

BRING IN THE NERDS: SECRECY, NATIONAL SECURITY, AND THE CREATION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW[♦]

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ABSTRACT

The negotiations of the international Anti-Counterfeiting Trade Agreement and Trans Pacific Partnership Agreement have been conducted largely in secret, elevating intellectual property piracy to the level of national security concerns for purposes of accessing information through the Freedom of Information Act (FOIA). However, the level of actual secrecy has been tiered, with corporate interests enjoying far more access to negotiation information than the general public. At the same time, similar intellectual property issues were negotiated in the relative transparency of Congress' debate over the Stop Online Piracy Act and PROTECT IP Act, allowing for much greater public involvement. With national security concerns as the backdrop, the focus of this Article is the use of national security arguments to prevent the public, and more specifically, public experts (i.e., the "nerds") from accessing information through FOIA about the creation of international intellectual property law. The Article proposes ways to address the information failures existing in international intellectual property lawmaking and international lawmaking more generally from policy and, as introduced in this Article, theoretical perspectives.

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“Consider the value of transparency and the difference between open code . . . and closed code. Secret laws are not law. . . . Closed code hides its systems of control; open code can’t. Any . . . system built into open code is transparent to those who can read the code, just as laws are transparent to those who can read Congress’ code—lawyers.”¹

“An hour after sending out our invite to negotiators (including USTR [the United States Trade Representative]) for the briefing we scheduled in the negotiation venue (Sofitel hotel), we received a note

¹ Lawrence Lessig, *The Code Is the Law*, INDUSTRY STANDARD (Apr. 9, 1999), available at <http://www.lessig.org/content/standard/0,1902,4165,00.html> (commenting on the outcry regarding the Communications Decency Act, which unsuccessfully attempted to regulate speech on the Internet, and the lack of outcry when web browsers attempt the same goal in their code).

from the hotel that they had been asked to cancel our reservation. We moved the workshop. But later found out that not all groups got the same treatment. All negotiators were invited by the host (USTR) to a private tour of 20th Century Fox studios, led by a member of Fox's government relations staff."²

"There is a problem. Let's take our time. Let's do it right. There is a problem. But let's bring the nerds in and get this right."³

I. INTRODUCTION

The past year has witnessed a tremendous amount of lawmaking activity on both the domestic and international stage relating to the contours of intellectual property (IP), particularly with regard to how to combat online piracy of copyrighted and other IP-protected goods. But while the public's attention to the creation of IP law has intensified recently through the increased public awareness of and opposition to the federal Stop Online Piracy Act (SOPA) and its sister bill the PROTECT IP Act (PIPA), the antecedents of this battle go back to around October 23, 2007. That is when the negotiations leading to the Anti Counterfeiting Trade Agreement (ACTA), an international multilateral lawmaking negotiation focusing on IP piracy issues and problems identical to those addressed in SOPA and PIPA, and which involves the United States, European Union and a number of other countries, were made public.⁴

The focus of this Article is the use of secrecy in the negotiation and creation of international IP law, as compared to the relative transparency of IP lawmaking on the U.S. domestic side.⁵ Specifically, this Article examines a particular instrumentality of secrecy, the exemption for national security information (NSI) found in the Freedom of Information Act (FOIA). Problematically, NSI law and policy is the analytical prism through which public access to information about

² E-mail from Sean Flynn, Assoc. Dir., American University Program on Information Justice and Intellectual Property, to IP Enforcement Listserv regarding TPP meeting in L.A. (Feb. 1, 2012, 12:23 PM) (on file with author).

³ *Markup of H.R. 3261, Stop Online Piracy Act Before the H. Comm. on the Judiciary*, 111th Cong. 89 (2011) (statement of Rep. Jason Chaffetz) (hereinafter *SOPA Markup*), available at <http://judiciary.house.gov/hearings/pdf/transcript12152011.pdf>.

⁴ See *Remarks by U.S. Trade Representative Susan C. Schwab*, OFF. U.S. TRADE REP. (Oct. 23, 2007),

http://www.ustr.gov/sites/default/files/uploads/speeches/2007/asset_upload_file110_13428.pdf; James Love, *What's (Still) Wrong with ACTA, and Why Governments Should Reject the Illegitimate Agreement*, KNOWLEDGE ECOLOGY INT'L (Feb. 27, 2012, 2:14 AM), <http://keionline.org/node/1369>.

⁵ It is beyond the scope of this Article to thoroughly analyze all aspects of secrecy, and the reasons for and against it, in the context of IP lawmaking generally. For a thorough discussion of those issues, see Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975 (2011).

international IP lawmaking is currently viewed.⁶

From a policy perspective, this Article posits that asking for information about the U.S.'s position regarding the substance of international IP law is not, and should not be theorized or treated as, the functional equivalent of asking the U.S. to name publicly its confidential intelligence sources, even though both implicate issues of U.S. foreign relations. Thus, this Article suggests that considering the public release of information about international IP lawmaking should not be subject to the same cautionary principles and rules that are understandably applied to consideration of a similar request for information about weapons of mass destruction (WMD). IP lawmaking is akin to an administrative rulemaking process, not covert intelligence gathering or military planning.

To identify and assess the issues with and concerns about this policy, this Article compares the relatively transparent Congressional debates about SOPA and PIPA with the mostly secret ongoing international negotiations surrounding ACTA and the Trans Pacific Partnership Agreement (TPP).⁷ Importantly, all of these lawmaking processes involve the same substantive issues regarding intellectual property infringement, namely, how to deal with⁸ intellectual property infringement fueled by the Internet.⁹ This comparison yields three key observations, reflected in the above three quotes, that are examined in this Article and that support the policy proposal outlined in Part IV as well as a proposed theoretical shift in FOIA introduced in this Article.

A. *The Observations*

The first observation is the amplified use of formal *secrecy* as an international lawmaking construct, which, like Lessig's closed code environment, hides its systems of operation—its texts, its negotiation sessions, its discussions and debates—from, the public and, more significantly for purposes of this Article and a modern conception of

⁶ National security concerns have impacted international lawmaking generally, but the focus of this Article is international intellectual property lawmaking. Nonetheless, the proposals offered herein would be applicable to international lawmaking generally.

⁷ The Online Protection and Enforcement of Digital Trade Act (OPEN, an alternative to SOPA and PIPA) is not discussed in this Article, but has interesting theoretical and public input implications to be discussed in future work.

⁸ It should be noted that the governmental reaction to disclosure of information about WMD versus a draft negotiating text from TPP would likely be quite different. One could easily imagine prosecution in the former setting, whereas it is not apparent that there have been any prosecutions of the leakers of ACTA and TPP drafts. But FOIA's fundamental impact on public disclosure is identical.

⁹ "The same issues that were on the table in [PIPA and SOPA], the discussion we had with respect to [ACTA], are now on the table in the negotiations about the [TPP]." Video: U.S. S. Comm. on Finance Hearing on the President's 2012 Trade Agenda, March 7, 2012 (statement of Sen. Ron Wyden (D-OR) at 122:55), available at <http://finance.senate.gov/hearings/hearing/?id=100a5535-5056-a032-5221-cd749e768acf>. It is important to note that these negotiations may and do propose some different solutions to the problems.

transparency and accountability, unaffiliated public experts (hereinafter, the “nerds”). In this formal construct, those entities lack the ability to gain access to useful information like negotiating texts and proposals because the law allows a tiered approach to information access to persist, with chosen advisors having significantly more access to information than the public and its nerds. Therefore, under such circumstances, if the public and nerds want to offer any input at all, they must use methods, like letters, written statements and grassroots organizing usually associated with more transparent open-code processes like U.S. domestic lawmaking.

This procedural situation creates needless tension as the public and its nerds desire to offer input but have no formal way to do so. Thus, the input is offered informally to whatever entities that might listen, like rogue actors such as the press who eschew the closed environment, rather than those most in need of the input, like the actual people at the negotiating table. This is an understandable reaction, as it is difficult to design an effective way to offer input to a closed environment that, by definition, is not open to inspection by or input from those outside of it. Thus, a problem emerges: the law, the code, that is created has the veneer of open code, and will be enforced as if it were created as open code, even though it is effectively closed from the perspective of significant stakeholders like the public at large and its experts, the nerds.

The mechanisms of secrecy that make international IP lawmaking opaque derive from alleged United States national security concerns that would arise if information like draft agreements were made public. Because of those concerns, these documents are born presumptively secret. This secrecy establishes an unfortunately adversarial relationship between the excluded public and the government from the outset, as those excluded from access have only one formal option: to request access from an entity, in this case the USTR, that has wide discretion under FOIA to deny the request. As such, the only means of public access to these documents, other than by an unauthorized leak with its attendant problems of accuracy and veracity, is by challenging their FOIA exemption status. Thus, from the very beginning, a sense that one’s input is not welcome is established, even before an ultimate decision is reached about the application of the national security exemption. Therefore, secrecy as a policymaking tool has the immediate negative effect of establishing a hierarchy of input that places the public and its experts significantly below the government’s chosen advisors who have access to information without regard to its alleged national security sensitivity.

FOIA allows the public’s request for information about the substantive U.S. position in international IP law negotiations like ACTA and TPP to be treated as the functional equivalent of asking for

information about how to build a weapon of mass destruction. As discussed in this Article, this treatment fundamentally misconceives and damages the relationship between the public and its representatives, international IP lawmaking, and international lawmaking more generally, without demonstrably benefitting U.S. national security. In fact, there are arguments suggesting that such secrecy damages U.S. national security as much as it benefits it, primarily through the creation of unbalanced law and the weakening of the U.S.'s position as a fair arbiter in international relations.

Importantly, this Article does not suggest that all information regarding international IP lawmaking should be disclosed to the public.¹⁰ However, the current state of affairs goes too far the other way. While there might be legitimate concerns about foreign diplomatic relations that warrant careful analysis and on occasion some secrecy, particularly with regard to foreign government information held by the U.S., the international lawmaking process' blanket treatment as an omnibus national security event has led to fundamental problems of *transparency and accountability* that make up the second major observation of this Article. While the public has been prevented from seeing negotiating texts and proposals because of proffered national security concerns, "cleared advisors," chosen by the USTR and made up almost exclusively of industry representatives, have presumably had access to those documents or relevant portions thereof.¹¹ In the case of the cleared advisors for the referenced international agreements, they are almost exclusively IP industry representatives who, as a community, generally seek increasingly restrictive IP laws.¹²

¹⁰ For example, there are other FOIA exemptions that may be applicable to international lawmaking, including those for trade secrets and commercially confidential information (5 U.S.C. § 552(b)(4)), and deliberative process, (5 U.S.C. § 552(b)(5)). Those exemptions are not impacted by the policy proposal made in this Article. For information about the impact of trade secrecy on public transparency, see David Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135 (2007), available at <http://ssrn.com/abstract=900929>.

¹¹ James Love, *Who Are the Cleared Advisors that Have Access to Secret ACTA Documents?*, KNOWLEDGE ECOLOGY INT'L (Mar. 13, 2009, 2:24 PM), <http://keionline.org/blogs/2009/03/13/who-are-cleared-advisors>. As a general matter, these "cleared advisors" get access to relevant portions of negotiating texts, though it is unclear whether they see the entire agreement or just relevant parts of it, through the USTR's Industry Trade Advisory Committees (ITAC). Nonetheless, they have primary source material at their fingertips whereas the public does not. I do not propose changes to the ITAC process in this Article, although changes involving how members are selected and/or the creation of a new nerd ITAC is clearly needed. Rather, this Article proposes that more balance needs to be created in public access to information, as opposed to hand-picking nerds that might be appointed to an ITAC. Again, the fundamental premise of the Article is that if the law considers when a nerd might need otherwise non-disclosable national security information, then there should be a presumption in favor of public disclosure generally. The government then has a bit less control over who sees this information than it currently enjoys.

¹² James Love, *Who USTR Clears to See Secret Text for IPR Negotiations? (Such as TPPA)*, KNOWLEDGE ECOLOGY INT'L (Feb. 16, 2012, 8:49 AM), <http://keionline.org/node/1362> ("After reviewing the names [of members of several USTR ITACs] (many of whom are former employees of USTR and other government trade offices), you can evaluate the USTR claim that none of them are 'lobbyists'"); see also Rashmi Rangnath, *PK and EFF Tell Congress:*

This information asymmetry makes the story told by Sean Flynn above particularly egregious. There is nothing stopping Flynn's American University School of Law's Program on Information Justice and IP (PIJIP) from hosting another workshop for TPP negotiators. But when PIJIP is unable to access draft TPP negotiating texts and proposals and is simultaneously asked to move its event so that an entity that does have access to negotiating texts through proxies can host a *de facto* lobbying event, the public should be concerned. The same nerds that were needed in the SOPA and PIPA debates are undoubtedly needed in the closed negotiations surrounding TPP. Thus, stories like Flynn's underscore both a perception and reality of special treatment for certain interests. Indeed, as has been amply documented,¹³ FOIA enables different standards of transparency and accountability between government and public versus some private entities that are deemed "cleared advisors," allowing for more information shared with, and therefore more input coming from, chosen private entities than the public and its nerds.

These realities lead to a third core observation: that the absence of experts can lead to *poorly drafted law*. The impact of the absence of nerds was crystallized in the SOPA debate. Representative Jason

Secret Negotiations Harm the Public Knowledge, PUB. KNOWLEDGE (Aug. 6, 2009), <http://www.publicknowledge.org/node/2593> ("[I]ndustry groups such as the [Recording Industry Association of America (RIAA)], the [Motion Picture Association of America (MPAA)], and PhRMA (Pharmaceutical Research and Manufacturers of America) are members of ITAC 15 [which covers IP rights] while public interest representatives, with the exception of one public health representative, are excluded. This gives the IP industry an opportunity to lock in its favored provisions into trade agreements, even when those provisions reflect controversial or unsettled interpretations of U.S. law.").

¹³ The USTR gives certain well-connected persons access to the ACTA Internet text. See James Love, *White House Shares the ACTA Internet Text with 42 Washington Insiders, Under Non-Disclosure Agreements*, KNOWLEDGE ECOLOGY INT'L (Oct. 13, 2009, 4:10 PM), <http://keionline.org/node/660>; Mike Masnick, *Hollywood Gets to Party with TPP Negotiators; Public Interest Groups Get Thrown out of Hotel*, TECHDIRT (Feb. 1, 2012, 9:01 AM), <http://www.techdirt.com/articles/20120131/23161417605/hollywood-gets-to-party-with-tpp-negotiators-public-interest-groups-get-thrown-out-hotel.shtml>. USTR says that only governments and big corporations need to know about tabled texts, and that if the public knows what is in the tabled texts, it is harder to reach an agreement. James Love, *Comment to What Best Describes Obama Administration Rationale for Secrecy of Tabled TransPacific Partnership Agreement IPR Texts?*, KNOWLEDGE ECOLOGY INT'L (Sept. 11, 2011, 1:58 PM), <http://keionline.org/node/1259>.

Who does have a say in the negotiations? Plenty of unelected officials and an Industry Trade Advisory Committee, made up of entirely corporate interest groups like the RIAA and Verizon. Groups like Public Knowledge have had to fight tooth and nail to even gain access to the text, much less talk freely about it. Despite the fact that the Agreement has huge implications for the public, few substantive steps have been taken to inform, engage, or even consider the public interest.

