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ACTA as a New Kind of International IP Lawmaking

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ACTA AS A NEW KIND OF INTERNATIONAL IP LAWMAKING

KIMBERLEE WEATHERALL*

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INTRODUCTION

The Anti-Counterfeiting Trade Agreement (“ACTA”) has all the features of the scheme of a Vaudeville Villain. The agreement has endured every possible cliché over the course of its several-years-long negotiation. The exclusive group of negotiators turning into a kind of new “coalition of the willing.” The secrecy and claims that keeping a text about IP enforcement confidential was a matter of “national security.”¹ Arguments that the whole agreement could be stitched up by “Executive Order” without any input from the U.S. Congress.² Reports of iPod-searching border guards (met only with

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

2. See Jack Goldsmith & Lawrence Lessig, *Anti-Counterfeiting Agreement*

the response that nothing in the agreement would *require* iPod-searching border guards). Leaked texts, again, and again, and again. Dissent in the ranks of the willing as some countries complained about the secrecy.³ Press releases that made assertions about the text that did not stand up to expert scrutiny. And an early text that, once published, contained excruciating detail on every conceivable way to strengthen enforcement—with none of the usual protections for user interests, but rather a few placeholders saying, to paraphrase, “we’ll put some fuzzy soft stuff here.” In sum, the whole process—coming on top of numerous other initiatives in intellectual property (“IP”) enforcement⁴—was, in practical terms, calculated to generate paranoia on the part of anyone who might ever be on the receiving end of an IP lawsuit—users, consumer representatives, access to medicines advocates, and technology companies. Cue the evil music and tie the consumers to the train tracks!

All these ludicrous trappings of the sideshow, however, are wont to distract us from taking the process seriously. This is not to say that people have ignored what is going on or have failed to analyze the substance of the agreement. Far from it. The reaction to ACTA and the analysis of the text has been something of a testament to collective, even “open source” analysis. The ongoing commentary has been informed, knowledge has been widely shared, and the text has been closely scrutinized for its impact on various interests in a range of jurisdictions.⁵ Every strategic move in the negotiations has

Raises Constitutional Concerns, WASH. POST, March 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html> (indicating that the Obama administration may adopt ACTA as a “sole executive agreement,” thereby circumventing Congressional approval by requiring only the President’s signature).

3. David Meyer, *MEPs Castigate ACTA Secrecy as Negotiations ‘Conclude’*, ZDNET UK (Oct. 5, 2010, 04:06), <http://www.zdnet.co.uk/news/regulation/2010/10/05/meps-castigate-acta-secrecy-as-negotiations-conclude-40090407/> (reporting the outrage by some Members of European Parliament over the conclusion of ACTA negotiations without consulting the European Parliament).

4. See generally Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* (IQsensato, 2008), available at http://www.iqsensato.org/wp-content/uploads/Sell_IP_Enforcement_State_of_Play-OPs_1_June_2008.pdf (providing an overview, albeit slightly outdated, of the multiple shifting initiatives of IP negotiation and enforcement, and concluding that when one unbalanced IP enforcement strategy is defeated, others arrive to replace it).

5. See *Anti-Counterfeiting Trade Agreement (ACTA)*, AM. U. WASH. C. L.

been analyzed on the fly.⁶ This article does not seek to repeat that work.

What the article does seek to do is to examine the process of negotiating ACTA for what it can tell us about the changing dynamics of IP lawmaking, particularly in the enforcement space—beyond the sentiment “it’s all just wrong.” ACTA has entered the scene on the heels of a decade of bilateral trade agreements, many of which include detailed provisions on IP, and more than a decade of development of IP rules within Europe. It follows very closely on a newly-announced European Union (“E.U.”) policy of drafting bilateral trade agreements in an “American style” with detailed IP chapters.⁷ In a world where unilateral action to enforce or raise IP standards has become commonplace, the ACTA negotiations represent an important post-TRIPS attempt to undertake broad-ranging “North-North” negotiations on key areas of intellectual property which are lacking in the TRIPS Agreement.⁸ We would be wrong, therefore, to simply dismiss ACTA as merely “more forum-shifting.”⁹ Rather, ACTA negotiations—particularly owing to the

PROGRAM ON INFO. JUST. & INTELL. PROP., <http://www.wcl.american.edu/pijip/go/acta> (last visited Mar. 1, 2011) (providing public access to all ACTA Negotiating Texts, sign-on letters, and other resources).

6. See Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. (forthcoming 2011) (manuscript at 29-31), available at <http://ssrn.com/abstract=1624813> (describing how ACTA was slowly made public through official limited disclosure by the negotiating parties, leaked drafts to the public, and the final official release of a consolidated draft in April 2010).

7. E.g., EUR. COMM’N, EU-SOUTH KOREA FREE TRADE AGREEMENT: TEN KEY BENEFITS FOR THE EUROPEAN UNION (Oct. 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146695.pdf (noting that a comprehensive chapter on intellectual property protection and enforcement has been included in the FTA in order to ensure a high level of protection for, among other things, E.U. agricultural products).

8. There have been other examples of successful post-TRIPS treaties. See, e.g., World Intellectual Property Organization [WIPO] Copyright Treaty, Apr. 12, 1997, S. TREATY DOC. NO. 105-17 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997). For an example of multilateral administrative negotiations leading to a successful treaty, see Singapore Treaty on the Law of Trademarks, Mar. 28, 2006, S. TREATY DOC. NO. 110-2.

9. On forum-shifting and regime-shifting generally, see Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 6 (2004) (arguing that the international expansion of IP lawmaking is the result of “regime shifting” where

various texts that have been released and leaked—represent an opportunity to see how much agreement there is among those developed country powers historically dominant in IP lawmaking—primarily Japan, Europe, and the United States—outside of the known contentiousness of the various multilateral fora. This context is also where we are able to assess the impact of bilateral agreements and analyze whether they really are a stepping-stone to new international standards.

This paper is a contribution to the analysis of ACTA as part of the dynamics of international IP lawmaking. Because comprehensiveness is a dreamer's goal, this work picks up on two questions, drawing heavily on the various versions of the ACTA text that have been both leaked, and published, over time.¹⁰ First, it explores what ACTA can tell us about the famed “global one-way IP ratchet” and considers the impact of the last decade's worth of

countries attempt to shift negotiations to “international regimes” that are closely aligned with their country's interests); Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 130, 141-42 (2004) (arguing that the post-TRIPS reformulation of bilateralism is a strategic tool to overcome limitations created by the TRIPS agreement, often causing multilateral “institutional neutrality”); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 395-96 (2004) (describing the benefits of switching to bilateralism, from the United States' perspective, as a way to have greater control and flexibility over the negotiating process).

10. This analysis draws most heavily on four texts of the ACTA. They are herein referred to as the January leaked text, the April Public text, the July leaked text, and the November draft text, respectively. A December draft text was released after this article was written, and will not be discussed in detail in this article, though reference will be made to it when appropriate. *See generally* Anti-Counterfeiting Trade Agreement: Informal Predecisional/Deliberative Draft, Jan. 18, 2010 [hereinafter ACTA Draft—Jan. 18, 2010], available at <https://sites.google.com/site/iipenforcement/acta> (follow “Full Leaked Text Dated January 18, 2010”); Anti-Counterfeiting Trade Agreement: Public Predecisional/ Deliberative Draft, Apr. 21, 2010 [hereinafter ACTA Draft—Apr. 21, 2010], available at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf; Anti-Counterfeiting Trade Agreement: Informal Predecisional/ Deliberative Draft, July 1, 2010 [hereinafter ACTA Draft—July 1, 2010], available at <https://sites.google.com/site/iipenforcement/acta> (follow “Consolidated ACTA Text, July 1, 2010”); Anti-Counterfeiting Trade Agreement: Subject to Legal Review, Nov. 15, 2010 [hereinafter ACTA Draft—Nov. 15, 2010], available at http://www.ustr.gov/webfm_send/2379; Anti-Counterfeiting Trade Agreement, Dec. 3, 2010 [hereinafter ACTA Text—Dec. 3, 2010], available at http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf.

bilateral agreements on its negotiation. As will become clear, the picture is a mixed one. Undoubtedly, the mere fact that the United States' bilateral free trade agreement partners are part of the ACTA negotiations is an indication of the role those agreements are playing. Looking at Australia in particular, it is clear that there would have been some opposition to certain ACTA proposals had Australia not already adopted similar rules as a result of its Free Trade Agreement with the United States. On the other hand, while both the United States and the European Union may have entered into ACTA with the intention of elevating detailed aspects of their domestic law to the level of an international agreement, the actual process has been a gradual watering-down of those provisions. This is important because it suggests limits on the "one-way ratchet" theory.

The second issue that this work explores is what ACTA can teach us about the negotiation of exceptions in international IP law—a critical issue for user representatives and advocates of all stripes, as well as for negotiators. For example, the course of negotiations in ACTA over safe harbors for online service providers clearly follows historical patterns. Each party puts its version on the table and then everyone has trouble reconciling the differences. This is a bad sign both for the agreement itself and for any attempt thereafter to create an international instrument that includes exceptions. In the course of discussing this issue, this work lays out how recent academic literature and advocates' attempts to conceive such an instrument hold lessons for negotiators. What becomes eminently clear is that those lessons are not yet making their way into the negotiating tents.

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

I. CAN WE EXPLAIN ACTA AS PART OF A BROADER STRATEGY TO RAISE IP STANDARDS?

The first set of lessons we can learn from the ACTA negotiations concern the relationship between IP chapters in recent bilateral trade agreements and subsequent multiparty negotiations.¹¹ ACTA is a testament both to the impact of bilateral agreements on countries' positions in later multiparty negotiations, and to the "endless upward spiral" of international IP obligations. It is also, as explored in the next section, evidence of the limits on this upward spiral and the failures of the strategy of using bilateral agreements to create international standards. But first, we need to acknowledge the strategy's success.

A matter of particular concern to commentators and non-governmental organizations interested in IP issues has been the inclusion of increasingly detailed IP chapters, enforcing IP standards well beyond those required by the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), in numerous bilateral and regional trade agreements since the turn of the 21st Century.¹² Among them, the U.S. bilateral (and plurilateral) free trade agreements have been the most exhaustive—extending to 30-plus pages of detailed provisions modeled closely on U.S. law.¹³ The European Union appears to have shifted to a similar approach.¹⁴

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

12. The following agreements can be accessed online at the United States Trade Representative's homepage: <http://www.ustr.gov/trade-agreements/free-trade-agreements>. See generally Free Trade Agreement, U.S.-Oman, Jan. 1, 2009; Free Trade Agreement, U.S.-S. Kor., *opened for signature* June 30, 2007, 46 I.L.M. 642 [hereinafter U.S.-S. Kor. FTA]; Trade Promotion Agreement, U.S.-Pan., *opened for signature* June 28, 2007; Free Trade Agreement, U.S.-Colom., Nov. 22, 2006; Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006; Free Trade Agreement, U.S.-Central Am.-Dom. Rep., Aug. 5, 2004; Free Trade Agreement, U.S.-Bahr., June 15, 2003, 44 I.L.M. 544; Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544; Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026; Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026.

13. See Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, 2008 U. ILL. J.L. TECH. & POL'Y 259, 260-61.

14. See Strategy for the Enforcement of Intellectual Property Rights in Third

Some commentators have argued that the detailed IP provisions in these agreements represent only the first stage of a conscious strategy on the part of right holder groups, the U.S. government, or perhaps both, that has a longer-term goal of eventually incorporating these higher bilateral IP standards into multilateral treaties that will bind third-party countries, as part of a “global IP ratchet.”¹⁵ As one commentator has put it, “if enough FTAs are negotiated containing TRIPS-plus provisions, these provisions will essentially become the new minimum standard from which any future WTO trade round will proceed.”¹⁶ As evidence of the ratcheting process, commentators point to the negotiation of the TRIPS agreement to show how bilateral mechanisms were used to break down resistance,

Countries, 2005 O.J. (C 129) 3 (providing that the European Commission’s strategy includes a number of actions similarly modeled on U.S. practices, including an indication of the intention to “revisit the approach to the IPR chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses” using existing E.U. Directives and regulations as an important approach to revising the IP standards); *see also* Free Trade Agreement, E.U.-S. Korea, Oct. 6, 2010 [hereinafter E.U.-Korea FTA], *available at* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en> (representing the bilateral trade agreement of the “new generation,” including a chapter with extensive obligations on geographical indications and enforcement).

15. *See* PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 143 (2002); Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 215-16 (Lorand Bartels & Federico Ortino eds., 2006); Peter Drahos, *BITS and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 798-99 (2001) [hereinafter Drahos, *BITS and BIPs*]; Ruth Mayne, *Regionalism, Bilateralism, and “TRIP Plus” Agreements: The Threat to Developing Countries* 1 (Human Dev. Report Office, Occasional Paper No. 18, 2005), *available at* http://hdr.undp.org/en/reports/global/hdr2005/papers/hdr2005_mayne_ruth_18.pdf; Peter Drahos, *The Global Ratchet for Intellectual Property Rights: Why it Fails as Policy and What Should be Done About It*, (Austl. Nat’l Univ., 2003), *available at* http://cgkd.anu.edu.au/menus/PDFs/IPRatchet_Drahos.pdf (“[E]ach subsequent bilateral or multilateral agreement can and usually does establish a higher standard of IP protection.”). Other commentators see the bilateral agreements as their own end point. *See* Okediji, *supra* note 9, at 130 (arguing that bilateralism is actually more consistent with the historical practices of the United States and that the multilateral TRIPS agreement is the oddity in the realm of international IP law); Sell, *supra* note 4 (noting the United States’ use of trade sanctions, along with bilateral and regional agreements, to pressure weaker developing countries into adopting TRIPS-plus standards); Yu, *supra* note 9, at 328 (describing the “clash of currents” between pushing for international harmonization and pushing for state autonomy).

16. Mercurio, *supra* note 15, at 223.

particularly amongst developing countries.¹⁷

Certain aspects of the international IP regime create a legal framework conducive to such a strategy. The first is the way in which key multilateral IP agreements adopt “minimum standards.” Contracting parties commit to enacting standards embodied in the agreement, while also agreeing that they can enact additional, more extensive IP protection if they so choose. However, they *cannot* adopt lower levels of protection.¹⁸ The second feature, national treatment, refers to provisions requiring that a contracting party accord to authors or other right holders from other contracting parties the same protection that it accords to its own authors or right holders.¹⁹ TRIPS contains an even stronger principle in the form of a most favored nation (“MFN”) clause, which requires that “any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”²⁰ Thus, where

17. See Drahos, *BITS and BIPs*, *supra* note 15, ch. 6 (describing the history of bilateral agreements leading up to the negotiation of TRIPS).

18. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 869 U.N.T.S. 299 [hereinafter TRIPS Agreement] (“Members may . . . implement in their law more extensive protection than is required by this Agreement.”); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations art. 22, Oct. 26, 1961, 496 U.N.T.S. 43; Berne Convention for the Protection of Literary and Artistic Works art. 5(1), Sept. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 30 (as revised at Paris, July 24, 1971) [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property art. 19, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (as revised at Stockholm, July 14, 1967) [hereinafter Paris Convention]; Annette Kur & Henning Grosse Ruse - Khan, *Enough Is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection* 9 (Max Planck Inst. for Intell. Prop., Competition & Tax L., Research Paper Series No. 09-01, 2008), available at <http://ssrn.com/abstract=1326429> (explaining that TRIPS acts as a “Paris & Berne-plus” agreement that sets minimum standards); see also E.U.-Korea FTA, *supra* note 14, arts. 10.5, 10.16, 10.33, 10.39; Free Trade Agreement, U.S.-Austl., arts. 17.1.2-17.1.5, May 18, 2004, 118 Stat. 919 [hereinafter U.S.-Austl. FTA] (serving as an example of a bilateral agreement that includes a provision requiring the accession or affirmation of membership in a particular multilateral or plurilateral agreement); Free Trade Agreement, Sing.-Austl., [2003] ATS 16 (Austl.), art. 2.

