OF ACTA/TPP AND SOPA/PIPA

Peter K. Yu*

ABSTRACT

In the past few years, policymakers, academic commentators, consumer advocates, civil liberties groups, and user communities have expressed grave concerns about the steadily increasing levels of enforcement of intellectual property rights. Taking note of these concerns, this Occasional Paper brings together two recently published essays discussing the ongoing efforts to strengthen intellectual property enforcement standards.

Published in The WIPO Journal as part of a special issue on the politics of intellectual property, the first essay examines the “country club” approach the negotiating parties of the Anti-Counterfeiting Trade Agreement (ACTA) embraced to establish new and higher international intellectual property enforcement standards. It points out that the agreement is flawed not only because it is a country club agreement, but also because it is a bad country club agreement.

The essay then examines ACTA in the context of a recent trend of using bilateral, plurilateral, and regional trade and investment agreements to circumvent the multilateral norm-setting process. It contends that this disturbing trend could upset the political dynamics in the current international intellectual property regime. The essay concludes with a discussion of the multiple layers of complex politics behind the ACTA negotiations: international, domestic, and global. It focuses on developments both within the new intellectual property enforcement club and without.

The second essay, which was published in the inaugural issue of Drake Law Review Discourse, touches on not only ACTA, but also the various other efforts that seek to ratchet up intellectual property enforcement standards. Termed collectively the “‘alphabet soup’ of transborder intellectual property enforcement,” these attempts ranged from the establishment of international agreements, such as ACTA and the Trans-Pacific Partnership Agreement (TPP), to the introduction of new domestic legislation, such as the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA).

This essay begins by identifying six different concerns and challenges ACTA poses to U.S. consumers, technology developers, and small and midsize firms. It then explores the ongoing negotiation of the TPP and explains why that agreement is likely to be more dangerous than ACTA from

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a public interest standpoint. The essay concludes by highlighting the challenges recently raised by the proposed SOPA and PIPA.

The spellings in the first essay have been Americanized, and the present version of both essays omits all the footnotes in the original works.
ACTA AND ITS COMPLEX POLITICS

INTRODUCTION

On October 1, 2011, eight countries—Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States—gathered together in a ceremony in Japan to sign the Anti-Counterfeiting Trade Agreement (ACTA). Aiming to set a new and higher benchmark for international intellectual property enforcement, this highly controversial plurilateral agreement was the result of three years and eleven rounds of formal negotiations among developed and like-minded countries. This agreement was finally adopted on April 15, 2011. As of this writing, it is still awaiting ratification and has not yet entered into force.

Commentators have widely criticized the ACTA negotiation process for its lack of transparency and accountability. By ushering in a new “country club” approach to setting international intellectual property norms, the negotiations have also raised important international concerns. This approach is likely to have serious ramifications for both the structural integrity and continued vitality of the existing international intellectual property regime.

As China and India noted at the June 2010 meeting of the WTO Council for Trade-Related Aspects of Intellectual Property Rights, ACTA has raised a wide variety of systemic problems within the international trading system. The agreement’s heightened enforcement standards will upset the delicate balance struck in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It will also increase the incoherence and unpredictability of the international regulatory framework.

Similarly, Francis Gurry, the director general of the World Intellectual Property Organization (WIPO), expressed his concern that, in negotiating ACTA, countries have “tak[en] matters into their own hands to seek solutions outside of the multilateral system to the detriment of inclusiveness of the present system.” Michael Geist, a law professor at the University of Ottawa, also noted that “some might wonder whether ACTA is ultimately designed to replace WIPO as the primary source of international IP [intellectual property] law and policy making.”

ACTA has indeed provided an excellent case study for examining the complex politics and institutional dynamics behind the development of the international intellectual property regime. As with the past two volumes of [The WIPO Journal], Volume 3 will devote its first issue to a topic of great importance to intellectual property scholars. Focusing on the politics of intellectual property, this special issue reminds readers that intellectual property developments are not just about law and economics—the primary foci of the previous two special issues. Intellectual property can also be about politics. Although scholarship on the politics of intellectual property is
only emerging in the scholarly literature, policymakers and activists have long recognized the importance of such issues.

As an introduction to this special issue, this article examines the country club approach the ACTA negotiating parties embraced to establish new and higher international intellectual property enforcement standards. It points out that the agreement is flawed not only because it is a country club agreement but also because it is a bad country club agreement. The article then situates ACTA in the context of a recent trend of using bilateral, plurilateral and regional trade and investment agreements to circumvent the multilateral norm-setting process. It contends that this disturbing trend could upset the political dynamics in the current international intellectual property regime. The article concludes with a discussion of the multiple layers of complex politics behind the ACTA negotiations: international, domestic and global. It focuses on developments both within the new intellectual property enforcement club and without.

THE ACTA COUNTRY CLUB

At the global level, the major criticisms of ACTA concern the limitation of its membership to developed and like-minded countries, the lack of representation by countries in the developing world and the agreement’s potential negative impact on the international intellectual property regime. To highlight the problematic nature of ACTA, some commentators, such as Daniel Gervais, have described the agreement as a “country club agreement.”

Within this country club, members set rules to govern its membership. Article 36 provides details on the ACTA Committee, which is charged with the agreement’s administration and management and is granted broad powers to establish ad hoc committees. Article 42 delineates the procedure for amending the agreement. Article 43 further specifies the time the agreement will be open for signature and how countries can accede to it after the expiration of the specified period.

Although the country club approach used by the ACTA negotiating parties has garnered considerable attention from policymakers and commentators, the use of clubs to coordinate international regulatory standards is not unprecedented. Developing countries, for instance, have frequently used coalitions to shape their negotiating agenda, articulate more coherent positions and establish a united negotiating front. By using these organizational structures, countries seek to achieve leverage that otherwise would not have existed for each country on its own.

What is interesting and somewhat different this time, however, is the developed countries’ aggressive use of club arrangements to enhance their already very powerful bargaining position. In political science, a burgeoning literature has been devoted to examining the use of club standards to set international norms. In All Politics Is Global, for example, Daniel Drezner
advances a typology of regulatory coordination. Based on the variations between the costs of adjusting national regulatory standards confronting “great powers” and those confronting the rest of the world, he identifies four different types of international regulatory standards: (1) harmonized standards; (2) sham standards; (3) rival standards; and (4) club standards. Professor Drezner’s four-field matrix is highly useful to our analysis of ACTA (see Table 1).

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<tr>
<th>High Adjustment Costs (Great Powers)</th>
<th>Low Adjustment Costs (The Rest)</th>
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<td>Sham Standards</td>
<td>Rival Standards</td>
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<td>Club Standards</td>
<td>Harmonized Standards</td>
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**Table 1: A Typology of Regulatory Coordination**

According to Professor Drezner, harmonized standards come into existence when adjustment costs are low for both great powers and the rest of the international community. The minimum substantive and enforcement standards in the TRIPS Agreement provide instructive examples. Because harmonized standards are usually the product of political compromises, they tend to be low and are therefore open to future upward adjustment. The TRIPS enforcement provisions, for instance, have been widely criticized by developed countries and their intellectual property industries for being primitive, constrained, inadequate, and ineffective. To some extent, the ACTA negotiations represent the attempt by developed countries to make an upward adjustment to the weak harmonized standards in the TRIPS Agreement.

In contrast to harmonized standards, sham standards are developed when adjustment costs are high for both great powers and the rest of the world. Examples of these standards are those concerning the transfer of technology, abuse of rights and restraints on trade. One could arguably
include the standards for the protection of traditional knowledge and cultural expressions, which have yet to become fully developed. As the quality of these standards improves, however, they may find their way to another category.

