

IS IP LAW MODERNIZATION POSSIBLE?
 ASSESSING APPROACHES IN ACTA, SOPA, AND BILL C-11

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I. INTRODUCTION

On January 18, 2012, visitors to the internet's sixth most-viewed webpage, Wikipedia.org,¹ found themselves unable to access the site.² Instead, users found a gray page asking them to "Imagine a World Without Free Knowledge"—the feared result of proposed U.S. legislation called the Stop Online Piracy Act (SOPA).³ SOPA, Wikipedia explained, "could fatally damage the free and open internet," including the online encyclopedia.⁴ Wikipedia called for Americans to fight the proposed legislation and to contact their congressional representatives in opposition.⁵

Similar debates replayed a few months later. Countries in Europe faced mass protests against the Anti-Counterfeiting Trade Agreement (ACTA, the treaty), an international agreement addressing problems similar to those addressed in SOPA.⁶ Tens of thousands of protestors demonstrated throughout Germany,⁷ leaders in Slovenia and Romania denounced the treaty, and Polish lawmakers donned Guy Fawkes masks to illustrate its oppressive potential.⁸

What kind of legislation could produce such strong responses?

In an increasingly digital age, countries face the difficult and nuanced task of regulating evolving information-sharing platforms. New technologies pose challenges for lawmakers, who must hold varying interests in balance: the need for national protection and security; the prevention of piracy and copyright violations; and maintaining a respect for freedoms of speech and information exchange.

Although many countries have laws in place to regulate and combat piracy, these regulations vary. The variance affects many in industries

¹ *Statistics Summary for Wikipedia.org*, Alexa.com, <http://www.alexa.com/siteinfo/wikipedia.org?range=5y&size=large&y=t> (last visited Sept. 5, 2013).

² Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES (Jan. 17, 2012), <http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *ACTA Up: Protests Across Europe May Kill An Anti-Piracy Treaty*, ECONOMIST, Feb. 11, 2012, <http://www.economist.com/node/21547235>.

⁷ Michael Steininger, *More Than 30,000 Germans Turn Out Against Anti-Piracy Treaty ACTA*, CHRISTIAN SCI. MONITOR (Feb. 13, 2012), <http://www.csmonitor.com/World/Europe/2012/0213/More-than-30-000-Germans-turn-out-against-anti-piracy-treaty-ACTA>. Estimates ranged from 30,000 to 100,000 demonstrators.

⁸ *ACTA Up*, *supra* note 6.

affected by piracy, as they cannot be sure how or to what extent their investments and products will be protected internationally. As technological capacities expand and consumers' use of both legitimate and pirated content increases, so do concerns for dealing with the piracy problem on an international level. Some consensus has been reached in recent years, laying foundations for future agreements. However, the nature of these agreements have been the subject of intense debate.

Part II addresses problems facing intellectual property (IP) law in the modern context and some of the international efforts to combat these problems. Part III examines three attempts to initiate new IP law: the international Anti-Counterfeiting Trade Agreement; the United States' Stop Online Piracy Act; and Canada's Bill C-11; and the assesses the formation, strengths, and criticism of each agreement. I offer my analysis in Part IV, which identifies problems that have plagued efforts to create workable IP law and suggests both how to continue the conversation and the substance to include in any legislation.

II. INTELLECTUAL PROPERTY INFRINGEMENT IN THE TWENTY-FIRST CENTURY

First, it is important to establish what piracy entails. An online bulletin published by the United Nations Educational, Scientific and Cultural Organization (UNESCO) defines piracy as “manufacturing unauthorised copies . . . of protected material” for sale.⁹ This definition includes making “unauthorised recording[s] of a live performance” (bootlegging) and selling a fake version of an item as genuine (counterfeiting).¹⁰ The modern understanding of piracy focuses on this act of reproduction—an offender is liable just for copying the protected material, regardless of whether or not they intend to profit from the copy.¹¹ However, a definition of “trafficking in illicit goods” from the International Criminal Police Organization (INTERPOL) does include smuggling legitimate products or selling them on the black market.¹²

⁹ Darrell Panethiere, United Nations Educational, Scientific and Cultural Organization, *The Persistence of Piracy: The Consequences For Creativity, For Culture, and For Sustainable Development 2* (July–Sept. 2005), available at http://portal.unesco.org/culture/en/files/28696/11513329261panethiere_en.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² INTERPOL, *Trafficking in Illicit Goods*, available at <http://www.interpol.int/Crime-area/Trafficking-in-illicit-goods/Trafficking-in-illicit-goods>.

We may hear about ‘pirated products’ and think simply of illegally reproduced DVDs, but problems of piracy reach into almost all economic sectors. INTERPOL does target electrical goods, like computer equipment and DVDs.¹³ However, among “imitation products,” INTERPOL also lists “fake and substandard” foods and drinks and personal care products.¹⁴ The food industry is plagued by foods improperly marketed as organic products, which investigators speculate have constituted 2% of the organic market since 2007. Examples of items seized include substandard olive oil and wine, fake tomato sauce, counterfeit cheese, and candy bars.¹⁵ Among personal care products, counterfeit medications are of particular concern. INTERPOL has confiscated counterfeit medicines and pharmaceutical products such as “antimalarial, cardiac, antifungal, multivitamin, hormonal, and skin medicines.”¹⁶ Counterfeit pesticides and agrochemicals are also traded, as are drugs like marijuana, ecstasy, and cocaine. Finally, other pirated consumer goods include brand clothing, accessories and other fashion items, weapons and ammunition, and even toys.¹⁷ Piracy is not limited to the digital or electronic sector but affects a number of industries.

Dealing in counterfeit goods is a lucrative enterprise: a 2007 study by the Organisation for Economic Co-operation and Development found that trade in “counterfeit and pirated products” cost as much as 200 billion USD in 2005—not including products produced and consumed domestically or those distributed over the internet.¹⁸ One estimate places commercial losses from the activities of these criminal networks as high as 500 billion USD.¹⁹ A report from the RAND Corporation suggests the problem is geographically widespread, from countries of the former Soviet Union to Morocco to Mexico.²⁰

INTERPOL recognized the international scope of IP infringement problems as early as 2000, when the organization added IP crime to its

¹³ Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 Hous. L. Rev. 1235, 1239–42 (2009).

¹⁴ INTERPOL Intellectual Property Rights Programme: IPR News, Spring 2012, available at <http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods/Publications-and-resources>.

¹⁵ *Trafficking in Illicit Goods*, *supra* note 12.

¹⁶ McManis, *supra* note 13, at 1243.

¹⁷ *Id.* at 1239–42.

¹⁸ Organisation for Economic Co-operation and Development, *The Economic Impact of Counterfeiting and Piracy: Executive Summary*, 4 (2007), available at <http://www.oecd.org/industry/industryandglobalisation/38707619.pdf>.

¹⁹ McManis, *supra* note 13, at 1244.

²⁰ *Id.* at 1244–45.

official mandate.²¹ The group has since initiated operations worldwide, many of them focused on developing countries, to combat the movement and sale of illegally manufactured or reproduced goods. The first operation addressing the IP crime mandate was Operation Jupiter, implemented in 2005 and focused on the tri-border area between Argentina, Brazil, and Paraguay.²² From 2005 to 2008, the operation expanded to include Bolivia and Peru, and the amount of goods seized increased from \$15 million to \$132 million.²³ In 2011, INTERPOL expanded operations in Africa with Operation Atlantique and expanded to Europe with Operation Opson, a joint effort with Europol.²⁴ Operation Atlantique targeted intellectual property crime in Western Africa and seized \$1.5 million worth of fake products.²⁵

Developing countries have a particularly prevalent problem with the sale of counterfeit medical products. INTERPOL launched an African operation in tandem with the World Health Organization (WHO) called Operation Mamba in Tanzania and Uganda targeting counterfeit medicinal products.²⁶ The WHO has further noted the extent of the problem in Latin America, the former Soviet Union, and Southeast Asia (where up to 50% of medicines available may be counterfeit).²⁷

While counterfeit goods like medicines are dangerous for consumers, trafficking in counterfeit goods is connected to other problems. Increasingly, organized crime and smuggling groups deal in counterfeit goods.²⁸ Film piracy, for example, has become a key activity of the worldwide organized crime industry, joining traditional illegal activities like drug trafficking, money laundering, extortion, and human trafficking.²⁹ Developing countries in particular “have become conduits for smuggling all sorts from less developed parts of the world,” and, as criminal activity becomes increasingly connected with piracy, those countries are increasingly concerned about fighting piracy.³⁰

Additionally, reports from groups such as the RAND Corporation tie criminal pirating activity in some South American areas to Islamic

²¹ *Id.* at 1239.

²² *Id.* at 1239–40.

²³ *Id.* at 1240.

²⁴ *Trafficking in Illicit Goods*, *supra* note 12.

²⁵ *Id.*

²⁶ McManis, *supra* note 13, at 1242–43.

²⁷ *Id.* at 1243.

²⁸ *Id.* at 1244–46.

²⁹ *Id.* at 1244.

³⁰ *Id.* at 1245.

terrorism.³¹ One such report calls the tri-border area between Brazil, Argentina, and Paraguay “the most important center for financing Islamic terrorism outside the Middle East,” detailing that the region supplies 20 million USD annually to Hezbollah, eliciting a personal note of thanks from Hezbollah’s leadership.³²

The problem of IP infringement, of the distribution of pirated, counterfeit, or otherwise unlawfully reproduced products, is a widespread problem. It affects many different industries in countries throughout the world and, as detailed, groups like INTERPOL have undertaken efforts to police the trade of pirated goods. Recently, legislative efforts have been undertaken as well, and the next section of this Note will examine some of these attempts.