19. See TRIPS Agreement art. 3; Berne Convention, *supra* note 18, art. 5.1; Paris Convention, *supra* note 18, art. 2.

20. TRIPS Agreement art. 4; see SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE

countries A, B and C are parties to TRIPS, and A and B agree to extend protection in copyright or patent, then authors or inventors from C will receive the benefits.²¹ Assuming that A is an IP-importing nation which sees higher IP standards as imposing net costs,²² the combination of minimum standards plus national treatment or MFN increases the cost to A of raising IP standards through a bilateral agreement with B. Perhaps more importantly, the cost to A of later agreeing to the same high standards in a multilateral agreement are reduced, since A is already providing heightened protection to creators from other TRIPS Members.²³ Thus the inclusion of higher standards in bilateral agreements ought to

CONVENTION AND BEYOND 302-5 (2d ed. 2006) (outlining the development of most favored nation clause as an evolution of the principle of minimum protection). *But see* General Agreement on Tariffs and Trade arts. 1, 24(5), 24(8), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (providing a general MFN treatment provision except when it comes to obligations undertaken in a customs union or free trade area; this exception to MFN for standards negotiated in regional trade agreements arguably does not apply to IP obligations, however, owing to the separate MFN obligation included in TRIPS article 4).

21. TRIPS Agreement art. 4. Imagine that Countries A, B and C are all party to the Berne Convention. In theory, A could agree with B to provide B's citizens with certain additional minimum standards, but such an agreement might not require that A's citizens receive the same standard of protection. In this case, Country C could only demand national treatment: what A provides A's citizens, less than what A provides B's citizens. An MFN standard, on the other hand, would require that C's citizens receive the same treatment as B's citizens. Thus, MFN is stronger than national treatment plus minimum standards.

22. For an IP-importing nation, high IP standards may represent a net cost as more royalties flow to foreign creators than will be obtained by local creators. This net flow may, or may not be offset to some extent by the increased incentive effect for local creators. *See generally* KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000); John Revesz, *Trade-Related Aspects of Intellectual Property Rights* 1-2 (Productivity Comm'n, Staff Research Paper 1999), available at <http://www.pc.gov.au/research/staffresearch/trips/trips.pdf> (conducting an analysis of Australia's IP "interests" and concluding that "in most cases gains would be maximised (or costs minimised) by not exceeding the minimum protection standards required by TRIPS").

23. *See* PRODUCTIVITY COMM'N, *BILATERAL AND REGIONAL TRADE AGREEMENTS: RESEARCH REPORT (AUSTL.) 260* (2010), available at <http://www.pc.gov.au/projects/study/trade-agreements/report> (noting the argument that "[g]iven . . . that the copyright term extension provisions in AUSFTA cannot readily be unwound, it could be argued that Australia, in future [bilateral or other agreements] it might negotiate, should seek to have the same provisions adopted by partner countries. This would generate benefits for those Australian IP rights holders who export to the partner country, while having no new adverse effect on the price and consumption of IP material purchased in Australia.").

increase the chance of similar provisions securing broader acceptance in a multilateral agreement.

Sometimes the story of this global IP ratchet is presented as if to suggest we can expect a future of repeating cycles of bilateral negotiations, followed periodically by consolidation of the bilateral standards at a multilateral level,²⁴ followed by new domestic standards, then bilateral standards, and so on. The potential consequences are serious. As Kur and Ruse - Khan state, for example, “once a substantial portion of trading partners have agreed to observe the same standards as those enshrined in present U.S./E.U. legislation, *there is no way back* to a meaningful lessening of what appears as widely accepted rules . . . creating a *spiral endlessly moving upwards*.”²⁵

The negotiation of ACTA is an interesting case study to test the assumption of an inevitable one-way “ratcheting up” of IP obligations and the role of bilateral agreements in this process. The ACTA negotiations can give us a clue as to whether the U.S. and E.U. FTAs are indeed stepping stones to multilateralization. A goal of ACTA is to strengthen the provisions on enforcement beyond

24. Formal multilateralization is not the only mechanism by which FTA provisions could influence obligations of third parties. See Ruth Okediji, *TRIPS Dispute Settlement and the Source of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 602-604 (2001) (noting that, based on Article 31(3) of the 1969 Vienna Convention on the Law of Treaties, bilateral agreements may also affect third countries' international obligations by “form[ing] the context for treaty interpretation” such as the effect of TRIPS on the WIPO Copyright Treaty); see also Ruth Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* 4 (UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 15, 2006), available at http://www.unctad.org/en/docs/iteipc200610_en.pdf (referring to a “common law” established by FTAs); Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331 (interpretation of treaties should include “any subsequent practice in the application of the treaty which establishes the agreement of the parties”). These kinds of influence however could only operate at a high level of generality, and would require more than a series of FTAs involving one dominant country. In other words, U.S. bilateral agreements might be *part* of a case for interpreting the WIPO Internet Treaties as requiring both a prohibition on circumvention *and* a prohibition on the circulation of circumvention devices. However, the U.S. FTAs alone would not be sufficient. An international tribunal would seek evidence that other countries supported a similar view—particularly countries from other cultural or regional blocs, such as Asian countries or the Least Developed nations.

25. Kur & Grosse Ruse - Khan, *supra* note 18, at 13-14 (emphasis added).

those presently found in the TRIPS Agreement. As numerous commentators have noted, the various texts of ACTA—particularly the early ones—demonstrate an intention to elaborate on TRIPS standards and remove flexibilities.²⁶ “TRIPS-plus” aspects of the ACTA proposals have included provisions to prescribe factors a court must consider in calculating damages;²⁷ a proposal to require statutory or additional damages, or at least presumptions for calculating damages;²⁸ extensive powers to require infringers to provide information;²⁹ and extensions to the powers of customs officials at the border.³⁰ The ACTA text also proposes the removal of

26. See Press Release, World Trade Org., Council Debates Anti-Counterfeiting Talks, Patents on Life (June 8-9, 2010), http://www.wto.org/english/news_e/news10_e/trip_08jun10_e.htm (reporting that China, India, and other developing countries have raised concern over provisions in the negotiating texts of ACTA that go beyond the TRIPS Agreement); see also *Text of Urgent ACTA Communiqué: International Experts Find that Pending Anti-Counterfeiting Agreement Threatens Public Interests*, AM. U. WASH. C. L. PROGRAM ON INFO. JUST. & INTELL. PROP., <http://www.wcl.american.edu/pijip/go/acta-communication> (last visited Mar. 1, 2011) (warning that ACTA would conflict with various provisions of TRIPS).

27. Compare ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.2 (prescribing that the court consider “any legitimate measure of value submitted by the right holder, which may include the lost profits, the value of the infringed good or service, measured by the market price, the suggested retail price, or [the profits of the infringer that are attributable to the infringement]”), and ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.2, ¶ 1 (requiring parties to ensure that courts “shall have the authority to consider” such factors), with TRIPS Agreement art. 45 (no specifications on factors the court should take into account when calculating damages). It should be noted that the final ACTA text requires only that parties ensure courts can consider such factors.

28. See TRIPS Agreement art. 45.2 (allowing but not requiring statutory damages). Compare ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.2, ¶ 3 (allowing optional statutory damages), with ACTA Draft—Jan. 18, 2010, *supra* note 10, art. 2.2 (requiring statutory damages or presumptions).

29. Compare TRIPS Agreement art. 47 (providing only that member states may allow their judicial authorities to require an infringer to reveal “the identity of third persons involved in the production and distribution of the infringing goods and of their channels of distribution”), with ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.4 (requiring that parties give their judicial systems the authority to require extensive information be shared about third parties), and ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.4 (qualifying the obligation by requiring that courts have the authority to order an infringer (or alleged infringer) to provide “relevant information as provided in its applicable laws and regulations that the infringer or alleged infringer possesses or controls” (emphasis added)).

30. Compare ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.7 (providing two options for the parties to choose from in determining the scope of their

certain flexibilities found in TRIPS. For example, it removes the choice under TRIPS Article 44.2 for a party to make injunctions unavailable so long as it provides for adequate remuneration.³¹ In this most basic sense, as a TRIPS-plus agreement, ACTA is consistent with the pattern of ever-increasing standards and hence a part of the general global IP one-way ratchet.

The more interesting story, however, is how ACTA relates to the bilateral agreements of the last decade. At first glance it looks like the evidence backs the ratcheting theory. Several of the countries participating in the ACTA negotiations are party to a U.S. FTA³² or an E.U. agreement.³³ Moreover, it seems clear that the negotiating position of these FTA-bound countries on controversial issues within ACTA have been influenced by their FTAs.

Australia is one example. Australia's FTA with the United States ("AUSFTA") required many changes to Australian IP law.³⁴

customs authorities' *ex-officio* authority), with ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.X (Border Measures) (requiring mandatory *ex officio* authority for customs authorities to suspend the release of suspect goods). See generally Kimberlee Weatherall, ACTA-Australian Section-by-Section Analysis (April 30, 2010) (unpublished manuscript), available at <http://works.bepress.com/kimweatherall/21/>.

31. TRIPS Agreement art. 44.2. See James Love, *Comments on ACTA Provisions on Injunctions and Damages* 5-6 (Knowledge Ecology Int'l, Research Note 2010:1, 2010), available at <http://keionline.org/node/826> (explaining that the ACTA language proposed by the United States and the European Union is inconsistent with other international agreements in certain areas, such as the flexibilities provided in TRIPS art. 44.2 for injunctions, and would thereby require changes in U.S. federal statutes).

32. See *EU ACTA Negotiator Confirms EU Wants Patent Provisions in ACTA*, INSIDE US TRADE, May 8, 2009, at 11, available at 2009 WLNR 8793214 (noting that the ACTA agreement was being negotiated by countries including several subject to a U.S. FTA: Australia, Canada, South Korea, Mexico, Morocco, and Singapore, along with other parties that have since dropped out of the negotiations, including Jordan, the United Arab Emirates, and Uruguay). Jordan has an earlier model FTA with the United States, while the United Arab Emirates has held FTA negotiations with the United States in the past.

33. These trade partnerships are relevant not only to negotiating positions, but also to the potential for the treaty to enter into force. Compare ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 6.2 (requiring five ratifications to bring ACTA into force, a number achievable by the United States with its FTA partners), with ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 6.2 (requiring six ratifications to bring ACTA into force).

34. See Burrell & Weatherall, *supra* note 13, at 259-260 (noting that Australian copyright law has been subject to multiple amendments in order to bring the law in

Importantly, prior to her FTA with the United States,³⁵ Australia's IP enforcement laws differed from the draft provisions of ACTA on key issues. For example, two of the most controversial areas in ACTA to date have been the digital chapter and the criminal provisions. On the former, Australia's pre-FTA copyright law embodied its own "Australian-grown" implementation of the WIPO Copyright Treaty. It did not prohibit the act of circumventing a technological protection measure,³⁶ on the basis that the real harm to copyright owners occurred through the creation of a market for circumvention devices and services, and that a ban on circumvention could not be effectively enforced since it intruded too significantly into the private sphere.³⁷ It included no safe harbors for online service providers, leaving it to the courts to develop the law of secondary liability as related to online intermediaries. While it is fair to say that Australia would, even without the FTA, have considered introducing some kind of safe harbors or at least a code of conduct for online service providers, there is reason to doubt they would have matched either the U.S. or E.U. provisions.³⁸ On criminal provisions as well,

compliance with the AUSFTA and describing the particular political controversy surrounding the implementation of the IP Chapter in Australia).

35. U.S.-Austl. FTA, *supra* note 18.

36. *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (Austl.).

37. See House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Copyright Amendment (Digital Agenda) Bill 1999, paras. 3.45-3.48 (1999) (joint submission of the Attorney-General's Department and the Department of Communications, Information Technology and the Arts) (Austl.), available at <http://www.aph.gov.au/house/committee/laca/digitalagenda/sub75.pdf> (noting that a ban on the "activity of circumvention" would also have the undesirable side-effect of preventing users from carrying out lawful activities). The Australian Copyright Amendment Act accords with early drafts of the WIPO Internet Treaties, which included language concentrating on "protection-defeating devices" or services. Commentators questioned whether the final language of the WIPO Internet Treaties required a prohibition on the circulation of circumvention devices or services but most concluded such a prohibition was required: See MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* 549-50, para. C11.12 (2002); JÖRG REINBOTHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996: COMMENTARY AND LEGAL ANALYSIS* 145, para. 23 (2002); RICKETSON & GINSBURG, *supra* note 20, at 978, para. 15.20.

38. See PHILLIPS FOX, *DIGITAL AGENDA REVIEW REPORT AND RECOMMENDATIONS* 6-7, 84-87 (2004) (noting the uncertainty prior to the adoption of the Copyright Amendment Act of what steps service providers needed to take in order to protect themselves from liability and recommending a "notice and take down procedure" that would balance the interests of owners and users.

Australia's law was narrower than initial U.S. proposals for ACTA. Pre-FTA Australia applied criminal penalties where infringement was related to trade or commerce and in non-commercial cases only where it could be shown that the *distribution* of copies had a substantial prejudicial impact on the copyright owner. Post-FTA, Australia also applies criminal law to non-commercial *acts of copying* that have such an impact, thus extending the criminal law, for example, to prolific downloaders as well as people uploading and distributing.³⁹

It seems unlikely that Australia would have simply accepted significant changes to its copyright law via ACTA.⁴⁰ Post-FTA, however, Australia has both political and legal reasons to discount ACTA's domestic importance, and reduced incentives to spend effort or political capital opposing even provisions that had previously been contrary to domestic policy. From a political perspective, the Australian government can portray ACTA as requiring no changes to Australian law and bringing only benefits in the form of better protection for Australian right holders overseas at little or no cost.⁴¹

The recommended system would not have been identical to that implemented in the U.S. DMCA.).

39. See *Copyright Act 1968* (Cth) s 132AC (Austl.) (introduced in 2006, after the AUSFTA, and creating liability for individuals who engage in infringement "on a commercial scale" that has a "substantial prejudicial impact on the owner of the copyright," thereby complying with Australia's obligation under the its FTA with the United States); see also U.S.-Austl. FTA, *supra* note 18, art. 17.11.26 (obliging Australia to introduce liability for "significant willful infringements of copyright, that have no direct or indirect motivation of financial gain").

40. Although no particular country's name is attached to ACTA amendments or leaked texts, proposed amendments on damages seem to suggest a resolve on the part of Australia to protect her own system of additional damages, as she did in negotiating her FTA with the United States. See U.S.-Austl. FTA, *supra* note 18, art. 17.11.7(b) (allowing a "system of additional damages in civil judicial proceedings" as an alternative); ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.2, ¶ 3 (making "additional damages" an alternative to statutory damages specifically in copyright cases). It is argued that the lengths Australia went to in order to protect this aspect of Australian law suggests that Australia would equally have fought to preserve her own version of criminal laws relating to copyright in the ACTA negotiations—were it not for the Australia-US Free Trade Agreement.

41. Indeed, the cynically-minded might even argue that Australia will *benefit* from other countries signing on to stringent IP laws, which she is already subject to as a result of the AUSFTA—and not just because more harmonized laws worldwide reduce transaction costs for Australian right holders. Stringent IP laws have the potential to impose costs on users—both public and private sector—in

This may have deprived some negotiating parties of a potential ally. Pre-FTA, discussions of the criminal provisions would likely have seen common ground between Australia and the European Union, with both taking the view that, in general, criminalization of end-users is a bad idea.⁴² On the subject of anti-circumvention, Australia would have had common interests with New Zealand, which today, like Australia pre-2004, has no prohibition on circumvention.⁴³ Australia's story thus provides some evidence for the success of a "ratchet" strategy. The AUSFTA removed potential opposition and made Australia a country that could easily sign on to high enforcement standards in ACTA.

This author hastens to note that this assessment of the political calculus facing Australia in the ACTA negotiations is, perhaps, realistic as a reflection of the way Australian negotiators would have viewed the negotiations. This does not mean, however, that it is an accurate representation of Australia's *actual* interests. The calculus outlined above fails to take into account certain broader political considerations that ought to be important. While the FTA has reduced the immediately *apparent* costs of adopting stringent provisions in the final version of ACTA, there are strong arguments that even an ACTA entirely consistent with post-FTA law is not in any IP-importing FTA country's interests, for four broad reasons.⁴⁴

Australia. To take just one example, copyright law imposes a not-insignificant cost each year on Australian educational institutions. If similar costs are not being borne in other jurisdictions then Australian user groups are at some disadvantage. From this perspective, it is advantageous for an already-bound Australia to encourage other countries to bind themselves to similarly stringent standards.

42. See Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms*, 31 MELB. U. L. REV. 967, 984 (2007) (describing the concern by the public over the introduction of strict liability and "potential liability in the absence of any intent or even knowledge of infringement" resulting in many "harmless situations where the legislation would make acts 'criminal'" including criminalizing innocent acts by children). See generally Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) (Austl.) (amending Australian copyright law to avoid unintended criminal liability and lessen other threats to the general public); Further Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth) (Austl.) (changing Australian copyright law once again to further remove other unintended strict liabilities).

