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

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

DAVID S. LEVINE*

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INTRODUCTION

On November 19, 2009, Dan Glickman, the then-Chairman and CEO of the Motion Picture Association of America (“MPAA”), wrote a letter to Senator Patrick Leahy of Vermont in support of a “sound and comprehensive” Anti-Counterfeiting Trade Agreement (“ACTA”).¹ After eleven rounds of intense negotiation, ACTA has

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1. Letter from Dan Glickman, Chairman and Chief Exec. Officer, Motion Picture Ass’n of Am., Inc., to Patrick J. Leahy, Chairman, U.S. Senate Judiciary Comm. (Nov. 19, 2009) [hereinafter Glickman Letter], *available at*

been described by the United States Trade Representative (“USTR”), the entity representing the United States in the negotiations, as intended to “establish a state-of-the-art international framework that provides a model for effectively combating global proliferation of commercial-scale counterfeiting and piracy in the 21st century.”² Indeed, given the endorsement from the Group of Eight (“G-8”), ACTA will likely become one of the most significant international agreements regarding intellectual property laws in history, a “new international framework.”³

The existence of a major international agreement addressing a significant legal problem is enough to warrant considerable public interest. Though ACTA has garnered much public attention, the substance of ACTA is at times overshadowed by the negotiation process.⁴ In his letter to Senator Leahy, Glickman addressed the major procedural problem in ACTA—one that has nearly eclipsed any substantive questions: the lack of transparency and accountability in the negotiations.⁵ Glickman dismissed those public concerns about the lack of transparency in ACTA’s negotiations as a “distraction,” and he also labeled “opponents of ACTA” as “indifferent to [the film industry’s] situation, or actively hostile toward efforts to improve copyright enforcement worldwide.”⁶

Glickman was and is correct that the concern for transparency diverts public attention from ACTA’s substance and its

<http://www.scribd.com/doc/22785108/MPAA-letter-re-ACTA>.

2. *Anti-Counterfeiting Trade Agreement (ACTA)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/acta> (last visited Mar. 1, 2011). The USTR is the government entity representing the United States in negotiations.

3. See *G-8 Declarations on Economy, Environment*, WALL ST. J. (July 8, 2008, 2:25 AM), <http://online.wsj.com/article/SB121549460313835333.html> (declaring the advancement of anti-counterfeiting and piracy initiatives to be a critical part of the G-8’s plan to increase protection of intellectual property rights).

4. See, e.g., Glickman Letter, *supra* note 1 (petitioning Senator Leahy to support the USTR’s efforts in the ACTA negotiations and expressing the concern that complaints about ACTA’s alleged lack of transparency were blocking “meaningful dialogue” on the agreement’s substantive provisions); *Sunlight for ACTA*, ELECTRONIC FRONTIER FOUND., <https://secure.eff.org/site/Advocacy?cmd=display&page=UserAction&id=383> (last visited Mar. 1, 2011) (lamenting that the public had scant opportunity to comment on or obtain information about ACTA despite the fact that the agreement could potentially harm both consumers and technological innovation).

5. Glickman Letter, *supra* note 1.

6. *Id.*

“ambition . . . to work with key trading partners to combat piracy and counterfeiting across the global marketplace.”⁷ However, Glickman understated the impact of the lack of transparency on both the governmental procedures and the substance of the law. This article seeks to address that “distraction” by answering a basic question: what can we learn about the creation of international intellectual property law in the Internet age from the secrecy efforts of the USTR, particularly in light of the marginal use of exemptions to the Freedom of Information Act (“FOIA”)? Although the agreement is not yet final, we already know that the lack of transparency placed leaked documents and hearsay at the center of public policy discussions, caused debates over both real and imagined issues, and brought about a general erosion of public knowledge and confidence in the ACTA process.⁸

The reason for these problems is that the USTR has attempted to keep the ACTA negotiations in the proverbial black box; the public knows that a box exists and that USTR (and others) are working therein, but they cannot open it to discover and examine what’s inside. This article observes that an ACTA black box has proven impossible to maintain.⁹ The USTR’s antiquated views about what the public can and should know about ACTA, and when the public should know it, attest to the urgency of this realization.

In September 2009, Knowledge Ecology International made a FOIA request to the USTR seeking “all records at USTR on the topic of the policy and practice of USTR regard [sic] the transparency of trade negotiations,” including ACTA.¹⁰ An incomplete response was received in October 2009, but among the produced documents was an email between USTR employees dated February 10, 2009,

7. *Id.*

8. See, e.g., *Intellectual Property Appears to Figure Prominently in Wikileaks Cablegate*, MICHAEL GEIST BLOG (Nov. 29, 2010), <http://www.michaelgeist.ca/content/blogsection/0/125/10/80/> (discussing leaked U.S. State Department cables referring to the ACTA negotiations and evaluating the varying attitudes of lobbying groups towards specific provisions of ACTA and the proposed legislation in the United States).

9. This reality is evidenced by the numerous drafts leaked online at various points during the negotiation process. See *infra* note 73 and accompanying text.

10. James Love, *USTR’s February 10, 2009 Memo on Transparency Soup*, KNOWLEDGE ECOLOGY INT’L (Sept. 8, 2010, 10:00 PM), <http://keionline.org/node/929>.

authored by Stan McCoy, the Assistant U.S. Trade Representative for Intellectual Property and Innovation. This email, which had the subject line “transparency soup,” included a draft USTR position paper on ACTA transparency with the following question and answer in FAQ (frequently asked question) format: “Q[uestion]: What if U.S. positions evolve during negotiations? [Answer:] The public can see how the U.S. position has evolved when the final text is signed.”¹¹ Without knowing better, one might view this response as a gallows-humor joke response to a legitimate question. Unfortunately, it was not a joke and, although stated in a draft document, accurately reflects the dismissive view of transparency and accountability that has been the hallmark of USTR’s handling of the ACTA negotiations. Additionally, even if such secrecy is desirable to the USTR, it has proven to be untenable and unrealistic, and thus bad policy no matter how it is viewed. Policies built on significant false assumptions naturally run a high risk of failure.

As discussed below, in the case of ACTA, the effects of the USTR’s failed policy have already begun to emerge. For example, because the negotiators tried but failed to keep absolute secrecy about the logistics of the negotiations and the substance of the agreement, they could not enjoy the usual benefit of secrecy—namely, a smooth and efficient process—and do not appear to be offering us better law. Thus, despite Glickman’s assertions, transparency has become as important in the ACTA negotiations as the agreement’s substance precisely because the substance would likely be different if there had been greater transparency and accountability.¹² Though the MPAA would likely not agree, those

11. *Id.* As of February 2009, after only four rounds of ACTA negotiations, two leaks of ACTA negotiating documents had already occurred. See *The ACTA Timeline: Tracing the Secret Copyright Treaty*, MICHAEL GEIST BLOG (Dec. 10, 2009), <http://www.michaelgeist.ca/content/view/4611/125> [hereinafter *ACTA Timeline*]. The details of the negotiations have been widely discussed on the Internet. See, e.g., James Love, *Details Emerge of Secret ACTA Negotiation*, KNOWLEDGE ECOLOGY INT’L (Feb. 3, 2009, 3:38 PM), <http://keionline.org/blogs/2009/02/03/details-emerge-of-secret-acta> (reporting the substance of the supposedly secret negotiations). This fact alone suggests that the USTR’s cavalier position was already fantastical.

