

# **THE GLOBAL IP UPWARD RATCHET, ANTI-COUNTERFEITING AND PIRACY ENFORCEMENT EFFORTS: THE STATE OF PLAY**

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## ACRONYMS

A2K	Access to Knowledge
ACE	Advisory Committee on Enforcement
ACP	African, Caribbean and Pacific Countries
ACTA	Anti-Counterfeiting Trade Agreement
APEC	Asian Pacific Economic Cooperation
BASCAP	Business Coalition to Stop Counterfeiting and Piracy
BSA	Business Software Alliance
CEO	Chief Executive Officer
CIEC	Center for Innovation and Economic Change
DIIP	Database on International Intellectual Property Crime
DMCA	Digital Millennium Copyright Act
EPA	Economic Partnership Agreement
FBI	Federal Bureau of Investigation
FTA	Free Trade Agreement
G8	Group of Eight
GATT	General Agreement on Trade and Tariffs
GMO	Genetically Modified Organism
GSP	Generalized System of Preferences
ICC	International Chamber of Commerce
IFPMA	International Federation of Pharmaceutical Manufacturers' Associations
IIPA	International Intellectual Property Alliance
IIPi	International Intellectual Property Institute
IMPACT	International Medicinal Products Anti-Counterfeit Taskforce
INTA	International Trademark Association
IP	Intellectual Property
IPI	Institute for Policy Innovation
ISP	Internet Service Provider
IT	Information Technology
MPA	Motion Picture Association
MPAA	Motion Picture Association of America
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization

OECD	Organization of Economic Cooperation and Development
PRO-IP	Prioritizing Resources and Organization for Intellectual Property
RIAA	Recording Industry Association of America
SECURE	Standards to be Employed by Customs for Uniform Rights Enforcement
SPLT	Substantive Patent Law Treaty
STOP	Strategy Targeting Organized Piracy
TRIPS	Agreement on Trade-Related Intellectual Property
USCC	United States Chamber of Commerce
USPTO	United States Patent and Trademark Office
USTR	United States Trade Representative
WCO	World Customs Organization
WHO	World Health Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
WIPO	World Intellectual Property Organization

## *Introduction*

Proponents of an IP maximalist agenda increasingly have been rebuffed in recent years. Developing country governments, NGOs, and Access to Knowledge (A2K) advocates have thwarted their efforts to ratchet up standards of intellectual property protection in multilateral intergovernmental forums such as the World Trade Organization, the World Intellectual Property Organization, and the World Health Organization. A2K advocates challenge the premises behind ever higher and broader intellectual property protection and seek, if not a rolling back of IP rights, at the very least a standstill. They argue that in the balance between rights and obligations, IP maximalists assert their rights without recognizing their obligations. IP maximalists always have seen TRIPS as a floor, not a ceiling. Ever since the WTO TRIPS negotiations that ended in 1994, they have been using every opportunity to increase intellectual property protection and enforcement beyond TRIPS. They have been relentless, focused, and have devoted untold resources to their quest for higher global standards of intellectual property protection and enforcement. Undaunted by recent setbacks at the multilateral level, IP maximalists have launched a major, almost surreptitious, anti-A2K campaign focused on “counterfeiting”, “piracy” and “enforcement.”<sup>[1]</sup> As the US Chamber of Commerce’s Global Intellectual Property Center sees it:

anti-IP forces are pressing their attacks in the U.S. Congress, in a growing number of key nations, and in multilateral forums like the World Trade Organization, the World Health Organization, and the World Intellectual Property Organization, harming both developed and developing countries and their people. The U.S. Chamber, as the voice of the broader business community, has launched a comprehensive campaign to rebuild global support for fundamental intellectual property rights.<sup>[2]</sup>

As in the process leading up to TRIPS, private actors have collaborated with OECD governments and various governmental and intergovernmental agencies to increase intellectual property rationing. This collaboration is multi-layered, multi-faceted, fast-moving, and presents an urgent challenge to A2K advocates. The discourse animating this push for higher standards of protection and enforcement echoes the 1980s focus on “competitiveness”<sup>[3]</sup> but also has added a “security” narrative. Introducing a security frame for IP has allowed these IP maximalists to enlist new actors, law enforcement agencies, in their cause. Law enforcement agencies have become eager recruits to the IP maximalists’ network. The IP Anti-counterfeiting and enforcement agenda involves hundreds of OECD-based global business firms and their foreign subsidiaries. It includes a number of initiatives including: the Anti-Counterfeiting Trade Agreement (ACTA); Interpol’s SECURE; the US Chamber of Commerce’s “Coalition against Counterfeiting and Piracy Intellectual Property Enforcement Initiative: Campaign to Protect America”; the Security and Prosperity Partnership of North America; the WHO’s IMPACT; WIPO’s ACE discussions; and many bilateral and regional Free Trade Agreements, Investment Treaties, and Economic Partnership Agreements. While European and American IP maximalists have pushed for TRIPS-Plus provisions in FTAs and bilateral agreements, they are now pushing for TRIPS-Plus-Plus protections in these various forums. TRIPS is the high water mark for multilateral hard law as it is both binding and enforceable. TRIPS-Plus-Plus norm- setting and soft law efforts proceed apace. These new anti-counterfeiting and enforcement initiatives are just the latest mechanisms to achieve the maximalists’ abiding goal of ratcheting up IP protection and enforcement worldwide.