43. See Copyright Act 1994, First Schedule, cl 226E(1) (N.Z.) (allowing circumvention devices to be used for "permitted act[s] under Part 3").

44. See Weatherall, *supra* note 30, at 1-3 (arguing that even if ACTA was

First, on the domestic front, such a country will receive little benefit, and may endure additional costs, from the further consolidation of stringent IP standards.⁴⁵ Although a U.S. FTA reduces a country's policy flexibility, the only party who can complain about non-compliance is the United States, which is itself something of a scofflaw when it comes to its international obligations in IP.⁴⁶ Creating such standards at a plurilateral level would only decrease flexibility and increase the number of trade partners with a right to complain of a failure to meet standards.⁴⁷ Second, from a pragmatic

consistent with Australian IP law, not all Australian IP law would be suitable for a multilateral treaty nor is it necessarily good policy for other countries). Early ACTA drafts would not have been consistent with Australian law and would have necessitated changes, but the Final November 2010 ACTA text does not require any immediate changes to Australian IP law, largely due to the changes already implemented through the AUSFTA.

45. See PRODUCTIVITY COMM'N, *supra* note 23, at 194 (noting that when negotiating bilateral and regional trade agreements, generally, countries must assess the likely national benefits and costs on the relevant sectors of the domestic economy).

46. See Burrell & Weatherall, *supra* note 13, at 287-88 (noting that the United States fails to provide moral rights protection even though it is required by the Berne Convention, art. 6*bis*; maintains financial penalties for foreign copyright owners who fail to register works, despite Berne's prohibition on formalities found in art. 5(2); calculates the term of copyright in "works made for hire" in a manner contrary to art. 7(1) of the Berne Convention; and may not protect all temporary reproductions as required under AUSFTA art. 17.4.1); *see also* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008) (holding that certain temporary reproductions, or "copies" under the Copyright Act, are not protected under U.S. law unless they are (1) "'embodied' in a medium for a period of 'transitory duration'" and (2) can be "'fixed' in that medium"); Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) (finding that the United States failed to comply with newly introduced exceptions to the performance right in musical works under the TRIPS Agreement); Award of the Arbitrator, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/12 ¶¶ 27, 47 (Jan. 15, 2001) (deciding that twelve months was a "reasonable period of time" for the United States to enforce the WTO panel report, not "at least fifteen months" as had been requested). *Compare* U.S.-Austl. FTA, *supra* note 18, art. 17.4.1 (containing no limitation on the basis of economic value or significance), *with* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 111 (2001), *available at* <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (asserting that the reproduction right covers "all reproductions from which economic value can be derived").

47. Admittedly ACTA will not contain any mechanism for enforcement of its obligations. In this respect it differs from the U.S.'s bilateral trade agreements, for example, U.S.-Austl. FTA, *supra* note 18, art. 21.1, which creates a "Joint Committee to supervise the implementation" of the agreement. However, non-

perspective, a country for which stronger IP standards are not a local policy priority is surely better off trading raised IP standards in return for the receipt of benefits or concessions in areas of direct economic interest. A country like New Zealand, for example, could trade its agreement to higher IP standards in return for access to U.S. markets for its agricultural goods. When Australia signed the FTA with the United States it knew that higher IP standards represented a net cost, but it could balance those costs against other perceived benefits, such as greater access to visas for professionals to work in the United States. Third, on the international front, arguably ACTA is not in the interests of a country's nationals trading overseas. For instance, Australian citizens and companies will not always be the complainants in IP proceedings overseas, and the border measures regime set out in the ACTA drafts could easily be used by local competitors to delay Australian imports or extract commercial-in-confidence information, perhaps by lodging a spurious claim of IP infringement in order to have goods seized or delayed at Customs.⁴⁸ Additionally, insofar as the ACTA provisions increase the power of administrative authorities, police, prosecutors, and judges, it implicates other potential dangers, including official corruption—endemic in many countries. Two ACTA negotiating countries, Mexico and Morocco, for example, are 98th and 85th (out of 178), respectively, on Transparency International's 2010 Corruption Perceptions Index ("TICPI").⁴⁹ Further, this issue will increase in importance as the negotiating parties seek expansion of the membership of ACTA. Australia, for example, mentioned a desire that ACTA "attract support from countries in [her] region."⁵⁰

compliance with ACTA will not be costless: (a) ACTA could be included in future agreements that do have enforcement mechanisms, such as future FTAs; and (b) in diplomatic contexts, particularly when negotiating new agreements of any type, compliance with existing obligations could be important in engendering the necessary trust or in convincing another country to enter or complete negotiations.

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

49. See TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2010 (2010), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010 (Select "Results").

50. *Anti-Counterfeiting Trade Agreement (ACTA)*, AUSTRALIAN DEP'T OF FOREIGN AFFAIRS AND TRADE <http://www.dfat.gov.au/trade/acta/index.html> (last

Regardless of how realistic that desire is, it is worth noting that Indonesia and the Solomon Islands both sit at 110th on the TICPI.⁵¹ Papua New Guinea is 154th and Timor-Leste is 127th.⁵² Vietnam is 116th.⁵³ And so on. It is true that the November and December drafts of ACTA specifically provide that the border measures be applied in a manner that “avoids the creation of barriers to legitimate trade;”⁵⁴ however, individual exporters will not be able to use that meager protection if targeted by spurious Customs procedures.⁵⁵

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

[M]ost of the benefits to IP rights holders from measures to promote adherence to existing rules in partner countries [i.e. IP enforcement provisions] can be expected to accrue to third parties, such as rights holders in the United States. Again, the question would arise as to whether Australia should ‘carry the water’ for others, when doing so would diminish the bargaining coin available to negotiate for other reforms by the partner country of potentially more benefit to both it and Australia.⁵⁶

While the Productivity Commission is talking about a “bargaining coin” in the context of bilateral negotiations—IP provisions in return for agricultural market access, for example⁵⁷—it is arguable that Australia also spends her diplomatic reputational “coin” by being part of an agreement explicitly seen as a threat by two of Australia’s

visited Mar. 1, 2011).

51. TRANSPARENCY INT’L, *supra* note 49.

52. *Id.*

53. *Id.*

54. ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.X (Scope of the Border Measures); ACTA Text—Dec. 3, 2010, *supra* note 10, art. 13.

55. *See* ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 5.3, ¶ 1 (providing that a party “may request in writing consultations with another Party with respect to any matter affecting the implementation of this Agreement”).

56. PRODUCTIVITY COMM’N, *supra* note 23, at 261.

57. *Id.* at 214-16 (noting that the negotiation process with partner countries is itself a cost).

top ten trading partners—India and China—at a time when Australia is actively seeking to conclude a free trade agreement with both of them.⁵⁸

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

Thus far this article has discussed what ACTA tells us about the use of bilaterals as a stepping stone to broader agreement. But ACTA itself could also be seen as a stepping stone to broader agreement. Indeed, the ratchet argument could be used as an explanation or, from an ACTA supporter's perspective, a justification for the existence of ACTA and the form in which the negotiations have proceeded. As noted at the outset, the form of the ACTA negotiations is bizarre in that it purports to address global counterfeiting but involves none of the major sources of counterfeit goods in the negotiation process.⁵⁹ However, this may make sense if one builds in a presumption that agreements between like-minded or “can-do”⁶⁰ countries can be a stepping stone to broader multilateral agreements that *will* bind source countries. There is explicit evidence for this evangelizing goal in the statements of negotiators, who have cited as a goal establishing “a new standard of intellectual property

58. See, e.g., Media Release, Austl. Dep't of Foreign Affairs and Trade, China Tops Trade in Goods and Services (Dec. 22, 2010), <http://www.dfat.gov.au/media/releases/department/2010/101222.html> (noting that China was Australia's largest export market as well as the largest two-way trading partner in 2009-2010); Media Release, Austl. Dep't of Foreign Affairs and Trade, Major Step Towards a Free Trade Agreement between Australia and India (May 4, 2010), http://www.trademinister.gov.au/releases/2010/sc_100504.html. On India and China's opposition to the ACTA provisions, see generally *infra* note 107.

59. See WORLD CUSTOMS ORG., CUSTOMS AND IPR REPORT 2008 9 (2008) (listing the top ten countries of departure for counterfeit goods, of which the United States is the only one that was involved in negotiating ACTA)

60. See Robert B. Zoellick, *American Will Not Wait for the Won't-Do Countries*, FIN. TIMES (U.K.), Sept. 22, 2003, at 23 (arguing that the United States would separate the “can do” countries from the “won't do,” and would “move towards free trade with [only] can-do countries”).

(IP) enforcement”—or “enforcement best practice.”⁶¹ The United States has made statements to the TRIPS Council emphasizing that the United States, at least, would “welcome all Members who are interested in enhancing IPR enforcement to consider joining the agreement.”⁶² At the time of this writing, Australia’s Department of Foreign Affairs and Trade asserts on its website that “Australia regards the extent to which ACTA can attract support from countries in our region as one important issue in determining the value of the agreement for Australia.”⁶³ The publicly released ACTA negotiating text includes provisions to enable a broader membership, including developing countries, with accession processes and provisions to allow for technical assistance and capacity-building for developing country members seeking to join.⁶⁴ This article will turn to whether this is a realistic goal shortly.

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

61. *Anti-Counterfeiting Trade Agreement (ACTA)*, *supra* note 50; *see also* OFFICE OF THE U.S. TRADE REPRESENTATIVE, SPECIAL 301 REPORT 4 (2008), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf (noting that “ACTA is envisioned as a leadership effort among countries that will raise the international standard for IPR enforcement”).

62. U.S. Talking Points for TRIPS Council Meeting (Oct. 26, 2010), *available at* <http://keionline.org/node/10008>.

63. *Anti-Counterfeiting Trade Agreement (ACTA)*, *supra* note 50.

64. *See* ACTA Draft—Nov. 15, 2010, *supra* note 10, arts. 4.3, ¶ 1, 6.5.

II. THE RISE ISN'T INEXORABLE: HOW ACTA STEPS BACK FROM THE STRONGEST STANDARDS

Despite this positive evidence for the IP ratchet, a closer examination of the ACTA negotiations also exposes the weakness of the strategy. ACTA demonstrates that the provisions in bilateral FTAs are simply not “multilateralizable,” and have had to be watered-down in plurilateral negotiations; this is a fact that was always apparent in theory but which has only now become demonstrable in fact.⁶⁵ Under ACTA, the standards have gone backwards, not forwards.

The most striking examples may be found in the development of ACTA’s digital enforcement chapter. In early drafts, this part of ACTA addressed secondary liability, targeted the providers of peer-to-peer file-sharing software, provided safe harbors for online service providers, and required anti-circumvention provisions and the protection of rights management information. Based on an analysis of both early leaked texts and the official public text released in April 2010, the initial proposal for the digital chapter, drafted by the United States, embodied many provisions similar to the U.S. FTAs. These included strong anti-circumvention provisions based on the U.S. Digital Millennium Copyright Act (“DMCA”) and online service provider safe harbors containing conditions based on those found in 17 U.S.C. § 512.⁶⁶ This looked like a concerted effort by the United States to “multilateralize” its FTA provisions.

The European Union, however, has its own rules, embodied in two directives, which differ in significant ways from the DMCA. The

65. See Burrell & Weatherall, *supra* note 13, at 313-14 (highlighting that multilateralization would require uniformity in copyright standards, but in practice, the United States has given ground in bilateral negotiations on the issues that are most contentious between the parties).

66. See ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18 (proposing several options for technological enforcement of IP in the digital environment with a focus on effective legal remedies); see also Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1201(a)(1)(A), 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.) (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”); 17 U.S.C. § 512(b)(2) (2006); U.S.-S. Kor. FTA, *supra* note 12, art. 18.10.30(a) (providing for enforcement measures to deter service providers from allowing “unauthorized storage and transmission of copyrighted materials”).

first is the Information Society Directive,⁶⁷ a hard-fought compromise among the members of the European Union that took five years to negotiate and considerable time to implement.⁶⁸ The second is the Ecommerce Directive, which provides horizontal protections for online service providers analogous to the U.S.'s "safe harbors," which are also controversial and overdue for review.⁶⁹ Leaked documents—appearing to be internal E.U. documents from 2009 that comment on the U.S. proposals—suggest that the major concern of the E.U. was how the U.S.-oriented proposals fit with the E.U. *acquis communautaire* represented by these directives.⁷⁰ These internal documents are entirely free of commentary on the position taken by other countries—underlining their irrelevance to the E.U.'s internal calculus.

Over the course of the negotiations we have seen an accommodation of E.U. positions in the text and the watering-down of the U.S.'s proposal, a process which Michael Geist has described as a "gradual caving" by the United States.⁷¹ Consider, for example,

67. Council Directive 2001/29, 2001 O.J. (L 167) 10-19 (EU) (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society).

68. See Martin Kretschmer, *Digital Copyright: The End of an Era*, 25 EUR. INTELL. PROP. REV. 333, 333-34 (2003) (describing Europe's struggle to make copyright law throughout the E.U. compatible while keeping up with the "digital agenda").

69. See Council Directive 2000/31, 2000 O.J. (L 178) 6 (EC) (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

70. See generally EUR. COMM'N DIRECTORATE-GEN. FOR TRADE, ACTA NEGOTIATIONS, Ref. 588/09 (Sept. 30, 2009) (detailing the status of the internet enforcement chapter before the next ACTA negotiating round was to begin in Seoul, Korea); European Union's Comments to the US Proposal Special Requirements Related to the Enforcement of Intellectual Property Rights in the Digital Environment (Oct. 29, 2009) (on file with American University International Law Review) (expressing concern over various ACTA proposals by the United States related to the enforcement of IPR in the digital environment, including that the U.S. proposal allows for both civil and criminal protection—which is inconsistent with E.U. Directives).

71. *U.S. Caves on Anti-Circumvention Rules in ACTA*, MICHAEL GEIST BLOG (July 19, 2010), <http://www.michaelgeist.ca/content/view/5210/99999> (commenting that "[w]hile the U.S. initially proposed an aggressive draft chapter it hoped would export U.S. law to all ACTA partners, it has now caved on many key issues with the European language carrying the day").

the anti-circumvention provisions where even the initial draft produced by the United States did not incorporate a full set of provisions from the U.S. FTA model. Most notably, unlike the FTAs, none of the available draft ACTA texts have sought to impose a closed list of exceptions.⁷² This alone makes the ACTA text much less prescriptive than either the U.S.'s FTAs,⁷³ or E.U. and U.S. laws, all of which place stringent—but very different—limits on allowable exceptions.⁷⁴ Neither the United States nor the European Union, for example, has a general exception to allow circumvention for the purposes of fair use or equivalents. The draft ACTA, however, would allow such an exception.⁷⁵

Early drafts did however incorporate other features of the U.S.'s DMCA, such as explicit protection for both access and copy controls; a prohibition on both the act of circumvention, for copy

72. Compare ACTA Draft—Jan. 18, 2010, *supra* note 10, art. 2.17, ¶ 5 (allowing each party to adopt their own limitations and exceptions), with U.S.-Austl. FTA, *supra* note 18, arts. 17.4.7(e), (f) (specifying a closed list of exceptions with a narrow ability to introduce additional exceptions under certain circumstances).

73. See STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, HOUSE OF REPRESENTATIVES, REVIEW OF TECHNOLOGICAL PROTECTION MEASURES 87, ¶ 3.118 (2006) (Austl.) (criticizing the closed list of exceptions, particularly the very narrow list of exceptions for provision of circumvention devices, in the IP Chapter of the AUSFTA as a “lamentable and inexcusable flaw . . . that verges on absurdity”).

74. Compare U.S.-Austl. FTA, *supra* note 18, art. 17.4 ¶ 7 (representing the U.S.'s practice of implementing a “short” list to exempt the manufacturing or distribution of circumvention devices or provision of circumvention services, and a “longer” list to exempt activities circumventing technological protection measures), with Council Directive 2001/29, *supra* note 67, art. 6.4 (requiring that “Member States shall take appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law . . . the means of benefiting from that exception or limitation” where that exception is one of a limited confined list including copying by libraries, educational institutions, galleries and archives, or communication in the form of illustration for the purposes of teaching or research, or for the reporting of news, or the assistance of persons with a disability). See also E.U.-Korea FTA, *supra* note 14, art. 10.12 (exporting the European Union's basic anti-circumvention obligations in its new generation FTAs, but not its exceptions).

