

# ESSAY

## THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA): TWO TALES OF A TREATY

*Charles R. McManis*\*

### TABLE OF CONTENTS

I. INTRODUCTION ..... 1235

II. TALE # 1: IP PIRACY, ORGANIZED  
CRIME, AND TERRORISM ..... 1239

III. TALE # 2: CRIMINALIZED FILE-SHARING  
AND LAPTOP BORDER SEARCHES ..... 1246

IV. THE DENOUEMENT OF THESE TWO TALES? ..... 1256

### I. INTRODUCTION

Over the past two years, through a coordinated series of public announcements<sup>1</sup> that seem to have been stimulated in part

---

\* Thomas & Karole Green Professor of Law and Director, Intellectual Property & Technology Law Program, Washington University School of Law. The Author gratefully acknowledges the research assistance of two Washington University law graduates, Jessica Mendez, J.D. 2009, whose research introduced the Author to ACTA, and Wan-Ling Cheng, IP L.L.M. 2009, whose research introduced the Author to the empirical literature on digital file-sharing.

1. See, e.g., Press Release, Office of the U.S. Trade Representative, The Office of U.S. Trade Representative Releases Summary of Anti-Counterfeiting Trade Agreement (ACTA) Negotiations (Apr. 6, 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/april/-office-us-trade-representative-releases-summary-an-0>. The actual summary is available on the U.S. Trade Representative's (USTR) website. OFFICE OF THE U.S. TRADE REPRESENTATIVE, ACTA: SUMMARY OF KEY ELEMENTS UNDER DISCUSSION (2009), [http://www.ustr.gov/webfm\\_send/1479](http://www.ustr.gov/webfm_send/1479) [hereinafter SUMMARY OF KEY ELEMENTS or

by previously leaked documents,<sup>2</sup> details have gradually come to light concerning negotiations over a proposed new Anti-Counterfeiting Trade Agreement (ACTA). According to the governments involved in these closed-door “plurilateral” trade negotiations, the purpose of ACTA is simply to help fight the proliferation of counterfeit and pirated goods in international trade.<sup>3</sup> From the outset, however, the negotiations have been embroiled in controversy, for at least four reasons. First, while the negotiations are being carried out behind closed doors, industry representatives are apparently being supplied with information that is not being disseminated to the public.<sup>4</sup> Second, the “plurilateral” nature of the negotiations has aroused

---

SUMMARY]. For a discussion of the coordinated nature of the release of this Summary, see *infra* note 55 and accompanying text.

2. See Discussion Paper on a Possible Anti-Counterfeiting Trade Agreement, <http://wikileaks.org/leak/acta-proposal-2007.pdf> (last visited Nov. 21, 2009) [hereinafter Discussion Paper]; WikiLeaks, Proposed US ACTA Multi-Lateral Intellectual Property Trade Agreement (2007), [http://wikileaks.org/wiki/Proposed\\_US\\_ACTA\\_plurilateral\\_intellectual\\_property\\_trade\\_agreement\\_%282007%29](http://wikileaks.org/wiki/Proposed_US_ACTA_plurilateral_intellectual_property_trade_agreement_%282007%29); Wikileaks, Classified US, Japan and EU ACTA Trade Agreement Drafts, [http://wikileaks.org/wiki/Classified\\_US%2C\\_Japan\\_and\\_EU\\_ACTA\\_trade\\_agreement\\_drafts%2C\\_2009](http://wikileaks.org/wiki/Classified_US%2C_Japan_and_EU_ACTA_trade_agreement_drafts%2C_2009) (last visited Nov. 21, 2009).

3. See SUMMARY OF KEY ELEMENTS, *supra* note 1. The USTR’s characterization of ACTA as a proposed “plurilateral” agreement seems primarily designed to make it clear that ACTA is neither a “multilateral” nor a “bilateral” nor a “regional” trade agreement, and is thus to be distinguished from: (1) existing multilateral trade agreements administered by the World Trade Organization (WTO), including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); (2) a raft of bilateral free trade agreements that have been negotiated between various trading partners subsequent to the establishment of the WTO; and (3) various regional free trade agreements such as the North American Free Trade Agreement (NAFTA) and those governing trade within the European Union.

By “counterfeit” the Summary of Key Elements apparently means mislabeled or otherwise “fake” goods, while “pirated” goods apparently means illicitly copied goods. Although these two categories overlap to some extent, and both connote bad faith misconduct, they are arguably distinguishable in the sense that counterfeit goods generally involve misuse of another’s trademark, while pirated goods generally involve infringement of another’s copyright. See Amarjit Singh, *Guarding Against Spurious and Counterfeit Products Through Effective Enforcement* 3, Paper Presented at the World Intellectual Property Organization Asia Sub-Regional Workshop (June 5–6, 2007), available at [http://www.wipo.int/edocs/mdocs/sme/en/wipo\\_smes\\_lhe\\_07/wipo\\_smes\\_lhe\\_07\\_www\\_81476.doc](http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_lhe_07/wipo_smes_lhe_07_www_81476.doc). Nowhere in the USTR’s Summary of Key Elements, however, are the terms “counterfeit” and “pirated” goods actually defined; nor is it clear that the proposed agreement will focus exclusively on counterfeit and pirated *physical* goods. See *infra* Part III (discussing the differences between the definitions of “counterfeit” and “pirated” good).

4. The leaked discussion paper, *supra* note 2, was reportedly provided to select lobbyists in the intellectual property industry, but not to public interest organizations concerned with the subject matter of the proposed treaty. See IP Justice, The Anti-Counterfeiting Trade Agreement (ACTA), <http://ipjustice.org/wp/campaigns/acta> (last visited Nov. 21, 2009); Posting of James Love, *Who Are the Cleared Advisors That Have Access to Secret ACTA Documents?*, to Knowledge Ecology International (Mar. 13, 2009, 14:44 EST), <http://www.keionline.org/blogs/2009/03/13/who-are-cleared-advisors>.

suspicious that the ACTA negotiations are but the latest example of “forum-shifting,” a well-documented tactic that is apparently being deployed as a part of a nodally coordinated effort on the part of intellectual property owners to ratchet up international standards for the protection of private intellectual property rights.<sup>5</sup> These procedural concerns about the conduct of the negotiations, in turn, are contributing to two further suspicions about the substantive purpose and scope of ACTA. The first suspicion is that ACTA may simply be an effort on the part of intellectual property owners to socialize the enforcement costs of their increasingly valuable private intellectual property rights by enhanced criminal and border enforcement proceedings and remedies.<sup>6</sup> The second suspicion—generated in part by a leaked negotiating document—is that the focus of these criminal and border enforcement provisions will not be limited to targeting commercial trade in counterfeit and pirated physical goods, but will also extend to “significant willful infringements without motivation for financial gain to such an extent as to prejudicially affect the copyright owner (e.g., Internet piracy).”<sup>7</sup> To the suspicious eye, this verbatim quote from the leaked document clearly seems to be referring to digital file-sharing—a controversial consumer phenomenon, to be sure, but quite distinct from the issue of commercial trade in counterfeit and pirated physical goods.<sup>8</sup>

A particularly jolting development in the effort by critics to secure more specifics concerning the ACTA negotiations occurred

---

5. Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners and Their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53, 62–74 (2004) (“[I]ntellectual property owners have sought to achieve the goal of compliance through the creation of an international enforcement pyramid that is nodally coordinated.”); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 14 (2004) (describing forum-shifting as a way to “alter the prevailing legal landscape”). In addition, “policy laundering” is the practice of disguising the origin of policy decisions, laws, or international decisions, including negotiating for terms in international treaties that might prove too politically unpopular to pass in national assemblies. Privacy International, *On International Policy Dynamics: Challenges for Civil Society* (Aug. 4, 2005), [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-180777](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-180777).

