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Sara Bannerman

*Australian National University, sara.bannerman@gmail.com*

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# WIPO AND THE ACTA THREAT

*Sara Bannerman*<sup>1</sup>

## ABSTRACT

The new Anti-Counterfeiting Trade Agreement (ACTA) has been seen as a potentially existential threat to the existing World Intellectual Property Organization (WIPO)—as a new plurilateral institution that could replace the older multilateral organization. The ACTA threat to WIPO has a number of predecessors. WIPO's centrality to international intellectual property norm-setting encountered its first major challenge in 1952 when the Universal Copyright Convention was established under UNESCO. It encountered a second major challenge with the establishment of the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPs Agreement). The ACTA challenge thus potentially represents a third instance where a major competing norm-setting institution has challenged WIPO. In this paper I review past instances where WIPO has been challenged by an outside norm-setting institution and the responses taken to those challenges. Second, I outline the main proposals for an ACTA institution. Third, drawing on the past instances, I outline the various possible forms that an ACTA-WIPO relationship could take, and various strategies that WIPO could use to maintain its role in the international intellectual property system. Finally, I outline a number of public policy concerns that the institutional proposals for ACTA pose.

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<sup>1</sup> SSHRC Postdoctoral Fellow, Centre for Governance of Knowledge and Development, Regulatory Institutions Network (RegNet), School of Regulation, Justice and Diplomacy (RJD), College of Asia and the Pacific, Australian National University. I would like to thank the Canada-US Fulbright Foundation and the Social Sciences and Humanities Research Council of Canada (SSHRC) for making this research possible. I would also like to thank the American University's Program on Information Justice and Intellectual Property (PIJIP) at the Washington College of Law, and Susan Sell, Director of George Washington University's Institute for Global and International Studies, for their support.

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## I. BACKGROUND

The longest-standing international institution dealing with intellectual property today is the World Intellectual Property Organization (WIPO). WIPO is the successor to the United International Bureaux for the Protection of Intellectual Property (BIRPI), which was established 117 years ago in 1893. BIRPI and its successor, WIPO, have functioned for over a century as the core of the international intellectual property system, administering the fundamental copyright, patent, trademark, and neighbouring rights, and other intellectual property treaties.

WIPO's leadership in and centrality to the world intellectual property system has fallen into question over the past decade. It has failed to accomplish any new international agreements since the WIPO Internet Treaties were established in 1997. This failure has led to the perception in some circles that WIPO is not presently leading in the area of intellectual property, and that other institutions may have overtaken WIPO as the key centres of action.

One of the challenges currently faced by WIPO comes from a new proposed treaty, the Anti-Counterfeiting Trade Agreement (ACTA). ACTA has been under negotiation since 2007, with the goal of combating counterfeiting and piracy. Proposed to cover intellectual property enforcement, including enforcement at borders and over the Internet, the treaty is under negotiation as a plurilateral, rather than a universal, treaty. ACTA negotiating parties include Australia, Canada, the European Union and its 27 member states, Japan, Mexico, Morocco, New Zealand, the

Republic of Korea, Singapore, Switzerland and the United States.<sup>2</sup> Some commentators have speculated that a new ACTA institution, if founded, could present a tremendous challenge to WIPO. ACTA has been seen as a potentially existential threat to WIPO—as a new institution that could replace the older organization.<sup>3</sup>

The ACTA threat to WIPO has a number of predecessors. WIPO's centrality to international intellectual property norm-setting encountered its first major challenge in 1952 when the Universal Copyright Convention was established under UNESCO. WIPO encountered a second major challenge with the establishment of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs). ACTA thus potentially represents a third instance where a major competing norm-setting institution has challenged WIPO's centrality and leadership in the international intellectual property system.

