Chapter 2: Networked Governance and the USTR

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Introduction

Intellectual property and enforcement policy was once a fairly narrow area of law and practice, administered by a handful of government agencies. Copyright and patent offices played a role, as did the customs office and a mix of national and municipal police agencies that targeted commercial infringers. Substantive responsibilities were set through domestic law and guided—at the international level—by voluntary treaties managed by the World Intellectual Property Organization (WIPO).

This situation has changed dramatically in the past quarter century. IP policy has become the subject of a proliferating array of international treaties and agreements, involving many more international actors, from the World Trade Organization (WTO), to the World Health Organization (WHO), to the European Commission, to—perhaps most prominently—the Office of the US Trade Representative (USTR), which has reshaped global IP policy through bilateral and multilateral trade agreements.

Enforcement efforts have become correspondingly complex. In the United States, domestic enforcement responsibilities are now shared among half a dozen major agencies, including the Departments of Commerce, Homeland Security, Justice, and State; the FBI (Federal Bureau of Investigation); and Customs and Border Protection (CPB)—as well as the copyright and patent offices. In Russia, responsibility is centered on the Ministry of the Interior but includes the Prosecutor's Office, the Federal Security Bureau, the Federal Customs Service, the Ministry of Culture, the Russian Cultural Protection Agency, the Federal Anti-Monopoly Bureau, and the Ministry of Commerce and Industry.

In Brazil, enforcement efforts cut across an array of decentralized police forces, including the Federal Police, the Federal Highway Police, state civil and military police, customs agents, and the Municipal Guards, as well as federal and state prosecutors. Coordination at the federal level is the responsibility of the National Council on Combating Piracy (CNCP), which pulls members from government ministries and the major industry associations. Some individual states and municipalities are also creating their own versions of the CNCP.

Inevitably, new agencies and initiatives have emerged to coordinate these growing enforcement networks. The United States recently launched its second such effort in the past decade, replacing the National Intellectual Property Law Enforcement Coordinating Council (NIPLECC) with a new "IP Czar" position in the White House. Russian enforcement has

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also gone through two major revisions in the period, first with the creation of the Governmental Committee for the Prosecution of Intellectual Property Violations, Its Legal Protection and Usage in 2002 (run by then vice–prime minister Dmitri Medvedev), and later with a major administrative reorganization in 2006. Brazil's CNCP was created in 2004, published its anti-piracy plan in 2005, and published a revamped plan in 2009.

All these coordinating bodies work closely with industry groups and ensure that industry plays a role in directing enforcement efforts. The industry groups, for their part, coordinate research, policy positions, and activism across the continuum of national and international venues in which they work, as well as with each other through higher-level coordinators such as the IIPA and BASCAP.[1] International organizations such as WIPO also provide connective tissue—both top-down in the form of treaties and bottom-up via technical training for lawyers, judges, customs officers, and other actors in the enforcement business. Money flows across these networks as international industry groups subsidize their local counterparts. The result is dense "networked governance," to use Peter Drahos' phrase, in which relevant policymaking and jurisdiction are spread across overlapping public institutions and corporate networks (Drahos and Braithwaite 2007).

This proliferation is the result of several decades of IP policy activism on the part of industry groups and aligned states—especially the United States, the European Union, and Japan (Sell 2003; Drahos and Braithwaite 2007). At the national level, it reflects a process of accumulation of public resources for the enforcement effort, marked by periodic attempts to organize and consolidate the resulting alphabet soup of participating agencies. Internationally, it reflects a process of "forum shopping" by industry representatives

1 Respectively, the International Intellectual Property Alliance, based in Washington, DC, and Business Action to Stop Counterfeiting and Piracy, a program of the International Chamber of Commerce.

for venues in which stronger and more binding IP measures can be passed. Where existing venues prove insufficiently accommodating, as with WIPO and now the WTO, industry lobbyists have pushed for new institutions with less representation of the obstructing parties. Over time, protection ratchets up as new international agreements create pressure for changes in national law and changes in national law set new baselines for international agreements.

The history of IP policy over the last three decades is largely a history of such maneuvers, undertaken whenever international or domestic institutions proved unwilling to adopt stronger protection measures. The resulting policymaking process can be very difficult to follow as it moves between venues, and indeed this has been an important advantage for well-coordinated state and industry actors, who have the resources to manage—and exploit—this complexity.

TRIPS and TRIPS+

Arguably the defining example of such forum shopping was the 1994 Trade-Related Aspects of Intellectual Property Rights (or TRIPS) agreement, which culminated a decade-long effort to move responsibility for global IP norms out of WIPO and into the new WTO. Much of TRIPS deals with trademarks, patents, and other forms of industrial property and with the extension of protection to biotechnology, software, semiconductors, and industrial designs. With respect to copyright, TRIPS was first and foremost an exercise in harmonizing national law around the Berne Convention for the Protection of Literary and Artistic Works—the 1886 agreement that established international recognition for minimum copyright terms, author's and performance rights, the "automatic" establishment of copyright upon the creation of a work (rather than via formal registration), and a variety of other features of modern copyright law. TRIPS was viewed as a more

Acronyms and Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
BASCAP	Business Coalition to Stop Counterfeiting and Piracy
CNCP	(Brazil) National Council on Combating Piracy
FTA	free trade agreement
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
IIPA	International Intellectual Property Alliance
IP	intellectual property
IPR	intellectual property rights
ISP	Internet service provider
IT	information technology
MPAA	Motion Picture Association of America
NAFTA	North American Free Trade Agreement
NET Act	(US) No Electronic Theft Act
NGO	non-governmental organization
P2P	peer-to-peer
PhRMA	Pharmaceutical Research and Manufacturers of America
RIAA	Recording Industry Association of America
SECURE	Standards to be Employed by Customs for Uniform Rights Enforcement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
USTR	Office of the United States Trade Representative
WCO	World Customs Organization
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

powerful instrument than Berne for universalizing those norms because, unlike WIPO, the WTO had a strong dispute resolution process, which could result in the loss of trade privileges when a member successfully pursued a complaint.

Developing countries had two expectations for TRIPS. First, they believed that the harmonization of IP rules would end long-standing disagreements with high-income countries over the appropriate levels of IP protection. Second, they believed that the dispute resolution process would end the strong-arming of developing countries through bilateral and regional trade negotiations—contexts in which the United States exercised obvious advantages (Sell 2003; Bayard and Elliot 1994). Both assumptions proved incorrect. Instead, TRIPS inaugurated a period of intense policy activism in other venues. WIPO, the administrator of the Berne Convention, immediately launched a round of negotiations to extend protection beyond the TRIPS baseline. These negotiations resulted in the Copyright Treaty (1996) and the Performance and Phonograms Treaty (1996)—collectively known as the Internet Treaties because of their provisions regarding the protection of digital works. The United States and the European Union also continued to negotiate regional and bilateral agreements that included higher levels of IP protection and, especially, stronger provisions for enforcement. These requirements are generally described as TRIPS+.

