

**CAT AND MOUSE: FORUM-SHIFTING IN THE
BATTLE OVER INTELLECTUAL PROPERTY
ENFORCEMENT**

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Abstract

Since the early 1980s advocates seeking to ratchet up levels of intellectual property (IP) protection have shifted forums both vertically and horizontally in order to achieve their goals. They have shifted vertically, from multilateral to regional to bilateral levels, and they have shifted horizontally across diverse international organizations. Those who seek to *ration* access to IP are engaged in an elaborate cat and mouse game with those who seek to *expand* access. As soon as one venue becomes less responsive to a high protectionist agenda, IP protectionists shift to another in search of a more hospitable venue.

Forum-shifting can refer to several distinct dynamics, all of which are designed to yield preferred results by changing the game. Parties might move an agenda from one forum to another, exit a forum altogether (e.g. the US exiting UNESCO in the 1980s), or pursue agendas simultaneously in multiple forums.¹ According to Peter Drahos, “forum shifting means that some negotiations are never really over.”² Strong states like the U.S. shift forums to optimize their power and advantages and minimize opposition. The IP enforcement agenda is just the latest in a series of strategic forum shifts. Yet “weaker” parties, such as developing countries and public advocacy non-governmental organizations (NGOs), also deploy forum-shifting strategies in their efforts to reshape the rules.

Laurence Helfer’s most recent analysis follows the process between TRIPs and the access to medicines campaign³. He traces two key cycles: first the adoption of TRIPs; followed by the access-to-medicines campaign’s desired amendments to TRIPs in WTO; and concludes that the latter was a victory for the “weak”⁴. By contrast Daniel Drezner traces three cycles: the adoption of TRIPs; the Doha Declaration; and the amendment to TRIPs for countries that have no domestic generic drug manufacturing capability.⁵ He concludes that this last cycle demonstrates that the “strong” states with large markets ultimately prevail. This paper does not seek to “prove” either of these two analysts “right” or “wrong”, but rather to demonstrate the importance of tracking regime complexity and highlighting both policy and analytic implications of such analysis. This paper extends these cycles forward into time and traces the process of contestation within and across forums.

¹ Drahos, 2004b: 55.

² Drahos, 2007.

³ Helfer, 2009.

⁴ Helfer, 2009; see also John Odell and Susan Sell, 2006. “Reframing the Issue: the WTO Coalition on Intellectual Property and Public Health” in Odell, ed. *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge: Cambridge University Press): 85-114.

⁵ Daniel Drezner, 2007. *All Politics is Global: Explaining International Regulatory Regimes*. Princeton: Princeton University Press.

ACRONYMS

A2K	Access to Knowledge
ACE	Advisory Committee on Enforcement
ACP	African, Caribbean and Pacific Countries
ACTA	Anti-Counterfeiting Trade Agreement
APEC	Asian Pacific Economic Cooperation
BASCAP	Business Coalition to Stop Counterfeiting and Piracy
BSA	Business Software Alliance
CEO	Chief Executive Officer
CIEC	Center for Innovation and Economic Change
CII	Confederation of Indian Industry
DIIP	Database on International Intellectual Property Crime
DMCA	Digital Millennium Copyright Act
EPA	Economic Partnership Agreement
FBI	Federal Bureau of Investigation
FTA	Free Trade Agreement
G8	Group of Eight
GATT	General Agreement on Trade and Tariffs
GMO	Genetically Modified Organism
GSP	Generalized System of Preferences
ICC	International Chamber of Commerce
IFPMA	International Federation of Pharmaceutical Manufacturers' Associations
IIPA	International Intellectual Property Alliance
IPI	International Intellectual Property Institute
IMPACT	International Medicinal Products Anti-Counterfeit Taskforce
INTA	International Trademark Association
IP	Intellectual Property
IPI	Institute for Policy Innovation
ISP	Internet Service Provider
IT	Information Technology
MPA	Motion Picture Association
MPAA	Motion Picture Association of America
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization of Economic Cooperation and Development
PRO-IP	Prioritizing Resources and Organization for Intellectual Property
RIAA	Recording Industry Association of America
SECURE	Standards to be Employed by Customs for Uniform Rights Enforcement
SPLT	Substantive Patent Law Treaty
STOP	Strategy Targeting Organized Piracy
TRIPS	Agreement on Trade-Related Intellectual Property

USCC	United States Chamber of Commerce
USPTO	United States Patent and Trademark Office
USTR	United States Trade Representative
WCO	World Customs Organization
WHO	World Health Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
WIPO	World Intellectual Property Organization

Introduction

Since the early 1980s advocates seeking to ratchet up levels of intellectual property (IP) protection have shifted forums both vertically and horizontally in order to achieve their goals. They have shifted vertically, from multilateral to regional to bilateral levels, and they have shifted horizontally across diverse international organizations. Those who seek to *ration* access to IP are engaged in an elaborate cat and mouse game with those who seek to *expand* access. As soon as one venue becomes less responsive to a high protectionist agenda, IP protectionists shift to another in search of a more hospitable venue.

Forum-shifting can refer to several distinct dynamics, all of which are designed to yield preferred results by changing the game. Parties might move an agenda from one forum to another, exit a forum altogether (e.g. the US exiting UNESCO in the 1980s), or pursue agendas simultaneously in multiple forums.⁶ According to Peter Drahos, “forum shifting means that some negotiations are never really over.”⁷ Strong states like the U.S. shift forums to optimize their power and advantages and minimize opposition. The IP enforcement agenda is just the latest in a series of strategic forum shifts. Yet “weaker” parties, such as developing countries and public advocacy non-governmental organizations (NGOs), also deploy forum-shifting strategies in their efforts to reshape the rules.

In its quest for higher global IP standards the US first horizontally shifted from WIPO to the GATT in the mid-1980s.⁸ The US sought to leverage its large market to induce developing countries to adopt high standards of IP protection. By linking IP protection to market access the US found leverage that it did not have in WIPO. The US simultaneously shifted forums vertically by pursuing bilateral and regional trade agreements mandating high standards of IP protection, and pursued punitive action through the US Trade Representative (USTR) under Special 301.⁹ This permitted the US to impose trade sanctions on trading partners who violated US IP rights. Trade pressure helped the US to reduce developing country opposition to an IP agreement in the multilateral GATT/WTO deliberations. With bilateral and regional agreements, and EU Economic Partnership Agreements, the EU and U.S. can bypass multilateral debates and pressure individual countries and/or weaker regional partners to adopt TRIPS-Plus IP standards.¹⁰

In order to analyze forum shifting one must complete at least seven tasks. First, one must identify the most salient actors. Second, one must identify the actors’ goals and

⁶ Drahos, 2004b: 55.

⁷ Drahos, 2007. Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines” *Liverpool Law Review*.

⁸ Susan K. Sell, 1998. *Power and Ideas: the North-South Politics of Intellectual Property and Antitrust*. Albany, N.Y.: State University of New York Press: 129-139.

⁹ Sell, 1998: 134-135.

¹⁰ TRIPS-Plus refers to standards that exceed the requirements of TRIPS.

strategies. Third, one must map out the institutions involved. Fourth, one must identify the relevant discourse that actors employ in competitive contests to dominate the issue in question. Fifth, analysts must map out the relationships between institutions and legal regimes. Are they nested hierarchically? Are they parallel and equal? Do they directly conflict? Sixth, one must analyze both implications for: policy; and seventh for theory. I cannot pretend to cover all of these here, but rather take a first cut at apprehending one of the most dynamic, fast-moving and enormously complicated regime complexes in international politics. Understanding these dynamics is crucial, particularly given the fact that the policies around intellectual property affect most *everyone* directly and implicate human rights, economic development, access to medicines, access to knowledge and education, innovation, cultural expression, biological diversity, climate change, and technology transfer.

Clearly this has important consequences for both policy making and for theory. As Drahos points out, developing country negotiators, non-governmental organizations (NGOs), and access to knowledge (A2K) advocates must adopt a longitudinal perspective on IP negotiations or they will risk winning small battles (e.g., the Doha Declaration on TRIPS and Public Health) but losing the war (e.g., access to affordable medicines).¹¹ Similarly, those seeking to ration access to intellectual property must take both a long and broad view in order to pursue their goals. As Kathleen Thelen suggests, “social phenomena are often better captured in ‘moving pictures’ that situate a given outcome within a broader temporal framework.”¹²

For analysts, the dynamic complexity of intellectual property policymaking raises many important questions. Current scholarship on regime complexity and global governance eschews strictly state-centric analysis because that type of analysis tends to obscure crucial processes and relationships that profoundly shape international politics.¹³ For example, scholars such as Drahos and Karen Alter and Sophie Meunier have highlighted the fact that studying discrete instances of international negotiations as one-off outcomes provides a distorted, narrow, and misleading picture.¹⁴ Focusing on interstate bargaining alone clouds our view of small group dynamics over time, in which

¹¹ Peter Drahos, 2007.

¹² Kathleen Thelen, 2000. “Timing and Temporality in the Analysis of Institutional Evolution and Change” *Studies in American Political Development* 14: 101.

¹³ Kal Raustiala and David Victor, 2004. “The Regime Complex for Plant Genetic Resources” *International Organization* 58 (2): 277-309; Edgar Grande and Louis Pauly, 2005. *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century* Toronto: University of Toronto Press Incorporated; Karen Alter and Sophie Meunier, 2009. “The Politics of International Regime Complexity” *Perspectives on Politics* 7 (1): 13-24; Deborah Avant, Martha Finnemore, and Susan K. Sell, 2010. “Introduction” and “Conclusion” in Avant, Finnemore and Sell eds. *Who Governs the Globe?* Cambridge: Cambridge University Press.

