Pre-FTA Australia applied criminal penalties where infringement was related to trade or commerce, and in non-commercial cases only where it could be shown that the *distribution* of copies had a substantial prejudicial impact on the copyright owner. Post-FTA, Australia also applies criminal law to non-commercial *acts of copying* that have such an impact: thus extending the criminal law to prolific downloaders, for example, as well as people uploading (and hence distributing).³⁸

It seems unlikely that Australia would have simply accepted significant changes to its copyright law via the ACTA.³⁹ Post-FTA, however, Australia has both political and legal reasons to discount the ACTA's domestic importance, and reduced incentives to spend effort or political capital opposing even provisions that had previously been contrary to domestic policy. From a political perspective, the Australian government can portray the ACTA as requiring no changes to Australian law, and hence as bringing only benefits (in the form of better protection for Australian

[3.45]-[3.48]; see also RICKETSON & GINSBURG, *supra* note 20, at 978, para. 15.20, M. FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET*, 549-50, para. C11.12. (Oxford University Press, 2002), J. REINBOHE & S. VON LEWINSKI, *THE WIPO COPYRIGHT TREATIES 1996*, 145 [23] (2002).

³⁷ Phillips Fox, *Copyright Amendment (Digital Agenda) Act 2000*, DIGITAL AGENDA REVIEW REPORT AND RECOMMENDATIONS 6-7 (2004) (noting that a review by Australia found that 'there [was] real uncertainty as to what steps Service Providers need to take in order to protect themselves from liability for authorisation of copyright infringement.' To reduce that uncertainty it recommended a notice and take down procedure balancing the interests of owners and users. The Report (at pp. 84-87) made detailed recommendations which would not have matched either the U.S. or EU systems).

³⁸ *Copyright Act 1968* (Cth) s.132AC (new in 2006). Despite the obscure wording of this provision (influenced by rather eccentric Australian criminal law drafting conventions), it creates liability for individuals who engage in infringement 'on a commercial scale' that has a 'substantial prejudicial impact on the copyright owner' and hence complies with Australia's obligation to introduce liability for 'significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain' (AUSFTA Article 17.11.26).

³⁹ This assertion receives some support from the fact that a reference to 'additional damages' has appeared in the ACTA text as an alternative to statutory damages (see, for example, Article 2.2.2(c) in the April Public Text). Although no particular country's name is attached to the amendment, even in the leaked July text, this provision likely reflects a resolve on the part of Australia to protect her own system of additional damages—as she did in negotiating the Australia-U.S. Free Trade Agreement (see Article 17.11.7(b)).

right holders overseas) and little or no costs (in the sense that it does not even make the usual losers from extended IP rights—Australian users—any worse off).⁴⁰ This may have deprived some negotiating parties of a potential ally. Pre-FTA, discussions of the criminal provisions would likely have seen common ground between Australia and the EU, with both taking the view that in general criminalisation of end-users is a bad idea.⁴¹ On its position on anti-circumvention, Australia would have had common interests with New Zealand, which today, like Australia pre-2004, has no prohibition on the act of circumvention.⁴² Australia's story thus provides some evidence for the success of a 'ratchet' strategy: AU.S.FTA removed potential opposition and made Australia a country which could sign up to high enforcement standards in the ACTA.

I hasten to note that this assessment of the political calculus facing Australia in the ACTA negotiations is, I think, realistic as a reflection of the way Australian negotiators must have been thinking. This does not mean, however, that I believe it is an accurate representation of Australia's *actual* interests. First, this reasoning only holds so long as, and to the extent that, ACTA is consistent with post-FTA Australian law. It is by no means clear that this will be the case: drafts of ACTA to date have been not just TRIPS-plus, but AU.S.FTA-plus.⁴³ ACTA is not just TRIPS-plus, for Australia, drafts to date have also been AU.S.FTA-plus.⁴⁴ This, however, is something that can only be ascertained after the text is finalised, and, to be

⁴⁰ Indeed, the cynically-minded might even argue that Australia will *benefit* from other countries signing up to the stringent IP laws to which it is subject as a result of its bilateral agreement with the United States—and not just because more harmonised laws worldwide reduce transaction costs for Australian right holders. Stringent IP laws have the potential to impose costs on users—both public and private sector—in Australia. To take just one example, copyright law imposes a not-insignificant cost each year on Australian educational institutions. If similar costs are not being borne in other jurisdictions then Australian user groups are at some disadvantage. From this perspective, it is advantageous for an already-bound Australia to encourage other countries to bind themselves to similarly stringent standards

⁴¹ See Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms* 31 (3) MELB. U. L. REV. 967, 984 (2007) (explaining that amendments Australia made to its criminal copyright laws in 2006 were drafted with the explicit goal of not extending liability to end-users in most cases after Parliamentarians expressed concerns about 'criminalising kids'); see also SUPPLEMENTARY EXPLANATORY MEMORANDUM, COPYRIGHT AMENDMENT BILL 2006 (Aust.) and FURTHER SUPPLEMENTARY EXPLANATORY MEMORANDUM, COPYRIGHT AMENDMENT BILL 2006 (Aust.).

⁴² See *Copyright Act 1994* (NZ) ss.226A, 226E(1).

⁴³ See Weatherall, *supra* note 29 (undertaking an exhaustive analysis of the publicly released April 2010 text of the ACTA to consider its impact on Australian law if adopted. Although based on superseded text, that analysis identified a number changes that might be required).

⁴⁴ See *id.* at 1-2 (listing provisions in the April Public Draft that would require

fair, DFAT in Australia has consistently stated that taking part in the negotiations will not oblige Australia to sign a completed treaty: if the differences are significant the attitude of the negotiators and their advice to government could change.

More importantly, the calculus outlined above fails to take into account certain broader political considerations that ought to be important. While the FTA has reduced the immediately *apparent* costs of adopting stringent provisions in a concluded ACTA, there are strong arguments that even an ACTA entirely consistent with post-FTA law is not in any IP-importing FTA country's interests, for four broad reasons. First, on the domestic front, such a country will receive little benefit, and may endure further costs, from the further consolidation of stringent IP standards.⁴⁵ Although a U.S. FTA reduces a country's policy flexibility, the only party who can complain about non-compliance is the U.S., which is itself something of a scofflaw when it comes to its international obligations in IP.⁴⁶ Further consolidation of such standards at a plurilateral level would only decrease flexibility and increase the number of trade partners who may complain of failure to meet standards.⁴⁷ Second, from a pragmatic perspective, a

changes to Australian law).

⁴⁵ See generally *supra* note 22 (describing the argument which rests on a view that as an IP-importing country, strengthening IP law beyond the level established in multilateral agreements has more costs than benefits to the national economy).

⁴⁶ Cf. Berne Convention, *supra* note 18, arts. 6*bis*, 5(2), 7(1) (noting that the U.S. continues to refuse to provide proper moral rights protection for authors (art. 6*bis*), maintains financial penalties for foreign copyright owners who fail to register works before bringing an enforcement action, despite Berne's prohibition on formalities (art. 5(2)), and the U.S. method of calculating copyright term in 'works for hire' is contrary Art. 7(1) of the Berne Convention); it is not clear whether the U.S. complies with its obligations to protect all temporary reproductions, as required under (for example) AUSFTA, above note 18, Article 17.4.1, given recent case law such as *Cartoon Network LP, LLLP v CSC Holdings, Inc* 536 F.3d 121, 127 (2d Cir. 2008). The U.S. Copyright Office has asserted that the reproduction right covers 'all reproductions from which economic value can be derived': U.S. Copyright Office, DMCA SECTION 104 REPORT (Aug. 2001) at 111. Cf. AUSFTA, Art. 17.4.1, which contains no limitation on the basis of economic value or significance. Finally, there is America's continued failure to comply with the ruling in the s.110(5) decision. That case, which went in part against the United States, concerned whether certain newly introduced exceptions to the performance right in musical works under U.S. law were compatible with the TRIPS Agreement. See WT/DS160/R (June 15, 2000) and note the subsequent arbitration proceedings: WT/DS/160/12 (January 15, 2001).

⁴⁷ Admittedly ACTA will not, it appears, contain any mechanism for enforcement of its obligations. Cf. the AUSFTA which allows for formal dispute resolution and retaliation for failure to comply (Ch.21). Early texts had references to the Committee of ACTA having 'dispute resolution' powers which disappeared from the July 2010 leaked text. However, non-compliance is not necessarily costless: (a) ACTA could be included in future agreements that do have enforcement mechanisms, such as future FTAs, and (b) in diplomatic contexts, particularly when negotiating new agreements of any type, compliance with existing obligations could be important in engendering the necessary trust or convincing another country to enter or complete negotiations.

country for whom stronger IP standards are not a local policy priority is surely better off making any agreement to raise standards conditional on receipt of benefits in areas of direct economic interest: for example, access for agricultural goods, or, perhaps, aid that is not tied to IP-related technical assistance. When Australia signed the FTA with the U.S. it knew that higher IP standards represented a net cost, but it could balance those costs against other perceived benefits, such as greater access to visas for professionals. It is also arguable, on the international front, that the ACTA is not in the interests of a country's nationals trading overseas: Australians and Australian companies will not always be the complainants in IP proceedings overseas, and the border measures regime set out in the ACTA drafts could easily be used by local competitors to delay Australian imports or extract commercial-in-confidence information.⁴⁸ Insofar as the ACTA provisions increase the power of administrative authorities, police, prosecutors, and judges, it behoves us to consider the potential dangers: not least, that official corruption is endemic in many countries. Two ACTA negotiating countries, Mexico and Morocco, for example, lie equal 89th on Transparency International's Corruption Perceptions Index ('TICPI') for 2009 (out of 180).⁴⁹ Further, to the extent that the negotiating parties intend to seek expansion of the membership of ACTA, this issue will be of more importance. Australia for example has mentioned a desire that ACTA be attractive to 'countries in our region.'⁵⁰ Regardless of how realistic that desire is, it is worth noting that Indonesia and the Solomon Islands lie equal 111th on the TICPI. Papua New Guinea lies equal 154th and Timor-Leste equal 146th. Vietnam sits at equal 120th. And so on.

Finally, there is a cost, albeit an inchoate one, to a country like Australia in appearing to act as a 'Deputy Sheriff', promoting costly IP standards for which the benefit flows to other countries. The Australian Productivity Commission recently addressed the question whether Australia should include IP enforcement provisions in its bilateral trade agreements, in an argument that has force as it relates to the ACTA agreement:

'most of the benefits to IP rights holders from measures to promote adherence to existing rules in partner countries [*i.e.* IP enforcement

⁴⁸ I am imagining here a competitor paying a bribe to a customs official to seize goods, and demand information, on the basis that goods are allegedly 'infringing', which they may or may not be. Any system that grants significant powers to officials such as customs officials holds some risk where corruption is a problem.

⁴⁹ *Corruption Perceptions Index 2009*, TRANSPARENCY INTERNATIONAL, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2009.

