THE CAPTURE OF INTERNATIONAL INTELLECTUAL PROPERTY LAW THROUGH THE U.S. TRADE REGIME

MARGOT E. KAMINSKI*

No two sentences are the same unless they're exactly the same, word for word. . . . Any variation in wording changes the nuances that emanate from the sentence. Discovering those nuances, and using them, are parts of the writer's job. We'll discover a few shortly.

—Verlyn Klinkenborg[1]

ABSTRACT

For years, the United States has included intellectual property ("IP") law in its free trade agreements. This Article finds that the IP law in recent U.S. free trade agreements differs subtly but significantly from U.S. IP law. These differences are not the result of deliberate government choices, but of the capture of the U.S. trade regime.

A growing number of voices has publicly criticized the lack of transparency and democratic accountability in the trade agreement negotiating process. But legal scholarship largely praises the "fast track" trade negotiating system. This Article reorients the debate over the trade negotiating process away from discussions of democratic accountability to focus instead on the problem of regulatory capture. The Office of the U.S. Trade Representative ("USTR") is exempt from the Administrative

* Lecturer in Law, Research Scholar in Law, Yale Law School; Executive Director of the Information Society Project, Yale Law School. Thank you to all who provided helpful comments at various stages of this project, including but certainly not limited to Jonathan Band, Margaret Chon, Matthew Cushing, Rebecca Eisenberg, Donald Harris, Camilla Hrdy, Amy Kapczynski, David Levine, Jessica Litman, Jeffrey Meyer, Lisa Larrimore Ouellette, Sean Pager, Robert Post, Rashmi Ragnath, Sharon Treat, and Peter Yu. Thanks to Jack Balkin for building a wonderful community at the ISP for me and countless others. Mistakes are all my own.

1. VERLYN KLINKENBORG, SEVERAL SHORT SENTENCES ABOUT WRITING 19–20 (2012). Many thanks to Benjamin Scheuer for pointing me to this book.

Procedure Act and functionally exempt from the bulk of the Federal Advisory Committee Act. As a result, the USTR is likely to be captured by private parties through information asymmetry and to negotiate against the public good. Subject matter areas that are subject to collective action problems, such as intellectual property law, are particularly likely to be captured in the USTR.

The institutional capture of the USTR has affected the substance of exported IP law. Negotiators are tasked with exporting U.S. law, but deliver the law in versions favorable to vested interests. Negotiators change unfavorable domestic rules into more pliable international standards, codify favorable domestic judicial interpretations as international rules, and omit parts of domestic law that balance IP protection against other values. These distortions arise because the USTR engages in "regulatory paraphrasing": it paraphrases the current state of U.S. law rather than exporting the words of U.S. statutes. This Article identifies examples of this captured paraphrasing, explores its domestic and international consequences, and proposes that Congress reinstate Federal Advisory Committee Act requirements to prevent this capture from continuing.

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I. INTRODUCTION

Over the past decade, the United States has exported detailed intellectual property ("IP") law in its free trade agreements. These agreements add substantive IP protections and enforcement measures to existing international law.[2] From an international perspective, these agreements have been understood as exporting U.S. IP law to other countries.[3] But the precise relationship of the IP law in free trade agreements to domestic U.S. IP law is rarely discussed.[4] This Article points out that the IP law in U.S. free trade agreements in fact differs in important ways from domestic IP law and explains why these differences exist.

The IP law exported in U.S. free trade agreements differs from domestic IP law in subtle but significant ways. These differences are not

2. Recent free trade agreements are often referred to as "TRIPS-plus." *See* Susan K. Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play*, AM. U. WASHINGTON C. L. PROGRAM ON INFO. JUST. & INTELL. PROP. RES. PAPER SERIES, PAPER NO. 15, at 3–4 (2010). TRIPS refers to the agreement on Trade-Related Aspects of Intellectual Property Rights, the agreement adopted by the WTO in 1994 that outlines international IP trade obligations. In contrast, "TRIPS-plus refers to standards that either are more extensive than TRIPS standards, or that eliminate options under TRIPS standards." SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 56 n. 10 (2003) [hereinafter SELL, PRIVATE POWER].

3. *See, e.g.*, Andrew Christie, Sophie Waller & Kimberlee Weatherall, *Exporting the DMCA Through Free Trade Agreements*, *in* INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS 211, 211 (Christopher Heath & Anselm Kamperman Sanders eds., 2007) (observing that "such IP Chapters are often based closely on the equivalent legislation in the US, and this is exemplified by the *Digital Millennium Copyright Act* (DMCA) provisions which the US now routinely includes in its FTAs . . . [effectively] exporting the DMCA into the national law of other countries").

4. For a discussion of the differences between U.S. law and the law in free trade agreements, see *id.* at 211, 214–19 (analyzing the extent of similarities and differences between the provisions of free trade agreements and U.S. legislation). For a more extensive comparison of U.S. IP law to the law in its free trade agreements, see Frederick M. Abbott, *Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law*, UNCTAD–ICTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT, ISSUE PAPER NO. 12 (Feb. 2006), *available at* unctad.org/en/Docs/iteipc20064_en.pdf. *See also* Beatrice Lindstrom, *Scaling Back TRIPS-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific*, 42 N.Y.U. J. INT'L L. & POL. 917, 949 (2010) (observing of U.S. free trade agreements that "[t]hese rules are not only TRIPS-plus, but are even more restrictive than U.S. domestic law").

the result of a deliberate mercantilist strategy on the part of the United States government. They are the result of disproportionate input into the trade negotiating process by a subset of domestic IP stakeholders. This subset of IP stakeholders, with access to current information and the ability to discuss negotiating proposals with U.S. negotiators, is able to nudge the law in free trade agreements toward the kind of IP law they would prefer existed domestically. Accordingly, the making of international IP law has been captured through the U.S. trade negotiating regime.

Two features of trade negotiations enable this capture: the institutional design of the U.S. trade negotiating regime, and the paraphrasing process by which the language in U.S. statutes is paraphrased for export. If the language in the agreements were not changed, there would be no room for capture to have substantive effects. And if the trade regime were designed differently, the paraphrased law might be more evenhanded. But the design of the trade negotiating regime, coupled with paraphrasing, has resulted in exported IP law that is "strategically inconsistent" with U.S. domestic law.[5]

This Article highlights that domestic institutional design can greatly influence the substance of international law. In other words, the domestic side of how international law gets written matters. Previous criticisms of the U.S. trade regime focus on the relationship between the executive branch and Congress. This Article instead focuses on the design of the Office of the U.S. Trade Representative ("USTR"). Unlike most trade scholarship, this Article focuses on the link between substantive policy problems and institutional capture of the USTR through information flow.[6] Critics of the fast track trade negotiating process often call the process undemocratic. They see fast track as Congressional abdication of control over trade policy and a land grab by the executive branch.[7] Supporters of fast track say that Congressional abdication is necessary if free trade agreements are to be successfully completed.[8] This debate over democratic

5. This term has been used by Kal Raustiala to describe the friction between international IP regimes. *See* Kal Raustiala, *Density & Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1027–28 (2007) ("What we termed 'strategic inconsistency' occurs when actors deliberately seek to create inconsistency via a new rule crafted in another forum in an effort to alter or put pressure on an earlier rule.").

6. For a discussion of the problems associated with excessive information flow in the administrative context, see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1324–25 (2010).

7. *See, e.g.*, LORI WALLACH, THE RISE AND FALL OF THE FAST TRACK TRADE AUTHORITY 140 (2013) (arguing that a new delegation mechanism is necessary to preserve "the vital tenets of American democracy in the era of globalization").

8. *See, e.g.*, Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 166–69 (1992) (describing and critiquing this form of objection to fast track negotiation).

deficiencies is certainly relevant, and increased Congressional oversight would solve some of the information flow problems. But the scholarly focus on whether trade negotiations are sufficiently democratic overlooks a central feature of the trade regime: its unusual approach to information.[9]

The statutes that govern information flow into and from most agencies functionally do not apply to the USTR. As a result, those stakeholders with privileged access to information and to agency input channels are able to influence trade lawmaking while others are left out in the cold. In the IP context, at least, this disproportionate access has concrete policy consequences. Information capture leads to skewed substantive law.[10]

Many of the inconsistencies between U.S. law and the law in free trade agreements are directly initiated by those stakeholders that sit on the USTR IP advisory committee. Other inconsistencies reflect a lack of input from opposing viewpoints. The text of trade negotiating proposals and drafts of free trade agreements are kept secret from most stakeholders, including the public and the press. Cleared advisors provide expert advice on the text of the free trade agreements, but these advisors underrepresent the breadth of domestic interests.[11] As a consequence, the United States has made and continues to make bilateral and multilateral free trade agreements containing IP law that does not match its own domestic laws. Discrepancies skew toward the interests of those industries with access to specific negotiating proposals. What appear to be subtle discrepancies can create costs for foreign consumers and businesses, U.S. consumers and businesses, and the trade-negotiating process itself.

The USTR paraphrases U.S. law for export, a process this Article calls "regulatory paraphrasing." Captured regulatory paraphrasing can and does have concrete consequences. The United States may find that its domestic law directly conflicts with rules it has asked other countries to adopt. Other consequences are more complex. In exporting skewed IP law, the United States fails to advance its purported goal of reducing trade barriers through regulatory harmonization for at least a subset of its stakeholders. U.S. businesses that rely on provisions of U.S. IP law that do not get accurately

9. David S. Levine began this line of inquiry, and has pointed out that the Freedom of Information Act does not apply to the USTR, and that the advisory committees hurt policymaking. David S. Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105, 109 (2012).

10. *See* Wagner, *supra* note 6, at 1326 (explaining that the costs of information capture skew the outcome of the regulatory process "in favor of the dominant interest group" by decreasing the power and representation of "diffuse beneficiaries, typically represented by public interest groups").

11. Levine, *supra* note 9, at 130–32 (identifying that the USTR fails to get advice from public experts, and positing that this hurts policymaking).

exported may have to adopt different policies abroad, and must assume the cost of determining what legal differences exist and which matter. Internet industries are a good example of this group—many larger Internet companies now rely heavily on exports, with Google and Facebook making over 50 percent of their revenue abroad—and may be affected by how other countries implement the changes the USTR has made to IP law.[12] The paraphrasing of IP law for export thus has costs for those commercial stakeholders not represented on the advisory committees.