¹⁴ Drahos, 2007; Alter and Meunier, 2009: 15, 21.

the same players meet and strategize and negotiate in across venues and in multiple iterations over the same core issues.¹⁵

Drahos has referred to this phenomenon as “nodal governance” in which policy making occurs through nodes of actors who are plugged into a variety of strategic networks that keep them well-informed and provide access to decision making.¹⁶ For example many of the same business actors participate in: the US Chamber of Commerce (USCC); various business associations such as the Business Software Alliance (BSA), the Pharmaceutical Research and Manufacturers of America (PhRMA) and the International Intellectual Property Alliance (IIPA); private-public partnerships that provide technical assistance in conjunction with government agencies (e.g., in the US it is the US IPR Training Coordination Group);¹⁷ serve on governmental advisory boards such as the assorted Advisory Committees for Trade Negotiations (ACTN) under the auspices of the Office of the United States Trade Representative (USTR);¹⁸ and directly participate in official delegations in interstate multilateral negotiations.¹⁹ This constitutes a very dense network of committed and engaged participants focusing on intellectual property policy across venues and over time. They engage in issue definition and agenda setting, advocacy, lobbying, education, public diplomacy, norm-setting, negotiation, monitoring and surveillance, and implementation.

John Braithwaite’s, Peter Drahos’s, and Laurence Helfer’s pioneering work on forum-shifting in intellectual property policy has emphasized feedback effects and the strategic deployment of competing institutions as a way of prevailing in particular negotiations.²⁰ For instance, Helfer has compellingly documented the way that public health advocates and developing country representatives reached agreements in the World Health Organization (WHO) that they were then able to invoke in the World Trade Organization (WTO) to amend the TRIPs in order to clarify developing countries’ rights to use its flexibilities.²¹ Many interpreted this outcome as a “victory” for public health²² while

¹⁵ Alter and Meunier, 2009. Drahos, 2004a. “Intellectual Property and Pharmaceutical Markets: a Nodal Governance Approach”, 77 *Temple Law Review* 401-424; Drahos, 2004b. “Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid” 36 *Case Western Reserve Journal of International Law* 53-77.

¹⁶ Drahos, 2004a; 2004b.

¹⁷ Intellectual Property Rights Training Data Base, sponsored by the Bureau of Economic and Business Affairs of the US Department of State, available at: <http://www.training.ipr.gov/index.cfm?fuseaction=content.about>; Matthews and Tellez, 2006; Trainer, 2008

¹⁸ Drahos, 2004b.

¹⁹ Susan K. Sell, 2003. *Private Power, Public Law: the Globalization of Intellectual Property Rights* Cambridge: Cambridge University Press.

²⁰ Braithwaite and Drahos, 2000. *Global Business Regulation* (Cambridge: Cambridge University Press); Laurence Helfer, 2004.

²¹ John Braithwaite and Peter Drahos, 2000. *Global Business Regulation* (Cambridge: Cambridge University Press); Laurence Helfer, 2004, “Regime Shifting: The TRIPs

others interpreted this outcome as a definitive defeat of the public health advocates' agenda.²³

Helfer's most recent analysis follows the process between TRIPs and the access to medicines campaign.²⁴ He traces two key cycles: first the adoption of TRIPs; followed by the access-to-medicines campaign's desired amendments to TRIPs in WTO; and concludes that the latter was a victory for the "weak".²⁵ By contrast Drezner traces three cycles: the adoption of TRIPs; the Doha Declaration; and the amendment to TRIPs for countries that have no domestic generic drug manufacturing capability.²⁶ He concludes that this last cycle demonstrates that the "strong" states with large markets ultimately prevail. This paper does not seek to "prove" either of these two analysts "right" or "wrong", but rather to demonstrate the importance of tracking regime complexity and highlighting both policy and analytic implications of such analysis. This paper extends these cycles forward into time and traces the process of contestation within and across forums.

The "powerful" do not always "win". Indeed, the concept of "winning" is far less obvious and stable than one might expect. International politics is messier than conventional approaches presume, and the messiness *itself* is important to understand and theorize. Focusing on single outcomes is both misleading and dangerous. Both interests and choices evolve;²⁷ they are not static. The complexity of the strategic, institutional, and discursive dimensions of international politics can be daunting for analysts and policymakers alike.²⁸ Yet the politics of intellectual property provide an edifying arena for examining some of the issues that regime complexity presents.

Realism, in particular, is least able to account for these dynamics. Its focus on outcomes based on capabilities and its insufficient attention to the array of key non-state actors in policymaking as well as institutional complexity blind it to significant aspects of international politics. For instance Daniel Drezner asserts that in the conflict between intellectual property and public health, the "strong" prevailed and the "weak" failed.²⁹ He ultimately invokes a United States national security frame to explain that the developing

Agreement and the New Dynamics of Intellectual Property Making" *Yale Journal of International Law* 29: 1-83; and Helfer, 2009. "Regime Shifting in the International Intellectual Property System" *Perspectives on Politics* 7 (1): 39-44.

²² Ellen t'Hoen 2002. "TRIPS, Pharmaceutical Patents, and Access to Medicines: a Long way from Seattle to Doha" *Chicago Journal of International Law* 3: 27-45.

²³ Drezner, 2007, p. 215.

²⁴ Helfer, 2009.

²⁵ Helfer, 2009; see also Odell and Sell, 2006.

²⁶ Drezner, 2007.

²⁷ Helfer, 2009, p. 41.

²⁸ Susan K. Sell, 2004. "The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions" *Temple Law Review* 77.

²⁹ Daniel Drezner, 2007: 191-194.

countries' and public health advocates' (weaker parties') apparent but insubstantial victory was really a product of American security interests.³⁰ Yet this tidy binary of health-plus-security neither captures the wider regime complex nor does it reflect a definitive "outcome."

Interests, strategies, and choices are embedded in a much larger landscape of contention over intellectual property policies. As metaphors go, Alter and Meunier's "chessboard politics" is thoughtful and evocative. It suggests that in dense regime complexity the repositioning of one piece in one institution may facilitate the repositioning of other pieces in other institutions. Adoption of a new rule in one venue may automatically have implications for multiple venues. Yet what Alter and Meunier helpfully describe as "chessboard politics"³¹ is actually more akin to a perpetual motion machine featuring intentional behavior and complicated and often unanticipated results. While analytically more tractable, the "chessboard" sounds so much more sedate than what actually transpires. Chess has fixed rules but infinite strategies; international politics may not have either.

This decidedly murkier policy landscape further holds implications for compliance. When norms in diverse yet non-hierarchically ordered institutions conflict, legal murkiness results. For example in intellectual property TRIPS does not explicitly offer protection for so-called "traditional knowledge" whereas in the Convention on Biological Diversity (CBD), such knowledge may be protected and its holders must be compensated as a condition for access. This ambiguity across institutional imperatives may facilitate non-compliance with the wishes of the strong by creating useful policy space for others.³² Further, it may inspire new coverage of so-called traditional knowledge in WIPO against the wishes of the OECD-based rights holders.

Once the access to medicines coalition of developing countries and NGOs mobilized in the World Trade Organization (WTO) in the early 2000s, the IP maximalists renewed their earlier World Intellectual Property Organization (WIPO) deliberations on a Substantive Patent Law Treaty (SPLT) in an effort to secure IP protection that went beyond TRIPS. However, the mobilized medicines coalition paid attention to WIPO and tried to counter this quest with a Development Agenda for WIPO.³³ The ensuing stalemate at WIPO over the SPLT led the IP maximalists to pursue other avenues, including continued bilateral and regional trade and investment treaties marked by TRIPS-Plus provisions as well as this new pluri-lateral effort behind the IP enforcement agenda. Industry has been relentless pursuing its IP agenda and circumventing developing country and NGO opposition, favoring non-transparent forums of "like-minded" actors. Undaunted by recent setbacks at the multilateral level, IP maximalists have launched a

³⁰ Ibid.

³¹ Alter and Meunier, 2009.

³² Ken Shadlen, 2005 [**policy space piece**]; Alter and Meunier, 2009: 20.

³³ Ahmed Abdel Latif, 2009. "Egypt's Role in the A2K Movement: an Analysis of Positions and Policies" in Nagla Rizik and Lea Shaver eds., *Access to Knowledge in Egypt: New Research on Intellectual Property, Innovation and Development* 29-85.

major, almost surreptitious, anti-A2K campaign focused on “counterfeiting”, “piracy” and “enforcement.”³⁴ As the US Chamber of Commerce’s Global Intellectual Property Center sees it:

Anti-IP forces are pressing their attacks in the U.S. Congress, in a growing number of key nations, and in multilateral forums like the World Trade Organization, the World Health Organization, and the World Intellectual Property Organization, harming both developed and developing countries and their people. The U.S. Chamber, as the voice of the broader business community, has launched a comprehensive campaign to rebuild global support for fundamental intellectual property rights.³⁵

IP-industries and their supportive governments have often shifted forums when it suits their interests. Now that developing country governments and NGOs are active in intellectual property governance in multilateral forums such as WTO, WIPO, and the World Health Organization, the intellectual property maximalists are looking elsewhere to ratchet up intellectual property protection. I discuss their strategic forum shifting, and then present an institutional roadmap of active arenas in the push for the IP enforcement agenda. The paper outlines industry’s goals and strategies and discusses some of the challenges that the IP enforcement agenda poses. It then analyzes the ways in which NGOs and developing country governments are fighting back to resist the enforcement agenda.

While there is undeniable arbitrariness involved in selecting the beginning of one’s narrative, for simplicity’s sake I will take up where Helfer (2009) and Drezner (2007) leave off. TRIPs is in place, the Doha Declaration exists, TRIPs has been amended to allow countries to import drugs produced under compulsory licenses (Helfer’s “victory” for the “weak”), but the conditions surrounding the use of the amendment are cumbersome and sub-optimal (Drezner’s “victory” for the “strong”).