Key Issues: The Anti-Counterfeiting Trade Agreement (ACTA), PUB. KNOWLEDGE, <http://www.publicknowledge.org/issues/acta> (last visited Apr. 17, 2012). "The text of ACTA is not officially available to the public." Joel Rose, *Secrecy Around Trade Agreement Causes Stir*, NPR (Mar. 17, 2010), <http://www.npr.org/templates/story/story.php?storyId=124780647>. "One of the worst parts of the Anti-Counterfeiting Trade Agreement (ACTA) was its ridiculous secrecy, under which it was easy for negotiators and industry reps to see draft text, but impossible for the public to do so except through leaks." Nate Anderson, *Beyond ACTA: Next Secret Copyright Agreement Negotiated This Week—in Hollywood*, ARS TECHNICA (Feb. 1, 2012, 6:30 PM), <http://arstechnica.com/tech-policy/news/2012/02/beyond-acta-next-secret-copyright-agreement-negotiated-this-weekin-hollywood.ars>.

Chaffetz, in December 2011 hearings about SOPA in the House of Representatives, noted a lack of expertise amongst the members debating the technical aspects of SOPA, particularly those related to a part of the bill that required, under certain circumstances, for websites engaged in alleged infringing activities to be removed from the Internet's Domain Name System (DNS).¹⁴ Noting the risk inherent in creating new law without understanding the technology to be altered and impacted, he logically called for Congress to "bring the nerds in." Because SOPA and PIPA were being debated in the relatively transparent Congress, Chaffetz's call for nerds was superfluous, as the nerds already knew what they needed to know in order to offer input. On the same day as the hearing, Internet engineers, the nerds and experts of our story that include actual Internet founders like Vint Cerf and Robert W. Taylor, wrote a letter to Congress noting that "both bills will risk fragmenting the Internet's global [DNS] and have other capricious technical consequences," including "network errors and security problems."¹⁵ Based on this and other concerns raised by the "nerds," Representative Lamar Smith (R-TX) subsequently indicated that the DNS provisions would be removed from SOPA.¹⁶

Because the international IP lawmaking process does not allow the nerds to be meaningfully brought in, unless the nerds happen to be "cleared advisors," which they are not,¹⁷ we do not know whether the negotiators of ACTA or TPP understand the technology that they seek to regulate. As discussed above, a lack of expertise, information and/or understanding within government about the technology to be regulated, in this case, the Internet, could lead to *bad or poorly-balanced law*. However, in the case of SOPA and PIPA, this possibility was diminished because public access to drafts of the bills allowed experts—the nerds—to offer meaningful input to members of Congress

¹⁴ See Lemley et al., *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (2011), available at <http://www.stanfordlawreview.org/online/dont-break-internet> (hereinafter, *Professors' Letter*) for a discussion of the DNS provisions in SOPA and PIPA.

¹⁵ Vent Cerf et al., *An Open Letter from Internet Engineers to the United States Congress* (Dec. 15, 2011), available at <https://www.eff.org/sites/default/files/Internet-Engineers-Letter.pdf>. Names and brief biographies of eighty-three signatories are available at <https://www.eff.org/deeplinks/2011/12/internet-inventors-warn-against-sopa-and-pipa>; see also *Professors' Letter*, *supra* note 14.

¹⁶ David Kravets, *Rep. Smith Waters Down SOPA, DNS Redirects Out*, WIRED (Jan. 13, 2012, 5:59 PM), <http://www.wired.com/threatlevel/2012/01/dns-sopa-provision>. This access and opportunity for input led to better legislation, as the problematic DNS provisions have been excised, at least for now, in SOPA. As of this writing, SOPA and PIPA are on hold and it is unclear whether or when they will be advanced. For purposes of this Article, the fact that useful input was offered and received by Congress is key. Whether the bills ultimately become law is not a concern as the focus of this Article is on the lawmaking process itself.

¹⁷ See James Love, *supra* note 12. Additionally, to the extent that the USTR might grant access to negotiating texts to public nerds or other non-"cleared advisors," that should suggest that the need for absolute secrecy is not as pronounced as the official position taken by the USTR would indicate. While I have no evidence of that actually happening, the possibility of such informal, back channel discussion cannot be dismissed given the general level of secrecy around the entire negotiating process.

in real-time about aspects of the bills about which they admittedly had no expertise or understanding.¹⁸

This third observation, together with the first two, support the policy reform proposal made in this Article, as well as the FOIA theoretical shift introduced here.¹⁹ The fundamental assumption at this Article's foundation is that the experience of SOPA and PIPA prove not just that the public needs access to more information about the negotiating status of international law, but more specifically that the nerds need to be brought in when lawmakers lack the necessary information and expertise to make informed decisions about the state of the law. If we are concerned that the public is unaware of the negotiating positions of the U.S. and other countries at the table for the ACTA and TPP negotiations, we should be even more concerned that the nerds, who may be able to offer uniquely valuable expertise on a given issue, are also excluded.

This insight proves valuable from both a theoretical and policy perspective. Putting aside the larger theoretical implications for a moment, the policy implications of this observation, if adopted, can have an immediate impact on the public's access to information about ACTA, TPP, or indeed any future international law negotiations. In sum, as discussed more fully in this Article, weighing the need for transparency and accountability based on a simple dichotomy between government and the general public's "right to know," as is currently the standard, operates at a level of abstraction and theory that makes decisions about what should or should not be made public difficult to ascertain. Rather, the better question is to ask when information should be provided to the nerds, who are often in the best position to offer useful information and input to policymakers, despite the facial applicability of a given exception to disclosure under FOIA. By asking that question, we can make better and more granular decisions about when secrecy is truly needed given the costs.

As it stands today, FOIA does not require that administrative entities like the USTR ask or answer this question. Rather, FOIA allows the USTR to make a blanket statement that disclosure of TPP

¹⁸ "I would hope that would give everybody pause to say maybe we ought to ask some nerds what this thing really does[.]" *SOPA Markup*, *supra* note 3, at 88 (statement of Rep. Jason Chaffetz; "You know, I am not going to get involved in the technology and whether it is effective or all that stuff, you all have to debate that[.]" *id.* at 184–85 statement of Rep. Melvin Watt; "I don't want to be derisive, but whenever we don't understand basic things in the bill, then what we are saying is let's pass the bill and then find out what is in it. Now, on both sides of the aisle, we don't ever want to hear that word said about anything we do again. So please, please, let's find out what is in this with facts before we move forward[.]" *id.* at 216 statement by Rep. Darrell Issa).

¹⁹ This Article does not and is not designed to fully explore this theoretical shift. Conceptualizing and exploring this proposed theoretical reorientation and its impact beyond intellectual property law is the subject of a longer article, the working title of which is *Freedom of Information Reconfigured*. Rather, this Article introduces the theory with a focus on intellectual property lawmaking.

negotiating texts and proposals would amorphously damage U.S. national security, leaving the excluded public to deduce and speculate about what may be on the table in the TPP negotiations, while, if legal resources exist, engaging in expensive and usually futile litigation over the applicability of the exemption. This is an untenable position from a policy and theoretical perspective, and we can reasonably expect that TPP will be poorer for it, both substantively and from a legitimacy perspective.

Indeed, the substantive impact has already been suggested by the provisions in TPP's leaked intellectual property chapter and confirmed in the watered-down final version of ACTA. On the procedural side, the legitimacy impact has been severe as there has been an outpouring of opposition to ACTA from those denied access to the closed environment in which it was negotiated, and an increasing level of opposition to the even more extreme secrecy displayed during the ongoing TPP negotiations. In stark contrast, SOPA and PIPA represent what the international lawmaking process could look like, even within the trade negotiation context.²⁰

Because of the ongoing legislative efforts discussed below, we can now begin to accurately assess the real impact of these transparency developments on IP lawmaking. With the counter-example of SOPA and PIPA, we finally have a comparator for analysis of the impact of these developments on international IP lawmaking, and lawmaking more generally. Thus, with the benefit of this information, I propose a policy solution and introduce a proposed theoretical shift in FOIA.

B. *The Proposals*

This Article primarily proposes a change in FOIA's policy with respect to national security information: the creation of a qualified public right to United States' national security information related to international lawmaking based, in part, upon the groundbreaking recent decisions in *Center for International Environmental Law v. Office of the U.S. Trade Representative*.²¹ This right should be considered and analyzed from the perspective of the nerd, the expert. In other words, if a nerd would find the information useful, then it would be subject to disclosure to the public generally (including the nerds) unless the government could overcome a presumption in favor of its disclosure based upon demonstrable evidence of likely or actual national security fallout. In addition, this Article proposes that under limited circumstances, there may be a basis for the disclosure of foreign

²⁰ A legitimate question is whether IP should be run through the trade negotiation process, but that question is beyond the scope of this article.

²¹ *Ctr. for Int'l Envtl. Law v. Off. of U.S. Trade Rep.* ("CIEL I"), 777 F. Supp. 2d 77 (D.D.C. 2011), *aff'd*, No. 01-498, 2012 U.S. Dist. LEXIS 25795 (D.D.C. Feb. 29, 2012) ("CIEL II"). The decision as to whether *CIEL II* will be appealed is pending.

government information related to international lawmaking held by the United States. The practical basis for and contours of these qualified rights are the focus of this Article.

From a theoretical perspective, these observations also suggest that a fundamental reorientation of FOIA may be needed. While not developed fully in this Article, the key to understanding current and potential long-term problems in IP lawmaking and lawmaking generally, and thus the policy proposal discussed below, is Professor Wendy Wagner's observation that the "ability to control the flow of information" *to decision makers* "is a crucial element in affecting decisions."²² Modifying this crucial observation for purposes of the problems in FOIA discussed in this Article, the flow of useful information to, rather than from, decision-makers is a usually overlooked and/or unrecognized aspect of freedom of information analysis and litigation. However, we ignore its import at our collective peril.

Thus, this Article introduces the suggestion that FOIA needs a theoretical reconfiguration given the vast technological improvements, spurred by the Internet, that allow the public to offer real-time, textual input to policymakers often at a faster speed than the government itself can provide information to the public. Therefore, FOIA needs to focus more on when public inputs *to government* generally and its agencies, like USTR, specifically, are most useful and currently lacking without diminishing the focus on what outputs are properly shared *by government* with the public. The theoretical dimensions and impact of such a proposal are beyond the scope of this Article but animate this Article's policy proposal.²³

As this article goes to the printer, a round of the TPP negotiations are concluding in Dallas, Texas. Therefore, this Article's focus is on the immediate policy needs of FOIA, USTR, nerds, and the public at large. It develops the basis for the qualified right to national security information by discussing the context, background, and application of FOIA's Exemption 1 (E1)²⁴ to international IP lawmaking and international lawmaking generally in Part II. The Article then outlines the status of TPP, ACTA, and SOPA and PIPA, noting the increasing level of public input in each example respectively, in Part III. Part IV discusses the proposed solution, and the Article concludes in Part V.

²² Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1400 (2010) (quoting Bruce M. Owen & Ronald Braeutigam, *THE REGULATION GAMES: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 4 (1978)).

²³ This theoretical reorientation will be fully developed and analyzed, and its dimensions unpacked, in a future article currently titled *Reconfiguring Freedom of Information*.

²⁴ 5 U.S.C. § 552(b)(1) (West, Westlaw through Oct. 2009 amendments).

II. FOIA EXEMPTION 1

Before examining FOIA's E1 in detail, it is important to note three developments that have impacted the international lawmaking process in recent years. The first development is the rise of closed international IP lawmaking resulting from the aforementioned national security concerns, which by definition requires extreme levels of secrecy.²⁵ Today, largely because of the increasing focus on IP at the international level, which gives rise to use of the national security exemption to FOIA,²⁶ the public does not get useful information from government whereas private corporate interests do. Thus, private corporate interests largely control the flow of information to USTR, who currently handles international IP lawmaking.

However, it is important to note that IP law is not alone; thus, the reform proposed herein would benefit not just IP lawmaking, but any international lawmaking that may encounter FOIA's national security exemption. For example, environmental policy has seen a similar internationalization with similar concerns raised. One observer of international environmental lawmaking noted that when

environmental policy was solely dealt with at the national level, the numerous opportunities for interested actors to participate in the formulation of environmental policy may have been taken for granted. However, with increasing frequency, environmental policy is being addressed at the regional or global level. This shift strips interested participants of many of the procedural protections and guarantees that safeguard participation in the development of environmental policy. The opportunities for meaningful participation by affected parties at the international level pales in comparison to opportunities provided participants at the national level.²⁷

Thus, the reforms suggested in this Article should benefit international lawmaking generally, particularly where national security concerns are raised to prevent public access to U.S. negotiating texts and proposals, and to a lesser extent, foreign government information.

The second trend is the problem of overclassification of documents for national security purposes. As Steven Aftergood of the Federation

²⁵ As will be discussed in more detail below, while there is some evidence that IP piracy might fund international terrorism, see David Kravets, *Hollywood-Funded Study Concludes, Piracy Fosters Terrorism*, WIRED (Mar. 3, 2009, 2:46 PM) <http://www.wired.com/threatlevel/2009/03/hollywood-funded>. FOIA's conception of IP as implicating national security concerns has more to do with foreign relations and diplomatic negotiations than terrorism or crime fighting.

²⁶ 5 U.S.C. § 552(b)(1) ("E1").

²⁷ Prasad Sharma, Comment, *Restoring Participatory Democracy: Why the United States Should Listen to Citizen Voices While Engaging in International Environmental Lawmaking*, 12 EMORY INT'L L. REV. 1215, 1222-23 (1998).

of American Scientists has pointed out, “the classification system that restricts access to government information on national security grounds clearly is not serving its intended purpose.”²⁸ Indeed, since 9/11, commentators have found that the United States government generally errs on the side of secrecy.²⁹ But, while national security overclassification is a problem that has existed for decades,³⁰ its impact in international lawmaking is a recent phenomena going back about ten years.³¹ Moreover, its impact in international IP lawmaking is even more recent, having been felt in the last four or so years as ACTA and TPP have been negotiated and/or finalized and the national security exemption in FOIA has stood in the way of public access to negotiating texts.³²

Additionally and finally, international IP agreements like ACTA, and more recently TPP, are now supplanting domestic lawmaking by placing pressure on domestic law to conform to international standards that may be more stringent than what could politically be achieved in Congress. Simultaneously, they are being treated like bilateral trade agreements, which historically have been negotiated in secret.³³ This is a powerful combination that makes international IP law more important than it ever has been.

The procedural impact of these developments, as will be discussed in Part III, is a lack of public access to negotiating texts and proposals, among other information. From a substantive perspective, it has also

²⁸ Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL’Y REV. 399, 400 (2009).

²⁹ David Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 AM. U. INT’L L. REV. 811, 817 (2011).

³⁰ Aftergood, *supra* note 28, at 400–01; William J. Katt, Jr., Note, *The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*, 106 COLUM. L. REV. 679, 696–97, 707 (2006) (“Any momentum for . . . changes [in Congressional and judicial oversight of executive document classification] spurred by the end of the Cold War in the 1990s was slowed considerably after September 11, 2001.”).

³¹ See Katt, *supra* note 30, at 706–07 n.171 and accompanying text; see also *id.* at 701 (“Subsequent [to 2002], USTR began routinely to classify all negotiating documents so as to ensure complete protection under Exemption 1 in every instance.”).

³² See Levine, *supra* note 29.