When adjustment costs are high for great powers but low for the rest of the international community, negotiations usually result in the creation of rival standards. The textbook example of this type of standard is the provision concerning the protection of geographical indications. While the European Union favors greater protection in this area, the United States insists that the use of certification and collective marks would provide adequate protection to rights holders. The disagreement between these two major trading powers eventually led to a World Trade Organization (WTO) dispute between the United States on the one hand and the European Union and Australia on the other. Such disagreement has also led to the inclusion in U.S. free trade agreements (FTAs) of provisions governing the relationship between geographical indications and trademarks.

Finally, when adjustment costs are low for great powers but high for the rest of the world, negotiations tend to result in the development of club standards. As Professor Drezner explains:

[A] great power concert will generate enough market power to lock in the concert’s preferred set of regulatory standards. The combined market size of a great power concert will induce most recalcitrant states into shifting their standards. However, states with severe adjustment costs will still resist, and the Prisoner’s Dilemma aspect of enforcement can tempt some governments into noncompliance; under this constellation of interests, the enforcement of standards becomes an issue. The crucial step for coordination to take place is a coalition of the willing among the greater powers.

Although developing countries and their supportive commentators have widely criticized the arbitrariness and exclusiveness of club standards, those standards have been used in other fields of international law. In 1989, the Group of Seven (G-7) established the Financial Action Task Force in the Paris Summit to combat money laundering (and later terrorist financing). In the early 1990s, this task force was extended to countries in the Organisation for Economic Cooperation and Development (OECD) as well as to a select group of non-OECD members, such as Hong Kong and Singapore, and to regional organizations, such as the Gulf Cooperation Council.

While club standards have not been widely used in the intellectual property arena, one could arguably trace the development of the TRIPS Agreement back to a two-stage process involving these standards. The first stage took place when the United States, the European Communities and Japan banded together to develop “highest common denominator” standards for the protection and enforcement of intellectual property rights. Once these
standards had been accepted, the second stage kicked in when these trading powers sought to multilateralize the standards by extending them to other members of the General Agreement on Tariffs and Trade (GATT), and later the WTO.

While many have considered the developed countries’ use of club standards undemocratic and inequitable, the standards’ more effective outcomes can justify such use. As Moisés Naim, the former editor in chief of Foreign Policy, has noted: “[A] smart multilateral approach to illicit trade has to be selective.” Moreover, club standards can help to avoid gridlocked situations where developed and developing countries fail to achieve progress in multilateral negotiations—the notorious stalemate over the revision of the Paris Convention being a good example. As Professor Drezner observes:

Club IGOs, such as the . . . G-7 . . . or the OECD, use membership criteria to exclude states with different preference orderings and bestow benefits for in-group members as a way to ensure collective action. Compared to universal IGOs, clubs have reduced legitimacy because of their limited membership, though this can be partially compensated through other sources of legitimacy such as a reputation for effectiveness. Clubs also have the advantage of a membership with a more homogenous set of preferences. The smaller number of actors also increases a club’s ability to coordinate and enforce policy.

Finally, it is important to keep in mind the geopolitical reality behind traditional international intellectual property negotiations. Regardless of what forum is ultimately used, countries—especially the weaker ones—rarely participate equally in the development of multilateral standards, due in part to their lack of resources, capacity and bargaining power. Even during the TRIPS negotiations, the discussions were dominated by developed countries and a small group of hardliner developing countries, such as Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania and Yugoslavia. Participation by smaller developing countries remained rather limited.

Thus, when examining ACTA, we need to compare its standards with those achievable under the present conditions of international intellectual property negotiations. We should not focus on an ideal arrangement that does not exist. Nevertheless, even if we take the present conditions into account, ACTA, as the next section will show, is still a rather disappointing plurilateral agreement.

A BAD COUNTRY CLUB AGREEMENT

In discussing club standards, commentators have widely noted the need to include in the negotiation process those countries that have a significant impact on the issue area. Consider, for example, the standards for international financial regulation established by the G-7 and the OECD.
Because all the important players in the field belong to either one of the two organizations, club standards were strategically chosen to enable powerful developed countries to establish high standards without the worry of dilution by marginalized players.

Once these standards have been established, an important goal of the G-7 and the OECD is to expand the club to outside players. As Professor Drezner explains:

In dealing with nonmembers, a club IGO can encourage the pooling of resources to induce outsiders into agreeing to the core’s regulatory regime. Material inducements, such as aid or technical assistance, can encourage peripheral states to accept the imposed standard. Small country leaders that are sympathetic to the core position can also use pressure from an international organization to bypass entrenched domestic interests and other institutional roadblocks. For the most recalcitrant states, a club IGO greatly enhances the utility of multilateral coercion. Once they join, they then have an incentive to pressure other governments into altering their regulatory standards. This dynamic produces a cascade effect in which a club IGO expands to near-universal size.

Over the years, new conditions have arisen, while the geopolitical make-up has changed. At times, clubs have adjusted their membership to accommodate these changing circumstances. For example, in the wake of the recent global economic crisis and in response to the rise of the so-called BRICS countries (Brazil, Russia, China, India and South Africa), developed countries smartly redesigned their norm-setting approach. By initiating discussions in the so-called G-20, which include emerging countries such as Argentina, Brazil, China, India, Indonesia, Mexico, Russia, Saudi Arabia and South Africa, the G-7 countries successfully expanded the “club” in the area of international financial regulation to cover new players that have increasingly significant impacts on the field. Such an expansion is unsurprising. After all, it is hard to imagine how the club could effectively respond to the sovereign debt crisis without the cooperation of powerful emerging economies.

To some extent, the transformation of the GATT to the WTO reveals a similar need to adapt to changing circumstances. In the beginning, the GATT, like the G-7, “was perceived of as a ‘rich nations’ club,’ focusing on the needs of the developed nations, though some of the more prominent developing nations such as Brazil and India played a role.” Most other developing countries received merely special and differential treatment. Today, however, the WTO includes 153 members, including three different groups of countries: developed, developing and least developed. Although the TRIPS Agreement includes transitional periods for both developing and least developed countries, the latter two groups of countries still take on key
obligations on the protection and enforcement of intellectual property rights, similar to those assumed by developed countries.

If one is willing to go back even further in time, one will notice a similar dilemma confronting members of the Berne Union, the well-known international copyright club. Following the decolonization movement after the Second World War and the arrival of a large number of newly emerging countries in the 1960s, developed countries in the Union had to decide whether they wanted to maintain their high Euro-centric copyright standards or offer significant concessions to entice developing countries to join the Union. In the end, the Berne Union members drafted the Stockholm Protocol Regarding Developing Countries, which was eventually adopted as an optional appendix to the Paris Act of the Berne Convention.

Notwithstanding the insights and lessons provided by these helpful precedents, ACTA fails to follow the formula for success for developing club standards. While the agreement was ambitiously designed to include high standards, similar to those international financial regulatory standards established by the G-7 or the OECD, the agreement does not include all the important players in the field of intellectual property enforcement. Notably excluded from the ACTA negotiations were Brazil, China and Russia, key players whose cooperation is badly needed to reduce cross-border piracy and counterfeiting.

Even worse, unlike the other club standards discussed in this article, ACTA has a very limited ability to induce other countries to join the club after it has been formed. In all fairness, the agreement was originally conceived as one involving two consecutive stages. As stated in an early discussion paper:

In the initial phase, it is important to join a number of interested trading partners in setting out the parameters for an enforcement system that will function effectively in today’s environment. As a second phase, other countries will have the option to join the agreement as part of an emerging consensus in favor of a strong IPR enforcement standard.