6. See Elec. Frontier Found., FOIA: Anti-Counterfeiting Trade Agreement (ACTA) (June 17, 2009), <http://www EFF.org/issues/acta>; Robin Gross, IP Justice, White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA) 4–5 (Mar. 25, 2008), available at [http://ipjustice.org/wp/wp-content/uploads/IPJustice\\_ACTA-white-paper-mar2008.pdf](http://ipjustice.org/wp/wp-content/uploads/IPJustice_ACTA-white-paper-mar2008.pdf). For an account of Electronic Frontier Foundation’s (EFF) ultimately futile attempt to obtain information about the ACTA negotiations through a lawsuit filed under the U.S. Freedom of Information Act, 5 U.S.C. § 552 (2006), see Elec. Frontier Found., *supra*.

7. See Discussion Paper, *supra* note 2, at 3.

8. See *infra* Part III (discussing the possibility that scope of the ACTA will include file-sharing provisions).

in March 2009, when, notwithstanding President Obama's campaign promises of greater transparency in U.S. government policymaking, the Office of the U.S. Trade Representative denied a Freedom of Information Act request for a copy of the ACTA discussion draft and related materials on the ground that they were "classified in the interest of national security."<sup>9</sup> While the invocation of national security may have been simply a ruse to camouflage and avoid exacerbating growing divisions among the negotiating parties,<sup>10</sup> it is nevertheless useful to take this national security claim at face value, as it provides a useful starting point for constructing an alternative narrative to explain what might be motivating the ACTA negotiations. Hence, the eponymous task of this Essay—namely to provide two alternative tales of the treaty, with a view to identifying and clarifying the various controversies currently surrounding the negotiations.

As Tale # 1 below will make clear, ACTA proponents have two powerful rebuttal arguments in response to criticisms that ACTA merely represents the latest chapter in an industry-instigated industrialized-world effort to impose ever higher standards of IP protection on a reluctant developing world. First, although ACTA is admittedly an industrialized-world initiative, a fluid, but generally increasing number of developing countries subsequently joined in the negotiations, and Brazil has apparently contacted one of the participants about joining the negotiations as well.<sup>11</sup> Second, while the participation of these developing countries may be window-dressing, as discrete tangible benefits may have been proffered by ACTA's original proponents to encourage such participation,<sup>12</sup> there are nevertheless ample reasons for developing countries, particularly

---

9. Grant Gross, *Obama Administration Says Treaty Text Is State Secret*, PCWORLD, Mar. 13, 2009, [http://www.pcworld.com/article/161234/obama\\_administration\\_says\\_treaty\\_text\\_is\\_state\\_secret.html](http://www.pcworld.com/article/161234/obama_administration_says_treaty_text_is_state_secret.html).

10. For a discussion of these growing divisions, see *infra* notes 89–90 and accompanying text.

11. See *EU ACTA Negotiator Confirms EU Wants Patent Provisions in ACTA*, 27 INSIDE U.S. TRADE 11, 12 (May 8, 2009) [hereinafter *EU Wants Patent Provisions in ACTA*] (reporting that Jordan, the United Arab Emirates (UAE), and Uruguay were involved in initial discussions but have dropped out); Michael Geist, ACTA Update: New Meetings, New Partners, *New Issues*, (June 30, 2009), <http://www.michaelgeist.ca/content/view/4092/408> (reporting that Brazil has approached one ACTA participant about joining the negotiations).

12. For example, the July 2009 ACTA negotiations were held in Morocco. Press Release, Office of the U.S. Trade Representative, Statement from USTR Spokeswoman Carol Guthrie on the Anti-Counterfeiting Trade Agreement (ACTA) (July 20, 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/july/statement-ustr-spokeswoman-carol-guthrie-anti-counte-0>. The December round of negotiations are reportedly scheduled for Mexico. Geist, *supra* note 11.

those that have become involved in the ACTA negotiations, to be concerned with international trade in counterfeit and pirated goods, as a mounting body of empirical evidence has linked trade in counterfeit and pirated goods with organized crime and terrorism.

## II. TALE # 1: IP PIRACY, ORGANIZED CRIME, AND TERRORISM

The starting point for this tale can be traced back at least to October 2000, when the General Assembly of INTERPOL, the world's largest international police organization, approved the addition of IP crime to the organization's official mandate.<sup>13</sup> Shortly thereafter, INTERPOL formed the Intellectual Property Action Group (subsequently renamed the Interpol IP Crime Action Group) as a public/private partnership to combat IP crime.<sup>14</sup> Today, financial and high-tech crime, including IP crime, is listed as one of INTERPOL's six priority crime areas.<sup>15</sup>

In 2005, by way of implementing its new mandate, INTERPOL, together with the World Customs Organization, the national police forces of three South American countries, and representatives from various pharmaceutical, recording, motion

---

13. INTERPOL, Intellectual Property (IP) Crime, <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Default.asp> (last visited Nov. 21, 2009). INTERPOL—the International Criminal Police Organization—is the second largest international organization after the United Nations and focuses on facilitating international police cooperation. See INTERPOL, About INTERPOL, <http://www.interpol.int/public/icpo/default.asp> (last visited Nov. 21, 2009). To maintain its political neutrality, INTERPOL's constitution limits its involvement to cross-border criminal investigations and forbids its involvement in investigations of political, military, religious, or racial crimes. See INTERPOL, ICPO-INTERPOL Constitution and General Regulations, <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenReg/constitution.asp> (last visited Nov. 21, 2009). INTERPOL has a somewhat checkered history, as it was established in Austria in 1923, but fell under the control of Nazi Germany prior to and during World War II, only to be revived by the victorious Allied Forces and subsequently headquartered in France. Mathieu Deflem, *The Logic of Nazification: The Case of the International Criminal Police Commission*, 43 INT'L J. COMP. SOC. 21, 21 (2002). In 2008, INTERPOL again became embroiled in controversy, when the President of INTERPOL, Jackie Selebi, National Commissioner of the South African Police Service, resigned and was later charged in South Africa on three counts of corruption and one of defeating the course of justice. Chris McGreal, *SA Police Chief Resigns as Interpol Leader as He Is Charged with Bribery*, GUARDIAN (London), Jan. 14, 2008, at 17.

14. INTELLECTUAL PROP. CRIMES ACTION GROUP, INTERPOL, INTELLECTUAL PROPERTY CRIMES: TRADEMARK COUNTERFEITING & COPYRIGHT PIRACY (2007), available at <http://www.interpol.int/Public/FinancialCrime/IntellectualProperty/Publications/IIPCAGBrochure.pdf>.