³³ KNOWLEDGE ECOLOGY INT’L, TRANSPARENCY IN NEGOTIATIONS INVOLVING NORMS FOR KNOWLEDGE GOODS 2 (July 22, 2009), available at http://www.keionline.org/misc-docs/4/ustr_transparency_asks_22jul2009_final.pdf (“The ACTA negotiations have adopted the secretive norms of bilateral trade negotiations, rather than the more transparent models often found in the multilateral and plurilateral negotiations normally used to set global norms for knowledge governance.”); Sean Flynn, *Prof. Flynn’s Presentation at the AALS: “New Directions in International Intellectual Property,”* AM. UNIV. WASHINGTON COLL. OF LAW PROGRAM ON INFO. JUSTICE AND INTELLECTUAL PROP (Jan. 7, 2012), <http://www.pjip-impact.org/2012/01/09/prof-flynn-presentation-at-the-aals-new-directions-in-international-intellectual-property> (“Unlike in the multilateral system, bilateral agreements are negotiated under antiquated procedures created for horse trading of tariff schedules. The negotiations themselves take place behind closed doors (unlike in the WTO or WIPO). A closed group of industry lobbyists (USTR calls them ‘citizens’) have access to ongoing proposals but no one else does.”); Peter K. Yu, *ACTA and Its Complex Politics*, 3 WIPO J. 1, 10 (2011) (“More importantly, when ACTA is juxtaposed with the many recent bilateral, plurilateral and regional trade and investment agreements, it makes salient a highly disturbing trend of using non-multilateral arrangements to circumvent the multilateral norm-setting process.”).

led to the possibility of higher standards of IP protection and enforcement than could be had in more transparent and multilateral World Intellectual Property Organization (WIPO).³⁴ Trade agreements, which traditionally involve issues like taxing and spending policies, tariffs and trade deficits,³⁵ and which usually involve two parties and unique individual interests, are very different from the regulation of IP law, where there are collective interests and global norm setting at stake.³⁶ Given these trends, the use of the national security exemption amplifies the negative consequences of increased classification of documents in a setting not accustomed to negotiations involving collective interests like the contours of the Internet which is, as Senator Wyden has said, “the engine of innovation, competition and so many of the new jobs.”³⁷

A. *Background and Standard of Review*

National security (NS) information (collectively, NSI) is, not unexpectedly, the most secret and protected form of government information.³⁸ The national security exemption in FOIA (i.e., E1), codified at 5 U.S.C. § 552(b)(1), protects information from disclosure that is “(A) specifically authorized under criteria established by an Executive order to be kept secret in national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive order.”³⁹ The rules for classification under subsection (A) are established and periodically updated by the President, but the information must be always be sufficiently sensitive such that “unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.”⁴⁰

The categories of NSI are not a product of the FOIA or other law.⁴¹

³⁴ Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP*, 18 J. INTELL. PROP. L. 447, 456 (2011) (“With ACTA, these countries could engage in non-transparent negotiations for much higher standards of intellectual property protection and enforcement than they could ever hope to achieve in the multilateral WIPO.”).

³⁵ Brian J. Schoenborn, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?*, 4 MINN. J. GLOBAL TRADE 103, 121 (1995).

³⁶ Yu, *supra* note 33, at 6. As an individual who focuses on music preservation explained to me in a recent conversation about the secrecy surrounding ACTA and TPP compared to bilateral trade negotiations, “I don’t care when the US and another country fight over how many bananas are going to be traded.”

³⁷ Arthur Stamoulis, *Transcript of the Exchange Between Sen. Wyden and USTR Kirk Over TPP Transparency*, INFOJUSTICE.ORG (Mar. 8, 2012) <http://infojustice.org/archives/8829>.

³⁸ There is minimal but rich scholarly discussion of national security information and FOIA generally. See Katt, *supra* note 30.

³⁹ 5 U.S.C. § 552(b)(1) (West, Westlaw through Oct. 2009 amendments).

⁴⁰ Exec. Order No. 12,958, 32 C.F.R. § 701.23 (1995) (“national security” defined as “the national defense or foreign relations of the United States.” Exec. Order 12,958 1.1(a)). The current relevant executive order, President Obama’s Executive Order 13,526, adopts this language. See Exec. Order No. 13,526, 75 Fed. Reg. 1013 (Dec. 29, 2009).

⁴¹ See *FOIA Exemptions*, FOIADVOCATES, <http://www.foiadvocates.com/exemptions.html> (last visited Apr. 2, 2012). There is a process to challenge the President’s classification, but that is a second order solution to the problems discussed herein. U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 164 (2009), available at

The current Executive Order identifies the following categories of information as NSI: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to NS; (f) U.S. government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to NS; or (h) the development, production, or use of weapons of mass destruction.⁴² As will be seen below, vesting this power in the President makes sense from an NS perspective, but becomes problematic when issues not clearly related to the above categories or primarily involving the President, like the creation of international IP law, enter the equation.

As E1 vests wide discretion in the President to designate information as a national security concern, courts are required to treat executive classification of information as exempt from FOIA under E1 with great deference. This standard is based on “a very broad and liberal Executive Order [in this case, President George H.W. Bush’s executive order] and case law that gives the government a great deal of leeway.”⁴³ Therefore, “in conducting *de novo* review in the context of national security concerns, courts must accord *substantial weight* to an agency’s affidavit concerning the details of the classified status of the disputed record.”⁴⁴ The U.S. Court of Appeals for the District of Columbia Circuit has articulated an expansive standard of deference in national security cases, noting that “little proof or explanation is required beyond a plausible assertion that information is properly classified.”⁴⁵ Indeed, although rarely cited by courts, foreign government information is governed by a specific Executive Order presumption that its “unauthorized disclosure” is “presumed to cause damage to national security.”⁴⁶

Not surprisingly, and as demonstrated in ACTA and TPP, “[i]n practice, the executive branch exercises discretion over the content of

http://www.justice.gov/oip/foia_guide09.htm (hereinafter DOJ GUIDE).

⁴² Exec. Order No. 13,526, § 1.4(a)–(h). Defense against transnational terrorism, *see* DOJ GUIDE, *supra* note 41, at 162–63, may also be a category, but it is not found in the Executive Order.

⁴³ *Bushies to Keep Airline Passenger Safety Negotiations Secret*, FOIA BLOG (Nov. 9, 2007), http://thefoia blog.typepad.com/the_foia_blog/2007/11/bushies-to-keep.html. This deference has not changed much in the intervening years: The “[a]mendment of Executive Order 12,958 removed the requirement in the original version of the order that agency classification authorities not classify information if there is ‘significant doubt’ about the national security harm.” DOJ GUIDE, *supra* note 41, at 163–64. As will be shown below, the harm in keeping U.S. IP international law negotiating positions from public is indeed “significantly doubtful.”

⁴⁴ *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal quotation marks omitted).

⁴⁵ *Morley v. C.I.A.*, 508 F.3d 1108, 1124 (D.C. Cir. 2007).

⁴⁶ Exec. Order No. 13,526, § 1.1(d).

[the Executive Order referenced in subsection (A)] free from legislative oversight or meaningful judicial review, so it has traditionally wielded these classification powers expansively.”⁴⁷ Thus, the power of this exemption leads to an unsurprising outcome. As one observer noted, “[b]ecause of Congress’s choice to tie Exemption 1 to the language of the executive order governing classification of documents, FOIA requestors are less likely to obtain information in the face of an Exemption 1 claim than under any of the other exemptions.”⁴⁸

This reality has had immediate consequences directly related to the issues of transparency and public input that are the subject of this Article. For example, it is reasonable to conclude that this extremely deferential standard led the public interest groups Electronic Frontier Foundation (EFF) and Public Knowledge (PK) to drop an action in 2009 seeking information about the ACTA negotiations through FOIA. Attesting to the impact of the national security exemption on the public’s ability to access “important documents about the secret intellectual property enforcement treaty [ACTA] that has broad implications for global privacy and innovation,” EFF explained:

Federal judges have very little discretion to overrule Executive Branch decisions to classify information on “national security” grounds, and the Obama Administration has recently informed the court that it intends to defend the classification claims originally made by the Bush Administration.

“We’re extremely disappointed that we have to end our lawsuit, but there is no point in continuing it if we’re not going to obtain information before ACTA is finalized,” said EFF International Policy Director Gwen Hinze.⁴⁹

Thus, the public never received the information sought by EFF and PK.⁵⁰ Because E1 is the most powerful exemption in FOIA, its continued use as a shield against public access to international IP lawmaking texts requires detailed examination. If it can be shown that the lawmaking process does not need, or should not be able to avail itself of, the most deferential standard tied to national security concerns, then it should follow that the reforms proposed herein are warranted.

⁴⁷ Katt, *supra* 30, at 694.

⁴⁸ *Id.*

⁴⁹ *EFF and Public Knowledge Reluctantly Drop Lawsuit for Information About ACTA*, ELECTRONIC FRONTIER FOUND. (June 17, 2009), <https://www.eff.org/press/archives/2009/06/17>. This outcome also illustrates a big general problem with FOIA in the context of the need for current information: lag time in FOIA litigation may make the information less useful when received by the public. Meaningful *ex ante* impact on lawmaking is difficult under FOIA, see Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1075 (2008), which is another reason why E1 needs to give more ground than it currently does.

⁵⁰ It is conceivable that the information could have been received by other means, but there is scant evidence of that fact.

B. *E1 and International Lawmaking*

Moreover, aside from the oft-mentioned diffuse public, the existence of public experts—nerds—who can offer meaningful and needed input to lawmakers suggests that the application of E1 to lawmaking scenarios may create more problems than benefits. Fortunately, while courts usually heavily defer to government in E1 cases, such deference is not absolute. Rather, deference “is only warranted ‘where [the agency’s] predictions [about damage to NSI] are sufficiently detailed and do not bear any indicia of unreliability.’”⁵¹ As will be discussed in more detail, there are significant enough “indicia of unreliability” to cause one to question the need for absolute secrecy about negotiating texts in international IP law.

The critique is built upon a threshold observation: as a matter of first impression, it would appear that the only thing that information about the development, production, or use of weapons of mass destruction⁵² and the U.S. international negotiating position regarding how to deal with copyright piracy of Adele’s Grammy Award-winning album “21”⁵³ have in common is their apparent classification as NSI exempt from FOIA under E1. Implicitly, FOIA is instructing that the damage to national security threatened by the release of this information is comparable. However, it is hard to envision that whatever one could do with information about weapons of mass destruction (e.g., build a weapon) would be comparably as damaging to U.S. national security as whatever one could do with knowledge of the U.S.’s position in international IP lawmaking (e.g., putting pressure on the USTR to take a certain position).

While this Article maintains that these observations are generally accurate, the U.S. takes a more granular approach to its classification as NSI of its position on how to address Adele’s lost copyright revenue. Specifically, the U.S. international negotiating position regarding how to deal with copyright piracy of Adele’s Grammy Award winning album purportedly falls under the specific NSI subcategories of “foreign relations”⁵⁴ and/or “foreign government information,”⁵⁵ meaning that

⁵¹ Elec. Privacy Info. Ctr. v. Dept’ of Justice, 511 F. Supp. 2d 56, 66 (D.D.C. 2007).

⁵² Exec. Order No. 13,526, § 1.4(h).

⁵³ Todd Martens, *Grammys 2012: Adele’s ‘21’ Wins Album of the Year*, L.A. TIMES (Feb. 12, 2012, 8:23 PM), http://latimesblogs.latimes.com/music_blog/2012/02/grammy-awards-2012-album-of-the-year.html.

⁵⁴ Exec. Order No. 13,526, § 1.4(d).

⁵⁵ *Id.* § 1.4(b); see also *CIEL I*, 777 F. Supp. 2d 77, 83, n.3 (D.D.C. 2011). “Foreign government information” is defined as

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence; (2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence;

the public would not be able to access that information absent an administrative challenge to the designation and/or litigation in federal courts. Thus, it is necessary to examine the basis for this designation by asking whether “foreign government information” regarding how to handle copyright piracy should be governed by an Executive Order’s presumption that its disclosure would, by definition, “cause damage” to U.S. national security. That issue will be discussed below.

Additionally, the prism through which IP lawmaking is currently being viewed has a devastating impact on the dissemination of information about international lawmaking processes. Thus, a second question is whether disclosure of *any* information about international lawmaking should be subject to the same degree of judicial deference as would be afforded the Executive when designating information about military plans, weapons systems, or operations exempt from disclosure.⁵⁶ This Article suggests that the answer to both questions must be “no,” and that the proposed solution strikes the proper balance between the government’s and the public’s interests while leaving open the possibility that such information could nonetheless implicate NS concerns.

The impact of running international IP lawmaking, and international lawmaking generally, through the E1 rubric leads to some surprising consequences. For example, the public currently knows more about the aggregate numbers of nuclear warheads the U.S. and Russia have deployed on inter-continental and submarine-launched ballistic missiles under the new Strategic Arms Reduction Treaty (START) than it does about U.S. negotiating positions in TPP.⁵⁷ This is at least questionable policy and a puzzling result. While it is unclear what one might do with information about Russia’s nuclear capabilities, it seems reasonable to assume that public knowledge of that information is more risky than public knowledge of the U.S. position in the TPP negotiations. Thus, we need to rethink the application of the “foreign relations” or “foreign government information” NSI categories to international lawmaking negotiations as the lawmaking process itself is categorically quite different from the other categories of NSI that have far more in common with each other than they do with the categories that have been applied to international lawmaking.

The questionable applicability of E1 to the situations discussed in this article is reflected in the cases cited in the United States Department of Justice (DOJ) Guide to the Freedom of Information Act that interpret

or (3) information received and treated as ‘foreign government information’ under the terms of a predecessor order.

Exec. Order No. 13,526, § 6.1(s).

⁵⁶ Exec. Order No. 13,526, § 1.4(a).

⁵⁷ *New START Treaty Aggregate Numbers of Strategic Offensive Arms*, U.S. DEP’T OF STATE (June 1, 2011), <http://www.state.gov/t/avc/rls/164722.htm>.

E1.⁵⁸ As would be expected given the categories of information usually at issue, most cases interpreting E1 involve the Central Intelligence Agency (CIA), National Security Agency (NSA) or the DOJ,⁵⁹ not the USTR or, even more significantly, a lawmaking process.⁶⁰ Obviously, the context of revealing information involving the most sensitive information held by the U.S. government is radically different than that which occurs in what would otherwise be transparent lawmaking negotiations if they were occurring in Congress. Therefore, because E1 as interpreted by courts does not distinguish between those cases and cases involving the U.S. position in international lawmaking, information that would otherwise be public if it were contained in a Congressional bill or hearing is instead treated as if it was involving how to build a weapon of mass destruction.

While this contrast does not necessarily mean that all information from international lawmaking should be made public, like, for example, information not already shared with “cleared advisors,” those documents should be able to be redacted to protect actual foreign government information that should be kept secret. In fact, redaction is already done in other FOIA contexts.⁶¹ Moreover, if a document does not indicate what foreign government suggested a given piece of language, as in plurilateral or multilateral negotiations like ACTA and TPP, it seems questionable that a foreign government should have any basis to object to disclosure of the document. Unfortunately, the prevailing process of analyzing such cases through the E1 rubric makes this discussion largely academic.

Fortunately, the recent *CIEL I* and *CIEL II* (collectively, “*CIEL*”)⁶² decisions suggest the possibility of rethinking FOIA’s approach to lawmaking information by, for the first time in a published opinion, questioning the blanket designation of such information as NSI. Steven Aftergood of the Federation of American Scientists has described the most recent opinion (*CIEL II*) as “an astonishing thing that federal courts almost never do” and the opinion as “extraordinary.”⁶³ Based upon the case history involving E1, Aftergood is correct.

⁵⁸ See DOJ GUIDE, *supra* note 41.

⁵⁹ Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Prevented Unnecessary Secrecy*, 58 ADMIN L. REV. 131, 163–65 (2006); see also DOJ GUIDE, *supra* note 41, at 141 (Exemption I section).

⁶⁰ The three cases cited in the DOJ Guide for examples of “foreign government information” involve the FBI or CIA, e.g., cases involving law enforcement and/or intelligence. DOJ GUIDE, *supra* note 41, at 159 n.84. Moreover, the DOJ Guide “foreign relations” cases are also heavily intelligence, defense, and law enforcement related. *Id.* at 161 n.88) (citing to cases concerned mainly with the intelligence information from the CIA and the Department of Defense, and revealing foreign government information when there is a “present understanding” with the foreign government that information will not be disclosed).