In contrast to its many formal provisions for protecting creative work, the Berne Convention is largely silent on the question of enforcement, specifying only that “infringing copies of a work shall be liable to seizure” in member countries (Art. 16). Here, TRIPS went significantly beyond Berne in specifying how norms should be enforced, notably by requiring that countries “provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale” (Art. 61).

As with many TRIPS provisions, the language provides an explicit path toward stronger measures but also affords countries discretion in defining key terms, such as the meaning of “commercial scale” or the nature of the penalties “sufficient to provide a deterrent” to infringement. In the past two decades, the commercial scale standard, in particular, has become a source of considerable tension in trade negotiations. In Berne-era national copyright laws, variations on commercial scale provided the most widely used threshold for criminal liability in cases of infringement. Consistently, the standard evoked not the number of infringing copies per se but rather the for-profit purposes of the infringement, signaled through such phrases as “commercial advantage” (EU and US law) and “financial gain” (US) (Harms 2007). Such language traditionally exempted non-commercial and personal infringement from criminal liability—though not civil liability. As digital distribution allowed nonprofit and individual copying to scale to levels once reserved for commercial entities, the assumptions underlying the standard began to fray, and industry groups began to press for an expansion of criminal liability to all infringing acts.

Concerted industry pressure to eliminate the commercial scale threshold for criminal liability dates back to the 1980s, when computer companies started to take notice of non-commercial software hacking. In the United States, revisions to copyright law in the 1990s progressively expanded the scope for criminal liability and increased its associated penalties. This push culminated in the 1997 passage of the No Electronic Theft Act (NET Act), which effectively gutted the commercial scale standard by redefining financial gain to include "the receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works" (Sec. 2a).[2] Under the new definition, all infringement is subject to criminal prosecution, with penalties of up to three years in prison for a first offense and six for a second. In practice—and despite continuing industry pressure—the law has been invoked only a handful of times, primarily against distributors of pirated software (and never against users of peer-to-peer services). In most high-income countries, including the United States, law enforcement agencies have been wary of expanding criminal prosecution in this direction and have instead favored the use of civil liability.[3] In most middle- and low-income countries, in contrast, criminal prosecution has become the norm (Harms 2007; Correa and Fink 2009).

The allocation of public resources is another area of explicitly national discretion in TRIPS, and another area that has come under significant pressure since its passage. As countries adopt broader criminal liability for infringement, demands by rights-holder groups for additional public resources to enforce the law have increased. As we discussed in chapter 1, the expansion of liability and the relatively modest growth in actual capacity to enforce have led to a divergence between the law and its application and to a related set of conflicts around TRIPS regarding the extent to which states must prioritize enforcement. Article 41.5 puts the matter clearly:

> Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

The passage reaffirms the right of states to set their own priorities regarding the use of public resources and recognizes that difficulties associated with IP enforcement are often inseparable from larger problems with judicial process and the rule of law. A related passage in Article 61 strikes a more complicated balance, affirming that "remedies available shall include

2 The NET Act also calls into doubt the other traditional requirement for criminal liability: intention to infringe. On this and related issues see Bailey (2002).

3 Even in the civil arena, file sharing cases against individuals have been extremely rare. In the United States, civil suits against Jammie Thomas-Rasset and Joel Tenenbaum are the only examples to have gone to trial—both brought by the Recording Industry Association of America. In both cases, juries supported the RIAA's demands for extremely high penalties, leveling a $1.92 million fine on Thomas-Rasset for sharing twenty-four songs over a P2P network (later reduced to $1.5 million) and a $675,000 fine on Tenenbaum for thirty songs. In 2009, the US Department of Justice went on record that the Thomas-Rasset penalty was appropriate under the 1999 Digital Theft Deterrence and Copyright Damages Improvement Act, which had raised statutory penalties for infringement.

imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity."

As usual, the language here is indirect enough to support a wide range of interpretations about the nature of member obligations—partly turning on the status of the "available" deterrent remedies. The main problem with this formulation from the rights-holder perspective is that copyright infringement has traditionally been categorized as a minor offense in the laws of most developing, IP-importing countries. Penalties for commercial infringement have generally been low, and evidentiary standards for conviction relatively high. Law enforcement has usually lacked ex officio authority to investigate infringement or make arrests, instead requiring complaints by rights holders or their representatives before taking action.[4] Most countries, in this context, have also resisted pressure to establish special courts or "fast-track" procedures for prosecuting copyright violations independent of wider civil and criminal procedures—a fact that has kept enforcement at the slow, often multi-year pace of other civil and criminal actions.

Pushing copyright infringement up the ladder of priorities for law enforcement has, consequently, been a top goal for industry groups and their government partners. TRIPS+ measures routinely include provisions for special IP courts, dedicated police and prosecutorial units, and lower evidentiary standards. Securing ex officio authority for police to open investigations, conduct raids, seize goods, and prosecute IPR (intellectual property rights) cases is a standard demand. Such provisions are key to transforming copyright infringement from a primarily civil matter into a criminal one, in which the burden of enforcement is borne by public agencies. Collectively, these measures make the principle that intellectual property is a private right rather than a public one—a core principle strongly reaffirmed in the TRIPS preamble—an all-but-dead letter.

Toward ACTA

In 2007, the United States filed the first WTO complaint regarding the enforcement practices of another country—China—for what it described as inadequate action against commercial vendors of pirated software. The case turned in part on a dispute over the meaning of the Chinese words for "large," "huge," and "severe" as applied to the vendor's activity—a strange linguistic quarrel widely viewed as an attempt by the United States to dictate the interpretation of commercial scale infringement. In January 2009, the WTO ruled in favor of Chinese discretion on this point, frustrating US hopes that it would override national prerogatives in resolving TRIPS ambiguities.[5]

4 This requirement explains the relatively common sight of police standing by in markets that openly sell pirated goods.

5 The ruling was a split decision on the two other points in the complaint, with China winning an important point about border-control compliance with TRIPS and the United States winning a less important point about the range of works accorded copyright protection (WTO 2009).