Nevertheless, it remains unclear which countries this second phase will target. A leaked U.S. government cable, for example, has revealed that Japan and the United States initially disagreed over whether “Italy and Canada . . . should be approached in the second group.” The U.S. position that these countries should be included eventually prevailed.

In contrast to Canada and Italy, major developing countries, such as Brazil, China and India, were excluded from the very beginning of the negotiations, even though Japan emphasized early on that “the intent of the agreement is to address the IPR [intellectual property right] problems of third-nations such as China, Russia and Brazil, not to negotiate the different interests of like-minded countries.” From the standpoint of intellectual
property protection, there is no doubt that these emerging countries are important to the successful operation of the international enforcement regime.

Consider China for example. The country’s piracy and counterfeiting problems have provided a major impetus for the development of new international intellectual property enforcement norms. China was also involved in a recent WTO dispute with the United States over the protection and enforcement of intellectual property rights. Given the negotiating parties’ conscious and determined choice to exclude China from the negotiations, it is unclear how they can now entice China to join this new exclusive club.

It is worth comparing ACTA with the WTO, an international trade club China joined a decade ago. In the 1990s and early 2000s, China was very eager to join this club and accede to the TRIPS Agreement even though it had to revamp a large array of laws and regulations and agree to high WTO-plus standards. As Samuel Kim observed at that time, China was willing “to gain WTO entry at almost any price.” The country’s approach was understandable. To many Chinese, the WTO membership helped secure China’s rightful place in the international community. Even if the economic costs were high, the symbolic value of the WTO accession and an improved standing in the international community would more than compensate for the short-term costs.

ACTA, however, is not the WTO. It does not give China a rightful place in the international community. Nor does the club membership seem to have any bearing on China’s dignitary interests. While it could be unattractive for China to be branded as a pirating nation, ACTA is not limited to countries that have always respected intellectual property rights. The checkered pasts of Japan and the United States, the two major proponents of this agreement, speak for themselves. More importantly, at the time of the negotiations, Canada, South Korea and a few EU member states were on the United States Trade Representative’s Special 301 Watch List. Even under the standards set unilaterally by the United States, the ACTA country club is a den filled with known pirates.

Even worse, the illegitimate nature of ACTA heavily undercuts the argument’s moral basis. To begin with, the negotiating parties’ insistence on completing the agreement through a shady backdoor deal has greatly undermined the legitimacy of the adopted standards. As Kimberlee Weatherall reminds us:

The secrecy [in the ACTA negotiations] is . . . operating, once again, to bring intellectual property law into disrepute. To the extent that at some later point governments and IP owners will ask people to accept the outcomes as “fair” and ones that should be adopted, it will be more difficult to convince them when the agreement has the appearance of a secret deal done with minimal public input.
Indeed, the adopted standards tell us more about like-mindedness than moral wrongs. At the international level, there remains no philosophical or normative consensus on the enforcement of intellectual property rights.

Like China, Brazil and India have shown no urgent desire to join ACTA. Nor have they found the club membership advantageous. As Anand Sharma, the Indian commerce and industry minister, emphatically declared: “If [the TRIPS Agreement] has to be revisited in any stage in future, it will be only in multilateral forum—the WTO, it cannot be done outside.” Likewise, Brazilian officials refused to “recognize the legitimacy of the treaty.”

The reactions of Brazil, China and India are indeed no surprise. In today’s age, these increasingly powerful developing countries are unlikely to buy into a system they did not help to shape. With their now considerable increase in economic power and geopolitical leverage, those days where a system could be created in developed countries and then shoved down their throats are long gone. If “enhanced international cooperation and more effective international enforcement” are some of ACTA’s key goals, as stated in the preamble, it is simply ill-advised to ignore these crucial partners in the negotiations. It is also short-sighted to consider countries unclubable by virtue of their lack of like-mindedness.

Compared with Brazil, China and India, small middle-income or low-income countries do not have the same bargaining leverage vis-à-vis the United States or the European Union. Nevertheless, it is still unclear how effective ACTA actually will be in inducing these countries to adopt higher intellectual property enforcement standards. After all, those countries that are overly eager to obtain trade benefits from the United States or the European Union are likely to agree to ACTA-like standards in non-multilateral agreements regardless of whether ACTA is adopted. By contrast, those countries that remain on the fence and that have enough power to resist pressure from the United States or the European Union are unlikely to find ACTA attractive. The reason is simple: ACTA offers neither carrot nor sticks.

The two “carrots” developed countries typically dangle in front of developing countries to entice them to offer stronger protection and enforcement of intellectual property rights are (1) increased foreign direct investment (FDI) and (2) accelerated transfer of technology. After more than 15 years of disillusionment in the TRIPS Agreement, many developing countries have begun to realize that the oft-presented carrots may be illusory.

To date, economists have widely questioned the link between intellectual property protection and FDI. As Keith Maskus noted, if stronger intellectual property protection always led to more FDI, “recent FDI flows to developing economies would have gone largely to sub-Saharan Africa and Eastern Europe . . . [rather than] China, Brazil, and other high-growth, large-market developing economies with weak IPRs.” More importantly,
developed countries have a long-standing history of failing to respect technology transfer obligations in international intellectual property agreements—article 66.2 of the TRIPS Agreement, for example. Although the Doha Ministerial Decision of November 14, 2001 reaffirmed the mandatory nature of these obligations, developed countries, thus far, have yet to take these obligations seriously. Thus, whether in the form of FDI or technology transfer, ACTA does not offer any attractive carrot.

The “stick” developed countries typically use in response to low intellectual property standards involve unilateral sanctions. However, in *United States—Sections 301–310 of the Trade Act of 1974*, the WTO dispute settlement panel made it clear that members are not allowed to use sanctions to resolve TRIPS-related disputes until they have exhausted all the remedies permissible under WTO rules. Because ACTA is designed as a TRIPS-plus agreement and covers rights falling largely within the scope of the TRIPS Agreement, unilateral sanctions are unlikely to constitute a permissible stick.

To be certain, the United States could still rely on the monitoring mechanism in section 301 of the Trade Act of 1974 to “punish” those countries that have failed to abide by ACTA standards. After all, the U.S. Trade Act of 2002 stipulates that the United States Trade Representative can take section 301 actions against countries that have failed to provide “adequate and effective protection of intellectual property rights notwithstanding the fact that [they] may be in compliance with the specific obligations of the [TRIPS] Agreement.” Nevertheless, without the teeth provided by unilateral sanctions, the section 301 process is at best a shaming device. As annoying as this device may be to developing countries, the process’s ability to induce developing countries to join ACTA or adopt its standards is significantly constrained.

In sum, by leaving out the key parties needed for cooperation and by providing neither carrots nor sticks to induce non-members to subsequently join the agreement, ACTA has failed dismally even under its own theoretical model. ACTA is flawed not only because it is a country club agreement but also because it is a bad country club agreement. Given this weakness, and its many well-documented negative side-effects, one cannot help but wonder why countries negotiated this agreement in the first place.

**The Non-Multilateral Era**

Although it is bad enough that ACTA fails under its own theoretical model, the use of the country club approach to international norm-setting has raised additional concerns. For example, commentators have expressed considerable fears that, by circumventing the multilateral process, ACTA will undermine the stability of the international trading system. The resulting instability is particularly disturbing considering the large amount of time, energy, resources and efforts developed countries have expended to create
the TRIPS Agreement and present international intellectual property enforcement regime. The ACTA negotiating parties’ insensitive push for tougher enforcement standards regardless of a country’s local conditions has also alienated many trading partners. Such alienation is likely to make it more difficult for the international community to undertake future multilateral discussions.