⁶¹ See, e.g., 5 U.S.C. § 552(b)(4) (West, Westlaw through Oct. 2009 amendments) (cases involving disclosure of trade secrets); see also Levine, *supra* note 10.

⁶² See *supra* note 21 and accompanying text.

⁶³ Steven Aftergood, *Court Says Agency Classification Decision Is Not “Logical,”* SECURITY NEWS (Mar. 2, 2012), http://www.fas.org/blog/secrecy/2012/03/not_logical.html.

In *CIEL*, the Center for International Environmental Law (“the Center”) sought documents under FOIA from the USTR regarding sessions of the Negotiating Group on Investment (NGI) for Free Trade Agreement of the Americas (FTAA).⁶⁴ Documents containing the United States’ position on trade investment issues were provided by USTR to negotiators with the understanding that documents produced or received in confidence during negotiations would not be released to the public without the consent of all nations involved.⁶⁵ Thus, when the Center requested documents about the FTAA negotiations from the USTR, specifically a document that explained the U.S. proposed position regarding the phrase “in like circumstances,” which the government described as “the initial US government position on this subject”⁶⁶ and was withheld pursuant to E1, USTR argued that disclosing the requesting document would (a) breach the agreement, leading to damaged relationships between nations, and (b) lead to less favorable trade terms for the United States; i.e., the disclosure could reasonably be expected to damage foreign relations or national security.⁶⁷

In *CIEL I*, the USTR moved for summary judgment, but the court denied its motion due to USTR’s failure to make a sufficient showing that releasing the document would harm national security.⁶⁸ The first argument involving breach of the confidentiality agreement was relatively easily dismissible. As *CIEL* argued and the court accepted, the USTR’s rationale that the expectation of confidentiality is sufficient to exempt documents from disclosure would give USTR “absolute discretion over classification regardless of whether disclosure would cause harm.”⁶⁹ Nonetheless, while it did not impact the court’s decision in requiring disclosure of the referenced document, the court indicated that disclosure would breach the agreements.⁷⁰

⁶⁴ *CIEL I*, 777 F. Supp. 2d 77, 80 (D.D.C. 2011).

⁶⁵ *Id.*

⁶⁶ Vaughn Index at 1, Ctr. for Int’l Env’tl. Law v. Off. of U.S. Trade Rep., 505 F. Supp. 2d 150 (D.D.C. 2007) (No. 01-CV-498).

⁶⁷ *CIEL I*, 777 F. Supp. 2d at 81. There were a few other arguments either not particularly relevant to this article, thus they are not addressed, or based upon the specific facts around the FTAA negotiations, and will be discussed below in Part IV. However, the most fundamental arguments for purposes of this Article are addressed here.

⁶⁸ *Id.* at 85–86. A similar motion was denied in *CIEL II*. As the opinion in *CIEL II* is very similar to *CIEL I* and involves the same basic arguments relevant to this Article, the focus is on *CIEL I* as the facts are more developed. In that vein, it should also be noted that there is an even earlier decision in this case, *see* Katt, *supra* note 30, which is also redundant and therefore not a focus of this Article.

⁶⁹ Plaintiff’s Points and Authority Memorandum at 14, Ctr. for Int’l Env’tl. Law v. Off. of U.S. Trade Rep., 505 F. Supp. 2d 150 (D.D.C. 2007) (No. 01-CV-498). The court credited that argument in *CIEL II*, 2012 U.S. Dist. LEXIS 25795, at *14–15 (D.D.C. Feb. 29, 2012) (“A per se rule that existence of a confidentiality agreement provides an adequate basis for proper classification of a covered document is flatly incompatible with FOIA’s commitment to subject government activity to the ‘critical lens of public scrutiny.’”).

⁷⁰ *CIEL I*, 777 F. Supp. 2d at 83–84; *see also* *CIEL II*, 2012 U.S. Dist. LEXIS 25795, at *12–13 (“There is, however, a meaningful difference between the United States’ disclosure of information that it receives in confidence from a foreign government, with the foreign

The second argument was more complex and goes to the core of the problem in current international IP lawmaking. The USTR argued that “if foreign nations expect that their trade positions will be publicly disclosed, their room to negotiate will be ‘substantially reduce[d]’ given the local economic pressures.”⁷¹ Here, the court drew a distinction between foreign government information and U.S. information, and held that the argument did not hold water with regard to U.S. information.⁷² *CIEL I* explained that

while disclosure here would breach the understanding with the other participating governments, the claim that such a breach would harm national security is much less compelling than it was in [cited cases omitted], since the United States would be revealing its own position only, not that of any other country. USTR, therefore, has not shown it likely that disclosing [the referenced document] would discourage foreign officials from providing information to the United States in the future because those officials would have no basis for concluding that the United States would dishonor its commitments to keep foreign information confidential.⁷³

Thus, *CIEL I* forms the basis for an opening to reconsider the impact of and need for the E1 exemption in international lawmaking, as will be analyzed in Part IV.

Significantly, *CIEL II* also pointed out that “the record lacks any indication that the United States’ FTAA partners would oppose disclosure” of U.S. information.⁷⁴ This is a critical fact in assessing the need for disclosure of lawmaking positions, which courts have heretofore ignored. Indeed, this is the basis for the proposal below, making it conceivable that even foreign government information could be released in limited circumstances, i.e., where there is no proof that such release would reasonably prejudice the foreign entity in ongoing negotiations and the entity has indicated a willingness to allow public

government’s understanding that the information will be kept secret, and the United States’ disclosure of a document that it itself created and provided to others. While a breach of the confidentiality agreement will occur in either case, the resulting affect on the United States’ foreign relations—the key factor for assessing whether the document is properly classified—is not identical.”)

⁷¹ *CIEL I*, 777 F. Supp. 2d at 83.

⁷² *Id.* at 83–84.

⁷³ *Id.* at 84. In *CIEL II*, the court revisited this argument but noted that “harm resulting from breach of the confidentiality agreement here, and the asserted need to insulate negotiations from potential opposition from participating nations’ ‘vested local economic interests’ in order to provide ‘room to negotiate’ and make it less likely that foreign partners will ‘adopt and maintain rigid negotiating positions unfavorable to U.S. economic and security interests’ is substantially mitigated because the FTAA negotiations are not ongoing.” *CIEL II*, 2012 U.S. Dist. LEXIS 25795, at *14 (internal citation omitted). This shading of the issues makes the disclosure of negotiating texts during negotiations, as might occur with TPP when they would be most valuable to the public as the public could offer input during the drafting of the texts themselves, more of a challenge. These points will be discussed in Part IV, below.

⁷⁴ *CIEL II*, 2012 U.S. Dist. LEXIS 25795, at *15.

disclosure of its information.

In sum, *CIEL I* represents the first case where a court questioned the national security arguments of the federal government in a trade negotiation. For that reason, it is a landmark decision that warrants careful analysis as to its applicability more broadly. As will be discussed in more detail below, *CIEL I* is in fact instructive in devising solutions to the problems discussed in the next section.

III. TPP, ACTA, AND SOPA/PIPA: THREE (ONGOING) STORIES IN IP LAWMAKING

The problems discussed above have been or could be played out in the lawmaking process associated with TPP and ACTA, or any similar agreement to be negotiated in the future. All of the above concerns and issues, while discussed with reference to current IP law, pose significant long-term challenges. Those challenges are not just to IP lawmaking and its increasing politicization, which could make the best of transparency intentions difficult to accomplish but nonetheless a worthy endeavor, but more broadly to the operations of FOIA and the creation of domestic and international law generally. In order to assess the impact of a lack of transparency in TPP and ACTA as compared to the comparatively transparent and accountable SOPA and PIPA processes, the below examples are discussed from worst to best from a public input perspective, starting with the FOIA-exempt TPP and ACTA processes.

As the focus of this Article is international IP lawmaking, it discusses international and domestic lawmaking processes a bit differently. ACTA and TPP will be outlined based upon five factual points: the law's stated purpose, current status, level of secrecy and public input, and the substantive impact of the relative secrecy and public input on the negotiations and/or law itself. SOPA and PIPA are discussed in comparison to ACTA and TPP.

A. *TPP*

TPP is an ongoing lawmaking process that is being treated as exempt from FOIA under E1.⁷⁵ In terms of actual secrecy, it is also the IP lawmaking process about which we have the least amount of information. As it is also ongoing, it is the best example from which to begin the analysis.

1. Purpose

TPP is a Free Trade Agreement (FTA) currently being negotiated among nine countries: U.S., Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam.⁷⁶ It has been

⁷⁵ See *supra* note 26.

⁷⁶ *Trans-Pacific Partnership*, OFF. U.S. TRADE REP. (2011), <http://www.ustr.gov/tpp>. For an

described as “an unprecedented free trade agreement . . . and has implications for regionalism—particularly in the Pacific Rim—and the World Trade Organization . . . and for the power dynamics between major trading blocs.”⁷⁷ The USTR website notes that “President Obama has directed U.S. negotiators to seek a 21st-century agreement that tackles old trade concerns in new ways, that deals with cross-cutting issues previously unaddressed in trade agreements, and that benefits from an unprecedented level of stakeholder input.”⁷⁸ It encompasses a broad range of chapters, of which IP is one.

2. Status

After eleven rounds of secret negotiations, the next round of TPP negotiations is scheduled for early July 2012 in San Diego, California.⁷⁹ An IP chapter negotiation, now on a monthly meeting schedule, convened in Santiago, Chile, April 9th–13th.⁸⁰ An outline for the agreement has been completed and member nations hope to conclude negotiations expeditiously over the course of 2012, while looking to possibly add Canada, Japan and Mexico to the agreement.⁸¹

3. Secrecy Efforts

For a trade agreement, OMB Watch has noted that “unprecedented levels of work [are] being done behind closed doors.”⁸² TPP has been treated as if is a run-of-the-mill bilateral tariff agreement, almost entirely secret to public, whereas “cleared advisors” through ITACs have access to more information, including negotiating texts.⁸³ Indeed, Knowledge Ecology International (KEI) has pointed out that

[u]nder procedures that have been aggressively pushed by the USTR, all versions of the negotiating text of the agreement are withheld from the general public. Although the general public is not permitted to see the texts, hundreds of “cleared advisers”—often

outstanding overview of TPP and its status, see Jonathan Band, *The SOPA-TPP Nexus* (PIJIP Research Paper No. 2012-06, 2012), available at <http://digitalcommons.wcl.american.edu/research/28>.

⁷⁷ Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27, 28 (2011).

⁷⁸ *Round 8: Chicago*, OFF. U.S. TRADE REP. (Sept. 9, 2011, 5:06 PM), <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-negotiation-updates/round-8-chi>.

⁷⁹ See Sean Flynn, *USTR Announces Next TPP Round in San Diego July 2-10*, INFOJUSTICE.ORG (May 17, 2012), <http://infojustice.org/archives/23927>; Sean Flynn, *Intellectual Property TPP Talks Stall in Melbourne*, INFOJUSTICE.ORG (Mar. 12, 2012), <http://infojustice.org/archives/8847>.

⁸⁰ Sean Flynn, *TPP IP Chapter Headed to Chile April 9-13*, INFOJUSTICE.ORG (Mar. 14, 2012), <http://infojustice.org/archives/8885>.

⁸¹ Pablo Garibian & Rachele Younglai, *Canada, Mexico Ask to Join Pan-Pacific Trade Talks*, REUTERS (Nov. 13, 2011, 9:15 PM), <http://www.reuters.com/article/2011/11/14/us-apec-canada-tpp-idUSTRE7AC12B20111114>.

⁸² *Trade Secrecy Reaches New High*, OMB WATCH (Feb. 22, 2012), <http://www.ombwatch.org/node/11987>.

⁸³ See Flynn, *supra* note 33.

representing large corporate interests—are permitted to analyze the text and offer feedback, but are not allowed to discuss the information with the public. USTR also routinely provides detailed briefings to corporate lobbyists. It is therefore only the general public that is intended to be kept in the dark as regards the substantive proposals.⁸⁴

USTR Ronald Kirk has recently described TPP as having “unprecedented” transparency, apparently because of the existence of the ITAC system and the ability for some stakeholders to attend negotiating rounds and offer commentary,⁸⁵ but the U.S. government also admits that TPP negotiating countries agreed that the language of the agreement will remain confidential throughout the negotiations.⁸⁶ Although drafts of the TPP text have not been released officially, a copy of the confidentiality agreement can be found on the New Zealand Ministry of Foreign Affairs and Trade website⁸⁷ and Australia’s Trade Ministry website.⁸⁸ The agreement applies to “negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations.” Moreover, it stipulates that all participating nations will keep the negotiations confidential for at least *four years* after TPP comes into force, or, even if it is never ratified, four years after the “last round” of negotiations. The entire explanation for this policy is “to maintain the confidentiality of documents, while at the same time allowing the participants to develop their negotiating positions and communicate internally and with each other.”⁸⁹

Again, while some level of secrecy during negotiations may be desirable, it is not readily apparent why secrecy would be necessary once the negotiations concluded, regardless of the outcome, much less

⁸⁴ Krista Cox, *KEI asks Senator Leahy (D-VT) to demand greater transparency in the TPPA*, KNOWLEDGE ECOLOGY INT’L (Jan. 26, 2012, 11:22 AM), <http://keionline.org/node/1349>.

⁸⁵ Mike Masnick, *USTR Claims TPP Has ‘Unprecedented’ Transparency, but it Won’t Reveal the Details Unless You’re a Big Industry Lobbyist*, TECHDIRT, (Feb. 20, 2012, 7:40 AM), <http://www.techdirt.com/articles/20120218/01452217800/ustr-claims-tpp-has-unprecedented-transparency-it-wont-reveal-details-unless-youre-big-industry-lobbyist.shtml>; see also Sean Flynn, *Kirk Responds to TPP Transparency Demands*, INFOJUSTICE.ORG (May 10, 2012), <http://infojustice.org/archives/21385> (quoting USTR as stating that “I am strongly offended by the assertion that our process has been non-transparent and lacked public participation. USTR has conducted in excess of 400 consultations with Congressional and private stakeholders on the TPP, including inviting stakeholders to all of the twelve negotiating rounds.”)

⁸⁶ Sean Flynn, *At TPP Negotiating Round, USTR Holds Firm on Secrecy and IP Maximalism*, INFOJUSTICE.ORG (Sept. 12, 2011), <http://infojustice.org/archives/5448>.

⁸⁷ See Mark Sinclair, *TPP Depository Letter*, available at <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20letter.pdf> (last visited Apr. 18, 2012).

⁸⁸ *Release of Confidentiality Letter*, AUSTRALIAN DEP’T OF FOREIGN AFF. AND TRADE, <http://www.dfat.gov.au/fta/tpp/111221-tpp-confidentiality-letter.html#letter> (last visited Apr. 18, 2012).

⁸⁹ *Id.*

four years thereafter. It is difficult to conceive how development of negotiating positions or communication amongst the parties would be impeded if, for example, negotiating texts and “proposals of each Government,” if not emails or “other information” (whatever that may be), were released before (a) four years after the TPP comes into effect, or even more unusually (b) four years after the last round of negotiations, particularly if no law actually comes out of the negotiations. Indeed, this agreement smacks of the overclassification problem that has become the hallmark of the post-9/11 world.⁹⁰ Nonetheless, the matter-of-fact tenor of the agreement, which may indicate that the need for secrecy is self-evident to its signatories, leaves the public properly asking a number of questions, starting with, “why is this level of secrecy needed?” Neither the document, nor the USTR, provide an answer, leaving the public to engage in rank speculation as to its necessity. Surely the public deserves an explanation.