The case also highlighted the broader difficulty of securing agreement among WTO members for stronger enforcement language in TRIPS. A bruising battle over access to medicines in the early 2000s had established that developed countries would resist any significant loosening of IP standards, even in the face of public health emergencies. In the following years, the split between developed and developing countries on these issues widened and moved beyond the WTO. By the middle of the decade, it was clear that stronger enforcement efforts faced serious and potentially insurmountable obstacles in all the broadly representative international bodies. WIPO emerged as the focal point for this resistance. In 2007, a coalition of developing countries (including Brazil, South Africa, and India) succeeded in pushing the Development Agenda through the WIPO General Assembly, which requires that new IP policy prioritize social and economic development goals.[6]

Industry plans to circumvent the emerging stalemate were laid in a series of meetings in 2004 and 2005—initially at the inaugural Global Congress on Combating Counterfeiting, sponsored by the Global Business Leaders' Alliance Against Counterfeiting[7] and hosted by Interpol and WIPO. These plans gained steam at the July 2005 G8 meeting, where Japanese representatives proposed the creation of a new enforcement regime to battle piracy and counterfeiting. They received a further push from the launch of BASCAP, a program of the International Chamber of Commerce, which has become a leading voice for more aggressive enforcement policy.

The first fruit of this effort emerged in 2006, when G8 members opened negotiations at the Brussels-based World Customs Organization (WCO) to strengthen international customs enforcement standards via a new agreement called SECURE (Standards to be Employed by Customs for Uniform Rights Enforcement). The WCO was viewed as a congenial forum for IP rights holders because corporations operated on equal footing with governments and did not have to publicly disclose their negotiations—or admit the participation of advocacy or consumer groups.

SECURE envisioned new responsibilities for customs agencies and included a number of "TRIPS-Plus-Plus" provisions that went beyond incremental extension of TRIPS protections. It expanded the scope of customs enforcement from its traditional point of application during the importation of goods to the full set of activities defining cross-border trade, including export, transit, warehousing, and transshipment. It diminished the obligations of rights holders to provide evidence of infringement in order to initiate a search or seizure, and it empowered customs authorities to impose deterrent penalties in the case of violation of any IPR laws—not just traditional issues of counterfeiting and piracy. Critics feared that the latter would create presumptions of guilt on complex issues that customs officials had little ability to adjudicate, such as patent infringement—an issue of particular concern to manufacturers of

6 WIPO Development Agenda, http://www.wipo.int/ip-development/en/agenda/.

7 GBLAAC members include Coca-Cola, Chrysler, Pfizer, Proctor & Gamble, American Tobacco, Phillip Morris, Swiss Watch, Nike, and Canon (Shaw 2008).

generic medicines—and violations of anti-circumvention laws governing technical protection measures (TPMs) used in electronics and software (Li 2008).

Because the WCO, like the WTO, is a multilateral organization with representation from some 170 countries, it provided a forum for developing countries to raise concerns about these expanded powers and their costs of implementation. When it became clear in 2008 that this coalition was large enough to block the adoption of SECURE, the process was slowed and eventually abandoned in mid-2009.

SECURE was not the only enforcement initiative underway, however. Two weeks after WIPO's September 2007 adoption of the Development Agenda, US, European, and Japanese officials announced that they would negotiate an agreement to "set a new, higher benchmark for enforcement that countries can join on a voluntary basis" (USTR 2007). This proposal became the Anti-Counterfeiting Trade Agreement (ACTA), which was negotiated over three years and declared finalized in October 2010 (despite some obvious points on which it remained incomplete). The primary partners in the negotiation were the United States, the European Commission, Japan, Germany, Switzerland, Australia, Korea, Canada, New Zealand, Jordan, Morocco, Singapore, and the United Arab Emirates. Notably absent were the industrialized middle-income countries that have been the principal obstacles to stronger enforcement at WIPO and the WTO—and the principal targets of US and European enforcement pressure in the past decade.[8]

Although initially billed as an effort to strengthen anti-counterfeiting coordination among customs agencies, the various drafts leaked (and later, released) throughout 2009 and 2010 described a much broader agreement, designed to create higher TRIPS+ enforcement standards on a full spectrum of patent, trademark, and copyright issues. Some of the most controversial provisions dealt with Internet regulation, including provisions for strong secondary liability and US-style "notice and takedown" procedures for infringing content—measures that would give rights holders much more control over Internet service providers (ISPs) and other web services. Drafts also included strong anti-circumvention language intended to criminalize workarounds for technical protection measures used to protect digital content, such as the copy protection used on DVDs.

In the background of these discussions—and intermittently visible in the drafts—was the shift in industry attention from traditional commercial infringement to consumer-based infringement, conducted largely over the Internet. Although the draft language never mentioned consumers or individuals in this context, it created a framework for requiring ISPs and other web services to take whatever measures were deemed appropriate by rights holders

8 As Hisamitsu Arai, an advisor to Japanese prime minister Koizumi, reportedly argued to US Tokyo Embassy staff: "the intent of the [proposed ACTA] agreement is to address the IPR problems of nations such as China, Russia, and Brazil, not to negotiate the different interests of like-minded countries" (Wikileaks cable 06TOKYO4025; July 20, 2006).

to stop infringement. Much of the current debate about Internet enforcement—and the only specific measure mentioned in the drafts—concerns the implementation of "three-strikes" laws designed to punish consumers accused of multiple infringements. But ACTA's language is flexible regarding what constitutes adequate compliance and thereby sets the stage for upward revisions of the standard.[9]

The final draft released in October 2010[10] differs in some significant ways from earlier ones, and it will be some time before the implications of the specific changes in the language are fully understood. Accounts to date suggest that the United States abandoned much of the Internet agenda late in the negotiations, under pressure from European negotiators and in an effort to bring the process to a rapid close. Little of the strong language on secondary liability survives in the final draft. Also gone are the "notice and takedown" provisions designed to universalize the US standard on this issue. The surviving language on anti-circumvention has been watered down and now differs little from earlier WIPO treaties.

But in other respects, the finalized document takes a large step toward a more pervasive culture of copyright liability and enforcement. The final text notably broadens the definition of commercial scale infringement, with "direct or indirect economic or commercial advantage" (Sec. 4) superseding the narrower definitions and exceptions present in much national law. The fact that no one can say with certainty what "indirect economic advantage" means, in this context, is not an accident. Rather, it creates a framework in which nothing is clearly excluded from the criminal standard—a position much closer to the US NET Act assertion that the receipt of anything of value constitutes financial gain.

Elsewhere, the text endorses (and may mandate) the use of statutory penalties for infringement, as opposed to the common practice, outside the United States, of allowing judges discretion over damages. It endorses the use of any "reasonable" rights-holder-submitted claims of damages, specifically including the retail price of the good (despite the fact that all the copyright industry groups have abandoned the use of retail price in describing losses).