15. See INTERPOL Home Page, <http://www.interpol.int/default.asp> (last visited Nov. 21, 2009). The other five priority areas are: (1) drugs and criminal organizations; (2) fugitives; (3) public safety and terrorism; (4) trafficking in human beings; and (5) corruption. *Id.*

picture, and tobacco industry organizations, launched Operation Jupiter, which focused on the tri-border area of South America at the intersection of Argentina, Brazil, and Paraguay, where organized crime involvement in cross-border IP crime was said to represent a particularly challenging environment for law enforcement.<sup>16</sup> In the initial phase of this operation, counterfeit and pirated goods valued at approximately US\$15 million were seized, while three subsequent phases of the operation, conducted between 2006 and 2008 in this same tri-border region, netted counterfeit goods valued at US\$35 million, US\$121 million, and US\$132 million, respectively.<sup>17</sup> A common denominator in the first two phases of Operation Jupiter, which was expanded in Phase II to include Chile and Uruguay, was said to be that

foreign nationals and nationals of Middle Eastern and Asian countries were well represented in these criminal conspiracies. Analysis indicated that typically transnational organized criminals of Arab, Indian and Pakistani origin have a controlling influence in informatics. Typically transnational organized criminals of Chinese origin have a controlling influence over CD/DVD pirate manufacturing and distribution as well as sports clothes and luxury goods.<sup>18</sup>

Phase III of Operation Jupiter focused on this same tri-border area in South America, and in particular on the so-called "Ciudad del Este Piracy Cartel," which had been identified in Phase II as being directed by Lebanese nationals.<sup>19</sup> Phase III of the operation yielded 185 arrests, surpassing the previous phase by 43 percent.<sup>20</sup> In Argentina alone, Phase III yielded seizures of 1 million CDs and DVDs, 8.6 million film and music sleeve jackets, plus 273 burners, together with large amounts of counterfeit brand clothes and machinery for manufacturing the clothing.<sup>21</sup> Operations in Brazil not only detected criminal

---

16. See INTERPOL, Operation Jupiter 2004–2009, <http://www.interpol.int/public/FinancialCrime/IntellectualProperty/OperationJupiter/Default.asp> [hereinafter Operation Jupiter] (last visited Nov. 21, 2009).

17. *Id.*

18. *Id.*

19. *Id.*; see also GREGORY F. TREVERTON ET AL., RAND CORP., FILM PIRACY, ORGANIZED CRIME, AND TERRORISM 75–82 (2009), available at [http://www.rand.org/pubs/monographs/2009/RAND\\_MG742.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG742.pdf) (describing the connection between organized crime in the tri-border area and Lebanese terrorist organizations).

20. Operation Jupiter, *supra* note 16.

21. *Id.* The city of Ciudad del Este is the capital of the Alto Paraná Department of Paraguay, and is part of a triangle known as the Triple Frontera (Triple border), or Tríplice Fronteira in Portuguese. *The Americas: Pillars of the Community; Brazil's Arab*

organizations headed by Lebanese nationals involved in the illegal trade of computer equipment, but also “disrupted four organizations devoted to the smuggling of pesticides, cigarettes, tires and electronics,” and resulted in the seizure of one ton of counterfeit watches, as well as large quantities of marijuana, crack, weapons, and ammunition, all said to be directly related to IP crimes.<sup>22</sup> Operations in Paraguay resulted in “[s]eizures of 188,200 counterfeit CDs and DVDs, 2,733,700 sleeve jackets for their commercialization”—an important part of the production of which was managed by the Ciudad del Este Piracy Cartel—as well as 23,000 counterfeit units of medication for treating erectile dysfunction.<sup>23</sup> In Chile, 443 pieces of designer clothing manufactured in Argentina were seized, as well as 2,784 counterfeit books, thus demonstrating the regional nature of IP crime.<sup>24</sup> Finally, in Uruguay, three shipping containers of counterfeit goods (including brand clothing, watches, luxury accessories, and computer equipment) valued at US\$1.67 million were seized at the port of Montevideo, and other operations netted 23,400 ecstasy tablets, valued at US\$800,000.<sup>25</sup>

In Phase IV of Operation Jupiter, two additional countries—Bolivia and Peru—took part, undertaking some of the first enforcement operations of the kind in these two countries.<sup>26</sup> In this phase of Operation Jupiter, officials “carried out 299 coordinated enforcement operations resulting in 311 arrests and the recovery of a range of dangerous products including life-threatening fake medicines, counterfeit foodstuffs, electrical goods, and agrochemicals.”<sup>27</sup> In addition, over 34 kilograms of cocaine derivatives and almost 1,500 kilograms of marijuana were seized during the operation.<sup>28</sup> In Argentina, “[c]ustoms and police authorities seized a total of 176,242 units of fake designer clothing, plus 144 bundles with no indication of the number of items,” having an estimated value of over US\$8 million.<sup>29</sup> Police in Brazil seized 3 tons of counterfeit agrochemicals and disrupted

---

*Diaspora*, ECONOMIST, Nov. 3, 2001, at 64. It is linked to the Brazilian city of Foz do Iguaçu by the Friendship Bridge and is also within just a few miles of the border with Argentina. TREVERTON ET AL., *supra* note 19, app. B, at 49.

22. Operation Jupiter, *supra* note 16.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Press Release, INTERPOL, Counterfeiting Networks Across South America Targeted in INTERPOL and World Customs Organization Operations (Apr. 3, 2009) <http://www.interpol.int/Public/ICPO/PressReleases/PR2009/PR200932.asp>.

28. Operation Jupiter, *supra* note 16.

29. *Id.*

a clandestine agrochemicals factory, seized a shipment of 62 tons, including toys manufactured from hospital waste, and, in the biggest single operation in Sao Paulo State so far, deployed a task force of 1,500 public agents to seize goods valued at over US\$11 million.<sup>30</sup> In Chile, “police authorities seized processed meat products, which were a counterfeit version of a local brand and not manufactured to health or regulatory standards.”<sup>31</sup> In Paraguay, enforcement operations not only yielded 15,000 counterfeit video game DVDs, but also the seizure of a parcel containing 3,190 (apparently authentic) Cytotec abortion pills, 16,000 liters of the agrochemical Glifosato, 3,500 kilograms of Flutrianol, 1,000 kilograms of Imazytapyr, and 23,500 kilograms of Methomil, all of which had apparently been smuggled into the country.<sup>32</sup>

A recent report by the RAND Corporation states that the tri-border region of South America that has been the focus of INTERPOL’s Operation Jupiter has emerged as “the most important center for financing Islamic terrorism outside the Middle East.”<sup>33</sup> For example, the report notes that this region channels US\$20 million annually to Hezbollah, which included one US\$3.5 million transfer from a DVD pirate who received a personal thank you note from the head of Hezbollah.<sup>34</sup>

A second INTERPOL enforcement operation offers a particularly disturbing illustration of the impact that international trade in counterfeit goods can have on the developing world, as this operation specifically involved counterfeit medicines. In 2008, INTERPOL, in the first combined operation with the World Health Organization (WHO), and as a part of the WHO’s larger International Medical Products Anti-Counterfeiting Taskforce (IMPACT), launched Operation Mamba, targeting counterfeit pharmaceutical products in

---

30. *Id.*

31. *Id.*

32. *Id.*

33. TREVERTON ET AL., *supra* note 19, at 75 (quoting ANGEL RABASA ET AL., RAND CORP., *THE OUTER RINGS OF THE TERRORIST UNIVERSE* 153 (2006)). This same report identifies two other cases in which film piracy, organized crime, and terrorism have been linked—one involving the Irish Republican Army in Northern Ireland and the other involving the D-Company, an organized crime group that has been active for generations in India but was transformed into a terrorist organization when it carried out the 1993 “Black Friday” bombings in Mumbai that killed more than 257 people and injured hundreds more. *Id.* at 82–96, app. A, at 116; *see also* Press Release, RAND Corp., *Organized Crime Is Increasingly Active in Film Piracy; Three Cases Link Terrorists to Piracy Profits* (Mar. 3, 2009), <http://www.rand.org/news/press/2009/03/03>.