IP-industries and their supportive governments have often shifted forums when it suits their interests. Now that developing country governments and Non-Governmental Organizations

(NGOs) are active in intellectual property governance in multilateral forums such as WTO, WIPO, and WHO, the intellectual property maximalists are looking elsewhere to ratchet up intellectual property protection. I discuss their strategic forum shifting, and then briefly present an institutional roadmap of active arenas in the push for the IP enforcement agenda. The paper outlines industry's goals and strategies and discusses some of the challenges that the IP enforcement agenda poses. It then discusses industry's sensationalist and misleading efforts to persuade lawmakers and the public of the merits of this approach. The language that the enforcement agenda deploys conceals the far-reaching substantive goals that directly endanger the goals of A2K. The paper offers some preliminary suggestions for fighting back.

### *Forum Shifting: a Longitudinal Approach*

Since the early 1980s advocates of a maximalist IP agenda have shifted forums both horizontally and vertically in order to achieve their goals. Those who seek to ration access to IP are engaged in an elaborate cat and mouse game with those who seek to expand access. As soon as one venue becomes less responsive to a high protectionist agenda, IP protectionists shift to another in search of a more hospitable venue. As Peter Drahos points out, developing country negotiators, NGOs, and A2K advocates must adopt a longitudinal perspective on IP negotiations or they will risk winning small battles (e.g., the Doha Declaration) but losing the war (e.g., access to affordable medicines).<sup>[4]</sup> According to Drahos, "forum shifting means that some negotiations are never really over."<sup>[5]</sup> Strong states like the U.S. shift forums to optimize their power and advantages and minimize opposition. The IP enforcement agenda is just the latest in a series of strategic forum shifts.

In its quest for higher global IP standards the US first horizontally shifted from WIPO to the GATT in the mid-1980s. The US sought to leverage its large market to induce developing countries to adopt high standards of IP protection. By linking IP protection to market access the US found leverage that it did not have in WIPO. The US simultaneously shifted forums vertically by pursuing bilateral and regional trade agreements mandating high standards of IP protection, and pursued punitive action through the US Trade Representative under Special 301. This permitted the US to impose trade sanctions on trading partners who violated US IP rights. Trade pressure helped the US to reduce developing country opposition to an IP agreement in the GATT/WTO deliberations. With bilateral and regional agreements, and EU Economic Partnership Agreements, the EU and US can bypass multilateral debates and pressure individual countries and/or weaker regional partners to adopt TRIPS-Plus IP standards.

Once the access to medicines coalition of developing countries and NGOs mobilized in the WTO, the IP maximalists renewed their earlier WIPO deliberations on a Substantive Patent Law Treaty (SPLT) in an effort to secure IP protection that went beyond TRIPS. However, the mobilized medicines coalition paid attention to WIPO and tried to counter this quest with a Development Agenda for WIPO. The ensuing stalemate at WIPO over the SPLT led the IP maximalists to pursue other avenues, including continued bilateral and regional trade and investment treaties marked by TRIPS-Plus provisions as well as this new pluri-lateral effort behind the IP enforcement agenda. Industry has been relentless pursuing its IP agenda and circumventing developing country and NGO opposition, favoring non-transparent forums of "like-minded" actors.<sup>[6]</sup>

IP-based firms, with their supportive governments, seek to go far beyond TRIPS in IP

enforcement. Their four main goals are to: document and explain the value of IP; ensure strong government support for IP in the US; rally allied nations and organizations to defend IP; and hold anti-IP governments accountable.<sup>[7]</sup> For instance, under the proposed Anti-Counterfeiting Treaty (ACTA) they would like to see all countries sign on to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT); together they are referred to as the “Internet Treaties.” Enforcement provisions under these treaties include legal remedies against circumvention of technological protection measures (e.g., encryption) or deletion of electronic rights management information.<sup>[8]</sup> Since many countries have not signed on to these treaties, the efforts to have everyone sign would raise IP standards and reduce some states’ flexibilities in IP policy. For economically advanced countries like Canada, IP-based firms would like to see them go beyond the TRIPS-Plus WIPO treaties and adopt something similar to the US Digital Millennium Copyright Act (DMCA).<sup>[9]</sup> The ACTA would run roughshod over differences across jurisdictions. (e.g., many countries have yet to sign on to the WIPO Internet Treaties).<sup>[10]</sup> The following section provides a brief institutional roadmap to the complex and comprehensive process underway.

### *Institutional Roadmap*

The main actors in the ACTA process are “nodal actors” or networks of state and private sector actors who coordinate their positions and enroll nodal actors to help the cause.<sup>[11]</sup> These are not single issue coalitions of states, but rather a mélange of private and public sector actors who share compatible goals and continue to coordinate their negotiating positions over time and across forums. Drahos states that “there is considerable evidence that the US runs its trade negotiation as a form of networked governance rather than as a simple process of domestic coalition building.”<sup>[12]</sup> The anti-counterfeiting and enforcement agenda represents densely networked governance. Among the actors that this network recently has enlisted are the World Customs Organization, the US Department of Homeland Security, and Interpol.