III. LEGISLATIVE RESPONSES TO IP INFRINGEMENT PROBLEMS

In response to growing problems of piracy, concerned countries have explored possibilities to address the issues using international law. In addition to international efforts to fight piracy, many countries like the United States and Canada have sought to strengthen their national anti-piracy laws. The next sections will examine the main recent international effort in ACTA, the U.S. effort in SOPA, and the Canadian revision of the country’s copyright laws in Bill C-11. These sections will examine the formation of these efforts, their supporters and critics, and potential lessons to learn from each.

A. The International Effort—The Anti-Counterfeiting Trade Agreement

1. Formation, Aims, and Provisions

The Anti-Counterfeiting Trade Agreement, or ACTA, was first proposed in 2006 by the United States and Japan.³³ Talks were held throughout 2009 and 2010 in Morocco, South Korea, Mexico, New Zealand, and Switzerland,³⁴ with one draft of an agreement officially released in April of

³¹ *Id.* at 1242.

³² *Id.*

³³ Hugo Greenhalgh, *Theft of Intellectual Property ‘should be a crime,’* FIN. TIMES, Sept. 25, 2010, <http://www.ft.com/intl/cms/s/0/d95fc81c-c7f7-11df-ae3a-00144feab49a.html?siteedition=intl#axzz2vqzYLQrk>.

³⁴ Michael Geist, *ACTA’s State of Play: Looking Beyond Transparency*, 26 AM. U. INT’L L. REV. 543, 545 (2011).

2010.³⁵ Although many countries joined subsequent talks,³⁶ and negotiations were made public earlier in October of 2007,³⁷ details about the treaty's provisions and aims were kept secret from the public.³⁸ When leaks of older versions became public, they enraged technology companies and advocacy organizations who wanted—or felt entitled by their place in the industry—to participate in discussions.³⁹ Nevertheless, the final product resulted from closed-door deliberations, not an open dialogue.

The text of ACTA begins by highlighting “effective enforcement of intellectual property rights” as “critical” for global economic growth and development.⁴⁰ According to the treaty, international copyright protection laws are inadequate, and the industry has been unable to keep up with the development of digital technology.⁴¹ Such outdated copyright protection laws allow “the proliferation of counterfeit and pirated goods.”⁴² ACTA proposes to prevent these abuses through “effective enforcement of intellectual property rights.”⁴³ Its concern seems primarily economic; language throughout the treaty reflects concerns for promoting economic growth, protecting a free market, and increasing trade.⁴⁴ ACTA clearly

³⁵ *Id.* at 543–44.

³⁶ Negotiating parties eventually included the U.S., the E.U., Singapore, South Korea, Australia, New Zealand, Canada, Morocco, Mexico, Switzerland, and Japan. *Japan Becomes First ACTA Signatory to Ratify Agreement*, INSIDE U.S. TRADE, Vol. 30, No. 37, Sept. 14, 2012.

³⁷ David Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 107 (2012).

³⁸ See *infra* Part II.A.3; see also Geist, *supra* note 34 (noting that, as of June 2010, final dates for a July 2010 international meeting to discuss ACTA had not been publicly announced).

³⁹ See, e.g., David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 AM. U. INT'L L. REV. 811, 828–29 (2011) (noting four primary areas of concern: “(1) general erosion of deliberative democracy, (2) one-sided input that reflects primary commercial perspectives, (3) speculation and guesswork replacing real discussion of the issues, and (4) deterioration of the legitimacy of the process and the law being created”).

⁴⁰ Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, available at http://www.ustr.gov/webfm_ser/d/2417 [hereinafter ACTA].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*; see also David Oberdick, *Anti-Piracy Laws Are Toughened by New International Treaty*, PITTSBURGH POST-GAZETTE (Nov. 22, 2010), <http://www.post-gazette.com/stories/business/legal/business-workshop-anti-piracy-laws-are-toughened-by-new-international-treaty-274390/> (characterizing ACTA's purpose as “strengthen[ing the country's] defense of intellectual property rights against counterfeiting and piracy”).

⁴⁴ ACTA, *supra* note 40.

seeks, first and foremost, to offer economic protections against the effects of piracy.

The final version of ACTA includes forty-five articles covering a wide range of intellectual property topics.⁴⁵ Reflecting the expanding influence of digital media and digital communication, ACTA includes a specific section titled “Intellectual Property Rights in the Digital Environment” to deal with some problems posed by digital developments.⁴⁶ There are also implications for the medical sector, mainly in restrictions applied to generic drugs for potential patent violations.

The parties involved insist ACTA does not substantially change existing IP laws of most of its signatories. Instead of setting or prescribing specific codes or procedures, for instance, ACTA claims to set a floor for piracy laws. Countries ascribing to ACTA essentially agree to maintain certain minimum levels of regulation and enforcement.⁴⁷ At the time of its completion, many European countries already had laws compliant with ACTA standards.⁴⁸ However, many observers have expressed concern about this kind of floor-setting language. In particular, they worry that the treaty’s language is too broad and open to unintended interpretations and applications. A Congressional Research Service study examining the implications of ACTA found that many provisions could contradict U.S. law, “depending on how broadly or narrowly” different parts of the text are interpreted.⁴⁹

One of the most contested articles is a provision for criminal enforcement. ACTA includes provisions to criminalize counterfeiting or piracy, making these offenses subject to criminal enforcement and penalties.⁵⁰ This section could potentially be applied to individual consumers, imposing criminal liability on anyone who illegally downloads music, for instance. Individual

⁴⁵ *Id.*

⁴⁶ ACTA § 5.

⁴⁷ ACTA ch. I, § 2, art. 1.

⁴⁸ Ben Rooney, *Crafters of ACTA to Blame for Confused Reactions*, WALL ST. J. (Feb. 9, 2012), <http://blogs.wsj.com/tech-europe/2012/02/09/crafters-of-acta-to-blame-for-confused>.

⁴⁹ Memorandum From Legislative Attorney, Am. Law Div., Brian T. Yeh, Cong. Research Serv., to the Honorable Ron Wyder, Potential Implications for Federal Law Raised by the October 2012 Draft of the Anti-Counterfeiting Trade Agreement (Oct. 29, 2010), available at <http://infojustice.org/wp-content/uploads/2011/05/CRS10292010.pdf>.

⁵⁰ ACTA ch. II, § 4, art. 23. ACTA requires criminal procedures and penalties be applied “at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale,” with “commercial scale” further defined as activities carried out for “direct or indirect economic or commercial advantage.”

countries have so far taken different approaches to punishment, and some countries worry that ACTA will be used to force them to adopt more stringent punishment systems. For example, France uses a “three strikes” policy, which proposes that internet service providers cut off service to customers who are thrice accused, but not necessarily convicted, of downloading or uploading infringing material.⁵¹ This policy has been harshly criticized, and some countries worry that ACTA will force them to adopt similar laws.⁵²

Additionally, some advocacy groups raise concerns about the actual focus and aims of the treaty. They argue that ACTA’s economic focuses, which protect copyright holders, do not do enough to protect users or technology developers.⁵³ For example, there are requirements for “certain measures to help businesses recover from intellectual property theft” but no corresponding considerations for public interests.⁵⁴ Citing these concerns, a group of close to 650 international intellectual property experts and public interest organizations issued a statement in opposition to many of ACTA’s policies, calling them “hostile to the public interest” in the following areas: “freedom on the internet; basic civil liberties including privacy and free expression; free trade in generic medicines; and the policy balances between protection and access.”⁵⁵ Proponents of the treaty brush off these concerns, noting that ACTA states it will operate “in a manner that balances the rights and interests of the relevant right holders, service providers, and users.”⁵⁶

⁵¹ Eric Pfanner, *Europeans Reject Treaty to Combat Digital Piracy*, N.Y. TIMES, July 5, 2012, at B5.

⁵² See, e.g., Cory Doctorow, *Warning to All Copyright Enforcers: Three Strikes and You’re Out*, GUARDIAN (July 1, 2008), <http://www.guardian.co.uk/technology/2008/jul/01/internet.copyright> (proposing that internet access of “the big copyright companies” be permanently cut off if they make three erroneous copyright infringement accusations).

⁵³ See *infra* Part III.A.2.

⁵⁴ Oberdick, *supra* note 43; Pfanner, *supra* note 51.

⁵⁵ Sean Flynn, *ACTA’s Constitutional Problem: The Treaty is Not a Treaty*, 26 AM. U. INT’L L. REV. 903, 911–12 (2011); Press Release, Program on Info. Justice & Intellectual Prop., Text of Urgent ACTA Communiqué: International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests (June 23, 2010), *available at* <http://www.wcl.american.edu/pijip/go/acta-communicue>.

⁵⁶ ACTA, Introduction. See also ACTA, ch. 2, § 3, art. 18 (mandating “assurance sufficient to protect the defendant” and measures to prevent abuse).