⁵⁰ *The Australian approach to the ACTA*, AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, available at <http://www.dfat.gov.au/trade/acta/index.html>.

provisions] can be expected to accrue to third parties, such as rights holders in the United States. Again, the question would arise as to whether Australia should ‘carry the water’ for others, when doing so would diminish the bargaining coin available to negotiate for other reforms by the partner country of potentially more benefit to both it and Australia.⁵¹

While the Productivity Commission is here talking about ‘bargaining coin’ in the context of bilateral negotiations (IP provisions in return for agricultural market access, for example), it is arguable that Australia also spends ‘diplomatic reputational coin’⁵² by being part of an agreement explicitly seen as a threat by two of Australia’s top ten trading partners, India and China, at a time when Australia is actively seeking to conclude a free trade agreement with both of them.⁵³

All these costs – the need to make further amendments to IP law; the cost of increased constraints on domestic policy-making, the potential for harm to nationals trading overseas and reputational harm ought to be weighed by a rational negotiator against any potential benefits to a country of having standards raised in other ACTA partners. It is hard to see the benefits being large enough to overcome the potential costs.

Thus far I have discussed what ATCA tells us about the use of bilaterals as a stepping stone to broader agreement. But ACTA itself could also be seen as a stepping stone to broader agreement. Thus the ratchet argument could be used as an explanation (or, from a right holder’s perspective, a justification) for the existence of ACTA and the form in which the negotiations have proceeded. As noted at the outset, the whole form of the ACTA negotiations, in purporting to address global counterfeiting but involving none of the major sources of counterfeit goods—is weird.⁵⁴ But it

⁵¹ *Bilateral and Regional Trade Agreements* 13.16 (Austl. Productivity Comm’n, Draft Research Report, 2010).

⁵² *See id.* at 7.14-7.18.

⁵³ *See generally Australian trade policy and news*, AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, available at <http://www.dfat.gov.au/trade/index.html> (noting that in 2008, China was Australia’s second most significant trading partner (13.2% of two way trade) and India was eighth (3.4% of two way trade). Both are potential FTA partners: Australia has had a number of rounds of negotiation with China and in May 2010 Australia and India completed a Joint Feasibility Study into a possible Australia-India FTA. Both India and China made statements criticising the ACTA initiative in the July 2010 meeting of the TRIPS Council).

⁵⁴ *Cf.* WORLD CUSTOMS ORGANIZATION, CUSTOMS AND IPR REPORT 2008, at 9 (noting that out of the top 10 countries of departure of counterfeit goods reported by the World Customs Organization in 2008, only one—the United States itself—is part of ACTA. The top 10 (top 9, in fact, because sometimes the departure country is unknown) were in descending order; China, Unknown, Hong Kong (China), India, Thailand, Turkey, United Arab Emirates, U.S., Poland and Hungary).

makes sense if you build in a presumption that agreements between ‘like-minded’ (can-do?⁵⁵) countries can be stepping stone to broader multilateral agreements that *will* bind source countries. There is explicit evidence for this evangelising goal in the statements of negotiators, who have cited a goal of establishing ‘a new standard of intellectual property (IP) enforcement’, or ‘enforcement best practice.’⁵⁶ At the time of writing, Australia’s Department of Foreign Affairs and Trade asserts on its website that ‘Australia regards the extent to which the ACTA can attract support from countries in our region as one important issue in determining the value of the ACTA for Australia.’⁵⁷ The publicly released negotiating text of the ACTA includes provisions to enable a broader membership, including developing countries, with accession processes and provisions to allow for technical assistance and capacity-building for developing country members seeking to join.⁵⁸ I will turn to whether this is a realistic goal shortly.

But in sum, we have evidence, through the ACTA process, that the IP ratchet is working. It would appear that the AU.S.FTA bilateral agreement has been a ‘stepping stone’ in that it removed Australia as a potential opponent to certain provisions. Moreover the ‘ratchet strategy’ is an explicit motivator of the ACTA itself, with the negotiators openly canvassing the possibility of establishing international standards of broader application. And while I have argued that the ACTA if concluded would have costs for Australia and other U.S. FTA signatory countries that outweigh any conceivable benefits, this perspective does not appear to have influenced at least the Australian negotiators to date.

B. The Rise Isn’t Inexorable: How ACTA Steps Back from the Strongest Standards

Despite this positive evidence for the IP ratchet, a closer examination of the ACTA negotiations to date also exposes the weakness of the strategy. ACTA demonstrates that the provisions in the bilateral FTAs are simply not

⁵⁵ Robert B. Zoellick, *America Will Not Wait for the Won’t-do Countries*, FINANCIAL TIMES (LONDON), Sept. 22, 2003, at 23 (noting that the United States would separate the ‘can do’ countries from the ‘won’t do,’ and would move towards free trade with [only] can-do countries).

⁵⁶ *Objectives of the ACTA*, AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, available at <http://www.dfat.gov.au/trade/acta/index-old.html>; see also U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 4 (2008), available at http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (noting that “ACTA is envisioned as a leadership effort among countries that will raise the international standard for IPR enforcement”).

⁵⁷ *The Australian approach to the ACTA*, *supra* note 50.

⁵⁸ See April public text, *supra* note 10, art. 3.3.

‘multilateralisable,’ and have had to be watered down in the context of plurilateral negotiations: a fact that was always apparent in theory but for which has only now become demonstrable in fact.⁵⁹ In ACTA, the standards are, of necessity, going backwards, not forwards.

The most striking examples may be found in the development of the ‘digital enforcement chapter.’ At least in early drafts, this part of the ACTA addresses secondary liability, safe harbours for online service providers, anti-circumvention provisions and the protection of rights management information. Based on an analysis of both early leaked texts and the ‘official’ public text released in April 2010, the initial proposal for the ‘digital chapter,’ drafted by the U.S., embodied many provisions similar to the U.S. FTAs, including strong anti-circumvention provisions based on the U.S. DMCA and online service provider safe harbours containing conditions based on those found in 17 U.S.C. §512. This looks like a concerted effort by the U.S. to ‘multilateralise’ its FTA provisions. The EU, however, has its own rules, which differs in significant ways from the DMCA, embodied in two directives. The first is the *Information Society Directive*,⁶⁰ a hard fought compromise among the members of the European Union that took five years to negotiate and a considerable time to implement.⁶¹ The second is the *E-Commerce Directive*, which provides horizontal protections for online service providers analogous to the U.S.’ ‘safe harbours,’ itself controversial and presently overdue for review.⁶² Leaked documents appearing to be internal European Union documents from 2009⁶³ commenting on the U.S. proposals suggest that the major concern of the EU was how the U.S.-oriented proposals fit with the EU

⁵⁹ See Burrell & Weatherall, *supra* note 13.

⁶⁰ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, O.J. L 167, 22/06/2001 P. 0010 – 0019.

⁶¹ See Martin Kretschmer, *Digital Copyright: The End of an Era*, 2003 EUROPEAN INTELLECTUAL PROP. REV. 333 (noting that few countries have implemented within the original deadline).

⁶² *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* OJ L 178, 17/7/2000, 1–16 (explaining that ‘horizontal’ protection means that online service providers are protected from liability, not just in copyright, but across other areas of law such as trade mark, or defamation or others).

⁶³ There have been several leaks of documents which appear to be internal European Union documents concerning the ACTA negotiations from 2009. While obviously none have been officially confirmed, the contents of the documents are not inconsistent with the ‘official’ negotiating text publicly released in April 2010. The documents include a document titled ‘ACTA Negotiations’ and dated 30 September 2009 (Ref. 588/09) (Memo 1), and a further document, dated 29 October 2009 and titled ‘European Union Comments to the U.S. Proposal Special Requirements Related to the Enforcement of Intellectual Property Rights in the Digital Environment. Copies of these documents are on file with the

acquis communautaire represented by these directives. These internal documents are entirely free of commentary on the position taken by other countries—underlining their irrelevance to the EU’s internal calculus.

Over the course of the negotiations we have seen an accommodation of EU positions in the text and the watering-down of the U.S.’s proposal: a process which Geist has described as a ‘gradual caving’ by the U.S..⁶⁴ Consider, for example, the anti-circumvention provisions. Here even the initial draft produced by the U.S. did not incorporate a full set of provisions from the U.S. FTA model. Most notably, unlike the FTAs, none of the available draft ACTA texts have sought to impose a closed list of exceptions.⁶⁵ This alone makes the ACTA text much less prescriptive than either the U.S.’s FTAs,⁶⁶ or EU and U.S. laws, all of which place stringent—but very different—limits on allowable exceptions.⁶⁷ Neither the U.S., nor the EU, for example, has a general exception to allow circumvention for the purposes of fair use or equivalents. The draft ACTA, however, would allow such an exception.⁶⁸

author.

⁶⁴ Michael Geist, *U.S. Caves on Anti-Circumvention Rules in ACTA*, MICHAEL GEIST BLOG (July 19, 2010), available at <http://www.michaelgeist.ca/content/view/5210/125/> (explaining that ‘While the U.S. initially proposed an aggressive draft chapter it hoped would export U.S. law to all ACTA partners, it has now caved on many key issues with the European language carrying the day’).

⁶⁵ See generally January leaked text, *supra* note 10 (nothing that the U.S. proposed text provided that parties could ‘adopt exceptions and limitations ... so long as they do not significantly impair the adequacy of legal protection...’).

⁶⁶ The closed list of exceptions, particularly the very narrow list of exceptions for provision of circumvention devices, was one of the most criticised aspects of the IP Chapter of the AUSFTA. A report by a Parliamentary Committee referred to this as a ‘lamentable and inexcusable flaw ... that verges on absurdity’: HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, REVIEW OF TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS (February 2006), at 87 para. [3.118].

⁶⁷ The U.S. has two lists of exceptions: a longer list to exempt activities circumventing TPMs, and a very short list to exempt the manufacturing or distribution of circumvention devices or provision of circumvention services. This approach has been exported in the U.S. FTAs: see eg AUSFTA, above n18, Article 17.4.7. The EU approach is quite different: Article 6.4 of the *Information Society Directive* (above n60) requires that ‘Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law’ where that exception is one of a confined list (which includes such acts as copying by libraries, educational institutions, galleries and archives, or copying/communication in the form of illustration for the purposes of teaching or research, or for the reporting of news or the assistance of persons with a disability). Interestingly, the EU has apparently decided to ‘export’ its basic anti-circumvention obligations in its ‘new generation’ FTAs such as the EU-Korea Agreement (above n14) but does not seek to export its exceptions: Article 10.12.

⁶⁸ Some stakeholders might argue that such an exception would be invalid because it would ‘significantly impair the adequacy of legal protection’ for technological protection

Early drafts did, however, incorporate other features of the U.S. DMCA: explicit protection for both access and copy controls; a prohibition on both the act of circumvention (in the case of copy controls) and manufacture, sale or distribution of circumvention devices; and both civil and criminal liability for violations of either prohibition. Even this draft was a step too far. The EU, Japan and New Zealand—countries not already bound by U.S. FTAs—all expressed doubt about the inclusion of access controls and criminal penalties.⁶⁹ The text publicly released in April 2010 clearly demonstrates that these differences continued in the Wellington round of negotiations, with square brackets separating out any reference to access controls or criminal penalties. The leaked text dated July 2010—after the round in Luzern, Switzerland in June-July 2010—shows a further shift away from the U.S.’s preferred model to a form of language that can accommodate a range of anti-circumvention laws. This is best illustrated by putting the U.S.’ proposed text from January 2010 beside the text the U.S. was proposing by July 2010. Key differences are underlined:

Table 1: U.S. proposals on anti-circumvention provisions: January v July 2010

January 2010	July 2010
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measures (see above n65). This would be difficult to prove in the short to medium term.