It also has costs for U.S. consumers. The Internet is a global forum, and laws implemented abroad affect the ability of members of the public to consume content and participate in the creation of content while remaining physically in the United States. If the USTR exports digital copyright laws containing a different balance than domestic law, this will affect the kind of foreign online content available to consumers back in the United States.

The capture of the USTR may have broader consequences for international trade. Public perception of the paraphrasing process may affect the efficacy of free trade agreements as they arrive in other countries. European protesters successfully influenced the EU to reject the Anti-Counterfeiting Trade Agreement because the negotiating process had "no inclusion of civil society organizations" and a "lack of transparency from the start."[13] In current negotiations of the Trans-Pacific Partnership Agreement, a group of Peruvian legislators has already asked for greater transparency, including "a public, political, and technical debate on the proposals."[14] In the United States, there have been movements around the lack of transparency and perceived corruption in the process.[15]

If other countries choose to reject trade agreements because of perceived illegitimacies, or if there is enough domestic pressure to discard the whole system, then other U.S. stakeholders that depend on trade will be harmed as well. Bundling subject matter areas that affect the public interest

12. ANUPAM CHANDER, THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD IN COMMERCE 9 (2013).

13. Mike Masnick, *European Parliament Official in Charge of ACTA Quits, and Denounces the 'Masquerade' Behind ACTA*, TECHDIRT (Jan. 26, 2012), http://www.techdirt.com/articles/20120126/11014317553/european-parliament-official-charge-acta-quits-denounces-masquerade-behind-acta.shtml.

14. Mike Palmedo, *Peruvian Legislators File Motion Seeking Public Debate on the Trans Pacific Partnership*, INFOJUSTICE (Sept. 4, 2013), http://infojustice.org/archives/30645 (internal quotation marks omitted).

15. Zach Carter, *Elizabeth Warren Free Trade Letter Calls for Trans-Pacific Partnership Transparency*, HUFFINGTON POST (June 13, 2013), http://www.huffingtonpost.com/2013/06/13/elizabeth-warren-free-trade-letter_n_3431118.html.

into a captured trade regime may end up causing trade agreements to be rejected, thus harming a wide swath of domestic businesses that rely on exports.

This Article closes with concrete policy recommendations addressed to Congress. Fast track trade negotiation authorization expired in 2007; the executive branch has called for its renewal,[16] and Congress introduced a bill in January 2014.[17] Congress need not avoid the fast track negotiating process entirely, as some have suggested.[18] But Congress should change the information input channels of the USTR. Otherwise the United States will continue to bind other countries to detailed agreements that depart from U.S. IP law, with adverse consequences for the U.S. interests that do not have a voice at the table.

II. INTERNATIONAL IP LAW AND TRADE

Free trade policy consists of lowering tariffs and other trade barriers to ensure the free flow of goods and services. For many, IP law does not intuitively belong in free trade agreements. But over the past several decades, free trade agreements have expanded to cover a number of regulatory areas, including IP, in surprising depth.[19]

There is both a theoretical reason and a practical explanation as to why IP is linked to free trade. The theoretical justification for linking IP to trade is that harmonizing laws across nations can lower barriers to trade; with regulatory harmonization, global companies incur fewer costs in moving between legal regimes. Global IP regulations are thus an example of "positive integration"—the creation of harmonized global legal standards—in contrast with, for example, tariff reduction, which removes regulation, a type of "negative integration."[20] The creation of a global floor

16. *See* Doug Palmer, *White House Says It Will Seek "Fast-Track" Trade Authority*, REUTERS (Mar. 1, 2013), http://www.reuters.com/article/2013/03/01/us-obama-trade-idUSBRE9200PK20130301.

17. Brian Wingfield, Laura Litvan & Michael C. Bender, *Congressional Deal Reached on Obama Trade Talks Authority*, BLOOMBERG (Jan. 9, 2014), http://www.bloomberg.com/news/2014-01-09/congressional-deal-reached-on-obama-trade-talks-authority.html.

18. *See, e.g.*, Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 658 (1994) ("Fast-track procedures have out-lived their usefulness and should not be renewed."); Lori Wallach, *Stopping Fast Track is One Way We Can Block TPP*, ELECTRONIC FRONTIER FOUND. (Jan. 10, 2014), https://www.eff.org/deeplinks/2014/01/stopping-fast-track-one-way-we-can-block-tpp.

19. *See, e.g.*, Wallach, *supra* note 18 (describing the potential dramatic consequences of U.S. trade negotiations for IP issues).

20. Sean Pager, *TRIPS: A Link Too Far? A Proposal for Procedural Restraints on Regulatory Linkage in the WTO*, 10 MARQ. INTELL. PROP. L. REV. 215, 217 (2006) (describing positive integration

for IP protection has also been argued to incentivize IP-intensive companies to export and invest abroad.

The more practical explanation for the IP-trade linkage is that the linkage was valuable to IP-exporting industries, which successfully lobbied governments to take up their cause. Historically, international IP law was broadly written and relatively unenforceable, governed by the World Intellectual Property Rights Organization ("WIPO") in the United Nations. If a signatory country failed to adopt the standards articulated by WIPO, there were no official means for sanctions. Linking IP to trade made IP law internationally enforceable through trade sanctions and, eventually, the World Trade Organization's ("WTO") dispute settlement process.[21]

At first, the United States had little interest in signing on to international IP agreements, let alone negotiating for higher standards. Up until the late nineteenth century, the United States was a net IP importer.[22] When U.S. firms began to increase patent filings in the late nineteenth century, the United States shifted its stance on the desirability of internationally harmonized IP.[23] Between the mid-1970s and late 1980s, substantive changes in U.S. trade law incorporated IP into U.S. trade policy. From 1974 to 1988, Congress repeatedly revised U.S. trade law in ways that gave IP-intensive industries more and more purchase on the trade agenda and enforcement mechanisms.[24] In large part, these legislative changes happened because industry players realized that the IP-trade linkage could be financially valuable.

Global efforts to link IP to trade culminated in the 1996 Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement") in the World Trade Organization. The TRIPS Agreement made international IP law broader, deeper, and more enforceable.[25] TRIPS covers numerous

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as an approach that aims to "affirmatively re-regulate (or harmonize), imposing global standards in place of national ones").

21. *See* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 2 (2004) (noting that TRIPS "contains detailed, comprehensive substantive rules and is linked to the WTO's comparatively hard-edged dispute settlement system").

22. Robert P. Merges, *Battle of Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 245 (1990) ("The decision was made in the US that [in the late nineteenth century], the best policy for the US was lax enforcement of foreign intellectual property.").

23. SELL, PRIVATE POWER, *supra* note 2, at 65 (describing U.S. firms' push for IP protections during the Paris Convention negotiations).

24. *See id.* at 76–95 (describing the development of U.S. trade law during the 1970s and 1980s).

25. *See* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 177 YALE L.J. 804, 821, 824 (2008) (describing the scope of the TRIPS Agreement's substantive IP protections).

areas of IP in more detail. However, there was enough space left for policy disagreement that several countries, including the United States, now use bilateral free trade agreements to supplement TRIPS's protections.[26]

A significant body of literature criticizes the link between IP and trade.[27] Linking IP to trade separates IP from other legal regimes governing health, biodiversity, speech rights, and privacy—all of which can be implicated by IP enforcement.[28] Advocates against the IP-trade linkage have consequently attempted to push back against the trade agenda with limitations on IP in the name of public health and human rights.[29] Critics also point out that IP is less like property and more like a government-created monopoly.[30] If IP is a monopoly granted by the government as an incentive for creation, it can be viewed as government interference with trade rather than freedom from government interference.[31]

In the post-TRIPS landscape of regional free trade agreements, the

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26. Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 OTTOWA L. & TECH. J. 125, 142–43 (2004).

27. *See, e.g.*, Pager, *supra* note 20, at 216–218 (discussing some of the various controversies regarding TRIPS).

28. *See* Helfer, *supra* note 21, at 28 (discussing the conflict between TRIPS and the current rules in specific legal regimes).

29. *See* Kapczynski, *supra* note 25, at 866–67 (discussing how "access to knowledge" advocates have attempted "to reframe intellectual property as a public health care issue or a freedom of speech issue" (internal quotation marks omitted)). *See generally* Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, WIPO Doc VIP/DC/8, [hereinafter Marrakesh Access Treaty] *available at* http://www.wipo.int/edocs/mdocs/diplconf/en/vip_dc/vip_dc_8.pdf (signaling a multilateral agreement to standards for international IP agreements that will facilitate access to and use of works by people with disabilities).

30. *See* MICHELE BOLDRIN & DAVID K. LEVINE, AGAINST INTELLECTUAL MONOPOLY 9 (2008) ("The U.S. Constitution is explicit that what is to be given to authors and inventors is an exclusive right—a monopoly.").

31. *See* Bill Watson, *For Free Trade's Sake, Get IP Out of the TPP*, HUFFINGTON POST (Nov. 22, 2013), http://www.huffingtonpost.com/bill-watson/for-free-trades-sake_b_4325963.html ("Imposing intellectual property rules through trade agreements has become a political liability that serves special interests at the expense of free trade."); SELL, PRIVATE POWER, *supra* note 2, at 52 ("[F]or much of the twentieth century US courts regarded patent 'rights' as 'monopolies'. . . ."). The international public policy manager for Hewlett-Packard defended this view by referring to IP as protectionism-that-is-not-protectionism:

> "Intellectual property protection is the only valid type of 'protectionism' being pushed now in Washington because it is really not traditional protectionism at all. Instead it is at the heart of an open trading system, and those companies that support the strengthening of the trading system and oppose protectionist approaches are the same ones that need and support better intellectual property protection."

Harvey E. Bale Jr., *A Computer and Electronics Industry Perspective*, INTELLECTUAL PROPERTY RIGHTS AND CAPITAL FORMATION IN THE NEXT DECADE 123 (Charles E. Walker & Mark A. Bloomfield eds., 1988).

United States is widely understood to be pushing "TRIPS-plus" versions of IP law on its trade negotiating partners. It has done so through bilateral free trade agreements, and more recently, through larger regional and plurilateral agreements such as the Anti-Counterfeiting Trade Agreement ("ACTA") and the Trans-Pacific Partnership Agreement ("TPP"). These agreements do not establish basic IP protection; they increase the global depth of IP harmonization on top of the detailed protections already afforded by TRIPS.