34. TREVERTON ET AL., *supra* note 19, at 77, 80; Press Release, *supra* note 33.

Tanzania and Uganda.<sup>35</sup> In Tanzania, Operation Mamba resulted in inspections of 191 locations, including pharmacies, warehouses, and illicit markets, and the seizure of over 100 types of products, including antimalarial, cardiac, antifungal, multivitamin, hormonal, and skin medicines.<sup>36</sup> In Uganda, 45 establishments were raided and a total of 38 shops and pharmacies were subsequently investigated for “operating illegal businesses without the necessary licenses and controls.”<sup>37</sup>

INTERPOL notes that counterfeit medical products “pose a major risk to public health and are becoming increasingly prevalent in all parts of the world, particularly in Africa.”<sup>38</sup> Similarly, a 2008 WHO brochure entitled “Counterfeit Drugs Kill!” notes that “[m]any countries in Africa and parts of Asia and Latin America have areas where more than 30% of the medicines on sale can be counterfeit” and that “[i]n many of the countries of the former Soviet Union the proportion of counterfeit medicines is above 20% of market value.”<sup>39</sup> This same brochure notes that medicines that are “purchased over the Internet from illegal sites that conceal their physical addresses are counterfeit in over 50% of cases.”<sup>40</sup> A European organization, established by the European Parliament, and called the Intergroup on Law Enforcement, Organized Crime, and Terrorism, likewise reports that, according to the WHO, 10% of medicines worldwide are counterfeit, and “[i]n some countries in Southeast Asia, this figure can be as high as 50%.”<sup>41</sup> According to Intergroup, the WHO believes that “counterfeit drug producers earn at least \$32 billion [annually],” which “may increase to \$75 billion by 2010” and that “[c]ounterfeit drugs kill more people and cause more harm than the trade in illegal narcotics.”<sup>42</sup>

Finally, a 2009 RAND Corporation report, entitled “Film Piracy, Organized Crime and Terrorism,” offers a cogent

---

35. See INTERPOL, Operation Mamba (IMPACT): Targeting Counterfeit Medicines in Tanzania and Uganda, <http://www.interpol.int/public/News/2008/mamba20081029.asp> [hereinafter Operation Mamba] (last visited Nov. 21, 2009). For more information on IMPACT, see IMPACT Home Page, <http://www.who.int/impact/en> (last visited Nov. 21, 2009).

36. Operation Mamba, *supra* note 35.

37. *Id.*

38. *Id.*

39. See INT'L MED. PROD. ANTI-COUNTERFEITING TASKFORCE, WORLD HEALTH ORG., COUNTERFEIT DRUGS KILL! 3 (2008), available at <http://www.who.int/impact/FinalBrochureWHA2008a.pdf>.

40. *Id.*

41. Intergroup on Law Enforcement, Organised Crime & Law Enforcement in Europe, <http://www.organisedcrime.info/index.php?mode=12&id=27> (last visited Nov. 21, 2009).

42. *Id.*

illustration of how international trade in pirated goods, like that in counterfeit medicines, can adversely impact developing countries.<sup>43</sup> Commentators describe the report as having established that “film piracy has become a key part of Russian organized crime’s illegal business portfolio, along with drugs, money laundering, extortion, and human smuggling.”<sup>44</sup> According to the report itself, the reason for organized crime’s embrace of film piracy is easy enough to understand, as the “profit margins (though not yet the total profits)” are much higher than those for illegal drugs, while the criminal penalties are relatively light by comparison to drug trafficking.<sup>45</sup> The report goes on to note that after an upsurge of violence in the 1990s upon the fall of the Soviet Union, as organized crime organizations scrambled to claim the fruits of privatization, Russian organized crime has reverted back to a pattern closer to that of the 1970s and 1980s, in which political and police corruption is used to create “protected spaces” for organized crime, free of outside interference.<sup>46</sup> It is thus no accident, as the report goes on to note, that Russia ranked 143 out of 179 countries on Transparency International’s 2007 Corruption Perceptions Index.<sup>47</sup>

To round out this tale of IP piracy, organized crime, and terrorism, it should also be noted that Dr. Moisés Naím, Editor in Chief of *Foreign Policy* magazine, published a book in 2005 entitled *Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy*, which documents the linkage between IP theft and socially destabilizing activities including terrorism, illegal arms trafficking, trafficking in human beings, and trade in illegal drugs.<sup>48</sup> According to Dr. Naím, the amounts of money involved are immense: The commercial losses due to these criminal networks is said to be US\$500 billion (as high as 5 to 10 percent of world trade), and growing *eight* times faster than legal trade.<sup>49</sup> He also notes that today’s criminal networks are not like cartels and mafia of the twentieth century, but are highly

---

43. See TREVERTON ET AL., *supra* note 19, at 6–7.

44. See Nikola Krastev, *Report Says Film Piracy, Organized Crime Intertwined in Russia*, RADIO FREE EUROPE/RADIO LIBERTY, Mar. 21, 2009, [http://www.rferl.org/content/Report\\_Says\\_Film\\_Piracy\\_Organized\\_Crime\\_Intertwined\\_In\\_Russia\\_/1514434.html](http://www.rferl.org/content/Report_Says_Film_Piracy_Organized_Crime_Intertwined_In_Russia_/1514434.html).

45. TREVERTON ET AL., *supra* note 19, at 28–29.

46. *Id.* at 98.

47. *Id.* at 99.

48. See MOISÉS NAÍM, *ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 217–20 (2005). Dr. Naím is a Venezuelan writer and columnist and the Editor in Chief of *Foreign Policy* magazine. Moisés Naím, [http://www.carnegieendowment.org/experts/index.cfm?fa=expert\\_view&expert\\_id=21](http://www.carnegieendowment.org/experts/index.cfm?fa=expert_view&expert_id=21) (last visited Nov. 21, 2009).

49. See NAÍM, *supra* note 48, at 112.

decentralized, horizontal, and fluid, just as terrorist networks are, and confirms that there is considerable crossover between the two.<sup>50</sup>

Thus, it is hardly surprising that developing countries might be as concerned over international trade in counterfeit and pirated goods as countries (and companies) in the industrialized world. While it is true that three of the developing countries said to have participated in the ACTA negotiations (namely Jordan, Mexico, and Morocco) have entered into free trade agreements with the United States,<sup>51</sup> and thus might have particularly strong incentives to support this U.S.-backed plurilateral trade initiative,<sup>52</sup> it is also noteworthy that the first two developing countries to join in the ACTA negotiations—Mexico and Morocco—each border on one of the world's two largest economic markets, and have become conduits for smuggling of all sorts from less developed parts of the world, with all of the attendant adverse consequences thereof, and thus might have their own autonomous reasons for wanting to combat international trade in counterfeit and pirated goods.<sup>53</sup> It is perhaps equally noteworthy that three of the four developing countries said to have been involved in the ACTA negotiations are moderate Muslim

---

50. *Id.* at 127, 226.

51. See Office of the U.S. Trade Representative, Free Trade Agreements, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (last visited Nov. 21, 2009); see also *EU Wants Patent Provisions in ACTA*, *supra* note 11, at 12 (reporting that Jordan has dropped out of the negotiations).