2. *Concerns and Public Outcry*

Although discussions about the formation of ACTA were kept secret from the public and members of the technology community, they included industries with significant copyright protection interests, like motion picture and recording companies.⁵⁷ For example, the U.S. Trade Representative gave copies of ACTA texts to entertainment and pharmaceutical industries but did not give information to other stakeholders such as the technology sector, educators, libraries, or private citizens.⁵⁸ The Office of the U.S. Trade Representative refused to release drafts of the treaty, declaring they were “classified in the interest of national security.”⁵⁹

This secrecy concerns many because it implies the interests protected in the treaty are largely corporate and might ignore the concerns of others such as consumers and technology developers. Technology groups on the cutting edge of internet development—indeed, companies propelling such development—were not privy to discussions and could not voice their concerns.⁶⁰ This treatment is contrasted with that of industry representatives, such as those from the motion picture industry, who were “cleared advisors” with access to versions of the treaty as it was being formulated and invitations to participate in the writing process.⁶¹ Although the groups negotiating ACTA asked for input from interested or affected parties, the clearance requirement limited any truly valuable input from those not included in discussions.⁶² Because of this exclusivity, many believe the resulting legislation is one-sided in favor of the copyright-holding industry representatives at the expense of those in the technology industry.⁶³

The secrecy surrounding ACTA’s formation, the inability of many sectors to participate in discussions, and the inherent suspicion attending the product of those discussions contribute to general concern about the substance of the

⁵⁷ Levine, *supra* note 37, at 11.

⁵⁸ Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT’L L. ONLINE 24, 32 (2009).

⁵⁹ McManis, *supra* note 13, at 1238.

⁶⁰ Levine, *supra* note 37.

⁶¹ *Id.* at 134–35.

⁶² *Id.* at 135.

⁶³ See generally *id.* (calling for less secrecy in ACTA discussions, and for the countries negotiating ACTA to include the technology industry in IP law discussions).

treaty.⁶⁴ For instance, depending on how broadly the treaty is interpreted, it could be enforced against a broad array of goods beyond pirated goods. Pirated goods are “illicitly copied goods . . . implicat[ing] the law of copyrights and related rights”⁶⁵ and are recognized as proper targets for IP legislation. Counterfeit goods, by contrast, “are arguably mislabelled goods—and thus implicate the law of trademarks and unfair competition.”⁶⁶ Introducing a broad understanding of counterfeit goods could lead to action against generic medicines or digital file sharing,⁶⁷ which could then implicate broader groups, including average internet users.

Further, there is uncertainty about the protection of individual privacy.⁶⁸ Enforcement provisions are not balanced with express limitations, creating broad governmental powers and the potential for overreaching action against individuals.⁶⁹

Generally, concerns about ACTA center on uncertainty: uncertainty regarding its formation, its terms and definitions, its breadth, and its criminal provisions. Opponents seem to focus less on the aims of ACTA or the problems it addresses and instead on the means, or potential means, it uses.

3. *Current State: A Holding Pattern*

Countries around the globe participated in the formation of ACTA.⁷⁰ Although many signed it, ACTA provides it will enter into force when it has been ratified by signatories.⁷¹

The treaty’s potential effectiveness was dealt a serious blow after its rejection by the European Union. The opposition received increasing

⁶⁴ See, e.g., *Anti-Counterfeiting Trade Agreement*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/acta> (noting ACTA’s potential to restrict rights of free speech, privacy, and due process as well as its creation of a “nondemocratic enforcement regime”); *Key Issues: The Anti-Counterfeiting Trade Agreement*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/issues/acta> (expressing concerns that the Agreement lacks transparency, ignores the democratic process and public input, that the terms used are vague, and that damages and penalties are disproportionate).

⁶⁵ McManis, *supra* note 13, at 1247. This argument is proposed not contrary to definitions of counterfeit goods used by policing organizations, see Panethiere, *supra* note 9, but to show how such definitions might be applied too broadly.

⁶⁶ McManis, *supra* note 13, at 1247.

⁶⁷ *Id.*

⁶⁸ Geist, *supra* note 34, at 554.

⁶⁹ *Id.*

⁷⁰ See *supra* Part III.A.1.

⁷¹ ACTA, ch. 6, art. 40.

attention, particularly after the failure of similar IP legislation in the U.S.⁷² In Europe, leaders who had previously offered support recanted, the European Union negotiator labeled it a “masquerade,” and demonstrations were held throughout the continent.⁷³

For the treaty to go into effect, the European Commission required all twenty-seven member-states to sign it and for the European Parliament to ratify it.⁷⁴ All twenty-seven states approved the treaty,⁷⁵ but the European Commission chose to delay and withhold approval until the European Court of Justice determined whether it “posed a danger to the rights of individual European citizens.”⁷⁶ The Commission then did not wait for the Court to rule and rejected ACTA on July 5, 2012.⁷⁷

There is some indication the U.S. will still try to put the treaty into effect, with perhaps a greater Pacific orientation in the absence of E.U. support.⁷⁸ Japan became the first signatory to complete ratification on September 6, 2012.⁷⁹

B. United States Domestic Effort—The Stop Online Piracy Act

1. National IP Concerns

The United States, as a leader in intellectual property production, has a significant interest in protecting against counterfeit production of goods.⁸⁰ Intellectual property production continues to thrive in the United States. The U.S. Patent Office has issued more than eight million patents, and the U.S. Copyright Office has issued more than 33.6 million copyrights.⁸¹ The value of intellectual property in the United States is estimated by the U.S. Chamber

⁷² See discussion *infra* Part III.B.3.

⁷³ ACTA *Up*, *supra* note 6; Steininger, *supra* note 7.

⁷⁴ Rooney, *supra* note 48.

⁷⁵ James Fontanella-Khan, *European Parliament Throws out Anti-Piracy Treaty*, FIN. TIMES, July 5, 2012.

⁷⁶ Ben Rooney, *European Anti-Piracy Law Now Dead in the Water*, WALL ST. J. EUR., May 14, 2012.

⁷⁷ Fontanella-Khan, *supra* note 75.

⁷⁸ *Japan Becomes First ACTA Signatory to Ratify Agreement*, *supra* note 36; Pfanner, *supra* note 51.

⁷⁹ *Japan Becomes First ACTA Signatory to Ratify Agreement*, *supra* note 36; Pfanner, *supra* note 51.

⁸⁰ National Crime Prevention Council, *Intellectual Property Theft: Get Real: Facts and Figures*, available at <http://www.ncpc.org/topics/intellectual-property-theft/facts-and-figures-1>.

⁸¹ *Id.*

of Commerce Intellectual Property Center to be between 5 and 5.5 trillion USD.⁸²

Pirated and counterfeited goods directly threaten the thriving intellectual property industry in the United States. The U.S. Chamber of Commerce alleges that the problem of counterfeiting and piracy “threatens our national security, lessens the value of legitimate brand names, and erodes the profits of nearly every business in America.”⁸³ Specifically, the Chamber reports the following statistics: 5% to 7% of world trade annually—as much as 512 billion USD—involves counterfeit goods (citing the FBI, Interpol, and the World Customs Organization); 750,000 American jobs are lost due to counterfeit merchandise (citing the U.S. Customs and Border Protection); and 10% of all pharmaceuticals sold, and up to 60% of those in some developing countries, are counterfeit drugs (citing the World Health Organization).⁸⁴ As reflected in the concerns motivating ACTA, counterfeited goods include not just music, movies, and brand-name accessories, but also medicines, foods, computer and car parts, even golf clubs and cosmetics.⁸⁵

Howard Gantman, the vice president of corporate communications for the Motion Picture Association of America, noted that the majority of piracy sites are offshore and therefore out of legal reach.⁸⁶ He reports that pirated movies, music, software, and video games cost the U.S. 58 billion USD each year, or about 400,000 lost jobs.⁸⁷ In 2011, the U.S. Chamber of Commerce estimated that piracy and counterfeiting cost movie studios, record companies, and publishing houses 135 billion USD in revenue annually.⁸⁸ The U.S. Customs and Border Patrol and the Immigration and Customs

⁸² *Id.*

⁸³ U.S. Chamber of Commerce, *What Are Counterfeiting and Piracy Costing the American Economy?*, 2005, available at http://www.fnal.gov/directorate/OQBP/sci/sci_reference_docs/SCI%20Costs%20to%20Economy%20uschamber.pdf.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Bob Strauss, *It's Hollywood vs. Silicon Valley in Battle Over Online Piracy Bill*, DAILY NEWS (L.A., CAL.) (Dec. 5, 2011), http://www.dailynews.com/ci_19471394.

⁸⁷ *Id.*

⁸⁸ Cecilia Kang, *Web Giants at Odds with Chamber of Commerce Over Piracy Bill*, WASH. POST (Nov. 15, 2011), http://articles.washingtonpost.com/2011-11-15/business/35282378_1_web-firms-web-giants-steve-tepp.

Enforcement agencies reported that seizures of counterfeit products reached almost 25,000 cases in 2011, an increase of 24%.⁸⁹

However, some observers insist the effect is smaller than indicated by the Chamber of Commerce. The United States Government Accountability Office (GAO), for example, issued a Report in April 2010 faulting many of the statistics used to attack piracy and counterfeiting.⁹⁰ The Report recognized the legitimacy of counterfeit trade concerns and affirmed that counterfeiting and piracy have “a wide range of effects on consumers, industry, government, and the economy as a whole,” including “health and safety risks, lost revenues, and increased costs of protecting and enforcing IP rights.”⁹¹ Further, technological advances continue to change the counterfeit industry and enable counterfeiters to operate more effectively.⁹² At the same time, the Report argued counterfeiting and piracy may actually influence some stakeholders positively.⁹³ Consumers benefit from wider access to affordable goods, either through direct purchase of pirated goods or lower prices for legitimate goods due to the competition.⁹⁴ Copyright or trademark holders can also benefit when consumers “sample” pirated goods and then decide to buy the legitimate version.⁹⁵

Most importantly, the GAO Report noted that “it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.”⁹⁶ Recognizing that the problem is “sizable,” the Report nonetheless cites two shortcomings: a lack of data about the extent of

⁸⁹ Gus G. Sentementes, *Ravens, NFL Pursue Online Sellers of Bogus Merchandise*, BALT. SUN (Jan. 11, 2012), http://articles.baltimoresun.com/2012-01-11/business/bs-bz-ravens-counterfeit-sales-20120111_1_anastasia-danias-websites-nfl-works.