Regarding the February 10, 2011, U.S. proposed chapter on intellectual property,⁹¹ which was leaked on March 10, 2011,⁹² and remains the only textual information about TPP available to the public, its cover page cites “foreign government information” as the basis for the secrecy.⁹³ Presumably this designation is based on the fact that foreign entities had a part in its development, although it offers no evidence of foreign government contributions. It also makes reference to the confidentiality agreement’s durational terms discussed above.⁹⁴ Thus, it is evident that the TPP negotiations are effectively on public lock-down, although importantly, the leak of this document does not appear to have slowed the negotiations down, much less derailed them.

Reflecting the tiered availability of information, those private entities on an ITAC are not subject to this secrecy;⁹⁵ rather, it only applies to the public and its nerds (i.e., anyone who is not a cleared advisor and/or on an ITAC). KEI notes that

[The leaked IP chapter] has been distributed to all member states participating in the TPP negotiations, so it is not secret from any of the parties in the negotiations. The document may also be subject to review by the hundreds of corporate insiders who serve on USTR advisory boards. It is, however, secret from the taxpayers and voters

⁹⁰ See *supra* notes 28-32 and accompanying text.

⁹¹ *Trans-Pacific Partnership Intellectual Property Rights Chapter Draft*, KNOWLEDGE ECOLOGY INT’L (Feb. 10, 2011), <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.

⁹² Michael Geist, *U.S. Intellectual Property Demands for TPP Leak: Everything it Wanted in ACTA but Didn’t Get*, MICHAEL GEIST BLOG (Mar. 11, 2011), <http://www.michaelgeist.ca/content/view/5686/125>.

⁹³ See Exec. Order No. 13,526, § 1.4(b). See also *supra* note 82.

⁹⁴ See *supra* note 82.

⁹⁵ Other than having to agree to abide by the terms of the confidentiality agreement. See *supra* note 88. (“Anyone given access to the documents will be alerted that they cannot share the documents with people not authorized to see them.”).

who live in the United States, and people everywhere who are going to live under the new norms.⁹⁶

PK sums up the current state of secrecy succinctly: “Members of the public are currently given no official information about copyright proposals for the TPP or draft texts. The last text to be leaked regarding copyright law is more than one year old and no further information has been provided about developments over the past year.”⁹⁷ That, to put it mildly, is not much transparency, and it is the most secrecy that has been seen in modern IP lawmaking.

4. Public Input

Because of the above, there has been minimal ability for the public and its experts to offer any useful input.⁹⁸ As PK has noted, “In the limited instances that the public has been able to comment [on] the TPP—albeit without access to the actual draft text or parties’ negotiating positions—the process continues to lack signs that the

⁹⁶ *The Complete Feb 10, 2011 Text of the US Proposal for the TPP IPR Chapter*, KNOWLEDGE ECOLOGY INT’L (Mar. 10 2011, 11:00 AM), <http://keionline.org/node/1091>. There is some mystery surrounding how much information “cleared advisors” actually see. Public Citizen’s Global Trade Watch claims that “[m]ore than 600 executives from corporations have been named as official U.S. trade advisors and have access to the texts and talks.” Lori Wallach, *Trans-Pacific Trade Talks in Malaysia Underscore Secrecy*, TPP WATCH (Dec. 8, 2011), <http://tppwatch.org/2011/12/08/trans-pacific-trade-talks-in-malaysia-underscore-secrecy>. OMB Watch notes that “[r]eports on the agreement process indicate that 600 corporate representatives will have access and the opportunity to comment on the trade agreement, while only between 12 and 16 labor and environmental representatives will have a chance to make their voices heard.” *See Trade Secrecy*, *supra* note 82. Moreover, Techdirt has explained that “tonight (as we post this), a bunch of big companies who employ some of the key lobbyists supporting the extreme nature of TPP . . . are hosting a fancy, expensive dinner in Washington DC. The dinner is sponsored by the U.S. Chamber of Commerce, Philip Morris, Chevron, PhRMA, Microsoft, Pfizer, Amgen, Dow Chemical, among others . . . and the ambassadors from the TPP countries will all be in attendance (though we’ve heard, but don’t have confirmation, that Australia just pulled out after realizing how bad this looked).” Mike Masnick, *Crony Capitalism: Big Companies Sponsor Fancy Dinner for TPP Negotiators*, TECHDIRT (Feb. 24, 2012, 5:46 PM), <http://www.techdirt.com/articles/20120224/17043217875/crony-capitalism-big-companies-sponsor-fancy-dinner-tpp-negotiators.shtml>.

⁹⁷ PUBLIC KNOWLEDGE, COPYRIGHT AND THE TRANS-PACIFIC PARTNERSHIP AGREEMENT, 1 (Feb. 2012), *available at*, <http://infojustice.org/download/tpp/tpp-civil-society/PK%20Copyright.pdf>.

⁹⁸ The Australian government has taken the position that the TPP process allows for much public input during the most recent round of negotiations in Melbourne, Australia:

The round had a strong stakeholder component, with over 250 stakeholders registered to attend the events. A stakeholder forum was held on Sunday 4 March and was attended by negotiators from all the TPP countries. The forum featured around 40 presentations from a range of academic groups, businesses and public interest groups. A reception night on Tuesday 6 March provided an opportunity for stakeholders and negotiators to meet informally and discuss their views on TPP related matters. In addition to the formal program, negotiators attended a number of events and presentations hosted by stakeholders through the week.

Eleventh Round of Trans-Pacific Partnership Agreement (TPP) Negotiations, AUSTRALIAN DEP’T OF FOREIGN AFF. AND TRADE, <http://www.dfat.gov.au/fta/tpp/120301-tpp-stakeholder-update-11.html>. However, when pressed for release of the negotiating text, the Australian representative to the TPP negotiations stated that a release would not be possible since “nothing is agreed until it is agreed.” Cox, *supra* note 79.

public's input is taken into consideration, such as public responses or improved text proposals."⁹⁹ Put simply, there is no opportunity to meaningfully bring in the nerds as the nerds would have no solid foundation upon which to offer input, other than the hope that the leaked text reflects the current negotiating status of TPP. As discussed below, there is an evident need for the public nerds to be at the table, or at least able to offer meaningful input to the USTR.

5. Substantive Impact

Because of the above, anything could wind up being in the agreement.¹⁰⁰ However, there are also apparently Internet architecture issues about which the nerds' (experts') input would be valuable. Jonathan Band points out one such example:

The U.S. TPP proposal . . . could impede the evolution of U.S. IP law. Article 4.1 suggests that all temporary copies qualify as copies for purposes of infringement. This policy is drawn from a controversial 1993 case, *MAI v. Peak*, and appears in U.S. free trade agreements. However, in 2008 the U.S. Court of Appeals for the Second Circuit ruled in *Cartoon Network v. Cablevision* that temporary "buffer" copies of copyrighted works that lasted 1.2 seconds were not sufficiently fixed to constitute copies for purposes of the Copyright Act.¹⁰¹

Translated into layperson's terms, Article 4.1 could mean that merely surfing the Internet and viewing a webpage could form the basis for a *prima facie* case of copyright infringement. The possibility that TPP might render anyone surfing the Internet a copyright infringer in the eyes of international and U.S. law warrants public discussion and debate. There is no more basic activity conducted by anyone that uses the Internet. However, this is a highly technical and technological issue that cannot be assessed without having an understanding of the meaning of "buffer" copies and other computing concepts. Indeed, just to understand the relationships between the various computers at issue in *Cablevision* would require an understanding of how servers and routers work. It would therefore be in the best interests of the negotiators to be

⁹⁹ See PUBLIC KNOWLEDGE, *supra* note 97.

¹⁰⁰ See Geist, *supra* note 92 ("The U.S. plan is everything it wanted in ACTA but didn't get"); Sell, *supra* note 34, at 464 ("if ACTA is any indication, it is likely that much of industry's wish-list will be included in U.S. negotiating proposals"). But it also may have provisions limiting secondary markets in copyrighted goods. See Mike Masnick, *How the US Trade Rep is Trying to Wipe Out Used Goods Sales with Secretive TPP Agreement*, TECHDIRT (Feb. 29, 2012, 4:19 AM), <http://www.techdirt.com/articles/20120224/03083617862/how-us-trade-rep-is-trying-to-wipe-out-used-goods-sales-with-secretive-tpp-agreement.shtml> ("[W]e didn't quite realize the extent to which the US Trade Representative (USTR) and the big industry interests were seeking to use the TPP process to wipe out the used goods market.")

¹⁰¹ Band, *supra* note 76, at 28–29 (citations omitted).

sure that they understand the technological ramifications of writing law in this manner and the complex distinctions between the holdings in *MAI* and *Cablevision*.

Thus, it is evident that issues addressed in TPP might impact collective U.S. public interests like innovation policy and a (if not the) core use of the Internet, viewing a webpage. Nerds should be able to offer expert input on these issues and confirm that the meaning and ramifications of Article 4.1 are understood without resorting to public letters, backchannels and conjecture, hoping that someone at the USTR might listen. Therefore, because of this secrecy and inability to offer input, the threshold concern is not that the TPP negotiators cannot or do not understand the technology, but rather that it is not clear that they do given the severe consequences of codifying *MAI*.

Bringing the nerds in would create both legitimacy and better law. It would help the negotiators (a) understand the technologies at issue and (b) give assurance to the public, who will live under the law if enacted, that the negotiators understood the technologies when they agreed to the language. Even if the language were not amended based upon such input, the very ability to offer meaningful input would add tremendous legitimacy to the process, partially address concerns of USTR capture by the content industry that are rampant in the discussions involving TPP,¹⁰² and hopefully amplify public acceptance of the law. All of those benefits would be in addition to the most important benefit of hopefully leading to law that is more thoroughly and thoughtfully drafted—that is to say, from the perspective of many outside the negotiating room and ITAC, that this problematic language is excised from the agreement.

Despite the above, the nerds have not been brought in. *CIEL* suggests reasons why they have not. As TPP is the example of extreme secrecy and its impact, Part IV will assess the propriety of the USTR's course of action.

B. ACTA

ACTA has already been treated as exempt under E1.¹⁰³ As the ACTA process, from negotiation to ratification, has been ongoing for over four years, there is already a body of procedural and substantive analysis,¹⁰⁴ particularly since the public release of the final draft agreement in November 2010.¹⁰⁵ There is also general consensus

¹⁰² See Flynn, *supra* note 33.

¹⁰³ See Levine, *Transparency Soup*, *supra* note 29.

¹⁰⁴ See *id.*; Sell, *supra* note 34; Yu, *Six Secret Fears*, *supra* note 5; Band, *supra* note 76; Mike Masnick, *What Is ACTA and Why Is it a Problem?*, TECHDIRT (Jan. 24, 2012, 1:18 PM), <http://www.techdirt.com/articles/20120124/11270917527/what-is-acta-why-is-it-problem.shtml>; Rashmi Rangnath, *What We Won in ACTA*, PUB. KNOWLEDGE (Oct. 3, 2011), <http://www.publicknowledge.org/blog/what-we-won-acta>; Love, *supra* note 4.

¹⁰⁵ See Jason Rantanen, *Final Draft of ACTA Released*, PATENTLYO (Nov. 16, 2010),

among those who most vocally opposed the secrecy that the final product is far better than the drafts that were released. Most significantly, it appears that many of the most problematic issues in ACTA were addressed in the final six months or so of the negotiations, after significant leaks of the agreement had occurred.¹⁰⁶ Nonetheless, as a comparator to the mostly-closed TPP process, it is worth briefly discussing, particularly given the backlash against it, based in large measure on misinformation engendered by the extreme secrecy of the process until it neared conclusion and public anger at being excluded from the opportunity to offer meaningful, real-time input.

1. Purpose

ACTA has been described by the USTR as intended to “strengthen the international legal framework for effectively combating global proliferation of commercial-scale counterfeiting and piracy.”¹⁰⁷ It outlines civil and criminal actions that signatory countries pledge to enforce against entities that violate IP rights, and “lays out procedures to strengthen cooperation among customs authorities and creates an international body to oversee implementation of the agreement.”¹⁰⁸ Indeed, given the endorsement from the Group of Eight (G-8), if it were enacted, ACTA will likely become one of the most significant international agreements regarding intellectual property laws in history, a “new international legal framework.”¹⁰⁹

2. Status

The U.S., Australia, Japan, Canada, Korea, Japan, New Zealand, Morocco, and Singapore signed ACTA in October 2011, and the EU and twenty-two member states signed in January 2012.¹¹⁰ But, as reported by the Associated Press, “The European Commission, facing opposition in city streets, on the Internet and in the halls of Parliament, has suspended efforts to ratify a new international anti-counterfeiting agreement, and instead will refer it to Europe’s highest court to see

<http://www.patentlyo.com/patent/2010/11/final-draft-of-acta-released.html>.

¹⁰⁶ See Levine, *Transparency Soup*, *supra* note 29, at 830 n.73, for a list of the leaks.

¹⁰⁷ Anti-Counterfeiting Trade Agreement (ACTA), OFF. U.S. TRADE REP., <http://www.ustr.gov/acta> (last visited Apr. 18, 2012). The USTR is the government entity representing the United States in negotiations.

¹⁰⁸ *Bulgaria Retracts Support for Global Anti-Piracy Agreement ACTA*, BLOOMBERG BUSINESSWEEK (Feb. 14, 2012), <http://news.businessweek.com/article.asp?documentKey=1376-LZDX131A114H01-69OIQ9TD06F7G8HFCG2KIROFGA>.

¹⁰⁹ See *G-8 Declarations on Economy, Environment*, WALL ST. J. (July 8, 2008, 2:25 AM), <http://online.wsj.com/article/SB121549460313835333.html> (declaring the advancement of anti-counterfeiting and piracy initiatives to be a critical part of the G-8’s plan to increase protection of intellectual property rights).

¹¹⁰ *Medecins Sans Frontieres, A Blank Cheque for Abuse: The Anti-Counterfeiting Trade Agreement (ACTA) and its Impact on Access to Medicines*, MSF ACCESS CAMPAIGN (Feb. 2012), http://www.msfaaccess.org/sites/default/files/MSF_assets/Access/Docs/Access_Briefing_ACTA/BlankCheque_ENG_2012.pdf.

whether it violates any fundamental [European Union (EU)] rights.”¹¹¹ Thus, ACTA’s status is currently in question; indeed, it may very well be dead.¹¹²

3. Secrecy Efforts

ACTA’s very secrecy is largely at the root of its endangered status, which further underscores the problems associated with insisting on extreme secrecy in our current political, social, and technological climate. ACTA was slightly less secret than TPP because of one official release of a draft in April 2010, and there were many leaks.¹¹³ Nonetheless, KEI was unable to get access to negotiating texts because of E1 at the time that they would have been most valuable, that is, during the early rounds of negotiation. Moreover, like TPP, the texts were apparently available to “cleared advisors” but not the public.¹¹⁴

Nonetheless, the official U.S. position is that ACTA was not secret. As explained by the U.S. to the World Trade Organization (WTO) in February 2012:

A draft was released in April 2010, while negotiations were still ongoing. We published a near-final text in October 2010, and then published the final text in December 2010, and then in May 2011 we published French and Spanish translations. The final English text has thus been public for more than a year.”¹¹⁵

4. Public Input

The USTR’s stated position regarding the transparency of ACTA does not tell the whole story. As explained in *Transparency Soup*, as a result of the extreme secrecy throughout most of the ACTA negotiations, the public debated both real and imagined provisions of ACTA.¹¹⁶ Meanwhile, ITAC “cleared advisors” signed non-disclosure agreements and had full access to the negotiating texts and were able to offer real-time, non-conjectural input to the USTR.¹¹⁷ Indeed, the

¹¹¹ E.U. to Seek Legal Opinion on Anti-Piracy Treaty, N.Y. TIMES (Feb. 23, 2012), <http://query.nytimes.com/gst/fullpage.html?res=9F04E7D8113EF930A15751C0A9649D8B63>.