Supporters argue that such harmonization is necessary to prevent global piracy. Critics point out, as they did with TRIPS, that the IP law that works for developed countries might not be appropriate for developing countries.[32] Scholars also point out that a rush to deep harmonization eschews the benefits of global experimentation with IP law, including the ability to better determine what systems work and why.[33] IP law governs newer technologies, including the Internet, and establishing a deeply harmonized global set of rules prevents investigation of which policies work best.[34]

Critics have also pointed out that in pursuing bilateral free trade agreements, the United States chooses to operate in the least transparent or democratic international negotiating regime. The World Intellectual Property Rights Organization releases draft texts of proposed treaties and allows participation by public interest groups. The World Trade Organization is less transparent and participatory but is still a multilateral process. Bilateral agreements, by contrast, are not negotiated through an existing international forum, do not involve multilateral parties, and have been described as "country club" agreements aimed at pushing international law from the outside.[35]

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32. For instance, overly strong IP law may conflict with public health policy and might in fact impede innovation by preventing follow-on inventions for products originally developed in other countries.

33. Margot Kaminski, *Positive Proposals for Treatment of Online Intermediaries*, 28 AM. U. INT'L L. REV. 203, 209–11 (2012). *See also* GRAEME B. DINWOODIE & ROCHELLE C. DREYFUSS, A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME 159 (2012) ("There are, however, costs to this aggressive approach [to global harmonization of IP law] . . . . [For example,] the rules announced might create one-size-fits-all regimes, even in fields where global harmonization is clearly unwarranted."); Lisa Larrimore Ouellette, *Patent Experimentalism*, 100 VA. L. REV. (forthcoming) (manuscript at 17) , *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294774 ("Patent law may be more uniform due to developments such as . . . TRIPS, but perhaps at the cost of increasingly locking every jurisdiction into a globally suboptimal system of innovation policy.").

34. DINWOODIE & DREYFUSS, *supra* note 33, at 10–12.

35. Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 SMU L. REV. 975, 1074–76 (2011).

This background is important for understanding the significance of the current capture of the U.S. trade negotiating process. The United States is often understood to be using its bilateral and plurilateral free trade agreements to push U.S. IP law onto other countries. And the content of the agreements is in fact very close to U.S. law. Others have discussed how U.S.-level IP law might not be a good fit for developing countries. But this Article shows that what is exported is not U.S. IP law. Free trade agreement IP chapters are influenced by who sits on industry advisory committees. This has two major effects on the substance of the agreements.

First, the depth of harmonization present in the agreements is itself likely the result of capture, combined with the USTR's selective framing of its mandate as prioritizing the needs of certain industries.[36] U.S. free trade agreements bind the United States to current IP policy in great detail, focusing primarily on IP enforcement measures. These highly detailed trade agreements make it more difficult for Congress to reform IP law in the near future.[37] If the process were not captured, trade agreements might still attempt to harmonize IP, but on a shallower level allowing for future policy reform. Disagreements between different constituencies might lead to the USTR leaving the more controversial parts of current IP law off the table.[38]

Second, this Article shows that the IP law in U.S. free trade agreements is close to, but not precisely, U.S. law. The USTR describes its recent free trade agreements as consistent with U.S. law, and Congress has told the USTR to negotiate agreements with standards similar to U.S. law. But the deviations from U.S. law in U.S. free trade agreements skew consistently toward the interests of one subset of domestic IP stakeholders at the expense of others, including the public. The rest of this Article explains why.

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36. *See* Alexander S. Dent, *Intellectual Property in Practice: Filtering Testimony at the United States Trade Representative*, 23 J. LINGUISTIC ANTHROPOLOGY E48, E50 (2013) (discussing how the USTR uses mandates established at the beginning of trade hearings to filter industry positions to the foreground of policy debates).

37. *See The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6–8 (2013) (testimony of Maria A. Pallante, Reg. of Copyrights, U.S. Copyright Office), *available at* http://www.copyright.gov/regstat/2013/regstat03202013.html (calling for the "next great copyright act," but noting the obstacles to its achievement).

38. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983) ("Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.").

III. THE CAPTURE OF THE USTR

The USTR is a captured agency. While a number of critics have cried capture, the current legal mechanisms of the USTR's capture have gone unexamined.[39] This Article identifies that the USTR is systematically exempt from transparency, accountability, and participation requirements; explains that the lack of these requirements leads to information capture; and links this capture to substantive consequences.

Capture can occur through diverse mechanisms.[40] There is substantial evidence that USTR agency staff receive revolving-door incentives from industry, taking IP industry jobs after USTR employment and coming from IP industry to the USTR.[41] It is also possible to view the USTR as normatively captured in the IP context, since it is tasked with enforcing adequate levels of IP law worldwide through trade sanctions.[42] However, the capture mechanism that most directly affects the text of the agreements is the imbalanced informational input the USTR receives from a subset of IP stakeholders.

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39. Critics have identified that U.S. trade policy was captured by industry, pointing in particular to the Section 301 process, which allows for trade retaliation against countries that do not safeguard U.S. IP rights. *See* PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 61–62 (2002) (describing the industry pressures that led to the adoption of the 301 process). But they have not addressed how the current statutory scheme that governs the USTR perpetuates capture of free trade agreements through informational asymmetry.

40. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–23 (2010) (identifying four reasons for agency capture: (1) the ability of industry groups to monitor and challenge agencies; (2) the influence of industry groups in lobbying and politics; (3) the revolving door phenomenon, by which agency employees often end up working in the industries they regulate; and (4) the information advantage possessed by industry insiders regarding the industry's operations and capabilities).

41. *See, e.g.*, SELL, PRIVATE POWER, *supra* note 2, at 83 (noting that a former general counsel for USTR became the executive vice president of the Pharmaceutical Research and Manufacturers of America); Susan K. Sell, *Revenge of the "Nerds": Collective Action Against Intellectual Property Maximalism in the Global Information Age*, 15 INT'L STUD. REV. 67, 73–74 (2013) [hereinafter Sell, *Revenge of the "Nerds"*] (describing various instances of the revovling door phenomenon); Timothy B. Lee, *How the Revolving Door Lets Hollywood Shape Obama's Trade Agenda*, VOX (Apr. 22, 2014), http://www.vox.com/2014/4/22/5636466/hollywood-just-hired-another-white-house-trade-official (reporting on hiring moves that suggest the "disturbingly cozy relationship between the [USTR] and industry groups that favor stronger copyright and patent protections"); James Love, *Who USTR Clears to See Secret Text for IPR Negotiations? (Such as TPPA)*, KNOWLEDGE ECOLOGY INT'L (Feb. 16, 2012), http://keionline.org/node/1362 (documenting the USTR's close relationship with a number of former government staff who had gone on to serve in industry-insider posts); *The Revolving Door*, PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, IP ENFORCEMENT DATABASE, https://sites.google.com/site/iipenforcement/the-revolving-door (documenting instances in which individuals have moved between high-level industry and regulatory posts in the IP industry).

42. *See* DRAHOS WITH BRAITHWAITE, *supra* note 39, at 88–93 (describing the USTR's sanction power under Section 301 of the Trade Act, and the influence of IP industry groups on USTR's activities).

Regulatory capture is the process by which special interests manipulate state action.[43] The government can be seen as analogous to a private firm, where the output is law.[44] Government will respond to demands and will be constrained by its inputs. Capture occurs when the regulator prioritizes one sector's demands over another's, calculating a regulated price level that falls above the competitive price.[45] But capture can also occur when a neutral or even pro-consumer regulator receives inadequate information. Even the incorruptible regulator cannot be effective if she is not fully informed.

Thus capture occurs in loosely two ways: through incentives and through informational asymmetry. The most noticeable forms of regulatory capture arise when a lawmaking body is subject to incentives or coercion. Incentives, such as bribes, can sway individual regulators toward a particular outcome, as can coercion.[46]

Information capture can produce the same dysfunctional policy results as capture through incentives or coercion.[47] Studies of information capture in administrative law have examined how one party can flood an agency with information, chasing out competitors and biasing agency results.[48] The USTR faces a different problem, unusual for most U.S. agencies and thus largely overlooked: it is structured to receive expert, detailed input, but

43. Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD R. ECON. POL. 203, 203 (2006).

44. *See* David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1399–1400 (2011) (describing the administrative process as "a form of economic activity"). *See also* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 4–6 (1971) (describing state power as a resource sought by its citizens); Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 49, 50–53 (Daniel Carpenter & David A. Moss eds., 2014) (describing the emergence of the view that regulatory agencies are analogous to firms).

45. Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 231 (1976) (arguing that "the rational regulator . . . will seek a structure of costs and benefits that maximizes political returns," which will in turn lead her "to suppress some economic forces that might otherwise affect the price structure."). *See also* Dal Bó, *supra* note 43, at 206–07 (offering a summary of Peltzman's theory of regulation).

46. Dal Bó, *supra* note 43, at 212–13.

47. *See* Wagner, *supra* note 6, at 1399–1402 (discussing the consequences of the strategic use of information capture).

48. *Id.* at 1338–39. *See also* BRUCE M. OWEN & RONALD BRAEUTIGAM, THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS 4–5 (1978) ("The ability to control the flow of information to the regulatory agency is a crucial element in affecting decisions."); Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1113–19 (1954) (discussing the ICC's attempts to organize the vast flow of industry information it received from industry members during the 1930s); Roger Noll, *The Economics and Politics of Regulation*, 57 VA. L. REV. 1016, 1030 (1971) (describing how agencies collect vast amounts of information and develop complex information-gathering procedures to shield themselves from accusations of apathy, with the effect of raising barriers to entry into the regulatory discussion for non-regulated groups).

only from a limited subset of domestic stakeholders.

This section identifies the mandate given to the USTR by Congress. The USTR departs from this mandate because its institutional design, dictated by statutes and exploited by the executive branch, sets the agency up to be captured through asymmetric information flow.[49]

A. THE USTR'S MANDATE

The U.S. government does not intend to use free trade agreements to impose different IP laws abroad. This intent to stay within the bounds of U.S. law is visible even on the surface of the agreements. The IP chapters of free trade agreements do not contain wholesale departures from U.S. IP law; they export the contours of U.S. law, but the text contains subtle differences and distortions. These distortions are not dictated by Congress and in fact may not even be intended by the USTR.