ACTA negotiations have taken place outside of WIPO. Practical and instrumental reasons for this stem in part from the failure of WIPO to make significant strides towards new norm-setting, and in part from a desire to negotiate ACTA among specific actors, rather than on a broad or universal basis. Some have objected to the circumvention of WIPO. The European Parliament passed a resolution deploring “the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and the World Trade Organization (WTO), which have established frameworks for public information and consultation.”<sup>4</sup> In what was presumably a bid to engage WIPO in ACTA debates, the European Parliament requested that WIPO and the WTO prepare reports on their own practices of transparency, their current enforcement activities, whether there is need for new enforcement activities, the relationship of ACTA to current IP norms, and the likely effects of ACTA on flexibilities under the TRIPs Agreement.<sup>5</sup> The Wellington Declaration, issued by participants at a New

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<sup>2</sup> *Joint Statement: ACTA Final Round, September 23 - October 2, 2010*

[http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/joint\\_statement-finale-declaration\\_commune.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/joint_statement-finale-declaration_commune.aspx?lang=eng).

<sup>3</sup> See Michael Geist, *Toward an ACTA Super-Structure: How ACTA May Replace WIPO* (March 26, 2010), <http://www.michaelgeist.ca/content/view/4910/99999/>.

<sup>4</sup> European Parliament Res. of 10 March 2010 on the transparency and state of play of the ACTA negotiations, EUR. PARL. DOC. B7-0154/2010 (2010), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0058>.

<sup>5</sup> See Kaitlin Mara, *WIPO, WTO Requested to Advise on Anti-Counterfeiting Treaty*, INTELLECTUAL PROPERTY WATCH (April 15, 2010), <http://www.ip-watch.org/weblog/2010/04/15/european-parliamentarians-call-on-wipo-wto-for-technical-advice-on-acta/>. See also Lamy tells EU Parliament No (For Now) on ACTA, INTELLECTUAL PROPERTY WATCH (May 13, 2010), <http://www.ip-watch.org/weblog/2010/05/13/lamy-tells-eu-parliament-no-for-now-on-acta/> (reporting that

Zealand forum on ACTA just prior to the New Zealand round of ACTA negotiations, also called WIPO the preferable forum for IP negotiations:

We note that the World Intellectual Property Organisation has public, inclusive and transparent processes for negotiating multilateral agreements on (and a committee dedicated to the enforcement of) copyright, trademark and patent rights, and thus we affirm that WIPO is a preferable forum for the negotiation of substantive provisions affecting these matters.<sup>6</sup>

WIPO has retained a public distance from ACTA, refraining from comment on the negotiations until recently. Francis Gurry, the Director-General of WIPO, originally stated that he had not read the agreement and knew little about ACTA.<sup>7</sup> However, he has since made several statements. In October 2009 he was reported as having commented, “Naturally we prefer open, transparent international processes to arrive at conclusions that are of concern to the whole world,” he said, citing WIPO’s role as an international, United Nations agency. And, he added, ‘IP is of concern to the whole world.’”<sup>8</sup> More recently, in May 2010, Gurry responded to the letter from the European Parliament:

[Y]our letter raises the question of possible co-operation between WIPO and a future ACTA Secretariat. Generally, international cooperation is one of the key pillars of WIPO's work in the field of IP enforcement, and the WIPO Secretariat maintains close cooperation with a large number of international IGOs and NGOs throughout its enforcement-related activities. [. . .]

I should like to reiterate, however, that WIPO has not participated in any capacity in the ACTA negotiations, nor have there been consultations between the WIPO Secretariat and the ACTA negotiating parties at any stage. We therefore do not have any information as to the

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the WTO has declined to prepare such a report).

<sup>6</sup> *The Wellington Declaration*, PublicACTA Blog (Apr. 11, 2010, 3:21 PM), <http://publicacta.org.nz/wellington-declaration/#more-330>.

<sup>7</sup> See Mara, *supra* note 5.