Nevertheless, non-multilateralism has some benefits. For example, it can help achieve outcomes that otherwise cannot be achieved under a multilateral setting. It can also help key parties to develop a preliminary common position that can be easily extended to other less important parties in the future. In fact, the negotiations of many key international agreements began with mini-negotiations among a small group of key players before the negotiations were finally extended to other members of the international community—the TRIPS Agreement being a very good example.

Thus, the question concerning ACTA is not so much about whether the agreement is a significant departure from the usual multilateral path, but whether the agreement’s non-multilateral approach can eventually help consolidate the countries’ positions through the multilateral process. As the previous section has shown, the answer to this question is mostly negative. By ignoring major developing countries and key players in the intellectual property enforcement area, ACTA is unlikely to facilitate the development of practical compromises that can be multilaterally extended in future negotiations.

More importantly, when ACTA is juxtaposed with the many recent bilateral, plurilateral and regional trade and investment agreements, it makes salient a recent and highly disturbing trend of using non-multilateral arrangements to circumvent the multilateral norm-setting process. Indeed, if ACTA represents the future of international norm-setting, non-multilateralism will not be the passing phase many policymakers and commentators expect—a short, inevitable transitional period before the development of a new multilateral arrangement, such as TRIPS II. Instead, the world will likely go through a long period of non-multilateralism, thereby generating interesting political dynamics that commentators have not yet studied in depth.

Such a development is consistent with the commentators’ repeat reminders that the TRIPS Agreement should not be seen as the endpoint in the development of the international intellectual property regime. As Susan Sell observes: “The TRIPS agreement is hardly the end of the story. In many ways, it is just the beginning.” Likewise, Carolyn Deere Birkbeck writes: “After a decade of tense North-South debates, TRIPS emerged a contested agreement. It was quickly apparent that far from a final deal, TRIPS was rather the starting point for further negotiations . . . .”

In an article examining the development of bilateral trade and investment agreements established by the United States since the turn of the
millennium, Ruth Okediji traces the agreements back to those bilateral agreements the country has signed since its founding period. As she explains:

The so-called new bilateralism is actually more consistent with historical uses of the foreign relations/treaty power of the United States, as well as the general framework of international law, in its dealings with developing countries since the independence era. Consequently, it is probably the TRIPS Agreement that is the aberration in international intellectual property law, and not the recent spates of bilateral and regional agreements.

Based on Professor Okediji’s insightful observation, the TRIPS Agreement should therefore not be considered as the endpoint of the international intellectual property regime. Nor is ACTA a drastic deviation from the traditional path of regime development. Instead, both agreements merely represent the ups and downs of such development.

To complicate matters further, countries have used different approaches to establish their interstate relationships outside the multilateral process. While the United States and the European Union have actively introduced free trade and economic partnership agreements, emerging countries such as China and India have been busy negotiating their own forms of non-multilateral agreements. As I have noted elsewhere, the agreements negotiated by China have very different goals and emphases from their U.S. and EU counterparts. The approaches used to negotiate those agreements are also quite different.

If these differences continue—or, worse, escalate—the international intellectual property regime will become even more fragmented. Such fragmentation, most certainly, will result in what Jagdish Bhagwati and other commentators have described as the “spaghetti bowl,” the “noodle bowl” or the “curry bowl.” Although commentators have widely studied the growing fragmentation of the international regulatory regime, it remains unclear whether such growing complexity would benefit developed or developing countries.

On the one hand, greater complexity will allow weaker countries to better protect their interests by mobilizing in favorable fora, developing the needed political and diplomatic groundwork and establishing new “counter-regime norms” that help restore the balance of the international intellectual property system. The existence of multiple fora will also help promote “norm competition across different fora as well as ... inter-agency competition and collaboration.”

On the other hand, a proliferation of fora will benefit more powerful countries by raising the transaction costs for policy negotiation and coordination, thereby helping these countries to retain the status quo. The higher costs, coupled with the increased incoherence and complexities in the international intellectual property regime, are particularly damaging to
developing countries, which often lack resources, expertise, leadership, negotiation sophistication and bargaining power.

More disturbingly, if significant differences exist between the terms found in the non-multilateral agreements established by developed countries and those established by emerging countries, the agreements may eventually precipitate what I have described as the “battle of the FTAs.” As countries continue to dispute over what norms they should obey, the conflicting norms in non-multilateral agreements will create complications that will eventually undermine the existing international intellectual property regime.

In fact, as Kimberlee Weatherall points out insightfully, ACTA tells us as much about the disagreement between the negotiating parties as it does about what higher standards these countries wanted to adopt. Among the conflicts revealed by the ACTA negotiations are the protection of geographical indications and the criminal enforcement of patent rights. These two disagreements have troubled the negotiations so much that the negotiators eventually had to strike a compromise by adopting a much lighter version (the so-called “ACTA Lite”) than what was originally advanced by the treaty’s proponents. In the wake of such drastically reduced protection, some commentators have wondered whether the final text would be so unattractive that some key negotiating parties would simply walk away from the treaty. To date, the European Union and Switzerland, two of the treaty’s major proponents, have not yet signed on to the agreement.

Equally salient from the ACTA negotiations is the disagreement between developed countries and major developing countries. Among the issues they continue to disagree about are access to essential medicines, software and information technology; the protection of traditional knowledge and cultural expressions; enforcement in the digital environment; special and differential treatment; obligations concerning transfer of technology, abuse of rights and restraints on trade; and the need to allow for alternative forms of innovation and modalities for protection. If one is willing to include such new issues as global climate change, the list can be extended even further.

Finally, the establishment of ACTA and the ongoing negotiation of the Trans-Pacific Partnership Agreement and other non-multilateral agreements have raised important questions about the future development of South-South agreements—or what I have described earlier as IPC4D (intellectual property coalitions for development). Discussions have already taken place among the fast-growing developing countries, in the form of IBSA trilateral cooperation (including India, Brazil and South Africa) and the BRICS summit (featuring Brazil, Russia, India, China and South Africa).

In a recent WIPO Development Agenda meeting, some developing countries specifically demanded the development of a project focusing on South-South collaboration. Although such demands were reasonable in light of the developing countries’ common plight, the proposal met with vehement opposition from developed countries. While the latter had a valid argument
that events organized by a multilateral organization like WIPO should not be limited to selected members, the position they took bordered on hypocrisy. After all, developed countries opposed the development of South-South collaboration at the same time when they were moving full steam ahead toward the completion of ACTA, a clearly North-North collaborative effort.

Indeed, without the complex questions raised by the mission of a multilateral organization, one could logically argue that, by establishing ACTA, developed countries are estopped from complaining about similar efforts undertaken by developing countries. As Professor Gervais has recently warned us, the change initiated by ACTA is likely to be “irreversible.” Nevertheless, it remains to be seen whether developing countries can take full advantage of the precedent set by developed countries to establish a better and more sustainable “club” for countries with like-minded pro-development approaches.

In sum, ACTA is problematic not only as a standalone agreement. It is also problematic because it is emblematic of the disturbing trend by both developed and less developed countries to push for non-multilateral arrangements that reflect their preferred norms, values and development models. If this non-multilateral movement continues, ACTA will not be the only club deviating from the traditional multilateral path. Other clubs will most certainly emerge from both the North and the South, further fragmenting the existing international intellectual property regime.

MULTIPLE LAYERS OF COMPLEX POLITICS

Commentators have widely blamed the establishment of ACTA on the lack of progress in enforcement discussions at both the WTO and WIPO. While this observation is somewhat correct, it oversimplifies the complex politics behind the formation of the new ACTA country club. In fact, the internal club politics are quite complex. So are the politics concerning the protesters outside the club. This section discusses in turn three different types of politics implicated by ACTA: international, domestic and global.