Who and What

The IP anti-counterfeiting and enforcement agenda involves thousands of OECD-based global business firms and their foreign subsidiaries.³⁶ It includes a number of initiatives including: the Anti-Counterfeiting Trade Agreement (ACTA); the World Customs Organization’s SECURE; the US Chamber of Commerce’s “Coalition against Counterfeiting and Piracy Intellectual Property Enforcement Initiative: Campaign to Protect America”; the Security and Prosperity Partnership of North America; the WHO’s IMPACT; WIPO’s ACE discussions; and many bilateral and regional Free Trade Agreements, Investment Treaties, and Economic Partnership Agreements. While European and American IP maximalists have pushed for TRIPs-Plus provisions in FTAs

³⁴ Terms in quotes because they are contested.

³⁵ US Chamber of Commerce, Global Intellectual Property Center.

<http://www.uschamber.com/sab/ip.htm>

³⁶ Drahos, 2004a: 414; 2004b: 67-69.

and bilateral agreements, they are now pushing for TRIPS-Plus-Plus protections in these various forums. TRIPS is the high water mark for multilateral hard law as it is both binding and enforceable. This suggests that it may stand in hierarchical relationship to other international organizations. Yet there is no consensus about this relationship among many international law scholars.³⁷ TRIPS-Plus-Plus norm- setting and soft law efforts proceed apace. These new anti-counterfeiting and enforcement initiatives are just the latest mechanisms to achieve the maximalists' abiding goal of ratcheting up IP protection and enforcement worldwide.

IP-based firms, with their supportive governments, seek to go far beyond TRIPS in IP enforcement. Their four main goals are to: document and explain the value of IP; ensure strong government support for IP in the US; rally allied nations and organizations to defend IP; and hold "anti-IP" governments accountable.³⁸ For instance, under the proposed Anti-Counterfeiting Treaty (ACTA) they would like to see all countries sign on to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT); together they are referred to as the "Internet Treaties." Enforcement provisions under these treaties include legal remedies against circumvention of technological protection measures (e.g., encryption) or deletion of electronic rights management information.³⁹ Since many countries have not signed on to these treaties, the efforts to have everyone sign would raise IP standards and reduce some states' flexibilities in IP policy. For economically advanced countries like Canada, IP-based firms would like to see them go beyond the TRIPS-Plus WIPO treaties and adopt something similar to the US Digital Millennium Copyright Act (DMCA).⁴⁰ The ACTA would run roughshod over differences across jurisdictions. (e.g., many countries have yet to sign on to the WIPO Internet Treaties).⁴¹ The following section provides an institutional roadmap to the complex and comprehensive process underway.

Institutional Roadmap

The main actors in the ACTA process are exemplary of Drahos' "nodal actors" or networks of state and private sector actors who coordinate their positions and enroll nodal actors to help the cause.⁴² In contrast to realist expectations, these are not single issue coalitions of states, but rather a *mélange* of private and public sector actors who share compatible goals and continue to coordinate their negotiating positions over time and

³⁷ For a range of viewpoints on this issue see special issue of *American Journal of International Law* (2002): 96(1).

³⁸ US Chamber of Commerce, Global Intellectual Property Center, p. 1-4.

<http://www.uschamber.com/sab/ip.htm>

³⁹ Ermias Tekeste Biadgleng and Viviana Munoz Tellez, 2008. "The Changing Structure and Governance of Intellectual Property Protection" South Centre, Research Papers 15, p. 10. www.southcentre.org

⁴⁰ IP-Watch, 2008. February 13. "US Government, Copyright Industry Continue to Push for Stronger Enforcement" <http://www.ip-watch.org/weblog/index.php?p=922&print=1>

⁴¹ Biadgleng and Tellez, 2008: 25.

⁴² Drahos, 2007.

across forums. Drahos states that “there is considerable evidence that the US runs its trade negotiation as a form of networked governance rather than as a simple process of domestic coalition building.”⁴³ The anti-counterfeiting and enforcement agenda represents densely networked governance. As Alter and Meunier point out, “the more technical an issue, and the more expertise is valuable, the more likely small group environments will exist” (2009: 19). In trade policy, in which intellectual property now has been firmly embedded, “information and expert knowledge is everything”.⁴⁴ Among the new actors that this network recently has enlisted are the World Customs Organization, the US Department of Homeland Security, and Interpol. Drahos emphasizes that by enlisting new partners the enforcement pyramid develops an increasingly wide dragnet.⁴⁵

- Campaign to Protect America

This campaign is the United States’ Chamber of Commerce’s Coalition against Counterfeiting and Piracy’s Intellectual Property Enforcement Initiative.⁴⁶ This initiative lays the groundwork for all of the other efforts because it is comprehensive, and outlines the full court press strategy that industry and supportive government agencies currently are pursuing. While it is US-based, it offers significant insights into the broader global strategy because the US has been the first mover and major instigator of the quest for ever higher IP standards. Many of the initiatives that follow fit neatly under this broader rubric. The campaign includes a number of ambitious goals. The campaign presents six initiatives. I will discuss each in turn. First, is to improve coordination of federal government intellectual property enforcement resources. To this end, the campaign sought to designate a chief IP enforcement officer (“IP czar”) within the White House. The US House of Representatives passed this provision, in the Prioritizing Resources and Organization for Intellectual Property Act (PRO-IP) in May 2008.⁴⁷ President George W. Bush signed it into law October 13, 2008.⁴⁸ The campaign also sought to raise anti-counterfeiting and piracy responsibilities to senior levels at the Department of Justice and Department of Homeland Security.

⁴³ Ibid.

⁴⁴ Drahos, 2004b: 70.

⁴⁵ Drahos, 2004a: 410; 2004b: 72. An enforcement pyramid describes a system in which punishment and persuasion are linked in a certain sequence which begins with persuasion at the base of the pyramid and ends with punishment at the pyramid’s apex. This sequence allows enforcers to address “rational”, “virtuous”, and “irrational” actors. Drahos, 2004a: 410.

⁴⁶ www.theCACP.com

⁴⁷ PRO-IP Act H.R. 4279. The MPA and RIAA pushed for this law May 2, 2008. The bill would create a new copyright enforcement division within the US Department of Justice and permit law enforcement agents to seize property from copyright infringers.

⁴⁸ Copyright Litigation Blog, 2008. “The Pro-IP Act of 2008: Copyright and Trademark Enforcement” October 19. <http://copyrightlitigation.blogspot.com/2008/10/pro-ip-act-of-2008-copyright-and.html>

In 2004 the White House initiated its Strategy Targeting Organized Piracy STOP! This has focused on interagency coordination. The US has established the National Intellectual Property Enforcement Council. Its members include the U.S. Coordinator for International IP Enforcement and high level officers from the Departments of Commerce, Homeland Security, Justice, State, and USTR. The US Copyright Office serves as an advisor to the Council.⁴⁹

The second initiative focuses on border protection against counterfeiting and piracy. This involves expanding information-sharing capabilities, developing databases to flag suspect shipments, to fund more agents and training programs, to give Customs and Border Protection agents more legal authority “to audit and assess fines for importers, exporters, or other parties that materially facilitate the unlawful entry of counterfeit and pirated goods into the US.”⁵⁰ This raises important questions because what constitutes a “counterfeit” or “pirated” product varies from jurisdiction to jurisdiction. These are complex legal issues that Customs officers are neither trained nor authorized to adjudicate. Border protection goals include eliminating the existing “personal use” exemption and outlawing importation of *any* quantity of counterfeit or pirated products including via mail or courier service.⁵¹ These goals could impact the fair use doctrine, or allowances for infringements for non-commercial purposes.

The third initiative addresses enhanced law enforcement capacities to crack down on “intellectual property theft” by increasing funding for law enforcement (US Attorneys’ Offices, FBI, training for state and local law enforcement), enhancing penalties for counterfeiters who cause bodily injury or death, and increasing coordination between law enforcement and industry.⁵²

The fourth initiative to “Protect America” is to coordinate with law enforcement and customs officials across borders and abroad. Activities include training and technical assistance. USTR and industry are, together, to devise and coordinate priorities for technical assistance. Public-private partnerships feature prominently.⁵³ It also involves funding “technical assistance” to train governments in IP enforcement, establish IP attaches at US embassies, and increase funding for Intellectual Property Law Enforcement Coordinators internationally. Again, in conjunction with USTR, the

⁴⁹ The National Intellectual Property Law Enforcement Coordination Council, “National Intellectual Property Enforcement and Protection”

http://www.stopfakes.gov/pdf/2008_NIPLECC_Report_and_Appendices_Final.pdf

⁵⁰ CACP, 2007. “Coalition against Counterfeiting and Piracy intellectual Property Enforcement Initiative: Campaign to Protect America” 6/11, p. 2.

<http://www.theCACP.com>

⁵¹ Ibid.

⁵² Ibid.

⁵³ Matthews and Munoz-Tellez, 2006; Trainer, 2008.

initiative endorses the use of the Generalized System of Preferences (GSP) and regional trade preference programs to encourage enforcement of IP rights.⁵⁴

Fifth, “Protect America” seeks to establish a pilot program for judges to handle counterfeiting and piracy cases, and institute treble damages against complicit activity related to counterfeiting.