⁶⁹ Three other negotiating countries who appear to be relatively silent at least on early drafts are not party to a U.S. FTA following the recent model: Canada, Mexico and Switzerland. Leaked drafts do not record any interventions/amendments proposed by Mexico, which has, for some years, had a number of proposed amendments to its limited anti-circumvention provisions and fairly constant pressure from right holders group: see, for example, International Intellectual Property Alliance’s Submission relating to the 2010 Special 301 Report on Copyright Protection and Enforcement (Mexico), available at <http://www.iipa.com/rbc/2010/2010SPEC301MEXICO.pdf> (copy on file with author). Switzerland had a number of limited comments. However it is worth noting that right holder groups’ complaints against anti-circumvention law in Switzerland concern a provision (*Federal Law on Copyright and Neighbouring Rights adopted on 9 October 1992* (Switzerland), Article 39(a)(4)) allowing circumvention ‘for the purposes of a use permitted by law’—including a quite broad exception covering private copying (Article 19): see, for example, the International Intellectual Property Alliance’s Submission relating to the 2010 Special 301 Report on Copyright Protection and Enforcement (Switzerland), available at <http://www.iipa.com/rbc/2010/2010SPEC301SWITZERLAND.pdf> (copy on file with author). Thus Swiss departures from a U.S. or EU model are allowed under the ACTA text’s generous approach to exceptions. On the face of the leaked documents, it appears that Canada has made few comments on the anti-circumvention provisions, which could be explained by simultaneous developments in Bill C-32, presently before the Canadian Parliament, which adopts a relatively stringent set of anti-circumvention provisions closely modelled on U.S. law: see Bill C-32, s.47 (proposed s.41). Again, where the Canadian Bill departs from the U.S./EU models is on exceptions and remissions of penalties, where the ACTA draft would allow much flexibility. However, it should be noted that the anti-circumvention provisions of the Canadian Bill have been the most controversial, which raises the possibility of amendment prior to passage.

<p>In implementing Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty, regarding adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, or producers or phonograms in connection with the exercise of their rights and that restrict <u>unauthorized acts in respect of their works, performances, and phonograms</u>, each Party shall provide for civil remedies, as well as <u>criminal penalties</u>, in appropriate cases of willful conduct, that apply to:</p> <ul style="list-style-type: none"> (a) the unauthorized circumvention of an effective technological measure that <u>controls access</u> to a protected work, performance or phonogram; and (b) the manufacture, importation, or circulation of a technology, service, device, product, component, or part thereof, that is: marketed or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure. 	<p>Each Party shall provide adequate legal protection and effective legal remedies at least against the circumvention of effective technological measures that are used by, <u>or at the direction of</u>, authors, and performers and producers of phonograms in connection with the exercise of their rights and that restrict acts in respect of their works, performances, and phonograms, <u>which are not authorised by the authors, performers or the producers of phonograms concerned or permitted by law</u>.</p> <p>In order to provide such adequate legal protection and effective legal remedies, each Party shall provide <u>protection</u> at least against:</p> <ul style="list-style-type: none"> (a) the unauthorized circumvention of an effective technological measure <u>that restricts acts not authorized by the right holder</u> and is carried out knowingly or with reasonable grounds to know; and (b) the manufacture, importation, or distribution of, or offer to distribute, a device or product, <u>that circumvents an effective technological measure and is either:</u> <ul style="list-style-type: none"> (i) primarily designed or produced for the purpose of circumventing an effective technological measure; or (ii) has only a limited commercially significant purpose other than circumventing an effective technological measure
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The table shows only the U.S. proposals and does not include footnotes, including the (important and disputed) definition of what counts as a technological protection measure: where the U.S. has maintained its proposal to include measures that ‘control access’ to works—an approach challenged by the EU and rejected by New Zealand.⁷⁰

⁷⁰ The relevant provisions would have been inconsistent with New Zealand’s law, which clearly excludes access protection measures: *Copyright Act 1994* (NZ) s.226 (‘does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes’). European law in the *Information Society Directive* does not talk about access protection measures *simpliciter*: instead, it talks about ‘technology, ... that, in the normal course of its operation, is designed to prevent or restrict acts, ... which are not authorised by the right holder of any copyright ... Technological measures shall be deemed “effective” where the use of a protected work or other subject-matter is controlled by the right holders *through application of an access control or protection process, such as encryption, scrambling or other transformation* of the work or other subject-matter or a copy control

But the table does show a number of important differences indicating a shift on the part of the U.S. away from provisions it has insisted on without variation in its FTAs, and towards narrower and weaker language that will accommodate both the U.S. and EU models.⁷¹ The reference to criminal penalties disappeared. The language indicating the overall scope of the laws was reduced, to focus on technical measures that restrict acts not authorised by the right holder *or law*—where the earlier draft refers only to acts authorised by right holders—a difference that could be important in cases such as, for example, technology that seeks to restrict acts not within a copyright owner’s rights, such as on-sale of existing copies or, in some cases, region-coding. The prohibition on circumvention in (a) has similarly changed—from a prohibition on circumventing any access control to a prohibition on circumventing a measure that restricts ‘acts not authorised by the right holder’ (with a footnote to allow the U.S. to retain its approach of allowing circumvention of copy controls⁷²). Part (b) has also changed in a way that requires, where the earlier draft did not, that a measure actually be capable of circumventing a technical measure before liability will arise, and which apparently allows for the circulation of technologies where the primary purpose is not circumvention. Proposals by other countries would soften the language still further. One proposal for example would (only) require adequate legal protection *in appropriate cases*—thus allowing for exclusions of certain technologies, like those found in legislation in Australia and New Zealand.⁷³

mechanism, *which achieves the protection objective.*: *Information Society Directive*, above n60, Article 6.3. Thus it appears to suggest that access measures are protected only where they ‘achieve the protection directive’. IVIR’s study of the implementation of the directive however did note that most countries had accepted that access control technology was covered: Lucie Guibault et al, *STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES’ LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY: FINAL REPORT*, Institute for Information Law, (February 2007).

⁷¹ Notably the shifts have not, at the time of writing, gone far enough to accommodate the existing rules of a smaller country like New Zealand. New Zealand’s copyright law as amended in 2008 prohibits only the distribution/circulation of circumvention devices and the provision of circumvention services (*Copyright Act 1994* (NZ) s.226A): it does not prohibit the act of circumvention and indeed positively states that ‘nothing in this Act prevents any person from using a TPM circumvention device to exercise a permitted act under Part 3’ (part 3 includes New Zealand’s copyright exceptions): s.226E(1). In the July draft New Zealand is recorded as proposing removing the prohibition on circumvention.

⁷² See *Copyright Protection and Management Systems, Circumvention of copyright protection systems* 17 U.S.C. § 1201(1)(a)(A) (1999).

⁷³ In New Zealand, the definition of a technological protection measure is explicitly stated *not* to include mechanism ‘to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes (for example, it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-

Equally striking is the apparent shift in relation the criminal provisions in the ACTA, illustrated in Table 2.

Table 2: U.S. proposals on criminal provisions: January v. July 2010

January 2010	July 2010
<p>Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.</p> <p>Willful copyright or related rights piracy on a commercial scale includes:</p> <ul style="list-style-type: none"> (a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and (b) willful copyright or related rights infringements for purposes of commercial advantage or private financial gain. <p>Fn: For purposes of this Agreement, financial gain includes the receipt or expectation of receipt of anything of value.</p>	<p>Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.</p> <p>Infringements carried out on a commercial scale include at least those carried out in the context of commercial activity for direct or indirect economic or commercial advantage; however each Party may treat acts carried out by end consumers as outside the scope of this Section.</p>

This is an area of some importance to the U.S., which recently failed in an argument that China's thresholds for the imposition of criminal liability for trademark counterfeiting and copyright piracy failed to comply with the TRIPS requirement to impose criminal penalties where such acts occur 'on a commercial scale.'⁷⁴ But it is also an area where the differences between the EU and U.S. are significant. The U.S. has consciously expanded criminal law to cover end-user and non-commercial activities via the *No Electronic Theft (NET) Act* of 1999. This is reflected in the U.S.' initial proposal, which is wide enough to render criminal single infringements perpetrated for the purpose of avoiding paying for a copy of a work. Certainly, on the initial U.S. proposal, file-sharing is treated as effectively 'commercial' (being done in exchange for receiving files)—and hence criminal even without any evidence as to the significance of its impact. On the other hand, criminalization in IP has been a controversial topic in the

infringing copy of a work)': *Copyright Act* 1994 (N.Z.) s.226. In Australia, the definition (found in s.10 of the *Copyright Act* 1968 (Aust.) has rather complicated wording designed to exclude region-coding technology on movies and computer games, and technology that seeks to control the kinds of 'spare parts' that will work in an electronic device, such as the printer in *Lexmark International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

⁷⁴ TRIPS, *supra* note 18, art. 61; see Panel Report, *China - Measures Affecting the*

EU: criminal provisions were dropped from the *IP Enforcement Directive* of 2004,⁷⁵ and a proposal for a second IP enforcement directive ('IPRED2') which would include criminal provisions has been plagued by doubts as to the competence of the EU, and doubts about the substance of the proposal.⁷⁶ It is doubtful therefore that the the EU could ever have accepted the U.S. proposal: the IPRED2 draft only ever referred to infringement 'on a commercial scale.'⁷⁷

These developments, in both the anti-circumvention provisions and the criminal provisions show that the global IP ratchet is not all one way, and the FTAs have not been sufficient to assure that similar standards will prevail in later negotiations. In short, we are not seeing multilateralisation of the FTA standards nor are they the 'starting point' from which standards can only go up. In fact, at all times the standards embodied in the ACTA draft have been considerably weaker than we have seen in the U.S. FTAs or in U.S. or EU internal rules. What minor countries like Australia or Morocco have signed up to is of limited, if any significance once you are negotiating with a more important player. It is clear that from Europe's perspective the key issue is the consistency of the ACTA text with its own internally negotiated *acquis communautaire*. This is not to deny the negative impact of the FTAs on countries that have signed them:⁷⁸ but

Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009).

⁷⁵ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004); published with corrigendum in OJ L 195, 02.6.2004, P. 0016 – 0025.

⁷⁶ See Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, April 26, 2006, COM/2006/0168 final; COD 2005/0127 */ ('IPRED2'); see generally Monika Ermert, *ACTA May Prompt Quick Restart to EU Harmonisation of Criminal Enforcement of IP*, INTELLECTUAL PROPERTY WATCH (Dec. 21, 2009, 7:42 PM) (summarizing past concerns as well as notes as to current developments).

⁷⁷ See IPRED2, *supra* note 76, art. 3 (noticing that there is no definition in the proposal of what would count as infringement on a commercial scale. It does appear that the EU is not entirely prevented from negotiating on questions of criminal provisions), Ermert, *supra* note 76 (explaining that competence is less of an issue following the entry into force of the Lisbon Treaty, and there are some signs that the proposal for a directive will be revived); see also THE STOCKHOLM PROGRAMME – AN OPEN AND SECURE EUROPE SERVING AND PROTECTING CITIZENS, O.J. C 115/1, 4 May 2010 (recalling that in May 2010, the Presidency published the *Stockholm Programme* in which the European Council "calls upon the Council and the European Parliament to consider as soon as possible legislation on criminal measures aimed at ensuring the enforcement of intellectual property rights'. However, such negotiations would be controversial and could be considered 'policy-laundering' – attempting to draft criminal provisions in international treaty in advance of any European *acquis communautaire*).