⁹⁰ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, *Intellectual Property: Observations on Efforts to Quantify Economic Effects of Counterfeit and Pirated Goods* (Apr. 2010); Sarah Jacobsson, *Government Says Data Estimating Piracy Losses is Unsubstantiated*, http://www.pcworld.com/article/194203/Government_Piracy.html.

⁹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 90, at 10–14. The Report goes into further detail in some areas: the dangers to consumers' health and safety due to toxic ingredients, mislabeling, or dysfunctional products (10–11); the effects on industry, including lost sales and decreased incentive to innovate (11–12); government loss of tax revenue or increased enforcement expenses, including expenses incurred from threats to national security or civilian safety (12–13); and slower economic growth (14).

⁹² *Id.* at 8–9.

⁹³ *Id.* at 14–15.

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 15.

⁹⁶ *Id.* at 16.

trade involving counterfeit and pirated goods,⁹⁷ and assumptions used in calculating the effects of that trade.⁹⁸

The Report specifically attacks three commonly cited estimates, sourced to U.S. government agencies, of losses due to counterfeiting or piracy.⁹⁹ The first is an FBI estimate that counterfeiting costs U.S. businesses 200–250 billion USD in lost revenue each year, a number that the FBI told the GAO “it has no record of source data or methodology for generating” and cannot corroborate.¹⁰⁰ The second is a Customs and Border Protection (CBP) press release estimating that counterfeit merchandise causes a loss of 200 billion USD in revenue and 750,000 jobs for U.S. business and industries. The CBP informed the GAO that these figures have been discredited.¹⁰¹ Finally, the third is an estimate by the Motor and Equipment Manufacturers Association, citing the Federal Trade Commission (FTC), that the U.S. automotive parts industry has lost three billion USD in sales because of counterfeit goods. When contacted by the GAO, the FTC could not find any record of the estimate nor remember how it was developed.¹⁰² The widespread use of these estimates and the GAO’s description of the difficulties in developing accurate estimates of the effect of the trade of counterfeit and pirated goods undermine some of the arguments in favor of strict legislation of the industry.

Nevertheless, although the extent and quantity of the problem might be disputed, few would argue that piracy and counterfeiting do not pose a substantial threat to U.S. industry. The disagreements grow out of how to deal with it.

⁹⁷ *Id.* at 16–17.

⁹⁸ *Id.* at 17–18. The two main assumptions used in calculations are the value of fake goods and the substitution rate, or the rate at which it is assumed a consumer would switch from buying a fake good to buying the legitimate product. Many calculations assume a one-to-one substitution rate, i.e., assume that the consumer is fully deceived by the counterfeit product and paying the same price they would for the legitimate product; however, the Report says, many experts believe that a one-to-one substitution rate is unlikely in most circumstances where consumers are aware that the price of the good they are buying is significantly lower than the price they know the legitimate good to be worth.

⁹⁹ *Id.* at 18–19.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

2. *Formation and Changes to Existing Law in SOPA*

In recent years, the U.S. government has sought to enforce existing U.S. laws against international offenders, including closing around 800 websites suspected of piracy.¹⁰³ Two examples from 2012 stand out. In January 2012, the Department of Justice brought charges against the website Megaupload.¹⁰⁴ Megaupload touts itself as a legitimate and legal way to transfer and share files by providing a platform for users to upload, and then transfer, files like movies and music.¹⁰⁵ Based on these processes, the U.S. government charged the site's operators with copyright infringement and conspiracy, and the indictment accuses them of damaging copyright owners to the tune of 500 million USD and of profiting 175 million USD from ads and subscriptions.¹⁰⁶

The government has also criminally charged Richard O'Dwyer, the founder of the website TVShack.net, with copyright infringement.¹⁰⁷ TVShack.net acts as a middleman, offering a site where users can link to other sites that actually host material like television shows and movies.¹⁰⁸ Important to the government's case are facts about the website suggesting that O'Dwyer knew he facilitated downloading copyrighted material; but he and other groups counter that this sets a dangerous precedent for bringing actions against search engines.¹⁰⁹

a. *Combating Online Infringement and Counterfeits Act*

These actions represent the U.S. government's willingness to criminally charge sites that infringe movie or television show copyrights. In light of concerns about counterfeit and pirated goods, Congress recognized a need for stricter regulation of copyrights, specifically in the realm of the internet.

One of the first efforts to protect against these concerns was the Senate bill titled Combating Online Infringement and Counterfeits Act (COICA). Senator Patrick Leahy proposed COICA in September 2010.¹¹⁰ COICA gave

¹⁰³ Somini Sengupta, *U.S. Pursuing A Middleman In Web Piracy*, N.Y. TIMES, July 13, 2012, at A1.

¹⁰⁴ Ben Sisario, *U.S. Charges Popular Site With Piracy*, N.Y. TIMES, Jan. 20, 2012, at B1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Sengupta, *supra* note 103.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Combating Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2010).

the U.S. Attorney General authority to bring actions against websites that are “primarily designed, [have] no demonstrable, commercially significant purpose or use other than, or [are] marketed by [their] operator” as offering copyright-infringing content.¹¹¹ Courts were given authority to effectively shut down offending websites by forcing domain registrars to “suspend operation of, and lock, the domain name”—all without any court hearing allowing the website to defend itself.¹¹² Court orders against foreign websites could go further, “compel[ing] Internet service providers to block users from reaching those domains, [preventing] financial service providers from processing their transactions, and [preventing] Internet advertisers from serving ads to these sites.”¹¹³

Commentators expressed concern that courts could shut websites down before the sites ever have the opportunity to defend themselves and worried that the procedure is “a profound affront to both due process and the First Amendment.”¹¹⁴ COICA passed the Senate Judiciary Committee in November 2010 but, although the Senate held several hearings on the bill, it was never passed by the chamber itself.¹¹⁵

b. Protect Intellectual Property Act

Senator Leahy made another effort in the next Congress and introduced a revised bill, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (the PROTECT IP Act, or PIPA).¹¹⁶ To address some of the concerns raised about COICA, PIPA used slightly different language to describe websites that infringe copyrights: those that have “‘no significant use other than engaging in, enabling, or facilitating’ (1) the infringement of copyrighted works in complete or substantially complete form; (2) the circumvention of copyright protection systems; or (3) the sale of goods, services, or materials bearing a counterfeit mark.”¹¹⁷ This language aims to narrow the scope of websites that can be prosecuted, specifically excluding websites that accidentally infringe copyrights or

¹¹¹ Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987–2012*, 14 YALE J.L. & TECH. 162, 211 (2011–2012).

¹¹² *Id.* at 211–13.

¹¹³ *Id.*

¹¹⁴ *Id.* at 211, n.223.

¹¹⁵ Ann Chaitovitz et al., *Responding to Online Piracy: Mapping the Legal and Policy Boundaries*, 20 COMM'LAW CONSPECTUS 1, 16 (2011).

¹¹⁶ *Id.* at 16–17.

¹¹⁷ *Id.* at 18.

trademarks.¹¹⁸ Senator Patrick Leahy, known for being a champion of the First Amendment, not only introduced the bill but drafted it himself.¹¹⁹ It cleared the Senate Judiciary Committee unanimously and with forty co-sponsors.¹²⁰

c. Stop Online Piracy Act

Representative Lamar Smith introduced the Stop Online Piracy Act (SOPA), a House parallel to PIPA, in 2011.¹²¹ In November 2011, the bill had twenty-five co-sponsors from both parties.¹²² One of the supporters, Democratic Representative Howard Berman, praised the bill as a “major effort to confront a pattern of illegal conduct.”¹²³

SOPA defines websites “dedicated to the theft of U.S. property” as those that are either: “primarily designed or produced for the purpose of,” have “only limited commercially significant purpose or use other than,” or are marketed as offering goods services, or materials that “bear[] a counterfeit mark” or that violate legal copyright laws.¹²⁴ It requires compliance not only from the domain itself, but also from service providers, search engines, payment network providers, and advertising services.¹²⁵ Further, SOPA changes liability policies, adjusting rules for who can be held liable for infringing content posted online.¹²⁶

The bill also provides means for blocking sites that post copyright-infringing content before a court hearing is held and allows companies to sue service providers, even if the providers are unaware of the infringing content.¹²⁷ Further, SOPA provides that copyright and trademark holders

¹¹⁸ *Id.*

¹¹⁹ Jonathan Weisman, *Web Rises Up to Deflect Bill Seen As Threat*, N.Y. TIMES, Jan. 19, 2012, at A1.

¹²⁰ *Id.*

¹²¹ Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

¹²² Hayley Tsukayama & Cecilia Kang, *SOPA Opposition Goes Viral*, WASH. POST (Nov. 22, 2011), http://articles.washingtonpost.com/2011-11-22/business/35282878_1_bill-sites-ordinary-users.