To the extent that there is flexibility on these issues, it lies in the convoluted language of the text, which permits multiple interpretations but which also sets up a familiar dynamic in which power relations between states will determine whose interpretations matter. Evidence of concern for the exceptions and limitations that make copyright a broader social compact between creators and users, in contrast, is completely absent.

Other aspects of ACTA have also generated controversy—notably the secrecy of the negotiations, which while broken on several occasions by leaks, was lifted only briefly in April

9 The RIAA and the MPAA (Motion Picture Association of America) have previewed their next steps in comments to the US "IP Czar," Victoria Espinel in 2010. These include the development of new international norms requiring preemptive content-filtering by ISPs and the inclusion of home-based monitoring software (AFTRA et al. 2010).

10 The consolidated draft text is available on the European Commission website: http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/.

2010 with the release of a public draft.[11] The method of adoption is also controversial. In the United States, the Obama administration has signaled that it would treat ACTA as a "sole executive agreement" rather than a treaty—a very unusual maneuver for an agreement of this scope, intended to sidestep the usual requirement of Senate ratification and the resulting public debate (Lessig and Goldsmith 2010).[12] Internationally, the battle lines are beginning to be drawn, with India—not a party to the negotiations—signaling that the proper venue for enforcement discussions is the WTO.

India's efforts to bring the WTO to bear highlight the most important aspect of ACTA: not the specific measures in the treaty, but rather the emergence of a new institution designed to co-opt the existing international framework for enforcement. Even in its watered-down form, ACTA consolidates a variety of TRIPS+ measures into a new baseline for IP enforcement. And as with TRIPS, this will almost certainly not be the end of the story. ACTA will provide a venue for further ratcheting up of protection and enforcement measures. If the past is any indicator, the job of building ACTA+ will fall primarily to the USTR.

The USTR and Special 301

It is hard to overstate the importance of the Office of the US Trade Representative to the process of forum shopping and leveling-up of international norms. The USTR's annual Special 301 reports are the stick in the US carrot-and-stick approach to international IP policy. The reports weigh countries' compliance with IP and enforcement standards—both those in existing treaties and those the United States would like to see adopted. They convey recommendations for changes in domestic law and signal US conditions for accession to international agreements, such as the WTO. They threaten and reward countries with inclusion on or delisting from the annual "Watch List" and "Priority Watch List" and signal US intentions to pursue sanctions or other measures when demands are not met.

US copyright industries and the USTR have, in key respects, a symbiotic relationship. The IIPA was instrumental in the creation of the Special 301 process, and annual IIPA country submissions furnish the primary and often only evidence on copyright issues cited in the Special 301 reports. In all but a few cases in any given year, the USTR closely follows IIPA recommendations in assigning countries to the watch lists. In 2008, the USTR accepted forty-six of the IIPA's fifty-four recommendations (84%). In 2010, it accepted all the Priority Watch

11 This secrecy extended to the elected officials of governments involved in the negotiations and has produced some striking internal tensions. In March 2010, the European Parliament voted to demand disclosure of ACTA documents from the European Commission, which is a party to the negotiations. The Canadian government—also a party to the negotiations—has advocated for fuller disclosure. A US Senator petitioned the USTR for more public information. Appeals for transparency were made by the governments of Spain, France, and Sweden.

12 Sole executive agreements are considered minor agreements that do not require congressional ratification or even a presidential signature. Several scholars, including Lessig and Goldsmith, have argued that the use of this model for ACTA is unconstitutional because the setting of intellectual property policy is clearly defined as a legislative function, not an executive one. See also Flynn (2010).

List recommendations and twenty-one of twenty-four for the Watch List (an acceptance rate of 91%). For the most part, IIPA findings and recommendations simply pass through into USTR reporting.[13]

This close relationship is not an accident. The USTR was created in 1974 to explicitly strengthen the ties between industry and government in trade negotiations. Its mandate was revised repeatedly in the 1970s and 1980s to make the USTR more responsive to business needs and revised further to ensure that it would not be limited or constrained by the provisions of existing trade agreements, such as the GATT and later the WTO. While other countries assumed that the multilateral dispute resolution process of the WTO would make unilateral USTR efforts redundant, in practice, the role of Special 301 expanded throughout the last two decades.

The History of Special 301

Special 301 builds on an earlier trade policy mechanism known as Section 301, established via the US Trade Act of 1974. Section 301 was created to address the lack of effective enforcement tools in existing international trade agreements—notably the General Agreement on Tariffs and Trade (or GATT), the set of global trade rules that preceded the WTO. Section 301 authorized the president to take economic measures against countries that "burden or restrict United States commerce," including the suspension of trade agreements, the imposition of tariffs or restrictions on imported goods, and the withdrawal of special trade benefits for developing countries (known as the Generalized System of Preferences, or GSP).[14]

Section 301 findings are, by definition, unilateral findings by the United States and subject to its own standards. At the time, this meant that foreign practices and policies did not have to contravene the GATT (or later, the WTO) to be found "unreasonable." Nor did it require the United States to take into account a country's level of economic development in determining what was fair or unfair—a sharp departure from GATT rules that favored differential treatment for developing countries.

Section 301 was strongly supported by US exporters, who wanted greater access to foreign markets during a period of widespread foreign protection of domestic industries.[15] Initially, a wide range of exporting industries participated in these efforts—especially automobile manufacturers and electronics companies worried by the rise in Japanese exports in the 1970s. But the initiative soon shifted to IP-based industries—drug companies, semiconductor

13 The Pharmaceutical Research and Manufacturers of America (PhRMA) is the second largest submitter. The USTR has historically adopted around 75% of PhRMA's recommendations.

14 GSP programs provide exemptions for developing countries from the equal treatment requirements of the WTO, generally in the form of more favorable tariffs or other terms of trade. The US and the EU maintain GSP programs with most developing countries.

15 For a general history of this process and its eventual outcome in the WTO, see Sell (2003), Harris (2006, 2008), and Drahos and Braithwaite (2007). On GATT enforcement rules, see Lowenfeld (2002).

manufacturers, and the entertainment industry especially—which increasingly viewed IP protection as the key to expansion into global markets. The push for a stronger international regime for intellectual property rights soon became the main front in this effort.

Section 301 was amended several times in the next decade in response to industry lobbying. An initial amendment in 1979 transferred its functions from the Department of Commerce to the Office of the USTR and increased its responsiveness to private-industry complaints. A second amendment in 1984 established "adequate and effective protection of intellectual property rights" as grounds for 301 investigation and sanctions. This change reflected the growing coordination and assertiveness of IP industry lobbying efforts—also signaled that year by the founding of the IIPA.