⁷⁸ Although I would argue that such negative impacts can only be assessed by looking, in detail, at implementation. The impact of the AUSFTA was considerably less than some people argued at the time it was concluded, although there certainly were significant changes: see Burrell & Weatherall, *supra* note 13.

rather, to point out that their pain, if there is pain, is their own,⁷⁹ and cannot be multilateralised.

Some commentators will no doubt note that this is nothing new: in the context of multi-party IP negotiations, ‘North-North’ conflict and accommodation have long been critical in shaping multiparty treaty text. In the lead-up to the TRIPS Agreement, for example, Drahos and Braithwaite have traced the ways that EU-U.S. differences over patents and royalties from audiovisual works impacted on the text.⁸⁰ Indeed, some of the *same* North-North conflicts that operated during the TRIPS negotiations have come back to haunt ACTA—particularly the differences between the EU and U.S. over geographical indications. But there is a key difference in the current context. As a colleague and I have pointed out in previous work,⁸¹ the bilateral agreements that were the ‘stepping stone’ to TRIPS for the most part required countries to sign up to two kinds of provisions: (a) existing multilateral standards (e.g., the Berne Convention) and (b) provisions that were not controversial as between the developed countries forming the ‘inner circle’ negotiating the TRIPS text. In the TRIPS negotiations proper, an inner circle of developed countries then negotiated text that perhaps industry was not happy with, and which were weaker than either EU or U.S. law, but which accommodated most differences between their systems.⁸² At a treaty level there was no real ‘stepping back’ from existing treaty provisions. More recently, however, what we have are blocs of countries establishing higher standards, not just domestically, but in international agreements—and then stepping back to more general provisions in the context of the ACTA negotiations.

But does it matter? It might be said that this misses the forest for the trees: that even if the language of an ACTA ends up more abstract or weaker than U.S. domestic law, the watered down version will still be stronger than existing multilateral treaties—and that ‘two steps forward one step back’ is still a net gain in protection terms. From the perspective of the

⁷⁹ One important qualification must be noted on that statement. It is of course possible that an FTA in one country will have negative impacts on other countries. For example, in the access to medicines context, the more countries which take actions to restrict the manufacture of generic drugs (for example, by extending patent terms or granting extended forms of data protection), the more difficult it will become for other countries to import generic drugs when they need them, although arguably it is unlikely to stop supply as long as there are countries which consider it important to take a stand on refusing to adopt such rules.

⁸⁰ DRAHOS & BRAITHWAITE, *supra* note 15 at 143-146; *see also* DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS*, para. 1.20, 1.29-1.30 (2d ed. 2003).

⁸¹ Burrell and Weatherall, *supra* note 13.

⁸² DRAHOS & BRAITHWAITE, *supra* note 15, at 143-146

IP industries supportive of the strong versions of IP provisions seen in U.S. FTAs, while the ‘ideal world’ might see detailed provisions multilateralised, perhaps a second-best alternative is to maintain strong provisions in bilaterals and a slightly watered down version in multiparty text. The model embodied in bilateral agreements can still, after all, be pushed via unilateral measures such as the U.S. ‘Special 301’ process⁸³ and its EU equivalent⁸⁴ as a benchmark against which ACTA compliance of trading partners is assessed.

This is all true, but the end result is still not the inexorable rise of IP standards so much as the proliferation of multiple (inconsistent) standards: U.S. standards in its FTAs, EU standards in its FTAs, and different ones again in an ACTA. This is not so much a one-way ratchet as an every-which-way global IP ratchet and it is not costless—either to right holders or to government (let alone users). More box-ticking, and more meetings on counterfeiting, more reports on compliance with more treaty obligations may give domestic and international bureaucrats and lobbyists something (or lots of things) to do, but they are unlikely to lead to actual results in terms of counterfeiting reduced. As I have previously pointed out:

There is a risk of confusion and fragmentation in this process, particularly, one would think, for government departments and enforcement bodies subject to multiple overlapping requirements found in multiple overlapping agreements. In a context where we want government to be more efficient, subjecting them to multiple sources of regulation is not likely to lead to happy results. What would we rather government be doing—actually encouraging innovation, or box ticking on their customs processes to check compliance with the multiple different obligations in different treaties? What should money be spent

⁸³ See DRAHOS AND BRAITHWAITE, *INFORMATION FEUDALISM* (Earthscan 2001) at 246; Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13(1) *PROMETHEUS* 6, 9 (1995); see generally Section 301 of the Trade Act of 1974, 19 U.S.C. §2411 (1974) (describing the annual review in which the U.S. TR identifies annually countries that according to its view deny adequate and effective protection for IPR; categorising countries which fail into groups: Priority Foreign Countries”, “Priority Watch List” countries or “Watch List” countries. Inclusion on a list may lead to negotiations, and, in some cases, trade retaliation).

⁸⁴ See generally Strategy for the Enforcement of Intellectual Property Rights in Third Countries, *supra* note 14 (noting the announcement by the European Commission that it would, from 2008, conduct a survey of the situation of IPR enforcement outside the EU, based on consultations and other input including data on counterfeit goods seized at EU borders. Like its U.S. counterpart, the EU Survey produces a list of list of priority countries in which the counterfeiting and piracy of IP rights is considered to present a serious problem, and which the Commission therefore believes should be the focus for future work. The surveys to date are published at the website of the Directorate General of Trade.

on—grants for artists or yet more forms and bodies and meetings about counterfeiting?⁸⁵

Further, there seems to be no reason to believe that the process of watering-down that we have seen in ACTA required by the need to reach an accommodation between the U.S. and EU (and others) would not be repeated in any future negotiation involving another significant player. ACTA standards themselves could be watered down in any future multilateral negotiations if the process of agreeing ACTA itself is any guide. Any one of China, India, or Brazil could play a similar role to that played by Europe in the ACTA negotiations: demanding alterations to the text to accommodate its own model. Their law is different, for one thing. Sticking with anti-circumvention laws, for example, India at the time of writing is considering a Bill which would take quite a simple approach to technological measures: it would criminalise circumvention for the purpose of infringement, with a raft of exclusions including circumvention undertaken ‘for a purpose not expressly prohibited by this Act’ (that is, to do anything lawful) and no action against distribution of circumvention tools.⁸⁶ Brazil’s recent copyright reform proposal also permits circumvention for purposes like fair dealing (which would be consistent with ACTA) but would sanction use of technical measures to hinder or prevent fair dealings. Neither model would seem to be an easy ‘fit’ with the ACTA provisions—suggesting that, at least if these countries consider the issues important, any attempt to multilateralise ACTA would hit significant hurdles. China, of course, is unlikely to agree to criminal provisions which would nullify its recent WTO win. It is worth noting, too, that we also have a fairly good idea of the attitudes of all three countries towards the ACTA negotiations and, in short, it is not friendly: all three made statements in a meeting of the TRIPS Council in early June 2010. These statements expressed a range of concerns: about the proliferation of IP standards in different forums, the potential for enforcement measures to distort legitimate trade; the upsetting of the various balances struck in TRIPS, and in particular, the potential interferences with a country’s right to determine the allocation of its own law enforcement resources. In sum, there is good reason to believe that these countries would have difficulty simply accepting the ACTA provisions in any future negotiations, justifying an expectation that we could see them play a role akin to that played by Europe

⁸⁵ Kimberlee Weatherall, *The Anti-Counterfeiting Trade Agreement: What’s It All About?*, available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=kimweatherall> at 4.

⁸⁶ India Copyright (Amendment) Bill 2010, s.65A

in ACTA—modifying, and generalizing, the language in the agreement.

We might also wonder about how the bilateral IP provisions are going to look in a post-ACTA world. If a watered-down ACTA is intended to be ‘a new standard of intellectual property rights (IPR) enforcement to combat the high levels of trade in counterfeit and pirated goods worldwide’—recently agreed between countries sharing a goal of adopting high standards of IP protection⁸⁷—then what are the bilateral provisions? Excessive? By failing to achieve a higher standard even where negotiations are conducted between high-protection countries, ACTA has the potential to undermine the push for higher standards, and validate a claim by opponents that the bilateral provisions are unacceptable, excessive and a source of conflict with other potential trade partners. It cannot, after all, be argued that the ACTA negotiators are a lowest common denominator group: in fact, this is the visual or political cost of including only countries with strong/high standards: you can’t argue that there were compromises needed to accommodate different kinds of interests. In reality, a watered-down ACTA means to say that there were things that the U.S. does that not even Europe, with its concerns for strong IP rights, considers appropriate or justifiable.

None of the analysis above is intended to downplay the serious potential impact of the ACTA. Analysis of the agreement’s potential impacts on all kinds of important interests, from consumer interests to access to medicines to innovation has been done by others as well as myself, and need not be repeated here. None of this analysis should be taken as suggesting that the ACTA is a good idea, or harmless. Rather, the points are more subtle ones, but the lessons are there for various interested parties. For advocates and opponents, for example, the development shows the importance of local models particularly in important negotiating countries. Changes have been wrought in the ACTA text over the course of negotiations in those areas where the EU model differed from that in the U.S. This suggests developing local models in *other* important countries as a strategy to counter the attempt to ‘multilateralise’ any harmful ACTA provisions. For scholars, I would suggest that even this brief review makes the question of the dynamics of bilateral agreements much more interesting than as a simple part of a one-way ratchet. Either way, ACTA’s development clearly holds new lessons in international IP law-making.

⁸⁷ *Australia to negotiate an Anti-Counterfeiting Trade Agreement*, AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE MEDIA RELEASE (Feb. 1, 2008), available at http://www.trademinister.gov.au/releases/2008/sc_012.html.

III. LESSON TWO: THE PROBLEMATIC INTERNATIONAL FRAMEWORK FOR EXCEPTIONS

The course of the ACTA negotiations also offers a stark demonstration of how difficult it will be to overcome a key weakness in our international IP treaties: the absence of a proper treatment of exceptions and limitations. This might be counterintuitive: one might think that a treaty about enforcement ought to have little to do with exceptions and limitations. Such a position is only superficially attractive, however: strengthening enforcement ‘across the board’ *without* thinking about exceptions risks demonising behaviour which in the past has been tolerated to the benefit of social welfare.⁸⁸ imagine, for example, if enforcement was significantly increased without addressing what kinds of private copies ought to be allowed. But in any event, ACTA is not just about enforcement: the drafts have always proposed the expansion of substantive rights,⁸⁹ and most relevantly, have included draft limitations in the form of provisions on safe harbours for internet service providers. It is true that these exceptions were proposed not so much for the benefits they may confer on online service providers, but for the *conditions* which seek to facilitate enforcement. Nevertheless, they *are* limitations on economic rights: not the most important or fundamental ones, and not at all adequate, but exceptions nevertheless. The way the drafts have developed suggests that negotiators have not turned their mind to how effectively to manage limitations, instead continuing to use standard methods of ‘adding up everyone’s existing law’—a process that has turned out to be deeply problematic. As I explain below, it is highly questionable whether the drafts as they have emerged from the negotiation process will serve either to improve matters for right holders, or to extend protection to online service providers in a way that can assure the reduction of barriers to trade and the encouragement of innovation in online services. But first, it is important to give some background on why exceptions are such a poor fit within the dynamic established by existing multilateral treaties in IP—and why this matters so much now.