¹²³ Strauss, *supra* note 86.

¹²⁴ 17 U.S.C. §§ 501, 1201, *cited in* Stop Online Piracy Act, H.R. 3261, § 103(a), 112th Cong. (2011).

¹²⁵ Stop Online Piracy Act, H.R. 3261, § 102(c)(2), 112th Cong. (2011).

¹²⁶ *Id.*

¹²⁷ Rebecca MacKinnon, Editorial, *Stop the Great Firewall of America*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/opinion/firewall-law-could-infringe-on-free-speech.html>.

will be able to request injunctions cutting off advertising and other revenue to websites hosting infringing material, even if the sites are unaware of that material.¹²⁸ The goal of such measures is to “cut off the oxygen for foreign pirate sites”—if the sites can no longer be found on large search engines or supported by payment processors, then the sites themselves will be forced to shut down, at least in the United States.¹²⁹

Responding to concerns about offshore sites that have so far been difficult for U.S. companies to legally prosecute, SOPA includes a section focused on “Defending Intellectual Property Rights Abroad.”¹³⁰ This section calls for a policy making the protection of intellectual property rights a “significant component of United States foreign and commercial policy in general”¹³¹ and for dedicating resources to ensure “aggressive support for enforcement action against violations.”¹³² The bill requires an appointment of “at least one intellectual property attache” to a U.S. embassy or diplomatic mission in six geographic regions: Africa, Europe and Eurasia, East Asia and the Pacific, the Near East, South and Central Asia and the Pacific, and the Western Hemisphere.¹³³

Initially, the bill was expected to pass: supporter for SOPA had spent far more than their opponents and lobbyists for supporters had a more solid relationship with Congress.¹³⁴

3. *Opposition: The Tech Industry Rallying*

An unusual group of supporters mobilized behind SOPA and PIPA, including the Motion Picture Association of America, the American Federation of Musicians, the Directors Guild of America, the Screen Actors Guild, the AFL-CIO, and the U.S. Chamber of Commerce.¹³⁵ In announcing its support, the Chamber of Commerce praised the bill as “legislation [that]

¹²⁸ Mike Swift, *Silicon Valley Fighting Proposed Law Pushed by Hollywood*, SAN JOSE MERCURY NEWS (Dec. 8, 2011), <http://www.meetthe112th.com/latest-news/silicon-valley-fighting-proposed-law-pushed-by-hollywood-3/>. This marks a significant shift in existing law under the 1998 Digital Millennium Copyright Act (DCMA), which did not hold websites liable for users’ content if the sites removed that content when notified by the right holders.

¹²⁹ Edward Wyatt, *Lines Drawn on Antipiracy Bills*, N.Y. TIMES, Dec. 15, 2011, at B1.

¹³⁰ Stop Online Piracy Act, H.R. 3261, 112th Cong. § 205 (2011).

¹³¹ *Id.* § 205(a)(1).

¹³² *Id.* § 205(a)(2)(A).

¹³³ *Id.* § 205(b).

¹³⁴ Herman, *supra* note 111, at 214.

¹³⁵ MacKinnon, *supra* note 127; Wyatt, *supra* note 129.

will provide U.S. law enforcement with refined legal tools to act against ‘rogue sites.’¹³⁶

Other groups have reacted strongly against the potential legislation. The Center for Democracy and Technology, a public policy and advocacy group that identifies itself as the “leading Internet freedom organization,”¹³⁷ published a list of groups and individuals opposed to SOPA and PIPA.¹³⁸ The Center stopped updating the list on January 25, 2012 and note that it is not exhaustive, but it records a sweeping amount of opposition: 106 companies, online services, and websites; 43 public interest, nonprofit, and advocacy groups; 85 cybersecurity groups, internet inventors, and engineers; 79 international human rights advocates; 446 founders, CEOs, executives, entrepreneurs, independent businesspeople, and venture capitalists; and 118 academics and experts, among others.¹³⁹ The list includes diverse names like Google, Facebook, AOL, Tumblr, Twitter, the ACLU, the Heritage Foundation, the Cato Institute, the Tea Party, and the founders of Mozilla Firefox, Netscape, Yahoo!, YouTube, and Wikipedia.¹⁴⁰

Many opponents, including Yahoo, Google, and the Consumer Electronics Association, either did leave or considered leaving the U.S. Chamber of Commerce because of the lobbying group’s support of SOPA.¹⁴¹ The Business Software Alliance, representing groups including Microsoft, Intel, Adobe, and Apple, withdrew support of SOPA in November of 2011.¹⁴² Google was reported to have hired “at least 15 lobbying firms” to oppose the bills, and on its Firefox browser homepage Mozilla put up a warning that “Congress is trying to censor the Internet.”¹⁴³

One of opponents’ primary arguments is that SOPA and PIPA threaten freedom of speech and expression on the internet.¹⁴⁴ Opponents also warn

¹³⁶ Press Release, U.S. Chamber of Commerce, U.S. Chamber Praises House Legislation to Protect Jobs and Sever Rogue Websites from the American Marketplace (Oct. 26, 2011), available at <http://www.uschamber.com/press/releases/2011/october/us-chamber-praises-house-legislation-protect-jobs-and-sever-rogue-websites>.

¹³⁷ About CDT, CTR. FOR DEMOCRACY AND TECH., <https://www.cdt.org/about> (last visited Oct. 10, 2013).

¹³⁸ *List of Those Expressing Concern with SOPA and PIPA*, CTR. FOR DEMOCRACY AND TECH. (Jan. 25, 2012), <https://www.cdt.org/report/list-organizations-and-individuals-opposing-sopa>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Kang, *supra* note 88.

¹⁴² Tsukayama & Kang, *supra* note 122.

¹⁴³ Wyatt, *supra* note 129.

¹⁴⁴ MacKinnon, *supra* note 127.

that the bills will slow start-up and entrepreneurial efforts, because compliance with the bill could require staff dedicated to monitoring user activity on websites to ensure no copyright-infringing material is posted.¹⁴⁵ Representative Darrell Issa charged that the bill “goes far beyond what is necessary to protect the rights of intellectual property owners” and poses a danger to business growth.¹⁴⁶ A former official with the Department of Homeland Security, Stewart Baker, has also expressed concern that other countries with heavy censorship reputations will now be able to point to legislation like SOPA and PIPA as evidence that the U.S. also supports censorship of “harmful” sites.¹⁴⁷ There is further concern that such policies, like the creation of an “internet blacklist” of sites charged with violating the law, would invite censorship by media companies or the government,¹⁴⁸ or to over-policing and over-censorship by sites themselves.¹⁴⁹

Methods of enforcement are also contested. Opponents assert that the ability to shut down a site for hosting an infringing video could, for example, shut down a site as big as Google for allowing advertising from online pharmacies that promote illegal prescription drugs in the United States.¹⁵⁰ Supporters argue that these measures are not the focus of the bill and should not be alarming,¹⁵¹ but that response does not satisfy concerns; in fact, it implies that the text of SOPA is indeed broad enough to be applied to shut down legitimate sites.

Both PIPA and SOPA elicited letters of opposition from groups and organizations across the United States as early as May 2011.¹⁵² Protect Innovation, a policy and advocacy group, published many of these letters, including one sent to lawmakers on November 15, 2011, expressing specific concerns about new liabilities for internet and technology companies and signed by AOL, eBay, Facebook, Google, LinkedIn, Mozilla, Twitter,

¹⁴⁵ *Id.*

¹⁴⁶ Strauss, *supra* note 86.

¹⁴⁷ Julian Sanchez, Op-Ed., *Killing the Internet to Save Hollywood*, N.Y. POST (Dec. 21, 2011), http://www.nypost.com/p/news/opinion/opedcolumnists/killing_the_internet_to_save_hollywood_ISWv0ymGvqWbvn5siAQgsK.

¹⁴⁸ *Id.*

¹⁴⁹ MacKinnon, *supra* note 127. As she asks, “Why invite legal hassle when you can just hit ‘delete?’ ”

¹⁵⁰ Wyatt, *supra* note 129.

¹⁵¹ *Id.*

¹⁵² *Opposition Letters*, PROTECT INNOVATION, <http://www.protectinnovation.com/opposition.html> (last visited Oct. 10, 2013).

Yahoo!, and Zynga.¹⁵³ Internet engineers sent an open letter to Congress on December 15, 2011 expressing their concern about SOPA and PIPA and their potential to create “an environment of tremendous fear and uncertainty for technological innovation.”¹⁵⁴ Not long after these letters, the White House announced that it, too, opposed both PIPA and SOPA because of concerns that the legislation would curb both free expression and development of the Internet.¹⁵⁵

While these developments cast doubt on the fate of the bills, Wikipedia dealt another, heavier blow on January 18, 2012 by leading a new form of Internet protest: a blackout.¹⁵⁶ Many websites had already expressed concern over SOPA and PIPA in late 2011. Tumblr “censored” its dashboard and then took users to a page explaining the legislation and urging them to contact their congressional representatives, who received 80,000 calls in three days.¹⁵⁷ Reddit and Twitter were also instrumental in publicizing the bills and keeping an active online opposition.¹⁵⁸

The online activism came to a head with the blackout, during which Wikipedia took its material off-line for the day.¹⁵⁹ Other sites like Google redirected users to pages with information about the technology industry’s opposition to the bills and a petition against them.¹⁶⁰ The January 18 protest had a far-reaching effect, as three million people emailed their representatives¹⁶¹ and more than seven million signed Google’s petition.¹⁶² By the end of the day, the House Speaker expressed concern for how the bill would go forward under the new “lack of consensus,”¹⁶³ and many Senators

¹⁵³ Letter from AOL et al. to Pat Leahy, Chairman, S. Judiciary Comm. (Nov. 15, 2011), available at http://protectinnovation.com/pdf/opposition/4_nov_15_internet_and_tech.pdf.