At the urging of the IIPA, and especially Jack Valenti of the MPAA, the Section 301 statute was amended again in 1988 to create the new IP-focused Special 301 reporting and sanctions process. Under Special 301, the USTR is required to identify foreign countries that "deny adequate and effective protection of intellectual property rights" or "fair and equitable market access to United States persons that rely upon intellectual property protection"[16] and subject them to expedited investigation. These requirements resulted in the well-known Watch List and Priority Watch List, which serve as warning mechanisms to countries out of compliance with the USTR's preferences on IP policy. A third status, Priority Foreign Country (PFC), represents a final warning stage. PFC designation triggers a thirty-day countdown during which the targeted country must "enter into good faith negotiations" or "make significant progress in bilateral or multilateral negotiations" or else face sanctions.[17]

Sanctions and Bilateral Agreements

The bilateral approach to building a stronger global IP regime came together in the mid-1980s. After the 1984 revision to the US Trade Act, the Reagan administration made quick use of Section 301's new IP provisions to launch investigations of Korea and Brazil—both countries with histories of domestic-industry protection.

Actions against Brazil were designed to end Brazilian protection of its domestic pharmaceutical and computer sectors. A 1985 case targeted the lack of copyright protection in Brazil for computer software—an innovation adopted in US law only in 1980. Brazil gave in to US demands, and the case was settled without sanctions in 1988. A second action in 1987 targeted Brazil's distinction between pharmaceutical processes (which were accorded patent protection) and final pharmaceutical products (which were not). This distinction had been widely and, under international law prior to TRIPS, legally employed to encourage the "reverse engineering" of important drugs and, relatedly, the development of local pharmaceutical industries. Because the public health benefits of the Brazilian position were clear and popular and the domestic commercial interests more entrenched than in the IT field,

16 19 USC 2242(a).

17 19 USC 2242(b)(1).

the Brazilian government refused to amend its law. As the dispute escalated in 1988 and 1989, the United States imposed duties on imported Brazilian goods, worth some $39 million.[18] Brazil responded with a suit under the GATT, challenging the legality of the retaliation. The United States, in turn, blocked the formation of a dispute settlement panel, making adjudication of the complaint impossible. Sanctions were eventually lifted in 1990 when the new Brazilian president, anticipating fuller patent protection requirements in TRIPS, agreed to adopt pharmaceutical end-product patents.

The 1985 case against Korea, also primarily on pharmaceutical patents, established what one negotiator described as a "blueprint" for the resolution of Special 301 disputes: bilateral treaties, or side agreements, that committed the targeted country to higher levels of patent and copyright protection (Drahos and Braithwaite 2007:103; US/Korea 1986).

In both cases, USTR actions eventually led to the passage of stronger Korean and Brazilian IP laws designed to bring the countries into closer compliance with US wishes. From the US industry perspective, these outcomes validated the 301 process and encouraged efforts to pass the still-stronger Special 301 provisions in 1988.

The strategic dimension of these actions grew more explicit in the late 1980s as the Uruguay Round of GATT negotiations neared its conclusion and set the stage for a new international trade agreement—the eventual WTO. Developing countries, led by India and Brazil, supported the strengthening of existing provisions on counterfeiting but opposed the inclusion of broader IP rules in the form of TRIPS. Such inclusion had no precedent in earlier trade agreements and duplicated existing international forums such as WIPO, which already managed a wide range of copyright and patent treaties.

The United States placed five of the ten "hard-liners" opposing TRIPS in the first Special 301 Report in 1989—Brazil, India, Argentina, Yugoslavia, and Egypt. Two years later, India, China, and Thailand became the first Priority Foreign Countries, triggering Section 301 investigations. Brazil lost its GSP benefits in 1988, Thailand in 1989, and India in 1992—all on matters related to pharmaceutical patents. US pressure, combined with assurances that TRIPS would end such unilateral action, eventually broke the anti-TRIPS coalition.

The Warnings Regime

With the passage of TRIPS, the USTR secured most of the IP goals it had pursued in the 1980s. But success did not end the program. Instead, Congress amended the trade statute in 1994 to specify that even countries fully compliant with TRIPS might lack "adequate and effective" IP protection. The amended statute authorized the use of Special 301 to promote IP and enforcement policy beyond what was required by TRIPS. The USTR quickly took up the task.

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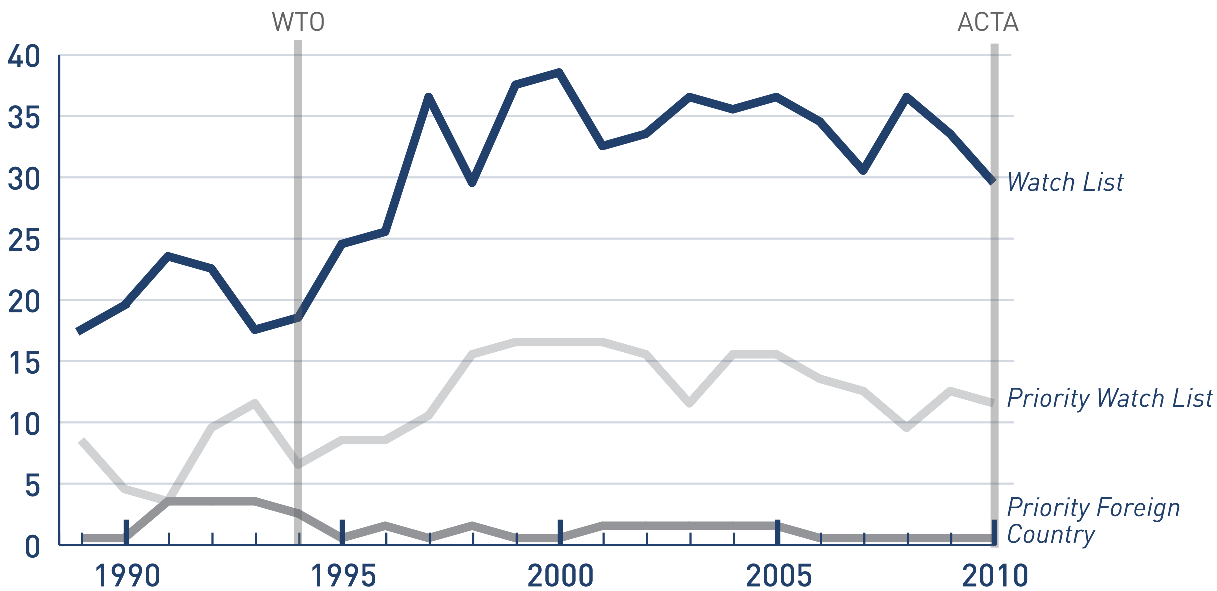
18 The number reflected a Section 301 requirement that sanctions "be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce."