The first type of politics implicated by the agreement is obviously international. To date, the divide in the international intellectual property debate is not as simple as one between the North and the South. Indeed, it is increasingly common to find developed countries standing side by side with emerging or fast-growing developing countries. An excellent illustration concerns the reluctance to publish the negotiating text of ACTA. The first draft text was not released until after the eighth round of negotiations in Wellington. Although commentators generally criticized the United States for preventing this important text from being publicly released, one has to appreciate the greater political complexity behind the decision not to release the negotiating draft.
As a leaked document has shown, the major holdouts before the Wellington Round were the United States, some members of the European Union (Belgium, Denmark, Germany and Portugal), Singapore and South Korea. Although the United States has been widely faulted for the non-transparent approach used in negotiating ACTA, due in part to its geopolitical and economic strengths, this country was unlikely to suffer the most politically if the negotiating draft were released. In fact, negotiators from Singapore and South Korea could have been more concerned about the release than their counterparts in the United States. After all, those governments were already under heavy criticism domestically for negotiating the arguably one-sided FTAs with the United States. If the draft ACTA text were released early on, the timing of such release could not have been worse for those governments.

To be certain, the United States was also very concerned about the release. However, its concern was mainly due to the fear that such disclosure would result in parties walking away from the negotiation table (in addition to further complications in the ongoing negotiations of other trade and investment agreements). As far as the agreement’s impact on domestic politics is concerned, however, the U.S. negotiators are likely to have much less to worry about than their counterparts in emerging countries.

After all, the American public is unlikely to be heavily disturbed by the treaty terms, most of which are similar or identical to those found in existing FTAs signed by the United States. The administration’s clear reluctance to introduce laws to implement the new agreement has also alleviated some of the reported concerns. If such reluctance is not sufficient, it remains unclear how much attention the public has actually paid to the ACTA negotiations. Other than internet websites, blogs and specialized newspapers, such as Inside U.S. Trade, the media have provided very limited coverage of the negotiations. It is also unclear how many Americans are actually sympathetic to the positions held by developing countries and their supporters in the developed world.

The second type of politics implicated by ACTA is domestic. As Robert Putnam has convincingly shown, the negotiation of international treaties involves a two-level game: one domestic and one international. The TRIPS Agreement provides an excellent illustration of how negotiators need to take into consideration not only the preferences at the international level but also those at the domestic level. The same can be said for ACTA, where negotiators have to be sensitive to domestic demands and concerns.

As far as domestic politics are concerned, there is a tendency to simplify the overall picture within each country. For example, developed countries are often identified with the maximalist approach that ensures greater protection and enforcement of intellectual property rights. Meanwhile, less developed countries are noted for their need for limitations, exceptions, transitional periods and special and differential treatment.
While these caricatures are generally correct, they overlook the internal politics within each group of countries. Even in developed countries, where intellectual property rights holders prefer strong protection and enforcement of intellectual property rights, these countries continue to disagree over how high those standards should actually be and whether those standards should vary from sector to sector. A good example is the disagreement over appropriate patent reform in the United States between the major companies in the software and information technology industries and those in the biotechnology and pharmaceutical industries.

Cross-sector disagreements can also be found when analyzing what measures the United States would find acceptable in ACTA. While the U.S. movie, music and software industries have actively pushed for the inclusion of criminal enforcement provisions in ACTA, the Intellectual Property Owners Association insisted that those provisions should not be extended to patents. Such opposition continued the years-long fight against the incorporation of criminal sanctions into the EU directive on criminal enforcement of intellectual property rights, the so-called IPRED2. As Tim Frain, the director of intellectual property at Nokia, explained to the *International Herald Tribune* at that time:

> [P]atent holders wanted protection but not penalties of imprisonment as they tested the boundaries of other patents. “It’s never black and white,” he said. “Sometimes third-party patents are so weak that I advise managers to go ahead and innovate because, after making a risk analysis, we feel we can safely challenge the existing patent.”

> He added, “But with this law, even if I’m certain the existing patent is no good, the manager involved would be criminally liable.”

In the end, footnote 2 of ACTA struck a compromise by enabling parties to “exclude patents and protection of undisclosed information” from the agreement’s civil enforcement provisions.

Similar cross-sector divides are present in many fast-growing developing countries, in which intellectual property stakeholders are slowly emerging. In China and India, for example, filmmakers and computer programmers repeatedly complain about the lack of intellectual property protection and its adverse impact on their livelihood. To a large extent, their concerns parallel those of their counterparts in developed countries.

In many developing countries, the interests of fast-growing stakeholders differ significantly from those of the rest of the country. It is therefore increasingly difficult for these countries to establish cohesive nation-based positions on intellectual property law and policy. As I have noted in the past, China may want to have stronger protection for computer programs, movies, semiconductors and selected areas of biotechnology but much weaker protection for pharmaceuticals, chemicals, fertilizers, seeds and
foodstuffs. Similar “schizophrenic” preferences can be found in other large middle-income countries, such as Brazil and India.

Even more complicated, the positions taken by national leaders can be heavily skewed by political payoffs—or, worse, nepotism and corruption. Due to a lack of coordination and other reasons, the positions taken by policymakers in the capitals can be quite different from those residing in diplomatic outposts. As I was recently reminded, even the positions held by diplomatic corps in Geneva could be quite different from those held by their colleagues in Brussels. It is therefore no surprise that “[d]eveloping country diplomats working on IP issues in Geneva frequently expressed frustration with IP reforms underway at home that sacrificed TRIPS flexibilities.” As we analyze the positions and interests of developing countries, it is important we take these variations into account.

The final type of politics implicated by ACTA concerns what commentators have identified as global politics—the type of politics that transcends the Westphalian order of nation states. While a significant part of the critique of ACTA addresses interests of countries in the South, many of the agreement’s most trenchant critics reside in the North. Examples of these critics are Michael Geist from Canada; the Electronic Frontier Foundation, Essential Action, Knowledge Ecology International, Public Citizen and Public Knowledge from the United States; the Foundation for a Free Information Infrastructure (FFII) and La Quadrature du Net from Europe; and global nongovernmental organizations such as Médecins Sans Frontières and Oxfam.

The active participation of critics from the North makes a lot of sense, considering their significant resources and capacity. Nevertheless, the collaboration between these players in the North and developing countries in the South has clearly shown that the developments in the international intellectual property arena have now gone beyond negotiations among nation states. Such developments also highlight the growing opportunity for the South to collaborate with the North—through academics, mass media or nongovernmental organizations.

Indeed, nongovernmental organizations have been increasingly successful in pushing for a greater recognition of the changing nature of global governance models. The World Summit on the Information Society and later the Internet Governance Forum provide good examples of how these models have shifted. So do the ongoing discourse on access to medicines and the emerging debate on access to knowledge. While non-state actors still have a long road to travel before they can become highly influential in the international intellectual property debate, there is no denying that the governance model has slowly evolved to cover these new and increasingly powerful actors.

In sum, ACTA offers not only insights into the development of club standards and the emerging non-multilateral era but also an important case
study on the various layers of politics behind the development of the international intellectual property regime. While the agreement is both disappointing and disturbing, it does inspire us to think more deeply about the role politics can play in the future development of this regime.