¹⁵⁴ Vint Cerf et al., *An Open Letter From Internet Engineers to the United States Congress* (Dec. 1, 2011), <http://www.eff.org/sites/default/files/Internet-Engineers-Letter.pdf>.

¹⁵⁵ Edward Wyatt, *White House Takes Issue with 2 Antipiracy Bills*, N.Y. TIMES, Jan. 15, 2012, at A22.

¹⁵⁶ Jenna Wortham, *Protest on Web Takes on 2 Bills Aimed at Piracy*, N.Y. TIMES, Jan. 18, 2012, at A1.

¹⁵⁷ Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling: Many Voices on the Web, Amplified by Social Media*, N.Y. TIMES, Jan. 20, 2012, at B1.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Amy Chozick, *A Clash of Media Worlds (And Generations)*, N.Y. TIMES, Jan. 22, 2012, at BU4.

¹⁶³ Hayley Tsukayama & Sarah Halzack, *Internet Blackouts Appear to Have Desired Effect*, WASH. POST, Jan. 19, 2012, at A11.

announced their opposition to PIPA, including the bill's co-author Senator Charles Grassley.¹⁶⁴ Although Senate Majority Leader Harry Reid asserted that a vote on PIPA would go on as scheduled, he later cancelled the vote because of "recent events."¹⁶⁵ Senator Reid's announcement was followed by Representative Lamar Smith indefinitely postponing the House discussion of SOPA.¹⁶⁶

The debate continues outside of Washington as copyright holders fight back. The protests drew sharp responses from the entertainment industry, like an op-ed from the CEO of the Recording Industry Association of America, Cary Sherman.¹⁶⁷ He echoes the arguments from many in the industry, demanding enforcement of anti-piracy laws and citing the economic effects of lax enforcement: both music sales and employment in the music industry have fallen by half since 1999 (the birth of music-sharing site Napster).¹⁶⁸ The industry also complains that Google and Wikipedia violate ethical principles by not only distorting truth through their protests but presenting that distortion as news, instead of as editorial comment.¹⁶⁹ Other critics of the opponents even accuse them of ignoring the property rights of creative industries and ultimately (directly or inadvertently) stealing copyrighted material.¹⁷⁰

Neither SOPA nor PIPA have been taken back up by Congress,¹⁷¹ and as of September 2013 Congress has not attempted to pass similar legislation.

¹⁶⁴ Weisman, *supra* note 119.

¹⁶⁵ Sean Lenggell, *Backlash Leads Reid to Postpone Anti-Piracy Vote*, WASH. TIMES (Jan. 20, 2012), <http://www.washingtontimes.com/news/2012/jan/20/backlash-leads-reid-postpone-anti-piracy-vote/?page=all>.

¹⁶⁶ *Id.*

¹⁶⁷ Cary H. Sherman, Op-Ed., *What Wikipedia Won't Tell You*, N.Y. TIMES, Feb. 8, 2012, at A27.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Stan Liebowitz, *Internet to Artists: Drop Dead*, WALL ST. J. (Jan. 24, 2012), <http://online.wsj.com/article/SB10001424052970204616504577171193402114300.html>.

¹⁷¹ The November 2012 elections perhaps discouraged Congress from taking up a contentious issue again. Even so, effects from the SOPA/PIPA debate were felt in the elections. Three California Representatives, considered "key political allies" to the film industry and who had sponsored and maintained support for SOPA, lost their seats in the House. Greg Sandoval, *After Election, No Sequel for Three SOPA-Sponsoring Congressmen*, Nov. 7, 2012, available at http://news.cnet.com/8301-1023_3-57546658-93/after-election-no-sequel-for-three-sopa-sponsoring-congressmen/. A potential Secretary of State candidate, Representative Howard Berman, has already been slammed for his advocacy for SOPA. Zach Carter, *Howard Berman Secretary of State Candidacy Potential Decried By Progressive*

However, in July 2012 Representative Lamar Smith introduced the Intellectual Property Attaché Act (IPAA), which calls for assigning diplomats to advocate for copyright protection and policing on the international stage.¹⁷² The IPAA has been criticized as a mere re-application of parts of SOPA and, conversely, defended as distinct from SOPA and necessary for international IP protection.¹⁷³

C. Canadian Domestic Effort—The Copyright Modernization Act

1. Canada's Modern IP History

In contrast to the United States, the Canadian Constitution does not give direction about the purposes or means of copyright protection.¹⁷⁴ The Canadian Supreme Court has read into the Canadian Constitution two overarching purposes: “promoting the public interest in the encouragement and dissemination of artistic and intellectual works, and justly rewarding the creator of the work.”¹⁷⁵

Because of a lax or outdated approach to copyright protection, Canada has appeared on the United States Trade Representative's 301 Priority Watch List repeatedly,¹⁷⁶ including in 2012.¹⁷⁷ Over the past five years, Canada's

Group (Nov. 12, 2012), http://www.huffingtonpost.com/2012/11/12/howard-berman-secretary-of-state_n_2117789.html.

¹⁷² H.R. __, 112th Cong. (2012), available at https://www.fff.org/sites/default/files/SMITTX_084_xml_0.pdf.

¹⁷³ Compare Mike Masnick, *Lamar Smith Looking To Sneak Through SOPA In Bits & Pieces, Starting With Expanding Hollywood's Global Police Force* (July 9, 2012), <http://www.techdirt.com/articles/20120709/12574819634/lamar-smith-looking-to-sneak-through-sopa-bits-pieces-starting-with-expanding-hollywoods-global-police-force.shtml> (expressing concern that the attachés exist “solely to push the copyright maximalist views of the legacy entertainment industry around the globe”), with Andrew Coutts, *SOPA is NOT Back—but IPAA Could Still be a Problem* (July 11, 2012), <http://www.digitaltrends.com/opinion/sopa-is-not-back-but-ipaa-could-still-be-a-problem/> (noting differences between IPAA and SOPA), and Tamlin H. Bason, *Are SOPA Opponents Crying Wolf Over Attaché Act?* (July 12, 2012), <http://www.bna.com/sopa-opponents-crying-b12884910580/> (noting that the Act does not create a new program because the IP attaché position has existed since 2006).

¹⁷⁴ Mark Edward Davis, *Copyright Law in Canada—Similar, but Not the Same*, 4 No. 5 LANDSLIDE 48, 50 (May/June 2012).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 48.

¹⁷⁷ AMBASSADOR RONALD KIRK, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 SPECIAL 301 REPORT 25, available at <http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report.pdf>.

government has unsuccessfully tried to update their copyright legislation.¹⁷⁸ Bill C-11, introduced on September 29, 2011, was another attempt to update copyright laws and hoped to attract new investments to Canada and foster job creation while protecting and promoting Canadian innovation.¹⁷⁹

2. Formation: Alternative Approaches to IP Legislating

Bill C-11 takes a more lenient approach to addressing copyright infringement by implementing a “notice and notice” system.¹⁸⁰ In this system, the owner of an infringed copyright notifies the offender’s ISP, who in turns notifies the offender.¹⁸¹ Other countries (including the United States) and international agreements go further and require the offending content be removed immediately.¹⁸² Bill C-11 also lowers the maximum penalties for individual copyright infringement from \$20,000 to \$5,000, a stark difference from maximums of \$150,000 in the United States.¹⁸³

Supporters of the legislation go so far as to call it “one of the most user-friendly, if not by far the most user-friendly, in the world.”¹⁸⁴ Some supporters emphasize that Bill C-11 provides consumer freedoms such as: ripping CDs for iPods and similar devices; copying legally-acquired music and movies for private use; and protection of consumer “mash-ups” (for example, YouTube videos that utilize copyrighted works for non-commercial purposes).¹⁸⁵ Supporters also note that the target of the stricter regulations is not sites like YouTube but sites that primarily enable infringement.¹⁸⁶

¹⁷⁸ Davis, *supra* note 174, at 48.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 50.

¹⁸¹ *Id.*

¹⁸² *E.g., id.* at 50–51; Vito Pilioci, *No One Will Like the New Copyright Laws: Bill C-11 Promotes Business Interests*, OTTAWA CITIZEN (Sept. 30, 2011), <http://www2.canada.com/ottawacitizen/news/bustech/story.html?id=39d5543c-dff9-4b36-9000-3a31767a6e30&p=1>.

¹⁸³ Pilioci, *supra* note 182. The lower penalties aim to protect consumers by discouraging frivolous lawsuits by copyright owners, since recovery from penalties will barely offset the legal costs of the suit.

¹⁸⁴ Barry Sookman, *This Bill Is No SOPA: Despite What Hysteria Says, Bill C-11 Would Make Canada’s Copyright Laws Among the Most User-Friendly*, Editorial, FIN. POST (Feb. 7, 2012), <http://opinion.financialpost.com/2012/02/07/this-bill-is-no-sopa/>.