¹¹² *The Economist* and *Financial Times* have already suggested that ACTA is dead. Glyn Moody, ‘*The Economist*’ and ‘*Financial Times*’ Already Writing off ACTA as Dead, TECHDIRT (Feb. 10, 2012, 3:37 PM), <http://www.techdirt.com/articles/20120210/11023517730/economist-financial-times-already-writing-off-acta-as-dead.shtml>.

¹¹³ See Levine, *Transparency Soup*, *supra* note 29, at 830 n.73, for a list of the leaks.

¹¹⁴ *Id.* at 823–25.

¹¹⁵ Interventions delivered by the United States of America on February 28, 2012, during WTO Council for TRIPS discussions on ACTA under “IP Enforcement Trends” Thiru, ACTA: US Intervention on IP Enforcement Trends at WTO Council for TRIPS (28 February 2012), KNOWLEDGE ECOLOGY INT’L (Mar. 1, 2012, 10:29 AM), <http://keionline.org/node/1379>.

¹¹⁶ Levine, *Transparency Soup*, *supra* note 29, at 813.

¹¹⁷ *Id.* at 824.

ACTA process shows that the ability to set national priorities can be easily impeded when secrecy prevents the public from offering meaningful input.

The impact of this disparity between those who did and did not have meaningful access to information is reflected in a 2008 Department of Homeland Security (DHS) letter to the USTR.¹¹⁸ In the letter, DHS expressed concerns that some provisions of ACTA would be harmful to national security because resources would be allocated to interdicting IP piracy at U.S. geographical borders rather than more important anti-terrorism efforts.¹¹⁹ DHS was able to offer that detailed insight because of its access to the actual draft of ACTA, to which it made repeated specific references by quoting chapter and section numbers.

In contrast, EFF was unable to offer meaningful input to the USTR, even when asked. In the same year as the DHS letter, the general ability for public input in the absence of available negotiating texts was summarized in an EFF response to a USTR request for public comments:

In the absence of a specific text to comment upon, these comments focus on the appropriate scope of any proposed agreement, and three aspects of recent copyright enforcement activity that have raised significant public policy concerns, and which we anticipate could form part of the content of any proposed treaty.¹²⁰

Offering comments based on speculation and “anticipated” issues is far from an ideal platform from which to ask for meaningful public input. Particularly as the USTR had asked for comments, it seems counterproductive, and even disingenuous, to make such a request without giving the public adequate information upon which to offer input. By the time of the official release of the draft text, at which time the public might have been able to offer meaningful input, much of ACTA had already been negotiated.¹²¹

5. Substantive Impact

As noted above, the excessive secrecy itself has caused backlash where countries are refusing to sign ACTA, or halting efforts at

¹¹⁸ James Love, *Homeland Security's 2008 Letter to USTR: ACTA Is a Threat to National Security*, KNOWLEDGE ECOLOGY INT'L (Apr. 22, 2011, 4:47 AM), <http://www.keionline.org/node/1117>.

¹¹⁹ *Id.* (“[S]ome possible outcome of the ACTA negotiations may harm national security and the ability of Customs and Border Protection (CBP) to exercise managerial discretion in setting priorities for intellectual property right (IPR) enforcement.”)

¹²⁰ Letter from Gwen Hinze, Int'l Policy Dir., Elec. Frontier Found., to Office of the U.S. Trade Representative *2 (Mar. 21, 2008) (on file with the author).

¹²¹ Sell, *supra* note 34, at 457.

ratification, because it was negotiated in secret.¹²² Since the beginning of 2012, there have been protests in “hundreds of cities across the continent.”¹²³ EU countries have been rejecting ACTA, including Poland, Germany, the Netherlands and Bulgaria, after waves of European protests, including Polish elected officials wearing Guy Fawkes masks.¹²⁴ American University’s Sean Flynn explained recent events to the TPP stakeholder forum in Melbourne, Australia, with regard to both TPP and ACTA, by noting that

[s]ince the last time TPP negotiators officially met in Lima, the [Internet] went dark. People in Europe took to the streets. And they remained there until governments responded. Protests followed in Paris, Stockholm, and, on February 11, throughout all of Europe. Hundreds of thousands of people took to the streets.

The protests led to the resignation of the EU Parliament’s rapporteur on ACTA, who criticized the public process as a “masquerade.” And also to the resignation of the Slovenia Ambassador to Japan who signed ACTA—who left office apologizing to her country and her children.

By the end of February, the EU states to suspend ACTA ratification included Bulgaria, Czech Republic, Slovakia, Germany, the Netherlands, Latvia, Romania, Cyprus, Estonia and Austria.

And finally, the EU commission itself suspended its ratification activities by referring ACTA to the EU Court of Justice to determine the extent to which the agreement encroaches on fundamental rights to access to information.¹²⁵

Thus, concern about the process by which ACTA was negotiated has continued to eclipse substantive concerns about the agreement, at

¹²² See Band, *supra* note 76, at 14.

¹²³ Michael Geist, *Assessing ACTA: My Appearance Before the European Parliament INTA Workshop on ACTA*, MICHAEL GEIST BLOG (Mar. 1, 2012), <http://www.michaelgeist.ca/content/view/6350/125>.

¹²⁴ Indeed, the Romanian PM said that he had “no idea” why Romania signed ACTA. Mike Masnick, *Romanian Prime Minister Admits He Has No Idea Why Romania Signed ACTA*, TECHDIRT (Feb. 6, 2012, 8:30 AM), <http://www.techdirt.com/articles/20120205/14043517663/romanian-prime-minister-admits-he-has-no-idea-why-romania-signed-acta.shtml>.

¹²⁵ Sean Flynn *Speaks at TPP Stakeholder Forum in Melbourne*, PROGRAM ON INFO JUST AND INTELL. PROP. BLOG, <http://www.wcl.american.edu/pijip/go/blog-post/sean-flynn-speaks-at-tpp-stakeholder-forum-in-melbourne>. A somewhat ironic recent development involves Germany. When German officials defended their claims that ACTA negotiations were transparent by saying that a German representative was present, a freedom of information request was made for the name of the German representative. Glyn Moody, *German Gov’t Uses Anger over Lack of ACTA Transparency to Justify Further Lack of Transparency*, TECHDIRT, (Mar. 21, 2012, 4:39 AM), <http://www.techdirt.com/articles/20120319/10545718159/german-govt-we-cant-be-transparent-about-who-was-present-acta-negotiations-because-anger-lack-transparency.shtml>. That request was denied out of fear for the official’s safety because of the recent “emotional discussions” surrounding ACTA. *Id.*

least in the mind of the public at large.

However, public scorn post-official release has led to a watered-down, less drastic, ACTA. Nonetheless, the Swedish representative to ACTA negotiations said in 2009 that the “secrecy issue has been very damaging to the negotiating climate in Sweden.”¹²⁶ Doctors Without Borders said that ACTA is a “blank cheque for abuse.”¹²⁷ Secrecy allowed good and bad information to be distributed simultaneously, as the public was speculating on what might be in the texts. This speculation led to a somewhat ironic criticism by Commissioner Karel de Gucht, who is generally responsible for stewarding ACTA through the EU, with regard to the referral to the EU Court of Justice: “I believe that putting ACTA before the European Court of Justice is a needed step. This debate must be based upon facts and not upon the misinformation or rumor that has dominated social media sites and blogs in recent weeks.”¹²⁸ Clearly, more transparency would have led to much less procedural quarreling, which in turn would have led to better negotiations and a better ACTA. In sum, ACTA represented a deeply flawed process that, by virtue of time and much public criticism, became eventually more open and therefore became a more balanced agreement.

C. SOPA/PIPA

SOPA/PIPA addresses the *same* general IP issues—combating IP piracy on the Internet—but within the U.S.’s comparatively transparent and accountable processes. As discussed in Part I, SOPA included and PIPA includes highly technical DNS blocking provisions that were strongly opposed by engineers, Internet founders, and law professors.¹²⁹ However, as Congressional lawmaking processes, they are not subject to E1 and are therefore discussed in this Article for comparative purposes only. What they reveal is what the international IP lawmaking process, from a U.S. perspective, could look like in the absence of E1.

For the most part, from a transparency perspective, SOPA and PIPA are unremarkable and given a more transparent process, the results are not overly surprising.¹³⁰ As Professor Derek Bambauer

¹²⁶ Wikileaks Cable, Concerns About ACTA Negotiations and IPR Update: IPRED, WIKILEAKS (Nov. 24, 2009), *available at* <http://www.cablegatesearch.net/cable.php?id=09STOCKHOLM736>.

¹²⁷ Medecins San Frontieres, *supra* note 110.

¹²⁸ *Statement by Commissioner Karel De Gucht on ACTA (Anti-Counterfeiting Trade Agreement)*, EUROPA (Feb. 22, 2012), <http://www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/128>.

¹²⁹ *See supra* notes 14–16 and accompanying text.

¹³⁰ The ability to make substantive changes in the law, especially given the forces arrayed against such changes, is much more notable. *See* David S. Levine, *Web Darkness, the Day After: Why the SOPA Protests Matter*, FORBES (Jan. 19, 2012, 6:01 PM), <http://www.forbes.com/sites/ciocentral/2012/01/19/web-darkness-the-day-after-why-the-sopa-protests-matter>.

noted by way of a somewhat backhanded compliment, “[w]hile [PIPA] suffers significant shortcomings, such as its focus on DNS filtering, and its grant of filtering power to private plaintiffs, it is admirably open and transparent about the censorship it imposes, and the process of considering the Act in Congress scores well on accountability measures.”¹³¹ Indeed, after public protest, an unprecedented web blackout involving websites like Wikipedia, and significantly, expert input to members, the bills are on hold and/or dead. Indeed, since the blackout in protest of SOPA and PIPA on January 18, 2012, a blackout that SOPA sponsor Representative Lamar Smith (R-TX) called “a publicity stunt,”¹³² SOPA appears to be getting a possible re-write.¹³³ The key change appears to be the removal of a provision that mandated DNS redirection of websites deemed to be devoted to infringing activity in response to concerns.¹³⁴ To date, it is unclear whether the bill will be amended or simply shelved.¹³⁵ On the Senate side, voting on PIPA was also postponed after the Internet blackout.¹³⁶ Several senators withdrew their support of the bill.¹³⁷ According to some reports, both SOPA and PIPA are dead, at least, for the time being.¹³⁸

¹³¹ Derek E. Bambauer, *Orwell's Armchair* 59 (Brook. Law Sch. Legal Studies Res. Papers Accepted Paper Series, Res. Paper No. 247, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926415.

¹³² Mike Masnick, *Lamar Smith & MPAA Brush off Wikipedia Blackout as Just a Publicity Stunt*, TECHDIRT (Jan. 17, 2012, 1:49 PM), <http://www.techdirt.com/articles/20120117/13254717438/lamar-smith-mpaa-brush-off-wikipedia-blackout-as-just-publicity-stunt.shtml>.

¹³³ David Kravets, *SOPA Getting a Face-Lift: How Evil Will it Be?*, WIRED (Jan. 19, 2012, 7:12 PM), <http://www.wired.com/threatlevel/2012/01/sopa-watering-down>.

¹³⁴ *Id.* Prior to the removal of the DNS provision, Representative Darrell Issa (R-CA) had planned to bring in nerds like Alex Ohanian of Reddit to explain the DNS provisions in a Congressional hearing. Issa cancelled that hearing after the provisions were removed by Smith, explaining that “[a]lthough SOPA, despite the removal of this provision, is still a fundamentally flawed bill, I have decided that postponing the scheduled hearing on DNS blocking with technical experts is the best course of action at this time.” Alex Howard, *Rep. Smith Pulls DNS Provision from SOPA, Rep Issa Postpones Hearing, White House Responds to Epetition*, GOV20.GOVFRESH (Jan. 14, 2012, 10:59 AM), <http://gov20.govfresh.com/rep-smith-pulls-dns-provision-from-sopa-rep-issa-postpones-hearing-white-house-responds-to-epetition>. Significantly, there was no consensus, even amongst the experts, that DNS blocking was a problem from a technological perspective. See George Ou, *My DNS Filtering Research Before House SOPA Panel*, HIGHTECH FORUM (Dec. 16, 2011), <http://www.hightechforum.org/my-dns-filtering-research-before-house-sopa-panel>. Particularly where there may be debate amongst experts about a technological issue, the need for input from public experts is manifest.

¹³⁵ Jenna Wortham & Somini Sengupta, *Bills to Stop Web Piracy Invite a Protracted Battle*, N.Y. TIMES (Jan. 15, 2012), http://www.nytimes.com/2012/01/16/technology/web-piracy-bills-invite-a-protracted-battle.html?_r=1.

¹³⁶ Jonathon Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

¹³⁷ Jasmin Melvin, *U.S. Congress Puts Brakes on Anti-Piracy Bills*, REUTERS (Jan. 20, 2012, 6:31 PM), <http://www.reuters.com/article/2012/01/20/us-usa-congress-internet-idUSTRE80J10X20120120>.

¹³⁸ Jennifer Martinez, *SOPA and PIPA Dead, for Now*, POLITICO (Jan. 20, 2012, 9:40 AM), <http://www.politico.com/news/stories/0112/71720.html>.

The “high score” on accountability was used to its full advantage by those who pay attention to these issues and therefore are weary after the inability to speak in ACTA and TPP. While there was one Congressional hearing on SOPA that was dominated by entities that were pro-SOPA,¹³⁹ the dire need for expert “nerd” input was expressed by members of Congress. Indeed, during the hearing, members of Congress stated that they were not “nerds,” highlighting their lack of expertise to assess SOPA’s DNS provisions. From the perspective of the concerns raised by this Article, and in comparison to the closed processes involving ACTA and TPP, the notable admission by those required to decide whether SOPA should become law underscores the impact of E1 on international lawmaking, where the opportunity to bring in the nerds to offer useful public input was absent.

Throughout the SOPA hearing, Representative Mel Watts (D-NC) expressed a dismissive attitude towards the need for expertise: “Mr. Chairman, as one who acknowledged in his opening statement that he was not a nerd and doesn’t understand a lot of the technological stuff, I am not the person to argue about the technology part of this.”¹⁴⁰ But, at the same time, others recognized that without experts with whom to consult—in this case, nerds—there was a high risk of passing bad law. As Rep. Chaffetz explained, “[a] gain, I worry that we did not take the time to have a hearing to truly understand what it is we are doing. And to my colleagues, I would say if you don’t know what [DNS] is, you don’t know what you are doing. So my concern is that there is a problem, but this is not necessarily the right remedy.”¹⁴¹ Rep. Dan Lungren (D-CA) perhaps expressed the concern about a dearth of expertise among the members best:

What I question is our judgment here, and our judgment is to be questioned if we are rushing to something when it appears that there are remaining huge issues of controversy not with respect to the policy, but with respect to the underlying facts, and if you want to get a bad jury verdict, all you have to do is make sure that there is no understanding of the facts, and frankly, I think the debate here has shown that we do not understand the facts underlying the decisions that we are making.¹⁴²

Aside from being a distressing condemnation of Congress’ ability

¹³⁹ Only one anti-SOPA entity, Google, was invited to testify. See Nate Anderson, *RIAA Still Raging Against Google, Wikipedia for “Misuse of Power” in SOPA Battle*, ARS TECHNICA (Feb. 8, 2012, 5:22 PM), <http://arstechnica.com/tech-policy/news/2012/02/riaa-still-raging-against-google-wikipedia-for-misuse-of-power-in-sopa-battle.ars>.