CONCLUSION

Only a few years ago, commentators were widely criticizing WIPO for its lack of legitimacy. As Christopher May noted shortly after the establishment of the WIPO Development Agenda, “[a]t the centre of [this] Agenda is a critique of the WIPO that suggests it represents a narrowly focused set of political economic interests that seek to expand the realm of commodified knowledge and information for their own commercial advantage.” Likewise, Sisule Musungu and Graham Dutfield observed:

There are perceptions that the Bureau is acting not as the servant of the whole international community but as an institution with its own agenda. That agenda seems more closely attuned to the interests and demands of some Member States than to others, and more to pro-strong intellectual property protection interest groups and practitioner associations, which are ostensibly observers but sometimes behave and are treated like Member States, than to the interest of developing countries.

In the midst of the ACTA negotiations, however, commentators have begun calling on the ACTA negotiations to be moved back to WIPO. As the Wellington Declaration, which was drafted by the participants of the Public ACTA Conference in New Zealand, proclaims:

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

For those of us who have paid close attention to the establishment of the WIPO Development Agenda, it was indeed astonishing to see this quick change of public perception of WIPO—from an organization widely criticized for being heavily captured by developed countries and their industries to a totally different one that is noted for having “public, inclusive and transparent processes.” Such a swift about-turn is indeed indicative of the highly dynamic nature of international intellectual property developments. It also underscores our need for greater appreciation of the complex political dynamics behind such developments.

Although intellectual property is a largely legal construct, it is not just about law and economics. It is also about politics. As Sebastian Haunss
and Ken Shandlen write in the introduction to their timely collection of essays on the politics of intellectual property:

[M]ost studies [of intellectual property policy-making] focus on national and international IP laws. But while laws are solidified results of social struggles and political conflicts, understanding the law itself tells us little about the social processes that lay behind laws and even less about the social dynamics that will eventually challenge and often change them. Laws establish opportunities for action, and strictly legal perspectives in most cases say little about different actors’ motivations and capacities to exploit these opportunities and how the motivations and capacities change over time. It is time, therefore, to reorient analysis of the politics of IP to the processes by which conflicts over the ownership, use, and control of information are manifest and resolved in regional, national and sub-national settings.

While the political aspects of intellectual property have been largely understudied, the academic landscape has been slowly changing. As more scholars become interested in the subject, we will have a deeper and fuller understanding of the international intellectual property regime. We will also be in a better position to anticipate potential struggles and conflicts while designing appropriate reforms to resolve them. By bringing together leading scholars studying the politics of intellectual property and players at the frontline of international intellectual property policymaking, it is my hope that this special issue will help generate more attention in this under-explored area.
THE ALPHABET SOUP OF TRANSBORDER INTELLECTUAL PROPERTY ENFORCEMENT

INTRODUCTION

In the past few years, policymakers, academic commentators, consumer advocates, civil liberties groups, and user communities have expressed grave concerns about the steadily increasing levels of enforcement of intellectual property rights. Many of these concerns relate to the “alphabet soup” of transborder intellectual property enforcement, which consists of the following: SECURE (Standards to Be Employed by Customs for Uniform Rights Enforcement), IMPACT (International Medical Products Anti-Counterfeiting Taskforce), ACTA (Anti-Counterfeiting Trade Agreement), TPP (Trans-Pacific Partnership Agreement), COICA (Combating Online Infringement and Counterfeits Act), PIPA (Protect IP Act), SOPA (Stop Online Piracy Act), and OPEN (Online Protection and Enforcement of Digital Trade Act).

Although I have discussed the various concerns raised by the highly controversial ACTA and the increasingly intrusive digital copyright enforcement agenda, I have yet to explore what a combination of these initiatives would mean for U.S. individuals, technology developers, and small and mid-sized firms. This Essay picks up that task by exploring whether—and if so, why—these entities should be concerned about this half-cooked alphabet soup.

Part II of this Essay identifies six different concerns and challenges ACTA poses to U.S. consumers, technology developers, and small and mid-sized firms. Part III explores the ongoing negotiation of TPP. Although the secretive and dynamic nature of the TPP negotiations has prevented this Essay from providing a detailed analysis of the emerging agreement, this Part explains why TPP is likely to be more dangerous than ACTA from a public interest standpoint. Part IV concludes by highlighting the challenges recently created by SOPA and PIPA—two pieces of legislation that are as problematic as, if not more problematic than, ACTA and TPP.

ACTA

The negotiation of ACTA began in June 2008 and concluded close to three years later, following eleven rounds of negotiations in different parts of the world. The Agreement aims at setting a higher benchmark for international intellectual property enforcement for the United States, Japan, members of the European Union, Switzerland, and other likeminded countries. As Susan Schwab, the former United States Trade Representative (USTR), formally announced:

[T]he goal [of the Agreement] is to set a new, higher benchmark for enforcement that countries can join on a
voluntary basis. The envisioned ACTA will include commitments in three areas: (1) strengthening international cooperation, (2) improving enforcement practices, and (3) providing a strong legal framework for intellectual property rights enforcement.

Although the Agreement was ambitious in scope—with proposals calling for the introduction of the graduated response system, the notice-and-take-down mechanism, and criminal liability for all forms of intellectual property infringements—the final text, which some commentators have referred to as “ACTA Lite,” contains much more moderate provisions. Instead of elevating the intellectual property standards of both the European Union and the United States, ACTA merely provides the lowest common denominator of standards found in these two trading powers. To alleviate intrusion on fundamental rights and to provide flexibility, the Agreement also includes some safeguard clauses and numerous optional provisions.

From a public interest standpoint, ACTA, therefore, may not be as dangerous as many initially claimed, at least with respect to a developed country like the United States. After all, many of the Agreement’s provisions can already be found in both existing U.S. legislation and the free trade agreements the country has signed with its trading partners. The Obama Administration has also taken the position that ACTA is a congressional–executive agreement. By virtue of this designation, the Administration need not seek Senate approval for the Agreement or introduce implementing legislation.

Nevertheless, ACTA, once ratified, will pose six different challenges to U.S. consumers, technology developers, and small and mid-sized firms. First, although the USTR claims ACTA will not modify U.S. laws, modification could still take place in the form of changes in common law interpretation of existing laws and changing emphases on how laws are to be enforced. Down the road, the administration could also use ACTA as a justification for statutory revision, leading to what commentators have described as “policy laundering” and “backdoor lawmaking.”

Second, ACTA will affect those Americans who travel outside the country to visit, study, or work. It will also affect U.S. firms conducting business abroad. While the Agreement does not explicitly require border guards to search iPods, DVD players, laptops, or other electronic devices, it gives them the authority to order the seizure, confiscation, or destruction of suspected counterfeit or pirated goods. Countries that are eager to please the U.S. government or attract foreign investors, therefore, may be tempted to provide more stringent protection than what is currently found within the United States.

In countries with unappealing records on corruption and limited protection of human rights and civil liberties, giving Customs more discretion is highly disturbing. Equally disconcerting is the potential
challenge small and mid-sized firms will face when Customs lock up their legitimate goods in faraway places.

Consider, for example, the confiscation of low-cost manufactured goods that look similar to their branded counterparts, but are in fact cheap products that are safe, legitimate, and widely consumed by Americans. Consider also the seizure of generic medicines that religious charities or not-for-profit organizations bring into poor countries to help the sick and needy. Once these legitimate goods are confiscated, the costs to secure their release are likely to be quite high. In many cases, such as those concerning essential medicines, the delay in securing such release could be more than a simple inconvenience. The procedures required by a foreign court or a government agency could also be highly cumbersome, not to mention the potential lack of safeguards found in the U.S. Constitution.

Third, ACTA will lock in some of the legal standards built into the existing intellectual property system. These lock-in standards, in turn, could privilege business models that rely heavily on strong intellectual property protection. For example, ACTA requires member states to offer protection against both the circumvention of technological measures used to protect copyrighted works and the removal of copyright management information. ACTA further requires these members to tighten regulations over Internet service providers while creating new penalties for “aiding and abetting” intellectual property infringements. By adopting standards embraced by incumbent industries, ACTA may “harm small and mid-sized enterprises and innovative start-ups.”