- Campaign to Protect America

This campaign is the USCC’s Coalition against Counterfeiting and Piracy’s Intellectual Property Enforcement Initiative.<sup>[13]</sup> This initiative lays the groundwork for all of the other efforts because it is comprehensive, and outlines the full court press strategy that industry and supportive government agencies currently are pursuing. While it is US-based, it offers significant insights into the broader global strategy because the US has been the first mover and major instigator of the quest for ever higher IP standards. Many of the initiatives that follow fit neatly under this broader rubric. The campaign includes a number of ambitious goals. The campaign presents six initiatives. I will discuss each in turn. First, is to improve coordination of federal government intellectual property enforcement resources. To this end, the campaign sought to designate a chief IP enforcement officer (“IP czar”) within the White House. The US House of Representatives passed this provision, in the Prioritizing Resources and Organization for Intellectual Property Act (PRO-IP) in May 2008.<sup>[14]</sup> It awaits the Senate vote. The campaign also sought to raise anti-counterfeiting and piracy responsibilities to senior levels at the Department of Justice and Department of Homeland Security.

In 2004 the White House initiated its Strategy Targeting Organized Piracy STOP! This has focused on interagency coordination. The US has established the National Intellectual Property Enforcement Council. Its members include the U.S. Coordinator for International

IP Enforcement and high level officers from the Departments of Commerce, Homeland Security, Justice, State, and USTR. The US Copyright Office serves as an advisor to the Council.[\[15\]](#)

The second initiative focuses on border protection against counterfeiting and piracy. This involves expanding information-sharing capabilities, developing databases to flag suspect shipments, to fund more agents and training programs, to give Customs and Border Protection agents more legal authority “to audit and assess fines for importers, exporters, or other parties that materially facilitate the unlawful entry of counterfeit and pirated goods into the US.”[\[16\]](#) This raises important questions because what constitutes a “counterfeit” or “pirated” product varies from jurisdiction to jurisdiction. These are complex legal issues that Customs officers are neither trained nor authorized to adjudicate. Border protection goals include eliminating the existing “personal use” exemption and outlawing importation of *any* quantity of counterfeit or pirated products including via mail or courier service.[\[17\]](#) These goals could impact the fair use doctrine, or allowances for infringements for non-commercial purposes.

The third initiative addresses enhanced law enforcement capacities to crack down on “intellectual property theft” by increasing funding for law enforcement (US Attorneys’ Offices, FBI, training for state and local law enforcement), enhancing penalties for counterfeiters who cause bodily injury or death, and increasing coordination between law enforcement and industry.[\[18\]](#)

The fourth initiative to “Protect America” is to coordinate with law enforcement and customs officials across borders and abroad. Activities include training and technical assistance. USTR and industry are, together, to devise and coordinate priorities for technical assistance. Public-private partnerships feature prominently. It also involves funding “technical assistance” to train governments in IP enforcement, establish IP attaches at US embassies, and increase funding for Intellectual Property Law Enforcement Coordinators internationally. Again, in conjunction with USTR, the initiative endorses the use of the Generalized System of Preferences (GSP) and regional trade preference programs to encourage enforcement of IP rights.[\[19\]](#)

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

Finally, “Protect America” seeks to create and administer a nation-wide consumer awareness campaign revealing the harms caused by counterfeiting and piracy (including paid and donated ads for television, radio, print, and the Internet).[\[20\]](#) It also seeks to focus on college campuses to fund R&D to secure campus networks against P2P network activity, and to direct funding agencies to favor those campuses that have the most stringent anti-piracy practices.[\[21\]](#)

- Industry associations and the USTR

Associations such as Motion Picture Association, the Recording Industry Association of America, the International Intellectual Property Alliance, and the Business Software Alliance routinely provide data and information about foreign governments' failure adequately to protect their intellectual property. They submit reports and complaints through the Special 301 process and USTR names alleged offenders on its annual Watch Lists. According to law professor Michael Geist, "Canadian officials have 'rightly dismissed' the Special 301 process as 'little more than a lobbying exercise.' ... One official told a parliamentary committee that Canada does not recognize the process because it 'lacks reliable and objective analysis' and is 'driven entirely by US industry.'"[22] The 2008 Watch List identified China, Russia, and Thailand as among the worst offenders. Significantly, China's placement on the Priority Watch List is due to concerns about enforcement. The US has filed a complaint against China with the WTO; this will be the first WTO dispute focused on *enforcement*. [23] Industry, through the USTR, is pressuring Russia to adopt TRIPS-Plus measures as part of its WTO accession process.