Finally, “Protect America” seeks to create and administer a nation-wide consumer awareness campaign revealing the harms caused by counterfeiting and piracy (including paid and donated ads for television, radio, print, and the Internet).⁵⁵ It also seeks to focus on college campuses to fund R&D to secure campus networks against P2P network activity, and to direct funding agencies to favor those campuses that have the most stringent anti-piracy practices.⁵⁶

- Industry associations and the USTR

Associations such as Motion Picture Association, the Recording Industry Association of America, the International Intellectual Property Alliance, and the Business Software Alliance routinely provide data and information about foreign governments’ failure adequately to protect their intellectual property. They submit reports and complaints through the Special 301 process and USTR names alleged offenders on its annual Watch Lists. According to law professor Michael Geist, “Canadian officials have ‘rightly dismissed’ the Special 301 process as ‘little more than a lobbying exercise.’ ... One official told a parliamentary committee that Canada does not recognize the process because it ‘lacks reliable and objective analysis’ and is ‘driven entirely by US industry.’”⁵⁷ The 2008 Watch List identified China, Russia, and Thailand as among the worst offenders. Significantly, China’s placement on the Priority Watch List is due to concerns about enforcement. The US filed a complaint against China with the WTO; this is the first WTO dispute focused on *enforcement*.⁵⁸ The WTO panel report of January 2009 ruled in favor of the US on two of its three complaints about China’s copyright enforcement.⁵⁹ Industry, through the USTR, is pressuring Russia to adopt TRIPS-Plus measures as part of its WTO accession process.

⁵⁴ Ibid. Also see Sell, 2003, for examples of the use of GSP to pressure foreign countries to adopt more stringent IP standards.

⁵⁵ CACP, 2007, p. 3.

⁵⁶ Ibid.

⁵⁷ quoted in Drahos, 2007.

⁵⁸ IP-Watch, 2008. February 18. “Officials Outline International Organizations’ IP Enforcement Policies”, p. 2.

⁵⁹ Office of the United States Trade Representative, 2009. “World Trade Organization adopts Panel Report in China – Intellectual Property Rights Dispute” 22 June.

<http://www.ustr.gov/about-us/press-office/press-releases/2009/march/world-trade-organization>

In a classic case of forum-shifting, on October 23rd 2007, just two weeks after WIPO's September 2007 adoption of the Development Agenda, USTR Susan Schwab announced that it would seek to negotiate ACTA in order to "set a new, higher benchmark for enforcement that countries can join on a voluntary basis."⁶⁰ Kevin Havelock, president of Unilever United States noted that Schwab "'made quite a commitment of her own energy' pushing for ACTA."⁶¹ On that same day, the Ministry of Foreign Affairs of Japan and the European Commission announced their intentions to pursue an international enforcement agreement.⁶² Notably this process will go forward independently of any international organization. Indeed, Eric Smith, head of IIPA, reflects industry's determination for an uncompromising agreement when he states that the ambitious agreement for strengthened enforcement "should not be sacrificed for additional signatories or the need for a hurried conclusion of negotiations."⁶³

- Industry-dominated groups in International Organizations

WIPO: the Advisory Committee on Enforcement (ACE), established in 2002 is industry dominated, and has devoted its efforts to discussing strengthening enforcement and problems that rights holders face in third countries.⁶⁴ ACE has not devoted attention to public interest considerations or rights holders' obligations.⁶⁵

The World Health Organization's International Medicinal Products Anti-Counterfeit Taskforce (IMPACT) is supported by the International Federation of Pharmaceutical Associations (IFPMA).⁶⁶ Interpol is deeply involved in this effort and has focused its efforts in Southeast Asia.⁶⁷ Other members include representatives of WIPO, OECD, WTO, and WCO. Government participation is voluntary; IMPACT tends to be industry-dominated, and according to Outterson and Ryan, industry tends to blur the

⁶⁰ USTR, "Ambassador Schwab Announces U.S. will seek new Trade Agreement to Fight Fakes" October 23, 2007.

http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab

⁶¹ IP-Watch, 2008. March 4. "Business, Governments See Momentum for ACTA, but EU Snags" http://www.ip-watch.org/subscribers/subscribers_20080304.php?print=1

⁶² Ermias Tekeste Biadgleng and Viviana Munoz Tellez, 2008. "The Changing Structure and Governance of Intellectual Property Enforcement" Research Paper 15, South Centre. p. 25. <http://www.southcentre.org>,

⁶³ Eric Smith, to USTR, 2008. Anti-Counterfeiting Trade Agreement: Request for Public Comments, March 21st. <http://www.iipa.org>

⁶⁴ Biadgleng and Tellez, 2008,. p. 10, p. 26, fn. 98.

⁶⁵ Ibid,p. 10.

⁶⁶ www.who.int/impact/en/

⁶⁷ Interpol, "Working with Business to Combat Transnational Organized Intellectual Property Crime"

<http://www.interpol.int/Public/ICPO/speeches/2008/sgIPcrime20080226.asp>

distinctions between parallel trade, compulsory licenses, and generics.⁶⁸ Critics question this initiative, which is a G8 priority that focuses on counterfeit drugs rather than other pressing health issues.

Industry also is very involved in monitoring the WTO accession process, and is pressing to make enforcement a permanent part of the TRIPS Council agenda.⁶⁹

- ACTA

While copyright and trademark-based industries have been concerned about enforcement for many years, the most recent push for a new approach emerged in 2004 at the first annual Global Congress on Combating Counterfeiting. The Global Business Leaders' Alliance Against Counterfeiting (GBLAAC), whose members include Coca Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Canon, sponsored the meeting in Geneva.⁷⁰ Interpol and WIPO hosted the meeting. At the July 2005 Group of 8 (G8), meeting Japanese representatives suggested the development of a stricter enforcement regime to battle "piracy and counterfeiting." The G8 issued a post-meeting statement: "Reducing IP Piracy and Counterfeiting Through More Effective Enforcement."⁷¹ In what would become a familiar trope, the first line claims that trade in counterfeit and pirated goods "can have links to organized crime," and threatens employment, innovation, economic growth, and public health and safety. That same year, the US Council of International Business partnered with the International Chamber of Commerce to launch the Business Coalition to Stop Counterfeiting and Piracy (BASCAP). A recently leaked discussion paper about ACTA circulated among industry insiders and government negotiators from the US, Japan, Switzerland, Canada, the European Union, Australia, Mexico, South Korea, and New Zealand included all of these negative effects and added "loss of tax revenue" to the litany.⁷²

This is no high-minded quest for the public good. As David Fewer of the Canadian Internet Policy and Public Interest Clinic and the University of Ottawa noted, "if Hollywood could order intellectual property laws for Christmas what would they look like? This is pretty close."⁷³ One of the central features of ACTA's approach would be to

⁶⁸ Biadgleng and Tellez, p. 28; Kevin Outterson and Ryan Smith, 2006. "Counterfeit Drugs: the Good, the Bad, and the Ugly" 16 *Albany Law Journal of Science and Technology* 525.

⁶⁹ Biadgleng and Tellez, 2008. p. 23.

⁷⁰ Aaron Shaw, "The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)" *Knowledge Ecology Studies*, Vol. 2 (2008)
<http://kestudies.org/ojs/index.php/kes/rt/printerFriendly/34/59>

⁷¹ <http://www.g7.utoronto.ca/summit/2005gleneagles/index.html>

⁷² <http://www.dfat.gov.au/trade/acta/discussion-paper.html>

⁷³ 24 May 2008. "Copyright deal would toughen laptop, iPod laws"
<http://www.Canada.com/calgary/herald/news/story.html>

enlist the public sector in enforcing private rights. This means that tax payers' dollars would be used to protect private profits. The opportunity costs of switching scarce resources for border enforcement of IP "crimes" are huge. There surely are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms. Other concerns address the lopsided nature of the ACTA approach, favoring rights holders above all else and presuming suspects to be guilty. Due process of law will be sacrificed to the interests of IP rights holders and there will be few, if any, checks on abuses of rights.⁷⁴ It might⁷⁵ authorize border guards and customs agents to search laptops, iPods, and cell phones for infringing content. Customs officials would have authority to take action against suspected infringers even without complaints from rights holders; they could confiscate the laptops and iPods. Privacy issues arise over extensive data sharing and possible wire tapping that could be involved in ramped up enforcement efforts.

ACTA proponents want plants shut down on "suspicion" of counterfeit production. This suggests that suspects are presumed to be guilty unless proven innocent. This is reminiscent of medieval times in which a woman suspected of being a witch would be thrown into water; if she survived it would prove that she was a witch, if she drowned she was innocent. Furthermore, ACTA proponents claim that the treaty will help developing countries with "capacity building" in enforcement. Yet it is clear what their version of "capacity building" entails (Trainer, 2008; Matthews and Munoz-Tellez, 2006); it is designed only to benefit the nodal governors. The Motion Picture Association (MPA) has provided Labrador retrievers, Lucky and Flo, who are trained to sniff out DVDs. The MPA gave another pair of DVD-sniffing dogs, Manny and Paddy, to the government of Malaysia for its efforts to crack down on DVD piracy.⁷⁶ To get an idea of how far-reaching an approach that the MPA and RIAA endorse, one need only look to the recent MPA/RIAA backed Los Angeles County Ordinance that will hold property owners liable for any "piracy" activity that goes on in their buildings!⁷⁷

ACTA would require Internet Service Providers to police and control their systems for infringing content.⁷⁸ Its one-size fits all policy exacerbates the problems that even the far more forgiving and flexible TRIPS revealed. It sharply reduces policy space

⁷⁴ Robin Gross, 2008. "IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA), 25 March. <http://ipjustice.org/wp/2008/03/25/ipj-white-paper-acta-2008/>

⁷⁵ Secrecy exemplifies the ACTA process; the Obama administration is continuing the Bush policies of non-disclosure due to "national security" "reasons". Intellectual property protection truly has been one of the few issues to retain deep bipartisan support.