12. See Glickman Letter, *supra* note 1 (discounting the validity of criticisms of transparency, but admitting their continued presence and possible effect on the substance of ACTA); *Sunlight for ACTA*, *supra* note 4 (urging the public to contact their representatives so that there is “meaningful consultation” regarding the

differences probably would have improved ACTA's substance from a viewpoint that intelligently balances the interests of all concerned.

From a broader perspective, and equally important, the ACTA negotiations have revealed an emerging trend in freedom of information scenarios where the government and commercial interests, working closely together, appear to have a mutual interest in keeping information of significant national concern from the public. Ultimately, this article proposes that the MPAA, and the public generally, would have been better served by an open and transparent ACTA process that was accountable to the public from its inception. In fact, there may have been fewer "opponents of ACTA" as a result, and resources would not have been wasted on largely futile secrecy efforts. Given the inefficient policy produced by secretive government negotiations, FOIA must be reconsidered to reflect the current state of technology in the era of WikiLeaks, and public/private relationships.

I. THE FREEDOM OF INFORMATION ACT

In order to understand the context within which the bulk of the ACTA negotiations have transpired, it is important to note the current trends in federal government transparency. During his first day as President of the United States, Barack Obama issued a "memorandum for the heads of executive departments and agencies" regarding the FOIA,¹³ a federal act that mandates open government with certain exceptions.¹⁴ In the first sentence of the memorandum, President Obama noted that "[a] democracy requires accountability, and accountability requires transparency In the face of doubt, openness prevails."¹⁵ As part of the directive, President Obama ordered the Attorney General to "issue new [FOIA] guidelines" and the Office of Management and Budget ("OMB") to "update guidance" to the agencies in order to "usher in a new era of open Government."¹⁶ The Attorney General issued a memorandum on

negotiation of ACTA).

13. Memorandum from President Barack Obama on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

14. 5 U.S.C. § 552 (2006).

15. Memorandum from President Barack Obama on the Freedom of Information Act, 74 Fed. Reg. at 4683.

16. *Id.*

March 19, 2009, laying out two primary instructions for how federal agencies should respond to FOIA requests based upon President Obama's memorandum: "First, an agency should not withhold information simply because it may do so legally. . . . Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure."¹⁷ As discussed in more detail below, this is a fundamental reorientation of how agencies respond to FOIA requests.

The OMB took a bit more time to present its guidance to agencies, but it did so on December 8, 2009 in the potentially groundbreaking Open Government Directive (the "OMB Memorandum").¹⁸ The OMB Memorandum requires federal agencies to "take specific actions to implement the principles of transparency, participation, and collaboration set forth in the President's Memorandum."¹⁹ This effort has been hailed as a potential "watershed moment for democracy, the likes of which can forever change the relationship between the government and the public it serves."²⁰ It has already resulted in agencies moving toward releasing data on the Internet, making data available for download at no cost to the user, and disclosing previously unreleased documents for public inspection.²¹ Indeed, every cabinet department is supposed to unveil a "new open government project."²²

17. Memorandum from Eric Holder, U.S. Attorney Gen., to the Heads of Exec. Dep'ts and Agencies (Mar. 19, 2009), *available at* www.usdoj.gov/ag/foia-memo-march2009.pdf.

18. Memorandum from Peter R. Orszag, Director, Exec. Office of the President, to the Heads of Exec. Dep'ts and Agencies (Dec. 8, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

19. *Id.*

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

21. See Miranda Fleschert, *White House Announces 20 Agency Open Government Initiatives*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Dec. 10, 2009, 3:50 PM), <http://www.rcfp.org/newsitems/index.php?i=11165> (mentioning plans by the Departments of Defense, State, Agriculture, Transportation and others to release electronically data ranging from updates on the Sudanese conflict in Darfur to nutrition facts about certain foods).

22. See Norm Eisen & Beth Noveck, *Why an Open Government Matters*, OPEN GOV'T INITIATIVE (Dec. 9, 2009, 3:16 PM), <http://www.whitehouse.gov/>

To understand the significance of these developments, it is important to note the general trend since the terrorist attacks of September 11, 2001. Since 9/11, commentators have found that the United States government generally errs on the side of secrecy.²³ Moreover, there has been increased use of the designation “Sensitive But Unclassified” by U.S. government agencies. This designation is often found on research and scientific or technological information generated by the government post-9/11, and allows for such information to be shielded from public view.²⁴ Thus, Obama’s FOIA memorandum has the potential to scale back the excessive, post-9/11 secrecy, and thereby catalyze a re-imagining of the relationship between government and citizens at the federal, state, and local levels.²⁵

Unfortunately, throughout the ACTA negotiations the federal government has taken positions that favor secrecy and undermine optimism for fundamental change. Indeed, U.S. government positions concerning the commercial interests of the industries most impacted by ACTA, as well as the other scenarios discussed below, may reveal a disturbing trend where the government has begun to

blog/2009/12/09/why-open-government-matters (describing the White House Directive that initiated the renewed emphasis on open government, and describing its effect on federal agencies).

23. See Peter P. Swire, *A Theory of Disclosure for Security and Competitive Reasons: Open Source, Proprietary Software, and Government Agencies*, 42 HOUS. L. REV. 1333, 1378 (2006) (decrying the post-9/11 boilerplate policy of classifying documents as resulting in excessive secrecy and agency self-protection). This does not always mean that information remains secret, but administrative errors are untenable as a basis of a disclosure regime. See Iain Thomson, *US Army Posted Secrets on the Web*, V3.CO.UK (July 12, 2007), <http://www.v3.co.uk/vnunet/news/2194072/army-posting-secrets-web> (reporting that the U.S. Army and its contractors accidentally posted military secrets on the web).

24. See generally GENEVIEVE J. KNEZO, CONG. RESEARCH SERV., RL 33303, “SENSITIVE BUT UNCLASSIFIED” INFORMATION AND OTHER CONTROLS: POLICY AND OPTIONS FOR SCIENTIFIC AND TECHNICAL INFORMATION 2-16 (2006) (reviewing past federal policies governing the release of scientific and technical information and making recommendations to streamline current policies, including limiting the number of those responsible for designating information as “sensitive but unclassified” and centralizing the information disclosure policies).

25. *But see* Andrew Malcolm, *A Little Secret About Obama’s Transparency*, L.A. TIMES, Mar. 21, 2010, at A28 (reporting that an Associated Press examination of seventeen major agencies’ FOIA request responses resulted in 466,872 denials—“an increase of nearly 50% from the 2008 fiscal year under Bush”).

assert aggressively the commercial interests of a private entity in denying FOIA requests on issues of national importance. Such a lopsided government policy gives commercial interests a favored position over the public in accessing otherwise-secret information.