Earlier in this paper I mentioned the two axiomatic principles which structure the multilateral IP treaty system so as to favour the creation and

⁸⁸ See Tim Wu, *Tolerated Use* (Colum. Law & Econ., Working Paper No. 333, 2008), available at <http://ssrn.com/abstract=1132247> (describing the importance of ‘tolerated use’).

⁸⁹ In particular, provisions on secondary liability and anti-circumvention and rights management information provisions, all of which go to the scope of the rights a right holder has.

expansion of IP rights: minimum standards, and national treatment.⁹⁰ There I noted the fact that these principles together work to encourage ever-increasing IP standards and their inclusion in multilateral agreements. As many commentators have noted, the *other* impact of these provisions is that exceptions and limitations on IP rights are constantly at risk. Existing flexibilities found in one treaty can be (and often are) limited in subsequent agreements as part of the creation of ‘more extensive rights,’⁹¹ whereas the attempt to limit rights found in an earlier agreement may contravene that agreement.⁹² The international IP framework includes very few ‘ceilings’ or mandatory limitations:⁹³ the Berne Convention itself contains just one, for quotations;⁹⁴ all the other exceptions (like most exceptions in international IP treaties) are put in permissive terms: a country may, but is not obliged to, recognise an exception.⁹⁵ Furthermore, international IP law includes limits on the kinds of exceptions which may be introduced, most importantly the TRIPS provisions embodying the three step test found in Articles 13 (copyright) and 30 (patent).⁹⁶ This means that exceptions and limitations introduced by a government are also subject to review by international courts or the WTO Dispute Settlement Panels, and may be overruled.⁹⁷

⁹⁰ See *supra* notes 18-23 and accompanying text.

⁹¹ Compare TRIPS, *supra* note 18 at art. 30 (allowing for compulsory licenses of patent provided the procedure in Article 30 of the Agreement is followed), with AUSFTA, *supra* note 18 at art. 17.9.7 (allowing for such use only (a) ‘to remedy a practice determined after judicial or administrative process to be anti-competitive’ or (b) ‘in cases of public non-commercial use, or of national emergency, or other circumstances of extreme urgency’); compare WIPO Copyright Treaty, *supra* note 8 at art. 11 (providing a very broad anti-circumvention provision which allows for considerable discretion in how it may be implemented), with AUSFTA, *supra* note 18 at art. 17.4.7 (providing a highly prescriptive regime regarding anti-circumvention).

⁹² The text of the provisions cited in n*** above generally includes a specific limitation to this effect. See for example TRIPS Article 1.1, which states that Members may ‘implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement’.

⁹³ See P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT: FINAL REPORT 6 (2008) (describing that ‘the Berne Convention was designed as a rights-centered instrument aimed primarily at the protection of creative works across international borders’).

⁹⁴ Berne Convention, *supra* note 18 at art. 10(1); see *id.* at Appendix B (enumerating certain mandatory limitations like Article 2.8 of the Berne Convention requires that protection not be given to the news of the day or miscellaneous facts; the WIPO Copyright Treaty states that there is to be no copyright protection for ‘ideas, procedures, methods of operation or mathematical concepts as such’ (Article 2) or the data itself in any compilation (Article 5)).

⁹⁵ See *The International Copyright System*, *supra* note 24 at 9.

⁹⁶ But cf. TRIPS, *supra* note 18, at art. 17 (explaining the provision on trademark exceptions found in Article 17, that is less stringent, requiring only that ‘such exceptions take account of the legitimate interests of the owner of the trademark and of third parties’).

⁹⁷ See Graeme Dinwoodie & Rochelle Dreyfuss, *TRIPS and the Dynamics of*

While this structure looks, and is, unbalanced, it is readily explained, in both historical and theoretical terms. First, as Hugenholtz and Okediji point out, the key concern at the time that the Berne and Paris Conventions were negotiated was the need to create safety nets for creators in a context where most countries provided little by way of rights for foreign authors.⁹⁸ Second, exceptions are adopted by individual countries on the basis of their own cultural and information policy, to benefit local users, and based on calculations as to what is appropriate given the local level of economic development and sources of comparative advantage.⁹⁹ In that context, it is said that international IP treaties should allow for ‘policy space’ for individual member countries to undertake their own balancing of these considerations.¹⁰⁰ Global mandatory or even minimum exceptions and limitations established in the early 20th Century, for example, would have imposed undue uniformity in a sphere that was the subject of wholly domestic goals. Third, it could be said that there is no need for treaty provisions to encourage countries to enact exceptions or limitations, as they will be motivated by self-interest to do so. Further, countries have historically had little incentive to *seek* exceptions of their trading partners in international negotiations, owing to the absence of mutual benefit that applies when countries agree to recognise exclusive rights. If Country A and Country B agree to recognise a given economic right, then A’s authors or inventors benefit in B’s market, and vice versa. In the case of exceptions, benefits from A’s exceptions have historically tended to be confined to users within A’s territory.¹⁰¹

Finally, there is inertia. Laws, like objects in physics, have a tendency to remain where they are and take the application of ‘force’ to bring about change. Legal change disrupts existing industry practice and once the prospect of copyright or patent reform is raised it is difficult to confine the issues that become ‘open for debate.’¹⁰² Countries will quite understandably approach treaty negotiations on exceptions with a view to

Intellectual Property Lawmaking, 36 CASE W. RES. J. INT’L L. 95 (2004).

⁹⁸ See Kur and Ruse-Khan, *supra* note 18 at 11.

⁹⁹ See Kur and Ruse-Khan, *supra* note 18 at 29.

¹⁰⁰ See Jane Ginsburg, *International Copyright: From a ‘Bundle’ of National Copyright Laws to a Supranational Code?* 47 J. COPYRIGHT SOC’Y U.S. 265 (2000), Henning Grosse Ruse-Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection* 1 TRADE L. & DEV. 56, 69 (2009).

¹⁰¹ See HUGENHOLTZ & OKEDIJI, *supra* note 93 at 37.

¹⁰² See generally Weatherall, *supra* note 41 (describing the history of the reform process in Australia), Jessica Litman, *Copyright Legislation and Technological Change* 68 OR. L. REV. 275, 278 (1989); Jessica Litman, *Copyright, Compromise, and Legislative History* 72 CORNELL L. REV. 857, 869 (1987) (describing the history of the reform process in the U.S.).

ensuring minimal disruption.¹⁰³ This effect is demonstrable: in the negotiations preceding the 1967 Stockholm Revision of the Berne Convention, where harmonisation of the reproduction right and its exceptions was discussed, the assumption on which the whole process proceeded was that it would be necessary to ensure that any provision ‘did not encroach upon exceptions that were already contained in national legislation.’¹⁰⁴ More recently, when the *Information Society Directive* was negotiated within Europe, the difficulty of choosing and delimiting the scope of the limitations on copyright and related rights ‘proved to be a daunting task.’¹⁰⁵ The first proposal had 7 exceptions;¹⁰⁶ the final text had twenty-three, drawn in general terms which would allow most countries to continue current practice, and only one of them mandatory.¹⁰⁷ This approach in Europe has not led to good outcomes for user or, arguably, right holder interests. It has provided little by way of harmonisation: a detailed study of the implementation found that most Member States have chosen to interpret the limitations contained in the Directive according to their own traditions, leading to a mosaic of different rules across Europe.¹⁰⁸ In some cases it had a limiting effect: in the United Kingdom, the government appears to have taken their existing equivalent exceptions, and simply added any additional conditions in the Directive: thus leading to narrower exceptions than the Directive required.¹⁰⁹ Further, as new circumstances have arisen post-2001, the list has become a straitjacket. The comprehensive review of intellectual property law in the UK, the *Gowers*

¹⁰³ ROBERT BURRELL & ALISON COLEMAN, *COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT*, 214 (Cambridge University Press, 2005) (discussing the *Information Society Directive* exceptions and the role of ‘official inertia’) and 216 (discussing the Berne Convention and states’ reluctance to give up their own exceptions).

¹⁰⁴ SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 33-34, 64-65, 75. 479 (Kluwer Law & Taxation, 1987) (noting that early rounds of the Berne negotiations experienced intractable debates over exceptions and limitations), see also Michaly Ficsor, *How Much of What? The Three-Step Test and its Application in Two Recent WTO Dispute Settlement Cases* 192 *REVUE INTERNATIONALE DU DROIT D’AUTEUR* 110 (2002).

¹⁰⁵ *Information Society Directive*, *supra* note 60 at art. 5(2), Guibault, *supra* note 70 at 39.

¹⁰⁶ See Guibault, *supra* note 70 at 39.

¹⁰⁷ See *Information Society Directive*, *supra* note 60 at art. 5(1) (excluding certain temporary and transient reproductions. Even this is arguably more like a limitation on the meaning of the right of reproduction than an exception as such), see also *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs* O.J. L. 111/16, 5/5/2009, arts. 5, 6 (describing other directives with mandatory exceptions: the Computer Program in particular has mandatory exceptions concerning back-up copies, testing, decompilation).

¹⁰⁸ See Guibault, *supra* note 70 at 63.

¹⁰⁹ See BURRELL & COLEMAN, *supra* note 103 at 235-36.

Review made a series of recommendations for new exceptions:¹¹⁰ the UK government response was that progress on many—even basic things like private copying to ensure that ordinary technology use isn't infringement—would require action at an EU level.¹¹¹

The ACTA negotiations on safe harbours for online service providers (OSPs) have clearly demonstrated the same kind of inertia, with negotiators evincing a desire to avoid disruption to local law, and to embody in international agreement conditions matching those applying domestically. OSP safe harbours were, perhaps, always going to be one of the hardest areas in which to make compromises and one where governments would be particularly keen to avoid disruption to local compromises. The negotiating countries, after all, came to the table each with their own detailed (and different) provisions in place already: representing, presumably, the outcome of three-way (at least) negotiations between government, the telecommunications and internet industries, and right holder groups. It would also have been an area where opening up existing rules to reform would be particularly sensitive. Recent years have seen a strong push on the part of right holders to require OSPs to cooperate more actively with enforcement, by introducing what have become known as 'three strikes' or 'graduated response' rules, requiring OSPs to cooperate with right holders—first with warning letters to identified infringers, later with technical measures or termination of service. Opening up these issues via the ACTA would give rise to entirely justified accusations of 'policy laundering': that is, an attempt to use an international agreement to bring into force laws which are presently highly controversial at a domestic level.¹¹²

¹¹⁰ UNITED KINGDOM GOVERNMENT, GOWERS REVIEW OF INTELLECTUAL PROPERTY 4-5 (2006), *available at* http://books.google.com/books?id=XhOz6cabI1gC&printsec=frontcover&dq=Gowers+Review+of+Intellectual+Property&source=bl&ots=k9ncuccFwQ&sig=yrbgyiBFH6FYmShksuiIprt1zFc&hl=en&ei=IQiuTNDGAoK88gaQkNnABA&sa=X&oi=book_result&ct=result&resnum=2&ved=0CBYQ6AEwAQ#v=onepage&q&f=false.