⁷⁶ "Dogs 'Humanize' the Problem of Counterfeit Movies" April 29, 2008. *America.gov* – *Telling America's Story* <http://www.america.gov/st/econ-english/2008/April/20080429185038berehellek2.34033e...>

⁷⁷ David Kravets, May 8, 2008. "Los Angeles says Piracy 'Detrimental to the Public Health, Safety'" *Wired Blog Network*, <http://blog.wired.com/27bstroke6/2008/05/los-angeles-say.html>

⁷⁸ Gross, 2008.

for developing countries to design appropriate policies for their public policy for innovation and economic development. It also would create an additional international intellectual property governance layer atop an already remarkably complex and increasingly incoherent intellectual property regime.

As Shaw points out, “instead of merely shifting the debate from one forum to another, the ACTA supporters now seek to create an entirely new layer of global governance.”⁷⁹ According to Timothy Trainer, former President of the International Anti-Counterfeiting Coalition, “ACTA is an initiative that allows governments to voluntarily commit themselves to whatever TRIPS+ standards are agreed.”⁸⁰ ACTA negotiations are ongoing despite increasing consumer concerns over transparency and potential negative consequences across a broad range of issue areas.⁸¹ On August 19th, 2009, representatives from organizations such as Oxfam, Doctors without Borders, and Knowledge Ecology International met with officials from the Obama administration, the State Department, USTR, and the Commerce Department to express their concerns about the enforcement agenda and its impact on access to medicine for developing countries.⁸²

- World Customs Organization

The G8 opened negotiations at WCO to establish customs enforcement standards. In June 2006 Members recognized the major role that they could play in IP protection, and established a set of standards for IP enforcement.⁸³ Brussels-based WCO is a congenial forum for IP rights holders because there they are on equal footing with governments.⁸⁴ Discussions at WCO have not been transparent, and advocacy and consumer groups have not been able to participate; many suspect that “rich country governments *view* it as a forum where they can strive for new IP rules, free from

⁷⁹ Aaron Shaw, 2008. “The Problem with the Anti-Counterfeiting Trade Agreement (and what to do about it)” *Knowledge Ecology Studies* Vol. 2, p. 2.

⁸⁰ Timothy Trainer, 2008. “Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation?” *The John Marshall Law School Review of Intellectual Property Law* 8:74.

⁸¹ 24 May 2008. “Copyright deal would toughen laptop, iPod laws” <http://www.canada.com/calgary/herald/news/story.html>; see for example Essential Action Access to Medicines Project, 2009. “ACTA and the Drug Monopoly Enforcement Agenda: a windfall for big drug companies; higher medicine prices for American families” July 27. <http://www.essentialaction.org/access/index.php?/categories/18-Drug-Monopoly-Enforcement>

⁸² *Los Angeles Times* “Obama endangering developing countries’ access to affordable drugs, activists charge” August 19. <http://www.latimes.com/news/nationworld/nation/la-na-drugs-international20-2009aug20>

⁸³ http://www.wcoomd.org/home_wco_topics_epoverviewboxes_epwcostrategyiprsecure.htm

⁸⁴ Yosh Tandon, “Editorial: WIPO, WCO, Intellectual Property and Border Guards” *South Bulletin* 16 May, 2008, Issue 15, p. 1 http://www.southbulletin_Issue15-16May.pdf

scrutiny.”⁸⁵ The provisional Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE), dramatically expand the scope and level of enforcement protections beyond TRIPS, leading some commentators to refer to these as Trips-Plus-Plus standards.⁸⁶ At its third meeting of the Working Group on SECURE the WCO Secretariat announced that consultations on SECURE had been completed, with an eye toward adopting SECURE at its June 2008 meeting.

SECURE is Trips-Plus-Plus because it: extends the scope from import to export, transit, warehouses, transshipment, free zones, and export processing zones; extends protection from trademark and copyright to all other types of IP rights; removes the obligations of rights holders to provide adequate evidence that there is prima facie an infringement to initiate a procedure; requires governments to designate a single authority as a contact point for Customs; gives Customs administrations the legal authority to impose deterrent penalties against entities knowingly involved in the export or import of goods which violate *any* IPR laws (versus just trademark counterfeiting and copyright piracy).⁸⁷

The IP enforcement agenda’s nodal network has enlisted the WCO to champion IP protection and to pursue an expanded mandate. SECURE would privilege IP rights holders, and while at this moment adopting SECURE is voluntary, these TRIPS-Plus-Plus provisions are likely to appear in bilateral and regional trade and investment treaties.⁸⁸ One can expect this given the US and EU track record of norm-setting, and then institutionalizing TRIPS-Plus provisions into Bilateral Investment Treaties, Free Trade Agreements, and EPAs.⁸⁹ Thus even though “the WCO lacks the authority to set or enforce policies that contradict the WTO,”⁹⁰ TRIPS specifies that member states are free to adopt IP protection and enforcement standards that exceed TRIPS provisions; therefore if states adopt SECURE provisions in bilateral or regional agreements they will *not* be contradicting WTO. WCO works with WIPO, Interpol, OECD, the European Commission, WHO, and the Council of Europe to coordinate its activities.

Brazil has been an outspoken critic of these measures as setting a dangerous precedent and of sneaking in TRIPS-Plus-Plus provisions “through the backdoor.”⁹¹ India has also actively criticized SECURE, and Indian civil society organizations have noted that India and other like-minded developing countries have both opposed and

⁸⁵ IP-Watch, 28 February 2008. “World Customs Organization Recommends far-Reaching New Rules on IP” <http://www.ip-watch.org/weblog/index.php?p=939&print=1>

⁸⁶ <http://www.southcentre.org/southbulletin/Issue15-16May.pdf>

⁸⁷ See the excellent, comprehensive Table 1, in Xuan Li, 2008. “SECURE: A Critical Analysis and Call for Action” *South Bulletin* 16 May, Issue 15, p. 5.

www.Southcentre.org

⁸⁸ Ibid. p. 4.

⁸⁹ Peter Drahos, 2001. “BITS and BIPS: Bilateralism in Intellectual Property” *Journal of World Intellectual Property* Vol. 4, Issue 6 (November): 791-808.

⁹⁰ Shaw, 2008, p. 2.

⁹¹ IP-Watch, 28 February 2008. *supra* n. 44..

successfully pushed back TRIPS-Plus enforcement initiatives at WCO.⁹² In June 2009 the WCO replaced SECURE with a new WCO Counterfeiting and Piracy (CAP) group to focus on health and safety issues; unlike SECURE the new CAP is limited to dialogue. After the June 2009 WCO meeting, IP-Watch reported that “SECURE is gone’.”⁹³ This example highlights the limitations of the static realist analysis of scholars like Drezner, whose frameworks are ill-equipped to capture these types of dynamics. By no means does this suggest that the story is over and that the “weak” prevailed, but it does indicate that the game has changed yet again and that the outcome is indeterminate.

- Interpol

Interpol increasingly has gotten involved in IP enforcement. It has been a prominent participant in the Annual Global Congresses Combating Counterfeiting & Piracy.⁹⁴ Interpol, WCO, WIPO, International Trademark Association, International Chamber of Commerce, and the International Security Management Association co-sponsor the Congresses, which have become an important global forum for government officials and IP rights holders to exchange information, best practices, and to discuss ways to stop counterfeiting and piracy. Interpol has dedicated one officer full-time to work with WHO’s IMPACT program. It has introduced an IP crime training program, beginning in June 2007 and will be expanding these activities.

In 2006 Interpol entered into partnership with the US Chamber of Commerce to develop a database on IP crime to facilitate information sharing.⁹⁵ In February 2008, Interpol presented its database on international IP crime (DIIP) at the G8 IP Experts Group meeting in Japan as best practice for all countries to adopt.⁹⁶ Critics have raised privacy concerns. Ronald Noble, Interpol’s Secretary General, has stated that “it is no longer acceptable to invoke misguided data-protection arguments for not sharing information.”⁹⁷ The politics of fear have facilitated support for a law enforcement approach to IP protection. Indeed Haunss and Kohlmorgen have found that the “criminalization” discourse has been difficult to counter and has contributed to the

⁹² Centre for Trade and Development (Centad), New Dehli, et. al. 2009. “Open Letter to the President of Confederation of Indian Industry (CII) on the Third International Conference on Counterfeiting & Piracy” August 17; SPICY IP, 2009, “CII’s Conference on combating Counterfeiting sparks L...” August 18, 2009; Intellectual Property Watch, 2009. *July Monthly Reporter* “WCO Softens on Counterfeiting and Piracy, Toughens Health Enforcement” 6:7: 1-2, 10.

⁹³ Intellectual Property Watch, 2009. *July Monthly Reporter* “WCO Softens on Counterfeiting and Piracy, Toughens Health Enforcement” 6:7: 1.