<sup>8</sup> Kaitlin Mara, *Perpetual Protection Of Traditional Knowledge “Not On Table” At WIPO*, INTELLECTUAL PROPERTY WATCH (Oct. 22, 2009, 4:01 PM), <http://www.ip-watch.org/weblog/2009/10/22/perpetual-protection-of-traditional-knowledge-%E2%80%9Cnot-on-table%E2%80%9D-at-wipo/>.

objectives of the parties, including the potential role of international organizations in a future ACTA Secretariat. To date, WIPO has not been approached or received any request concerning such co-operation and again, the Organization's response would be guided by the decisions of its Member States.<sup>9</sup>

In June 2010, in more direct public comments, Gurry called ACTA a “bad development” for WIPO—an example of the difficulty faced by WIPO and other UN agencies in addressing issues and concluding agreements. “A number of countries feel [there is] an important area of public policy they are not able to address in a multilateral forum, and so have gone outside the multilateral framework to satisfy their desire for creating some form of ‘international’ cooperation,” he said. The challenge, according to Gurry, is how to make the multilateral system relevant.<sup>10</sup>

## II. WIPO: THE INSTITUTION

WIPO was founded in 1970, when the 1967 Convention Establishing the World Intellectual Property Organization came into effect.<sup>11</sup> The organization took over from its predecessor, BIRPI, which had acted as a combined secretariat for several international intellectual property treaties since 1893. Several years later, in 1974, WIPO became a specialized agency of the United Nations (UN). BIRPI was originally a European-dominated organization that had always sought to expand, especially into the United States. In the 1970s WIPO strove to become a truly universal organization. This effort was helped along when, in 1994, the World Trade Organization Agreement required adherence to key WIPO-administered treaties. Membership expanded, and WIPO now encompasses 164 member states.<sup>12</sup>

WIPO's key functions include the administration of intellectual property

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<sup>9</sup> Letter from Francis Gurry, Director General of WIPO, to Members of European Parliament (May 6, 2010), *available at* [http://en.act-on-acta.eu/Greens\\_EFA\\_MEPs\\_letter\\_to\\_WIPO\\_and\\_WTO/Answer\\_from\\_WIPO](http://en.act-on-acta.eu/Greens_EFA_MEPs_letter_to_WIPO_and_WTO/Answer_from_WIPO).

<sup>10</sup> Catherine Saez, *ACTA A Sign Of Weakness In Multilateral System*, *WIPO Head Says*, INTELLECTUAL PROPERTY WATCH (June 30, 2010, 6:18 PM), <http://www.ip-watch.org/weblog/2010/06/30/acta-a-sign-of-weakness-in-multilateral-system-wipo-head-says/>.

<sup>11</sup> See Christopher May, *The World Intellectual Property Organization*, 11(3) *New Pol. Econ.* 435 (2006).

<sup>12</sup> See World Intellectual Property Organization Member States, <http://www.wipo.int/members/en/> (last visited Aug. 31, 2010).

systems, such as processing patent applications under the Patent Cooperation Treaty (PCT) and international trademark applications under the Madrid System; the provision of technical assistance to help member states build their capacity to protect and regulate intellectual property; and international intellectual property norm-setting, including the initiation of new treaties and the revision of old ones.

BIRPI was established as a simple secretariat in Berne with several staff members. Over the past 117 years, it has expanded into a large international institution. WIPO is now based at a complex in Geneva. It has offices in New York, Rio de Janeiro, Singapore, and Tokyo.<sup>13</sup> Regional bureaus within WIPO coordinate and facilitate technical assistance to Africa, the Arab countries, Asia and the Pacific, and Latin America and the Caribbean.<sup>14</sup> Since 1998 WIPO has operated the WIPO Academy, which offers training and professional development programs on IP in English, Arabic, Chinese, French, Portuguese, Russian and Spanish, including various Master of IP Law programs that are run in partnership with outside universities. Hundreds of students circulate through WIPO Academy programs each year.<sup>15</sup> Other services provided by the organization include public outreach activities, the publication of *WIPO Magazine*, and the hosting of events and conferences around the world.

74% of WIPO's funding comes from PCT fees, and another 16% of its funding comes from other fees under the various treaties it administers. The remaining 10% comes from member state contributions and other income. WIPO's total income figures at 314 million Swiss francs (\$311 million in today's USD), with staff expenditures of 194 million Swiss francs (\$192 million in today's USD) and non-staff expenditures of 87 million Swiss francs (\$86 million USD today).<sup>16</sup>

### III. THE UNIVERSAL COPYRIGHT CONVENTION

BIRPI encountered its first outside competing norm-setting institution in 1952 when the Universal Copyright Convention (UCC) was established under the United Nations Educational, Scientific and Cultural Organization (UNESCO). Unlike ACTA, the UCC established lower rather than higher levels of copyright protection. The UCC was therefore attractive to developing countries for whom international copyright obligations created a

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<sup>13</sup> See WORLD INTELLECTUAL PROPERTY ORGANIZATION, WORLD INTELLECTUAL PROPERTY ORGANIZATION: AN OVERVIEW 6 (2009).