¹¹¹ UK DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS, DIGITAL BRITAIN FINAL REPORT 113 (2009), *available at* http://books.google.com/books?id=vo4pfi0D5Q4C&pg=PT101&lpg=PT101&dq=%E2%80%98The+Government+has+considered+whether,+in+the+round+there+should+also+be+a+modernisation+of+%E2%80%98fair+use%E2%80%99+rights+for+consumers+to+reflect+the+realities+of+the+digital+age.+The+Government+has+concluded+that+the+scope+for+such+modernisation+is+heavily+constrained+within+the+EU+copyright+framework%E2%80%99&source=bl&ots=6z-25qtkXQ&sig=McY5iZ24oyEAPbUh_pUzdcBVKCY&hl=en&ei=fwmuTNPbAcOC8gbgv9y7BA&sa=X&oi=book_result&ct=result&resnum=2&ved=0CBUQ6AEwAQ#v=onepage&q&f=false.

¹¹² See Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT.

Looking at domestic laws of the negotiating countries, it is clear there are many differences. The U.S. (and countries bound by U.S. FTAs) and Europe effectively agree on a ‘safe harbour’ approach which protects OSPs from liability for monetary remedies but does not prevent a court ordering some action to protect copyright owners.¹¹³ But in the U.S. these safe harbours are copyright-specific; in the EU they are horizontal (that is, they apply to protect from liability across different legal regimes: trademark, defamation, and others).¹¹⁴ More importantly, the two jurisdictions apply different conditions before protection applies. While both recognise that OSPs which are not merely providing network access ought to be required to remove copyright infringing material in an expeditious manner, only the U.S. has a fully elaborated scheme set out in legislation, including, for example, detailed requirements for copyright owners seeking to give notice of infringement; sanctions against abuse and misstatement; and a system for having material restored pursuant to a ‘counter-notice’ from a user.¹¹⁵ The EU system provides less explicit protection for users, leaving these issues to local rules and industry codes.¹¹⁶ The U.S. also applies more stringent conditions for availability of protection: in particular, it conditions the safe harbours on an online service provider ‘adopting and reasonably implementing’ a policy for the termination of service to repeat infringers.¹¹⁷ The EU has no similar requirement. The EU system contains a strong prohibition on Member States imposing ‘monitoring obligations’ on OSPs,¹¹⁸ the U.S. rules merely state that the safe harbours do not *themselves* impose such a requirement.¹¹⁹ It should also be noted that other countries involved in the negotiations have systems even more different. Canada, for example, in Bill C-32, appears to propose an entirely different approach built not on safe harbours but on an independent obligation to cooperate with right holders. Under Bill C-32, a copyright amendment bill currently

L.J. 121, 128 (2006), Peter Yu, *supra* note 7 at 35-37 (explaining the fears concerning ACTA).

¹¹³ See *Digital Millennium Copyright Act*, 17 U.S.C. § 512(j) (1998) (limiting the kinds of injunctions which can be ordered), *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178, 17/7/2000*, arts. 12-14 [hereinafter *E-Commerce Directive*].

¹¹⁴ The U.S. does have some horizontal protections, but intellectual property is excluded from these: see 15 U.S.C. §230. The EU provisions in the *E-Commerce Directive* (above n113) apply across the board.

¹¹⁵ See generally *Digital Millennium Copyright Act*, *supra* note 113.

¹¹⁶ See *E-Commerce Directive*, *supra* note 113 at art. 16 (encouraging the formation of industry codes).

¹¹⁷ See *Digital Millennium Copyright Act*, *supra* note 113 at § 512(i)(1)(A).

¹¹⁸ See *E-Commerce Directive*, *supra* note 113 at art. 15.

¹¹⁹ See *Digital Millennium Copyright Act*, *supra* note 113 at §512(m).

under discussion, there would be a fairly broad exemption for online service providers from liability for conduct by their users,¹²⁰ coupled with a separate *positive* obligation on online service providers to pass on notices of infringement received from copyright owners subject to fixed (statutory damages) payments for failure to do so¹²¹—and no obligation to take down material. Interestingly, unlike the ‘expeditious removal’ requirement in the EU and U.S., the obligation to pass on notices under the Canadian system would apply to *any* online service provider—including one merely providing transmission.¹²² Japan is different again.

Despite these differences, it is worth noting that there is significant agreement at least at a high level of generality. With one exception, the negotiating countries have or seem to be amenable to exceptions directed at OSPs operating as neutral intermediaries as between third parties and providing the basic infrastructure of the Internet.¹²³ All seek to provide

¹²⁰ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers* [2004] 2 S.C.R. 427; 240 D.L.R. (4th) 193 [hereinafter *Tariff 22*] (describing the Canadian law that contains important exemptions for intermediaries. Section 2.4(1)(b) provides that ‘a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public’. This exemption was interpreted broadly in *Tariff 22* decision, where the Canadian Supreme Court held that it applied to shield ISPs from liability for communication and caching, albeit subject to possible liability for authorising infringement in limited circumstances. As the court noted, ‘section 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright regime’. Bill C-32 contains two further important innovations: (1) s.31.1, which excludes liability arising solely by reason of a person ‘providing services related to the operation of the Internet or another digital network, [and in the course of providing those services] provid[ing] any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network’; and (2) a specific new form of secondary liability in s.27(2.3) which makes it infringement ‘for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service’. In light of previous statements in *CCH* and *Tariff 22*, it would seem likely that the Canadian courts would focus on s.27(2.3) as the key form of secondary liability in an online context, rather than expanding the law of authorisation, as has occurred in Australia and the U.S.).

¹²¹ Bill C-32, ss.41.25-41.26.

¹²² The Canadian system has a lot to say for it: not least, that it reduces uncertainty for online service providers, in that the penalty for failure to engage in the required level of cooperation is a fixed amount in statutory damages rather than a highly uncertain liability for damages for copyright infringement.

¹²³ The only real outlier here appears to be Mexico which does not have such laws in place. However, commentators have noted that when the issue of ISP liability comes to be negotiated, the government (and right holders) will be having to negotiate with ‘the richest man in the world’, Carlos Slim Helu, *Mexico Copyright Reform: Well That was Quick*, BLAYNE HAGGART’S ORANGESPACE (April 6, 2010, 6:25 PM), <http://blaynehaggart.blogspot.com/2010/04/mexico-copyright-reform-well-that-was.html>.

some relief from copyright liability to these providers assuming certain conditions are met. All require some cooperation to assist right holders' enforcement efforts, although the nature of that cooperation varies as between different countries: it could involve expeditious removal of infringing material; adoption of technical means to reduce infringement; passing on notices; enabling the provision of information so right holders can pursue litigation—again, the details vary but the basic goal of facilitating right holders' enforcement efforts is a common theme. Not all of the systems explicitly provide protection against abuse (the U.S.'s copyright law does; the EU does not) but it might be possible, through discussion, to ascertain that in other countries general principles apply to limit abuse.

What happened when the broad agreement and these differing models came to the table in the ACTA negotiations? The same thing that has happened in past discussions of exceptions and limitations—each country put their own model on the table. In the earliest complete leaked draft we have, from January 2010, we can see a series of separate proposals: one from the U.S. based on the DMCA; an EU proposal based on the *Ecommerce Directive*, another from Japan; hesitation about the inclusion of information location tools (*i.e.* search engines) from New Zealand; queries from Canada as to whether the system is predicated on ISPs being liable for infringement in the first place; and a suggestion from Switzerland that the whole thing be made optional since to recognise mandatory limitations would reduce its existing domestic protection. Many of these differences clearly persist in the April Public Draft (although positions of individual countries are no longer reflected). By the time we see a draft dated July 2010, there is a single proposal but with significant question marks over the conditions under which the safe harbours are intended to apply (with each country persisting on proposing its own conditions remain part of the scheme).

But this little bit of history repeating is predictable. It is far more interesting to consider the way the process illustrates the difficulties that arise in drafting: even in circumstances where the existence and broad parameters of an exception are accepted by most parties. One explanation for the difficulty in negotiating these exceptions is that the negotiating countries (whether of their own volition, or at the behest of stakeholder groups) are or were simply unwilling to give up part of the safe harbours that was aimed at furthering the goal of enforcement online. But another is that it is genuinely *hard* to reconcile *differences* in conditions? Leaving to one side for a moment the *really* controversial condition—the U.S.' requirement of a 'repeat infringer policy'—*any* condition not the same in

different countries raises difficult issues given the detailed style of drafting that the negotiators have adopted. Take the requirement of counter-notices. Under the U.S. DMCA, if a right holder sends a notice to an OSP, claiming that material hosted by the OSP is an infringement of copyright, and the OSP removes that material, the OSP must also inform the relevant user; who may then submit a ‘counter-notice’ stating that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material. On receipt of a counter-notice, the OSP must inform the right holder and replace the material within 14 business days unless the right holder files court proceedings.¹²⁴ The EU has no equivalent requirement included in its directives (although there would be nothing to stop a Member State adopting such rules). In the ACTA texts to date, this condition has remained in the text but in square brackets, indicating that it is not agreed.

Now consider the perspectives of the various parties in the negotiation. If a counter-notice system becomes a mandatory condition, changes to the EU *Ecommerce Directive* would be required. From the perspective of the EU policymakers, that is a highly undesirable outcome: not least because ACTA was not meant to make substantive changes to the *acquis communautaire*, and because it would necessitate re-opening the questions not just in IP law but across the board,¹²⁵ and see right holder groups seeking the adoption of ‘three strikes’ or ‘graduated response’ rules. It is unlikely the EU want to have that debate now. For the EU, even a counter-notice condition (let alone something more controversial, such as a repeat infringer policy) cannot be in the text. But consider then the position of the U.S. First, the U.S. can expect criticism from user groups for failing to protect their interests. The legal impact could vary, depending on how the provision is drafted. If the conditions are exclusive, that is, if *only* the conditions stated in the provision are allowed to be imposed on an OSP, then the U.S. will be required to change its law to remove an established end-user protection: thus eliciting accusations that the agreement is unbalanced—and opening up the safe harbours to reform in ways that could be very controversial. If the ACTA conditions are merely inclusive, and further conditions can be imposed domestically, then the U.S. is clearly not required to change its law—but there is a price, which is that the same drafting that gives the U.S. freedom to impose additional conditions on protection also applies to other countries—with unpredictable results. OSPs will continue to face wildly varying market and legal conditions across the

¹²⁴ See *Digital Millennium Copyright Act*, *supra* note 113 at § 512(g).

¹²⁵ As noted above, the *Ecommerce Directive* conditions are ‘horizontal’ ones.

world—and, in extreme situations, any protection offered by the safe harbour could be effectively gutted by the addition of further conditions. To date, the latter drafting—an inclusive, rather than exclusive list—has been prevailing. Drafts negotiated by the parties have moved towards the removal of conditions not universally reflected in the negotiating parties' law; and there is no provision which would appear to be aimed at reducing the risk that the exception will be gutted by legislatures adding additional conditions.¹²⁶ This is, of course, consistent with a focus on enforcement but hopeless for OSPs.