52. See Margot Kaminski, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT'L L. 241, 250 (2009).

53. For example, in Mexico, CD and video piracy are said to have become so rampant that although Mexico was the eighth largest music market in the world in the year 2000, by 2003 it had fallen out of the top ten. *Record 16 Million Blank CD-Rs Seized in Mexico*, ENFORCEMENT BULLETIN (Int'l Fed'n of the Phonographic Indus., London), Dec. 2004, at 11, <http://www.ifpi.org/content/library/enforcement-bulletin-25.pdf>. During that same three-year period some 3,500 independent video rental outlets had closed due to competition from pirated videos. INT'L INTELLECTUAL PROP. ALLIANCE, 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT: MEXICO (Feb. 17, 2009), available at <http://www.iipa.com/rbc/2009/2009SPEC301MEXICO.pdf>. Likewise, although in 2008, Mexico's video game industry was reported to be "exploding," and likely to be worth \$1 billion by the end of the decade, it too has been hampered by piracy, as 75% of games sold in Mexico are reportedly pirated. Press Release, Americas News Intelligence, Mexican Video Game Industry Nears \$1-Billion Mark (Dec. 6, 2007), <http://www.prlog.org/10040808-mexican-video-game-industry-nears-1-billion-mark.pdf>; Sarah Coleman & Nick Dyer-Witherford, *Playing on the Digital Commons: Collectivities, Capital, and Contestation in Videogame Culture*, 29 MEDIA, CULTURE, & SOC'Y 934, 938 (2007). The situation is similar in Morocco, as a 2005 report indicated that software, movie, and CD piracy was costing Morocco US\$200 million per year. Middle East News Information, Ninety-five Percent of Moroccan Music Products Affected by Piracy (June 2, 2005), <http://www.menareport.com/en/business/184415>.

countries with a track record of trying to combat IP piracy as a part of a larger economic development strategy.<sup>54</sup>

In short, Tale # 1 offers plausible support for the argument that ACTA is indeed responding to legitimate national and international security concerns about the growing link between trade in counterfeit and pirated goods on the one hand and organized crime and terrorism on the other. At the same time, as Tale # 2 below suggests, there are equally strong reasons to be concerned that the ACTA negotiations themselves could be hijacked by private industry representatives whose focus is not limited to combating commercial trade in counterfeit and pirated physical goods, but extends as well to combating the far more controversial phenomenon of digital file-sharing.

### III. TALE # 2: CRIMINALIZED FILE-SHARING AND LAPTOP BORDER SEARCHES

On April 6, 2009, in an obvious attempt to respond to growing criticisms of the secrecy surrounding the ACTA negotiations and growing suspicions as to ACTA's substantive purpose and scope, governments of a number of the participating countries released a detailed summary of the current state of the ACTA negotiations.<sup>55</sup> Far from quieting concerns over ACTA,

---

54. Press Release, Office of the U.S. Trade Representative, ACTA Partners on Recent ACTA Negotiations (Nov. 6, 2009), <http://www.ustr.gov/about-us/press-office/press-releases/2009/november/-office-us-trade-representative-releases-statement>; see *Moroccan Piracy Drops Against Global Trend*, MIP WEEK (Managing Intellectual Prop., London), Jul. 8, 2001, available at <http://www.managingip.com/Article/1327436/Moroccan-piracy-drops-against-global-trend.html> (noting that piracy in Morocco dropped 5% in 2000); see also AMEinfo.com, Arab World Responds to \$50bn IP Fraud 'Epidemic,' <http://www.ameinfo.com/148378.html> (reporting that although software piracy is rampant in the Arab world, the rate of business software piracy in the UAE is no greater than the global average of 35%, and the UAE is the only Arab country on a world list of the top 20 countries with the lowest piracy rates in 2006); Asim El Sheikh et al., *An Exploratory Study of Software Piracy in Jordan*, 23 ELEC. J. ON INFO. SYS. IN DEV. COUNTRIES 1, 2 (2006), available at <http://www.ejisdc.org/ojs2/index.php/ejisdc/article/viewFile/188/146> (reporting business software piracy rates in Jordan that were said to be comparable to those elsewhere in the Arab world, but also noting that Jordan's developing IT industry employs some 10,000 people and generate some US\$167 million in annual revenues, which has stimulated Jordan's government to adopt various IP measures in an effort to encourage foreign investment and promote growth in its fledgling software industry). However, Jordan and the UAE have reportedly dropped out of the negotiations. See *EU Wants Patent Provisions in ACTA*, *supra* note 11, at 12.

55. See Press Release, *supra* note 1 (announcing the release of the Summary of Key Elements in the United States). Identical versions of the Summary released on the same day can be found on government websites in Canada, the EU, Japan, New Zealand, and the United Kingdom. See Dep't of Foreign Affairs & Int'l Trade Can., The Anti-Counterfeiting Trade Agreement: Summary of Key Elements Under Discussion (Apr. 6, 2009), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect\\_property.aspx](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/intellect_property.aspx); Directorate of Trade for the EU, The Anti-Counterfeiting Trade Agreement

however, this Summary of Key Elements Under Discussion has only served to fuel those concerns, and understandably so.<sup>56</sup>

As an initial matter, the Summary of Key Elements makes no effort to define “counterfeiting” and “piracy,” even though both are exceedingly malleable rhetorical terms, as one person’s counterfeit may encompass another person’s legitimate generic medicine, and one person’s piracy may encompass file-sharing activities that may or may not constitute copyright infringement.<sup>57</sup> Counterfeit goods are arguably mislabelled goods—and thus implicate the law of trademarks and unfair competition—while pirated goods are illicitly copied goods—and thus implicate the law of copyrights and related rights.<sup>58</sup> Attacking the problem of counterfeiting and piracy without first defining the parameters of the problem to be addressed, however, creates a risk that some of the negotiating parties, or the private stakeholders for whom they speak, under the guise of combating one problem, such as trade in counterfeit or pirated goods, will attempt to combat another, more controversial problem, such as generic medicines or digital file-sharing<sup>59</sup>—a phenomenon not

---

Summary of Key Elements Under Discussion (Apr. 6, 2009), [http://trade.ec.europa.eu/doclib/docs/2009/april/tradoc\\_142745.pdf](http://trade.ec.europa.eu/doclib/docs/2009/april/tradoc_142745.pdf); Press Release, Ministry of Economy, Trade & Indus. of Japan, Anti-Counterfeiting Trade Agreement (ACTA) (Summary of Key Elements Under Discussion) (Apr. 7, 2009), [http://www.meti.go.jp/english/press/data/20090407\\_01.html](http://www.meti.go.jp/english/press/data/20090407_01.html); Press Release, N.Z. Ministry of Econ. Dev., The Anti-Counterfeiting Trade Agreement: Summary of Key Elements Under Discussion (Apr. 7, 2009), [http://www.med.govt.nz/upload/67481/883411\\_1-web.pdf](http://www.med.govt.nz/upload/67481/883411_1-web.pdf); Intellectual Property Office of the U.K., Anti-Counterfeiting Trade Agreement (ACTA) <http://www.ipo.gov.uk/pro-policy/pro-crime/pro-crime-acta.htm> (last visited Nov. 21, 2009).

56. See, e.g., *USTR Releases ACTA ‘Summary,’ Civil Society Wants More*, BRIDGES WKLY. TRADE NEWS DIG. (Int’l Ctr. for Trade & Sustainable Dev., Geneva, Switz.), Apr. 8, 2009, at 3–4, available at <http://ictsd.net/i/news/bridgesweekly/44809> (describing how concerns of public health groups and generic drug makers with the ACTA were not assuaged by the Summary of Key Elements); Posting of David Kravets, *Details Lacking in Counterfeiting Treaty Paper*, to Wired (Apr. 6, 2009, 16:15 EST), <http://www.wired.com/threatlevel/2009/04/details-lacking> (explaining that the released Summary of Key Elements did not relieve concerns that the ACTA would criminalize peer-to-peer file-sharing).

57. See SUMMARY OF KEY ELEMENTS, *supra* note 1; *WHO Executive Board Grapples with IP Issues*, BRIDGES WKLY. TRADE NEWS DIG. (Int’l Ctr. for Trade & Sustainable Dev., Geneva, Switz.), Jan. 28, 2009, at 3, available at <http://ictsd.net/downloads/bridgesweekly/bridgesweekly13-3.pdf> (illustrating the difficulty of defining counterfeiting, particularly in the context of prescription drugs).