<sup>14</sup> See *id.* at 27.

<sup>15</sup> See *id.* at 31.

<sup>16</sup> See *id.* at 50-51.

net outflow of revenue. It was also attractive to the United States who, for sixty-six years, had refused to join the Berne Convention, finding a number of its requirements unsuitable to the American situation. The UCC quickly garnered a broad and powerful membership, including, most prominently, the United States.

The UCC was a threat to BIRPI on a number of levels. Though not an existential threat to the organization, the UCC challenged what were viewed as the high copyright standards that BIRPI represented, as well as the breadth of the membership of BIRPI's copyright treaty. In the years between 1967 and 1971, the fundamental question of whether BIRPI/WIPO would continue to attempt to achieve universal membership, or whether it would cede parts of the world to its competitor, was answered. Two options were on the table: BIRPI/WIPO could come to an arrangement with the UCC that would allow BIRPI/WIPO to continue to attempt to achieve universal membership, or the organization could instead cater to a more restricted membership, consisting of only those countries who wished to maintain the higher levels of copyright mandated by the Berne Convention. In the latter case, the Universal Copyright Convention would provide an alternative set of copyright norms catering to developing countries and the United States, perhaps to act as a stepping stone for those countries' eventual accession to the Berne Convention.<sup>17</sup>

BIRPI, and later WIPO, chose to come to an arrangement with the UCC that would allow the two organizations to work together and to neutralize the UCC threat to WIPO's membership and norms. To achieve this goal, a number of steps were taken. The two organizations held joint meetings of their oversight bodies in order to share information, representation, and plans. In 1971 the threat of the UCC was further neutralized when the two conventions were simultaneously revised in a way that made their provisions aimed at developing countries similar enough to eliminate the temptation for a developing country to join one convention but not the other. Provisions were also added to the agreement that would effectively eliminate the possibility of developed countries from denouncing the Berne Convention in favour of the UCC.<sup>18</sup> The UCC came to be conceptualized as a bridge leading to ultimate adherence to the Berne Convention.<sup>19</sup>

In 1967, when the convention that would establish the World

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<sup>17</sup> Charles F. Johnson, *The Origins of the Stockholm Protocol*, 18 BULL. OF THE COPYRIGHT SOC'Y OF THE U.S. 91, 92 (1970).

<sup>18</sup> See Universal Copyright Convention, art. 17, July 24, 1971, 943 U.N.T.S. 178. See also 2 SAM RICKETSON & JANE GINSBURG, INT'L COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND §§ 18.27–37 (2d ed. 2006).

<sup>19</sup> See Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne*

Intellectual Property Organization as a successor to BIRPI was signed, the WIPO was given a new and broad mandate. When the WIPO Convention came into effect in 1970, a number of new functions would ensure that the organization had a continuing mandate.

#### IV. THE WORLD TRADE ORGANIZATION

The TRIPs Agreement was also perceived as a threat to WIPO. The United States, by 1986, had grown frustrated with its inability to increase levels of intellectual property under WIPO and with the absence of an effective WIPO enforcement mechanism. WIPO was seen as identifying too strongly with the interests of developing countries, who held a majority in the organization. That year, the U.S. shifted its IP treaty-making efforts to the General Agreement on Tariffs and Trade (GATT).<sup>20</sup>

A 1995 *Agreement between the World Intellectual Property Organization and the World Trade Organization* established a framework that would ensure cooperative relations between WIPO and the WTO. That agreement ensures cooperative use of resources (laws & regulations, databases), cooperative provision of technical assistance, and regular contact and exchange of information between the two organizations. As Professor Laurence Helfer notes:

[T]he WTO did not supplant WIPO as the principal intergovernmental organization devoted to intellectual property lawmaking. TRIPs itself implicitly acknowledges the continuing importance of WIPO as a forum for negotiating treaties, particularly those embodying “higher levels of protection of intellectual property rights.” In addition, a 1995 agreement between WIPO and the WTO requires each organization to provide technical and legal assistance to developing countries, delegates to WIPO certain administrative functions in TRIPs, and enhances information sharing about national intellectual property laws.