Figure 2.1 Special 301: Number of Cited Countries



Source: *Authors.*

Figure 2.1 shows the number of countries placed on the US watch lists since the creation of Special 301 in 1989. As it suggests, the launch of the WTO had a powerful effect on USTR strategy: after 1994, the use of sanctions dropped off sharply, and the Special 301 process became predominantly a surveillance and warnings regime.

This change reflected concerns about the legality of Special 301 within the WTO framework. The WTO had remedied the GATT's deficiencies on enforcement by allowing dispute panels to be formed without the consent of both parties and by establishing a strong sanctions mechanism for members found in violation of WTO rules. The resulting Dispute Settlement Understanding[19] required WTO members to use the prescribed process to settle any questions about TRIPS compliance.[20] In 1999, a dispute settlement panel initiated by the European Commission reviewed the use of Section 301 in non-IP cases and held that the United States could not use the process to impose trade sanctions outside the dispute settlement process (WTO 1999). The ruling was taken as a signal that sanctions imposed under Special 301 regarding conduct covered by TRIPS would themselves be in violation of the WTO agreement. The USTR's subsequent actions appear to reflect this concern. Since 1994, the USTR has initiated sanctions through Special 301 only once against a WTO member—

19 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

20 Article 23.2 states: "Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this understanding."

Argentina in 1997, for alleged violation of pharmaceutical patents. Argentina capitulated quickly, and the United States avoided a direct challenge to the legality of the Special 301 program.

There is also some basis in WTO jurisprudence for seeing the watch lists as a violation of WTO rules. In the same 1999 dispute settlement, the WTO panel explained that the "threat alone" of unilateral sanctions outside the dispute settlement process risks undermining the basic principle of WTO legitimacy, the "equal protection of both large and small":

> Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat . . . To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures." (WTO 1999: Para. 7.89)

Many WTO observers interpreted the ruling as a shot across the bow of the US watch lists, but the matter has never been pursued.

In the WTO era, the punitive power of Special 301 has consequently become more indirect. Watch list status still signals US displeasure, but that displeasure no longer leads to sanctions for WTO members. The United States has other ways to advance its positions in trade disputes, including through the WTO dispute settlement process itself, of which it is the most frequent user.[21] Due to requirements that aspiring WTO members negotiate accession agreements with major trading partners, entry into the WTO has also become a bottleneck where Special 301 demands are brought to bear. This has been the case, notably, for Russia and several other post-Soviet republics that have adopted TRIPS+ standards in an effort to secure US approval for accession.[22]

Free trade agreements are also frequently part of the settlement process around Special 301 disputes, and US officials have acknowledged that inclusion in the annual Special 301 report can hinge on a country's attitude toward such negotiations. FTAs almost always include IP

21 Of the WTO's 402 dispute settlements to date, the US is the complainant in 92 cases. The EU is second with 80 disputes initiated. Among other lead filers: Canada, 31; Brazil, 23; Mexico, 17; India, 16; Korea, 13; China, 6 (since joining in 2001).

22 Adoption of the WIPO Internet Treaties has been a key benchmark of compliance with USTR demands. After twelve years on the Priority Watch List, Russia signed the Internet Treaties in February 2009. Kazakhstan (Watch List, 2000–2005) signed the treaties in 2004, Azerbaijan (Watch List 2000–2005) in 2006. The Ukraine, which was sanctioned for copyright piracy between 2001 and 2005, signed in 2002 (and acceded to the WTO in 2008).

obligations stricter than those found in TRIPS, including—in the copyright realm—accession to the WIPO Internet Treaties and strengthened enforcement procedures by police, courts, and border officials. Signing an FTA, however, does not ensure a free pass from the USTR. Israel, Canada, Mexico, and Chile have all maintained their places on the watch lists after signing FTAs, including on grounds of poor implementation of those agreements. Chile was moved from the Watch List to the Priority Watch List years after signing its FTA with the United States.[23]

Participation and Influence

The USTR has direct ties to industry through various advisory committees. The Industrial Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (or IFAC-3) plays the leading role where Special 301 is concerned and includes the IIPA, PhRMA, Time Warner, the RIAA, and a long list of other companies and industry organizations.[24] Such formal linkages are complemented by the long-standing revolving door between the USTR and its industry clients, which creates a reward system for USTR officials who cater to industry requests. The USTR and other federal agencies with IP and enforcement responsibilities have been regular way stations for lucrative industry careers in the past three decades—and, importantly, bipartisan way stations.

The list of former senior USTR officials working for organizations that lobby the USTR is a long one and includes Harvey Bale (now at the International Federation of Pharmaceutical Manufacturers and Associations—IFPMA), Joe Papovich (now at the RIAA), and former head Mickey Kantor (currently at PhRMA). The Copyright Office also has its share of influential alumni, including former general counsel for policy and international affairs Shira Perlmutter (now at the IFPI) and former liaison to the ACTA negotiations Steven Tepp (now at the US Chamber of Commerce). The revolving door extends to the Department of Justice and DC law firms that represent media and technology companies and includes an assortment of other politically connected former office holders, including Dan Glickman, former secretary of agriculture and head of the MPAA until 2010, and Bruce Lehman, former head of the US Patent and Trademark Office and current director of the International Institute for Intellectual Property, an industry-supported think tank.[25]

23 Israel signed an FTA in 1985 but has made frequent Watch List (1997, 2003, 2004) and Priority Watch List (1998–2002; 2005–9) appearances. Canada signed the North American Free Trade Agreement (NAFTA) in 1994 but has maintained a place on the Watch List every year since 1989 (with the exception of 1994) and graduated to the Priority Watch List in 2009. Mexico has been on the watch lists repeatedly since signing NAFTA (1999; 2003–9), mostly in regard to film piracy. The US-Chile FTA became effective in January 2004, and Chile has spent some fifteen years on the Watch List (1994–2006) and Priority Watch List (2007–9).

24 The full list is available on the USTR website: http://ustraderep.gov/Who_We_Are/List_of_USTR_Advisory_Committees.html.