Congress clearly intended that the IP chapters of free trade agreements should (1) be similar to U.S. law and (2) not require Congress to make changes to U.S. law. Congress has instructed the USTR to ensure that the IP chapters of free trade agreements "reflect a standard of protection similar to that found in United States law."[50] Congress has also indicated, when implementing free trade agreements, that it will not recognize any changes to domestic law.[51] The USTR has been instructed to take U.S. IP law as its model, and not to come back to Congress requesting any changes in domestic law. The easiest way to ensure compliance with both of these requirements is to export U.S. IP law.[52]

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49. For an informative review of the relevance of agency institutional design to capture, see generally Barkow, *supra* note 40.

50. Trade Act of 2002, 19 U.S.C. § 3802(b)(4)(A)(i)(II) (2012) ("The principal negotiating objectives of the United States regarding trade related intellectual property [include] . . . ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law . . . .").

51. *See, e.g.*, United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 102, 125 Stat. 430 (2011) [hereinafter KORUS FTA Implementation Act] ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.").

52. What constitutes U.S. IP law is a difficult question (thanks to Donald Harris for raising this issue). Clearly, no international agreement will perfectly track a U.S. statute, or U.S. caselaw. This Article does not argue that this level of harmonization is required, or that it would even be desirable. It points out, however, that Congress does not intend for bilateral Free Trade Agreements to be a vehicle for domestic policy change, and Congress's desire constrains the USTR in important substantive ways. The contours of domestic IP law are molded by stakeholders. The USTR's determination of the essential features of U.S. IP law should be subject to balanced stakeholder input, at least broadly equivalent to domestic stakeholder participation.

There is evidence that the USTR understands its mandate to be to export U.S. IP law, or at least to track U.S. law extremely closely. The USTR has publicly described what it does as "coloring within the lines" of U.S. law.[53] The USTR's advisory committees claim that their advice helps the USTR follow U.S. law.[54] And the law within the agreements illustrates this intent, because it does closely resemble existing U.S. IP law. For example, the IP chapters contain subsections on digital rights management ("DRM") that closely mirror U.S. law, down to a familiar list of exceptions, including reference to the triennial rulemaking proceedings done by the Librarian of Congress.[55] The IP chapters also contain limitations on liability for online service providers that closely resemble the limitations on liability established in U.S. law.[56] There is thus no indication—from Congress, the USTR, or the advisory committees—that the purpose of the IP chapters of the free trade agreements is to create a different system abroad than exists at home.

Congress additionally gave the USTR the statutory negotiating objective of eliminating barriers and distortions that are directly related to trade.[57] IP law that is not harmonized across borders has been characterized as a trade barrier or distortion because it increases legal costs for exporting firms trying to determine differences between domestic and foreign law.[58] Countries originally used trade policies to protect domestic industries at the expense of other nations. This mercantilist viewpoint, which thrived during the Industrial Age, emphasized regulating trade to reach a favorable

53. Eddan Katz, *Stopping the ACTA Juggernaut*, ELECTRONIC FRONTIER FOUND. (Nov. 19, 2009), https://www.eff.org/deeplinks/2009/11/stopping-acta-juggernaut (citing the comments of an anonymous trade official regarding the ACTA negotiations).

54. *See* INDUS. TRADE ADVISORY COMM. ON INTELLECTUAL PROP. RIGHTS (ITAC-15), THE U.S.-PANAMA TRADE PROMOTION AGREEMENT: THE INTELLECTUAL PROPERTY PROVISIONS 3 (2007) [hereinafter ITAC PANAMA REPORT] (underscoring the importance attached by the committee to its "close working relationship" with industry members and trade negotiators, and noting that these relationships have ensured the conformance of trade agreements to model FTA IP law).

55. *Compare* Free Trade Agreement Between The United States of America and the Republic of Korea, U.S.-S. Kor., art. 18.4, para. 7(d)(viii), June 30, 2007 [hereinafter KORUS FTA], *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf (giving effect to certain administrative or legislative proceedings for renewable periods of not more than three years), *with* 17 U.S.C. § 1201(a)(1)(C) (2012) (requiring the Librarian of Congress to review prohibitions on access of certain copyrighted work after successive three year periods).

56. *Compare* KORUS FTA, *supra* note 55, art. 18.10, para. 30(b) (setting out rules governing the type of liability limitations the agreeing parties shall implement with regard to online service providers), *with* 17 U.S.C. § 512 (2012) (limiting liability for online service providers in the same manner).

57. 19 U.S.C. § 3802(a)(2) (2012).

58. *See* CHANDER, *supra* note 12, at 142–43 (describing the uncertainty regarding which laws apply in the international context as a major legal challenge in the electronically-tradable service economy).

balance of trade.[59] Modern trade theory, however, focuses on the role of liberalization in increasing global welfare.[60] Under modern trade theory, liberalization allows individual countries to benefit from their comparative advantages, and global welfare increases as industries scale.[61] The addition of IP to the trade regime has been justified, whether correctly or not, as a reduction of non-tariff trade barriers.[62] Seen in this context, Congress's mandates to the USTR both to reduce trade barriers and export a standard "similar to U.S. law" suggests a desire for harmonization rather than mercantilist protectionism of domestic industries.

B. INFORMATION CAPTURE

However, the law that the USTR exports is skewed in subtle ways toward the interests of its industry advisors. This is because the U.S. trade regime is institutionally prone to information capture. Information capture, as discussed above, is the use of information to influence regulatory outcomes.[63] A complex statutory and doctrinal scheme prevents, or at least mitigates, information capture in most U.S. agencies, through input, oversight, and transparency requirements.[64] Information capture in other

59. DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 26 (1996). For a discussion regarding the intersection of mercantilist theory and patent trade, see Sarah R. Wasserman Rajec, *Free Trade in Patented Goods: International Exhaustion for Patents* 14–24 (working paper), *available at* http://www.law.msu.edu/ipic/workshop/2013/papers/free-trade-patented-goods.pdf.

60. PAUL R. KRUGMAN, MAURICE OBSTFELD & MARC J. MELITZ, INTERNATIONAL ECONOMICS: THEORY & POLICY 24–35 (9th ed. 2012). *See also* CHANDER, *supra* note 12, at 8 (describing the work of David Ricardo as showing that "countries that traded with each other would each stand to gain from the trade").

61. *See* Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49, 55–56 (1998) (discussing the sources and benefits of comparative advantage).

62. THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) VOL. I: COMMENTARY 707–08 (Terence P. Stewart ed. 1993) (characterizing the Uruguay Round's negotiations on TRIPS as related to the GATT's concerns regarding non-tariff barriers to trade). *See also* General Agreement on Tariffs and Trade, Ministerial Declaration on the Uruguay Round, GATT/MIN/DEC 7 (1986) (explaining that negotiations leading to TRIPS were intended "to reduce the distortions and impediments to international trade, and [to take] into account the need to promote effective and adequate protection of intellectual property rights").

63. I define information capture differently from Wendy E. Wagner, who defines it as "the inadvertent or the strategic use of costly communications—well beyond what is necessary to convey the message—to gain control over regulatory outcomes." Wagner, *supra* note 6, at 1329. Wagner's definition addresses a subset of information capture which applies to administrative agencies governed by the Administrative Procedure Act but not to the USTR.

64. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (discussing the role of "judicial disenchantment" with administrative agencies between 1967 and 1983 in establishing safeguards against information capture).

U.S. agencies is usually a problem of surplus, not of deficit.[65] The USTR, however, is different. By statutory design and by some chance, the USTR is not subject to the same transparency, input, or oversight requirements as other agencies. Consequently, the USTR is structurally subject to information capture by its limited industry advisors, with little to no countervailing textual input by opposing industries, the public, or public interest groups.

Much of administrative law focuses on the importance of information.[66] Agency expertise is the core of administrative law, and "information is the lifeblood of expertise."[67] One oft-cited reason for Congressional delegation is that an agency is more likely to be an expert in the subject matter area and may have better access to information than Congress.[68]

An agency's sources of information can include "nongovernment experts who communicate with the agency informally, the agency's staff, the public, consultants, and advisory committees."[69] Each information source serves different functions and has different benefits and limitations.[70] Allowing the public to participate in the notice-and-comment period, for example, broadens both the substantive and political base of agency decisions. And advisory committees are a uniquely valuable source of agency information in a number of ways: they supplement agency staff expertise, can function as effective political tools for convincing some sectors to support government policy, and allow ongoing and dynamic personal discussions between staff and committee members.[71]

However, an agency's reliance on advisory committees can lead to information capture. Agencies often regulate the same firms that provide them with expertise. Even if the agency is a neutral and rational decisionmaker with the public's best interests in mind, it can still be affected by skewed informational input.[72] Agencies may even be prone to

65. Wagner, *supra* note 6, at 1328.

66. *See, e.g.*, Super, *supra* note 44, at 1400–04 (discussing legal culture's emphasis on information when considering scarcity of inputs to legal decisionmaking).

67. Henry H. Perritt, Jr. & James A. Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. L.J. 725, 726 & n.5 (1975) (noting Louis Jaffe's description of an administrative agency as "a reservoir into which data flows and out of which information may be drawn when needed").

68. Super, *supra* note 44, at 1414.

69. Perritt & Wilkinson, *supra* note 67, at 726–27 (footnote omitted).

70. *Id.* at 727–29

71. *Id.*

72. *See* Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2 J.L. ECON. & ORG. 181, 203 (1986).

requesting skewed informational input because a biased advisor might be seen as more credible in a given subject matter area.[73] If the agency is viewed not as a purely rational decisionmaker, but as a group made up of individuals who form relationships with other individuals, its decisions can additionally be skewed by personal relationships and even friendships formed through the consultation process.[74]

Information capture occurs when those providing information use that information and their relationships with decisionmakers to influence an agency's outcome. Information capture often occurs when some have access—such as access to expert information or to an agency's limited attention—that others do not have. Information capture can thus be mitigated by providing adversarial interest groups with the same information, to minimize the cost of finding out what information an agency is considering. Capture can be mitigated by providing equal access to formal input channels into the agency's decisionmaking process. It can also be mitigated by granting adversaries oversight over each other's interactions with the agency. Oversight ensures that no single entity is able to influence the agency unsupervised and reinforces equal access to information.[75]

The statutory scheme that governs most agencies and prevents certain forms of information capture is a blend of open government law and administrative law, including the Administrative Procedure Act ("APA"), the Freedom of Information Act ("FOIA"), and the Federal Advisory Committee Act ("FACA").[76] These statutes provide transparency requirements and govern agency input channels, preventing information capture through information deficits in most agencies.