75. Cf. Kretschmer, *supra* note 68, at 336 (arguing that fair use exceptions are ineffective in practice under the WIPO Internet Treaties because any unauthorized use of the protected material is against the economic interests of the rights holder and it is unclear how the user, in practice, could take advantage of those fair use exceptions if the material is already protected.)

controls but not access controls, and a prohibition on marketing, manufacture, sale or distribution of circumvention devices; and both civil and criminal liability for violations of either prohibition.⁷⁶ Even this draft was a step too far. The European Union, Japan, and New Zealand—parties not already bound by U.S. FTAs—all expressed doubt about the inclusion of access controls and criminal penalties.⁷⁷ The text publicly released in April 2010 clearly demonstrates that these differences continued in the Wellington round of negotiations, with square brackets separating out any reference to access controls or criminal penalties. The draft dated July 2010—leaked after the round in Luzern, Switzerland in June-July 2010—shows a further shift away from the U.S.'s preferred model to a form of language that can accommodate a range of anti-circumvention laws. This is best illustrated by putting the U.S.'s proposed text from January 2010 beside its proposed text from July 2010 and the final draft from November 2010.⁷⁸ Key differences are italicized.

76. *See generally* 17 U.S.C. §§ 512, 1201-05, 1301-32 (2006); 28 U.S.C. § 4001 (2006).

77. Three other negotiating countries who appear to be relatively silent at least on early ACTA drafts (and are not party to one of the recent generation of U.S. FTAs) are Canada, Mexico, and Switzerland (NAFTA, to which both Canada and Mexico are party, contains much more limited IP provisions, having been negotiated much earlier). Canada's silence on the point may be referable to the fact that it was, at the time, developing its own anti-circumvention provisions. *See* Bill C-32, 40th Parliament, s.47 (3d Sess. 2010) (Can.) (adopting a relatively stringent set of anti-circumvention provisions that departs from the U.S. and E.U. laws with regard to exceptions and remission of penalties where the ACTA draft would allow more flexibility); Bundesgesetz über das Urheberrecht und verwandte Schutzrechte [URG] [Federal Law on Copyright and Neighboring Rights] Oct. 9, 1992, 231.1, art. 39(a)(4) (Switz.) (allowing circumvention "for the purposes of a use permitted by law," including a broad exception for private copying). *See generally* INT'L INTELLECTUAL PROP. ALLIANCE, 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION: MEXICO (2010), *available at* <http://www.iipa.com/rbc/2010/2010spec301mexico.pdf> (discussing Mexico, which has for some years had a number of proposed amendments to its limited anti-circumvention provisions and fairly constant pressure from right holder groups); INT'L INTELLECTUAL PROP. ALLIANCE, 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION: SWITZERLAND 397-98 (2010), *available at* <http://www.iipa.com/rbc/2010/2010spec301switzerland.pdf> (addressing right holder groups' challenges to Article 19 of Switzerland's Federal Law on Copyrights and Neighbouring Rights, which allows circumvention for private copying).

78. *Compare* ACTA Draft—Jan. 28, 2010, *supra* note 10, art. 2.17, ¶ 4 (Option 1), *with* ACTA Draft—July 1, 2010, *supra* note 10, art. 2.18, ¶ 4, *and* ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶¶ 5-6. The December final text

TABLE 1: US PROPOSALS ON ANTI-CIRCUMVENTION PROVISIONS:
JANUARY, JULY AND NOVEMBER 2010

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| <p>January 2010 (Leaked Text)</p> <p>Art. 2.17 ¶ 4 Option 1</p> | <p>In implementing Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty regarding adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, or producers of phonograms in connection with the exercise of their rights and that restrict <i>unauthorized acts in respect of their works, performances, and phonograms</i>, each Party shall provide for civil remedies, as well as <i>criminal penalties</i>, in appropriate cases of willful conduct, that apply to:</p> <ul style="list-style-type: none"> (a) the unauthorized circumvention of an effective technological measure that <i>controls access</i> to a protected work, performance or phonogram; and (b) the manufacture, importation, or circulation of a technology, service, device, product, component, or part thereof, that is: marketed or primarily designed or produced for the purpose of circumventing an effective technological measure; or that has only a limited commercially significant purpose or use other than circumventing an effective technological measure. |
| <p>July 2010 (Leaked Text)</p> <p>Art. 2.18 ¶ 4</p> | <p>Each Party shall provide adequate legal protection and effective legal remedies at least against the circumvention of effective technological measures that are used by, <i>or at the direction of</i>, authors, and performers and producers of phonograms in connection with the exercise of their rights and that restrict acts in respect of their works, performances, and phonograms, <i>which are not authorised by the authors, the performers or the producers of phonograms concerned or permitted by law</i>.</p> <p>In order to provide such adequate legal protection and effective legal remedies, each Party shall provide <i>protection</i></p> |

included the same anti-circumvention provisions as the November draft. ACTA Text—Dec. 3, 2010, *supra* note 10, art. 27 ¶ 5-27 ¶ 6.

| | |
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| | <p>at least against:</p> <p>(a) the unauthorized circumvention of an effective technological measure <i>that restricts acts not authorized by the right holder</i> and is carried out knowingly or with reasonable grounds to know; and</p> <p>(b) the manufacture, importation, or distribution of, or offer to distribute, a device or product, <i>that circumvents an effective technological measure</i> and is either:</p> <p>(i) primarily designed or produced for the purpose of circumventing an effective technological measure; or</p> <p>(ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.</p> |
| <p>November 2010</p> <p>Arts. 2.18.5-2.18.6</p> | <p>(5) Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights <i>in</i>, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.</p> <p>(6) In order to provide such adequate legal protection and effective legal remedies, each Party shall provide protection at least against:</p> <p>(a) <i>to the extent provided by its law</i>:</p> <p>(i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and</p> <p>(ii) <i>the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and</i></p> <p>(b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that:</p> <p>(i) is primarily designed or produced for the purpose of circumventing an effective</p> |

| | |
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| | <p>technological measure; or</p> <p>(ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.</p> |
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For the two early texts, the table shows only the U.S. proposals and does not include footnotes, including the important and disputed definition of what counts as a technological protection measure. The United States maintained, through many drafts, its proposal to include measures that “control access” to works—an approach challenged by the European Union and rejected by New Zealand.⁷⁹

However, the table does show a number of important differences indicating a shift on the part of the United States away from provisions it has insisted on in its FTAs, and towards weaker language that accommodates both the U.S. and E.U. models.⁸⁰ The reference to criminal penalties disappeared. The language indicating the overall scope of the laws was reduced to focus on technical measures that restrict acts not authorized by the right holder *or law*—where the earlier draft refers only to acts authorized by right holders. This difference could be important in cases involving technology that seeks to restrict acts not within a copyright owner’s rights, such as

79. See Council Directive 2001/29, *supra* note 67, art. 6.3 (declaring that “[t]echnological measures shall be deemed ‘effective’ where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process . . . which achieves the protection objective”); Copyright Act 1994, First Schedule, cl 226E(1) s.226 (N.Z.) (excluding access protection measures by noting that it “does not include a process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes”); INST. INFO. LAW, STUDY ON THE IMPLEMENTATION AND EFFECT IN MEMBER STATES’ LAWS OF DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY 75 (2007) (noting that access control technology that “achieve the protection objective and exercise at least some control over the use of the work are protected”).

80. Notably the shifts have not, at the time of this writing, gone far enough to accommodate the existing rules of a smaller country like New Zealand. See generally Copyright Act 1994, First Schedule, cl 226A(1), 226E(1) (N.Z.) (prohibiting only the distribution and circulation of circumvention devices and provision of circumvention services, but not the act of circumvention itself).

on-sale of existing copies or, in some cases, region-coding. The prohibition on circumvention is similarly changed—from a prohibition on circumventing any access control to a prohibition on circumventing a measure that restricts acts not authorized by the right holder, including a footnote allowing the United States to maintain its approach of allowing circumvention of copy controls.⁸¹ Part (b) of this provision was also changed in July by requiring, unlike the earlier draft, that a device or scheme actually be capable of circumventing a technical measure before liability will arise, and by apparently allowing for the circulation of technologies where the primary purpose is not circumvention.⁸² The November draft adopts most of this language, but introduces two very important qualifications that severely limit the obligation in ACTA even more than the July 2010 draft.⁸³ The combined impact of these two qualifications is that both the United States (which, unlike the European Union, explicitly protects any access control measures)⁸⁴ and the European Union (which, unlike the United States, prohibits the act of circumventing copy control measures)⁸⁵ can retain these more protective aspects of their law without obliging the other to make adjustments. These qualifications are:

First, the obligation to prohibit circumvention, and marketing of devices or services, applies only “to the extent provided by [the Party’s] law.”

Second, the definition of a “technological protection measure” that must be protected is qualified so that it applies to “any technology, device, or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works, performances or phonograms, which are not authorized by authors, performers, or producers of

81. ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶ 6 n.14; *see* 17 U.S.C. § 1201(a)(1)(A) (2006) (prohibiting circumvention of a “technological measure that effectively controls access to a work protected under this title”).

82. ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶ 6(b); *see* ACTA Text—Dec. 3, 2010, *supra* note 10, art. 27 ¶ 6 (retaining the same language as the November draft); 17 U.S.C. § 1201(k) (restricting certain analog devices if they do not “conform to the automatic gain control copy control technology”).

83. *See* ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶ 6.

84. *See* 17 U.S.C. § 1201(a)(1)(A).

85. *See* Council Directive 2001/29, *supra* note 67, art. 6.1.

phonograms, *as provided for by a Party's law.*"⁸⁶

Both these qualifications effectively give parties the right to introduce significant exceptions, such as the right to not prohibit circumvention entirely—like New Zealand does; the discretion to exclude certain kinds of technological protection measures;⁸⁷ or, for example, the ability to heavily qualify any protection for measures that control access to copyrighted works.

Equally striking is the apparent shift in ACTA's criminal provisions, illustrated by Table 2.⁸⁸

TABLE 2: U.S. PROPOSALS ON CRIMINAL PROVISIONS: JANUARY, JULY AND NOVEMBER 2010

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| <p>January 2010 (Leaked Text)</p> <p>Art. 2.14.1</p> | <p>Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. Willful copyright or related rights piracy on a commercial scale includes:</p> <p>(a) significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain; and</p> <p>(b) willful copyright or related rights infringements for purposes of commercial advantage or private financial gain.</p> <p>Fn. 19: For purposes of this Agreement, financial gain includes the receipt or expectation of receipt of anything of</p> |
|--|---|

86. ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶ 6(a), n.14 (emphasis added); *see* ACTA Text—Dec. 3, 2010, *supra* note 10, 27 ¶ 6(a), n. 14 (retaining the same language as the November draft).

87. *See Copyright Act 1968* (Cth) s. 10 (Austl.) (containing a rather complicated wording designed to exclude region-coding technology on movies and computer games as well as technology that seeks to control the kinds of 'spare parts' that will work in an electronic device); *Copyright Act 1994*, First Schedule, cl. 226 (N.Z.) (excluding mechanism "to the extent that, in the normal course of operation, it only controls any access to a work for non-infringing purposes").

88. *Compare* ACTA Draft—Jan. 28, 2010, *supra* note 10, art. 2.14, ¶ 1, *with* ACTA Draft—July 1, 2010, *supra* note 10, art. 2.14, ¶ 1, *and* ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.14, ¶ 1. The criminal provisions in the November draft are the same as those in the December text. *See* ACTA Text—Dec. 3, 2010, *supra* note 10, art. 23 ¶ 1.

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| | value. |
| July 2010 (Leaked Text) Art. 2.14.1 | Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. Infringements carried out on a commercial scale include at least those carried out in the context of commercial activity for direct or indirect economic or commercial advantage; however a Party may exclude such acts carried out by end consumers. Each Party may treat acts carried out by end consumers as outside the scope of this Section. |
| November 2010 Art. 2.14.1 | Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage. |

Criminal liability for copyright and trademark infringement is an area of some importance to the United States, which recently failed to show in an argument before the WTO that China's thresholds for the imposition of criminal liability for trademark counterfeiting and copyright piracy violated the TRIPS requirement to impose criminal penalties where such acts occur "on a commercial scale."⁸⁹ But it is also an area where the differences between the European Union and United States are significant. The United States has consciously expanded criminal law to cover end-user and non-commercial activities via the No Electronic Theft (NET) Act of 1999.⁹⁰ This is

89. See TRIPS Agreement art. 61; Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009).

90. Pub L. No. 105-147, 111 Stat. 2678 (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.) (defining "criminal infringement" to include willful infringement of a copyright "for purposes of commercial advantage or private financial gain, or by the reproduction or distribution . . . which have a total

reflected in the U.S.'s initial proposal, which is wide enough to render criminal single infringements carried out in private (i.e. not in the context of a commercial enterprise) and for the mere purpose of avoiding having to pay for a copy of a work. In the initial U.S. proposal, file-sharing is treated as effectively "commercial" because it is being done in exchange for receiving files—and hence criminal even without any evidence as to the significance of its impact.

On the other hand, criminalization in IP has been a controversial topic in the European Union. Criminal provisions were dropped from the IP Enforcement Directive of 2004,⁹¹ and a proposal for a 2nd IP enforcement directive ("IPRED2"), which would include criminal provisions, has been plagued by debates and misgivings as to the competence of the European Union and the substance of the proposal.⁹² It is doubtful, therefore, that the European Union could ever have accepted the U.S. proposal. The IPRED2 draft only sought to criminalize infringement "on a commercial scale."⁹³ In ACTA's final text, only infringement carried out *as* a commercial activity

retail value of more than \$1,000" and includes receiving "other copyrighted works" during any 180-day period).

91. Council Directive 2004/48, 2004 O.J. (L 157) 45 (EC), *published with corrigendum in* 2004 O.J. (L 196) 16 (EU) (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights).

92. *Amended Proposal for a Directive of the European Parliament and of the Council*, COM (2006) 168 final (April 26, 2006) (Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights); see Monika Ermert, *ACTA May Prompt Quick Restart to EU Harmonisation of Criminal Enforcement of IP*, INTELL. PROP. WATCH (Dec. 21, 2009, 7:42AM), <http://www.ip-watch.org/weblog/2009/12/21/acta-may-prompt-quick-restart-to-eu-harmonisation-of-criminal-enforcement-of-ip/> (summarizing concerns about European IP law harmonization including the draft IPRED1's lack of a definition for the term "on a commercial scale").

93. *Amended Proposal for a Directive of the European Parliament and of the Council*, *supra* note 92, art. 3; see also *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 2010 O.J. (C 115) 1 (calling "upon the Council and the European Parliament to consider as soon as possible legislation on criminal measures aimed at ensuring the enforcement of intellectual property rights"). *But see* Ermert, *supra* note 92 (noting that the European Union is not prevented from negotiating questions of criminal provisions and, following the entry into force of the Lisbon Treaty, there are some signs that the proposal for a directive will be revived).

falls within the provision.⁹⁴

These developments in both the anti-circumvention provisions and the criminal provisions show that the global IP ratchet is not all one-way, and that FTAs are not sufficient to assure that similar standards will prevail in later negotiations. In short, we are not seeing multilateralization of FTA standards, nor are we seeing them become the starting point from which negotiated standards only ratchet up. In fact, at all times the standards embodied in the ACTA draft have been considerably weaker than we have seen in the U.S. FTAs or in U.S. or E.U. internal rules. This suggests that Australia's or Morocco's acquiescence to higher standards in a U.S. FTA is largely unimportant when multiparty negotiations occur. Furthermore, it is clear that for Europe the key issue is the consistency of the ACTA text with its own internally-negotiated *acquis communautaire*. This is not to deny the negative impact of FTAs on countries that have signed them,⁹⁵ but rather to point out that their pain, if there is pain, is their own and cannot be multilateralized.⁹⁶

Some commentators will no doubt note that this is nothing new: in

94. Compare ACTA Draft—July 1, 2010, *supra* note 10, art. 2.14, ¶ 1 (criminalizing activity “in the context of” commercial activity), with ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.14, ¶ 1, and ACTA Text—Dec. 3, 2010, *supra* note 10, art. 23.1 (criminalizing activity “carried out” as commercial activity). The shift in language between July and November 2010 is interesting. In July 2010 the provision criminalized activity *in the context of* commercial activity. In November, this becomes activity carried out *as commercial activity*. Consider, for example, the implications in the context of a company that uses infringing software to do its internal accounting. Certainly that is infringement *in the context of* commercial activity, but is it infringement *as* commercial activity? It seems far from clear that such a case is covered by the final language.