⁹⁴ <http://www.ccapcongress.net/archives/Geneva/Geneva.htm>

⁹⁵ “INTERPOL launches Intellectual Property crime database at conference in India” 26 February 2008. <http://www.interpol.int/Public/ICPO/PressReleases/PR200806.asp>

⁹⁶ <http://www.interpol.int/Public/ICPO/speeches/2008/sgIPcrime20080226.asp>

⁹⁷ Secretary General Ronald K. Noble, Keynote address: “INTERPOL: Working with Business to Combat Transnational Organized Intellectual Property Crime “ (February 26, 2008). <http://www.interpol.int/Public/ICPO/speeches/2008/sgIPcrime20080226.asp>

European Community's success in advancing the enforcement agenda (2008). Interpol and the World Customs Organization enthusiastically have embraced this new mission, with its prospect of high-level support and expanded resources. Thomas Donahue, President and CEO of the U.S. Chamber of Commerce actively has supported an expanded role for Interpol through lobbying government, and targeting "hotbeds" of piracy such as China, India, and Russia. Interpol and the US Chamber of Commerce conducted their 1st Annual Global Forum on Innovation, Creativity and Intellectual Property in Beijing in March 2007, and their 2nd in Mumbai in February 2008. The USCC has provided resources and information for an Interpol Database on International Intellectual Property Crime (DIIP). While Interpol has largely focused on counterfeit pharmaceuticals, it has been working with the Business Software Alliance, the Entertainment Software Association, the International Federation of the Phonographic Industry, and the Motion Picture Association to build internet anti-piracy capacity.⁹⁸

Interpol's "intellectual property crime" unit fails to provide clear definitions of trademark counterfeiting and copyright piracy; Biadgleng and Tellez point out that, "this is a serious concern for developing countries and consumers, given that the potential scope of the definition of counterfeit and piracy may be so wide as to include legitimate uses of works and cases where an individual may infringe an intellectual property right without knowing it."⁹⁹

- The Security and Prosperity Partnership of North America

The SPP is a White House-led initiative among NAFTA signatories: the US, Canada, and Mexico, "to increase security and to enhance prosperity."¹⁰⁰ Under a competitiveness rubric the SPP aims to enhance IP enforcement and crack down on counterfeit and pirated goods. It seeks to target export processing zones in particular {maquilladoras}, and has established a task force of senior officials from all three countries to develop a coordinated strategy to combat counterfeiting and piracy. It is best described as an ongoing dialogue rather than a formal agreement or treaty.¹⁰¹ The US government agencies engaged in this dialogue are the Department of Commerce {"prosperity"}, the Department of Homeland Security {security} and the Department of State {to coordinate}.¹⁰² The SPP is focused on increasing private sector engagement in the process to help the North America's competitive position in the global economy.¹⁰³

- APEC

⁹⁸ Ronald Noble, Keynote Speech, <http://www.interpol.int/Public/ICPO/speeches/2008/sgIPcrime20080226.asp>

⁹⁹ Biadgleng and Tellez, 2008. p. 27.

¹⁰⁰ "SPP Myths vs Facts" http://www.spp.gov/myths_vs_facts.asp

¹⁰¹ Ibid. p. 2.

¹⁰² Ibid.

¹⁰³ SPP, 2006. "Fact Sheet: Security and Prosperity Partnership of North America" March 31. p. 1. http://www.spp.gov/factsheet.asp?dName=fact_sheets

In APEC the U.S. has been pressing an “Anti-Counterfeiting Piracy Initiative.” APEC has adopted a number of U.S. proposals including five model guidelines on reducing trade in counterfeiting and pirate goods.

- “Think Tanks”

One of the IP maximalists’ objectives, according to the US Chamber of Commerce, is to build a “virtual IP network (NGO) capable of influencing leading European political parties and non-business think tanks in favor of government support for IP – in Germany, Austria, Switzerland, France, Italy, Scandinavia, and the UK.”¹⁰⁴ Industry-supportive “think tanks” have been producing studies for the cause of ratcheting up IP standards and enforcement. For example, industry lobbyist outlets such as the International Intellectual Property Institute, the Institute for Policy Innovation, the Stockholm Network, and the Center for Innovation and Economic Change, have all supplied studies and articles promoting TRIPS-Plus-Plus approaches to IP.

Technical Assistance Providers

The technical assistance industry represents another vivid instance of what Drahos refers to as “nodal governance”. The “technical assistance” industry is alive and well. TRIPS Article 67 stipulates that developed countries are obligated to provide technical assistance to developing countries for implementing their TRIPS commitments. This has fostered a lack of balance in technical assistance provision insofar as most providers are self-interested and profit from higher standards of IP protection; they have no incentives to instruct developing countries about their ability to use TRIPS flexibilities. Typical of the types of providers are people like Timothy Trainer, former President of the International Anti-Counterfeiting Coalition and head of the Global Intellectual Property Strategy Center (notably located on K Street, Washington DC’s infamous lobbyist gulch).¹⁰⁵ His Center provides technical assistance and he has done projects for the State Department, World Bank, and various organizations for USAID projects. The US IPR Training Coordination Group is one mechanism through which the US fulfills its Article 67 technical assistance obligation. According to Matthews and Munoz-Tellez, this group is “composed of private sector organizations that represent US-based IP industries and multiple US government agencies that work closely to protect IP on a global level” (including IIPA, IACC, PhRMA, and IIPi).¹⁰⁶ US public interest NGOs and academics who highlight TRIPS flexibilities are not included in this node.

The Dangers of Discourse and the Politics of Fear

The G8’s 2007 Heiligendamm declaration emphasized intellectual property

¹⁰⁴ US Chamber of Commerce, Global Intellectual Property Center, p. 3.

¹⁰⁵ Trainer, 2008: 47.

¹⁰⁶ Matthews and Munoz-Tellez, 2006. “Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective” *The Journal of World Intellectual Property* 9(6): 637.

protection and enforcement as its top priority (Haunss and Kohlmorgen, 2008: 2). As in the process leading up to TRIPS, private actors have collaborated with OECD governments and various governmental and intergovernmental agencies to increase intellectual property rationing. The discourse animating this push for higher standards of protection and enforcement echoes the 1980s focus on “competitiveness”¹⁰⁷ but also has added a “security” narrative highlighting both national security (“terrorism”) and “criminalization”¹⁰⁸. This new framing has created new possibilities for mobilization. Introducing a security frame for IP has allowed these IP maximalists to enlist new actors, law enforcement agencies, in their cause. Law enforcement agencies have become eager recruits to the IP maximalists’ network.

A number of scholars have examined discursive strategies, and linked them to particular outcomes.¹⁰⁹ Some discursive strategies have favored the “strong” while others have mobilized effective opposition coalitions.¹¹⁰ Framing an issue in itself is indeterminate, but scholars such as Haunss and Kohlmorgen (2008), and Kapczynski (2008) have sought to investigate the conditions under which issue framing succeeds or fails.¹¹¹ As Kapczynski argues, “the framing perspective is intended... to account for how groups inspire and legitimate action and how they come to view some actions and events as more or less desirable, risky, or costly.”¹¹² Haunss and Kohlmorgen have found that “frame-building” in which adversaries actively and directly engage each others’ frames

¹⁰⁷ This is to be expected as the US faces significant trade deficits with China in the early 21st century. This is reminiscent of the significant trade deficits with Japan in the 1980s that led to Section 301 of the US Trade and Tariff Act and the beginning of bilateral pressure to raise IP protection standards abroad. Notably in so-called “rust-belt” states, the Democratic candidates for the Presidential nomination of 2008, such as Hillary Clinton, resuscitated much of the protectionist narrative that fueled the adoption of 301 as a hedge against tariffs and trade wars. See Susan K. Sell, 2003. *Private Power, Public Law: the Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press).

¹⁰⁸ International Anti-Counterfeiting Coalition, 2005. *White Paper: the Negative Consequences of International Intellectual Property Theft: Economic Harm, Threats to the Public Health and Safety, and Links to Organized Crime and Terrorist Organizations* available at: http://www.iacc.org/resources/IACC_WhitePaper.pdf; Haunss and Kohlmorgen, 2008).

¹⁰⁹ Sebastian Haunss and Lars Kohlmorgen, 2008, “Political Claims-making in IP Conflicts” paper presented at ECPR Workshop 14: The Politics of Intellectual Property, Rennes, April 11-16; and Susan K. Sell and Aseem Prakash, 2004. “Using Ideas Strategically: the Contest between Business and NGO Networks in Intellectual Property Rights” *International Studies Quarterly* 48:1 (2004).

¹¹⁰ Pamela Samuelson, 1997, “The U.S. Digital Agenda at WIPO” *Virginia Journal of International Law* 37: 369-439; Haunss and Kohlmorgen, 2008.

¹¹¹ Haunss and Kohlmorgen, 2008; Amy Kapczynski, 2008. “The Access to Knowledge Mobilization and the New Politics of Intellectual Property” *Yale Journal of International Law* 117: 804.

¹¹² Kapczynski, 2008: 815.

can be more effective than direct counter-framing, especially in cases less normatively charged than patients versus patents, or death versus profits (2008). They show how both advocates and opponents of software patents in Europe tried to claim “innovation” for themselves, and opponents of software patents blocked the policy (2008).

Advocates of the IP enforcement agenda have engaged in a shrill public relations campaign to frighten people into accepting their agenda. At a CropLife America meeting on December 1st 2007 Dan Glickman, head of the Motion Picture Association, recommended that advocates underscore the *danger* of counterfeited and pirated goods.¹¹³ Through fear mongering, IP enforcement agenda advocates are constructing a big tent that includes all types of intellectual property: trademarks, patents, copyrights. As Haunss and Kohlmorgen suggest:

the criminality issue functions as a master frame that unites diverse interests of the music and film industry, large software firms (esp. Microsoft) and luxury goods manufacturers. The argument ... is about fighting product piracy and that ... [it] is necessary to protect consumers from counterfeit goods (2008: 14).

Suddenly spinning IP enforcement as a *consumer protection* issue is fascinating. Given the extent to which overly strong property rights and rampant rent-seeking in the pharmaceutical industry are often understood to *deny* consumer access to things consumers actually need to live there is a bit of the *Alice Through the Looking Glass* quality (in which everything is backward) to this new tack. The 2007 G8 Heiligendamm official declaration stated that “The protection of IPRs is of core interest for consumers in all countries, particularly in developing countries”; this is rather ironic given the whole access to medicines controversies in the Global South (Haunss and Kohlmorgen, 2008). Despite the very real differences between all the types of intellectual property contained in the IP enforcement agenda’s “big tent” approach, there is one thing that Kate Spade bags and pharmaceuticals DO have in common and that is high prices. High prices are directly related to the demand for counterfeit products. This campaign is characterized by strategic obfuscation; its message is intentionally misleading. For example, it is difficult to imagine a “dangerous” counterfeit handbag, or a “dangerous” dvd. Even more baffling are references to the dangers of “counterfeit cigarettes” to public health!¹¹⁴ Consumers must be protected to get access to the *real* fatal stuff, not the fake fatal stuff!