Nonetheless, in each situation discussed below, the initial efforts to withhold information have been largely overcome by public pressure. While full disclosure has not been achieved, significant information has eventually reached the public, and in some circumstances disclosure is currently being litigated. This reality should cause policymakers to consider whether fights over secrecy are worth the battle if some or all of the information sought will eventually be disclosed—or, as in the case of ACTA, leaked. The following three examples are illustrative of the problem.

A. BLOOMBERG L.P. v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

A startling example analogous to the ACTA situation occurred towards the end of President George W. Bush's administration. On November 7, 2008, Bloomberg L.P. ("Bloomberg") filed a complaint in the United States District Court for the Southern District of New York against the Board of Governors of the Federal Reserve System ("Fed").²⁶ The case involved a FOIA request made by Bloomberg to the Fed in May 2008, asking the Fed to "disclose the recipients of more than \$2 trillion of emergency loans from U.S. taxpayers and the assets the central bank is accepting as collateral."²⁷ After months of not receiving a substantive response to the request, Bloomberg alleged in their complaint:

The government documents that Bloomberg seeks are central to understanding and assessing the government's response to the most cataclysmic financial crisis in America since the Great Depression. The

26. Complaint for Declaratory and Injunctive Relief, *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262 (S.D.N.Y. 2008) (No. 08-CV-9595), 2008 WL 8066871.

27. Mark Pittman, *Fed Refuses to Disclose Recipients of \$2 Trillion*, BLOOMBERG (Dec. 12, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGvwtDayiiM>; see FOIA Requests from Bloomberg News Serv. to the Fed. Reserve Bd. (Feb. 21, 2009), available at <http://www.scribd.com/doc/12760404/Bloomberg-News-FOIA-Request-Federal-Reserve-Board> (cataloguing every FOIA request sent from Bloomberg to the Fed).

effect of that crisis on the American public has been and will continue to be devastating. Hundreds of corporations are announcing layoffs in response to the crisis, and the economy was the top issue for many Americans in the recent elections.²⁸

Bloomberg's request sought documents disclosing the terms of the Fed lending programs,²⁹ and their complaint explained the significance of the information sought, from a transparency perspective:

In response to the crisis, the Fed has vastly expanded its lending programs to private financial institutions. To obtain access to this public money and to safeguard the taxpayers' interests, borrowers are required to post collateral. Despite the manifest public interest in such matters, however, none of the programs themselves make reference to any public disclosure of the posted collateral or of the Fed's methods in valuing it. Thus, while the taxpayers are the ultimate counterparty for the collateral, they have not been given any information regarding the kind of collateral received, how it was valued, or by whom [it was valued].³⁰

After the complaint was filed, but before it was answered, the Fed responded to the request in a five page letter.³¹ The Fed noted that it had located responsive documents,³² but decided to withhold these "approximately 231 full pages of information" because, among other reasons, they contained confidential commercial information.³³

Although FOIA does protect privately-held, commercially valuable information,³⁴ it is disturbing that the government seemingly went out of its way to protect commercial interests in the context of an unprecedented bank loan program where the taxpayers had an at-risk exposure of \$2 trillion. For example, the Fed noted that it "has to be and is mindful of the commercial and financial interests of

28. Complaint for Declaratory and Injunctive Relief, *supra* note 26, ¶ 2.

29. *E.g.*, Pittman, *supra* note 27.

30. *Id.* ¶ 3.

31. Letter from Jennifer J. Johnson, Sec'y of the Bd., Bd. of Governors of the Fed. Reserve Sys., to Mark Pittman, Bloomberg (Dec. 9, 2008) [hereinafter Johnson Letter] (on file with American University International Law Review).

32. *See id.* (mentioning that these documents included reports "containing certain information (specifically, the names of participants, originating Federal Reserve Bank district, names of borrowers, individual loan amounts and origination and maturity dates)").

33. *Id.*

34. 5 U.S.C. § 552(c)(4) (2006).

borrowers, [and] the institutions whose collateral secured the borrowings.”³⁵ It explained that “institutions that may potentially borrow [from the Fed] recognize that counterparts and market analysts may draw adverse inferences about their financial health if the institutions have turned to [the Fed] and, for that reason, such institutions can be extremely concerned about the stigma of borrowing [from the Fed].”³⁶ Thus, disclosure would “harm individual borrowers’ competitiveness.”³⁷

While arguing that such secrecy protects the interests of the taxpayer and the Fed in administering the loan program, the Fed is asserting, in part, that it also protects the commercial interests of its borrowers in denying the request. However, as Bloomberg explains in their complaint, the public’s interest is magnified by the Fed’s risky policies and the effects of the on-going financial crisis on the American economy.³⁸ In the battle between commercial interests of private entities and the public’s right to know, the federal government and FOIA have become proxies for the former, and are being used to control the flow of information regarding corporate entities to the public.³⁹ Here, the commercial entities get favored treatment by virtue of their commercial dealings with the government, and, hence, know far more about the operations of the Fed than the public that funds it. Indeed, in a related Bloomberg FOIA request to the Fed (that resulted in the production of 560 pages of marginally relevant and heavily redacted emails some twenty months after they were requested), one commentator described FOIA as “honorable and useful” as long as you are “not asking for information about the bank bailout,” willing to wait years for the information, and “don’t mind if the requested documents are 95% blacked out when you finally get them.”⁴⁰

35. Johnson Letter, *supra* note 31.

36. *Id.*

37. *Id.*

38. Complaint for Declaratory and Injunctive Relief, *supra* note 26, ¶ 19.

39. Importantly, Bloomberg was ultimately successful in court. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 282 (S.D.N.Y. 2008), *aff’d*, 601 F.3d 143, 151 (2d. Cir. 2010); Mark Pittman, *Court Orders Fed to Disclose Emergency Bank Loans*, BLOOMBERG (Aug. 25, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7CC61ZsieV4>. However, as of this writing, the Fed has not produced the requested documents.

40. Katya Wachtel, *Fed Gives Bloomberg the Lamest FOIA Document Ever*, *as*

The impact of such a partnership raises disturbing issues about the dual role of government as both a commercial lender and defender of the public's interests. Policymakers must question whether the government can play these dual roles without compromising the public's right to know, especially where there is strong public interest in timely disclosure of the information.

B. BRITISH PETROLEUM AND COREXIT

In the wake of the massive British Petroleum ("BP") Deepwater Horizon oil spill, Nalco Company's ("Nalco") COREXIT dispersants were used to mitigate damages associated with the spill.⁴¹ This is problematic because unlimited use of COREXIT "could [have] cause[d] unknown risks to human and marine health."⁴² After requests for Nalco to publicly release information about COREXIT's formula so that researchers could attempt to ascertain the potential impact of its widespread use,⁴³ both the Environmental Protection Agency ("EPA") and Nalco released the ingredients to the public,⁴⁴ but shielded the exact concentration formula of the chemicals, stating that they are trade secrets.

The exact formula for COREXIT, the use of which has been

Everything That Matters is Blacked Out, BUS. INSIDER (Oct. 25, 2010, 11:18 AM), <http://www.businessinsider.com/fed-protects-citi-and-itself-from-foia-request-sends-hundreds-of-blacked-out-pages-to-bloomberg-reporter-2010-10#ixzz1430hkFG0>.