Seen from this perspective, the shift from WIPO to GATT to TRIPs was not intended to eclipse WIPO. . . . Whereas the WTO emphasized implementation, enforcement, and dispute settlement, WIPO focused on

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*Convention*, 22 CORNELL INT'L L.J. 171, 177 (1989).

<sup>20</sup> See Susan K. Sell, *Private Power, Public Law* 46, 105 (2003).

generating new forms of intellectual property protection, administering existing intellectual property agreements, and providing technical assistance to developing countries.<sup>21</sup>

The WIPO Development Agenda, established in 2007, has further entrenched the cooperative relationship between the two organizations. Recommendation 14 of the Development Agenda calls on WIPO to provide advice to developing countries on the implementation of TRIPs:

Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.<sup>22</sup>

The Development Agenda also cites TRIPs as a guideline for WIPO's activities:

45. To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”, in accordance with Article 7 of the TRIPS Agreement.<sup>23</sup>

Although initially perceived as a threat, TRIPs and WIPO became complimentary institutions.<sup>24</sup> At the same time, the advent of TRIPs may

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<sup>21</sup> Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking* 29 YALE J. INT'L L. 1, 25 (2004).

<sup>22</sup> World Intellectual Property Organization, The 45 Adopted Recommendations under the WIPO Development Agenda 2 (2007), <http://www.wipo.int/export/sites/www/ip-development/en/agenda/recommendations.pdf>.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> See Frederick Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 J. INT'L ECON. L. 63, 63-81 (2000). Abbott holds up the cooperation between WIPO and the WTO as a positive example of

have shifted perceptions of WIPO, such that the organization came to be viewed to a greater extent as serving administrative and technical assistance functions.

## V. ACTA: INSTITUTIONAL PROPOSALS

Discussions about institutional arrangements for ACTA date back to March of 2008, when Canada volunteered to write a non-paper outlining the various options for an ACTA institution, for consideration by negotiating partners.<sup>25</sup> Since the leak of the Canadian non-paper, various draft texts of ACTA have become available, as has a near-final official text resulting from the Tokyo round of negotiations in October 2010. ACTA includes a section on institutional arrangements.<sup>26</sup>

In general, the parties to the agreement appear to envision a very simple and limited institutional structure. Japan, for example, suggested that “[i]n order to avoid excessive burden of finance on human resources of the Parties, the institutional structure of the ACTA should be as simple as possible. The provisions concerning institutional structure should be limited to such as may be truly needed.”<sup>27</sup> The ACTA text states that the ACTA Committee “shall strive to avoid unnecessary duplication of other international efforts regarding the enforcement of intellectual property rights,”<sup>28</sup> and that Parties conducting capacity building and technical assistance under ACTA “shall strive to avoid unnecessary duplication...with respect to other international efforts.”<sup>29</sup> The preamble notes the desire of the Parties that “ACTA operate in a manner mutually supportive of international enforcement work and cooperation conducted

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distributed governance.

<sup>25</sup> See CANADA – ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) NON-PAPER ON INSTITUTIONAL ISSUES UNDER THE AGREEMENT, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (scroll down to “2008” and follow “Canada – Non-Paper on Institutional Issues” hyperlink) [hereinafter CANADA NON-PAPER].

<sup>26</sup> See, e.g., Anti-Counterfeiting Trade Agreement Consolidated Text, art. 5, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Official Text - October 2, 2010” hyperlink) [hereinafter ACTA Text – Oct. 2, 2010], and Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: Jul. 1, 2010, art. 5, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Full Leaked Text Dated July 1, 2010” hyperlink) [hereinafter ACTA Draft – Jul 1, 2010].