¹⁸⁵ Pilioci, *supra* note 182.

¹⁸⁶ Sookman, *supra* note 184. Sookman lists the criteria under which a site’s primary function would be called infringement: the site was promoted as such; it was aware it was permitting or encouraging infringement; it has “no significant uses” apart from enabling infringement; it benefits from enabling infringement; and, it would be “economically unviable but for enabling infringement.”

3. *Opposition*

In response, “dozens of organizations” came out in opposition to Bill C-11, including “businesses, the Retail Council of Canada, creator groups, consumer groups, education and library associations,”¹⁸⁷ and groups advocating for Canadians with perceptual disabilities, for the Documentary Organizations of Canada, and for the Liberal and Green political parties.¹⁸⁸ They pinpointed several areas of concern.

The use of digital locks, officially known as Technological Protection Measures (TPMs), is one of the most controversial parts of Bill C-11.¹⁸⁹ TPMs allow copyright owners to put a lock on their online works, limiting use and dissemination, and critics worry these locks will limit the rights of users and consumers.¹⁹⁰ Instead of creating exceptions for permissible uses of copyrighted material, Bill C-11 creates a strict standard that applies TPM prohibitions to both permissible and impermissible uses.¹⁹¹ Some scholars worry that this expanded TPM prohibition violates Canada’s constitution by going beyond the federal government’s authority in copyright law and infringes the provinces’ jurisdiction over property and civil rights law.¹⁹² Another concern is that the digital locks will hinder Canadians with disabilities, particularly the blind, from accessing digital content.¹⁹³

Canadian activist group OpenMedia.ca sought to organize opposition through an online petition titled “Dear Parliament: Say No to the Internet Lockdown.”¹⁹⁴ The group claims Bill C-11 is among the most restrictive worldwide, particularly in its use of digital locks.¹⁹⁵ In addition to opposing

¹⁸⁷ Michael Geist, *Canada’s Overhaul of Copyright Law Could Take on a SOPA Flavour*, TORONTO STAR (Feb. 5, 2012), <http://www.thestar.com/business/article/1126541--canada-s-overhaul-of-copyright-law-could-take-on-a-sopa-flavour>.

¹⁸⁸ Michael Geist, *Conclusion of Copyright Debate Leaves Many Unanswered Questions*, TORONTO STAR (May 26, 2012), <http://www.thestar.com/business/article/1196810--conclusion-of-copyright-debate-leaves-many-unanswered-questions> (noting these groups’ specific concern for more flexible digital lock rules).

¹⁸⁹ Davis, *supra* note 174, at 50.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The United States has also strongly supported the use of TPMs and advocated for their inclusion in world agreements.

¹⁹² Michael Geist, *Are Canada’s Digital Laws Unconstitutional?*, TORONTO STAR (Jan. 9, 2012), <http://www.thestar.com/business/article/1112019--geist-are-canada-s-digital-laws-unconstitutional>.

¹⁹³ Geist, *supra* note 188.

¹⁹⁴ Terence Corcoran, Comment, *Copyright Lockdown*, NAT’L POST (Mar. 13, 2012), <http://opinion.financialpost.com/2012/03/13/terence-corcoran-copyright-%C2%ADlockdown/>.

¹⁹⁵ *Id.*

the digital locks (the TPMs), the petition claims Bill C-11 has the power “to lock users out of their own services and give Big Media giants increased power to shut down websites.”¹⁹⁶

However, to some extent, opposition to the bill was not as energetic as was expected from the “supposed critics—literary groups, educators, consumer associations, and individual Canadians.”¹⁹⁷ Those groups requested only modest changes, like limiting the locks imposed under TPMs.¹⁹⁸ Other opposition came from copyright holders who want Bill C-11 to be stronger and include stricter provisions.¹⁹⁹

4. *Passage: An IP Legislation Success Story*

Bill C-11 was passed by the House of Commons on June 18, 2012.²⁰⁰ The Canadian Intellectual Property Council (CIPC) announced their approval on July 3, 2012 and applauded the bill, particularly for the potential to improve the Canadian economy by promoting “an even playing field” and encouraging creators and innovators.²⁰¹ The CIPC also notes that the Bill brings Canada in line with international agreements and the World Intellectual Property Organization (WIPO).²⁰² The Honourable Christian Paradis, Canadian Minister of Industry, and the Honourable James Moore, Minister of Canadian Heritage and Official Language, also praised the Bill for balancing the needs of both consumers and creators.²⁰³

IV. ANALYSIS: POTENTIAL PATHS FORWARD

The debate over intellectual property protections has been conducted from many angles and has featured arguments from two passionate and

¹⁹⁶ *Id.*

¹⁹⁷ Michael Geist, *Copyright Bill Hits the Home Stretch*, TORONTO STAR (Mar. 10, 2012), <http://www.thestar.com/business/article/1144302--copyright-bill-hits-the-home-stretch>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ VOTE #446 ON JUNE 18TH, 2012, <http://openparliament.ca/bills/votes/41-1/446/>.

²⁰¹ *Canadian Intellectual Property Council Pleas Canada Passes Copyright Bill*, STATES NEWS SERVICE (July 3, 2012), <http://www.chamber.ca/index.php/en/media-centre/C197/canadian-intellectual-property-council-pleased-canada-passes-copyright-bill/>.

²⁰² *Id.*

²⁰³ Press Release, Ministers Paradis and Moore Welcome Passage by the House of Commons of the Copyright Modernization Act (June 19, 2012), *available at* <http://www.reuters.com/article/2012/06/19/idUS130255+19-Jun-2012+MW20120619>.

driven fronts. Any assessment of the debate will have to consider each of those fronts, and their intersection, to reach a comprehensive solution.

Clearly, there are problems of copyright protection that need to be addressed. The significant economic impact of copyright infringement cannot be ignored. The growing connection of intellectual property violations with the organized crime and terrorism raises serious concerns, especially as it extends to commodities people rely on, like medicines, car parts, and smoke detectors. Critics who call ACTA entirely unnecessary go too far; in a global economy, this problem must be addressed on an international scale. As these problems expand and change in scope, existing international agreements must be amended and updated. Actual implementation of ACTA or a similar treaty would propel signatory states to keep intellectual property laws current and in line with international needs.

A. Changing the Conversation

However, before any meaningful change can be made in IP law, the conversation must be expanded to include all of the parties interested in the resulting legislation.

Governments cannot fully consider the implications of IP legislation without including the technology industry in the debate. The governments involved in the ACTA negotiations seemed to forget about, or underestimate, the powers of the industry they sought to regulate. Nothing stays secret in the era of the internet, and secrecy makes the substance of agreements suspect. Secrecy creates and perpetuates a perception that copyright holders (like the movie and music industries) are controlling legislation and using it for their own ends. Secrecy also makes it seem more likely that governments will apply IP laws broadly, endangering more than just criminal activity. Government refusal to tailor the language more narrowly only reinforces these concerns.

Further, by not inviting members of the technology industry, the discussions blocked important voices from the discussion. The technology industry understands (and often creates) the technology being regulated, and it represents many of the innovators in that field. Not including them deprives legislation and agreements of valuable and necessary insights.

Canada's Bill C-11 provides a good example of a more open exchange. The Canadian Parliament considered and incorporated many (although not

all) of the concerns expressed by various interest groups.²⁰⁴ Even if there was dissatisfaction with Bill C-11, Canadians and interest groups had a greater opportunity to collaborate with Parliament. That stands in stark contrast to the ACTA negotiations, held in secret, and to the writing of SOPA. Talks and negotiations should include representatives of the technology sector—parties involved in dissemination of copyrighted material, and the owners and developers of new platforms for using copyrighted material. Ignoring these parties ignores the way the industry is developing. Not only will the legislation not be up-to-date, but it will leave out some of the most interested parties.

Broadened input should not stop with the technology industry but should also include artists and creators. Copyright holders like record companies may hold the copyrights of many creative works, but many artists choose to operate independently of those corporations.²⁰⁵ A number of artists actually oppose the bills,²⁰⁶ and as interested parties their viewpoints should also be represented.

The forum and method of these discussions is just as significant as the requirement for openness. The debates over ACTA and SOPA (and, in a more peripheral way, Bill C-11) show that both governments and copyright holders need to improve their methods of disseminating information. Opponents of ACTA and SOPA were able to reach wide audiences quickly and, most significantly, to mobilize them quickly. Regardless of the merits of their viewpoints, the opponents have arguably the most important factor weighing heavily in their favor: they know how to communicate their message, and they know how to do so persuasively. Opponents (particularly the technology industry) have and will maintain a head start on the government in communication; they control powerful means of dissemination in that they run the major websites. This should encourage copyright holders and the government to talk more directly with them in order to prevent drastic measures like the anti-SOPA blackout.

²⁰⁴ Geist, *supra* note 197 and discussion in Part III.C.

²⁰⁵ See, e.g., THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC, <http://a2im.org/> (“promot[ing] business opportunity, provid[ing] advocacy and representation” for independent musicians); THE SUNDANCE FILM FESTIVAL, <http://www.sundance.org/festival/> (annual showcase of independent films).

²⁰⁶ See, e.g., *An Open Letter to Washington from Artists and Creators* (Jan. 17, 2012), <http://stopthewall.us/artists/> (emphasizing the benefits they as artists receive from a “free and open internet” and expressing concern about the impact of SOPA and/or PIPA on those benefits).