On October 23<sup>rd</sup> 2007, just two weeks after WIPO's September 2007 adoption of the Development Agenda, USTR Susan Schwab announced that it would seek to negotiate ACTA in order to "set a new, higher benchmark for enforcement that countries can join on a voluntary basis." [24] Kevin Havelock, president of Unilever United States noted that Schwab "made quite a commitment of her own energy" pushing for ACTA. [25] On that same day, the Ministry of Foreign Affairs of Japan and the European Commission announced their intentions to pursue an international enforcement agreement. [26] Notably this process will go forward independently of any international organization. Indeed, Eric Smith, head of IIPA, reflects industry's determination for an uncompromising agreement when he states that the ambitious agreement for strengthened enforcement "should not be sacrificed for additional signatories or the need for a hurried conclusion of negotiations." [27]

- Industry-dominated groups in International Organizations

WIPO: the Advisory Committee on Enforcement (ACE), established in 2002 is industry dominated, and has devoted its efforts to discussing strengthening enforcement and problems that rights holders face in third countries. [28] ACE has not devoted attention to public interest considerations or rights holders' obligations. [29]

The World Health Organization's International Medicinal Products Anti-Counterfeit Taskforce (IMPACT) is supported by the International Federation of Pharmaceutical Associations (IFPMA). [30] Interpol is deeply involved in this effort and has focused its efforts in Southeast Asia. [31] Other members include representatives of WIPO, OECD, WTO, and WCO. Government participation is voluntary; IMPACT tends to be industry-dominated, and according to Outterson and Ryan, industry tends to blur the distinctions between parallel trade, compulsory licenses, and generics. [32] Critics question this initiative, which is a G8 priority that focuses on counterfeit drugs rather than other pressing health issues.

Industry is very involved in monitoring the WTO accession process, and is pressing to make enforcement a permanent part of the TRIPS Council agenda.[\[33\]](#)

- ACTA

While copyright and trademark-based industries have been concerned about enforcement for many years, the most recent push for a new approach emerged in 2004 at the first annual Global Congress on Combating Counterfeiting. The Global Business Leaders' Alliance Against Counterfeiting (GBLAAC), whose members include Coca Cola, Daimler Chrysler, Pfizer, Proctor and Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Canon, sponsored the meeting in Geneva.[\[34\]](#) Interpol and WIPO hosted the meeting. At the July 2005 Group of 8 (G8), meeting Japanese representatives suggested the development of a stricter enforcement regime to battle "piracy and counterfeiting." The G8 issued a post-meeting statement: "Reducing IP Piracy and Counterfeiting Through More Effective Enforcement."[\[35\]](#) In what would become a familiar trope, the first line claims that trade in counterfeit and pirated goods "can have links to organized crime," and threatens employment, innovation, economic growth, and public health and safety. That same year, the US Council of International Business partnered with the International Chamber of Commerce to launch the Business Coalition to Stop Counterfeiting and Piracy (BASCAP). A recently leaked discussion paper about ACTA circulated among industry insiders and government negotiators from the US, Japan, Switzerland, Canada, the European Union, Australia, Mexico, South Korea, and New Zealand included all of these negative effects and added "loss of tax revenue" to the litany.[\[36\]](#)

This is no high-minded quest for the public good. As David Fewer of the Canadian Internet Policy and Public Interest Clinic and the University of Ottawa noted, "if Hollywood could order intellectual property laws for Christmas what would they look like? This is pretty close."[\[37\]](#) One of the central features of ACTA's approach would be to enlist the public sector in enforcing private rights. This means that tax payers' dollars would be used to protect private profits. The opportunity costs of switching scarce resources for border enforcement of IP "crimes" is huge. There surely are more pressing problems for law enforcement in developing countries than ensuring profits for OECD-based firms. Other concerns address the lopsided nature of the ACTA approach, favoring rights holders above all else and presuming suspects to be guilty. Due process of law will be sacrificed to the interests of IP rights holders and there will be few, if any, checks on abuses of rights.[\[38\]](#) It would authorize border guards and customs agents to search laptops, iPods, and cell phones for infringing content. Customs officials would have authority to take action against suspected infringers even without complaints from rights holders; they could confiscate the laptops and iPods. Privacy issues arise over extensive data sharing and possible wire tapping that could be involved in ramped up enforcement efforts.

ACTA would require Internet Service Providers to police and control their systems for infringing content.[\[39\]](#) Its one-size fits all policy exacerbates the problems that even the far more forgiving and flexible TRIPS revealed. It sharply reduces policy space for developing countries to design appropriate policies for their public policy for innovation and economic development. It also would create an additional international intellectual property governance layer atop an already remarkably complex and increasingly incoherent intellectual property regime.

As Shaw points out, “instead of merely shifting the debate from one forum to another, the ACTA supporters now seek to create an entirely new layer of global governance.”<sup>[40]</sup> The treaty will be tabled at the G8 meeting in Tokyo in July 2008.<sup>[41]</sup>

- World Customs Organization

The G8 opened negotiations at WCO to establish customs enforcement standards. In June 2006 Members recognized the major role that they could play in IP protection, and established a set of standards for IP enforcement.<sup>[42]</sup> Brussels-based WCO is a congenial forum for IP rights holders because there they are on equal footing with governments.<sup>[43]</sup> Discussions at WCO have not been transparent, and advocacy and consumer groups have not been able to participate; many suspect that “rich country governments view it as a forum where they can strive for new IP rules, free from scrutiny.”<sup>[44]</sup> The provisional Standards to be Employed by Customs for Uniform Rights Enforcement (SECURE), dramatically expand the scope and level of enforcement protections beyond TRIPS, leading some commentators to refer to these as Trips-Plus-Plus standards.<sup>[45]</sup> At its third meeting of the Working Group on SECURE the WCO Secretariat announced that consultations on SECURE had been completed, with an eye toward adopting SECURE at its June 2008 meeting.