<sup>27</sup> Anti-Counterfeiting Trade Agreement Informal Predecisional/Deliberative Draft: Jan. 18, 2010 Consolidated Text, art. 5, PIJIP IP ENFORCEMENT DATABASE, <http://sites.google.com/site/iipenforcement/acta> (follow “Full Leaked Text Dated March 18, 2010” hyperlink) [hereinafter ACTA Draft – Jan. 18, 2010].

<sup>28</sup> See ACTA Text – Oct. 2, 2010, *supra* note 26, art. 5.1 ¶ 8.

<sup>29</sup> See *id.* art. 4.3, ¶ 3.

within relevant international organizations.”<sup>30</sup>

In past discussions regarding the location of the institution and whether it would function as a stand-alone entity, some parties, including the EU, proposed that ACTA should make use of an existing international organization, likely in Geneva, to provide secretariat services. Korea and Morocco preferred this option, with Korea’s preferred international organization being the WTO and Morocco’s being WIPO.<sup>31</sup> Some preferred that ACTA would remain autonomous, perhaps with a secretariat provided on a rotating basis by member states. According to the text of ACTA, rules regarding the hosting and chairing of ACTA meetings will be decided according to the ACTA rules and procedures, to be set within a reasonable period of time after the entry into force of ACTA.<sup>32</sup> The text does not specify the use of WIPO or the WTO as a secretariat.

The ACTA text establishes an ACTA Committee comprised of one representative from each contracting state.<sup>33</sup> This committee will have four main functions: 1) to review the implementation and operation of the agreement (this could be done on a regular, pre-determined rotating basis, or on an *ad hoc* basis at the request of a party to the agreement<sup>34</sup>); 2) to consider matters concerning the development of the agreement and amendments thereto; 3) to approve the terms of accession to the Agreement for those seeking to become Party to the agreement; and 4) to consider any other matter that may affect the operation of the agreement.<sup>35</sup> The committee is also empowered to set up ad hoc committees and working groups; assist non-party governments in acceding to the agreement on request; seek advice from non-governmental persons or groups; make recommendations, provide information, and share or endorse best practices on the implementation and operation of the agreement and on reducing intellectual property rights infringement, including techniques for identifying and monitoring piracy and counterfeiting; and other tasks as

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<sup>30</sup> See *id.*, Preamble.

<sup>31</sup> See ACTA Draft – Jan. 18, 2010, *supra* note 27, art. 5.2, ¶ 1.

<sup>32</sup> See ACTA Text – Oct 2, 2010, *supra* note 26, art. 5.1, ¶ 4(a).

<sup>33</sup> The Canadian non-paper suggested a smaller membership of this body:

“Negotiating partners may also wish to consider how best to coordinate issues among a larger Council. It is noted that the number of Parties may increase significantly, as accession is granted to additional countries. As such, another option might be to appoint a smaller group of Parties to the Council, on either a permanent or rotating basis.” CANADA NON-PAPER, *supra* note 25, at 2. Singapore, Australia, and New Zealand appear to support a full membership on this body. See ACTA Draft – Jan. 18, 2010, *supra* note 27, art. 5.1, ¶ 1. The ACTA text states that “The Parties hereby establish the ACTA Committee and each Party shall be represented on that Committee.” ACTA Text – Oct. 2, 2010, *supra* note 26, art. 5.1, ¶ 1.

<sup>34</sup> CANADA NON-PAPER, *supra* note 25, at 4.

<sup>35</sup> See ACTA Text – Oct. 2, 2010, *supra* note 26, art. 5.1, ¶ 2.

decided by the parties.<sup>36</sup> The committee will generally meet once a year.<sup>37</sup> The chair of the committee could rotate between states, but decisions regarding specific processes for selection of chairs have not yet been taken.