41. See Erick Kraemer, *What is COREXIT and Why is it Still Being Used in the Gulf*, DISASTER ACCOUNTABILITY BLOG (July 28, 2010), <http://blog.disasteraccountability.com/2010/07/28/what-is-corexit-and-why-is-it-still-being-used-in-the-gulf> (noting that the dispersal of millions of liters of COREXIT into the Gulf of Mexico was the largest use of such chemicals in U.S. history).

42. See Anne C. Mulkern, *Maker of Controversial Dispersant Used in Gulf Oil Spill Hires Top Lobbyists*, N.Y. TIMES, June 25, 2010, <http://www.nytimes.com/gwire/2010/06/25/25greenwire-maker-of-controversial-dispersant-used-in-gulf-94328.html> (reporting that the EPA and the U.S. Coast Guard eventually ordered BP to stop using the chemical).

43. Press Release, Earthjustice, Conservation Groups Act to Uncover What's In Gulf Oil Dispersants (July 14, 2010), <http://www.earthjustice.org/news/press/2010/conservation-groups-act-to-uncover-what-s-in-gulf-oil-dispersants>.

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

banned in the United Kingdom,⁴⁵ is held by the EPA. Due to a general dearth of information regarding the impact of the chemical, the Gulf Restoration Network and the Florida Wildlife Federation made a FOIA request to the EPA for health and safety data regarding the dispersant.⁴⁶ After failing to receive a response to their request, the parties brought an action against the EPA seeking “data and studies submitted to EPA pursuant to [relevant federal environmental laws] regarding dispersants and their constituents, and un-redacted copies of communications between EPA and BP concerning the use of dispersants during the response to the BP Deepwater Horizon oil spill.”⁴⁷

Presumably, the EPA would take the position that the requested information is a trade secret and/or confidential commercial information under FOIA.⁴⁸ Indeed, the EPA would likely be correct, revealing a separate problem in FOIA.⁴⁹ But, even if FOIA operates as an impediment to disclosure of *some* information, it is not an impediment to disclosure of *all* information unless the administrative agency holding the information willfully slows down the process. Such was the case here. The EPA’s delay in releasing the components that make up COREXIT was a direct result of the agency’s preference for protecting the interests of Nalco and BP over the public’s interest. Accordingly, the watchdog group OMB Watch issued the following criticism of EPA upon its release of COREXIT

45. *See id.* (noting that the use of COREXIT is banned in the U.K. because of a failure to pass the “limpet test”—where the product is sprayed on rocks to seeing if “limpets, (a type of small mollusk) can still cling to them”). Nalco therefore claims that the product is not intended for use on rocky shorelines, but instead for open sea waters. *Id.*

46. Complaint for Injunctive Relief ¶ 20, Fla. Wildlife Fed’n, Inc. v. EPA, No. 10-293 (N.D. Fla. July 14, 2010), 2010 WL 2884458.

47. *Id.* As of this writing, the action is ongoing. *See EPA Reveals What’s in Gulf Oil Spill Dispersants*, GULF OIL SPILL (Dec. 30, 2010), <http://www.gulfspill.oil.com/updated-epa-reveals-whats-in-gulf-oil-spill-dispersants> (announcing that the EPA eventually released data on the chemical compounds used in the Gulf oil spill, but also reporting that the Gulf Restoration Network and Florida Wildlife Federation have hired experts to assess the data provided by the EPA and determine whether the chemicals used were truly toxic).

48. *See* 5 U.S.C. § 552(c)(4) (2006).

49. *See generally* David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007) (analyzing FOIA and advocating for governmental “transparency and accountability” over strict protections for commercial trade secrets).

data:

After weeks of gallon after gallon [of COREXIT] pouring into the Gulf, finally the public is given the most basic information crucial to monitoring the fate and impacts of these chemicals. EPA had the authority to act all along; its decision to now disclose the ingredients demonstrates this. Yet it took a public outcry and weeks of complaints for the agency to act and place the public's interest ahead of corporate interests.⁵⁰

Here, as seen in *Bloomberg* and the ACTA negotiations, continual public pressure on the EPA forced the agency to release information that it would have preferred to keep secret. In doing so, the EPA risked the scorn of corporate interests, and legitimately caused the public to question where the EPA's loyalties and political interests lie.⁵¹ But still, FOIA remains an impediment to the dissemination of information, as public pressure alone cannot change the language of the law.

C. ACTA

FOIA has been interpreted to exist, in part, to prevent the development of "secret law."⁵² Yet, the ACTA negotiations' lack of transparency heightens concerns that "secret law" is precisely what is being developed. Here, the focus is not the power of the purse, or public health and safety concerns, but another fundamental role of government: lawmaking. In the ACTA context, FOIA requests from Knowledge Ecology International ("KEI") to the USTR in the early days of the Obama administration were met with responses similar to those received by Bloomberg. In January 2009, KEI sought seven specific documents that reflected proposals for the substantive text of ACTA.⁵³ In a summary response in March 2009, around the same

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

51. Cf. Mulkern, *supra* note 42 (discussing the role of lobbyists in EPA investigations of companies like Nalco and explaining that because the EPA "has a lot of leverage," companies being investigated by the agency often employ lobbyists who can advocate for them as a counterbalance to the EPA's investigative power).

52. See, e.g., Frank H. Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUD. 775, 777 (1980) (looking to FOIA's indexing and reading-room rules as indications that the Act's "primary objective is the elimination of 'secret law'").

53. See James Love, *Obama Administration Rules Texts of New IPR Agreement*

time as the OMB Memorandum, the USTR denied the request, citing an exemption to FOIA for “information that is properly classified in the interest of national security.”⁵⁴ Upon receipt of the denial letter, KEI’s director, James Love, explained:

The texts are available to the Japanese government. They are available to the 27 member states of the European Union. They are available to the governments of Canada, Mexico, New Zealand, Australia . . . and many other countries. They are available to “cleared” advisers (mostly well connected lobbyists) for the pharmaceutical, software, entertainment and publishing industries. But they are a secret from you, the public.⁵⁵

Again, while the law may support such a denial by the USTR, a disturbing reality has emerged. Just as the Fed asserted the interests of commercial borrowers in fighting Bloomberg’s FOIA request, thereby maintaining the borrowers’ superior knowledge about the loan program, the USTR has elevated commercial interests over the general interests of the public. The result has been distribution of information—generally unavailable to the public through non-disclosure agreements (“NDAs”)—to (primarily) corporate entities and their proxies.⁵⁶ These special groups apparently have their own freedom of information rules. The public has no opportunity to sign a NDA and cannot obtain the real-time information to which these special groups are privy.⁵⁷ The result is that these NDA-signing entities and/or “cleared advisors” are far better positioned to offer timely, meaningful input than the public. Information disparities like this, which are fueled rather than rectified by an open government

are State Secrets, HUFFINGTON POST (Mar. 12, 2009), http://www.huffingtonpost.com/james-love/obama-administration-rule_b_174450.html (reporting that the documents sought by KEI were widely available to lobbyists and foreign government officials, but not the U.S. public).