SECURE is Trips-Plus-Plus because it: extends the scope from import to export, transit, warehouses, transshipment, free zones, and export processing zones; extends protection from trademark and copyright to all other types of IP rights; removes the obligations of rights holders to provide adequate evidence that there is *prima facie* an infringement to initiate a procedure; requires governments to designate a single authority as a contact point for Customs; gives Customs administrations the legal authority to impose deterrent penalties against entities knowingly involved in the export or import of goods which violate *any* IPR laws (versus just trademark counterfeiting and copyright piracy).<sup>[46]</sup>

The IP enforcement agenda’s nodal network has enlisted the WCO to champion IP protection and to pursue an expanded mandate. SECURE privileges IP rights holders, and while at this moment adopting SECURE is voluntary, these TRIPS-Plus-Plus provisions are likely to appear in bilateral and regional trade and investment treaties.<sup>[47]</sup> One can expect this given the US and EU track record of norm-setting, and then institutionalizing Trips-Plus provisions into Bilateral Investment Treaties, Free Trade Agreements, and EPAs.<sup>[48]</sup> Thus even though “the WCO lacks the authority to set or enforce policies that contradict the WTO,”<sup>[49]</sup> TRIPS specifies that member states are free to adopt IP protection and enforcement standards that exceed TRIPS provisions; therefore if states adopt SECURE provisions in bilateral or regional agreements they will *not* be contradicting WTO. WCO works with WIPO, Interpol, OECD, the European Commission, WHO, and the Council of Europe to coordinate its activities. Brazil has been an outspoken critic of these measures as setting a dangerous precedent and of sneaking in TRIPS-Plus-Plus provisions “through the backdoor.”<sup>[50]</sup>

- Interpol

Interpol increasingly has gotten involved in IP enforcement. It has been a prominent

participant in the Annual Global Congresses Combating Counterfeiting & Piracy.<sup>[51]</sup> Interpol, WCO, WIPO, International Trademark Association, International Chamber of Commerce, and the International Security Management Association co-sponsor the Congresses, which have become an important global forum for government officials and IP rights holders to exchange information, best practices, and to discuss ways to stop counterfeiting and piracy. Interpol has dedicated one officer full-time to work with WHO's IMPACT program. It has introduced an IP crime training program, beginning in June 2007 and will be expanding these activities.

In 2006 Interpol entered into partnership with the US Chamber of Commerce to develop a database on IP crime to facilitate information sharing.<sup>[52]</sup> In February 2008, Interpol presented its database on international IP crime (DIIP) at the G8 IP Experts Group meeting in Japan as best practice for all countries to adopt.<sup>[53]</sup> Critics have raised privacy concerns. Ronald Noble, Interpol's Secretary General, has stated that "it is no longer acceptable to invoke misguided data-protection arguments for not sharing information."<sup>[54]</sup> The politics of fear have facilitated support for a law enforcement approach to IP protection. Interpol and the World Customs Organization enthusiastically have embraced this new mission, with its prospect of high-level support and expanded resources. Thomas Donahue, President and CEO of the U.S. Chamber of Commerce actively has supported an expanded role for Interpol through lobbying government, and targeting "hotbeds" of piracy such as China, India, and Russia. Interpol and the US Chamber of Commerce conducted their 1<sup>st</sup> Annual Global Forum on Innovation, Creativity and Intellectual Property in Beijing in March 2007, and their 2<sup>nd</sup> in Mumbai in February 2008. The USCC has provided resources and information for an Interpol Database on International Intellectual Property Crime (DIIP). While Interpol has largely focused on counterfeit pharmaceuticals, it has been working with the Business Software Alliance, the Entertainment Software Association, the International Federation of the Phonographic Industry, and the Motion Picture Association to build internet anti-piracy capacity.<sup>[55]</sup>

Interpol's "intellectual property crime" unit fails to provide clear definitions of trademark counterfeiting and copyright piracy; "this is a serious concern for developing countries and consumers, given that the potential scope of the definition of counterfeit and piracy may be so wide as to include legitimate uses of works and cases where an individual may infringe an intellectual property right without knowing it."<sup>[56]</sup>

- The Security and Prosperity Partnership of North America

The SPP is a White House-led initiative among NAFTA signatories: the US, Canada, and Mexico, "to increase security and to enhance prosperity."<sup>[57]</sup> Under a competitiveness rubric the SPP aims to enhance IP enforcement and crack down on counterfeit and pirated goods. It seeks to target export processing zones in particular {maquilladoras}, and has established a task force of senior officials from all three countries to develop a coordinated strategy to combat counterfeiting and piracy. It is best described as an ongoing dialogue rather than a formal agreement or treaty.<sup>[58]</sup> The US government agencies engaged in this dialogue are the Department of Commerce {"prosperity"}, the Department of Homeland Security {security} and the Department of State {to coordinate}.<sup>[59]</sup> The SPP is focused on increasing private sector engagement in the process to help the North America's competitive position in the global economy.<sup>[60]</sup>

- APEC

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

- “Think Tanks”

One of the IP maximalists’ objectives is to build a “virtual IP network (NGO) capable of influencing leading European political parties and non-business think tanks in favor of government support for IP – in Germany, Austria, Switzerland, France, Italy, Scandinavia, and the UK.”[\[61\]](#) Industry-supportive “think tanks” have been producing studies for the cause of ratcheting up IP standards and enforcement. For example, industry lobbyist outlets such as the International Intellectual Property Institute, the Institute for Policy Innovation, the Stockholm Network, and the Center for Innovation and Economic Change, have all supplied studies and articles promoting TRIPS-Plus-Plus approaches to IP.