25 For a doubtless incomplete list, see "The Revolving Door," IP Enforcement Database, https://sites.

Until recently, there was little pressure for greater participation or procedural transparency in relation to Special 301. The institutional culture discouraged it; the most obvious affected parties—other countries—had no meaningful standing, and the traditional obscurity of trade policy sheltered it from the public attention directed at policymaking bodies in related areas, such as the Federal Communications Commission. The legal status of Special 301 reinforces these tendencies. The Special 301 process is an "informal adjudication" as opposed to a formal adjudication or rulemaking process. As described by the US Administrative Procedure Act, adjudication is a technical determination of rights and responsibilities based on existing rules and past conduct, whereas rulemaking is forward looking. In our view, this distinction misses the primary function of Special 301 as an instrument for pushing foreign and American IP commitments beyond existing obligations without the inconvenience of a strong public comment process (as required in rulemaking) or a structured adversarial process (as required in formal adjudication).

Informality plays an important part here and creates considerable leeway with respect to procedures. Notably, informal adjudications do not have to be "on the record after the opportunity for an agency hearing." Even this lax requirement has been ignored for most of Special 301's history: the first hearing took place in February 2010.

Nonetheless, the term has been subject to a variety of legal interpretations regarding what constitutes due process in such contexts, with strong consensus in the courts that "a minimum procedure must include at least some form of notice and an opportunity to be heard at a meaningful time and in a meaningful manner."[26] In our view, the Special 301 process has been out of compliance with a reasonable understanding of this standard. Minimal and still inadequate notice was made possible only in 2008. The first meaningful opportunity to be heard was the hearing in 2010.

A Symbiotic Relationship

Despite this obscurity, the USTR has to meet certain basic requirements to justify its findings, including acting on the basis of evidence collected during the Special 301 process. With some fifty to sixty countries placed annually on the watch lists, the research requirements of the Special 301 process are considerable. The USTR's role in this process was never clearly defined by statute and quickly defaulted to industry, which ramped up its research capacities throughout the 1990s to meet the new demand. This division of labor quickly became reflected in the USTR's internal organization: in 2009, only eight of the roughly two hundred USTR staff worked on IP issues. Most of the findings, legal recommendations, and country detail discussed

google.com/site/iipenforcement/the-revolving-door.

26 32 Fed. Prac. & Proc. Judicial Review § 8136 (1st ed.), stating: "Generally, all informal adjudications have some form of three elements—notice, some opportunity to participate and reasons." See also 32 Fed. Prac. & Proc. Judicial Review § 8201 (1st ed.), stating: "Several courts have said that a minimum procedure must include at least some form of notice and an opportunity to be heard at a meaningful time and in a meaningful manner."

in the Special 301 reports simply recapitulate IIPA (and other industry) work. For nearly two decades, the IIPA and the USTR have been the research and policy sides, respectively, of a larger collective enterprise.[27]

The Special 301 process begins each year with a public comment period designed to gather information for the report. This is, in principle, a fact-finding exercise that takes into account "any information . . . as may be available to the Trade Representative and . . . as may be submitted . . . by interested persons."[28] Interested persons can include other countries, non-US industry groups, non-governmental organizations (NGOs), and—in principle—individuals. In practice, it has overwhelmingly meant US industry. The USTR's interest in hearing from other parties has generally been viewed as negligible, and this perception was reinforced by the unusual restrictions on the comment process itself. Until 2008, all comments from all parties were due on the same day—a requirement that made the notification of countries about complaints and same-year replies to them impossible. Under these circumstances, only a handful of countries (and typically no civil society groups) bothered to submit comments at all, and the few that did generally responded to the previous year's comments.

Under new rules that went into effect in 2008, countries (but not NGOs or other parties) were permitted two additional weeks to submit comments after industry submissions were received. This small opening had a dramatic effect on participation (see table 2.1): the number of countries submitting comments jumped from three to twenty-four. In 2010, the country participation held steady, but the number of individual and nonprofit comments exploded, following efforts by legal advocacy and public interest groups to draw attention to ACTA and to IP policymaking more generally.

Table 2.1 Special 301 Comments

	2007	2008	2009	2010
Companies and Industry Groups	21	19	30	37
Countries on Previous Watch Lists	4	3	24	25
Individuals	0	2	1	441
Nonprofits	1	0	0	26

Source: Authors.

27 The handful of cases in which the USTR has departed from IIPA recommendations (in 2009, Sweden, Nigeria, Kazakhstan, Lithuania, and Brunei) are suggestive of the somewhat broader field of political inputs that affect USTR decisions, including geopolitical goals, conflicting industry requests, and other factors shaping bilateral relationships. In South Africa, for example, the controversial dispute over patent protection for AIDS medicines in the late 1990s cast a shadow over subsequent IIPA requests for South African inclusion on the watch lists. The USTR ignored these requests between 2000 and 2006, and South Africa has since fallen off the list of countries targeted by the IIPA.

28 19 USC 2242(b)(2)(B).

USTR sensitivity about the Special 301 process has grown in recent years as the scope of trade negotiations has expanded and their public profile has risen. Like other government agencies, the USTR is also subject to new requirements to adopt higher evidentiary standards and more transparency about the research it uses in policymaking. Much of this pressure, ironically, originated with industry groups looking for tools to head off unwanted regulatory action resulting from federally funded scientific research. This is the background, notably, of the 2000 Data Quality Act, which established procedures for complainants to challenge data used in policymaking.[29] While many view the act as a victory of lobbying over science, the interesting question for agencies like the USTR is what the act implies in contexts where there is no scientific research culture to undermine.

In 2005, the Office of Management and Budget issued an interpretation of the Data Quality Act that requires peer review whenever the federal government disseminates "scientific information [that has] a clear and substantial impact on important public policies or private sector decisions" worth more than $500 million (OMB 2005). The OMB did not limit this requirement to the natural sciences—in fact, it specifically included economic and other policy-relevant research. It noted further that an adversarial comment process, in which contending parties submit and challenge each other's comments, is not an adequate substitute for peer review. When the Department of Commerce implemented the OMB directive in 2006, it placed emphasis on "transparency—and ultimately reproducibility" as the crucial standard in policy research and clarified that transparency "is a matter of showing how you got the results you got" (Department of Commerce 2006).

The de facto outsourcing of research to the IIPA and other industry groups allows the USTR to exempt Special 301 from such quality-control efforts. Nothing in the Data Quality Act or the OMB bulletin addresses transparency requirements for privately produced research or discusses how to improve policymaking processes that depend entirely on it. The absence of hearings or a reasonably structured comment process ensures, further, that Special 301 undershoots even the lower evidentiary standards of an adversarial process, in which the stakeholders comment and respond to each other. The USTR does, nonetheless, set two modest requirements for submitted comments. It specifies that (1) comments should "provide all necessary information for assessing the effect of the acts, policies, and practices"; and (2) "any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses."[30] As we have argued in chapter 1, by any reasonable standard, these requirements go unmet.