In addition, the Agreement may “reduce consumer access to innovative products or services from abroad,” including those from Japan and South Korea. Because the Internet is global in nature, changes in ACTA members could also affect the information U.S. users will be able to obtain. In fact, “if firms are eager to develop a transnational policy that will satisfy the laws and policies of all the major markets, the more restrictive laws and policies other countries have, the more these laws will eventually dictate the type of policy to which U.S. internet users are subject.”

Fourth, by locking in the existing high protection and enforcement standards, ACTA may foreclose the opportunity for Congress to revise laws in the near future. While Congress can always ratchet up intellectual property standards beyond what ACTA requires, the Agreement may prevent Congress from ratcheting down those standards. ACTA, therefore, may prevent countries from experimenting with new regulatory and economic policies at a time when the Internet and new communications technologies have created many new opportunities.

Fifth, ACTA will undermine the longstanding interests of the United States in promoting human rights, civil liberties, and the rule of law throughout the world. Unless explicit safeguards are included in the Agreement to protect free speech, free press, and privacy, there is a very
good chance that ACTA will provide a pretext for other countries to tighten information control. Even worse, ACTA would “make it difficult for the United States to complain about those highly intrusive foreign laws that are introduced in the name of implementing ACTA or complying with its higher enforcement standards.”

Finally, in negotiating ACTA, the USTR has wasted considerable time, energy, and resources on developing a highly ineffective plurilateral agreement. The resulting agreement not only excludes countries that constitute the major sources of piracy and counterfeiting, such as China, Paraguay, Russia, and Ukraine, but it also fails to remedy the many enforcement-related defects in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Worse still, by using a “country club” approach to international norm-setting, ACTA takes away the opportunity to strengthen enforcement norms in current multilateral regimes—whether under the World Trade Organization or the World Intellectual Property Organization.

On April 15, 2011, ACTA was finally adopted, after more than five years of planning, pre-negotiations, negotiations, and debates. A few months later, eight countries—Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States—signed the Agreement in a ceremony in Japan. [As Mexico prepared to join the TPP negotiations, it also signed the Agreement in July 2012. Thus far, Switzerland] and five members of the European Union (Cyprus, Estonia, Germany, the Netherlands, and Slovakia) have refrained from signing the Agreement. Because ACTA will not enter into force until six countries have deposited their instruments of ratification, it remains interesting to see if and when the Agreement will enter into force.

**TPP**

While the Obama Administration was actively completing the ACTA negotiations, it also began the TPP negotiations with Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. It is anticipated that TPP will include an intellectual property chapter, similar to those intellectual property chapters found in existing U.S. free trade agreements. As the USTR stated in his recent update on the TPP negotiations:

TPP countries have agreed to reinforce and develop existing [TRIPS] rights and obligations to ensure an effective and balanced approach to intellectual property rights among the TPP countries. Proposals are under discussion on many forms of intellectual property, including trademarks, geographical indications, copyright and related rights, patents, trade secrets, data required for the approval of certain regulated products, as well as intellectual property enforcement and genetic resources.
and traditional knowledge. TPP countries have agreed to reflect in the text a shared commitment to the Doha Declaration on TRIPS and Public Health.

When the TPP negotiations were first announced, one could not help but wonder whether such negotiations would call for development of intellectual property protection and enforcement standards that go beyond those aspired to by the ACTA negotiators. Indeed, many commentators have described TPP as “ACTA-plus.” Although it is hard to predict which provisions the final text will eventually adopt, it is not difficult to explain why TPP could become more dangerous than ACTA from a public interest standpoint. There are at least five reasons.

First, unlike in the ACTA negotiations, the United States has more political and economic leverage over the other parties in the TPP negotiations. Although the ACTA negotiations brought together two major intellectual property powers—the European Union and the United States—the continuous disagreements between these two powers resulted in the adoption of a more moderate agreement. As Kimberlee Weatherall points out, ACTA tells us as much about the disagreement between the negotiating parties as it does about what higher standards these countries wanted to adopt.

For example, the United States wanted to have stronger mandates concerning digital enforcement; yet, the European Union was not ready to agree to provisions that had yet to be harmonized within the Union, such as the graduated response system and safe harbors for online service providers. Similarly, although the European Union pushed hard for the inclusion of criminal liability for all forms of intellectual property rights (including most notably geographical indications), the United States was reluctant to provide such broad coverage. In fact, many U.S. companies expressed concern over the potential criminal liability for trademark and patent infringement, as opposed to mere piracy and counterfeiting.

Compared with the ACTA negotiations, the dynamics of the TPP negotiations are rather different. Without the European Union at the negotiation table, the United States is able to rely more on its sheer economic and geopolitical strengths to push for provisions that are in the interest of its intellectual property industries. From increased enforcement in the digital environment to greater protection of pharmaceutical products, TPP is likely to track more closely to the high U.S. standards of intellectual property protection than the compromised provisions in ACTA. In fact, if the United States needs to make compromises, those compromises are likely to be found in other trade-related areas, not in the intellectual property area.

Second, the United States has more and better items to offer to trading partners in the TPP negotiations. Unlike ACTA, which focuses narrowly on intellectual property protection and enforcement, the TPP negotiations are trade-based and have a much broader scope. Because the negotiations involve more cross-cutting issues, the U.S. negotiators will be
able to offer “carrots” that they otherwise could not provide during the ACTA negotiations.

For instance, New Zealand may find it beneficial to make greater concessions in the intellectual property area if the United States is willing to allow for more exports in lamb, wool, and other sheep products. Indeed, compared with ACTA, TPP is likely to provide a fairer bargain among the negotiating parties. Although the usual disparity in bargaining power remains, the availability of other trade items could facilitate constructive bargaining among the participants, including even those with limited resources and bargaining chips.

From the standpoint of protecting due process, free speech, and other civil liberties, however, TPP is likely to be more dangerous. Because of the different value negotiating parties place on trade and trade-related items, some parties may be willing to concede more on intellectual property protection and enforcement in exchange for greater benefits in other trade or trade-related areas. TPP, therefore, could include more stringent obligations in the intellectual property area.

Third, although the ACTA negotiations already concluded, the TPP negotiations are still in progress. Being later in time, the latter negotiations may incorporate matters that did not have much traction during the ACTA negotiations. The TPP negotiators could also revive proposals that were rejected by the ACTA negotiators, especially the EU delegates. More importantly, should new issues arise, the TPP negotiators will be able to include those new items in the negotiations.

Fourth, although both ACTA and TPP have raised similar concerns about transparency and accountability, these concerns are somewhat different. While it is hard to support the categorical nondisclosure of draft treaty texts, especially with respect to proposals advanced solely by the U.S. government, it is more acceptable to refrain from disclosing complicated and sensitive information, such as tariffs, quotas, and financial data. Thus, the USTR may have a stronger justification for refusing to disclose the draft TPP text.

Finally, the highly technical and trade-oriented nature of the TPP negotiations may greatly reduce the interest of the public at large in the negotiations. In fact, without the controversial issues surrounding the Internet and digital communications technologies, one has to wonder whether the TPP negotiations could find their way to the mainstream media. The public at large is simply not interested in trade tariffs or trade remedies. Even ACTA did not receive much coverage in the mainstream media, notwithstanding the fact that it is mostly about intellectual property protection and enforcement, as opposed to trade issues.