FOIA and FACA provide transparency, giving outsiders, including the public, access to information that the agency uses to make its decisions.

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73. *See* David Austen-Smith & John R. Wright, *Competitive Lobbying for a Legislator's Vote*, 9 SOC. CHOICE & WELFARE 229, 231–32 (1992) (discussing the possibility that a legislator may see a lobbyist as particularly credible—and thus worthy of trust—when she is perceived to have access to information that the legislator does not).

74. *See, e.g.*, Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 551–54 (1985) (describing a model of rational decisionmaking that results in a decisionmaker choosing to take advice from one "who is biased toward her own point of view, even though neutral advice is available.").

75. *See infra* note 298 and accompanying text for a number of direct solutions to the problem of revolving door capture. But those solutions would not be enough in this case.

76. *See* Perritt & Wilkinson, *supra* note 67, at 725 (describing these statutes as having "progressively increased the public's access to executive branch activities and documents"). The Government in the Sunshine Act ("GISA") was added to this scheme when it was enacted after FACA in 1976. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976).

Access to relevant information can be necessary for public input in the process.[77] FOIA allows individuals to obtain agency documents post-facto, subject to a series of statutory exemptions. FACA, which applies only to agency advisory committees, applies earlier in the process and requires a more proactive approach by the agency and its committees. FACA requires that advisory committees file a charter and keep detailed minutes of all meetings.[78] Committee minutes, records, and reports must be made available to the public, as long as they do not fall within a FOIA exemption.[79] The public can also attend advisory group meetings unless an exemption applies.[80]

However, the limiting ingredient for agencies is often attention, not the amount of information they are given.[81] This is especially true when an agency faces time constraints. Transparency equalizes access to decisionmaking materials, but formal input channels equalize access to an agency's attention during the decisionmaking process.

Administrative law recognizes the importance of creating formal input channels. The APA provides for formal public input channels into the agency rulemaking process through notice-and-comment. Industries can find additional opportunities for input outside of notice-and-comment, but the APA's governance of rulemaking ensures that agencies receive and respond to public input at some point during the process.[82]

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77. *See* Levine, *supra* note 9, at 141 (2012) (explaining that because of the USTR's use of the "national security exemption to FOIA . . . , 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 . . . .").

78. 5 U.S.C. app. 2 §§ 9(c), 10(c) (2012).

79. *Id.* § 10(b). Under FACA, advisory committee meetings can be closed only subject to narrow exemptions outlined in GISA while agency documents are left within broader FOIA exemption standards. GISA exemptions include: national defense information, information relating solely to internal personnel rules, information related to accusing a person of a crime, information where the disclosure would constitute a breach of privacy, information related to investigatory records, information related to the agency's participation in legal proceedings, and information that would lead to financial speculation. *Id.* § 552b(c). *See also* Mary Kathryn Palladino, *Ensuring Coverage, Balance, Openness and Ethical Conduct for Advisory Committee Members Under the Federal Advisory Committee Act*, 5 ADMIN. L.J. 231, 260, 263–64 (1991) (noting that after the 1976 amendment of FACA, "advisory committee documents [were left] within FOIA standards, but . . . the closure of meetings [was] subject to the more narrow provisions of [GISA] . . . .").

80. Palladino, *supra* note 79, at 265 & n.216.

81. Wagner, *supra* note 6, at 1341 ("[T]he major problem with organizations is their failure to realize that attention, not information, is the limiting ingredient." (internal quotation marks omitted)).

82. 5 U.S.C. § 553(c) (2012). *But see* Wagner, *supra* note 6, at 1422–23 (discussing the problems created by industry domination of the formal administrative process at early stages of policy development, and suggesting reforms that would insulate "policy wonks" from industry voices during the preproposal stage of rulemaking).

FACA also governs formal input to agencies through agency use of advisory committees. FACA grew out of Congress's concern that advisory committees had grown into a "fifth branch of government."[83] It requires that advisory committees consist of a membership that is "fairly balanced in terms of the points of view represented."[84] FACA's "balanced membership" requirement equalizes who gets privileged access to an agency's attention,[85] and FACA limits the duration of that privileged access to only two years unless the establishing entity or Congress creates a specific exemption.[86]

FACA's balanced membership and transparency requirements provide for oversight of the relationship between industries and an agency. Congress recognized that advisory committees can be a "beneficial means of furnishing expert advice, ideas, and diverse opinions" to the executive branch.[87] But Congress also feared that unregulated advisory committees would lead to regulatory capture. FACA thus aims to ensure that committee advice should "not be inappropriately influenced" by "any special interest."[88] The legislative history of FACA shows that capture was a significant worry: "One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns."[89] The statute thus normatively requires that committee advice reflect independent judgment without improper influence from special interests.[90]

FACA's transparency requirements serve not only to inform the public of inputs in agency decisions, but also as an oversight mechanism. FACA seeks "to open to public scrutiny the manner in which government agencies obtain advice from private individuals."[91] This protects against "the risk

83. 117 CONG. REC. 2750 (1971) (describing the remarks of Representative Monagan).

84. 5 U.S.C. app. 2 § 5(b)(2) (2012).

85. A D.C. Circuit panel was divided over whether the balanced membership requirement is justiciable. Palladino, *supra* note 79, at 254–59.

86. 5 U.S.C. app. 2 § 14(a)(1) (2012).

87. *Id.* § 2(a).

88. *Id.* § 5(b)(3).

89. H.R. REP. NO. 92-1017, at 6 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3491, 3496. *See also* S. REP. NO. 92-1098, at 6 (1972) ("The lack of public scrutiny of the activities of advisory committees was found to pose the danger that subjective influences not in the public interest could be exerted on the Federal decisionmakers.").

90. *See* Cummock v. Gore, 180 F.3d 282, 284–85 (D.C. Cir. 1999) (characterizing FACA as Congress's attempt to strike a balance between the desire for expert assistance in policymaking and the fear of interest group domination of the administrative process).

91. Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1072 (D.C. Cir. 1983) (quoting Food Chem. News, Inc. v. Davis, 378 F. Supp. 1048, 1051 (D.D.C. 1974)) (internal quotation marks omitted).

that governmental officials [will] be unduly influenced by industry leaders."[92] Public oversight also ensures that agency decisions "[will] not be unduly weighted by input from the private commercial sector, lest the Government fall victim to the devastating harm of being regulated by those whom the Government is supposed to regulate in the public interest."[93]

In most administrative agencies, FACA, FOIA, and the APA thus create channels for input into agency decisionmaking while preventing information capture. This statutory scheme, however, does not apply to the USTR.

First, the APA does not apply to the USTR, because the APA does not apply to international lawmaking.[94] There is no formal rulemaking process in trade law and thus no institutionalized channel of input from the public into the text of free trade agreements in the form of notice-and-comment.[95] The USTR does call for public comments with respect to higher level policymaking. However, the public does not participate in rulemaking with respect to the trade agreement texts or specific negotiating proposals as to the substance of the text. This Article argues that the distinction is important, because substantive policy decisions happen at the level of the text.

The Freedom of Information Act ("FOIA") has also functionally not applied to the USTR since 2002, through classification decisions made by the agency itself and supported by other parts of the executive branch. FOIA would provide the transparency necessary for both public input and democratic accountability to occur, albeit subject to delay.[96] However, the executive branch in general, and the USTR in particular, has become

92. Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 437 (D.C. Cir. 1989) (Edwards, J., concurring in part and dissenting in part).

93. *Food Chem.*, 378 F. Supp. at 1051–52.

94. 5 U.S.C. § 553(a)(1). *See also* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 221 (2009) ("The APA applies extensively to nearly every agency decision, but it expressly exempts foreign affairs.").

95. Oona A. Hathaway has suggested creating an APA for international law, which would go some length toward solving the problems identified here. However, Hathaway does not extend her suggestion to fast track or other ex-post congressional-executive agreements, which would leave this process untouched. Hathaway, *supra* note 94, at 241–53.

96. *See* Levine, *supra* note 9, at 111 ("FOIA enables different standards of transparency and accountability between government and public versus some private entities . . . ."). *See also* Annemarie Bridy, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, 30 CARDOZO ARTS & ENT. L.J. 153, 163 (2012) (arguing that FOIA's "information out" emphasis is necessary but not sufficient for good policymaking, since "there must [also] be both informal and formal mechanisms for allowing members of the public, particularly those with technical expertise, to 'talk back' to government").

increasingly institutionally prone toward secrecy over the past decade. For example, since 2002, the USTR has routinely classified all trade negotiating documents.[97] The consequence of this routine classification is that trade documents, including draft texts of the agreements, are not released to the public under FOIA.[98] The USTR now strongly encourages its negotiating partners to sign memoranda of understanding recognizing that negotiations will be kept secret, and has cited to these memoranda as justification for why documents cannot be released under FOIA.[99] In 2012, a district court held that the USTR could not withhold all negotiating documents under FOIA's national security exemption without providing justification.[100] However, the U.S. Court of Appeals for the District of Columbia Circuit overturned the holding.[101] The public and the press thus do not have access to USTR documents through FOIA.

A subset of IP stakeholders has access to documents the public cannot see and access to an input channel the public cannot use. The Trade Act establishes industry advisory committees, as contemplated by the FACA.[102] These advisory committees, known as the Industry Trade Advisory Committees ("ITACs"), have access to detailed negotiating proposals and to the USTR's attention. The USTR has been lauded when it closely follows these advisory committees' suggestions.[103]

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97. William J. Katt, Jr., *The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*, 106 COLUM. L. REV. 679, 699 n.117 (2006). The USTR's decision to classify negotiating documents can either be chalked up to the broader institutional closing of the executive branch after September 11, 2001, or traced to a specific FOIA case where the USTR won nondisclosure of negotiating documents on a national security exemption but lost on a different FOIA exemption. *Id.* at 699–701.

98. *See* Levine, *supra* note 9, at 120 (describing how two public interest groups dropped their FOIA suits after the government bolstered the USTR's claim of a national security exemption). *See also EFF and Public Knowledge Reluctantly Drop Lawsuit for Information About ACTA*, ELECTRONIC FRONTER FOUND. (June 17, 2009), https://www.eff.org/press/archives/2009/06/17 (reporting that EFF and Public Knowledge had dropped their lawsuits "demanding that background documents on ACTA be disclosed under the Freedom of Information Act").