95. *But see* Burrell & Weatherall, *supra* note 13, at 260-61 (noting that the impact of the AUSFTA on Australia's prohibition of the sale of circumvention devices was considerably less than some commentators feared at the time it was concluded, although there certainly were significant changes and costs in general. This shows that the negative impact of an agreement can only be assessed by looking in detail at its implementation).

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

the context of multi-party IP negotiations, “North-North” conflict and accommodation have long been critical in shaping multiparty treaty text.⁹⁷ In the lead-up to the TRIPS Agreement, for example, Drahos and Braithwaite have traced the ways that E.U.-U.S. differences over patents and royalties from audiovisual works impacted on the text.⁹⁸ Indeed, some of the *same* North-North conflicts that operated during the TRIPS negotiations have come back to haunt ACTA—particularly the differences between the European Union and United States over geographical indications. But there is a key dissimilarity in the current context. As this author has pointed out in previous work,⁹⁹ the bilateral agreements that were the stepping stones to TRIPS required, for the most part, countries to sign onto two kinds of provisions: (a) existing multilateral standards and (b) provisions that were not controversial between the developed countries forming the “inner circle” negotiating the TRIPS text. In the TRIPS negotiations proper, the negotiations among this inner circle yielded a text with which the industry was not, perhaps, entirely happy because it was weaker than either E.U. or U.S. law, but which accommodated most differences between their systems.¹⁰⁰ At this treaty level there was no real “stepping back” from existing treaty provisions. Today, however, blocs of countries are establishing higher standards, not just domestically, but in international agreements and then stepping back to more general provisions in the context of the ACTA negotiations.

But does it matter? It might be said that the above analysis misses the forest for the trees. That is, even if the language of an ACTA ends up more abstract or weaker than U.S. domestic law, the watered-down version will still be stronger than existing multilateral

97. See DRAHOS WITH BRAITHWAITE, *supra* note 15, at 143 (discussing both the South-North and North-North split between the parties during the negotiation of parts of the TRIPS Agreement).

98. See *id.* at 143-46; DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* ¶¶ 1.20, 1.29-130 (2d ed. 2003) (commenting that various industrialized countries had separate visions of the TRIPS agreement, not only regarding the content of each proposed chapter, but also on the exact subjects to be covered).

99. See generally Burrell & Weatherall, *supra* note 13.

100. See DRAHOS WITH BRAITHWAITE, *supra* note 15, at 137-46 (describing the many groups and “circles of consensus” which formed during the negotiation process, where the United States and European Union would often meet separately to negotiate privately).

treaties—and that “two steps forward one step back” is still a net gain in IP protection terms. From the perspective of the IP industries supporting the strong IP provisions included in U.S. FTAs, an “ideal world” might multilateralize at least the fundamentals of detailed provisions, while perhaps a second-best alternative is to maintain strong provisions in bilaterals and slightly watered-down versions in multiparty text. The model embodied in bilateral agreements can still, after all, be pushed via unilateral measures, such as the U.S. “Special 301” process¹⁰¹ and its E.U. equivalent,¹⁰² as a benchmark against which trading partners’ compliance with ACTA is assessed.¹⁰³

This is all true, but the end result is still not the inexorable rise of IP standards so much as it is the proliferation of multiple and inconsistent standards—U.S. standards in its FTAs, E.U. standards in its FTAs, and yet a third set of standards in ACTA. Pity the South Koreans who are potentially subject to all three. This is not so much a one-way ratchet as an every-which-way global IP ratchet and it is not costless—either to right holders, to governments, and, most of all, to users. More box-ticking, more meetings on counterfeiting, and more reports on compliance with more treaty obligations may give domestic and international bureaucrats and lobbyists something (or lots of things) to do, but they are unlikely to lead to actual results in terms of reduced counterfeiting. As this author has previously pointed out:

There is a risk of confusion and fragmentation in this process, particularly, one would think, for government departments and

101. *See id.* at 88-90 (noting the 1984 amendment to Section 301 of the Trade Act, which clarified that the President could impose trade sanctions on a state which failed to provide “adequate and effective” protection for U.S. IP: 19 U.S.C. § 2411 (2006)); Peter Drahos, *Global Property Rights in Information: The Story of TRIPS at the GATT*, 13 PROMETHEUS 6, 9-12 (1995) (discussing the 301 annual review process which places states on different “watch lists” if the state did not provide protection for U.S. IP).

102. *See* Strategy for the Enforcement of Intellectual Property Rights in Third Countries, *supra* note 14, at 5 (announcing that, similar to the U.S. 301 process, the European Commission will conduct a survey of the situation of IPR enforcement outside the E.U. based on consultations with other trading partners).

103. *See* ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 5.1, ¶ 3(c) (endowing the ACTA Committee with the power to “make recommendations regarding implementation and operation of the Agreement, including endorsing best practice guidelines”).

enforcement bodies subject to multiple overlapping requirements found in multiple overlapping agreements. In a context where we want government to be more efficient, subjecting them to multiple sources of regulation is not likely to lead to happy results. What would we rather government be doing—actually encouraging innovation, or box ticking on their customs processes to check compliance with the multiple different obligations in different treaties? What should money be spent on—grants for artists or yet [more] forms and bodies and meetings about counterfeiting?¹⁰⁴

Further, there seems to be no reason to believe that the process of watering-down what we have seen in ACTA, required by the need for the United States and the European Union (and others) to reach consensus, would not be repeated in any future negotiation involving another significant player. ACTA standards themselves could be watered-down in any future multilateral negotiations if the process of agreeing to ACTA itself is any guide. Any one of China, India, or Brazil could play a similar role to that played by Europe in the ACTA negotiations—demanding alterations to the text to accommodate its own model. Their law is different, for one thing. On the topic of anti-circumvention laws, for example, India at the time of this writing is considering a bill that takes quite a simple approach to technological measures. It would criminalize circumvention for the purpose of infringement, with a raft of exclusions for inter alia circumvention undertaken “for a purpose not expressly prohibited by this Act” (in other words, to do anything lawful), and does not include action against distribution of circumvention tools.¹⁰⁵ Brazil’s recent copyright reform proposal also permits circumvention for purposes like fair dealing, which would be consistent with ACTA, and would sanction use of technical measures to hinder or prevent fair dealings.¹⁰⁶ Neither model would seem to be an easy “fit” with

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

105. Copyright (Amendment) Bill, 2010, No. 24, § 65A (India), available at <http://prsindia.org/uploads/media/Copyright%20Act/Copyright%20Bill%202010.pdf>.

106. Law No. 9610 of 19 February 1998 on Copyright and Neighbouring Rights, Consolidated with the Bill in Public Consultation since 14 June 2010, art. 107, available at http://www.gpopai.usp.br/blogs/files/2010/08/brazilian_copyright_bill_consolidated_june_2010.pdf; see *Brazil’s Approach on Anti-Circumvention: Penalties for Hindering Fair Dealing*, MICHAEL GEIST BLOG, <http://www.michaelgeist.ca/content/view/5180/125/> (last visited Mar. 1, 2011).

the ACTA provisions, suggesting that, at least if these countries consider the issues important, any attempt to multilateralize ACTA would hit significant hurdles. China, of course, is unlikely to agree to criminal provisions that would nullify its recent WTO win.¹⁰⁷ All three of these countries have made statements in a meeting of the TRIPS Council in early June 2010 criticizing the ACTA negotiations.¹⁰⁸ These statements expressed a range of concerns about the proliferation of IP standards in different forums, the potential for enforcement measures to distort legitimate trade, the upsetting of the various balances struck in TRIPS, and, in particular, the potential interferences with a country's right to determine the allocation of its own law enforcement resources.¹⁰⁹ In sum, there is good reason to believe that these countries would have difficulty simply accepting the ACTA provisions in any future negotiations, justifying an expectation that they may play a role akin to that played by Europe in ACTA—modifying and generalizing the language in the agreement.

It is worthwhile pondering too how the bilateral IP provisions would look in a post-ACTA world. If a watered-down ACTA is intended to be “a new standard of intellectual property rights (‘IPR’) enforcement to combat the high levels of trade in counterfeit and pirated goods worldwide,” involving “state-of-the-art provisions on the enforcement of [IPR]” recently agreed between countries sharing a goal of adopting high standards of IP protection,¹¹⁰ then what are

(arguing Brazil's exception to circumvention sanctions are similar to Canada's approach).

107. *Compare Panel Report, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, §§7.447-7.479, 8.1(c) (Jan. 26, 2009) (finding that China's restrictions on criminal provisions in copyright where only a certain number or value of infringements were involved is consistent with TRIPS), *with* ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.14, ¶¶ 1, 4 (requiring criminal procedures to be applied in all cases where the infringement was “carried out as commercial activities for direct or indirect economic or commercial advantage”).

108. *See* Council for Trade-Related Aspects of Intellectual Property Rights, Minutes of Meeting Held in the Centre William Rappard on 8-9 June 2010, ¶¶ 251-73, 316-18, IP/C/M/63 [hereinafter TRIPS Council Meeting Minutes], *available at* http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm (describing China, India, and Brazil's fear that ACTA will have an overall negative impact on the “balance of rights and obligations under the intellectual property system”).

109. *Id.*

110. Press Release, Austl. Dep't of Foreign Affairs and Trade, Australia to

the remaining bilateral provisions? Excessive? By failing to achieve a higher standard even where negotiations are conducted between high-protection countries, ACTA has the potential to undermine the push for higher standards and validate a claim by opponents that the bilateral provisions are unacceptable, excessive, and a source of conflict with other potential trade partners.¹¹¹ It cannot, after all, be argued that the ACTA negotiators are a lowest common denominator group. In fact, this is the visual or political cost of including only countries with strong and high standards because one cannot argue that there were compromises needed to accommodate different kinds of interests. In reality, a watered-down ACTA means that there were things the United States does that not even Europe, with its concerns for strong IP rights, considers appropriate or justifiable. Future negotiators from either the United States or European Union should perhaps consider ACTA as representing the zenith of appropriate IP provisions possibly included in bilateral agreements.

None of the analysis above is intended to downplay the serious potential impact of ACTA. Analysis of the agreement's potential impacts on all kinds of important interests, from consumer interests to access to medicines to innovation, has been accomplished by others in this special issue, as well as this author elsewhere, and need not be repeated here.¹¹² None of this analysis should be taken as

Negotiate an Anti-Counterfeiting Trade Agreement (Feb. 1, 2008), http://www.trademinister.gov.au/releases/2008/sc_012/html; Press Release, Austl. Dep't of Foreign Affairs and Trade, Joint Statement on Finalising ACTA Text (Nov. 16, 2008), <http://www.dfat.gov.au/trade/acta/final-press-release.html>.

111. Cf. TRIPS Council Meeting Minutes, *supra* note 108, ¶ 252 (voicing objections to ACTA, China pointed out that TRIPS required "only minimum standards . . . and allowed Members to implement in their laws more extensive protection . . . [by] provid[ing] certain conditions for applying such extensive protection.").

112. See Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Act*, 34 YALE J. INT'L L. 247, 255 (2009) (noting that ACTA could make it more difficult for generic drugs to be traded across state lines, even though these drugs are legally produced, and could also interfere with individual's freedom of speech and privacy by allowing for greater monitoring of information transmitted via the internet and more extensive searches of personal items at borders); Tanya Woods, *Copyright Enforcement at All Costs? Considerations for Striking Balance in the International Enforcement Agenda*, 37 AIPLA Q. J. 347, 380-86 (2009) (describing the negative impacts of ACTA and expansive IP regulation on individuals, including infringements on the rights to participate in cultural affairs and freedom of expression).

suggesting that ACTA is a good idea or harmless. Rather, the points are more subtle, but the lessons are there for various interested parties. For advocates and opponents, for example, the development shows the importance of local models, particularly those from negotiating countries. Changes have been wrought in the ACTA text over the course of negotiations in those areas where the E.U. model differed from that in the United States. This suggests developing local models in *other* important countries as a strategy to counter the attempt to multilateralize any harmful ACTA provisions. For scholars, even this brief review makes the question of the dynamics of bilateral agreements much more interesting than the simple concept of a one-way ratchet. Either way, ACTA's development clearly holds new lessons in international IP lawmaking.

III. THE PROBLEMATIC INTERNATIONAL FRAMEWORK FOR EXCEPTIONS

Keen-eyed readers might have noted another aspect of the changes outlined in Table 1 and Table 2 above: namely, that the course of negotiations removed *limiting* language, or language that might even have suggested that there should be ceilings on IP obligations. In the criminal provisions, the July 2010 draft provided that "each Party may treat acts carried out by end consumers as outside the scope of this Section." This language has been removed from the November 2010 text.¹¹³ In the anti-circumvention section, the July 2010 draft required that "each Party shall provide protection at least against . . . the unauthorized circumvention of an effective technological measure *that restricts acts not authorized by the right holder.*"¹¹⁴ The italicized language was also removed from the November 2010 text. Although the July text would not have prohibited either criminalizing users or protecting technological protection measures that prevent lawful acts not authorized by a copyright owner, the text suggested

113. Compare ACTA Draft—July 1, 2010, *supra* note 10, art. 2.14, ¶ 4, with ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.14, ¶ 1. This text was also not included in the December 2010 draft. ACTA Text—Dec. 3, 2010, *supra* note 10, art. 23.1.

114. Compare ACTA Draft—July 1, 2010, *supra* note 10, art. 2.18, ¶ 4, with ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶ 6. This text was also not included in the December 2010 draft. ACTA Text—Dec. 3, 2010, *supra* note 10, art. 27, ¶ 5.

limits on rights. These limits are gone now, preserving the ability of countries to impose them but removing the appearance of their legitimacy that the July text conferred.

This leads to a second point worthy of note coming out of ACTA. The course of the negotiations offers a stark demonstration of how difficult it will be to overcome a key weakness in our international IP treaties—the absence of a proper treatment of exceptions and limitations. This might be counterintuitive because one might think that a treaty about enforcement ought to have little to do with exceptions and limitations. However, such a position is only superficially attractive because strengthening enforcement “across the board” *without* thinking about exceptions risks demonizing behavior which in the past has been tolerated to the benefit of social welfare.¹¹⁵ Imagine, for example, if enforcement was significantly increased without addressing what kinds of private copies ought to be allowed—thereby potentially making every iPod user an infringer. In any event, ACTA is not just about enforcement. The drafts have always proposed the expansion of substantive rights,¹¹⁶ and most relevantly, have included draft limitations in the form of provisions requiring safe harbors for internet service providers. It is true that these exceptions were proposed not so much for the benefits they may confer on online service providers, but for the *conditions* which facilitate enforcement. Nevertheless, they *are* limitations on economic rights. The way the drafts have developed also suggests that negotiators have not turned their mind to how to manage effectively these limitations, instead continuing to use standard methods of “adding up everyone’s existing law,” a process that has turned out to be deeply problematic. As is explained below, it is highly questionable whether the drafts as they have emerged from the negotiation process will serve either to improve matters for right holders, or to extend protection to online service providers in a way that can assure the reduction of barriers to trade and the

115. See generally Tim Wu, *Tolerated Use* (Columbia Law Sch., Working Paper No. 333, 2008), available at http://papers.ssrn.com/paper.taf?abstract_id=1132247 (describing “tolerated use,” or casual use of copyrighted material that infringes on the owner’s copyright but is generally accepted and not enjoined).

116. In particular, the drafts have expanded the scope of the rights holder through provisions on secondary liability, anti-circumvention, and rights management information.

encouragement of innovation in online services. But first, it is important to give some background on why exceptions fit poorly within the dynamic established by existing multilateral treaties in IP—and why this matters so much now.