54. *Id.*; see 5 U.S.C. § 552(c)(1).

55. Love, *supra* note 53.

56. See James Love, *White House Shares the ACTA Internet Text with 42 Washington Insiders, Under Non Disclosure Agreements*, KNOWLEDGE ECOLOGY INT’L (Oct. 13, 2009, 4:10 PM), <http://keionline.org/node/660> (naming individuals allowed to view secret documents pursuant to NDAs). Indeed, when KEI requested the names of the entities that had signed a NDA and received a copy of the ACTA text, the USTR’s initial response was to deny it, again “on the grounds that the release of the names of persons who had seen the text would undermine the national security of the United States.” *Id.*

57. KEI was one of the few non-commercial entities given an opportunity to sign a NDA. *Id.*

law, should give us pause, especially when that open government law is FOIA.

More strikingly, this broad power of the USTR to control the flow of information through FOIA is not an accident. Rather, the USTR's power is derived from the Obama administration's choice to continue designating ACTA as an Executive Agreement, thus by-passing Congress and the traditional transparent format for negotiating international agreements.⁵⁸ This choice has resulted in a stunning lack of transparency, as compared to a variety of international institutions that facilitate international agreements, including the World Intellectual Property Organization ("WIPO"), the World Trade Organization ("WTO"), the Organization for Economic Cooperation and Development, the Commission on Science and Technology for Development, and the Internet Governance Forum.⁵⁹ Aside from official drafts released late in the negotiating process, the public has had to rely on guesswork and speculation based upon leaked texts and rumors to ascertain the status of ACTA's negotiations.

Consequently, ACTA's lack of transparency has mutated what would otherwise have been a largely public debate about ACTA's merits and terms into a hearsay-laden, speculative melee. This is a policy choice made by the Obama administration that has given corporate entities a "most favored nation" status and limited real benefits to the negotiation process or the public. In summary, intellectual property law agreements have apparently become issues of national security that require the input of commercial interests but not the public at large. As Peter Yu points out, this "national security" concern is "more correctly identified with the maintenance of good foreign or diplomatic relations with ACTA negotiating

58. Eddan Katz, *Stopping the ACTA Juggernaut*, ELECTRONIC FRONTIER FOUND. (Nov. 19, 2009), <http://www EFF.org/deep links/2009/11/stopping-acta-juggernaut>.

59. See Jeremy Malcolm, *Public Interest Representation in Global IP Policy Institutions* 13-17 (Am. Univ. Wash. Coll. of Law, Program on Info. Justice & Intellectual Prop., Working Research Paper No. 6, 2010), available at <http://digitalcommons.wcl.american.edu/research/6/> (comparing the capacity of certain international organizations to further the development of intellectual property policy at the global level and commenting on ACTA's weaknesses as an institutional mechanism).

partners.”⁶⁰ Though negotiating partners may want to be free of public relations concerns as they negotiate,⁶¹ FOIA has allowed national security implications to trump legitimate public concerns about the impact of ACTA on domestic law. In so doing, this designation has allowed the USTR to deny many ACTA-related FOIA requests. These denials, in tandem with the USTR’s apparent trend toward maintaining secrecy despite promising transparency, have created an environment in which ACTA may very well go down as the least transparent international agreement in living memory.

Compounding the problem—and similar to the Fed’s denial of FOIA requests regarding \$2 trillion in loans to banks, the USTR does not seem particularly concerned that the public cannot access information about an agreement that could impact every U.S. citizen’s rights under copyright law.⁶² The issues of \$2 trillion in federal loans, public health and safety in the Gulf of Mexico, and lawmaking about basic intellectual property (“IP”) protections have national importance and involve close interactions between government and the affected private interests. All are situations where private commercial interests have secretly been given higher priority than the public’s interest in basic information. Moreover, the government, aided ironically by FOIA, has amplified the detrimental impact on public transparency and accountability through its close interactions with interested commercial entities. Therefore, while only three examples, albeit significant ones, do not make a trend, they do suggest an emerging mode of response to major issues of national importance, particularly when a meaningful segment of the public could possibly disagree with the official position taken by the government. This emerging trend of decreased information flow

60. Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) (manuscript at 20), available at <http://ssrn.com/abstract=1624813>.

61. *Id.* (manuscript at 20-21) (quoting *ACTA-Summary of Key Elements Under Discussion*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2009/november/acta-summary-key-elements-under-discussion>).

62. See Katz, *supra* note 58 (criticizing the USTR for its purposefully constructed lack of accountability in keeping the ACTA negotiations secret and advocating for trade negotiation reform and increased Congressional oversight of agencies like USTR).

warrants further exploration and monitoring.

In sum, the examples of Bloomberg, BP, and ACTA indicate that FOIA needs to be reconsidered. One may legitimately question whether FOIA is up to the task of balancing the public's interest with the interests of the government and its corporate partners. The failure to balance public and corporate interests was apparent in the government's multi-trillion dollar loans to financial entities, the government's reliance on BP to clean up the Gulf oil spill, and the government's close consultation with primarily corporate entities on matters of international lawmaking in ACTA.⁶³ More specifically, FOIA seems to assume an *ability* to keep and maintain secrets about matters of significant public concern that may not be realistic in an Internet-dominated, WikiLeaks-prone age. Indeed, as the authors of *Millennial Makeover* suggest, we are due for a reassessment of law as a response to the "growth and success of new communication technologies."⁶⁴ Therefore, along the lines of the Obama administration's early promises to make government more transparent,⁶⁵ FOIA needs to be re-conceptualized to reflect the broad information sharing powers and expectations established by the Internet. The remainder of this article focuses on facilitation of this policymaking process through the lens of ongoing ACTA negotiations.

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

Despite the efforts for secrecy, some ACTA information has leaked to an eager public and, to a lesser extent, has been officially

63. The government may not have a perfect mutuality of interest in these scenarios, but it is clearly operating as a partner with corporate entities to achieve mutually-identified goals. The exact parameters of this balancing are beyond the scope of this paper, but are a subject of current research.

64. See MORLEY WINOGRAD & MICHAEL D. HAIS, *MILLENNIAL MAKEOVER: MYSPACE, YOUTUBE, AND THE FUTURE OF AMERICAN POLITICS* 49 (2008) (reviewing "cycles" of American political activity and predicting a "comeback" of "activist government" due, in part, to the impact of technological development on voter behavior).

65. See *Change has come to WhiteHouse.gov*, WHITEHOUSE.GOV (Jan. 20, 2009), http://www.whitehouse.gov/blog/change_has_come_to_whitehouse-gov/ (proclaiming the Obama administration's commitment to transparency and announcing the online publication of executive orders and proclamations).

released.⁶⁶ This information, perhaps because it is so unusual to receive, has been rapidly disseminated through the Internet.⁶⁷ Thus, a related question is whether attempts at secrecy can be maintained in the face of an international negotiation on a far reaching topic—the state of IP law—and hidden from a public with a robust and pervasive tool with which to communicate and share information—the Internet. In other words, can interested parties ever reap the *benefits* of secrecy when there is a strong public interest in the concealed information?⁶⁸ Aside from transparency concerns, which may provide a normative policy argument in favor of greater disclosure, is secretive behavior nonetheless defensible from a practical perspective as a preferred mode of lawmaking? In this section, this article proposes that the likely answer is no.