To effectively engage in what is bound to be a public debate, the U.S. government and copyright holders must learn to communicate their message. In that vein, they must act like they want to communicate their message and explain their rationales instead of operating in secret. Secret, fast deal-making and bill-writing will trigger fears of subversive legislation.

Ideally, nations involved in the ACTA talks should reconvene, in a more public setting, and invite members of the technology community. In response, opponents should acknowledge the legitimacy of the need for this legislation—and not just by stating that certain protections are beneficial. Opponents have to stop using loaded terminology and doomsday predictions in discussing legislation; doing so keeps the public, especially in the United States media climate, from appreciating the potential benefits of the legislation.

Although discussion of how to conduct legislative talks might seem unnecessary (and might seem like a discussion of public relations tactics), the technology industry's response to legislation makes this discussion essential. Given the public's support of the technology industry, it is clear that the public will likely not support any measures that industry strongly opposes. The technology industry will continue to use eye-catching language and tactics to communicate a message they deem essential to their survival. To facilitate candid and complete discussion, and to garner any public support for IP laws, governments have to engage the technology industry.

B. Approaching the Problem

1. The Stage: International and National Efforts

Piracy and counterfeiting problems are international problems, and they call for international solutions. The global economy prevents IP offenses from staying within one country, and it calls for international recognition of legal actions and enforcement. Internet websites can operate in one country, for example, and facilitate sharing of illegally-copied works that violate the copyright of another country. The second country needs an international remedy to address the copyright violation. The same principle applies for criminal organizations that distribute pirated materials in countries other than the country where the copyright was violated. Distribution of pirated materials is not confined to the country in which the copyright violation occurred. Because the setting for copyright violations is international,

addressing the problem must be international as well; individual countries need to be able to rely on consistent enforcement in other nations.

The success of international action combating piracy can be seen in initiatives like the INTERPOL efforts.²⁰⁷ Their activities show that the problem is an international one, spanning continents, and that it needs to be addressed internationally. Practically speaking, it makes more sense to have the staff of an international organization tackling this problem; instead of U.S. agents constantly updating themselves on international movement of pirated goods, INTERPOL agents can work continuously on projects and build up a base of knowledge about the piracy industry in certain areas.

To reach an effective consensus, coordinated international efforts should be combined with strengthening of laws in individual countries. Individual countries strengthening their copyright laws will encourage enforcement; it will be more difficult for offenders to find safehavens, and it will make it more difficult to sell or distribute pirated goods. ACTA encouraged this by setting a floor for IP laws for its signatories. National efforts to fight piracy provide support to international efforts and, hopefully, make it more difficult for offenders not only to access copyrighted material but to distribute it.

International policing, as well as coordination among countries, will facilitate the prevention of copyright violations and the prosecution of piracy crimes. Continuing and strengthening these efforts should be part of any international IP legislation.

2. *Substantive Analysis and Changes*

Any successful IP legislation should be written with narrower language and higher degrees of specificity. One cause for uproar over both ACTA and SOPA was the broad language that opponents feared would be construed more strictly and harmfully than the legislation's writers claimed or intended.²⁰⁸ Writers certainly want the bills to have teeth, and they should write them so as to be effective. At the same time, they need to recognize concerns about over-breadth. Put another way, just because the authors intend narrow construction and application, other parties could still try to apply the bills broadly if the language permits. Language should specify what parties will be liable and what content they will be liable for.

²⁰⁷ See discussions *supra* Part II.

²⁰⁸ See discussions, *supra* Parts III.A.2, III.B.3.

Future international and national legislation should look to Bill C-11 for specific language about protections for consumers and establish certain limitations for the reach and scope of the legislation. Concerns for stifling creativity, internet development, and freedoms of speech are serious, and legislation must not include overly burdensome punishments or overly broad applications. A good start is including explicit language protecting creative development and speech, instead of only language condemning copyright offenses. Including the technology industry in the legislative process will provide significant protections against these concerns and a counterbalance to the voices of copyright holders.

Any legislation should work to find a compromise for modes of enforcing its terms. Copyright holders want a stricter mode of enforcement than simply notifying offenders, but the technology industry and the public want to avoid the immediate shutting-down of sites with offending content. In ACTA, the text goes even further, allowing injunctions or prosecutions on the basis of speculation without evidence. These two positions are at the extremes, and parties will need to work together to find means of enforcement that do not impose undue burdens.

Including the technology industry in discussions should provide ideas for less onerous means of enforcement. Not only is that industry very familiar with the technology and able to understand and propose means of enforcing restrictions, but they will be motivated to come up with new ideas because they are the subject of enforcement. It is possible to enforce IP laws through less restrictive means; Bill C-11, for example, includes much lighter sentences for individual offenders thus removing some of the fear of heavy punishments for unsuspecting users. Innocent offenders, particularly individuals, should be offered greater protection.

One particular protective provision should be a *mens rea* requirement to avoid convicting innocent offenders. Some provisions have been written broadly enough that offending sites could be shut down, or internet access terminated, without any kind of notification or hearing. These kinds of provisions should be avoided. Instead, there should be notification requirements so that offenders have a chance to either protest the charges or remove offending content. To ensure effective legislation and prevent repeated pleas of ignorance, there can be methods of proving awareness of the content and harsher punishments for repeat offenders.

Criticism of ACTA raised valid concerns about how countries will address piracy problems within their borders. Because not every copyright offense is criminal (for instance, internet users who are not aware that the

material they access is copyrighted), having universal international enforcement could overreach. It could also set a high bar requiring universal application of standards that not every country accepts.

Many of these concerns can be addressed through narrower language in constructing an agreement such as specifying particular copyright protections but not specific enforcement mechanisms. Language could also be included offering specific protections for consumers or technology companies to limit the kinds of enforcement possible in order to protect innocent offenders. Finally, any treaty could specify what kinds of international enforcement will be possible. For example, the three strikes policy is a national enforcement mechanism opposed by many countries; to satisfy those who oppose that policy, a treaty could specify that there will be no such mandates for national enforcement, or provide an explicit, basic, and more liberal minimum standard.

V. CONCLUSION

Intellectual property has been legally protected nationally and internationally for centuries. Ongoing developments in technology, however, mean that continuing this protection is becoming more difficult for holders of copyrights and for governments. Internet users find new and creative ways to share content—music, movies, and written works—online, fracturing copyright protections and cutting into profits of those industries that rely on copyrights for their works. Other technologies make it easier for counterfeiters to pirate other materials like medicines, foods, car parts, fashion accessories, and fabrics. Increasingly, pirating and distribution of pirated goods is becoming connected with international crime groups and organized terrorism.

To remain effective, copyright protection laws must be updated as technology develops. Many measures can and should be explored to effectively deal with national and international piracy, especially in a digital age. However, actually coming to an agreement about how to update and apply IP laws has proved elusive in recent international and national attempts.

The U.S. and Japan spearheaded ACTA to create an international standard for IP laws. Signatories would agree to certain floors in their national IP laws and enforcement to help combat the production and purchase of counterfeit goods. However, technology companies and internet openness advocates fought ACTA and worried it would stifle creativity and

internet freedoms. They argued that its provisions would be applied to shut down legitimate websites or those ignorant of offending copyrighted materials present on their sites.

While ACTA was accepted by many countries, including the U.S., the European Union rejected it in the summer of 2012. The rejection came after months of bad press, popular protests, and key governmental figures withdrawing support, and it leaves the future of the treaty uncertain. Without the important E.U. support, it remains to be seen what countries will carry through with ratification.

The U.S. also proposed national legislation in 2011 to deal with copyright and piracy problems. The PROTECT IP Act and the Stop Online Piracy Act were both supported by diverse groups, from the Motion Picture Association of America and the U.S. Chamber of Commerce to the AFL-CIO. These supporters emphasized the need to protect industry revenues and jobs. The technology industry rose up in opposition, emphasizing the potential applications of these bills to be read broadly enough to shut down websites like Google and Wikipedia. After online protests and popular backlash, both PIPA and SOPA were tabled in January 2012, and no legislation has yet been proposed to replace them.

In contrast, in the summer of 2012 Canada passed a copyright reform bill, Bill C-11. Discussion and debate over Bill C-11 was more open than either ACTA or SOPA and PIPA, and the Canadian legislature took into account concerns voiced from several industries. While many expressed the same concerns raised against ACTA and SOPA and PIPA—concerns about overbreadth and broad applications—others consider Bill C-11 the most user-friendly copyright reform yet passed.

In the face of obvious problems in the media and health industries as well as the national security realm, why has comprehensive copyright reform been so difficult? One major problem is that the conversation has centered on government and copyright holders. To recognize the changing industries and players, the conversation must expand to include the technology industry. This industry is essential in the modern dissemination of copyrighted material, and it can provide insight into development and enforcement.

Further, the substance of legislation needs to change to address concerns raised by the technology industry and its users. Legislation should be written narrowly, so there is no question of possible misapplication or over-reaching. Technology developers are also attuned to concerns like freedoms of the internet and of speech, and their influence in the conversation will strengthen legislation's observance and respect for those concerns. Continuing

technological changes mean that any legislation should be flexible, so it can adapt to these changes.

IP law will remain a dynamic field as technology continues to evolve, posing a challenge to governments as they try to protect interests of copyrights, freedoms of speech, and technological and creative development. Joining the voices of all interested parties and tailoring IP legislation in response to each voice will lead to stronger and more effective laws to not only combat piracy but promote continued growth of the industry.