Earlier, this paper mentioned the two axiomatic principles which structure the multilateral IP treaty system so as to favor the creation and expansion of IP rights: minimum standards, and national treatment.¹¹⁷ There it noted the fact that these principles together work to encourage ever-increasing IP standards and their inclusion in multilateral agreements. As many commentators have noted, the *other* impact of these provisions is that exceptions and limitations on IP rights are constantly at risk.¹¹⁸ Existing flexibilities found in one treaty can be, and often are, limited in subsequent agreements as part of the creation of “more extensive rights,”¹¹⁹ whereas the attempt to limit rights found in an earlier agreement may contravene that agreement.¹²⁰ The international IP framework includes very few “ceilings” or mandatory limitations.¹²¹ For example, the Berne

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

118. E.g., Kaminski, *supra* note 112, at 253-54.

119. Compare TRIPS Agreement art. 30 (allowing for compulsory licenses of patent provided the procedure in Article 30 is followed), with U.S.-Austl. FTA, *supra* note 18, art. 17.9 ¶ 7 (allowing for such use only (a) “to remedy a practice determined after judicial or administrative process to be anti-competitive” or (b) “in cases of public non-commercial use, or of national emergency, or other circumstances of extreme urgency”). Compare WIPO Copyright Treaty, *supra* note 8, art. 11 (providing a very broad anti-circumvention provision for copyrights, which allows for considerable discretion in how it may be implemented), with U.S.-Austl. FTA, *supra* note 18, art. 17.4.7 (setting forth a highly prescriptive copyright regime).

120. See, e.g., TRIPS Agreement art. 1.1 (stating that “Members may . . . implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement”) (emphasis added).

121. See Berne Convention, *supra* note 18, art. 2 ¶ 8 (requiring that protection not be given to the “news of the day or miscellaneous facts”—a mandatory limitation); WIPO Copyright Treaty, *supra* note 8, arts. 2, 5 (stating that there is to be no copyright protection for “ideas, procedures, methods of operation or mathematical concepts” and extending this exception under Article 5 to the individual data composing a compilation); P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT 55 app. B (2008), available at http://www.ivir.nl/publications/hughenoltz/limitations_exceptions_copyright.pdf (providing a list of mandatory limitations under the Berne Convention, Paris Convention, Nairobi Treaty, TRIPS, WCT, European Patent Convention, and E.U. Directives).

Convention itself contains just one.¹²² All the other exceptions, like most exceptions in international IP treaties, are put in permissive terms: a country may, but is not obliged to, recognize an exception.¹²³ Furthermore, international IP law includes limits on the kinds of exceptions that may be introduced, the most important of these limitations being the TRIPS provisions embodying the three-step test found in Articles 13 (copyright) and 30 (patent).¹²⁴ This means that exceptions and limitations introduced by a government are also subject to review by international courts or the WTO Dispute Settlement Panels, and may be overruled.¹²⁵

While this structure looks, and is, unbalanced, it is readily explained, in both historical and theoretical terms. First, as Hugenholtz and Okediji point out, the key concern at the time that the Berne and Paris Conventions were negotiated was the need to create safety nets for creators in a context where most countries provided little by way of rights for foreign authors.¹²⁶ Second, exceptions are adopted by individual countries on the basis of their own cultural and information policy, to benefit local users, and based on calculations as to what is appropriate given the local level of economic development and sources of comparative advantage.¹²⁷ In that context, scholars suggest that international IP treaties should

122. Berne Convention, *supra* note 18, art. 10, ¶ 1; *see* HUGENHOLTZ & OKEDIJI, *supra* note 121, at 6 (“[T]he Berne Convention was designed as a rights-centered instrument aimed primarily at the protection of creative works across international borders.”).

123. *See* Okediji, *supra* note 24, at 8-9.

124. TRIPS Agreement arts. 13, 17, 30 (creating additional, but less stringent trademark exceptions in Article 17 than in Articles 13 and 30 by requiring only that “such exceptions take account of the legitimate interests of the owner of the trademark and of third parties”).

125. *See generally* Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT’L. L. 95 (2004) (arguing that the WTO system influences and imposes constraints on domestic policymaking).

126. *See* HUGENHOLTZ & OKEDIJI, *supra* note 121, at 35-36 (describing the pre-Berne uneven trade balance where some states produced and exported a high volume of literary works, while other states imported these works with lower levels of copyright protection than the originating state); Kur & Grosse Ruse - Khan, *supra* note 18, at 11 (explaining the “one-way character” of the amendments to the Berne and Paris Conventions, which heightened levels of protection but still left room to revise domestic legislation).

127. Kur & Grosse Ruse - Khan, *supra* note 18, at 29.

allow for “policy space” for individual member countries to undertake their own balancing of these considerations.¹²⁸ Global mandatory or even minimum exceptions and limitations established in the early 20th century, for example, would have imposed undue uniformity in a sphere that was the subject of wholly domestic goals. Third, it could be said that there is no need for treaty provisions to encourage countries to enact exceptions or limitations because they will be motivated by self-interest to do so anyway. Further, countries have historically had little incentive to *seek* exceptions of their trading partners in international negotiations, owing to the absence of mutual benefit that applies when countries agree to recognize exclusive rights. For example, if Country A and Country B agree to recognize a given economic right, then A’s authors or inventors benefit in B’s market, and vice versa. In the case of exceptions, benefits from A’s exceptions have historically tended to be confined to users within A’s territory.¹²⁹

Finally, there is inertia. Laws, like objects in physics, have a tendency to remain where they are, and take an application of “force” to bring about change. Legal change disrupts existing industry practice and once the prospect of copyright or patent reform is raised it is difficult to confine the issues that become open for debate.¹³⁰

128. Henning Grosse Ruse - Khan, *Time for a Paradigm Shift? Exploring Maximum Standards in International Intellectual Property Protection* 1 TRADE L. & DEV. 56, 69 (2009); see Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?* 47 J. COPYRIGHT SOC’Y U.S.A. 265, 287 (2000) (arguing that national legislation should apply with regard to exceptions for copyright enforcement in order to protect local users).

129. HUGENHOLTZ & OKEDIJI, *supra* note 121, at 37. *But see* GOOGLE, ENABLING TRADE IN THE ERA OF INFORMATION TECHNOLOGIES: BREAKING DOWN BARRIERS TO THE FREE FLOW OF INFORMATION 14 (2010), available at <http://googlepublicpolicy.blogspot.com/2010/11/promoting-free-trade-for-internet.html> (arguing that restrictions on “online information flows” are barrier to trade and therefore do not benefit the market of any one state).

130. Many stakeholders have an interest in IP reform, including commercial parties, human rights groups, and technology entrepreneurs, causing governments which undertake IP reform to face heavy lobbying from large numbers of factions with very disparate interests. See Jessica D. Litman, *Copyright Legislation and Technological Change* 68 OR. L. REV. 275, 277-280 (1989) (providing a history of the development of U.S. copyright legislation and finding that the law has had “difficulty accommodating technological change,” partially due to the heavy involvement of various interested parties and industries); Jessica D. Litman, *Copyright, Compromise, and Legislative History* 72 CORNELL L. REV. 857, 869 (1987) (describing the history of the U.S. 1976 Copyright Act whose substantive

Countries will quite understandably approach treaty negotiations on exceptions with a view to ensuring minimal disruption.¹³¹ This effect is demonstrable. In the negotiations preceding the 1967 Stockholm Revision of the Berne Convention, where harmonization of the reproduction right and its exceptions was discussed, the whole process proceeded on the assumption that the negotiating parties would ensure that any provision “did not encroach upon exceptions that were already contained in national legislation.”¹³² More recently, when the Information Society Directive was negotiated within Europe, “[t]he difficulty of choosing and delimiting the scope of the limitations on copyright and related rights . . . proved to be a daunting task.”¹³³ The first proposal had seven exceptions;¹³⁴ the final text had twenty-three, drawn in general terms which would allow most countries to continue current practice, and only one of them mandatory.¹³⁵ This approach in Europe has not led to good outcomes for users’ or, arguably, right holders’ interests. It has provided little by way of harmonization. A detailed study of the implementation found that “most Member States have chosen to interpret the limitations contained in the Directive according to their own

provisions were the result of negotiation and compromise between Congress and various stakeholders); *see, e.g.*, Weatherall, *supra* note 42 (describing the process of copyright reform in Australia, including the importance of interest groups).

131. *See* ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 214-16 (2005) (discussing the Information Society Directive exceptions, the role of “inertia,” and the Berne Convention and states’ reluctance to give up their own exceptions). *See generally* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 ch. 9 (1987).

132. BURRELL & COLEMAN, *supra* note 131, at 216; *see* RICKETSON & GINSBURG, *supra* note 20, at 33-34, 75, 479 (noting that early rounds of the Berne negotiations experienced intractable debates over exceptions and limitations); Michaly Ficsor, *How Much of What? The “Three-Step Test” and its Application in Two Recent WTO Dispute Settlement Cases*, 192 REVUE INTERNATIONALE DU DROIT D’AUTEUR [INTERNATIONAL REVIEW OF AUTHOR RIGHTS] 110 (2002) (Fr.).

133. INST. INFO. LAW, *supra* note 79, at 39; *see* Council Directive 2001/29, *supra* note 67, art. 5, ¶ 2.

134. INST. INFO. LAW, *supra* note 79, at 39.

135. Council Directive 2001/29, *supra* note 67, art. 5, ¶ 1 (excluding certain temporary and transient reproductions); INST. INFO. LAW, *supra* note 79, at 39; *see also* Council Directive 2009/24, arts. 5-6, 2009 O.J. (L 111) 16 (EC) (Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs) (noting other mandatory exceptions in computer programs including back-up copies, testing, and decompilation).

traditions,” leading to a mosaic of different rules across Europe.¹³⁶ In some cases it had an even more limiting effect. In the United Kingdom, for example, the government appears to have taken their existing equivalent exceptions, and simply added any additional conditions in the Directive, thus leading to narrower exceptions than the Directive required.¹³⁷ Further, as new circumstances have arisen post-2001, the list has become a straitjacket. The comprehensive review of intellectual property law in the United Kingdom, the *Gowers Review*, made a series of recommendations for new exceptions.¹³⁸ The U.K. government response was that progress on many—even basic things like private copying to ensure that ordinary technology use is not infringement—would require action at an E.U. level.¹³⁹

The ACTA negotiations on safe harbors for online service providers (“OSPs”) have clearly demonstrated the same kind of inertia, with negotiators evincing a desire to avoid disruption to local law, and to embody in international agreement conditions matching those applying domestically.¹⁴⁰ OSP safe harbors were, perhaps, always going to be one of the hardest areas in which to make compromises and one where governments would be particularly keen to avoid disruption to local compromises. The negotiating countries, after all, came to the table each with their own detailed and different provisions in place already. These provisions presumably already represent the compromises of multifaceted negotiations between the

136. INST. INFO. LAW, *supra* note 79, at 63.

137. See BURRELL & COLEMAN, *supra* note 131, at 235-36 (describing the state practice of “bolting-on” any possible limitations or conditions the E.U. directive may have required, resulting in tighter limitations than were originally intended by the directive).

138. ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 4-5 (2006) (U.K.), available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (recommending an “orphan works” provision, a limited private copying exception, clarification on the research exception, and an allowance for libraries to copy and reformat archival work in order to preserve it).

139. See DEP’T FOR CULTURE MEDIA & SPORT & DEP’T FOR BUS., INNOVATION AND SKILLS, DIGITAL BRITAIN: FINAL REPORT para. 32 (2009) (U.K.), available at <http://www.official-documents.gov.uk/document/cm76/7650/7650.pdf>

(considering possible changes to allow preservation of archival works, but noting that the Government is otherwise “heavily constrained” by the European Union).

140. *E.g.*, Kaminski, *supra* note 112, at 253-54 (predicting that ACTA would allow the United States to promulgate its own law as an international IP standard, overriding contrary limits and exceptions of individual countries).

government, the telecommunications and Internet industries, and right holder groups. It would also have been an area where opening up existing rules to reform would be particularly sensitive. Recent years have seen a strong push on the part of right holders to require OSPs to cooperate more actively in IP enforcement, by introducing what have become known as “three strikes” or “graduated response” rules, which require OSPs to cooperate with right holders—first with warning letters to identified infringers and later with technical measures or termination of service.¹⁴¹ Opening up these issues via ACTA would give rise to entirely justified accusations of “policy laundering”—that is, an attempt to use an international agreement to bring into force laws which are presently highly controversial at a domestic level.¹⁴²

Looking at domestic laws of the negotiating countries, it is clear there are many differences. The United States, countries bound by U.S. FTAs, and Europe effectively agree on a “safe harbor” approach which protects OSPs from liability for monetary remedies but does not prevent a court ordering some action to protect copyright owners.¹⁴³ But in the United States these safe harbors are copyright-specific while in the European Union they are horizontal. In other words, E.U. safe harbors apply across different legal regimes to protect from liability arising from trademark, defamation, and other areas.¹⁴⁴ More importantly, the two jurisdictions apply different

141. Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1374-1376, 1379, 1429 (2010) (generally describing three strikes rules).

142. See, e.g., Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 128 (2006); Yu, *supra* note 6, at 35-37 (providing a discussion of policy laundering as related to ACTA).

143. 17 U.S.C. § 512 (2006); Council Directive 2000/31, *supra* note 69, arts. 12-14. The DMCA and U.S. FTAs also limit the kinds of injunctions which can be ordered. See 17 U.S.C. § 512(j) (enumerating permissible forms of injunctive relief that a court may grant, including preventing the service provider from allowing users to access infringing material and requiring the service provider to terminate accounts of users infringing copyrights, and “[s]uch other injunctive relief as the court may consider necessary to prevent or restrain infringement”); U.S.-Austl. FTA, *supra* note 18, art. 17.11, ¶ 29(b)(viii) (limiting injunctions to terminating user accounts, disabling access to material that infringes on copyrights, and “taking reasonable steps to block access to a specific, non-domestic online location,” and requiring that these injunctions apply only “where the service provider has received notice and an opportunity to appear before the judicial authority.”).

144. Compare 17 U.S.C. § 512 (limiting protection from liability for copyright

conditions before protection applies. While both recognize that OSPs that are not merely providing network access ought to be required to remove copyright infringing material in an expeditious manner, only the United States has a fully elaborated scheme set out in legislation, including, for example, detailed requirements for copyright owners seeking to give notice of infringement; sanctions against abuse and misstatement; and a system for having material restored pursuant to a “counter-notice” from a user.¹⁴⁵ The E.U. system provides less explicit protection for users, leaving these issues to local rules and industry codes.¹⁴⁶ The United States also applies more stringent conditions for availability of protection. In particular, it conditions the safe harbors on an online service provider “adopt[ing] and reasonably implement[ing] . . . a policy that provides for the termination [of service to] . . . repeat infringers.”¹⁴⁷ The European Union has no similar requirement. The E.U. system contains a strong prohibition on member states imposing monitoring obligations on OSPs;¹⁴⁸ the U.S. rules merely state that the safe harbors do not *themselves* impose such a requirement.¹⁴⁹ It should also be noted that other countries involved in the negotiations have systems that are even more different. Canada, for example, through Bill C-32, appears to propose an entirely distinct approach built not on safe harbors but on an independent obligation imposed on OSPs to cooperate with right holders.¹⁵⁰ Bill C-32 is a copyright amendment bill currently under discussion, under which there would be a fairly broad exemption for online service providers from liability for conduct by their users,¹⁵¹ coupled with a separate *positive* obligation

infringement specifically), with Council Directive 2000/31, *supra* note 69, arts. 12-14 (protecting OSPs from liability for information used or stored via the service generally, but not limited to liability for copyright infringement)

145. 17 U.S.C. § 512(c), (f) - (g)(2)(B).

146. Council Directive 2000/31, *supra* note 69, art. 16.1(d) (encouraging the formation of industry codes of conduct, including calling for input from consumer associations).

147. 17 U.S.C. § 512(i)(1)(A).

148. Council Directive 2000/31, *supra* note 69, art. 15.

149. 17 U.S.C. § 512(m).

150. See Bill C-32, ¶ 41.25, 40th Parliament (3d Sess. 2010) (Can.) (describing the obligations of rights holders to notify service providers of potential copyright infringement, but not containing any blanket provision exempting service providers from liability for their users' actions).

151. *Id.* ¶ 41.25-26.

on online service providers to pass on notices of infringement received from copyright owners subject to fixed or statutory damages payments for failure to do so,¹⁵² with no obligation to take down material (that is, it is a “notice and notice” rather than a “notice and take-down” system). Interestingly, unlike the “expeditious removal” requirement in the European Union and United States, the obligation to pass on notices under the Canadian system would apply to *any* online service provider, including one merely providing transmission.¹⁵³ Although not discussed here, Japan is different again.¹⁵⁴

Despite these differences, there is significant agreement at least at a high level of generality. With two exceptions, the negotiating countries are, or seem to be, amenable to exceptions directed at OSPs operating as neutral intermediaries such as acting between third parties and providing the basic infrastructure of the Internet.¹⁵⁵ All seek to provide some relief from copyright liability to these providers assuming certain conditions are met. All require some cooperation to assist right holders’ enforcement efforts, although the nature of that cooperation varies between different countries. It could involve expeditious removal of infringing material; adoption of technical

152. See Bill C-32, ¶ 41.25-26, 40th Parliament (3d Sess. 2010) (Can.) (reducing uncertainty for online service providers because the penalty for failure to engage in the required level of cooperation is a fixed amount in statutory damages rather than a highly uncertain liability for damages for copyright infringement).