### *The Dangers of Discourse and the Politics of Fear*

Advocates of the IP enforcement agenda have engaged in a shrill public relations campaign to frighten people into accepting their agenda. At a CropLife America meeting on December 1<sup>st</sup> 2007 Dan Glickman, head of the Motion Picture Association, recommended that advocates underscore the *danger* of counterfeited and pirated goods. Through fear mongering, IP enforcement agenda advocates are constructing a big tent that includes all types of intellectual property: trademarks, patents, copyrights. Despite the very real differences between all the types of intellectual property contained in the IP enforcement agenda’s “big tent” approach, there is one thing that Kate Spade bags and pharmaceuticals DO have in common and that is high prices. High prices are directly related to the demand for counterfeit products. This campaign is characterized by strategic obfuscation; its message is intentionally misleading. For example, it is difficult to imagine a “dangerous” counterfeit handbag, or a “dangerous” dvd.

The fear mongering ranges from tales of exploding cell phones and toxic counterfeit drugs, to unsubstantiated allegations of organized crime and even terrorist involvement. In April 2008, US Attorney General Michael Mukasey asserted that terrorists sell pirated software to fund their operations, yet provided no evidence for this claim.[\[62\]](#) He was merely trying to frighten people into backing a PRO-IP law (the Prioritizing Resources and Organization for Intellectual Property Act) in Congress, which would, among other things, create the post of Copyright Enforcement Czar to coordinate IP protection efforts.[\[63\]](#) The USCC has ardently promoted the PRO-IP law.

The IP enforcement agenda advocates have promoted two sensationalist books, *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy* and *Knockoff: the Deadly Trade in Counterfeit Goods*.[\[64\]](#) The ICC funded a public broadcast of a program based on *Illicit*, which equates counterfeiting with human smuggling, drug smuggling, small arms trafficking, and black market trade in nuclear materials.[\[65\]](#) *Knockoff* appears to be entirely

based on information from ACTA advocates: the International Trademark Agency; the International Intellectual Property Institute; the International Anti-Counterfeiting Coalition, the Association Against Counterfeiting and Piracy, and the Anti-Counterfeiting Group. The Secretary General of the World Customs Organization offers his endorsement inside the book jacket, calling the counterfeit trade “**the** crime of the 21<sup>st</sup> century.” Chapter titles include: “Lies, damn lies, knockoffs”; and “Show us the dead bodies.” Recent US Congressional hearings about tainted blood thinner (heparin) from China have raised the profile of danger and death that will no doubt be deployed in the service of the IP enforcement agenda.

The MPA and RIAA have pushed hard for the IP enforcement agenda. While the first line of attack appears to be copyrights and trademarks, patents are not far behind as is evident from the media blitz. Kevin Outterson and Ryan Smith have provided a careful analysis of the deliberate rhetorical obfuscation over “counterfeit” drugs.<sup>[66]</sup> The authors point out not only that the evidence for counterfeit drugs is anecdotal rather than empirical, but that the only comprehensive collection point for global data on counterfeiting is the Pharmaceutical Security Institute – a trade organization created by the security directors of 14 global drug companies – that does not make its data available to the public.<sup>[67]</sup> Furthermore, they point out that “the terms fake or counterfeit have included a wide range of drug products, from those resulting in criminal acts of homicide, to placebos, to safe and effective drugs from Canada.”<sup>[68]</sup>

By casting this wide rhetorical net global pharmaceutical companies hope to curtail drug importation from Canada, parallel importation, and the TRIPS-compliant use of compulsory licenses – three important avenues for increasing access to essential medicines. In a thinly veiled reference to TRIPS-compliant compulsory licensing of drugs (think Thailand), David Chavern, USCC vice president noted that a broad and “disturbing trend is essentially the expropriation of intellectual property by governments with support of NGOs, with noble-sounding reasons why they’re doing it, but ultimately with the same effect [as counterfeiters and pirates] – crush the innovative engine, not only of our economy, but ultimately of the worldwide economy.”<sup>[69]</sup> The consumer safety issue actually is far narrower and should be restricted to “contaminated products peddled by criminal gangs.”<sup>[70]</sup> Nobody in the A2K movement wants tainted heparin or deliberately toxic counterfeit drugs. All the misleading data and rhetoric is geared to winning broad political support for much more stringent IP enforcement measures.