The lack of disclosure and accountability since the beginning of the ACTA negotiations has been roundly criticized. The primary concerns have been (1) general erosion of deliberative democracy, (2) one-sided input that reflects primary commercial perspectives, (3) speculation and guesswork replacing real discussion of the issues, and (4) deterioration of the legitimacy of the process and the law being created.⁶⁹ Each of these concerns has played a part in the public condemnation of the negotiators' positions on transparency and accountability.⁷⁰ But what about the primary benefit of

66. See, e.g., Jane Fae Ozimek, *ACTA Leaks - But Secret Squirrel Stays Secret: Fingers Point to the USA*, THE REGISTER (July 23, 2010), http://www.theregister.co.uk/2010/07/23/acta_leak_secretcy/ (suggesting that the secrecy surrounding ACTA negotiations is potentially pointless because news about meetings and discussions is constantly being leaked).

67. See e.g., ACTA WATCH, <http://acta.michaelgeist.ca> (last visited Mar. 1, 2011); KNOWLEDGE ECOLOGY INT'L, <http://keionline.org> (last visited Mar. 1, 2011); ELECTRONIC FRONTIER FOUND., <http://www.eff.org> (last visited Mar. 1, 2011).

68. See Aaron X. Fellmeth, *The Anti-Counterfeiting Trade Agreement in the Public Eye*, 14(18) ASIL INSIGHT, June 24, 2010, at 1, available at <http://www.asil.org/files/insight100624pdf.pdf> (commenting that while the United States is typically secretive in its treaty negotiations, the USTR has begun to feel pressure from mounting criticism about the guarded nature of ACTA negotiations); see also Ozimek, *supra* note 66 (opining that leaks signal the futility of keeping ACTA negotiations secret).

69. See *supra* notes 7-12 and accompanying text (discussing criticisms of the ACTA process as lacking transparency).

70. See Yu, *supra* note 60, at 21 (decrying the government's decision to support certain industries to the detriment of the greater public).

secrecy—namely, smooth and efficient negotiations free from external influences, which range from “political complications in the capitals to opposition from civil society groups?”⁷¹ Because the Internet exists as a pervasive means to disseminate information on issues of significant public concern, the remainder of this paper suggests that the benefit of secrecy is difficult, and in some cases impossible, to maintain when (1) an issue of significant national interest is receiving national attention, and (2) there is an organized and technologically-savvy group of interested members of the public that are not receiving desired information about the issue. Therefore, under these circumstances, governmental policies formulated with an assumption of the ability to maintain strong secrecy run a risk of failure to the extent that secrecy is fundamental to achieving the given goals.

A. PROBLEMS WITH THE SECRECY ASSUMPTION

There are several problems with assuming the ability to maintain strong secrecy in the ACTA context. Since information was first leaked about the mere existence of the ACTA negotiations, concerns were raised that ACTA was locked inside the proverbial black box. Professor Michael Geist, one of Canada’s leading copyright scholars, noted in an early commentary that ACTA “could ultimately prove bigger than WIPO—without the constraints of consensus building, developing countries, and civil society groups, the ACTA could further reshape the IP landscape with tougher enforcement, stronger penalties, and a gradual eradication of the copyright and trademark balance.”⁷²

Thus began a concerted effort to grab the most useful information about the state of the ACTA—namely, actual drafts of the agreement. Despite coordinated international efforts to maintain the security of negotiating drafts, at least six full or partial drafts were

71. *Id.* at 22; *see also* EUROPEAN COMM’N, ANTI-COUNTERFEITING TRADE AGREEMENT FACT SHEET 4 (2008), *available at* http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142039.pdf (“For reasons of efficiency, it is only natural that intergovernmental negotiations dealing with issues that have an economic impact, do not take place in public and that negotiators are bound by a certain level of discretion.”).

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

leaked and widely disseminated on the Internet by highly-read technology information websites, including Boing Boing and WikiLeaks.⁷³

To be clear, leaks are not a system of public transparency, and the information adduced typically cannot be used to offer much meaningful input to policymakers. Unsurprisingly, however, the USTR did not offer any formal ways for the public to offer input on leaked information. Though the public could not obtain a perfect picture of the U.S. position, it was simply wishful thinking—from the beginning—for the USTR to assert that the public would find out how the U.S. position evolved only once the agreement had been signed. Indeed, a week before the date of McCoy's "transparency soup" email, which made this assertion, the second leak of an ACTA draft had been publicly discussed and analyzed.⁷⁴ The USTR, Ambassador Ron Kirk, also maintained this position in December 2009, telling KEI's James Love that the ACTA text would be made public "when it is finished."⁷⁵ At that time at least four leaks had occurred.⁷⁶ Policymaking based upon wishful thinking cannot lead to

73. The first leak occurred on May 22, 2008 and was reported by WikiLeaks. *Proposed US ACTA Multilateral Intellectual Property Trade Agreement (2007)*, WIKILEAKS (May 21, 2008), http://wikileaks.org/wiki/Proposed_US_ACTA_plurilateral_intellectual_property_trade_agreement_%282007%29. The second, less substantial leak occurred in February 2009. *Putting Together the ACTA Puzzle: Privacy, P2P Major Targets*, MICHAEL GEIST BLOG (Feb. 3, 2009), <http://www.michaelgeist.ca/content/view/3660/125> [hereinafter *ACTA Puzzle*]. The third leak occurred in April 2009 and was again published on WikiLeaks. The fourth, focusing on Internet issues, occurred in November 2009. *The ACTA Internet Chapter: Putting the Pieces Together*, MICHAEL GEIST BLOG (Nov. 3, 2009), <http://www.michaelgeist.ca/content/view/4510/99999>. The fifth leak was a full text draft of the agreement and was leaked in March 2010. *ACTA's De Minimis Provision: Countering the iPod Searching Border Guard Fears*, MICHAEL GEIST BLOG (Mar. 23, 2010), <http://www.michaelgeist.ca/content/view/4900/125>. The most recent leak occurred in September 2010. Cory Doctorow, *Latest Leaked Draft of Secret Copyright Treaty: US Trying To Cram DRM Rules Down the World's Throats*, BOING BOING (Sept. 6, 2010, 7:38 AM), <http://boingboing.net/2010/09/06/latest-leaked-draft.html>.

74. See *ACTA Puzzle*, *supra* note 73 (noting that although the treaty is not near completion, ACTA's scope appears to encompass multiple chapters ranging from enforcement to institutional arrangements); *supra* note 11 and accompanying text.

75. James Love, *Ambassador Kirk: People Would be "Walking Away from the Table" if the ACTA Text is Made Public*, KNOWLEDGE ECOLOGY INT'L (Dec. 3, 2009, 5:31 PM), <http://keionline.org/node/706>.