153. *Id.*

154. [Law Concerning the Limits of Liability for Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Sender], Law No. 137 of 2001, art. 3 (Japan), *available at* http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/Compensation-Law.pdf (establishing limits on service provider liability for a user’s transmission of information, noting that service providers are not liable unless the providers failed to take available precautionary measures to prevent infringement, the provider was directly involved in transmitting the copyrighted information, or where the service provider knew or should have reasonably known that the service was being used to infringe copyrights).

155. The only real outliers here appear to be Mexico and Switzerland, which do not have such laws in place. See Blayne Haggart, *Mexico Copyright Reform: Well That was Quick*, BLAYNE HAGGART’S ORANGESPACE (Apr. 6, 2010, 6:25 PM), <http://blaynehaggart.blogspot.com/2010/04/mexico-copyright-reform-well-that-was.html> (noting that once Mexico begins negotiating on the issue of ISP liability, they will have to negotiate with “the richest man in the world,” telecommunications mogul Carlos Slim Helu).

means to reduce infringement; passing on notices; or enabling the provision of information so right holders can pursue litigation. Again, the details vary but the basic goal of facilitating right holders' enforcement efforts is a common theme.¹⁵⁶ Not all of the systems explicitly provide protection against copyright abuse—the United States' copyright law does, the European Union's does not—but it might be possible, through discussion, to ascertain that in other countries general principles apply to limit abuse.¹⁵⁷

What happened when this broad agreement and these differing models came to the table in the ACTA negotiations? The same thing that has happened in past discussions of exceptions and limitations—each country put their own model on the table. In the earliest complete leaked draft, dated January 2010, we can see a series of separate proposals: one from the United States based on the DMCA; an E.U. proposal based on the Ecommerce Directive; another from Japan; hesitation about the inclusion of information location tools (i.e., search engines) from New Zealand; queries from Canada as to whether the system is predicated on ISPs being liable for infringement in the first place; and a suggestion from Switzerland that the whole thing be made optional because recognizing mandatory limitations would reduce its existing domestic protection.¹⁵⁸ Many of these differences clearly persist in the April

156. *See, e.g.*, [Law Concerning the Limits of Liability for Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Sender], Law No. 137 of 2001, art. 4 (Japan), *available at* http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/Resources/laws/Compensation-Law.pdf (allowing rights holders to request information—including users' identities—from service providers upon presentation of evidence that their rights have been infringed by users); 17 U.S.C. §§ 512(b)(2)(E), (i)(1)(A) (2006) (conditioning the OSPs' exception from liability for user infringement on the provider's immediate removal of material known to be a copyright infringement; the provider's adoption, implementation and user notification of a policy of terminating service for repeat infringers; and the accommodation of the copyright holder's technology for protecting the copyright).

157. *E.g.*, § 512(f) (imposing liability on copyright owners or right holders who knowingly and materially misrepresent that material is infringing); § 512(c)(3)(B)(i) (limiting the impact of copyright owner notices which fail substantially to comply with the legislative requirements).

158. *E.g.*, § 512; Council Directive 2000/31, *supra* note 69. The influence of the individual legislation is clear in the draft's components. *See* ACTA Draft—Jan. 18, 2010, *supra* note 10, art. 2.17, ¶ 3(a) (United States Options 1, 2) (excepting service providers from liability for automatic transmission of information or

public draft, although positions of individual countries are no longer reflected.¹⁵⁹ By the time we see a draft dated July 2010, there is a single proposal but with significant question marks over the conditions under which the safe harbors are intended to apply, with each country continuing to insist its own conditions remain part of the scheme.¹⁶⁰ In the November and December draft text, the provisions are gone altogether, with a faint echo remaining only in footnote 13 referring to safe harbors as an example of a way that a party could implement online IP enforcement “in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with each Party’s law, preserves fundamental principles such as freedom of expression, fair process, and privacy.”¹⁶¹

But this “little bit of history repeating” itself is predictable.¹⁶² It is far more interesting to consider the way the process illustrates the difficulties that arise in drafting, even in circumstances where the existence and broad parameters of an exception are accepted by most parties. One explanation for the difficulty in negotiating these exceptions is that the negotiating countries, whether of their own volition, or at the behest of stakeholder groups, are or were simply unwilling to give up any part of their domestic safe harbors that were aimed at furthering their goals of online enforcement. Another explanation is that it may be genuinely *hard* to reconcile differences in states’ safe harbor conditions. Leaving to one side for a moment the *really* controversial condition—the U.S.’ requirement of a “repeat infringer policy”¹⁶³—*any* condition which varies between

independent transmission of information by users; conditioning the exceptions on the provider “adopting and reasonably implementing a policy to address” copyright infringement by users; and specifying that Article 3 would not prevent a judicial or administrative authority from “requiring the service provider to terminate [service] or prevent an infringement”).

159. ACTA Draft—Apr. 21, 2010, *supra* note 10, art. 2.18, ¶ 3 (containing two clear options which closely imitate provisions of the DMCA and the Ecommerce Directive, but, unlike the January 2010 leaked text, giving no indication of which countries and regions support each Option).

160. ACTA Draft—July 1, 2010, *supra* note 10, art. 2.18, ¶ 3.

161. ACTA Draft—Nov. 15, 2010, *supra* note 10, art. 2.18, ¶ 2 n.13; ACTA Text—Dec. 3, 2010, *supra* note 10, art. 27, ¶ n.13.

162. Alex Gifford, *History Repeating* (recorded by Shirley Bassey and the Propellerheads, Wall of Sound prod., 1997).

163. See § 512(i)(1)(A).

countries raises difficult issues given the detailed style of drafting that the negotiators have adopted. Take for example the requirement of counter-notices.¹⁶⁴ Under the U.S.'s DMCA, if a right holder sends a notice to an OSP, claiming that material hosted by the OSP is an infringement of copyright, and the OSP removes that material, the OSP must also inform the relevant user—who may then submit a “counter notification” stating that the “subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material.”¹⁶⁵ On receipt of a counter-notice, the OSP must inform the right holder and replace the material within 14 business days unless the right holder files court proceedings.¹⁶⁶ The European Union has no equivalent requirement in its directives, although there is nothing to stop a member state from adopting such rules.

Now consider the perspectives of the various parties in the negotiation. If a counter-notice system had become a mandatory condition, changes to the E.U. Ecommerce Directive would have been required. From the perspective of E.U. policymakers, that is a highly undesirable outcome (1) because ACTA was not meant to make substantive changes to the *acquis communautaire*; (2) it would necessitate re-opening difficult policy questions as to how OSP liability ought to be framed, not only in IP law, but across the board;¹⁶⁷ and (3) right holder groups would seek the adoption of “three strikes” or “graduated response” rules. It is unlikely the European Union wants to have that debate now. Not even a counter-notice condition, let alone something more controversial such as a repeat infringer policy, could be included in ACTA with their support. But consider then the position of the United States. First, the United States can expect criticism from user groups for failing to protect their interests should counter-notices not be required. The legal impact could vary, depending on how the provisions were drafted. If the conditions had been exclusive and not included a counter-notice provision—that is, if *only* the conditions stated in the

164. § 512(g)(3).

165. § 512(g)(3)(C).

166. § 512(g) (providing additionally that the service provider must wait a minimum of ten business days from the receipt of the subscriber's counter-notice).

167. See *supra* note 144 and accompanying text (comparing the U.S. and E.U. safe harbor provisions for OSPs).

provision were allowed to be imposed on an OSP, then the United States would be required to change its law to remove its established end-user protection. This would elicit accusations that the agreement was unbalanced and would open up the safe harbors to reform in ways that could be very controversial.¹⁶⁸ If the ACTA conditions were merely inclusive, and further conditions could be imposed domestically, then the United States would clearly not be required to change its law. However, everything comes with a price—the same flexible provisions that gave the United States freedom to impose additional conditions on protection would also apply to other countries which could lead to unpredictable results. OSPs would—and will, given that no safe harbors were included in the November or December draft text—continue to face wildly varying market and legal conditions across the world. Right up to a very late stage, the latter form of drafting—an inclusive, rather than exclusive list—prevailed. The drafts slowly moved towards the removal of conditions not universally reflected in the negotiating parties' law, and there emerged no provision aiming to reduce the risk that the exception will be gutted by legislatures adding additional conditions.¹⁶⁹ This is, of course, consistent with a focus on enforcement, but not helpful for OSPs. In the end, the result was no safe harbors because they turned out to be too hard to negotiate.

This process illustrates the core difficulties in drafting exceptions. How is the need for national autonomy to serve local interests reconciled with a desire to foster global public welfare and free movement of knowledge goods? Should exceptions be mandatory or optional, and what principles, if any, should distinguish between those that should be optional and those that ought to be required? Should exceptions be drafted at a general level, leaving matters of detail to signatories with the attendant risk that individual countries

168. See generally Yu, *supra* note 141 (analyzing reform of U.S. copyright law to favor a “graduated response” system and such reform’s effect on end-users, rights holders, and service providers; and stressing the importance of refraining from targeting users who are only suspected—not proven—infringers).

169. See, e.g., ACTA Draft—July 1, 2010, *supra* note 10, art. 2.18, ¶ 3(a), (b) (stating that “Each Party shall [or, for Switzerland, may] provide at least that online service providers shall not be held liable or shall not be subject to monetary remedies” in certain situations, conditioned on certain not yet finalized provisions; suggesting that these are minimum, but not maximum conditions to be applied to the relevant OSP).

will hedge exceptions so far about with conditions that their impact will be nullified? If we choose general language for exceptions, do we need an equivalent to the “three-step test” in order to control states’ ability to gut exceptions and limitations at the behest of powerful lobby groups or stronger FTA negotiating partners?¹⁷⁰ And if we can imagine a principle constraining justifiable “limits on exceptions,” would it be the kind of test that could be appropriately adjudicated by an international group like the WTO Dispute Settlement Body, which tends to eschew questions of domestic policy?¹⁷¹

Generally, the failure of the parties to agree on real and effective safe harbors in ACTA is an unfortunate development not just for ACTA, but for IP law treaty-making as a whole. Some might argue that ACTA is better off without the OSP provisions entirely because they are a stalking horse for three strikes rules.¹⁷² Early leaks confirmed this fear by including, in one U.S. proposal, a requirement that an OSP “adopt . . . and reasonably implement . . . a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights.”¹⁷³ A footnote stated that “[a]n example of such a policy is providing for the termination in appropriate circumstances of subscriptions [and/or] accounts on the service provider’s system or network of repeat infringers.”¹⁷⁴

170. See Grosse Ruse - Khan, *supra* note 128, at 72 (considering the problem of political bargaining where weaker parties agree to give up flexibility in the context of a trade negotiation but noting that when flexible exceptions are granted, a party then may not be obliged to prohibit certain activities which may lead to an internationally unenforceable domestic provision).

171. See e.g., Graeme Dinwoodie & Rochelle Dreyfuss, *Diversifying Without Discrimination: Complying with the Mandates of the TRIPS Agreement*, 13 MICH. TELECOMM. & TECH. L. REV. 445, 447-449 (2007) (noting in the area of patent protection, “[t]he combined effect of giving strict international scrutiny [read, WTO] to legislation impinging on producer interests while leaving domestic legislatures with considerable discretion over abrogating user interests is that legislative deals tend to unravel”).

172. See Yu, *supra* note 141, at 1384-87 (describing the growing tendency of OSPs to take affirmative steps to reduce copyright infringing use of digital services by monitoring infringing use in the context of such rules as the “three strikes” or “graduated response” systems, thereby possibly reducing their ability to take advantage of safe harbor provisions).

173. ACTA Draft—Jan. 18, 2010, *supra* note 10, art. 2.17, ¶ 3 (Option 1).

174. *Id.* art. 2.17, ¶ 3 n. 29 (Option 1).

Although such drafting would not require graduated response,¹⁷⁵ it could be, and was, read as encouraging the introduction of such laws. It does not follow, however, that standing on principle and rejecting any kind of OSP protection is the best strategy. Certainly if ACTA could be confined to genuine physical counterfeiting and cooperation between law enforcement officials—that is, if ACTA were confined to the remit it claims—then OSP protections would not be required. Given, however, that ACTA’s scope surpasses pure physical counterfeiting by covering online activity, then exceptions for OSPs will remain important, and their absence renders the agreement a one-sided and disreputable affair. An OSP safe harbor with some conditions is better than higher damages, statutory penalties, and more ready injunctions without that protection.

The failure to include exceptions is a serious flaw of ACTA for a range of reasons. It is becoming more difficult to justify the absence of exceptions and limitations in IP treaties as many of the old explanations have lost their salience; it is, for example, no longer truly the case that the benefit of exceptions is confined to users in the country providing them. “[C]reative works and knowledge goods” that build on existing material, and benefit from exceptions in order to do so, today diffuse more rapidly and broadly.¹⁷⁶ Global trade in goods and services produced in reliance on limitations to IP protection, including exceptions, duration limitations, and subject matter limitations, depends on international availability of similar limitations. The absence of such congruent limitations creates a barrier to international trade.¹⁷⁷ Certain users’ rights also *require*

175. *Id.* art. 2.17, ¶ 3. Both Australia and the United States have provisions similar to this in their laws, but neither presently imposes graduated response as a matter of law. *See* 17 U.S.C. 512(i)(1) (2006); *Copyright Act 1968* (Cth) s. 116AH(1) (Austl.).

176. HUGENHOLTZ & OKEDIJI, *supra* note 121, at 37-38 (arguing that “knowledge goods are not just public goods, but they are global public goods”).

177. *See* TRIPS Agreement pmb., arts. 40.1, 41.1 (emphasizing in the Preamble the need to “ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;” noting in Article 40.1 that “some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology;” and stating in Article 41.1 that enforcement measures “shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse”); *see also* Grosse Ruse - Khan, *supra* note 128, at 80.

international, rather than merely local, exceptions to be effective. For example, the World Blind Union has pointed out that in order to improve access to copyright material for the visually impaired, national organizations assisting with accessibility must be able to exchange materials.¹⁷⁸ Additionally, the presence of exceptions in at least exporting and importing countries is critical to making the Doha Declaration on access to medicines operative.¹⁷⁹ FTAs constraining exceptions and limitations are becoming more commonplace today, making it seem likely that many smaller, less powerful nations now stand less in need of policy freedom or flexibility, than of legal security and predictability about what exceptions they are allowed to introduce consistent with international constraints such as the three-step test.¹⁸⁰ The absence of guidance as to what exceptions qualify may have a chilling effect.¹⁸¹ International consensus on allowable exceptions could, at least, impose important constraints both on powerful domestic lobbying groups and on the kinds of demands that are often made in the framework of bilateral trade negotiations.¹⁸²

178. See WIPO, Standing Comm. on Copyright and Related Rights, Proposal by Brazil, Ecuador and Paraguay on a WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons, Annex 1, SCCR/18/5 (May 25, 2009) [hereafter World Blind Union Proposal] (calling for an exception from copyright liability for importing and exporting of material in versions accessible to the visually impaired). See WIPO Standing Comm. on Copyright and Related Rights, Study on Copyright Limitations and Exceptions for the Visually Impaired, 118-120, SCCR/15/7 (Feb. 20, 2007) (by Judith Sullivan), for a discussion of the need to have an exception to copyright law for accessible materials. Interestingly, Canada attempted to address the need for international exchange of accessible materials in its copyright amendment bill, but the solution is confined to works of Canadian authors. Bill C-32, ¶ 37, 40th Parliament (3d Sess. 2010) (Can.).

179. World Trade Org., Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

180. See Grosse Ruse - Khan, *supra* note 128, at 76-77 (finding that countries may not want to introduce exceptions for fear of facing WTO dispute settlement or trade sanctions); WIPO, Standing Comm. on Copyright and Related Rights, Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related to Exceptions and Limitations, SCCR/16/2 (July 17, 2009) [hereinafter Work Exceptions Proposal], available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf (demonstrating states' desires for more certainty by requesting that WIPO's Standing Committee on Copyright and Related Rights (SCCR) begin work on prescribing a minimum framework of public policy exceptions).