58. See *supra* note 3. While in the United States the term “related rights” refers to such common law rights as the right of publicity, in civil law countries the term “related rights” is generally considered synonymous with “neighboring rights”—i.e., rights of performers, broadcasters, and producers of phonograms—which have no precise counterpart in U.S. copyright law. See INT’L BUREAU OF WIPO, BASIC NOTIONS OF COPYRIGHT AND RELATED RIGHTS, at ¶¶ 52–53, [http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic\\_notions.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/basic_notions.pdf) (last visited Nov. 21, 2009) (describing the nature of related rights).

59. See *infra* notes 83–87 and accompanying text (discussing specific examples of

entirely unknown to international intellectual property negotiations.<sup>60</sup>

Equally troubling is the particular wording of the Summary's apparent effort to quiet concerns raised by the previously leaked document. The leaked discussion paper indicated that ACTA would not be limited to targeting commercial trade in counterfeit and pirated physical goods but would also extend to "significant willful infringements without motivation for financial gain to such an extent as to prejudicially affect the copyright owner (e.g., Internet piracy)."<sup>61</sup> Rather than stating unequivocally that ACTA will focus solely on commercial trade in counterfeit and pirated physical goods, the Summary of Key Elements more ambiguously notes that ACTA's "intended focus is on counterfeiting and piracy activities that significantly affect commercial interests, rather than on the activities of ordinary citizens."<sup>62</sup> To the suspicious eye, this carefully crafted wording seems to amount to a tacit admission that ACTA will not be limited to combating commercial trade in counterfeit and pirated physical goods, but could extend to at least some types of digital file-sharing—namely file-sharing that significantly affects commercial interests of digital content providers.

The disclaimer of any intent to focus on the "activities of ordinary citizens" is further undercut by the subsequent acknowledgement in the Summary that one of the issues being discussed under the heading Criminal Enforcement is "clarifying the scale of infringement necessary to qualify for criminal sanctions in cases of trademark counterfeiting and copyright and

---

how ACTA could be brought to bear on both issues).

60. For instance, a discrepancy existed between the economic arguments used to justify the protection of database contents and the particular solution adopted in the EU Database Directive, Council Directive 96/9, arts. 7–8, 1996 O.J. (L 77) 20 (EC). Charles R. McManis, *Database Protection in the Digital Information Age*, 7 ROGER WILLIAMS U. L. REV. 7, 33 (2001). Although the main reason given for the decision to create a *sui generis* property right in the contents of databases was "to prevent the potential damage caused by the slavish copying [of data] by competitors; the 'economic case for the creation of a right to prevent extraction and reutilization of unoriginal content by users [in general, noncompetitors as well as competitors] has never been satisfactorily explained.'" *Id.* (quoting Mark Powell, *The European Union's Database Directive: An International Antidote of the Side Effects of Feist?*, 20 FORDHAM INT'L L.J. 1215, 1225 (1997)); see also *supra* note 5 (discussing "policy laundering," which is the practice of disguising the origin of policy decisions, laws or international decisions, including negotiating for terms in international treaties that might prove too politically unpopular to pass in national assemblies). The phenomenon of policy laundering was said to have previously occurred in the negotiation of the WIPO's Copyright Treaty and Performances and Phonograms Treaty in 1996. Russell McOrmand, *Copyright Consultations*, Aug. 5, 2009, <http://www.ic.gc.ca/eic/site/008.nsf/eng/00015.html>.

61. Discussion Paper, *supra* note 2, at 3.

62. SUMMARY OF KEY ELEMENTS, *supra* note 1.

related rights piracy.”<sup>63</sup> As we shall see, the available empirical evidence to date strongly suggests that downloading digital content from unauthorized sources is a widespread and growing global phenomenon among ordinary citizens and—whatever may be its net social welfare effects in the short and long run—is clearly affecting the commercial interests of digital content providers.<sup>64</sup>

The disclaimer concerning “activities of ordinary citizens” rings particularly hollow when considered in light of two other statements in the Summary of Key Elements. The first of these is to be found in the sections identifying issues being addressed with respect to Civil Enforcement and Border Measures.<sup>65</sup> In both sections, the Summary acknowledges that one issue under discussion is which intellectual property rights would be covered by the measures under consideration.<sup>66</sup> If commercial trade in counterfeit and pirated goods were the sole focus of ACTA, the answer to that question would be obvious. The relevant intellectual property rights would be those created by the law of *trademarks*—and the associated law of unfair competition—and *copyright and related rights* as these two bodies of law collectively comprehend all activities that would fall within the conventional meaning of the terms “counterfeit” (misabeled) and “pirated” (illicitly copied) goods.<sup>67</sup> If, on the other hand, the civil enforcement and border measures mandated by ACTA are drafted so as to extend to patent-protected subject matter, ACTA’s reach will effectively extend to goods that are neither mislabeled nor illicitly copied, such as generic drugs unprotected by patents where manufactured but infringing where imported or trans-shipped.<sup>68</sup> The fact that the negotiating parties are even considering what intellectual property rights other than trademarks and copyrights might be covered by the civil enforcement and border measures mandated by ACTA again suggests that the ACTA negotiations range well beyond concerns over trade in counterfeit and pirated goods.

---

63. *Id.*

64. *See infra* notes 95–100 and accompanying text (discussing the short and long term net social welfare effects of digital file sharing).

65. SUMMARY OF KEY ELEMENTS, *supra* note 1.

66. *Id.*

67. *See supra* note 3 (discussing the meaning of “counterfeit” and “pirated” goods and noting that the terms are not defined in the Summary of Key Elements).

68. *See infra* note 88 and accompanying text (explaining that such drugs are not necessarily counterfeited and that border measures may actually be harmful in this context).

A second statement in the Summary of Key Elements that does ostensibly offer reassurance that ACTA will not focus on the activities of ordinary citizens is to be found in the section on Border Measures, which indicates that one element under discussion is “a de minimis exception that could permit travelers to bring in goods for personal use.”<sup>69</sup> As it turns out, however, that reassurance is more apparent than real, at least when considered in light of statements made in the course of an April 6, 2009 briefing conducted by Canadian government officials at the time of the Canadian government’s release of the Summary of Key Elements. During this briefing, it became clear that a “big fight” is expected on proposals for a de minimis exception.<sup>70</sup>

Indeed, this same Canadian government briefing provided a bonanza of other previously undisclosed information about the ACTA negotiations, thus highlighting how little the U.S. Government has been willing to disclose.<sup>71</sup> While the Office of the U.S. Trade Representative remains tight-lipped about the ACTA negotiations and was content to limit its comments on the Summary of Key Elements to a brief accompanying press release,<sup>72</sup> the Canadian Government appears to have adopted a much more open approach to the ACTA negotiations.

According to blogger Michael Geist, who is a law professor at the University of Ottawa where he holds the Canada Research Chair in Internet and E-commerce Law, and who apparently attended the briefing:

The meeting started with a bang as Don Stephenson, an Assistant Deputy Minister at DFAIT [the Department of Foreign Affairs and International Trade], noted the two sources of ACTA. One was obviously counterfeiting. The other was the stalemate at the World Intellectual Property Organization. With the emergence of the Development Agenda, WIPO now finds itself torn between different views of intellectual property. Canadian officials were clear that [it was the] frustration with WIPO in developing further international IP standards that has led to an attempt to

---

69. SUMMARY OF KEY ELEMENTS, *supra* note 1.

70. Michael Geist, Canada’s ACTA Briefing, Part Five: The Fight over a De Minimis Exception (Apr. 6, 2009), <http://www.michaelgeist.ca/content/view/3834/99999> (describing the controversy over the inclusion of a de minimis exception in ACTA).