99. *See EFF and Public Knowledge Reluctantly Drop Lawsuit for Information About ACTA*, ELECTRONIC FRONTER FOUND. (June 17, 2009), https://www.eff.org/press/archives/2009/06/17 (reporting that EFF and Public Knowledge had dropped their lawsuits "demanding that background documents on ACTA be disclosed under the Freedom of Information Act").

100. Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 845 F. Supp. 2d 252, 260 (D.D.C. 2012), *rev'd*, 718 F.3d 899 (D.C. Cir. 2013).

101. Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 718 F. 3d 899, 904 (D.C. Cir. 2013); Addison Morris, *Federal Appeals Court Allows US Trade Representative to Withhold Documents*, JURIST (June 9, 2013), http://jurist.org/paperchase/2013/06/federal-appeals-court-allows-us-trade-representative-to-withhold-documents.php.

102. 19 U.S.C. § 2155(b) (2012).

103. Goldman, *supra* note 18, at 673. A 1989 Commerce Department publication extolled the benefits of serving on advisory committees, explaining that "[t]he advisory committee members spent

There are three tiers of advisory committees that participate in trade. The highest level, or tier one, is the Advisory Committee for Trade Policy and Negotiations ("ACTPN"), which is "broadly representative" and provides "overall policy advice" on trade.[104] Tier two consists of general policy committees in industry, labor, agriculture, services, and other interests, and requires coordination between the USTR and the Secretaries of Commerce, Defense, Labor, Agriculture, Treasury, or other executive departments.[105] Tier three consists of the sectoral or functional advisory committees, which are the committees that are most prone to capture and most integral to the USTR's negotiating process.[106]

A number of FACA's important procedural checks do not apply to the USTR's advisory committees, so the advisory committee relationship to the USTR is prone to capture. First, FACA's suggested limits on advisory committee term length do not apply. Congress statutorily lengthened the tenure of these committees beyond FACA's recommendation of two years to four years.[107] In practice, the USTR extends the committees' tenure far beyond the four-year length.[108] Second, the Trade Act of 1974 exempts trade advisory committees from the transparency requirements of the FACA, subject to the USTR's discretion, which it has employed.[109] Third,

long hours in Washington consulting directly with negotiators on key issues and reviewing the actual texts of proposed agreements. For the most part, government negotiators followed the advice of the advisory committees . . . [W]henever advice was not followed, the government informed the committees of the reasons it was not possible to utilize their recommendations." *Id.* (citing *Government Seeks Advice from Industry on U.S. Trade Policy*, BUSINESS AMERICA, Jan. 1989, at 8, 9).

104. 19 U.S.C. § 2155(b)(1).

105. *Id.* § 2155(c)(1).

106. *Id.* § 2155(c)(2). *See* Rashmi Rangnath, *Comments of Public Knowledge*, IN RE REQUEST FOR PUBLIC COMMENT ON THE SCOPE OF VIEWS REPRESENTED ON INDUSTRY TRADE ADVISORY COMMITTEES, Docket No. 100416189-0189-01, 8 (2010) ("Public interest representation on the tier 3 ITAC 15 is essential in addition to public interest representation on the tier 1 and tier 2 committees. As the 2002 GAO report noted, the tier 1 committee may not have any influence on the tier 2 and tier 3 committees. Furthermore, tier 2 committees have been less active than tier 3 committees. Also, tier 1 and tier 2 committees are general policy committees that will not be able to provide focused non-business perspective on specialized areas such as intellectual property." (footnotes omitted)).

107. *Compare* 5 U.S.C. § 14(a)(2) (2012) ("Each advisory committee . . . shall terminate not later than the expiration of the two-year period beginning on the date of its establishment . . . ."), *with* 19 U.S.C. § 2155(f)(2)(B) (2012) ("[N]otwithstanding subsection (a)(2) of section 14 of the Federal Advisory Committee Act, any committee established under subsection (b) or (c) of this section may, in the discretion of the President or the President's designee, terminate not later than the expiration of the 4-year period beginning on the date of its establishment.").

108. The ITAC charter was renewed in 2014 for a four-year period with the possibility of another renewal. U.S. Department of Commerce and the Office of the United States Trade Representative, *Charter of the Industry Trade Advisory Committee on Intellectual Property Rights* 11 (Feb. 14, 2014), *available at* http://www.trade.gov/itac/committees/charter-itac15.pdf [hereinafter *ITAC-15 Charter*].

109. 19 U.S.C. § 2155(f)(2)(A). The USTR has exempted the tier 3 sectoral ITACs. *See* Information Regarding ITAC on Intellectual Property Rights, FACA DATABASE,

the USTR evidently reads the Trade Act as removing the USTR's sectoral advisory committees from FACA's balanced membership requirements.[110] Congress requires that members of the sectoral trade advisory committees be representative only of industry interests in the particular sector area concerned.[111] Congress did not mandate the inclusion of consumer interest groups, nor the existence of a public interest advisory committee to counterbalance the voice of industry committees on IP.

The membership of the USTR's IP advisory committee, ITAC-15, shows that in practice, the USTR operates as though FACA's balanced membership requirement does not apply to its sectoral advisory committees. The committee is imbalanced with respect to inclusion of public interest groups (there are none), and with respect to the breadth of industry voices included. The executive branch delegated authority to the USTR to choose membership.[112] The USTR chooses the membership of the committees by consulting with "interested private organizations" and taking into account a list of statutory factors, and its decisions are subject to approval by the Secretaries of Commerce, Defense, Labor, Agriculture, or Treasury.[113] In the case of the IP committee, the USTR chose the membership after consulting with "interested private organizations" and

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http://www.facadatabase.gov/committee/history.aspx?hid=16395&cid=1987 (last updated Jan. 7, 2014) ("Subsection 135(f) of the Trade Act provides that the ITACs shall be exempt from the provisions of the FACA relating to open meetings, public notice, public participation, and public availability of documents when it is determined that the proceedings would, if disclosed, seriously compromise the Government's negotiating objectives or bargaining positions regarding trade policy matters."). There is also ample evidence of tier two policy ITACs established under 19 U.S.C. § 2155(c) employing the Trade Act's statutory FACA exemption in § 2155(f). *See, e.g.*, Meeting Notice, Labor Advisory Committee for Trade Negotiations and Trade Policy, 77 Fed. Reg. 65,581 (Oct. 29, 2012) (announcing that a Labor Advisory Committee meeting on the subject of U.S. trade policy would be closed to the public pursuant to § 2155(f)); Notice and Request for Nominations, Agricultural Policy Advisory Committee and the Agricultural Technical Advisory Committees for Trade, 76 Fed. Reg. 64,892, 64,893 (Oct. 19, 2011) ("Committee meetings may be closed if USTR determines that a committee will be discussing issues that justify closing a meeting or portions of a meeting, in accordance with 19 U.S.C. 2155(f).").

110. *See* Goldman, *supra* note 18, at 675 (arguing that to achieve openness and balance in the trade advisory system, "Congress should make it clear that all trade advisory committees are fully subject to the balanced membership requirements of the Federal Advisory Committee Act").

111. 19 U.S.C. § 2155(c)(2) (requiring membership on sectoral advisory committees that is "representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned"). *See also ITAC-15 Charter*, *supra* note 108 (describing one of the core criteria of ITAC-15 membership as "representation of a sponsoring U.S. entity's or U.S. organization's and its subsector's (if applicable) interests on trade matters").

112. *See* Exec. Order No. 11,846, 40 Fed. Reg. 14,291, 14,293 (Mar. 31, 1975) ("The functions of the President . . . with respect to advisory committees . . . are delegated to the Special Representative.").

113. 19 U.S.C. § 2155(c)(2)(A)–(B). *See also ITAC-15 Charter*, *supra* note 108, at 2 (describing ITAC-15 membership selection procedures).

with the help of the Secretary of Commerce.[114] Membership in the committee is limited to under fifty members.[115] The current membership, as of this writing, consists only of IP-intensive industries, including the Recording Industry Association of America ("RIAA"), the Coalition for Intellectual Property Rights, the Pharmaceutical Research and Manufacturers of America ("PHRMA"), and the Motion Picture Association of America ("MPAA").[116] There are no public interest representatives, no representatives from other industry perspectives that could add balance, such as Internet companies, and no academic representatives. Public interest groups see the trade advisory committee membership list as a strong example of USTR bias.[117]

The legislative history of the Trade Act provides only a short explanation for trade's partial exemption from FACA. It cites the intimacy of the expected relationship between the trade negotiators and the committees and the nature of the information to be discussed as some reasons for the exemption. "If the advisory committees are to play an effective role in the negotiations they should be privy to our negotiating objectives, strategy, and tactics. These are not subjects which can be discussed in public meetings, which may include representatives from other governments and the press."[118] The legislative history also contemplates that the USTR may permanently exempt itself from FACA transparency requirements.[119] Early analysts of FACA specifically discourage such "grants of blanket exemptions to entire agencies," describing them as "unwise."[120]

The practical result of the USTR's exemptions from FACA oversight is that members of the sectoral industry trade advisory committees see detailed negotiating proposals, whereas the public does not. The committees give specific advice to the USTR, which it is encouraged to heed. By contrast, the public and other stakeholders can only offer generalizations based on the text of previous free trade agreements. The

114. *ITAC-15 Charter*, *supra* note 108, at 2.

115. *Id.* The USTR and Secretary of Commerce may also reappoint a member at their discretion.

116. *Industry Trade Advisory Committee on Intellectual Property Rights: ITAC-15*, INT'L TRADE ADMINISTRATION, http://www.trade.gov/itac/committees/ipr.asp (last visited Mar. 13, 2014).

117. Goldman, *supra* note 18, at 675; Levine, *supra* note 9, at 110 & n.12. *See also* Love, *supra* note 41 (documenting the USTR's close relationship with a number of former government staff who went on to serve in industry-insider posts).

118. S. REP. NO. 93-1298, at 7250 (1974).

119. *See id.* ("It is anticipated that, as the advisory committees begin discussion of U.S. negotiation positions, one determination [that the discussion should be shielded from FACA's transparency requirements] could be issued for all future meetings on that subject.").

120. Perritt & Wilkinson, *supra* note 67, at 746–47.

advisory committees consist of a limited membership from only a subset of stakeholders. And there is no oversight, public or adversarial, over the relationship between the sectoral advisory committees and the USTR.