¹⁴⁰ *Stop Online Piracy Act: Hearing on H.R. 3261 Before the H. Comm. On the Judiciary*, 112th Cong. 180 (2011) (statement of Rep. Mel Watts).

¹⁴¹ *Id.* at 88 (statement of Rep. Jason Chaffetz).

¹⁴² *Id.* at 204–05 (statement of Rep. Dan Lungren).

to legislate in this arena, as this committee was supposed to be made up of members who had an expertise (or at least an interest) in this area, SOPA illustrates the risks associated with a lawmaking process that eschews expert input from non-chosen and hand-picked (and in the case of ACTA and TPP, non-ITAC) experts. The members candidly admitted that they needed experts—like neutral technologists and engineers—to advise it, particularly on the DNS provisions.¹⁴³ This admission, combined with a process that allowed the public to offer direct input by having access to the legislation and being able to write specific analysis based upon its specific language, averted a possible technological disaster that 110 IP and technology law professors agreed would cause nothing less than breaking the Internet.¹⁴⁴

Thus, the substantive impact was significant. Despite heavy lobbying from entertainment industry, Representative Smith withdrew the DNS provisions and conceded that the DNS provision was bad law after nerds (moneyed and not) were consulted.¹⁴⁵ Indeed, the Obama administration issued a statement (ironically through a new online petition process) identifying similar concerns about the bills.¹⁴⁶ Whatever comes of SOPA and PIPA, there is assurance that the nerds were brought in and the public's voice was heard at a meaningful time. That cannot be said about ACTA and particularly TPP.

IV. SOLUTION

This Article suggests a policy reform to FOIA that might address concerns about the lack of transparency, accountability, and public input in ACTA, TPP, and future international lawmaking processes without doing violence and permanent harm to the legitimate need of negotiators to be able to negotiate without a constant public spotlight on their activities. In order to assess this proposal, it is important to identify the reasons for secrecy in international lawmaking. Professor Peter K. Yu has pointed out five primary “official” reasons for the secrecy associated with ACTA that are applicable to TPP as well: (a) “smooth and much more successful” negotiations, (b) “insulat[ing] the negotiations from external influences, which range from political complications in the capitols to opposition from civil society groups,” (c) reducing “the pressure faced by the negotiators while at the same time promoting . . . [a] long-term relationship,” (d) completing negotiations but giving a country the option to walk away from it, and (e) avoiding a “slippery slope where the public would demand disclosure of negotiations concerning other bilateral and plurilateral

¹⁴³ *Id.* at 180.

¹⁴⁴ *Professors' Letter*, *supra* note 14, at 1.

¹⁴⁵ For a detailed discussion of the reaction to the Web protest and outcome in the legislation, see Band, *supra* note 76, at 9.

¹⁴⁶ *Id.* at 9–11.

trade and investment agreements.”¹⁴⁷ In *Transparency Soup*, I addressed the first argument by asserting that the level of secrecy necessary to maintain smooth and efficient negotiations is nearly impossible to achieve in the Internet age, assuming that it was even desirable.¹⁴⁸ This Article addresses, in part, the other concerns.

We need to know the parameters for when secrecy is actually needed versus when the need for transparency and public input should outweigh the concerns raised above. This is a dynamic question based partially on normative judgments and is highly contextual, meaning that the judgment may vary from negotiation to negotiation. Nonetheless, the proposal offered below is a good starting point from which to conduct this balancing act.

To that end, nothing proposed in this Article would impact lobbying and off-the-record conversations. There will always be, and always should be, some secrets, including those under FOIA exemption five for internal and interagency governmental deliberations.¹⁴⁹ But if there are actual “national security” secrets in international lawmaking processes that would harm national security if disclosed, we need better explanations and evidence of the actual national security harm(s) than what has been offered to date.

To address the above procedural issues, I offer one primary reform in this Article.¹⁵⁰ Again, key to understanding current (and long-term if not addressed) problems in IP lawmaking and lawmaking generally, and thus the two proposals discussed below, is that the “ability to control the flow of information” *to decision makers* “is a crucial element in affecting decisions.”¹⁵¹ Thus we need to find ways to bring in the nerds in a meaningful and timely way.

A. *Proposal: A Qualified Public Right to Certain NSI*

This Article proposes a policy reform of FOIA: creation of a public right to U.S. “foreign relations” national security information. As discussed in this Article, largely because of the national security exemption to FOIA (E1), the public does not get useful international IP lawmaking information from the government and therefore private and corporate interests control the flow of information to USTR, who currently handles international IP lawmaking. This problem is compounded because government labels vast quantities of international

¹⁴⁷ Yu, *Six Secret Fears*, *supra* note 5, at 1021–24. Yu also assesses the merit of those arguments in Part A of his article, to which I refer the reader as it is a comprehensive critique of their merit.

¹⁴⁸ See Levine, *Transparency Soup*, *supra* note 29. This Article does not seek to respond to the remaining arguments on a point-by-point basis or necessarily refute them, although that may be a consequence of the reform proposal.

¹⁴⁹ See 5 U.S.C. § 552(b)(5); Katt, *supra* note 30, at 697.

¹⁵⁰ As noted earlier, development of a proposal for a theoretical orientation of FOIA is left to a future article with a working title of *Freedom of Information Reconfigured*.

¹⁵¹ Wagner, *supra* note 22, at 1400.

IP lawmaking documents as NSI and treats them as such.¹⁵²

As noted in the Introduction, while national security overclassification is a problem that has existed for decades,¹⁵³ its use in international IP lawmaking is a more recent phenomenon. Moreover, the need for the NSI exemption in IP lawmaking is questionable, as sharing the U.S. position on substantive IP law negotiations with the U.S. public is not the functional equivalent of sharing information about CIA covert operations with the public. Indeed, as has been noted already, “while secrecy is important to protect personal privacy, national security and sensitive government functions, unnecessary secrecy inhibits the ability of journalists to expose problems in government, putting public safety at risk and facilitating corruption.”¹⁵⁴ As NSI is conceptually something other than the negotiating position of the U.S. government in international IP lawmaking, uniformly applying E1 to international lawmaking is exactly the “unnecessary secrecy” that deters exposing “problems in government, putting public safety at risk and facilitating corruption.” Thus, we should not treat all NSI as if its disclosure would have the same impact on governmental and public interests.

As a summary of the remaining arguments for secrecy identified by Professor Yu,¹⁵⁵ the essence of the argument in favor of secrecy under E1 is foreign relations; that is, negotiating partners would be unwilling, for a variety of reasons, to negotiate in good faith if negotiations were done in the public eye.¹⁵⁶ However, this position may not be borne out by past trade negotiations. Daniel Magraw, CIEL President and CEO, who formerly represented the U.S. in NAFTA and FTAA negotiations, declared in *CIEL I*:

¹⁵² As previously noted, ITAC should be reformed also but that is a sideshow. As it does not address the broader ability of the public to access meaningful information so as to allow diffuse but knowledgeable stakeholders, who may not have the political acumen or ability to be appointed to an ITAC so as to offer meaningful input, it is not a focus of this Article. See Rashmi Rangnath, *Shhhh. The TPP Is Secret*, INFOJUSTICE.ORG (Mar. 2, 2012), <http://infojustice.org/archives/8612> for more on the Trade Act’s requirement that ITACs exist and are populated by “representatives of industry that either benefit from or are affected by trade agreements.”

¹⁵³ See *supra* notes 28–32 and accompanying text.

¹⁵⁴ David Cuillier & Bruce E. Pinkleton, *Suspicion and Secrecy: Political Attitudes and Their Relationship to Support for Freedom of Information*, 16 COMM. L. & POL’Y 227, 229 (2011).

¹⁵⁵ See Yu, *supra* note 5. Professor Yu does an admirable job assessing the merit of these arguments. My focus is more narrowly on what those arguments mean for FOIA’s impact on IP lawmaking, so I do not address their merit in detail.

¹⁵⁶ Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 13 (2010); Ctr. For Int’l Envtl. Law v. Office of U.S. Trade Representative, 505 F. Supp. 2d 150, 156 (D.D.C. 2007) (“USTR reasons that ‘publishing the US proposal would allow the proposal to become a target for constituencies of the US negotiating partners who would pressure their governments not to adopt it, thereby reducing the negotiating positions of those partners.’”).

During the course of trade negotiations, many governments, including the United States, have made their negotiating positions known to their citizens, through public briefings and consultation. In such instances, I am not aware that the United States' public disclosure of *its own* negotiating positions was ever treated as a breach of a binding confidentiality agreement, a breach of trust, or a reason not to negotiate with the United States in the future. Moreover, in my experience in such negotiations, the fact that a particular government disclosed its negotiating positions to its citizens did not cause the United States to adopt a more rigid position, or cause other governments to adopt more rigid positions.¹⁵⁷

While there is no question that if negotiating partners released their own negotiating documents to a supportive public they could entrench their positions and gain negotiating leverage,¹⁵⁸ such secrecy is nearly impossible to obtain in the current technological climate.¹⁵⁹ Moreover, IP enforcement issues implicate collective concerns of all citizens about the flow of information, and therefore illustrate divergence of opinion between governments and their citizenry.¹⁶⁰ So the question becomes: how should FOIA react given the changing terrain of information flows to and from government?

To modernize FOIA, this Article proposes the establishment of an explicit qualified right in the lawmaking context to U.S. and under certain limited circumstances, foreign NSI¹⁶¹ currently categorized as "foreign government information"¹⁶² or "foreign relations."¹⁶³ The proposal envisions that the primary, although not exclusive, categories

¹⁵⁷ Decl. of Daniel B. Magraw, Jr., ¶¶ 5–6, *CIEL I*, 777 F. Supp. 2d 77 (D.D.C. 2011) (No. 01-CV-00498); see also *CIEL I*, 777 F. Supp. 2d at 84 n.4. Admittedly, "negotiating positions" may not be the same as "negotiating texts" or "proposals," but in the context of *CIEL I*, Magraw was supporting a request for documents relating to the U.S. position, as shared with its negotiating partners in the FTAA. Thus, his statement may be fairly construed to support the reforms suggested in this Article. Additionally, Gary Horlick, a former U.S. trade official with forty years of experience in trade negotiations, recently stated that TPP "is the least transparent trade negotiation I have ever seen." Lori Wallach, *A Stealth Attack on Democratic Governance*, AM. PROSPECT (Mar. 13, 2012), <http://prospect.org/article/stealth-attack-democratic-governance>.

¹⁵⁸ *CIEL I*, 777 F. Supp. 2d at 84 n.4.

¹⁵⁹ See Levine, *Transparency Soup*, *supra* note 29.

¹⁶⁰ See *supra* Part II.

¹⁶¹ See Alasdair Roberts, *National Security and Open Government*, 9 GEO. PUB. POL'Y REV. 69, 71–72 (2004).

¹⁶² Exec. Order No. 12,958 § 1.4(b), 60 Fed. Reg. 19,825 (Apr. 17, 1995).

¹⁶³ *Id.* § 1.5(b). Balancing tests that weigh the legitimate national security concerns of the United States against the public's right to know are not uncommon, although they have not been seen in the situations discussed in this Article. For example, Senator Patrick Leahy recently offered an amendment to the National Defense Authorization Act, which became law, that requires "the Secretary of Defense to consider whether the disclosure of critical infrastructure information would reveal vulnerabilities that would result in harm to government property or facilities, and whether the public interest in the disclosure of this information outweighs the government's need to withhold the information." *Senate Puts Limits on FOIA Infrastructure Statute*, FOIA BLOG (Dec. 2, 2011, 9:30 AM), http://www.thefoiablog.typepad.com/the_foia_blog/2011/12/senate-puts-limits-on-foia-infrastructure-statute.html.

of information subject to this qualified right would be negotiating proposals and texts. This qualified right is based on *CIEL's* reasoning and therefore would require balancing the actual needs of government for meaningful public expert (nerd) input against the actual risk to the reasonable negotiating position of the U.S. and/or, in the case of foreign information, its negotiating partners. Moreover, if the requestor can demonstrate the nerd's need for the information in the face of an assertion of E1 against its disclosure, this Article proposes that the subject information would be made public generally and not just to the nerd. Thus, the specific nerd, rather than the amorphous and diffuse public, is the prism through which the balancing would occur, allowing for a more granular and specific analysis of the relative benefits and harms of disclosure.

Additionally, by maintaining its status as NSI if so designated by the President, this proposal would allow courts to give due deference to the government when appropriate and keep power vested in the President to decide what categories of information might have NS implications. However, in order to overcome an excessive degree of deference, and based upon the reasoning of *CIEL I*, the balancing test would include a presumption in favor of disclosing applicable U.S. international lawmaking negotiation texts, proposals and other negotiating documents shared with other parties or with an ITAC except when the same information may also be fairly categorized and withheld under another non-controversial NSI category (e.g., information about weapons systems).

Importantly, this balancing test uses the rubric of the nerd's need for information as a prism through which to analyze the need for public disclosure of documents generally. In other words, this Article proposes that if a public expert, a nerd, needs the information so as to offer meaningful input to the government, be it the USTR or other governmental entity, then it should follow that the document should be made public. Conceptualizing the qualities of a given nerd for purposes of consideration of the request and/or in litigation could occur by way of supporting documents like affidavits in the initial request, thus allowing the agency-recipient of the request and/or a court to engage in granular balancing of public and governmental interests.

This right has the primary advantage of recognizing that IP, environmental and other international lawmaking efforts involve collective interests that are categorically quite different from most of the NSI categories and traditional trade negotiation topics. Thus, many of the arguments in favor of broad discretion for the President to classify and protect NSI under E1 simply do not apply to many international lawmaking contexts, or perhaps to lawmaking generally. For example, E1 cases have consistently recognized that an agency's articulation of the threatened harm to national security must always be speculative to

some extent and that to require a showing of actual harm would be judicial “overstepping.”¹⁶⁴ This standard makes sense when dealing with issues involving intelligence activities, but when dealing with international IP negotiations, where there is much less need for speculation, using Exemption 1 merely gives more deference to the need for IP lawmaking secrecy than is warranted or needed.

Indeed, the DOJ Guide implies as much when it says, “[i]n the area of intelligence sources and methods, for example, courts are strongly inclined to accept the agency’s position that disclosure of this type of information will cause damage to national security interests because this is ‘necessarily a region for forecasts in which [the agency’s] informed judgment as to potential future harm should be respected.’”¹⁶⁵ It is at least debatable that this same reasoning holds in international IP lawmaking, where the broad positions of governments, particularly the U.S., are well-known. One can look at SOPA/PIPA as originally introduced with broad bipartisan support,¹⁶⁶ for example, to get a good idea where U.S. lawmakers stand on international IP piracy and enforcement. Therefore, this new standard, as applied, would suggest that actual U.S. government information should more often than not be disclosed regardless of arguments to the contrary, as suggested by *CIEL I*.

From a disclosure standpoint, more problematic are documents that clearly contain conflated U.S. and foreign information, like perhaps the leaked TPP IP Chapter. Therefore, a challenge of this standard is how to handle actual foreign government information, like draft texts and correspondence, that could otherwise be redacted.¹⁶⁷ To deal with the complex factors associated with the release of foreign government information, this Article proposes a limited qualified right to such documents classified under E1 where (a) the foreign government(s) at issue can be shown to actually not want E1 secrecy based upon credible evidence and (b) there is no known countervailing harm to the U.S. or the subject country caused by its potential disclosure.