76. See *supra* note 73 (chronicling the various leaks that occurred during the

good law, and the realities of the USTR's limited ability to maintain secrecy might explain why negotiators finally caved and released an "official" draft text in April 2010.

Aside from the basic fact that draft texts and portions thereof were being leaked in spite of the official stance, another part of the problem is that USTR's support and encouragement of ironclad secrecy stands in stark contrast to the approach of other international bodies charged with lawmaking in the intellectual property sphere. For example, major IP treaty bodies such as the World Health Organization ("WHO"), WTO—which includes the Council for the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the United Nations Commission on International Trade Law ("UNCITRAL") publish agendas, lists of participants, meeting minutes, and draft documents on their respective web sites.⁷⁷ Indeed, as Jeremy Malcolm noted in his recent study of a number of international institutions, "even the WTO, the least participatory of the organizations studied, posts all of its official documents online, and most of the other institutions [including WIPO] also make available negotiating texts."⁷⁸ Thus, the USTR had virtually no precedent for such an extreme maneuver, and the public rightly expected more information based upon past precedent.

Indeed, the strategy inspired Senator Ron Wyden of Oregon to write to the USTR in late 2009 asking for the USTR's specific ACTA negotiation positions.⁷⁹ Upon receiving a response, Wyden

course of the ACTA negotiations).

77. See Malcolm, *supra* note 59, at 15-17 (summarizing the strengths and weaknesses of various international organizations with respect to transparency); Electronic Frontier Found. et al., *ACTA is Secret. How Transparent are other Global Norm Setting Exercises?* (July 21, 2009), http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf (providing examples of transparency from the policies and practices of, inter alia, WHO, WTO, WIPO, and UNCITRAL).

78. See Malcolm, *supra* note 59, at 17, 20 (concluding that ACTA fails to meet the transparency best practices employed by existing intellectual property institutions).

79. See Letter from Ron Wyden, U.S. Senator, to The Honorable Ron Kirk, U.S. Trade Representative (Jan. 6, 2010), *available at* http://keionline.org/sites/default/files/Wyden_Letter_to_USTR_on_ACTA_Jan_2010.pdf (requesting information such as the extent to which USTR was considering the impact of negotiation proposals on domestic laws and USTR's goals regarding ACTA's scope).

issued a press release in January 2010 in which he noted that he was attempting to “shed light” on ACTA’s “secret negotiations” and sought to “encourage[] [the USTR] to give the public a say over issues that so profoundly affect their lives, as trade policies often do.”⁸⁰ The highly unusual action of a Democratic Senator challenging an appointee of a Democratic President on a major international negotiation, combined with the stark differences in negotiation transparency and accountability between ACTA and all other major international IP agreements of recent vintage, suggests that the USTR’s apparent strategy of extreme secrecy was a non-starter.

Despite the possibility of a streamlined process where public input is virtually non-existent and a hand-picked group of advisors periodically offers counsel to the USTR, evidence suggests that ACTA has actually taken longer to negotiate than many similar international IP agreements.⁸¹ Assuming that ACTA negotiations began in June 2008 and as of this writing have not yet concluded, these negotiations have taken over two and a half years. While this is not an excessive amount of time to negotiate a multilateral international agreement, KEI notes that it is longer than negotiations for nine of sixteen multilateral IP agreements.⁸² Thus, while there are many factors that affect the speed with which a treaty is negotiated, it is at least questionable whether the efforts at secrecy, however flawed, have actually streamlined the negotiation process. Stated differently, the fact that WIPO and WTO are more transparent, yet have been able to facilitate the conclusion of major recent international IP agreements in comparable or less time than ACTA, challenges the notion that secrecy inevitably leads to a streamlined

80. Malini Aisola, *USTR Responds to Senator Wyden’s Letter on ACTA*, KNOWLEDGE ECOLOGY INT’L (Mar. 2, 2010, 5:01 PM), <http://keionline.org/node/791>.

81. See Alberto Cerda, *How Much Time is Necessary to Negotiate the Text of a Multilateral Agreement on Intellectual Property?*, KNOWLEDGE ECOLOGY INT’L (June 4, 2010, 12:03 PM), <http://keionline.org/node/861> (outlining the negotiation histories of major international IP treaties).

82. See *id.* (“[T]he time to negotiate the text of [an] agreement generally took less than four years, and in many cases, less than two years.”). For example, the 1996 WIPO Internet treaties were negotiated in less than two years, whereas WTO’s TRIPS, arguably the most significant IP treaty, was concluded in 1993 after three and a half years of negotiations. *Id.*

and efficient negotiation process in IP lawmaking.

Aside from the questionable practical impact of excessive secrecy, the USTR's position is rendered even more untenable simply because it does not meet current expectations of a transparent and accountable government. The Internet has raised public expectations of what transparency and accountability look like, and policymakers ignore this shift at their peril. Indeed, as illustrated during the ACTA negotiations, interested parties can force transparency where little or none is officially desired.⁸³ Once transparency is forced by the public, any administrative efforts to realistically control disclosure become tainted. Hence, the USTR's largely unsuccessful efforts to maintain black box secrecy can be dismissed as little more than an effort to prevent the public from knowing about its lawmaking activities.

Indeed, as KEI's James Love explained to Ambassador Kirk in December 2009, receiving the text after it was concluded "was too late, and the public wanted the text out now, before it's too late to influence anything."⁸⁴ Only time will tell whether the final draft reflects scholars' and practitioners' indirect input, offered through the analysis of leaked texts and more recent "official" versions.⁸⁵ Nonetheless, despite this uncertainty and USTR's efforts to shield the negotiation process from the public, this has not been a process wholly devoid of public input. At a minimum, the public has compelled some disclosure and forced the USTR and other negotiating parties to defend the official policy of not releasing drafts and other valuable information.⁸⁶

83. See *supra* note 73 and accompanying text (detailing the numerous leaks of ACTA despite attempts by the negotiating parties to preserve secrecy).

84. See Love, *supra* note 75 (describing how the interaction between Love and Ambassador Kirk—which occurred while the two were seated next to each other on an airplane—was reported in a number of major Internet news outlets including Tech Dirt, Wired, Boing Boing, and Slashdot, which further attests to the ability of the Internet to quickly disseminate information to an interested community).

85. See *PIJIP Research Paper Series*, AM. U. WASH. C. L. DIGITAL COMMONS, <http://digitalcommons.wcl.american.edu/research> (last visited Mar. 1, 2011) (listing numerous academic papers investigating issues surrounding ACTA's negotiations and substantive provisions).

86. See Love, *supra* note 75 (reporting that Ambassador Kirk responded to criticisms about transparency by saying that certain parties would "walk[] away from the table" if the ACTA negotiations were not secret); see also Sean Flynn, *ACTA to Meet Sept. 23: Locking Out Civil Society?*, PROGRAM ON INFO. JUST. &

Although Love also quotes Ambassador Kirk as stating that “the issue of transparency was ‘about as complicated as it can get,’” one commenter on Love’s interaction with Kirk retorts that “[t]ransparency is only a complicated issue when you’re being dishonest.”⁸⁷ This unsympathetic response is to be expected, as here, the USTR has employed extreme and unprecedented efforts to keep secret a major international negotiation aiming to create new law and international enforcement institutions on a hot-button issue like copyright piracy. Because of its forceful attempts to maintain unprecedented levels of secrecy, the USTR must expect a negative public reaction once the existence of the negotiations is revealed. Whether this commenter’s view reflects reality is secondary to the fact that it is a logical reaction to the USTR’s unparalleled efforts to keep an international lawmaking negotiation process secret.