Other opportunities for input into the USTR do exist. The USTR holds phone calls with stakeholders, often speaking to hundreds of people at a time, though allowing questions from only a few. The USTR also calls for input into its negotiating objectives through the Federal Register; but this input is high-level policy input and not at the level of textual analysis, so it does not address the problems raised here.[121] The USTR allows for public interest stakeholder participation at negotiating rounds, but this participation is limited to hosting tables and holding simultaneous presentations offsite from where negotiations occur.[122]

The USTR has on a few occasions held more substantive informal meetings with a number of stakeholders, including public interest stakeholders, allowing them to express concern over specific provisions of the IP chapter. But the USTR does not provide the text of the agreement it is negotiating,[123] so stakeholders in these informal meetings must rely on the text of past agreements to identify potential concerns. This reliance on past texts can be inadequate when the USTR introduces new provisions, as it did with the ACTA, or resuscitates provisions left out of more recent agreements, as it did with the no-first-sale-doctrine provision in the TPP recently.[124]

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121. *See, e.g.*, Request for Comments on Negotiating Objectives with Respect to Japan's Participation in the Proposed Trans-Pacific Partnership Trade Agreement, 78 Fed. Reg. 26,682 (May 7, 2013) (seeking broad policy advice through the public comment process); Request for Comments on Negotiating Objectives with Respect to Canada's Participation in the Trans-Pacific Partnership Trade Agreement, 77 Fed. Reg. 43,131 (July 23, 2012) (same); Request for Comments on Negotiating Objectives with Respect to Mexico's Participation in the Proposed Trans-Pacific Partnership Trade Agreement, 77 Fed. Reg. 43, 133 (July 23, 2012) (same).

122. *See* Nate Anderson, *Beyond ACTA: Next Secret Copyright Agreement Negotiated this Week—In Hollywood*, ARS TECHNICA (Feb. 1, 2012), http://arstechnica.com/tech-policy/2012/02/beyond-acta-next-secret-copyright-agreement-negotiated-this-weekin-hollywood/ (noting that USTR's outreach efforts regarding TPP negotiations include a "largely worthless TPP blog," a web form for public comment submission, and negotiators' attendance at presentations by outside groups "on some occasions").

123. *Id.*

124. *See* Timothy B. Lee, *Here's Why Obama Trade Negotiators Push the Interests of Hollywood and Drug Companies*, WASH. POST (Nov. 26, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/26/heres-why-obama-trade-negotiators-push-the-interests-of-hollywood-and-drug-companies/ ("Sherwin Siy, an attorney at the advocacy organization Public Knowledge, has had multiple meetings with USTR representatives during the course of the TPP negotiations. But he says it was difficult to give USTR meaningful feedback because he didn't know what positions U.S. negotiators were advocating.")

Recently departing from its rule of not showing the text of agreements to non-advisory committee members, the USTR hosted a session with public interest groups late in the ACTA negotiations and reviewed the text subject to non-disclosure agreements and under a tight timeline. There is no indication, however, that the USTR intends to hold such sessions again.

The USTR might receive input from those members of Congress cleared to see the text of the negotiating documents. However, those members of Congress are unlikely to be experts in IP law to the extent required to catch some of the subtle changes taking place. The USTR does receive input from the Copyright Office, which sends a delegate to USTR negotiations. It is unclear why the representative from the Copyright Office or the PTO are unable to correct or prevent the substantive problems identified here.

C. COLLECTIVE ACTION PROBLEMS AND USTR CAPTURE

The USTR is subject to capture primarily through the advisory committee mechanism, combined with its lack of transparency. These mechanisms will not necessarily lead to capture under all circumstances. They are more likely to lead to capture where the subject matter area addressed is already subject to a collective action problem.

Some topics are inherently more likely to be suboptimally or excessively regulated. When the stakes in regulation are disproportionately salient to one regulated faction, that group is more likely to actively try to influence regulation in its favor.[125] These efforts will be most successful when one group is more organized relative to its adversaries. Efforts to protect the public interest with respect to public goods thus face two obstacles: the cost of making an issue salient to the general public, and organization costs.[126]

Environmental regulation is a classic example of this problem. The public's stakes in environmental regulation are not always visible or individually salient. Industries that harm the environment are also more

125. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 14 (2004) ("The enforcement of an exclusive right to intellectual property can shower economic rents on the holder of that right, but copiers can hope to obtain only a competitive return. This should make it easier to organize a collective effort of copyright and patent owners to expand intellectual property rights . . . ."); Wagner, *supra* note 6, at 1337 (discussing the theory that when policy benefits are spread across a population but costs are concentrated within a small group of regulated parties, the regulating agency is at risk of capture unless a charismatic representative of the public interest emerges).

126. Sell, *Revenge of the "Nerds," supra* note 41, at 69–70 (describing the importance of both discursive framing of issues and networked organization to building powerful social movements).

easily able to organize around environmental regulation than the general public, which faces a considerable collective action problem.

Public interest groups can intervene in this dynamic, but their resources are often limited relative to industry. When industry is able to strategically shift lawmaking forums, the shift creates considerable additional costs for public interest groups who must learn new rules and expand limited resources across multiple venues.[127]

Domestic and international environmental law is affected by rules established in the free trade agreements negotiated by the USTR. It is no surprise that environmental advocates found much to criticize in the U.S. trade negotiation system.[128] In the 1990s, during negotiations of NAFTA and the Uruguay round of the General Agreement on Tariffs and Trade ("GATT"), environmentalists faced information capture dynamics at the USTR very similar to what public interest IP advocates face today.

Environmentalists accused the U.S. trade regime of clashing with fundamental democratic principles.[129] On closer examination, they faced sectoral advisory committees with no environmentalist input and Congressional negotiating objectives that failed to adequately address the public interest in the environment.[130] Criticisms grew so heated that President Clinton established a trade and environment advisory committee by Executive Order.[131] One senator proposed modifying fast track to allow Congressional amendments to particular subject matter areas, including environmental law and labor standards.[132] The modification did not pass, but when Congress reauthorized fast track in 2002, it added specific negotiating objectives addressing the public interest in both labor and the

127. *See, e.g.*, Helfer, *supra* note 21, at 14–15 & n.51 (describing the phenomenon by which actors can attempt to gain an advantage relative to others by changing the status quo through "regime shifting").

128. *See* Goldman, *supra* note 18, at 634–43 (describing the ways in which trade negotiations and agreements have resulted in weakened standards for international environmental law).

129. *Id.* at 643–48.

130. *Id. See also* Omnibus Foreign Trade and Competitiveness Act § 1101(b), 19 U.S.C. § 2901(b) (2012) (neglecting to include environmental improvement in a list of the United States' principal trade negotiating objectives).

131. Exec. Order No. 12,905, 59 Fed. Reg. 14,733, 14,733 (Mar. 25, 1994).

132. S. Res. 109, 102d Cong. (1991). *See also Sen. Riegle Introduces Resolutions to Modify Fast-Track Procedure to Permit Amendments*, 8 INT'L TRADE REP. 600, 601 (Apr. 24, 1991) ("Under the proposal, the fast-track no-amendment rule would be modified and amendments would be allowed in the area[] of . . . environmental standards . . . ."). Senator Riegle "vowed to bring up and append the resolution in a future year to a 'must-pass' piece of legislation." Koh, *supra* note 8, at 157 n.38. Representative Levin introduced a similar bill in the House. David S. Cloud, *Lawmakers Offer Plans to Modify Fast Track*, 49 CONG. Q. 1047, 1047 (Apr. 27, 1991).

environment.[133]

Knowledge regulation faces many of the same collective action problems faced by the regulation of other public goods.[134] Intellectual property has the additional hurdle of being a highly specialized area, which both makes it challenging for public interest groups to highlight its saliency to the general public and more likely that the government will turn to stakeholders for expert advice.[135] It is not surprising, then, that regulating intellectual property through an institution structurally prone to capture will in fact result in capture of that institution.

As discussed above, the linkage of IP to trade has been much discussed and criticized.[136] However, the linkage is longstanding, and is unlikely to go away any time soon.[137] The question is how to structure the domestic institutions involved in the trade negotiation regime so that collective action problems are not exacerbated and capture is mitigated, if not prevented.

IV. WHY THE CAPTURE OF THE USTR HAS GONE UNEXAMINED

Legal scholars have failed to analyze the structural mechanisms of the USTR's capture because they have either assumed capture's existence or approached it only tangentially, through the framework of other debates.[138]

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133. 19 U.S.C. § 3802(b)(11).

134. *See* Kapczynski, *supra* note 25, at 845–47 (describing the term "intellectual property" as a frame for understanding a variety of related rights that has had the effect of facilitating and strengthening alliances amongst holders of these rights); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS 33, 40–44 (2003) (discussing the ways in which intellectual property is—and is not—characterized by collective action problems).

135. *See* Wagner, *supra* note 6, at 1344 (noting that for rules that are less nationally salient, "relative obscurity is central to understanding why they may be uniquely susceptible to information capture"); SELL, PRIVATE POWER, *supra* note 2, at 47, 99 (describing IP lawyers as "privileged purveyors of expertise," and positing that this gives them an advantage over the general public in influencing trade negotiations and other government policy).

136. *See, e.g.*, J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 754–61 (1989) (discussing the complaints of industrialized countries regarding IP's treatment in international trade); Pager, *supra* note 20, at 216–20 (same).

137. *See* Okediji, *supra* note 26, at 129 (observing that "the TRIPS Agreement may be *less* the tour de force that scholars have assumed, and may represent instead an instrumentalist 'pause' in what has been an enduring feature of international relations" (emphasis in original)).

138. Scholars have previously identified that private actors used Congress, the USTR, and an international network of affiliates both in and out of government to promulgate a maximalist IP agenda in the lead-up to the TRIPS Agreement. SELL, PRIVATE POWER, *supra* note 2, at 24–26. *See also* DRAHOS WITH BRAITHWAITE, *supra* note 39, at 126 ("The way to maximize [control over a particular IP] . . . was through copyright protection. . . . The GATT offered the first entrants . . . a perfect platform to this end."). Susan K. Sell has additionally identified three broader mechanisms through which

Experts in the subject matter exported through trade agreements—such as environmental law, public health, and IP—tend to assume capture without addressing the laws, or lack of laws, that enable it. Instead of crying capture, however, subject-matter experts focus on calling for increased transparency and direct democratic accountability.[139]

To international and constitutional law scholars, however, the trade negotiation regime represents a compromise that solves longstanding challenges in international lawmaking.[140] The trade regime may be less directly accountable and less transparent than other methods of U.S. lawmaking, but these features are, according to a number of scholars, the result of a carefully calculated historical tradeoff to ensure efficacy and prevent capture in Congress.