The big tent approach to “counterfeiting” and “piracy” is designed to capture behavior that is legal.<sup>[71]</sup> Indeed, Drahos warns of the dangers of complex implementation measures that involve self-interested interpretation; this framework offers potential for abuse.<sup>[72]</sup>

It is allowing proponents to construct a multi-pronged attack on the A2K and development agendas. The US seeks to undo developing countries’ abilities to issue compulsory licenses. The EU’s Cariforum Economic Partnership Agreement transfers European IP standards to ACP countries, extends rights of complainants to access private information such as banking records and to have goods seized.<sup>[73]</sup> Complainants may pursue injunctions against some IP uses without needing to prove harm. Third party intermediaries who are not themselves infringers are targeted. The EPA includes no limitations and exceptions to protect defendants. Like most of the IP enforcement agenda it is one-sided in favor of rights-holders,

Critics have questioned a law enforcement approach to IP protection noting that there are many other avenues available to protect consumers. Customs officials are not trained to resolve complex legal determinations of infringement issues.<sup>[74]</sup> ACTA proponents want plants shut down on

“suspicion” of counterfeit production. This suggests that suspects are presumed to be guilty unless proven innocent. This is reminiscent of medieval times in which a woman suspected of being a witch would be thrown into water; if she survived it would prove that she was a witch, if she drowned she was innocent. Furthermore, ACTA proponents claim that the treaty will help developing countries with “capacity building” in enforcement. The MPA has provided Labrador retrievers, Lucky and Flo, who are trained to sniff out DVDs. The MPA gave another pair of DVD-sniffing dogs, Manny and Paddy, to the government of Malaysia for its efforts to crack down on DVD piracy.[\[75\]](#) To get an idea of how far-reaching an approach that the MPA and RIAA endorse, one need only look to the recent MPA/RIAA backed Los Angeles County Ordinance that will hold property owners liable for any piracy activity that goes on in their buildings![\[76\]](#)

Is there any way to stop the IP rights holders’ juggernaut of ever higher levels of protection and enforcement? I present several possibilities below.

First, one should insist that IP enforcement proponents define terms such as trademark counterfeiting and copyright piracy quite explicitly. As Outterson and Ryan suggested, it is important to clarify terminology and explicitly distinguish between and create different sets of rules for counterfeited goods, pirated goods, grey goods, parallel imports, generic goods, and goods produced under TRIPS-compliant compulsory licenses.[\[77\]](#)

It is also imperative to identify and target policymakers and industry representatives who are sympathetic to the A2K agenda. Some members of the US Congress have been supportive, and the European Parliament has injected some balance into EU policies. The OECD is another potential venue to lobby against this IP enforcement agenda. Also, despite the USCC approach, many successful and powerful business firms have good reason to object to the IP enforcement agenda. Many IT firms have been lobbying Congress to roll back patent protection in their industry because of the so-called “patent troll” problem.

The hypocrisy of the campaign must be highlighted. For instance, the MPA always emphasizes its interest in preserving American jobs. Indeed, when you watch a Hollywood DVD you get to see the FBI anti-piracy notice, and sometimes the brief testimonials of caterers, stunt people, make up artists, and camera people claiming that downloading movies illegally costs them their jobs. MPA is always telling Congress how many *American* jobs counterfeiting costs Hollywood. Yet MPA does huge amount of filming in Canada due to lower production costs and generous subsidies; Hollywood unions have tried to sue MPAA for taking jobs out of the country.[\[78\]](#) As Lee points out, “in a 2000 report, the US Department of Commerce estimated that this ‘runaway production’ to Canada resulted in production losses of \$2 billion to the U.S. economy in 1999.”[\[79\]](#) Thus, despite the sometimes seemingly altruistic rhetoric, MPA “lobbies for the interests of its own members, even when doing so appears to go against the interests of the U.S. economy.” [\[80\]](#)

Furthermore, films and music, and even apparel, do not fit in to the “danger” trope, even though US State Department ads about dangerous counterfeits (e.g. pills, exploding cell phones, faulty electrical cords, failing car brakes, and DVDs?!) include images of DVDs. Also, it is reasonable to assume that Microsoft would prefer that poor people use bootleg Microsoft software rather than Linux, in order to get them hooked on the Windows platform. Monsanto just might not mind the unauthorized transfer of GMO seeds across borders from Argentina to Brazil to circumvent biosafety regulations, because once the proverbial cat is out of the bag it is hard to go back.[\[81\]](#) Hypocrisy is also evident in the narrative that counterfeits cause injury.[\[82\]](#) According to the

USPTO-commissioned study on the subject, governments are obligated to protect public health. Yet IP enforcement agenda advocates actively oppose government efforts to protect public health when it comes to compulsory licensing and parallel imports, even when millions of patients are at risk of death.