At the time of writing, it is not even clear that the OSP safe harbours will be in the final text of ACTA—it may turn out to be too hard to negotiate. Regardless of the outcome, this process illustrates the core difficulties in drafting exceptions: How is the need for national autonomy to serve local interests to be reconciled with a desire to foster global public welfare and free movement of knowledge goods? Should exceptions be mandatory or optional, and what principles, if any, should distinguish between those which should be optional and those that ought to be required? Should exceptions be drafted at a general level, leaving matters of detail to signatories—with the attendant risk that individual countries will hedge exceptions so far about with conditions that the impact of the exceptions will be nullified? If we choose quite general language for exceptions, do we need an equivalent to the 'three step test' so as to control states' ability to 'gut' exceptions and limitations at the behest of powerful lobby groups or stronger FTA negotiating partners?¹²⁷ And if we can imagine a principle constraining justifiable 'limits on exceptions,' would it be the kind of test that could be appropriately adjudicated by an international body like a WTO Dispute Settlement Body, which tends to eschew questions of domestic policy?

It may not be politically correct to say this, but if indeed, the parties are unable to agree on real and effective safe harbours in ACTA, it will be an unfortunate development: not just for ACTA, but for what it indicates about IP law treaty-making. Some might argue that an ACTA would be better off without the OSP provisions entirely owing to the controversy they have generated: particularly since they have been seen as a stalking horse

¹²⁶ See generally July text, *supra* note 10 (noting that the July text states that 'Each Party shall [or, for Switzerland, may] provide at least' that OSPs shall not be held liable for monetary remedies, and 'that the application of' the limitation 'is conditioned on' [certain not yet concluded conditions]. This drafting suggests that these are minimum, but not maximum conditions to be applied to the relevant OSP).

¹²⁷ See Ruse-Khan, *supra* note 100 at 72 (discussing targeting the problem of weaker parties agreeing to give up flexibility in the context of a trade negotiation by drafting exceptions which state that a 'party may not be obliged to ...' prohibit certain activities).

for three-strikes rules. Early leaks confirmed this fear by including, in one (U.S.) proposal, a requirement that an OSP ‘adopt and reasonably implement a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights.’ A footnote stated that ‘an example of such a policy is providing for the termination in appropriate circumstances of subscriptions and/or accounts on the service provider’s system or network of repeat infringers.’ Although such drafting would not require graduated response,¹²⁸ it could be, and was, read as encouraging the introduction of such laws. It does not follow, however, that standing on principle and rejecting any kind of OSP protection is the best strategy. Certainly if ACTA could be confined to genuine physical counterfeiting and cooperation between law enforcement officials—that is, if ACTA were confined to the remit it claims—then OSP protections would not be required. Assuming, however, that ACTA (or any equivalent) is not to be confined to pure physical counterfeiting, and is drafted to cover, for example, remedies such as damages and injunctions or any online activity, then exceptions for OSPs will remain important, and their absence would render the agreement a one-sided and disreputable affair. An OSP safe harbour with some conditions is better than higher and statutory damages and more ready injunctions without that protection.

Including OSP safe harbours—and other exceptions—is important to ACTA for a range of reasons. It is becoming more difficult to justify the absence of exceptions and limitations in IP treaties. Many of the old explanations have lost their salience. It is, for example, no longer truly the case that the benefit of exceptions is confined to users in the country providing them. Creative works and knowledge goods that build on existing material and benefit from exceptions in order to do so now diffuse more rapidly and broadly.¹²⁹ Global trade in goods and services produced in reliance on limits to IP protection (exceptions, duration limitations, subject matter limitations) depends on international availability of similar limits, and the absence of limits is a barrier to international trade.¹³⁰ Certain

¹²⁸ See generally *Digital Millennium Copyright Act*, *supra* note 113 at § 512(i)(1) (implementing an equivalent US law), *Copyright Act 1968 s 116AH(1)* (Austl.) (implementing an equivalent Australian law under the AUSFTA), *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 83 IPR 430 (Austl.) (explaining the case in which an Australian court rejected arguments by right holders that an ISP was required to adopt something similar to a three strikes policy).

¹²⁹ See HUGENHOLTZ & OKEDIJI, *supra* note 93 at 38.

¹³⁰ See Ruse-Khan, *supra* note 100 at 80 (noting the importance of this is demonstrated in the TRIPS Preamble (which emphasises the need to ‘ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade’); Article 41.1 (stating that enforcement measures ‘shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for

users' rights also *require* international rather than merely local exceptions to be effective. For example, the World Blind Union has pointed out that in order to improve access to copyright material for the visually impaired national organizations assisting with accessibility must be able to exchange materials;¹³¹ the presence of exceptions in at least exporting and importing countries is critical to making the Doha Declaration on access to medicines operative. In a context, too, where FTAs that constrain exceptions and limitations are becoming more commonplace, it also seems likely that many smaller, less powerful nations now stand less in need of policy freedom or flexibility, than of legal security and predictability about what exceptions they are allowed to introduce consistent with international constraints such as the three step test.¹³² The absence of guidance as to what exceptions qualify may have a chilling effect;¹³³ international consensus on allowable exceptions (at least) could impose important constraints both on powerful domestic lobbying groups and on the kinds of demands that can be made in the framework of bilateral trade negotiations.¹³⁴

Finally, there is the question of public perceptions as to the value and fairness of the agreement. A perception that it is fair as between stakeholders is important to IP law, which it is not readily 'self-enforcing.' By this I mean that IP law requires people to self-consciously refrain from behaviours that are common, easy, and enjoyable: infringement is so easy

safeguards against their abuse') and Article 40 (noting Members' agreement 'that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.') TRIPS Article 8.2 allows States to adopt measures to curb abuses of IP rights).

¹³¹ See World Blind Union Proposal: WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons, art. 8, Oct. 23, 2008 (Annexed to WIPO Document No. SCCR/18/5, PROPOSAL BY BRAZIL, ECUADOR AND PARAGUAY, RELATING TO LIMITATIONS AND EXCEPTIONS: TREATY PROPOSED BY THE WORLD BLIND UNION, May 25, 2009 (hereafter, World Blind Union Proposal), Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, WIPO Document Number SCCR/15/7 February 20, 2007, at 119-122; see also Bill C-32, *supra* note 121 at § 32.01 (noting Canada's recent attempt to address the need for international exchange of accessible materials in its copyright amendment bill, Bill C-32 attempts to address this issue: but the solution is confined to works of Canadian authors).

¹³² See Ruse-Khan, *supra* note 100 at 76-77 (explaining countries' desire for this certainty can be demonstrated in the proposal by Brazil, Chile, Nicaragua and Uruguay for 'Work related to Exceptions and Limitations'); see also WIPO, PROPOSAL BY BRAZIL, CHILE, NICARAGUA AND URUGUAY FOR WORK RELATED TO EXCEPTIONS AND LIMITATIONS, WIPO Doc. SCCR/16/2, July 17, 2008, available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf (noting the request by Brazil, Chile, Nicaragua and Uruguay that WIPO's Standing Committee on Copyright and Related Rights (SCCR) begin work on prescribing a minimum framework of public policy exceptions)/

¹³³ See Kur and Ruse-Khan, *supra* note 25 at 8.

¹³⁴ See *id.*

to do and observing IP rights, particularly copyright, involves, particularly these days, some self-denial. IP law therefore needs support from the public in order to be effective, and in order to receive any such support IP law needs to address the needs of all stakeholders.¹³⁵ Treaties that strengthen enforcement without addressing the needs of users look unfair and will bring IP law further into disrepute. Nor is the need to engage with fairness just a matter of appearance. There has been, over the last five years or so, a definite uptick in momentum on questions of access, exceptions and limitations: scholars are talking about them; NGOs and governments are proposing them; law reform reports worldwide have suggested widening them. If ACTA stands outside this trend, obdurately refusing to concede the need for exceptions in addition to enforcement, it risks a backlash from an organised, motivated set of people with well-developed ideas—and makes it easier for countries not presently involved in the negotiations to reject its outcomes out of hand. If ever there was a treaty which needed to find ways to look more balanced, it must be the ACTA. In public relations terms, ACTA started very badly, as an apparently secret, behind-closed-doors negotiation between select countries only: a process that has tended to bring the negotiations into serious disrepute. Once the draft was released to the public, the absence of balancing provisions was a key point of commentary. While there have been improvements both in transparency and content over time, perceptions remain, quite rightly, deeply negative.¹³⁶ Including genuine limitations will not guarantee the treaty is welcomed with open arms—but they would help.

It is certainly arguable that safe harbours for OSPs who provide the basic structure of the Internet fall into the category of exceptions that ought to be both international and mandatory. Mandatory global exceptions can be justified on at least two bases: that owing to the global nature of the activities concerned, the absence of such exceptions poses an unreasonable and unjustifiable barrier to trade, or alternatively, that the exception will ‘generate positive spillovers to benefit global welfare ...[or facilitate] the production of global public goods.’¹³⁷ Both fit. The absence of exceptions applicable to OSPs or the imposition on them of onerous conditions could easily become a significant barrier to trade. A search engine, for example, or a user-generated content platform that cannot escape liability in a particular jurisdiction for copyright infringement which it has no power to

¹³⁵ See Dinwoodie & Dreyfuss, *supra* note 97 at 97-98 (noting the importance of ‘tradeoffs’ in IP lawmaking); see also Jane Ginsburg, *How Copyright Got a Bad Name For Itself*, 26 COLUM. J.L. & ARTS (2002).

¹³⁶ See generally Peter Yu, *supra* note 7.

¹³⁷ HUGENHOLTZ & OKEDIJI, *supra* note 93 at 43.

control could be prevented from operating in that jurisdiction; insofar, then, as a goal of international IP treaty-making is the reduction of barriers to trade, the reaching of common standards on this question falls well within that goal. As for global public goods: the basic infrastructure of the Internet which OSPs provide clearly generates positive spillovers globally, and it could be argued the Internet is, itself, a global public good,¹³⁸ or, at least, is a fundamental tool for the creation and dissemination of what are undoubtedly global public goods—information and knowledge.¹³⁹

But how do we handle the difficulties of negotiations discussed above? While the negotiators to date have not displayed any tendency to move beyond historical methods of drafting exceptions, it need not be thus. There is a body of thinking that could help. Advocates, policymakers, and scholars have spent considerable time recently developing ideas for an international framework for IP exceptions, particularly copyright exceptions.¹⁴⁰ We have seen a concerted effort on the part of the various interested groups to envisage how limitations and exceptions might more effectively be embodied at an international level. Recent scholarly treatments have sought to tackle some of the difficult questions. Among these efforts, two, at least, should be noted:¹⁴¹ the 2008 Report, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, by Hugenholtz and Okediji sponsored by the Open Society Institute,¹⁴² and the *Intellectual Property Rights in Transition* ('IPT') project at the Max Planck Institute for Intellectual Property, Competition and Tax Law.¹⁴³ Both of these efforts envisage the embodiment of mandatory exceptions or

¹³⁸ A global public good is a good that is non-rivalrous, non-excludable and available worldwide. It is perhaps not clear that the Internet itself is truly non-excludable, although the argument that the Internet or broadband internet is a global public good has certainly been made.

¹³⁹ Joseph Stiglitz, *Knowledge as a Global Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21st CENTURY (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999).