Provisions within the draft texts with regard to the admission of observers to ACTA meetings have been dropped, leaving decisions with regard to the admission of observers to the rules and procedures of the ACTA Committee.<sup>38</sup>

## VI. SCENARIOS

Regarding the future relationship between ACTA and WIPO, there are three main possibilities. First, it is possible that no formal relationship will be established between the two institutions. There are no public indications that a formal relationship is, as of yet, on the agenda, and the ACTA text seems to envision ACTA as a stand-alone entity. Second, a formal ACTA-WIPO relationship could be established on some level. This could be a formal agreement between the two bodies that might, as in past cases, involve some level of information and/or service sharing. WIPO could agree to perform technical assistance and informational functions for ACTA (maintaining information on the laws and regulations of various countries, for example). The WIPO Development Agenda could be used as a tool for assisting developing countries to implement ACTA. The third former possibility was that ACTA and WIPO could, on some level, merge. The possibility was initially raised that WIPO could house an ACTA secretariat or provide secretariat services to ACTA.<sup>39</sup> This possibility was dropped from the ACTA text.

In terms of the stature of the two organizations, there are four main possibilities. First, it is possible that the ACTA initiative will decline or fail to come into force. International IP agreements have been notoriously hard to realize, especially where issues are contentious. ACTA remains controversial and is opposed by significant groups. ACTA could also fail if it fails to achieve the minimum number of ratifications, acceptances, and approvals to come into force.<sup>40</sup> A second possibility is, as some commentators have suggested, that WIPO's stature could decline. It seems most likely that this decline would be a simple decline in stature as a result

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<sup>36</sup> See *id.* art. 5.1, ¶ 3.

<sup>37</sup> See *id.* art. 5.1, ¶ 6.

<sup>38</sup> See *id.* art. 5.1, ¶ 4.

<sup>39</sup> See ACTA Draft – Jan. 18, 2010, *supra* note 27, art. 5.2 ¶ 1.

<sup>40</sup> The minimum number of accessions, according to the most recent leaked text, is six. See ACTA Text – Oct. 2, 2010, *supra* note 26, art. 6.2, ¶ 1.

of a failure to achieve new treaties, while the organization continued to perform its other functions. WIPO could come to be seen, to a greater extent, as primarily a technical assistance agency and administrative hub. It is also possible, but less likely, that other organizations such as ACTA could take over or take precedence in those functions as well. This seems like a long-term threat, since the ACTA text appears to envision a small institution with limited responsibilities; negotiating parties to ACTA are concerned not to incur undue cost and seem to wish to avoid duplication of functions amongst organizations. On the other hand, ACTA does encompass the provision of technical assistance, requiring each Party to provide technical assistance and work closely with other parties. This, however, relates only to technical assistance provided to Parties to the Agreement and prospective Parties to the Agreement, under the proviso that “[e]ach Party shall strive to avoid unnecessary duplication of the activities described in this Article with respect to other international efforts.”<sup>41</sup> Third, it is possible that both ACTA and WIPO could go into decline as a result perhaps of changing attitudes towards IP or changing geopolitics and new innovation models. Finally, it is possible, as I have suggested, that neither WIPO nor ACTA will decline, but that the two institutions will come to an arrangement that sees both take on important roles in the international IP system.

## VII. STRATEGIES

A number of strategies have historically been employed in order to ensure that WIPO maintains a role and a significant stature at the core of the international IP system. These include efforts to portray WIPO and its treaties as the highest standard in intellectual property norm-setting, as was done when the Universal Copyright Convention competed with BIRPI’s Berne Convention, portrayed as the gold standard of intellectual property. WIPO can now draw on its status as a broad-based multilateral organization in its self-portrayal as the most legitimate forum for IP norm-setting. A number of strategies have also been employed to ensure that WIPO works in harmony with outside IP organizations, turning competition into collaboration and ensuring that each organization has a role or niche in the international intellectual property system. Such strategies include hosting joint or co-located meetings and assemblies, as well as informal or formalized information and service sharing. Such strategies have shaped treaty language itself, where treaties laid out complementary roles, or have

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<sup>41</sup> See *id.* art.4.3 ¶ 1-3.

been revised to resemble each other enough to invite dual membership, rather than membership in just one of the two treaties. Language has also been included that has made it in effect impossible to exit one treaty in favour of another. Competing international organizations based in the same epistemic community often share an interest in collaborating, carving out niches, and mutually ensuring each other's legitimacy.