The failure of the USTR to maintain the black box as part of its “you’ll-find-out-when-it’s-done” method of lawmaking has demonstrated its weakness as a law-making modality. Real-time disclosure of information is both expected and key to a deliberative democracy, and the USTR’s efforts reflect a policy that is opposed to such disclosure. Naturally, offering input on drafts after they have been negotiated is not as valuable as having the opportunity to do so before the parties settle on an agreement’s core goals and terms. While some secrecy is to be expected and may even be desirable, for ACTA, the USTR’s secrecy efforts denied *any* opportunity for substantively meaningful real-time input from the public with little or no countervailing benefit to the USTR or its negotiating partners. Putting aside the reality in which organized citizens have access to the greatest system of information sharing ever invented, the USTR curtailed democratic legitimacy and public buy-in on the laws enacted, and its position is therefore difficult to defend.

The existence of the Internet broadly, and WikiLeaks specifically, only exacerbates the failings of USTR’s policy. Once we engraft the Internet, organizations at war with secrecy like WikiLeaks, and an organized, technologically savvy, and interested public onto these

INTELL. PROP. (Sept. 21, 2010, 10:08 AM), <http://www.wcl.american.edu/pijip/go/blog-post/acta-to-meet-sept-23-locking-out-civil-society> (describing how the USTR has reacted to the public by starting to release some documents, including meeting agendas).

87. Love, *supra* note 75.

legitimacy problems, the USTR's position becomes not only damaging to democracy, but nearly impossible to achieve. Indeed, as seen in ACTA, increased public condemnation and outcry forced some begrudging disclosure and led to something less than a smooth and efficient process. In sum, the USTR's policy has proven to be little more than wishful thinking regarding a bad idea and should be abandoned in future international negotiations.

CONCLUSION

Going back to Jeremy Bentham and even earlier, the theoretical bases against secrecy in a democracy have been known and articulated.⁸⁸ During ACTA negotiations, secrecy's modern practical limitations in a democracy have been shown. Today, it should be received wisdom that the kind of secrecy possible before the advent of the Internet—the proverbial “black box”—is increasingly difficult to maintain and, therefore, from a practical perspective, should not be part of lawmakers' considerations in deciding how best to create and enact law. Indeed, the mainstream media understands this point well. In the promotion of its political comedy series *The Thick of It*, the BBC noted that:

If [twenty-four] hours is “a long time in politics,” the two decades since *Yes, Prime Minister* [a 1980s BBC show] now seem like light years ago. So when *The Thick of It* first appeared in 2005, it was well overdue. Secrets are harder to keep in this age of cell phone cameras, blogs and Tweets.⁸⁹

Absolute secrecy cannot be maintained, especially regarding a controversial issue like anti-piracy enforcement in the international context.⁹⁰ This paper points out that the leaks and resulting opaque “transparency soup”—or partial, uncontrolled and haphazard

88. See Levine, *supra* note 49, at 158-59 (remarking that nineteenth century scholars like Bentham acknowledged that openness and transparency increase governmental efficiency and help to ensure that the electorate can make informed voting choices).

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

90. See Jonathan Lynn, *States Clash over Anti-Counterfeiting Enforcement*, REUTERS (June 9, 2010), <http://in.reuters.com/article/idINIndia-49179920100609> (reporting on the controversial nature of certain ACTA proposals).

secrecy—upend the main benefits associated with secrecy, particularly streamlining and efficiency. These benefits can only be achieved by maintaining the black box, an outcome which has proven difficult—and in cases like ACTA, impossible—in 2011.

A post-hoc disclosure of information—whether authorized or by leak—seems to primarily discredit the withholding institutions when they have not allowed for the benefit of meaningful real-time public input at the critical point when policy is being formulated and laws written. For example, the kind of secrecy envisioned by the USTR needlessly created an adversarial relationship with the public that reinforced the worst fears and criticisms about current lawmakers. Simultaneously, leaks and official drafts were released in the midst of the purported black box policy. This resulted in the public being afforded a less efficient mode of lawmaking, and led them to lose faith in the institutions involved.

Combined with the reality that governments, particularly administrative agencies, and private industry often have a strong mutuality of interest in keeping information regarding matters of significant national concern from the public, it seems that the structure of FOIA needs to be reconsidered. As economist Alfred E. Kahn explained, when an administrative commission is responsible for the performance of an industry, it is under nearly inescapable pressure to protect the health of the companies it regulates.⁹¹ The agency naturally seeks desirable performance from the entities over which it exercises authority, and tends to prefer its own controls rather than the unpredictable forces of competition.⁹² As the examples discussed in this article illustrate, limiting transparency can be seen broadly as part of the “controls” used to shield commercial entities and their regulators from public scrutiny, second-guessing, and accountability. If the prevailing opinion within commercial and administrative entities is that a lack of public input in relevant policy decisions maintains or increases the commercial “health” of the regulated industries, as may be indicated by the above examples,

91. See ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 11-13 (1988) (“Responsible for the continued provision and improvement of service, [the agency] comes increasingly and understandably to identify the interest of the public with that of the existing companies on whom it must rely to deliver these goods.”).

92. *Id.*

then the competing values and capture of administrative entities by commercial interests is a problem long-overdue to be addressed.

In sum, it is both damaging to democracy and untenable to maintain a FOIA that allows fundamental information about the expenditure of taxpayer dollars, health and safety risks associated with a clean-up of a major oil spill, and lawmaking itself to be withheld from the public. This is particularly true in an environment where the sharing of information is getting increasingly simple, pervasive, and expected. While a certain level of secrecy is necessary and even desirable in the functioning of government, as reflected generally (if not perfectly) in the exemptions to FOIA,⁹³ excessive and unjustified secrecy, as seen in the above examples, is problematic and concerning. Indeed, the ACTA negotiations have proven that lawmaking on issues of significant national concern becomes bogged down, rather than streamlined and improved, when antiquated laws and assumptions about secrecy merge. This article seeks to advance this simple, but important point, so that policymakers can move on to the next, more challenging, question: How do we update FOIA, acknowledging the close partnership between government and the private sector and its impact on what information is and is not disclosed to the public? If this issue is taken up by Congress, the unfortunate experience of the ACTA negotiation process might be the impetus for meaningful change in how the United States conceives its version of democracy. We would have fewer “distractions,” and, by virtue of policymakers getting the benefit of meaningful, real-time public input, we might draft better, more balanced, and more legitimate IP laws—and laws generally.

93. 5 U.S.C. § 552(c) (2006). Indeed, this author is currently researching and writing on the blurring and merger of national security and commercial interests under FOIA—and what technology can do about it.