In sum, TPP may not receive the same amount of public scrutiny as ACTA. Without such scrutiny, the provisions from TPP are likely to favor private rights holders more than they otherwise would have. From a public interest standpoint, TPP, therefore, could be more dangerous than ACTA.
Both ACTA and TPP focus on creating intellectual property protection and enforcement standards at the international level. SOPA and PIPA, by contrast, are domestic bills submitted to the U.S. Congress. They seek to impose new obligations on Internet intermediaries to block access to websites that facilitate online piracy and counterfeiting. SOPA specifically focuses on four groups of intermediaries: Internet service providers, search engines, payment networks, and advertising networks.

Because SOPA and PIPA implicate websites that are located abroad or are accessed through domain names registered overseas, the potential extraterritorial reach of the proposed legislation has sparked major concern not only within the United States, but also in other parts of the world. In a joint letter to U.S. policymakers, members of the European Parliament remind them of “the need to protect the integrity of the global internet and freedom of communication by refraining from unilateral measures to revoke [Internet protocol] addresses or domain names.”

On November 16, 2011, which was popularly christened as the “American Censorship Day,” Tumblr, Mozilla, Reddit, Techdirt, and other companies staged a major protest on SOPA. Although this protest did not receive much public attention, the public (and policymakers) began paying greater attention following the service blackout launched by Wikipedia, Reddit, WordPress, and other Internet companies two months later. As Senator Ron Wyden reminded USTR Ronald Kirk in a recent trade policy hearing of the Senate Finance Committee, “The norm changed on Jan. 18, 2012, when millions and millions of Americans said we will not accept being locked out of debates about Internet freedom.”

To be fair, SOPA and PIPA serve a very important goal—that is, to protect the valuable intellectual property assets of American rights holders. One could further argue that protecting intellectual property rights is critical to the U.S. economy. Nevertheless, the proposed bills are poorly drafted, relying on flawed enforcement designs. Although this Part focuses primarily on SOPA, most of its analysis is equally valid for PIPA or other similar legislation.

In its current form, SOPA has at least five shortcomings. First, some of the proposed correction measures are highly disproportional to the wrong. As noted constitutional law scholar Laurence Tribe observes:

[Under SOPA, conceivably, an entire website containing tens of thousands of pages could be targeted if only a single page were accused of infringement. Such an approach would create severe practical problems for sites with substantial user-generated content, such as Facebook, Twitter, and YouTube, and for blogs that allow users to post videos, photos, and other materials.]
Indeed, it is hard to explain why legitimate industries and Internet users should pay the price—economically or technologically—when the online community has some inevitable bad apples.

Second, U.S. Customs has already actively seized piratical and counterfeiting websites, including those providing live streams of sporting events. The U.S. government has also initiated extradition proceedings against massive infringers from abroad, including most recently Kim Dotcom, the owner of Megaupload. Successful, past extradition efforts have even sent the Australian leader of the warez group DrinkOrDie, Hew Raymond Griffiths, to jail in Virginia for fifteen months.

Third, SOPA fails to take into consideration the many new technological and business models that have become popular among Internet users. Consider YouTube, for example. Displaying billions of videos a day in more than fifty languages, this service is exciting not because it facilitates copyright infringement, but because it provides an attractive platform for Internet users to locate legitimate content unavailable on the market.

Unfortunately, SOPA does not appreciate the social benefits brought about by these new websites and services. As the Center for Democracy and Technology acknowledges, “The new de facto duty to track and control user behavior [as required by the proposed legislation] would significantly chill innovation in social media and undermine social websites’ central role in fostering free expression.”

Fourth, while SOPA would not “break the Internet”—as some have claimed in exaggeration—it does inflict some serious collateral damage. From erosion of free speech to creation of cybersecurity concerns, the statute’s benefits do not always compensate for its unintended harms. As the U.S. Public Policy Council of the Association for Computing Machinery points out in its analysis of SOPA:

[W]e do not believe that attempts to block or alter DNS [domain name system] or DNSSEC [DNS Security Extensions] look-ups will be particularly effective in stopping individuals who wish to connect to criminal sites outside the U.S., and will be less effective over time for all users. However, the costs and overhead associated with maintaining blocks and responding to orders will remain.

Finally, like ACTA, SOPA could provide repressive governments with an internationally acceptable blueprint for developing Internet censorship regulations. The legislation “would … set the dangerous international precedent that governments seeking to block online content that violates domestic law should look to online communications platforms as points of control.” Should SOPA be adopted, it would indeed be hypocritical for the U.S. government to complain about similar laws enacted abroad.

Given the bill’s many shortcomings, and the political complications massive Internet protests will create in an election year, it is no surprise that
the Obama Administration was willing to distance itself from the controversial legislation. The weekend before the massive Internet service blackout in January 2012, the Administration released a carefully drafted statement declaring that “it will not support legislation that reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet.”

Immediately following the blackout, several congressional members also quickly withdrew their support for SOPA and PIPA. More importantly, Representative Lamar Smith and Senator Harry Reid announced the postponement of consideration of these bills, bowing to pressure from Internet companies and the user community. In retrospect, the developments concerning SOPA and PIPA may have shown us how to mobilize individuals and communities to protest against international agreements such as ACTA and TPP.

CONCLUSION

For the past few years, policymakers, with strong support from the entertainment and pharmaceutical lobbies, have been cooking alphabet soup in the legislative cauldron. Large and small, homemade or otherwise, time-tested or experimental, a wide variety of alphabet pasta has been added to this soup. While the pasta may look fun and attractive, and it could even fill up one’s stomach, strong evidence suggests that the fully cooked soup will unlikely nourish society.

Although it is undeniably important to address intellectual property piracy and counterfeiting, most of the proposed initiatives are badly designed. The development of ACTA, TPP, SOPA, and PIPA is unlikely to provide private rights holders with much-needed protection. Even worse, such development may harm the public interest by violating due process while at the same time stifling free speech, free press, and other civil liberties.

It is high time policymakers start inquiring about what they are really cooking in that legislative cauldron. It is also important that they explore whether alternative ingredients can be used to prepare better enforcement soup. After all, legislators have made election promises to carefully deliberate over what gets served at our table. It is only fair that we hold them accountable for what they cook.
ABOUT THE CENTER

The Intellectual Property Law Center at Drake University Law School was founded in fall 2007 to promote global, interdisciplinary understanding of intellectual property law and policy. The Center was established with the generous support of a $1.5 million gift from Wayne (’72) and Donna Kern of Dallas, Texas, which endowed the Kern Family Chair in Intellectual Property Law, and a $750,000 leadership commitment from Pioneer Hi-Bred International Inc., a subsidiary of DuPont. In the past four years, peer surveys conducted by the U.S. News and World Report have ranked the Center consistently among the top 25 intellectual property law programs in the United States.

This dynamic Center offers an innovative curriculum, providing students with a solid foundation in both the theoretical and practical aspects of intellectual property law. The Center has also featured annual summer institutes bringing together judges, policymakers, industry leaders, attorneys, and academics to explore cutting-edge issues at the intersection of intellectual property, biotechnology, and agricultural sciences. In addition, the Intellectual Property Law Center serves as an international research hub, fostering partnerships with leading research institutions from around the world. Every year, the Center sponsors groundbreaking symposia and distinguished lectures; hosts eminent speakers and internationally recognized experts; and develops international research and outreach programs.

To facilitate a constructive, ongoing dialogue on critical issues concerning global intellectual property law and policy, the Center publishes an Occasional Papers in Intellectual Property Law series. This series features papers written by the Center faculty, distinguished visitors, and symposium participants.
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Prof. Peter K. Yu  
Intellectual Property Law Center  
Drake University Law School  
2507 University Avenue  
Des Moines, IA 50311  
U.S.A.