### VIII. CONCERNS

While the decline or disappearance of WIPO as a result of the ACTA threat seems unlikely, important concerns remain. If a plurilateral organization becomes the primary locus of intellectual property normsetting among some countries, the international intellectual property system could fracture. Core norms contained in WIPO and WTO treaties could unify the system at a basic level, but a variety of differing norms and institutions might govern other areas. Although a source of complexity and perhaps uncertainty, such a scenario might bring a measure of policy innovation and competing norms to the international intellectual property system.<sup>42</sup>

The biggest question is whether ACTA will have a formal secretariat. While the ACTA text does not provide for a secretariat, this does not preclude the possibility of formal offices being established in the future. A secretariat could provide the continuity and resources necessary to build and maintain ACTA into a true competitor to WIPO.<sup>43</sup>

The breadth of membership on the governing body of ACTA is of prime importance to the ability of parties to the agreement to have influence on the functioning of the ACTA institution and to guide future revisions of the agreement. A broader or full membership on this body, or transparent rules surrounding decisions on membership that would see all parties, at one point or another, included, would be of particular benefit to the less powerful parties to the agreement. The conditions upon which outsiders might become a party to the agreement and to gain a seat on the steering body of ACTA should also be of interest to outsiders.

The question of the location of an ACTA secretariat or ACTA meetings has important implications. If a secretariat were housed at multilateral organizations like WIPO or the WTO in Geneva, there might be

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<sup>42</sup> See Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime*, 36 CASE W. RES. J. INT'L L. 123 (2004).

<sup>43</sup> It has been suggested that the Inter-American copyright system ultimately went into decline because of the absence of a secretariat that might have paved a smoother and more tenable multilateral system. See STEPHEN P. LADAS, 1 THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 636; SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 79 (2008).

a greater likelihood of broader engagement with ACTA, both by parties to the agreement and observers, as a simple result of location. Such an arrangement would signify a higher level of collaboration and support between ACTA and the institution with which it was housed. Both engagement and collaboration could have a variety of effects that deserve further consideration. The provision of secretariat services by parties to the agreement, rather than by an independent office, might signify a more modest and frugal approach by ACTA parties, and a greater confidence in organizations like WIPO to provide technical assistance. If secretariat services are provided by parties to the agreement on a rotating basis, this could provide the hosting parties with significant agenda-setting opportunities.

Possible formal arrangements between ACTA and outside treaties and institutions could have a strong impact on the future revision of and implementation of ACTA, and other international IP agreements' future relationship to ACTA, including the ability of outside agreements and institutions to manoeuvre with, around, and potentially against ACTA. Such formal arrangements should be of high concern to those interested in the future of the international IP system.

The transparency of the governing body of ACTA to non-party states and NGOs is also an important concern. Admission of observers is an issue of importance to the legitimacy and stature of the institution, its responsiveness to outside concerns and developments, and to outside parties affected by the agreement.

## IX. CONCLUSION

ACTA could potentially threaten, to some extent, WIPO's place in areas such as treaty-making and technical assistance, and as a result, WIPO's overall stature in the international intellectual property system. However, ACTA is not an existential threat to WIPO, and the institutional basis for ACTA appears to be, at the present time, envisioned on a relatively small scale that leaves room for the continuing work of - and work with - other international organizations, including WIPO. It seems likely, based on past experience, that WIPO will carve out a continuing niche for itself in the areas of administration and technical assistance, and that cooperation between the two organizations could be established. Should this happen, the result may be that the international intellectual property system will consist of a large international institution with significant resources in the area of administration, promotion, and technical assistance in intellectual property (WIPO), alongside a small group of powers with little transparency

leading in the area of treaty-making. It is possible that WIPO, as a large and relatively legitimate organization, will be enlisted in the implementation of ACTA, effectively supporting the norms created by the smaller and non-transparent body. This scenario raises important concerns. The structure, control, and transparency of ACTA, as well as its potential relationship to WIPO, should be of prime concern to those who wish to influence the architecture of the international IP system in the years ahead.