181. Kur & Grosse Ruse - Khan, *supra* note 18, at 8.

182. See *id.* at 24 (highlighting the importance of international consensus on provisions and norms that could impose ceilings on permissible state action under

Finally, there is the question of public perceptions as to the value and fairness of the agreement. Treaties that strengthen enforcement without addressing the needs of users look unfair and will bring IP law further into disrepute. IP law needs to be perceived as fairly balancing the interests between stakeholders because it is not readily self-enforcing—that is, IP law requires people to self-consciously refrain from behaviors that are common, easy, and enjoyable. Infringement can be easy to accomplish, while observing IP rights, particularly copyright, involves some self-denial, such as waiting for a movie to be released on DVD rather than downloading it the moment it hits cinemas. IP law therefore needs public support to work, and in order to receive such support IP law must address the needs of all stakeholders.¹⁸³

Nor is the need to engage with fairness just a matter of appearance. There has been, over the last five years or so, a definite uptick in momentum on questions of access, exceptions, and limitations—scholars talk about them; NGOs and governments are proposing them; law reform reports worldwide have suggested widening them.¹⁸⁴ By standing outside this trend, obdurately refusing to concede the need for exceptions in addition to enforcement, ACTA and its supporters risk a backlash from an organized, motivated set of people with well-developed ideas—and make it easier for countries not presently involved in the negotiations to reject its outcomes out of hand. If ever there was a treaty which needed to find ways to look more balanced, it must be ACTA. In public relations terms, ACTA started very badly, as an apparently secret, behind-closed-doors negotiation between only select countries, a process that has tended to bring the negotiations a lot of bad press.¹⁸⁵ Once the draft was released to the public, the absence of

IP treaties).

183. See Dinwoodie & Dreyfuss, *supra* note 125, at 97-98 (noting the importance of “tradeoffs” in IP lawmaking). See generally Jane Ginsburg, *How Copyright Got a Bad Name For Itself*, 26 COLUMBIA J.L. & ARTS 61 (2002) (critiquing the conflicting interests of copyright holders and the “greed” of consumers).

184. See, e.g., Guy Pessach, *Reciprocal Share-Alike Exemptions in Copyright Law*, 30 CARDOZO L. REV. 1245 (2008) (calling for a new kind of exemption called the “reciprocal share-alike” copyright exception that will help balance the social costs and benefits of copyright protection).

185. See *supra* notes 1-3 and accompanying text; see, e.g., Emily Ayoob, Note,

balancing provisions was a key point of commentary.¹⁸⁶ While there have been improvements both in transparency and content over time, perceptions remain, quite rightly, deeply negative.¹⁸⁷ Including genuine limitations would not have guaranteed the treaty was welcomed with open arms—but they would have helped.

It is certainly arguable that safe harbors for OSPs that provide the basic infrastructure of the Internet—that is, mere conduits, hosts, information location tools (search engines), and their ilk—fall into the category of exceptions that ought to be both international and mandatory. Mandatory global exceptions can be justified on at least two bases: that owing to the global nature of the activities concerned, the absence of such exceptions poses an unreasonable and unjustifiable barrier to trade, or alternatively, that the exception will “generate positive spillovers to benefit global welfare . . . [or facilitate the] production of global public goods.”¹⁸⁸ Both fit. The absence of exceptions applicable to OSPs, or the imposition on them of onerous conditions, could easily become a significant barrier to trade. A search engine, for example, or a user-generated content platform that cannot escape liability in a particular jurisdiction for copyright infringement, which it has no power to control, could be prevented from operating in that jurisdiction. If, however, the goal of international IP treaty-making is to reduce barriers to trade, the reaching of common standards on this question falls well within that goal. As for global public goods, it could be argued that the basic infrastructure of Internet is, itself, a global public good;¹⁸⁹ or, at least,

Recent Development: The Anti-Counterfeiting Trade Agreement, 28 CARDOZO ARTS & ENT. L.J. 175, 187-89 (2010) (noting that “[t]he strongest and most widely-held critique of ACTA has been the lack of disclosure by participating states”).

186. See Fanny Coudert & Evi Werkers, *In the Aftermath of the Promusicae Case: How to Strike the Balance?*, 18 INT'L J.L. & INFO. TECH. 50, 53-54 (2010) (noting that leaked ACTA papers contained no indication that the agreement would protect consumer interests against the interests of rights holders, since the agreement failed to specify how service providers would prevent and terminate infringement).

187. See generally Yu, *supra* note 6 (criticizing the development of and current text of ACTA).

188. HUGENHOLTZ & OKEDIJI, *supra* note 121, at 43; see Grosse Ruse - Khan, *supra* note 128, at 80.

189. See Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 308, 308-

is a fundamental tool for the creation and dissemination of what are undoubtedly global public goods—namely, information and knowledge.¹⁹⁰

But how do we handle the difficulties of negotiations discussed above? While the negotiators to date have not displayed any tendency to move beyond historical methods of drafting exceptions, it need not be thus. There is a body of thinking that could help. Advocates, policymakers, and scholars have spent considerable time recently developing ideas for an international framework for IP exceptions, particularly copyright exceptions.¹⁹¹ We have seen a concerted effort by interested groups to envisage how limitations and exceptions might more effectively be embodied at an international level. Recent scholarly treatments have sought to tackle some of the difficult questions. Among these efforts, two, at least, should be noted:¹⁹² the 2008 Report, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, by Hugenholtz and Okediji sponsored by the Open Society Institute,¹⁹³ and the *Intellectual Property Rights in Transition* (“IPT”) project at the Max Planck Institute for Intellectual Property, Competition and Tax Law.¹⁹⁴ Both of these efforts envisage the embodiment of mandatory exceptions or limitations in an international instrument, although through different

311(Inge Kaul et al. eds., 1999) (defining a global public good as a good that is non-rivalrous, non-excludable and available worldwide). It is perhaps not clear that the Internet itself is truly non-excludable, although the argument has certainly been made.

190. *See generally id.*

191. There have been some limited developments going beyond copyright. *E.g.*, Treaty on Access to Knowledge, May 9, 2005 (draft), *available at* <http://www.cptech.org>.

192. Mention might also be made of the WITTEM EUROPEAN COPYRIGHT CODE, an academic project drafted to “serve as a model or reference tool for future harmonization or unification of copyright at the European level.” However, the *Wittem Code*, THE WITTEM PROJECT, EUROPEAN COPYRIGHT CODE 5, 19-23 (2010), *available at* http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf, is designed to create a unified code, and therefore, it does not need to grapple with the questions being raised and discussed here since it envisages removing the freedom of individual nation states subject to the code to vary exceptions as they choose. While flexibility remains in the code, it is only flexibility for courts to recognize new exceptions in circumstances comparable to those specifically enumerated.

193. *See* HUGENHOLTZ & OKEDIJI, *supra* note 121.

194. *See* Kur & Grosse Ruse - Khan, *supra* note 18, at 64-68.

mechanisms.¹⁹⁵ Both projects emphasize the need for flexibly-drafted mandatory exceptions, plus provisions designed to make it easier to introduce new exceptions—either in the form of a general omnibus principle or the replacement of the three-step test with a more “user-oriented” test.¹⁹⁶

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

Perhaps the closest that these discussions come to suggesting a means of preventing such gutting is the Max Planck Institute for Intellectual Property’s proposal to strengthen Articles 7 and 8 of TRIPS.¹⁹⁷ Specifically, Annette Kur has suggested that TRIPS could be amended to add an Article 8(a), which would create an *obligation* to ensure a balance of interests and that users may use protected subject matter without right holder consent:

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

(2) Members shall ensure that users may, without the consent of the right holder, use protected subject matter, provided that such use does not

195. Compare HUGENHOLTZ & OKEDIJI, *supra* note 121, at 50 (imagining an international instrument—initially “soft law”—as a possible step towards something more binding developed within WIPO), with Kur & Grosse Ruse - Khan, *supra* note 18, at 64-69 (attempting to “visualize” amendments that could be made to TRIPS).

196. Compare HUGENHOLTZ & OKEDIJI, *supra* note 121, at 50 (employing the general omnibus principle), with Kur & Grosse Ruse - Khan, *supra* note 18, at 64-69 (using the “user-oriented” test).

197. Annette Kur, IP in Transition – Proposals for Amendments to TRIPS, (presentation slides available at http://193.174.132.100/shared/data/pdf/ipt_fuer_rom_maerz_07.pdf).

unreasonably prejudice the legitimate interests of the right holder, taking into due consideration the normal exploitation of the right.¹⁹⁸

Similar ideas and proposals have been emerging from the advocacy arena, as non-governmental organizations and governments have attempted to draft international instruments on exceptions. For example, the 2005 proposal for a Treaty on Access to Knowledge lists mandatory exceptions that every country should adopt and provides additional provisions for a flexible exception to allow for further uses not presently foreseen.¹⁹⁹ In the policy arena, the WIPO's Development Agenda requires the WIPO's Standing Committee on Copyright and Rights ("SCCR") to engage in selecting exceptions "that should form part of a prescriptive minimum global framework of exceptions."²⁰⁰ The 20th Session of the WIPO's SCCR held in June 2010 had several proposals before it on exceptions and limitations including: a proposal by Brazil, Ecuador, and Paraguay in support of the World Blind Union's proposals for a treaty addressing access for the visually impaired;²⁰¹ and a more recent and comprehensive proposal from the Africa Group calling for a WIPO treaty on exceptions and limitations extending also to education and research institutions, libraries, and archives.²⁰² As one would expect, each of these efforts envisages certain mandatory exceptions, although none touch on questions regarding OSPs.

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

(1) *Flexibility*—including a provision stating that "Contracting Parties shall be free to determine the appropriate method of

198. *Id.*

199. Treaty on Access to Knowledge, *supra* note 191, art. 3.

200. Work Exceptions Proposal, *supra* note 180, at 2.

201. World Blind Union Proposal, *supra* note 178.

202. WIPO, Standing Comm. on Copyright and Related Rights, Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers, SCCR/20/11 (June 15, 2010) [hereinafter Africa Group Proposal].

implementing the provisions of this Treaty”;²⁰³ and

(2) *Limits on Flexibility*— including a provision stating:

“[Parties] shall ensure that the implementation allows for timely and effective exercise of authorized actions covered by this Treaty, including expeditious procedures that do not in themselves create barriers to legitimate uses, are fair and equitable, and are not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays.”²⁰⁴

It has to be conceded that (2) above would be difficult to litigate, even assuming someone could be found willing to take a country to task for non-compliance.²⁰⁵ Nevertheless, (2) does seek to provide some bulwark against gutting of the exceptions.²⁰⁶

These proposals also suggest another way to approach a safe harbor regime for OSPs. First, such an approach would, as suggested by all the initiatives discussed so far, adopt relatively flexible and abstract language in order to accommodate the various domestic models. It would seek to identify the public policy goals of an OSP safe harbor, and the problems that may arise from the imposition of conditions that are too strict. The approach would then draft an obligation on signatory countries to ensure—in drafting their conditions and rules—that those ends were served and that the legitimate fears were unrealized. Without attempting to draft actual language, it is not difficult to identify its broad parameters while bearing in mind the following goals: (1) to provide protection for OSPs; (2) to provide some assistance in enforcement; (3) to address the concern that conditions would gut the protection to OSPs and create barriers to global trade in information goods and distribution

203. World Blind Union Proposal, *supra* note 178, art. 2(c); Africa Group Proposal, *supra* note 202, art. 3(c).

204. World Blind Union Proposal, *supra* note 178, art. 2(f); Africa Group Proposal, *supra* note 202, art. 3(e).

205. See Kur & Grosse Ruse - Khan, *supra* note 18, at 30 (discussing the difficulty of enforcing uniform provisions given the diversity of domestic circumstances and noting the benefit of flexible standards).

206. The World Blind Union proposal goes still further to create a “minimum exceptions” structure. World Blind Union Proposal, *supra* note 178, art. 2(d) (stating that “[c]ontracting Parties may, but shall not be obliged to, implement in their law more extensive protections for the visually impaired and reading disabled than are required by this Treaty, provided that such measures do not contravene the provisions of this Treaty”).

of knowledge; and (4) to address the concern that conditions may also interfere with the rights and interests of users, in particular the right to privacy. Such an exception:

- would allow, or preferably for all the reasons already outlined, require countries to provide for protection from monetary liability for OSPs, identified in broad terms as neutral intermediaries providing facilities for the transmission, communication, location, or hosting of material online;
- would allow, or require countries to oblige OSPs (excluding those OSPs merely providing transmission) to take action on obtaining knowledge of infringement. It would not require that such obligations be conditions on the protection from liability, recognizing Canada's different model of legislating a free-standing obligation subject to payment of a "fine" for non-compliance.²⁰⁷ Nor would it require that the "action" occur in the form of "take-down," recognizing Canada's "notice-and-notice" system;²⁰⁸
- would allow for further conditions or requirements to be imposed on OSPs, *provided that* such conditions:
 - Must not give rise to barriers to legitimate trade;
 - Must be fair and equitable, and not unnecessarily complicated or costly, or entail unreasonable time, time-limits or unwarranted delays to either enforcement of intellectual property rights or authorized uses;
 - Must not require OSPs actively to seek evidence of infringement or to monitor the information which they transmit or store;
 - Must reflect a fair balance between private economic interests and the larger public interest as well as the interests of third parties, including the interests of individual users;

207. *See supra* note 152 and accompanying text (citing Canadian Bill C-32).

208. *Id.*

- Are subject to laws protecting the right to privacy or confidential information, the disclosure of which would prejudice law enforcement or the legitimate commercial interests of particular enterprises, public or private, or otherwise be contrary to public interest.

By allowing further conditions to be imposed on OSPs, an exception of this kind would clearly allow for the introduction of three strikes or graduated response provisions in signatory countries, which might cause some people to object. However, for all the reasons discussed by Hugenholtz and Okediji, the Max Planck Institute, and the IPT project, as well as the various historical reasons given above for why exceptions have not historically been found in international IP law, it seems unlikely that countries would wish to sign up to a provision that mandated that kind of ceiling.²⁰⁹ An exception of this kind also respects the fact that countries may wish to avoid significant disruption to local existing law. As efforts to draft international instruments on exceptions and limitations suggest, flexibility is a necessary part of drafting such rules. The better approach is to put in place principles to guide the exercise of that flexibility.

CONCLUSIONS

ACTA is . . . complicated. Despite the trappings of almost vaudevillian evil, it is more than just something to be opposed point blank—although it is that too, for many reasons explored elsewhere.²¹⁰ It is more than another attempt to increase enforcement and ratchet up standards—though it is that as well. Stated broadly, ACTA provides object lessons in the dynamics of international IP lawmaking that we would all do well to learn from as scholars, advocates, non-governmental organizations, governments, and treaty negotiators alike. This author hopes that various aspects of the

209. See *supra* notes 193-98 and accompanying text (describing the proposals by Hugenholtz and Okediji and Kur).

210. See, e.g., Kaminski, *supra* note 112, at 254-55 (noting the following concerns: ACTA will replace bilateral negotiations with a uniform global standard for enforcement of IP rights; ACTA negotiations have excluded developing countries; and ACTA's enforcement measures may interfere with the civil liberties of individuals).

analysis above will provide food for thought. However, the morsel that emerges most clearly is the importance of developing alternative models which provide a realistic perspective on what we could support, not just what we could oppose. Existing local models are critical in negotiations because these local models are what give a country a reason to oppose provisions in treaty negotiations. And models for exceptions that countries can sign up to with minimal disruption are needed so we can make progress on that other, critical side of the IP “balance.”

It is on questions of exceptions that some of the most urgent current issues are arising in the international sphere—for advocates and users, certainly, but also for negotiators and right holders. Without credible efforts to instantiate exceptions, limitations, and user protections in international agreements, IP lawmaking risks losing all credibility and any buy-in from a large part of the world. Negotiators need to be paying attention to this side of the coin. Equally, advocates need to take account of the historical dynamics on exceptions which, as the ACTA negotiations have indicated, have not changed. Sadly, in the wash-up, despite three years of negotiations, multiple multi-day meetings, and endless input from civil society, ACTA is a missed opportunity to address balance. As such, it is a further black mark against the name of IP rules, just when they need more widespread support.