¹⁴⁰ TREATY ON ACCESS TO KNOWLEDGE, Draft dated May 9, 2005, available at <http://www.cptech.org> (including the patent provisions).

¹⁴¹ Mention might also be made of the WITTEM EUROPEAN COPYRIGHT CODE, an academic project drafted to 'serve as a model or reference tool for future harmonization or unification of copyright at the European level.' The code is available (with explanation) at <http://www.copyrightcode.eu/>. The *Wittem Code* however is designed to create a unified code: it does not need, therefore, to grapple with the questions being raised and discussed here since it envisages removing the freedom of individual nation states subject to the code to vary exceptions as they choose. While flexibility remains in the code, it is flexibility for *courts* to recognise new exceptions in circumstances comparable to those specifically enumerated: see Article 5.5 and the discussion in footnote 48 of the Code.

¹⁴² See HUGENHOLTZ & OKEDIJI, *supra* note 93.

¹⁴³ See Kur and Ruse-Khan, *supra* note 25.

limitations in an international instrument.¹⁴⁴ Both projects emphasise the need for flexibly-drafted mandatory exceptions, plus provisions designed to make it easier to introduce new exceptions: either in the form of a general omnibus principle (Hugenholtz and Okediji) or the replacement of the three-step test with a more ‘user-oriented’ test.¹⁴⁵

Neither project, however, has to grapple with the nitty-gritty of how these issues would arise in negotiations. A critical practical question, as the *Information Society Directive* implementation demonstrated and the ACTA negotiations confirm, is how to handle the combination of inertia, or attachment to existing laws, and inconsistent conditions on exceptions. The proposal that exceptions should be drafted ‘flexibly’ to allow local balancing of interests and adjustment doesn’t address the problem that exceptions could end up being gutted by the addition of conditions pre-existing in local law.

Perhaps the closest that these discussions come to suggesting a means of preventing such gutting is Max Planck’s proposal to strengthen Articles 7 and 8 of TRIPS. Thus Annette Kur has suggested that TRIPS could be amended to add an Article 8a, which would create an *obligation* to ensure a balance of interests and that users may use protected subject matter without right holder consent.

1. Members shall take due account of the objectives and principles set out in Articles 7 and 8 when formulating or amending their laws and regulations. In doing so, they shall ensure that the protection granted reflects a fair balance between private economic interests and the larger public interest as well as the interests of third parties.

2. Members shall ensure that users may, without the consent of the right holder, use protected subject matter, provided that such use does not unreasonably prejudice the legitimate interests of the right holder, taking into due consideration the normal exploitation of the right.¹⁴⁶

¹⁴⁴ Although the mechanism envisaged is different as between the two proposals: Hugenholtz and Okediji imagine an international instrument – initially ‘soft law’ as a possible step towards something more binding– developed within WIPO; the Max Planck project on the other hand has attempted to ‘visualise’ amendments that could be made to TRIPS.

¹⁴⁵ See Kur and Ruse-Khan, *supra* note 25 at 30 (explaining that Articles 7 and 8 could be amended to suggest that member states ‘shall take due account of the objectives and principles set out in Articles 7 and 8 when formulating or amending their laws or regulations [and] shall ensure that the protection granted reflects a fair balance between private economic interests and the larger public interest as well as the interests of third parties’).

¹⁴⁶ Annette Kur, *IP In Transition – Proposals for Amendments to TRIPS*, available at http://193.174.132.100/shared/data/pdf/ipt_fuer_rom_maerz_07.pdf.

Similar ideas and proposals have been emerging from the advocacy arena, as non-government organisations and governments have attempted to draft international instruments on exceptions. There is nothing like actually drafting text to make you grapple with the hard questions. Thus we have the 2005 proposal for a Treaty on Access to Knowledge, which proposes lists of mandatory exceptions which every country should have, plus room for a flexible exception to allow for further uses not presently foreseen.¹⁴⁷ In the policy arena, we have WIPO's Development Agenda, in which context the SCCR is required to engage in selecting exceptions 'that should form part of a prescriptive minimum global framework of exceptions'.¹⁴⁸ The 20th Session of the WIPO's Standing Committee on Copyright and Related Rights held in June 2010 had several proposals before it on exceptions and limitations: including a proposal by Brazil, Ecuador and Paraguay in support of the World Blind Union's proposals for a treaty addressing access for the visually impaired,¹⁴⁹ and a more recent and comprehensive proposal from the Africa Group calling for a WIPO treaty on exceptions and limitations extending also to education and research institutions, libraries and archives.¹⁵⁰ As you would expect, each of these efforts envisages certain mandatory exceptions, none of which touch on questions regarding OSPs.

More importantly, however, these mandatory exceptions are coupled in both the World Blind Union proposal and the Africa Group proposal with certain general principles designed, it would seem, to provide flexibility without creating a situation where exceptions can be gutted by the method of implementation. Both proposals contain:

1. **Flexibility:** through a provision stating that 'Contracting Parties shall be free to determine the appropriate method of implementing the provisions of this Treaty';¹⁵¹ and
2. **Limits on flexibility:** by including a provision stating that 'shall ensure that the implementation allows for timely and effective exercise of authorized actions covered by this Treaty, including expeditious procedures that do not in themselves create barriers to legitimate uses, are fair and equitable, and are not unnecessarily

¹⁴⁷ See TREATY ON ACCESS TO KNOWLEDGE, *supra* note 140.

¹⁴⁸ WIPO Secretariat, PROPOSAL BY BRAZIL, CHILE, NICARAGUA AND URUGUAY FOR WORK RELATED TO EXCEPTIONS AND LIMITATIONS 2, WIPO Doc. SCCR/16/2 (17 July 2008).

¹⁴⁹ See World Blind Union Proposal, *supra* note 131.

¹⁵⁰ DRAFT WIPO TREATY ON EXCEPTIONS AND LIMITATIONS FOR THE DISABLES, EDUCATIONAL AND RESEARCH INSTITUTIONS, LIBRARIES AND ARCHIVE CENTERS: PROPOSAL BY THE AFRICA GROUP, SCCR/20/11, June 15, 2010 ('Africa Group Proposal')

¹⁵¹ See *id.* at art. 3(c), World Blind Union Proposal, *supra* note 131 at art. 2(c).

complicated or costly, or entail unreasonable time, time-limits or unwarranted delays'.¹⁵²

It has to be conceded that (2) above would be difficult to litigate, even assuming someone could be found willing to take a country to task for non-compliance.¹⁵³ Nevertheless, it does seek to provide some bulwark against gutting of the exceptions.¹⁵⁴

These proposals suggest another way to approach a safe harbour regime for OSPs. Such an approach would first, as suggested by all the initiatives discussed so far, adopt relatively flexible and abstract language, in order to accommodate the various domestic models. It would also seek to identify the public policy goals of an OSP safe harbour, and the problems that may arise from the imposition of conditions that are too strict, and then draft an obligation on signatory countries to ensure—in drafting their conditions and rules—that those ends were served and that the legitimate fears were unrealised. Without attempting to draft actual language, it is not difficult to identify its broad parameters, bearing in mind that the goal of such a provision is to provide protection for OSPs while providing some assistance in enforcement, and that the *concern* about conditions is that they would gut the protection to OSPs, create barriers to global trade in information goods and distribution of knowledge, and/or interfere with the rights and interests of users, in particular the right to privacy. Such an exception:

- would allow, or preferably for all the reasons already outlined, require countries to provide for protection from monetary liability for OSPs, identified in broad terms as neutral intermediaries providing facilities for the transmission, communication, location or hosting of material online;
- would allow, or require countries to oblige OSPs (excluding OSPs merely providing transmission) to take action on obtaining knowledge of infringement. It would not require that such obligations be conditions on the protection from liability: recognising Canada's different model of legislating a free-standing obligation subject to payment of a 'fine' for non-

¹⁵² See Africa Group Proposal, *supra* note 150 at art. 3(e), World Blind Union Proposal, *supra* note 131 at art. 2(f).

¹⁵³ See Kur and Ruse-Khan, *supra* note 25 at 30.

¹⁵⁴ See World Blind Union Proposal, *supra* note 131 at art. 2(d) (creating a 'minimum exceptions' structure, stating that 'Contracting Parties may, but shall not be obliged to, implement in their law more extensive protections for the visually impaired and reading disabled than are required by this Treaty, provided that such measures do not contravene the provisions of this Treaty'. This idea of creating an equivalent to the 'minimum standards' rule that applies in economic rights is useful, but not immediately relevant to the drafting of particular exceptions that is being addressed here).

compliance. Nor would it require that the ‘action’ occur in the form of ‘take-down’, recognising Canada’s ‘notice-and-notice’ system;

- would allow for further conditions or requirements to be imposed on OSPs, *provided that* such conditions:
 - Must not give rise to barriers to legitimate trade;
 - Must be fair and equitable, and not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays to either enforcement of intellectual property rights or authorised uses;
 - Must not require OSPs actively to seek evidence of infringement or to monitor the information which they transmit or store;
 - Must reflect a fair balance between private economic interests and the larger public interest as well as the interests of third parties, including the interests of individual users;
 - Are subject to laws protecting the right to privacy or confidential information the disclosure of which would prejudice law enforcement or the legitimate commercial interests of particular enterprises, public or private, or otherwise be contrary to public interest.

By allowing further conditions to be imposed on OSPs, an exception of this kind would clearly allow for the introduction of three strikes or graduated response provisions in signatory countries, which might cause some people to object. However, for all the reasons discussed in Hugenholtz and Okediji, and the Max Planck IPT project, as well as the various historical reasons given above for why exceptions have not historically been found in international IP law, it seems unlikely that countries would wish to sign up to a provision that mandated *that* kind of ceiling. An exception of this kind also respects the fact that countries may wish to avoid significant disruption to local existing law. As efforts to draft international instruments on exceptions and limitations suggest, flexibility is a necessary part of drafting such rules: the better approach, then, is to put in place principles to guide the exercise of that flexibility.

IV. CONCLUSIONS

ACTA is . . . complicated. Despite its trappings of almost vaudevillian evil, it is more than just something to be opposed point blank (although it is

that too, for many reasons explored elsewhere). It is more than another attempt to increase enforcement and ratchet up standards (although it is that too). It also provides object lessons in the dynamics of international IP lawmaking that we would all do well to learn from: scholars, advocates, non-government organisations, governments, and treaty negotiators. I hope there are various aspects of the analysis above that will provide food for thought, but if there is one that emerges most clearly, I think, it is the importance of developing alternative models: what we could support, not just what we could oppose. Existing local models are critical in negotiations: they are what gives a country reason to oppose provisions in treaty negotiations. And models for exceptions that countries can sign up to with minimal disruption are needed so we can make progress on that other, critical side of the IP ‘balance.’

It is on questions of exceptions that some of the most urgent current issues are arising in the international sphere: for advocates and users, certainly, but also for negotiators and right holders. Without credible efforts to instantiate exceptions, limitations, and user protections in international agreements, IP law-making risks losing all credibility and any buy-in from a large part of the world. Negotiators ought to be paying attention to the thinking in this space; equally, advocates need to take account of the historical dynamics on exceptions—dynamics which, as the ACTA negotiations indicate, haven’t changed.

The lessons I think are clear. More work on the models. At least that gives us something to build towards.