The basis for this limited qualified right is a basic question: if a foreign government or entity involved in the negotiations does not want the secret and has made that known, then why should that information be secret?¹⁶⁸ For example, during the ACTA negotiations, the European

¹⁶⁴ DOJ Guide, *supra* note 41, at 159.

¹⁶⁵ *Id.*

¹⁶⁶ Dan Nguyen, *SOPA Opera: Which Legislators Support SOPA and PIPA?*, PRO PUBLICA (Jan. 12, 2012, 3:18 PM), <http://www.propublica.org/nerds/item/sopa-opera-which-legislators-support-sopa-and-pipa>.

¹⁶⁷ Redaction, if possible, is a very simple way to deal with a concern about revealing foreign information. However, where a document reflects conflated U.S. and foreign information, redaction may not be possible.

¹⁶⁸ Peter Yu points out in *Six Secret Fears*, *supra* note 5, at 1013–14, that the U.S. was able to get foreign governments to agree to some disclosure of otherwise non-public ACTA documents.

Union publicly criticized hyper-secrecy in the negotiations.¹⁶⁹ In that kind of scenario, it makes sense for the government to have to prove how U.S. interests are damaged by disclosure of foreign government information despite the foreign government's lack of interest in keeping its information secret.¹⁷⁰

Of course, it would be unreasonable to expect the U.S. to prove a negative, i.e., to prove that the country wants secrecy, as a negotiating partner may not want or desire to be involved in a U.S. judicial battle, or may refuse to be involved or take any public position. Certainly for purposes of FOIA, that should be their right. Especially as the U.S. may be negotiating with closed regimes, countries that do not have a FOI law, or countries that do not share U.S. views on transparency and accountability, a foreign government's unwillingness to embrace more transparency should not become the U.S.'s problem to be solved by way of FOIA. Thus, a country's silence on the subject should be construed as a belief that the foreign government desires that its information remain secret, which should be respected by FOIA.

B. *Benefits and Challenges*

This proposal has a number of benefits. First, although balancing tests are subject to judicial error, Congress intended E1 to be applied based upon an "objective, independent judicial determination" using "common sense" in analyzing the appropriateness of an E1 assertion.¹⁷¹ Indeed, as noted in Part II, deference is only allowed where there are no "indicia of unreliability" in the government's predictions of national security impact.¹⁷² This test would presumably be considered under the same general standard of deference and review, subject to the proposed limited presumption in favor of disclosure.¹⁷³

While that is admirable, reliance on governments to internally agree to disclosure information does not a system of pro-active disclosure make.

¹⁶⁹ Nate Anderson, *Report: ACTA Secrecy Is All the United States' Fault*, ARS TECHNICA (Sept. 7, 2010, 2:18 PM), <http://arstechnica.com/tech-policy/news/2010/09/report-acta-secrecy-is-all-the-united-states-fault.ars> ("EU policy sources say that 'American officials blocked European attempts to publish the latest draft of the global Anti-Counterfeiting Trade Agreement (ACTA) on an EU website after a Washington-based round of negotiations in August.'").

¹⁷⁰ See *Keenan v. Dep't. of Justice*, No. 94-1909, slip op. at 9-11 (D.D.C. Dec. 17, 1997) (ordering release of document segments withheld by the Agency pursuant to Exemption 1 because the agency failed to show that the foreign governments named in documents more than thirty years old "still wish to maintain the secrecy of their cooperative efforts with" the U.S.) (on file with author); Mike Masnick, *Polish Prime Minister Steps up His Anti-ACTA Efforts After Hosting 7-Hour Open Q&A Via IRC* (Feb. 22, 2012, 3:01PM), <http://www.techdirt.com/articles/20120222/01532117836/polish-prime-minister-steps-up-his-anti-acta-efforts-after-hosting-7-hour-open-qa-via-irc.shtml> ("On Feb. 6, all this activity culminated in an unprecedented conversation between Polish Prime Minister Donald Tusk and—for want of a better word—the internet, that lasted the better part of seven hours.").

¹⁷¹ *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978).

¹⁷² Elec. Privacy Info. Ctr., *supra* note 51.

¹⁷³ This may have some tangential benefits as well. Just as EFF may have felt compelled to drop its lawsuit in the face of an uphill battle over the current Exemption 1 standard, a reoriented

Additionally, this solution supports both deliberative democracy¹⁷⁴ and collaborative governance theories.¹⁷⁵ Furthermore, a qualified right allows for better flow of information between government and knowledgeable and interested parties which would undoubtedly have improved ACTA and would improve whatever is happening with TPP. This could lead to a tangential but important benefit of improved useful and productive interactions between scientists, engineers, and government.¹⁷⁶

Importantly, Senator Ron Wyden has recently introduced a bill designed to achieve a similar result in a more direct way.¹⁷⁷ With regard to TPP, Wyden proposes that the USTR post on its website within thirty days every document offered in prior negotiation rounds that describe “a position of, or proposal made by, the United States with respect to intellectual property, the Internet, or entities that use the Internet, including electronic commerce.”¹⁷⁸ Going forward, USTR would be required to post these documents online within twenty-four hours of their being shared with negotiating partners.¹⁷⁹ But significantly, Wyden would also allow an exception for any document labeled NSI by the President.¹⁸⁰ Thus, while this is a welcome proposal to spur transparency, and encourages proactive disclosure of documents which should be the ultimate end of FOIA,¹⁸¹ it runs the serious risk of getting nullified by the same alleged NS concerns that have been at issue thus far, and for which FOIA currently lacks a mechanism to fairly weigh. Nonetheless, it is an improvement on where we are currently

standard could cause government to change designations and/or agree to proactively produce more information if the law develops in such a way where the effective presumption in favor of secrecy is eliminated or heavily diminished. Moreover, while the government has arguably no financial incentive to skip the fight, as its lawyers' time is worthless (i.e., government lawyers do not bill by the hour), the prospect of diverting resources to this battle may force more disclosure where there would have been none or little.

¹⁷⁴ See David S. Levine, *The People's Trade Secrets?*, 18 MICH. TELECOMM. & TECH. L. REV. 61, 102–05 (2011).

¹⁷⁵ See Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 345–46 (2010); Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 926–27 (2009).

¹⁷⁶ See Joseph Straw, *Allen: Government Leaders Don't Understand Today's Technology*, SEC. MGMT., (Feb. 25, 2011), <http://www.securitymanagement.com/news/allen-government-leaders-dont-understand-todays-technology-008237> (“Senior leaders in the U.S. government simply don't understand state-of-the-art data technology . . .”). *But see* STEVE OLSON ET AL., STATE SCIENCE AND TECHNOLOGY POLICY ADVICE, at x (2008), *available at* <http://www.nap.edu/catalog/12160.html> (“[S]cientists and engineers have done a poor job of communicating scientific information clearly and effectively to policy makers and the public.”).

¹⁷⁷ Mike Palmedo, *Wyden Offers Amendments on ACTA and TPP*, INFOJUSTICE.ORG (Mar. 20, 2012), <http://infojustice.org/archives/9066>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Proposed Amendment to H.R. 3606, Sen. Wyden, 112th Cong., *available at* <http://infojustice.org/wp-content/uploads/2012/03/Wyden-TPP-Transparency-Amendment.pdf>.

¹⁸¹ See David S. Levine, *The Social Layer of Freedom of Information Law*, 90 N.C. L. REV. (forthcoming 2012), *available at* <http://ssrn.com/abstract=2013465>.

and underscores the reality that there is significant public interest in having negotiation texts made public, and that FOIA is not doing its job in letting the public know how law is being created.

Moreover, this Article's proposal could be tethered to more "nerdy" solutions to the access to information problem, like Internet live-streaming of negotiation rounds or placing a negotiating draft on a wiki or other crowdsourcing website for purposes of public input. Clearly, such solutions would serve the public interest and allow for greater interaction and information flow to and from government. However, they would be of marginal import and usefulness without actual access to the negotiating texts and proposals themselves. Nonetheless, they could be considered ancillary possible benefits to the solution proposed in this Article.

Notwithstanding those benefits, this Article's proposal also has some drawbacks. First, it does remove some deference from the Executive. As the DOJ has noted, national security is a "uniquely executive purview" and "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.¹⁸² That reality is possible in international lawmaking, but as international IP lawmaking is not a typical national security scenario, but rather is increasingly an issue of collective public interests, courts should not be as reluctant to second guess an NSI designation. Put simply, running IP lawmaking through the same process as a request for information about weapons of mass destruction just does not make sense from a procedural or substantive perspective.

Of course, there might be a negative impact if the U.S. government signs a non-disclosure agreement (NDA) with other governments, as it has in TPP. Disclosure might mean that the U.S. would be in breach of the agreement.¹⁸³ However, in contract law, private ordering is often nullified.¹⁸⁴ In fact, *CIEL I* pointed out that if this argument is given credence, it means that government can dictate secrecy simply by signing an agreement. That outcome does not make sense, and, if anything, the U.S. government should be discouraged from signing an NDA that severely impacts the public's ability to offer input.

Moreover, there would be difficult questions of line drawing and deciding what international lawmaking processes, beside IP and

¹⁸² DOJ GUIDE, *supra* note 41, at 148–49. This critique leads to a reasonable question: should lawmaking just be removed from E1? After all, IP law is not a uniquely executive purview, whereas negotiating an arms reduction treaty is. Nonetheless, removal of all executive authority over all international lawmaking information seems to be an unnecessary step. The key information to which the public may want access—negotiating texts, position papers—could be had through this less extreme solution.

¹⁸³ See *CIEL I*, 777 F. Supp. 2d 77, 80 (D.D.C. 2011).

¹⁸⁴ For example, many states do not enforce contracts if they violate public policy. See *Danzig v. Danzig*, 904 P.2d 312, 314 (Wash. App. 1995).

environmental, might be amenable to this proposal.¹⁸⁵ But over time, caselaw would establish baseline precedents to follow, starting with *CIEL*. To that end, any related concerns about information overload, that is, too much public input, can be largely remedied by better information technology within government.¹⁸⁶ Regardless, it is indefensible in 2012 for the USTR, or any U.S. entity involved in international lawmaking, to deny an interested public the opportunity for real-time input using robust information technologies, even if there are other impediments to that input actually being digested. This proposal seeks to create an administrative environment and procedure conducive to the possibility of new ways for the public to offer its input.

From a practical perspective, an additional problem is the potential that negotiators will simply offer their “real” negotiating positions and proposals in a way that would not be subject to FOIA, and/or disengage from negotiations. In other words, negotiators would keep truly useful information, and the “actual” negotiating text, outside of the ambit of FOIA. However, this reality exists regardless of this proposal. Moreover, the practical impact of actually leaving the room would usually be far more severe than disclosure of negotiating texts and proposals, particularly given the prevalence of unofficial and unauthorized leaks that create much public pressure and glare upon their publication, if not a useful basis upon which to offer meaningful input.

This criticism nevertheless raises an important caveat: FOIA is not a panacea for perfect transparency. There will always be ways for clever (and not so clever) public officials to employ communications methods that allow for the prevarication identified by Bentham. Nonetheless, so long as the written word remains the cornerstone of communication, if not its only form, there will be documents like negotiating texts and proposals created.

Moreover, the continued success of FOIA in revealing information that some in government would rather be kept from the public means that a public official’s personal ability to keep information from the public only goes so far. Indeed, a public official no less than Henry Kissinger proved this point in a recently-disclosed conversation with foreign officials in 1975: “Before the Freedom of Information Act, I used to say at meetings, ‘The illegal we do immediately; the

¹⁸⁵ Conceptualizing the theoretical shift in more detail including relevant factors to consider, as will be done in *Reconfiguring Freedom of Information*, should help address these concerns.

¹⁸⁶ See Levine, *Social Layer*, *supra* note 181 (better IT in government should allow better sorting and assessment of information). Additionally, from a practical perspective, it is unlikely that there would be significantly more entities trying to offer input if formal negotiating texts were made public. The same nerds, non-governmental organizations and advocacy groups will still offer input, except with actual texts upon which to rely, and while there may be marginally more potential submitters, it seems doubtful that there will be many more than those who are attempting to offer input in our current, closed code environment. The primary difference would be that the input would be based on actual facts and therefore much more useful, and it will therefore be harder for the government to ignore it.

unconstitutional takes a little longer.’ [laughter] But since the Freedom of Information Act, I’m afraid to say things like that.”¹⁸⁷ Thus, the very existence of FOIA can have the effect of deterring speech only if a public official is disciplined enough to control when and how he or she communicates. If Henry Kissinger can say truly horrific things with full knowledge of their possible revelation under FOIA, then the public has serious reason to doubt how much useful information will actually move to an exempt location.

Ultimately, the biggest drawback to the reforms proposed in this Article is the risk of just plain getting the line drawing wrong. An error in disclosing information that leads to negative consequences for the U.S. or a foreign government should not be taken lightly. Moreover, there is no guarantee that a court would get the analysis right. However, as it stands now, it is unclear that the President has drawn or will draw the lines correctly either; in fact, ACTA and TPP suggest that the President has been getting the line drawing wrong, at least from the perspective of the public and those outside experts, the nerds, that do not fall within the purview of “cleared advisors.” Indeed, based upon current line drawing, what we have been left with on the international lawmaking front is disenfranchisement of the public regarding the contours of international law about fundamental collective interests of the U.S. that is simultaneously becoming, at least in IP, a substitute for domestic lawmaking. Ultimately, this Article asks the public and the U.S. government to assess its tolerance for that outcome, and whether we want to continue to exclude the nerds from the discussion given the potential and real harms.

V. CONCLUSION

Controversy has surrounded the public’s ability to offer meaningful input to international lawmakers. Sean Flynn of PIJIP puts the question at stake in current IP lawmaking best:

[I]f we can and should follow more open models in WIPO, in the WTO, in our own Congress, with all the industry representatives in the ITAC system, and even in select areas like the recently published Bilateral Investment Treaty model text—why can’t and shouldn’t a similar open process be followed every time the US proposes a new international law standard on intellectual property in any binding international law making forum?¹⁸⁸

¹⁸⁷ William F. Jasper, *Kissinger: “The Illegal We Do Immediately; the Unconstitutional Takes a Little Longer,”* NEW AM., (Nov. 8, 2010, 4:30 PM), <http://www.thenewamerican.com/usnews/politics/5125-kissinger-qthe-illegal-we-do-immediately-the-unconstitutional-takes-a-little-longerq>.

¹⁸⁸ See Flynn, *supra* note 87.

This Article proposes that it should be an uncontroversial and even welcome proposition that an expert should be able to access official negotiating texts and proposals so as to offer his or her unique perspective on the best way to craft TPP, and that such a possibility would still allow for much of the negotiations to occur beyond the public's gaze. Unfortunately, recent international IP lawmaking processes has exposed FOIA as creating controversy on what should be a largely uncontroversial process of lawmaking or, more forward-thinking, collaborative decision-making.

Fortunately for international law generally, we can learn from this experience so as to avoid these problems in international lawmaking in the future. More broadly, the ACTA and TPP processes have revealed shortcomings of FOIA and the benefits of new ways of thinking about need for secrecy and its consequences in the international lawmaking arena generally. This Article is designed to begin that discussion and offer a policy proposal for consideration, in an open, transparent and accountable way, that allows for a more focused analysis of when it is most desirable to force disclosure where the default would otherwise be secrecy. While it is incorrect to say that we are now all "nerds," we need to do a better job of consulting the experts and bringing in the nerds, and the public at large, wherever they are and regardless of their access to the levers of power and influence.

Unfortunately, we do not have the luxury of waiting or letting these ideas gel. The need for nerds and primary sources as public information in international IP lawmaking is immediate. The TPP or [insert the most recent international law under negotiation] negotiators are planning to meet and/or are meeting now.