Clearly, in this field, evidence-based empirical analysis is necessary to counter some of the more outlandish claims advanced in support of this enforcement agenda. The current ACTA push is based on highly suspect data. The IP enforcement agenda advocates' use of data can be creative. For example, while BASCAP claims that worldwide losses to counterfeiting and piracy amount to \$600 billion per year,<sup>[83]</sup> \$250 billion in the U.S. alone, the more sober yet still supportive OECD estimates that worldwide trade in counterfeit and pirated goods is closer to \$200 billion per year.<sup>[84]</sup> The IIPA quoted one study as estimating lost tax revenue in the US to be \$2.6 billion in 2006.<sup>[85]</sup> Many IP enforcement agenda advocates rely on just one economist, who continues to produce reports that echo the ACTA lobbyists' narrative. Steve Siwek provides figures for IIPA, and Institute for Policy Innovation, RIAA, and MPAA with his "True Cost of Piracy" series.<sup>[86]</sup> Siwek has conducted over 11 studies for industry and also helped to formulate methodology for WIPO to calculate the copyright industries' role in all economies.<sup>[87]</sup> Figures provided by self-interested industry lobbyists can be inflated, by assuming, for example, that one may calculate lost revenue based on the differential between the full retail price of a good and the lower price of the "knockoff." Yet often those who buy the cheaper version could not afford to pay the full retail price and would not buy it if the knockoff were unavailable. Thus the industry-generated numbers are unreliable guides for policymaking. Finally while the danger rhetoric is sensational, a USPTO-commissioned study on injuries and counterfeit goods concluded that over 60% of counterfeit seizures have nothing to do with health or safety.<sup>[88]</sup> Independent studies must be conducted by economists who are not on industry's payroll and who will not be tempted or obligated to inflate numbers.

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

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[1] Terms in quotes because they are contested.

[2] US Chamber of Commerce, Global Intellectual Property Center.  
<http://www.uschamber.com/sab/ip.htm>

[3] This is to be expected as the US faces significant trade deficits with China in the early 21<sup>st</sup> century. This is reminiscent of the significant trade deficits with Japan in the 1980s that led to Section 301 of the US Trade and Tariff Act and the beginning of bilateral pressure to raise IP protection standards abroad. Notably in so-called "rust-belt" states, the Democratic contenders for the nomination are resuscitating much of the protectionist narrative that fueled the adoption of 301 as a hedge against tariffs and trade wars. See Susan K. Sell, 2003. *Private Power, Public Law: the Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press).

[4] Peter Drahos, 2007. "Four Lessons for Developing Countries from the Trade Negotiations over access to Medicines" *Liverpool Law Review*.

[5] Ibid.

[6] A related recent example of this behavior is six large corporations' initiative to bypass international Biosafety negotiations. See CropLife International's proposed private sector voluntary

Compact: “Contractual Compensation Mechanism concerning recourse in the event of damage to Biological Diversity caused by Living Modified Organisms” [BASF, Bayer Crop Sciences, Dow AgroSciences, DuPont/Pioneer, Monsanto & Syngenta] 29 April 2008

[7] US Chamber of Commerce, Global Intellectual Property Center, p. 1-4.  
<http://www.uschamber.com/sab/ip.htm>

[8] Ermias Tekeste Biadgleng and Viviana Munoz Tellez, 2008. “The Changing Structure and Governance of Intellectual Property Protection” South Centre, Research Papers 15, p. 10.  
[www.southcentre.org](http://www.southcentre.org)

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

[10] Biadgleng and Tellez, 2008: 25.

[11] Drahos, 2007.

[12] Ibid.

[13] [www.theCACP.com](http://www.theCACP.com)

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

[15] The National Intellectual Property Law Enforcement Coordination Council, “National Intellectual Property Enforcement and Protection”  
[http://www.stopfakes.gov/pdf/2008\\_NIPLECC\\_Report\\_and\\_Appendices\\_Final.pdf](http://www.stopfakes.gov/pdf/2008_NIPLECC_Report_and_Appendices_Final.pdf)

[16] CACP, 2007. “Coalition against Counterfeiting and Piracy intellectual Property Enforcement Initiative: Campaign to Protect America” 6/11, p. 2. <http://www.theCACP.com>

[17] Ibid.

[18] Ibid.

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

[20] CACP, 2007, p. 3.

[21] Ibid.

[22] quoted in Drahos, 2007. supra note 4.

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

[24] USTR, “Ambassador Schwab Announces U.S. will seek new Trade Agreement to Fight Fakes” October 23, 2007.  
[http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/October/Ambassador\\_Schwab](http://www.ustr.gov/Document_Library/Press_Releases/2007/October/Ambassador_Schwab)

[25] IP-Watch, 2008. March 4. “Business, Governments See Momentum for ACTA, but EU Snags”  
[http://www.ip-watch.org/subscribers/subscribers\\_20080304.php?print=1](http://www.ip-watch.org/subscribers/subscribers_20080304.php?print=1)

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

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

[28] Biadgleng and Tellez, 2008,. p. 10, p. 26, fn. 98.

[29] Ibid, p. 10.

[30] [www.who.int/impact/en/](http://www.who.int/impact/en/)

[31] Interpol, "Working with Business to Combat Transnational Organized Intellectual Property Crime" <http://www.interpol.int/Public/ICPO/speeches/2008/sgIPcrime20080226.asp>

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

[33] Biadgleng and Tellez, 2008. p. 23.

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

[35] <http://www.g7.utoronto.ca/summit/2005gleneagles/index.html>

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

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<http://www.Canada.com/calgary/herald/news/story.html>

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[41] 24 May 2008. "Copyright deal would toughen laptop, iPod laws"  
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[42] [http://www.wcoomd.org/home\\_wco\\_topics\\_epoverviewboxes\\_epwcostrategyiprsecure.htm](http://www.wcoomd.org/home_wco_topics_epoverviewboxes_epwcostrategyiprsecure.htm)

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

[45] <http://www.southcentre.org/southbulletin/Issue15-16May.pdf>

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