The fear mongering ranges from tales of exploding cell phones and toxic counterfeit drugs, to unsubstantiated allegations of organized crime and even terrorist involvement. As Haunss and Kohlmorgen, this crime discourse has succeeded in Europe and led to the adoption of the EC’s Enforcement Directive (2008). In April 2008, US

¹¹³ Glickman was the keynote speaker at this event in Washington, DC at The Federalist Society offices at which I also was a speaker.

¹¹⁴ International Anti-Counterfeiting Coalition, 2005. “White Paper: the Negative Consequences of International Intellectual Property Theft: Economic Harm, Threats to the Public Health and Safety, and Links to Organized Crime and Terrorist Organizations”, January. http://www.iacc.org/resources/IACC_WhitePaper.pdf

Attorney General Michael Mukasey asserted that terrorists sell pirated software to fund their operations, yet provided no evidence for this claim.¹¹⁵ He was merely trying to frighten people into backing the PRO-IP law (the Prioritizing Resources and Organization for Intellectual Property Act) in Congress, to create the post of Copyright Enforcement Czar to coordinate IP protection efforts.¹¹⁶ The USCC ardently promoted the PRO-IP law.

The IP enforcement agenda advocates have promoted two sensationalist books, *Illicit: How Smugglers, Traffickers, as Copycats are Hijacking the Global Economy* and *Knockoff: the Deadly Trade in Counterfeit Goods*.¹¹⁷ The ICC funded a public broadcast of a program based on *Illicit*, which equates counterfeiting with human smuggling, drug smuggling, small arms trafficking, and black market trade in nuclear materials.¹¹⁸ *Knockoff* appears to be entirely based on information from ACTA advocates: the International Trademark Agency; the International Intellectual Property Institute; the International Anti-Counterfeiting Coalition, the Association Against Counterfeiting and Piracy, and the Anti-Counterfeiting Group. The Secretary General of the World Customs Organization offers his endorsement inside the book jacket, calling the counterfeit trade “the crime of the 21st century.” Chapter titles include: “Lies, damn lies, knockoffs”; and “Show us the dead bodies.” Recent US Congressional hearings about tainted blood thinner (heparin) from China have raised the profile of danger and death that will no doubt be deployed in the service of the IP enforcement agenda.

The Motion Picture Association (MPA) and the Recording Industry Association of America (RIAA) have pushed hard for the IP enforcement agenda. While the first line of attack appeared to be copyrights and trademarks, patents are not far behind as is evident from the media blitz. Kevin Outterson and Ryan Smith have provided a careful analysis of the deliberate rhetorical obfuscation over “counterfeit” drugs.¹¹⁹ The authors

¹¹⁵ “Feds lie about link between Software Piracy and Terrorism” Preston Gralla, April 2, 2008. <http://blogs.computerworld.com>

¹¹⁶ The MPA and RIAA pushed for this law, which was signed into law October 13, 2008. The bill will also create a new copyright enforcement division within the US Department of Justice and permit law enforcement agents to seize property from copyright infringers.

¹¹⁷ Moses Naim, 2005. *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy* (N.Y.: Anchor Books); Tim Phillips, 2005. *Knockoff: the Deadly Trade in Counterfeit Goods* (London: Kogan Page).

¹¹⁸ <http://www.nationalgeographic.com/illicittrade/>;
<http://www.thetruecost.org/portal/truecosts/default>

¹¹⁹ Outterson and Smith, 2006. *supra* n. 32. For studies that rely on industry-generated figures and narratives see: Candace Friel, 2007. “The High Cost of Global Intellectual Property Theft: an Analysis of Current Trends, the TRIPS Agreement, and Future Approaches to Combat the Problem” 7 *Wake Forest Intellectual Property Law Journal* 209; Cortney Arnold, 2006. “Protecting Intellectual Property in the Developing World: Next Step – Thailand” *Duke Law & Technology Review* 10; Bradley Olson et. Al. 2007. “The 10 Things Every Practitioner should Know about Anti-Counterfeiting and Anti-

point out not only that the evidence for counterfeit drugs is anecdotal rather than empirical, but that the only comprehensive collection point for global data on counterfeiting is the Pharmaceutical Security Institute – a trade organization created by the security directors of 14 global drug companies – that does not make its data available to the public.¹²⁰ Furthermore, they point out that “the terms fake or counterfeit have included a wide range of drug products, from those resulting in criminal acts of homicide, to placebos, to safe and effective drugs from Canada.”¹²¹

By casting this wide rhetorical net global pharmaceutical companies hope to curtail drug importation from Canada, parallel importation, and the TRIPS-compliant use of compulsory licenses – three important avenues for increasing access to essential medicines. In a thinly veiled reference to TRIPS-compliant compulsory licensing of drugs (think Thailand), David Chavern, USCC vice president noted that a broad and “disturbing trend is essentially the expropriation of intellectual property by governments with support of NGOs, with noble-sounding reasons why they’re doing it, but ultimately with the same effect [as counterfeiters and pirates] – crush the innovative engine, not only of our economy, but ultimately of the worldwide economy.”¹²² The consumer safety issue actually is far narrower and should be restricted to “contaminated products peddled by criminal gangs.”¹²³ Nobody in the A2K movement wants tainted heparin or deliberately toxic counterfeit drugs. All the misleading data and rhetoric is geared to winning broad political support for much more stringent IP enforcement measures.

The big tent approach to “counterfeiting” and “piracy” is designed to capture behavior that is legal.¹²⁴ Indeed, Drahos warns of the dangers of complex implementation measures that involve self-interested interpretation; this framework offers potential for abuse.¹²⁵ It is allowing proponents to construct a multi-pronged attack on the A2K and development agendas. The US seeks to undo developing countries’ abilities to issue compulsory licenses. The EU’s Cariforum Economic Partnership Agreement transfers European IP standards to ACP countries, extends rights of complainants to access private information such as banking records and to have goods seized.¹²⁶ Complainants may

Piracy Protection” 7 *Journal of High Technology Law* 106; Bryan Liang, 2006. “Fade to Black: Importation and Counterfeit Drugs” 32 *American Journal of Law and Medicine* 279; Amy Bunker, 2007. “Deadly Dose: Counterfeit Pharmaceuticals, Intellectual Property and Human Health” 89 *Journal of the Patent & Trademark Office Society* 493.

¹²⁰ Outterson and Smith, 2006. 526-7.

¹²¹ Ibid. 530.

¹²² “Business Experts call for Intellectual Property Protection” March 25, 2008.

America.gov – Telling America’s Story <http://www.america.gov/st/econ-english/2008/March/20080325165949cpataruk3.670901e->.

¹²³ Outterson and Smith, 2006. 534.

¹²⁴ “Essential Action Comments on Anti-Counterfeiting Trade Agreement”, 2008. March 22, *Ip-health digest* Vol. 1, #2569, message 2.

¹²⁵ Drahos, 2007.

¹²⁶ Dalindyebo Shabalala, 2008. “Intellectual Property in the European Union: Economic Partnership Agreements with the African, Caribbean and Pacific Countries: What way

pursue injunctions against some IP uses without needing to prove harm. Third party intermediaries who are not themselves infringers are targeted. The EPA includes no limitations and exceptions to protect defendants. Like most of the IP enforcement agenda it is one-sided in favor of rights-holders.

Critics have questioned a law enforcement approach to IP protection noting that there are many other avenues available to protect consumers. Customs officials are not trained to resolve complex legal determinations of infringement issues.¹²⁷ Most alarmingly, in 2008 17 consignments of generic pharmaceuticals were seized in transit in Frankfurt and Amsterdam under the EU Directive on Enforcement. As an Open Letter from numerous civil society representatives and scientists in India to the President of the Confederation of Indian Industry states:

These consignments were being exported from developing countries (such as India and Brazil) to other developing countries, and the contents of the consignments are perfectly legal in both the exporting as well as the importing nations. These highly questionable seizures resulted in the crisis of health programmes as it resulted in delays in and prohibitive costs of access to life-saving medicines in developing of Africa and Latin America.¹²⁸

The drug seizures raised a number of concerns. In the WTO India noted that the EU seizures had an “adverse systemic impact on legitimate trade of generic medicines, South-South commerce, national public health policies”, and that the EU enforcement policy is “problematic and can be misused, and has been misused, to create barriers to legitimate trade.”¹²⁹

The Open Letter raises some core issues that illuminate forum shifting as a strategy. The Open Letter protested the fact that the CII was hosting the Third International Conference on combating Counterfeiting and Piracy, August 19-20th in Dehli with the US Embassy and the Quality Brand Protection Committee (QBPC) of

Forward after the Cariforum EPA and the interim EPAs?” Center for International Environmental Law, April. <http://www.ciel.org>

¹²⁷ Biadgleng and Tellez, 2008: 25.