71. See Dep’t of Foreign Affairs & Int’l Trade Can., Summary of Discussions: ACTA Roundtable Consultation (Apr. 6, 2009), [http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/discussion\\_summary-resume.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/discussion_summary-resume.aspx?lang=eng) (summarizing the briefing of a variety of interests groups on Canada’s role in the ACTA negotiations).

72. See Press Release, *supra* note 1 (providing general background information about the ACTA negotiations and stating that the summary has been released and is being shared with stakeholders).

2009]

## TWO TALES OF A TREATY

1251

establish a “plurilateral” treaty rather than the multilateral efforts at WIPO.<sup>73</sup>

Another article describes a similar briefing provided by the negotiators for the European Commission’s (E.C.) trade directorate, who were said to be “very open” in answering questions about the reason for a plurilateral agreement instead of a multilateral agreement, such as the WTO’s TRIPS Agreement or the agreements administered by the WIPO.<sup>74</sup> “ACTA is very much about enforcement,” one of the negotiators is quoted as saying.<sup>75</sup> “Speaking on enforcement in WTO, not to talk about WIPO, is extremely difficult.”<sup>76</sup> There was said to be no intention to duplicate TRIPS; rather, “we want to go beyond it,” the negotiator said, adding, “TRIPS is the floor, not the ceiling.”<sup>77</sup> These observations by Canadian and E.C. officials lend considerable weight to the concern that the ACTA negotiations might indeed simply represent the most ambitious effort to date on the part of intellectual property owners to engage in the tactic of forum-shifting, as a part of a larger strategy to ratchet up international protection for private intellectual property rights.<sup>78</sup>

The Canadian briefing also apparently included a PowerPoint presentation (later posted online), which was said to have “effectively confirmed the substance of many of the leaks online.”<sup>79</sup> Canadian officials were also said to confirm that they favor “a more transparent approach to ACTA” and that “there are ongoing discussions among negotiating partners about how to address transparency concerns.”<sup>80</sup> But these officials also apparently “acknowledged that there is still disagreement on the

---

73. Michael Geist, Canada’s ACTA Briefing, Part One: ACTA Is a Response to WIPO Gridlock (Apr. 6, 2009), <http://www.michaelgeist.ca/content/view/3830/99999>.

74. Monika Ermert, *European Commission on ACTA: TRIPS Is Floor Not Ceiling*, INTELL. PROP. WATCH, Apr. 22, 2009, <http://www.ip-watch.org/weblog/2009/04/22/european-commission-on-acta-trips-is-floor-not-ceiling>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See supra* note 5 and accompanying text (discussing policy laundering and nodally coordinated enforcement pyramids as a means to protect private intellectual property rights).

79. *See* Michael Geist, Canada’s ACTA Briefing, Part Two: The Treaty Provisions, (Apr. 6, 2009), <http://www.michaelgeist.ca/content/view/3831/99999> (noting the substantive points covered in the briefing). The ACTA PowerPoint used for the presentation is available online. Douglas George, Intellectual Prop., Info. & Tech. Trade Policy Div., Presentation at the Roundtable ACTA Consultation (Apr. 6, 2009), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ACTAPresentation-eng.pdf>.

80. Michael Geist, Canada’s ACTA Briefing, Part Three: The Official Summary Document (Apr. 6, 2009), <http://www.michaelgeist.ca/content/view/3832/99999>.

transparency issue, with some countries favouring release of the draft text sooner rather than later, while others indicat[e] that they typically keep everything secret until completion.”<sup>81</sup> One possibility under consideration, the Canadian officials were said to have noted, was “releasing the draft with all suggested changes without attribution to the particular delegation.”<sup>82</sup>

According to Professor Geist, one of the most interesting points made during the ACTA briefing concerned “the possibility of including a *de minimis* [sic] exception within the Border Measures chapter [of ACTA].”<sup>83</sup> Such an exception, as he notes, is presumably designed to ensure that tougher border measures will not result in iPods being searched by border guards, for instance—one of the most common concerns raised about ACTA and one that the Canadian government’s PowerPoint presentation took pains to refute.<sup>84</sup> Indeed, the Canadian officials were said to have indicated that both they and a number of other participants had put forward *de minimis* proposals.<sup>85</sup> The Summary of Key Elements document itself acknowledges that one of the elements under discussion with respect to border measures includes a “*de minimis* exception that could permit travelers to bring in goods for personal use.”<sup>86</sup> On the other hand, it was observed that there will “be a big fight over this provision, with some groups concerned that it would send a signal that purchasing counterfeit products for personal use is acceptable or that it could lead to the importation of counterfeit medicines.”<sup>87</sup> As we have already seen, however, not every generic medicine infringing patents in the country of importation or transshipment is necessarily a counterfeit or pirated medicine.<sup>88</sup> Thus,

---

81. *Id.*

82. *Id.*

83. Geist, *supra* note 70.

84. See George, *supra* note 79, slide 7 (“ACTA is NOT about . . . [s]eizing portable music players and laptops at the border.”).

85. Geist, *supra* note 70.

86. SUMMARY OF KEY ELEMENTS, *supra* note 1.

87. Geist, *supra* note 70.

88. For instance, the EU “has come under fire for seizures by Dutch customs authorities of drugs made outside of patent in India that were headed to South American countries but routed through the Netherlands, where the drugs enjoy patent protection.” *EU Wants Patent Provisions in ACTA*, *supra* note 11, at 11; see also Third World Network, *Developing Countries Attack Dutch Seizure of Generic Medicines*, Feb. 9, 2009, <http://www.twinside.org.sg/title2/wto.info/2009/twninfo20090203.htm> (providing a more detailed discussion of the Dutch drug seizure).

Critics of ACTA are said to fear that “ACTA would replicate this scenario in other countries.” *EU Wants Patent Provisions in ACTA*, *supra* note 11, at 11. The Summary of Key Elements acknowledges that one issue under discussion regarding border measures includes “whether border measures should only apply to importations or should equally

to the suspicious eye, this disagreement over whether to insert a *de minimis* exception in ACTA's provisions on border measures seems to underscore the plausibility of concerns that ACTA could indeed be implemented in such a way as to result in the seizure of generic drugs, or for that matter searches of portable music players or laptops, at the border.

The disagreement brewing over the *de minimis* exception is apparently but one of a number of issues that are currently dividing the negotiating parties and slowing the ACTA negotiations. Professor Geist provides a summary of a recent article in which Pedro Velasco Martins, an EU official involved in the ACTA negotiations, identified several areas of disagreement, including disagreements over potential Internet provisions.<sup>89</sup> These provisions are said to be controversial because "they may involve liability for Internet service providers that host Internet copyright pirates" or could "involve requirements that these providers monitor usage by private citizens, [which] could violate EU privacy directives."<sup>90</sup> An equally important reason why attempting to extend ACTA's reach to Internet activities should be considered controversial, however, is because it diverts

---

apply to the export and the transit of goods." SUMMARY OF KEY ELEMENTS, *supra* note 1.

89. *EU Wants Patent Provisions in ACTA*, *supra* note 11, at 11. Professor Geist summarizes the article by identifying the following areas of disagreement:

1. **The scope of ACTA coverage.** The Europeans would like to extend ACTA to patents. Canadian officials are known to want to limit it to copyright and trademark.
2. **Anti-camcording provisions.** The Europeans are not supportive of a specific anti-camcording provision [prohibiting the recording of films in movie theaters using hand-held devices]. The U.S. obviously is and pressured Canada to enact such a provision in 2007.
3. **Dispute Resolution.** The Europeans prefer a "peer review" approach to review compliance. Other countries are known to support a judicial process complete with penalties for non-compliance.
4. **Internet provisions.** The Europeans are not prepared to go beyond existing EU law of any Internet provisions.