None of this is particularly surprising given the history and goals of Special 301. The program has very ably performed its mission of translating US industry positions into trade

29 The brainchild of tobacco-industry lobbyists, the Data Quality Act has been used to challenge federally funded research on a variety of health and environmental issues, from the effects of exposure to pesticides like Atrazine to studies of animal habitats used to restrict logging permits on federal land.

30 19 USC 2242(b)(2)(B).

policy. But as trade negotiations assume greater importance in national and international politics, standards of procedural fairness and credibility can and should change. Although the USTR bears no direct responsibility for industry claims, it does have statutory responsibility for the information it presents as factual, and it can discount or reject material that fails to meet its own evidentiary standards. Although peer review is difficult to reconcile with third-party comment submission, the USTR could do much more to ensure a credible and—in our view—more effective policymaking process. These steps would start with (1) taking its own evidentiary requirements seriously; (2) creating a more dynamic and open comment process; and (3) building more diverse representation into the layer of advisory and coordinating committees that set the USTR's agenda, including consumer groups.

Foreign Countries

The spike in country comments that began in 2009 was also marked by a perceptible change in tone. Traditionally, foreign countries have been deferential in their dialogues with the USTR—often highly so. Country comments typically catalogue the actions taken in the previous year to meet American wishes and on that basis request removal from the watch lists. Local policy and enforcement activities in targeted countries also often follow the seasonal rhythm of the Special 301 process, as governments seek to head off placement on the lists.

Occasionally, countries have filed more pointed objections to USTR claims and the industry research underlying them. In 1992, Italy challenged the $224 million estimate of losses by the MPAA to pirated movie cassettes—focusing in particular on the assumption that pirated video cassette sales represented a one-to-one loss with respect to ticket sales (Drahos and Brathwaite 2007:97). But such comments and, especially, research-related comments have been rare. Countries have ignored, acquiesced to, or tried to finesse the Special 301 process. They have seldom contested it.

There are signs that this politics of avoidance is beginning to change. Country comments from 2009 and 2010 include a number of unusually blunt rebuttals, including criticism of the Special 301 process, of IIPA claims, and of USTR complaints about policies that comply with TRIPS.[31] Most of these comments take note of the lack of consistency in the evidence and standards that underpin the various warnings. Israel—on the Priority Watch List in 2008 and 2009—responded sharply in 2009 to IIPA and USTR criticism of its recently revised copyright law. In considerable detail, it objected to the unilateralism of US demands that it go beyond existing international obligations on issues such as the copyright term for sound recordings, the scope of fair use provisions, the legal protection accorded technical protection measures (anti-circumvention), takedown procedures for ISPs, the liability of end-users of pirated software, compensation for the accidental seizure of licit goods, and much of the rest of the TRIPS+ playbook (Israel 2009). Turkey, which appeared on the Priority Watch List from 2004 to 2007

31 The comments can be found at regulations.gov: http://www.regulations.gov/search/Regs/home.html#home (Dockett ID # USTR-2009-0001).

and on the Watch List in 2008, 2009, and 2010, offered similar criticism of US unilateralism in reference to ongoing disputes over pharmaceutical patents.[32]

Spain, which the IIPA described in 2009 as having "the worst per capita Internet piracy problem in Europe and one of the worst overall Internet piracy rates in the world," also made an active rebuttal of IIPA claims, arguing that "numerous assertions in the report are not based at all on data contained in the report or on coherent arguments" (Jordan 2009). Drawing on its own consumer-survey data, the Spanish government challenged the rates of music piracy cited in the IIPA report, drew attention to gaps in the IIPA data, underscored its own solid ranking in the Business Software Alliance's piracy reports, and reminded the USTR of its commitment to enforcement through its participation in the ACTA negotiations.

A Transitional Regime

For our part, the details or even accuracy of the recent country rebuttals are less interesting than what they suggest about the evolution of the Special 301 process. The more accessible comment window and the obvious inclination of countries to use it marks a step toward openness and accountability of a kind the USTR has generally avoided since its beginning.[33]

These small steps also bring into relief the tensions in what appears to be a transitional moment in the global IP policy and enforcement regime. Since the inauguration of the WTO in 1994, the USTR has operated in a space of ambiguous legality and soft power—able to threaten countries but largely unable to make good on those threats for fear of generating an adverse WTO ruling. The stability of this position, in our view, was the product of a number of factors, including the industry's virtual monopoly on the evidentiary discourse around piracy; the disorganization of developing-country coalitions on IP policy; and the general obscurity of copyright and enforcement issues, which allowed IP policymaking to fly under the radar of most consumer and public interest groups. Where all these factors held true six or seven years ago, it is difficult to make a strong case for any of them today. Industry research has been delegitimized by its opacity and the excesses of its advocacy campaigns, developing countries are more organized and assertive with regard to IP policy, and enforcement has begun its "consumer turn" toward measures that are likely to make obscure IP policy venues like the USTR much more visible and controversial in the public eye. A more transparent USTR may be the only possible way forward.

The waning of this fifteen-year Special 301 interregnum is also visible in the USTR's leadership of the current round of IP enforcement forum shopping. Signs of openness at the agency come at a moment when some of the USTR's major accomplishments have been

32 "There is no rule obligating the members to apply patent linkage in the TRIPS Agreement . . . [A] patent linkage process as stipulated in the US legislation is not a global rule and the lack of such a linkage cannot be interpreted as a weakness in protecting IPR" (Turkey 2009).

33 There is also some circumstantial evidence that the growth in participation in 2010 influenced that year's Special 301 report. Notably, USTR fidelity to PhRMA recommendations fell from 75% in 2009 to around 60% in 2010, following a major push for delisting countries by health advocates.

folded into ACTA. ACTA's eventual jurisdiction is unclear at this point and may remain so long after the agreement is ratified—if it is ratified. At a minimum, however, ACTA seems likely to undercut the WTO's preeminence in enforcement and push the bilateral and multilateral regimes back into closer alignment, at least temporarily. Special 301 is unlikely to disappear in this context. More likely, it will become a mechanism for pressuring other countries to adopt the new multilateral regime, and eventually for new ACTA+ policies. The continuation of this state of affairs would, in our view, be a mistake. In an era in which trade and IP agreements shape basic questions of social welfare, from health to taxes to broader prospects for economic growth, the process needs sunlight, wider participation, and greater legitimacy. The USTR and Special 301 are too powerful to remain insiders' games.

About the Study

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