¹²⁸ “An Open Letter to the President of the Confederation of Indian Industry (CII) on the Third International Conference on Combatting Counterfeiting and Piracy, August 2009 [on file with author]; also reported on SPICY IP blog, August 18, 2009; Third World Network, August 18, 2009. Also see Jyoti Datta, 2009. “16 out of 17 Drug Consignment Seizures in the Dutch were from India”

<http://www.thehindubusinessline.com/2009/06/08/stories/2009060851700300.htm>;

Jonathan Lyn, “India Brazil raise EU drug Seizures issue at WTO”

<http://livemint.com/2009/02/04232721/India-Brazil-raise-EU-drug-se.html>; “Indian Minister of State for External Affairs Broaches Seizures of Generics at ECOSOC”

<http://www.keionline.org/blogs/2009/07/08/india-ecosoc-seizures/#more-2404>

¹²⁹ IP-Watch, 2009. “Possible Changes to TRIPS Ahead, But Debates over Drug Seizures” 6(7): 9.

China (representing MNCs operating in China). The protestors underscored the irony that the CII was doing the bidding of the very same “nodal governors” whom India had successfully “pushed back” in multilateral governance forums such as the World Health Organization¹³⁰ and the World Customs Organization.¹³¹ The Letter called upon the President of the CII to reject any attempts to bring a TRIPS-plus enforcement agenda into India and noted that, “by partnering at this vital stage with an MNC lobby group and a heeding to developed country governments, CII is not acting in furtherance of the legitimate public interests of Indian domestic industry and the Indian people.”¹³²

Conclusions

This overview holds implications for both policy and theory. In terms of policy it raises the question - is there any way to stop the IP rights holders’ juggernaut of ever higher levels of protection and enforcement? I present several possibilities below.

First, opponents could insist that IP enforcement proponents define terms such as trademark counterfeiting and copyright piracy quite explicitly. As Outterson and Ryan suggested, it is important to clarify terminology and explicitly distinguish between and create different sets of rules for counterfeited goods, pirated goods, grey goods, parallel imports, generic goods, and goods produced under TRIPS-compliant compulsory licenses.¹³³

It is also imperative to identify and target policymakers and industry representatives who are sympathetic to the A2K agenda. Some members of the US Congress have been supportive, and the European Parliament has injected some balance into EU policies. In terms of technical assistance both the UK and Sweden have offered approaches that focus on TRIPS-compliant flexibilities;¹³⁴ and institutionally the EU is set up to take into account consumer preferences (unlike the US).¹³⁵ The OECD is another potential venue to lobby against this IP enforcement agenda. Also, despite the USCC approach, many successful and powerful business firms have good reason to object to the IP enforcement agenda. Many information technology firms have been

¹³⁰ IP-Watch, 2009. “World Health Organization Poised to Drop Use of ‘Counterfeit’” 6(6): 4-5. India insisted that the issue of “counterfeit” medicines be dropped from WHO’s strategic plan; countries with substantial generic manufacturing capacity such as India and Brazil emphasize that “counterfeit” is a trademark issue that does not belong in WHO. These countries prefer terms such as “substandard”, “falsified”, or “poor quality drugs” so as not to inadvertently infuse health discussions with trademark protections.

¹³¹ As noted earlier, India had played a prominent role in pushing back to get SECURE killed.

¹³² Open Letter, op. cit.

¹³³ Outterson and Smith, 2006.

¹³⁴ Matthews and Munoz-Tellez, 2006.

¹³⁵ Haunss and Kohlmorgen, 2008.

lobbying Congress to roll back patent protection in their industry because of the so-called “patent troll” problem.¹³⁶

The hypocrisy of the campaign must be highlighted. For instance, the MPA always emphasizes its interest in preserving American jobs. Indeed, when you watch a Hollywood dvd you get to see the FBI anti-piracy notice, and sometimes the brief testimonials of caterers, stunt people, make up artists, and camera people claiming that downloading movies illegally costs them their jobs. MPA is always telling Congress how many *American* jobs counterfeiting costs Hollywood. Yet MPA does huge amount of filming in Canada due to lower production costs and generous subsidies; Hollywood unions have tried to sue MPAA for taking jobs out of the country.¹³⁷ As Lee points out, “in a 2000 report, the US Department of Commerce estimated that this ‘runaway production’ to Canada resulted in production losses of \$2 billion to the U.S. economy in 1999.”¹³⁸ Thus, despite the sometimes seemingly altruistic rhetoric, MPA “lobbies for the interests of its own members, even when doing so appears to go against the interests of the U.S. economy.”¹³⁹

Furthermore, films and music, and even apparel, do not fit in to the “danger” trope, even though US State Department ads about dangerous counterfeits (e.g. pills, exploding cell phones, faulty electrical cords, failing car brakes, and DVDs?!) include images of dvds.. Also, it is reasonable to assume that Microsoft would prefer that poor people use bootleg Microsoft software rather than Linux, in order to get them hooked on the Windows platform. Monsanto just might not mind the unauthorized transfer of GMO seeds across borders from Argentina to Brazil to circumvent biosafety regulations, because once the proverbial cat is out of the bag it is hard to go back.¹⁴⁰ Hypocrisy is also evident in the narrative that counterfeits cause injury.¹⁴¹ According to the USPTO-commissioned study on the subject, governments are obligated to protect public health. Yet IP enforcement agenda advocates actively oppose government efforts to protect public health when it comes to compulsory licensing and parallel imports, even when millions of patients are at risk of death.

Clearly, in this field, evidence-based empirical analysis is necessary to counter some of the more outlandish claims advanced in support of this enforcement agenda. The current ACTA push is based on highly suspect data. The IP enforcement agenda advocates’ use of data can be creative. For example, while BASCAP claims that

¹³⁶ Robert Thomas, 2004.

¹³⁷ Kevin Lee, 2008. “The Little State Department’: Hollywood and the MPAA’s Influence on Trade Relations” 28 *Northwestern Journal of International Law & Business* 371, p. 382-3.

¹³⁸ *Ibid*,

¹³⁹ *Ibid*.

¹⁴⁰ Peter Newell, 2009. “Technology, Food, Power: Governing GMOs in Argentina” in Doris Fuchs and Jennifer Clapp eds, *Corporations in Agrifood Governance* (Cambridge: the MIT Press) pp. 283-318

¹⁴¹ Forzley, 2003.

worldwide losses to counterfeiting and piracy amount to \$600 billion per year,¹⁴² \$250 billion in the U.S. alone, the more sober yet still supportive OECD estimates that worldwide trade in counterfeit and pirated goods is closer to \$200 billion per year.¹⁴³ The IIPA quoted one study as estimating lost tax revenue in the US to be \$2.6 billion in 2006.¹⁴⁴ Many IP enforcement agenda advocates rely on just one economist, who continues to produce reports that echo the ACTA lobbyists' narrative. Steve Siwek provides figures for IIPA, and Institute for Policy Innovation, RIAA, and MPAA with his "True Cost of Piracy" series.¹⁴⁵ Siwek has conducted over 11 studies for industry and also helped to formulate methodology for WIPO to calculate the copyright industries' role in all economies.¹⁴⁶ Figures provided by self-interested industry lobbyists can be inflated, by assuming, for example, that one may calculate lost revenue based on the differential between the full retail price of a good and the lower price of the "knockoff." Yet often those who buy the cheaper version could not afford to pay the full retail price and would not buy it if the knockoff were unavailable. Thus the industry-generated numbers are unreliable guides for policymaking. Finally while the danger rhetoric is sensational, a USPTO-commissioned study on injuries and counterfeit goods concluded that over 60% of counterfeit seizures have nothing to do with health or safety.¹⁴⁷ Independent studies must be conducted by economists who are not on industry's payroll and who will not be tempted or obligated to inflate numbers.

¹⁴² Based on WCO and Interpol figures;

<http://www.uscib.org/index.asp?DocumentID=3492>

¹⁴³ OECD, "The Economic Impact of Counterfeiting and Piracy" 2007.

¹⁴⁴ Executive Summary, Testimony of Eric Smith, International Intellectual Property Alliance before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, "International Piracy: the Challenges of Protecting Intellectual Property in the 21st Century", October 18, 2007, p. 1

<http://www.iipa.org>

¹⁴⁵ Steve Siwek, "The True Cost of Motion Picture Piracy to the U.S. Economy" September 2006. Institute for Policy Innovation, IPI Center for Technology and Freedom, Policy Report 186; "The True Cost of Sound Recording Piracy to the U.S. Economy" August 2007. Institute for Policy Innovation, Policy Report 188. "The True Cost of Copyright Industry Piracy to the U.S. Economy" October 2007. Institute for Policy Innovation, Policy Report 189. "Copyright Industries in the U.S. Economy: the 2006 Report" International Intellectual Property Alliance, November 2006. www.iipa.com. Also see "Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries" 2005, http://nbcumv.com/corporate/Engines_of_Growth.pdf For business software see, BSA and IDC, Fourth Annual Global Piracy Study, <http://w3.bsa.org/globalstudy/> (May 2007). The US Chamber of Commerce hosts a website: www.truecosts.org

¹⁴⁶ Eric Smith, response to USTR request for public comments on ACTA, March 21, 2008, pp. 2-3. <http://www.iipa.org>

¹⁴⁷ Michele Forzley, 2003. "Counterfeit Goods and the Public's Health and Safety" International Intellectual Property Institute. P. 32. www.iipi.org

Finally, it is important to emphasize that “enforcement” is not a one-sided concept. Enforcement means not only enforcing IP holders’ rights, but it also means enforcing balance, exceptions and limitations, fair use, civil rights, privacy rights, and antitrust (or competition policy).

Surveying the regime complex around intellectual property suggests that simpler and more tractable modes of analysis miss much of what is happening within and across diverse yet connected institutions. Analytic tools that are familiar and comfortable provide misleading and possibly dangerous guideposts to the contemporary intellectual property regime complex. At this point it is still unclear whether anybody “won” or “lost”. Rather this analysis stresses ongoing contestation as the central process of the politics of intellectual property. The field is wide open in terms of both policy and analysis, and that is what makes it so vital and exciting.