Michael Geist, Divisions Between US and EU Begin to Appear Over ACTA, (May 18, 2009), <http://www.michaelgeist.ca/content/view/3979/99999>. The anti-camcording provision is alluded to in the Summary of Key Elements, which notes that criminal enforcement issues being discussed include "criminal procedures and penalties . . . of camcording motion pictures or other audiovisual works." SUMMARY OF KEY ELEMENTS, *supra* note 1. The Internet provisions are contained in a separate section, entitled Intellectual Property Rights Enforcement in the Digital Environment, which notes that one issue under discussion is "the possible role and responsibilities of internet service providers in deterring copyright and related rights piracy over the Internet." *Id.* By contrast, the Summary of Key Elements makes no specific reference to issues regarding dispute resolution, other than to indicate that a chapter, entitled Institutional Arrangements, will deal with "questions related to the implementation of the agreement." *Id.*

90. *EU Wants Patent Provisions in ACTA*, *supra* note 11, at 12.

attention from ACTA's primary focus on combating trade in counterfeit and pirated physical goods, and embroils the ACTA negotiations in the far more controversial and separate issue of digital file-sharing.

While the digital content industries—and particularly the music industry—would no doubt like to convince the ACTA negotiating parties and the public at large that digital file-sharing constitutes as much of a threat to digital content providers as trade in counterfeit and pirated goods does to intellectual property owners as a whole, the empirical evidence on that point is in fact decidedly mixed, as a recently released report of a comprehensive study commissioned by the Dutch government demonstrates. This report, dated February 19, 2009, and entitled *Ups and Downs: Economic and Cultural Effects of File Sharing on Music, Film and Games*, concludes that “the economic implications of file sharing for welfare in the Netherlands are strongly positive in the short and long terms.”<sup>91</sup> The report found that file-sharing “provides consumers with access to a broad range of cultural products, which typically raises welfare,” even though “the practice is believed to result in a decline in sales of CDs, DVDs and games.”<sup>92</sup> The report goes on to note that “[d]etermining the impact of unlicensed downloading on the purchase of paid content is a tricky exercise,” as one track of music downloaded “does not imply one less track sold.”<sup>93</sup> The study explains that many people download music tracks to get to know new music (sampling) and eventually buy the CD if they like it.<sup>94</sup>

The report notes that “to the extent that file sharing results in a decline in sales (*substitution*), [it entails] a transfer of welfare from operators/producers to consumers,” who otherwise lack purchasing power (that is, lack the collective power to influence consumer prices, absent the ability to download from unauthorized sources), with no net welfare effect.<sup>95</sup> The reason for this lack of purchasing power is that the music industry, as currently organized, arguably constitutes a functional oligopoly.<sup>96</sup>

---

91. ANNELIES HUYGEN ET AL., MINISTRIES OF EDUC., CULTURE & SCI., ECON. AFFAIRS & JUSTICE, *UPS AND DOWNS: ECONOMIC AND CULTURAL EFFECTS OF FILE SHARING ON MUSIC, FILM, AND GAMES 3* (Willemien Kneppelhout et al., trans. 2009), available at [http://www.ivir.nl/publicaties/vaneijk/Ups\\_And\\_Downs\\_authorized\\_translation.pdf](http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf) (providing an authorized English translation of the report).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 120.

96. See Tung Q. Nguyen-Khac, *The Music Industry in Dilemma: How New*

For that reason, unauthorized music downloading might be serving to encourage innovation and new business models in the music industry. Indeed, it already seems to be doing just that, as evidenced by the runaway success of Apple's iPod and the associated iTunes online music store.<sup>97</sup>

In addition to presenting its own empirical findings, the consortium of organizations involved in producing the Dutch report on the economic and cultural effects of file-sharing on music, films, and games, also devotes a chapter to evaluating virtually all peer-reviewed academic empirical studies investigating the relationship between downloading and music purchasing, concluding that the results of these studies "vary widely, ranging from positive to neutral to negative."<sup>98</sup> The report also notes that these studies "appear to be methodologically complex and . . . criticism[s] can be raised about many of them."<sup>99</sup> A potential problem with many of the studies is that they focus entirely on the music industry, whereas the Dutch study itself offers a comprehensive examination of the impact of digital file-sharing on the entertainment industry as a whole.<sup>100</sup> The report's overall conclusion is that music file-sharing has had "only a moderate effect on physical audio format sales,"<sup>101</sup> as a variety of other factors appear to have contributed to the downturn in CD sales since the year 2000, including the inevitable end of consumer replacement of obsolete LPs and cassettes (during which the music industry had reaped windfall profits from selling essentially the same music twice to the same consumer), competition from online distribution of music, and—perhaps most importantly—competition with other forms of hand-held entertainment products as well, for example, video games and mobile phones.<sup>102</sup> Indeed, one of the most important insights offered by the Dutch study is that, "[w]hereas the size of the

---

Technologies Can Turn an Industry Upside Down (Aug. 2003) (unpublished manuscript) (on file with Houston Law Review).

97. Since 2004, Apple has dominated digital music sales, both in the United States and worldwide. See HUYGEN ET AL., *supra* note 91, at 20. Competition from Apple's iTunes music store and other online distributors has contributed to the decline of CD sales. See *infra* note 102 and accompanying text.

98. HUYGEN ET AL., *supra* note 91, at 83.

99. *Id.* at 98.

100. *See id.* at 83–102.

101. *Id.* at 83, 102.

102. *Id.* at 93; accord Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 39 (2007) (citing declining patterns of consumer replacement, changing distribution methods, and substitution of music with other forms of entertainment as all possible reasons for declining CD sales).

entertainment market as a whole is relatively constant, the share of music is declining gradually and the share of games is showing explosive growth.”<sup>103</sup>

The study’s overall conclusion about the appropriate policy response to digital file-sharing has particular salience for the ongoing ACTA negotiations: “Don’t ‘criminalise’ individual end users—educate them.”<sup>104</sup>

#### IV. THE DENOUEMENT OF THESE TWO TALES?

On July 14, 2009, a coalition of leading library, civil rights, and technology companies in the United States sent a letter to the U.S. Trade Representative (USTR), urging: (1) that the Internet-specific provisions of ACTA be deleted; (2) that the USTR make negotiating documents publicly available; and (3) that the USTR “[e]stablish advisory committees to represent Internet and civil society constituencies” in the negotiations.<sup>105</sup> According to this letter, the USTR staff has “acknowledge[d] that [the Internet issues] are some of the most controversial and complex in the ACTA negotiations.”<sup>106</sup> The letter goes on to note that these Internet issues “differ significantly from those facing other industry sectors,” and that “cleared advisors with expertise in the Internet industry would be able to provide [the] USTR with information and a perspective that it is not presently receiving.”<sup>107</sup>

Given the two tales just told, the foregoing suggestions appear eminently sensible and represent an appropriate denouement to both tales. Combating international trade in counterfeit and pirated goods is a far too urgent international trade concern to be diverted or delayed by tangential debates over the more controversial and quite distinct question of digital file-sharing. Digital file-sharing, in turn, is a far too complex phenomenon to be dealt with under the misleading banner of combating trade in counterfeit and pirated goods. Finally, evidence of the entanglement of the two issues in the ACTA negotiations serves as its own cautionary tale concerning the virtues of promoting a greater degree of transparency and public participation in these negotiations.

---

103. HUYGEN ET AL., *supra* note 91, at 6.

104. *Id.* at 122.

105. See Letter from the Am. Ass’n of Law Libraries et al., to Ron Kirk, U.S. Trade Rep. Ambassador (July 14, 2009), available at <http://cdt.org/copyright/LettertoAmbassadorKirkJuly142009.pdf>.

106. *Id.*

107. *Id.*