The current debate over trade negotiations thus focuses on the democratic process, and to some extent on the lack of transparency, and appears to be at an impasse. These two groups are talking past each other. Subject-matter experts are not interested in transparency for transparency's sake; they are concerned about their inability to participate in and correct substantively skewed lawmaking. International legal scholars, on the other hand, are correct that the fast-track negotiating mechanism does contain multiple opportunities for democratic accountability and congressional oversight. The capture lens reorients this discussion to identify problems neither group has addressed, but on which they might actually end up agreeing.

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intellectual property maximalists influence U.S. lawmaking both domestically and abroad: campaign finance, data dependence, and the revolving door. Sell, *Revenge of the "Nerds," supra* note 41, at 72–74. This Article, in contrast to those valuable historical accounts, brings capture literature to bear on the USTR's current institutional structure, and into the current conversation about transparency, accountability, and fast track.

139. *See, e.g.*, Goldman, *supra* note 18, at 633 ("The international trade system operates contrary to every principle of democracy and government accountability imbedded in U.S. domestic policymaking. Secrecy pervades the entire system. Trade officials operate behind closed doors with no public record of their activities when they negotiate or implement trade agreements or when they resolve disputes arising under them.").

140. *See* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 905–06 (1995) (describing fast track as crucial to the success of the Trade Act in facilitating international agreements); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1304–05 (2008) (attributing to fast track "some of the most important congressional-executive agreements still in effect today"); Koh, *supra* note 8, at 148 (describing fast track's beneficial effects, including its mitigation of "domestic special interest group pressures that might otherwise have provoked extensive, *ad hoc* amendment of a negotiated trade accord").

A. THE FOCUS ON FAST TRACK

The U.S. trade negotiating process is a relatively recent statutory innovation that departs from constitutional mandates. It has been the focus of much discussion by legal scholars, for whom the trade negotiating process represents a successful compromise between governmental branches that allows international law to get made.[141] The usual puzzle in international law is how to overcome significant hurdles to both negotiation and implementation.[142] The domestic side of the international lawmaking process has been one of these hurdles. Thus, when critics point to the lack of democratic accountability in the trade negotiating process, scholars see a lack of understanding of the historical inefficacy of alternative procedures.

Congress devised fast track in 1974 after a series of perceived failures in the domestic side of international lawmaking. In the first half of the twentieth century, international lawmaking was subject to capture through Congress, unreliability with respect to international partners, and isolationism after World War I. These failures led to widespread criticism of the Article II treaty-negotiating process and a series of decisions by Congress to voluntarily give more control to the executive branch.[143]

In the early twentieth century, two types of congressional behavior gave rise to significant concerns about Congress's participation in international trade. The first concern was that Congress's participation could result in unreliable agreements. Congress twice decided to unilaterally withdraw from existing trade agreements that had never been ratified through the Article II process.[144] The executive branch was left to explain to its negotiating partners that these agreements did not have the full legal force of treaties, and thus could not be relied on as stable law.[145] Congress worsened the situation by pursuing an aggressively protectionist agenda. In 1930, Congress raised tariffs to the most protectionist levels in

141. Ackerman & Golove, *supra* note 140, at 905–06.

142. *See, e.g.*, Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 67–68 (2013) (recommending "persuasion treaties," which require states to persuade third parties to comply through regulation, as a means for ameliorating the implementation problems associated with most treaties).

143. *See generally* Ackerman & Golove, *supra* note 140 (describing the United States' historical frustrations in the arena of international lawmaking and Congress's eventual push for change)

144. Congress authorized the President to negotiate tariff agreements with Brazil and France, and then later unilaterally withdrew from both arrangements. *Id.* at 822–25.

145. Acting Secretary of State Huntington Wilson wrote to France: "I have the honor to remind you that these commercial agreements, not being treaties in the constitutional sense . . . would, in the absence of enabling legislation by Congress, have been terminated ipso facto on the going into effect of the tariff act . . . ." Letter from Huntington Wilson, Acting Secretary of State, to the French Chargé (Aug. 23, 1909), *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE U. S. 251 (1914).

U.S. history, in response to Congressional logrolling by domestic interests.[146] This triggered retaliatory measures by U.S. trading partners, halting international trade, and has been cited as a core cause of the Great Depression.[147] Ironically, given the current capture of the USTR, one of the primary justifications for placing trade negotiations in the executive branch was to avoid protectionist capture in Congress.

Thus in 1934, Congress responded positively to the president's pleas that it give the executive branch the authority to independently negotiate stable trade agreements.[148] The Trade Act of 1934 gave the president authority to negotiate and conclude international trade agreements without notifying or consulting Congress.[149] Compared to modern congressional-executive agreements, the grant was limited in a number of ways.[150] However, the 1934 trade negotiating system was a more complete delegation than the modern trade regime, because Congress did not retain any checks over the negotiations or the final agreements.[151]

The fast track regime that has more recently governed trade is a hybrid

146. ROBERT A. PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 1929–1976 78 (1980); Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1194 (1986).

147. H.R. REP. NO. 73-1000, at 2 (1934) (citing "high trade barriers built up in a frenzied effort to gain a so-called 'favorable balance of trade'" as cause of the Great Depression). *See also* PASTOR, *supra* note 146, at 79 (discussing the role of the Smoot-Hawley Tariff Act in worsening the Great Depression).

148. FRANKLIN D. ROOSEVELT, REQUEST TO AUTHORIZE THE EXECUTIVE TO ENTER INTO EXECUTIVE COMMERCIAL AGREEMENTS WITH FOREIGN NATIONS, H.R. DOC. NO. 73-273, at 2 (1934) ("[O]ther governments are to an ever-increasing extent winning their share of international trade by negotiated reciprocal trade agreements. If American agricultural and industrial interests are to retain their deserved place in this trade, the American Government must be in a position to bargain for that place with other governments . . . . If the American Government is not in a position to make fair offers for fair opportunities, its trade will be superseded. If it is not in a position at a given moment rapidly to alter the terms on which it is willing to deal with other countries, it cannot adequately protect its trade against discriminations and against bargains injurious to its interests. Furthermore, a promise to which prompt effect cannot be given is not an inducement which can pass current at par in commercial negotiations. For this reason any smaller degree of authority in the hands of the Executive would be ineffective. The executive branches of virtually all other important trading countries already possess some such power.").

149. An Act to Amend the Tariff Act of 1930, Pub. L. No. 73-316, § 350(a)(1)–(2), 48 Stat. 943, 943–44 (codified as amended at 19 U.S.C. § 1351 (2012)).

150. The scope of the authorized agreements was relatively narrow, focusing on tariff barriers, and the length of the grant of authority was relatively short, sunsetting after three years. *Id.* § 2(c), 48 Stat. at 944.

151. The delegation of authority to the executive branch in the international arena can be seen as a parallel to domestic delegations to expert administrative agencies during the New Deal. Ackerman & Golove, *supra* note 140, at 848 ("In the domestic arena, [empowering the executive to take decisive action] meant delegation of lawmaking authority to expert administrative agencies under presidential control. Internationally, it meant the same thing.").

arrangement, an ex post congressional-executive agreement that neither fully delegates authority to the executive branch nor retains full Article II control in the Senate.[152] The Article II Treaty Clause requires the approval of two-thirds of the Senate for treaty ratification.[153] Article II treaties are notoriously difficult to both ratify and implement.[154] The Senate monopoly has allowed minorities to "blackmail" or "hold hostage" the treaty process, "even in the face of broad popular support."[155] In the 1940s, nationwide criticism of the Treaty Clause, which was seen as the source of U.S. isolationism after World War I, resulted in a proposed Constitutional amendment that made its way through the House.[156] In response to this popular criticism of the Article II process, the government arrived at a compromise. [157] The congressional-executive agreement permits the authorization and completion of international law through a majority of both houses of Congress, instead of a two-thirds majority in the Senate.[158]

Congressional-executive agreements have significant benefits over Article II treaties.[159] They are arguably more democratic, because they go in front of all of Congress instead of just the Senate.[160] They are less likely to be blocked by minority interest groups, which can more easily obstruct the necessary two-thirds majority in the Senate.[161] They are more reliable from the perspective of our international partners, because they lower the hurdles to making international law domestically binding by combining the ratification and implementation stages of international lawmaking into one

152. Oona A. Hathaway has distinguished between the two kinds of congressional-executive agreements, ex post and ex ante. Ex ante congressional-executive agreements more closely resemble a complete delegation and thus are subject to more accountability concerns. Ex post congressional-executive agreements, such as fast track, allow Congress to retain some control over the executive branch by requiring a return to Congress for approval. Hathaway, *supra* note 94, at 144 n.5.

153. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2, cl. 2.

154. *See* Hathaway, *supra* note 140, at 1312 (explaining that the conclusion of Article II treaties "can be halted by those far outside of the mainstream").

155. *Id.* ("Treaties . . . can be held hostage even in the face of broad popular support."); Ackerman & Golove, *supra* note 140, at 870 (observing that the Senate's role in treaty ratification, "when married to the two-thirds rule, was a standing invitation for sectional interests to blackmail the majority").

156. Ackerman & Golove, *supra* note 140, at 862–65. By 1944, a Gallup poll reported that 60 percent of respondents favored a two-house ratification process over the Senate alone. *Id.* at 863.

157. *Id.* at 890–91 (calling the use of congressional-executive agreements a "constitutional compromise").

158. *Id.* at 802–03.

159. This may be true, at least, of ex post congressional-executive agreements. Hathaway, *supra* note 140 at 1307–08. For a description of the problems with ex ante congressional-executive agreements, see Hathaway, *supra* note 94, at 145–48.

160. Ackerman & Golove, *supra* note 140, at 870 (describing the "blatantly undemocratic character" of Senatorial treaty making); Hathaway, *supra* note 140, at 1308.

161. Hathaway, *supra* note 140, at 1307.

step.[162] Finally, although courts are not decided on the issue, congressional-executive agreements may be more difficult for the President to unilaterally undo.[163]

The fast track trade negotiating process enacted in 1974 is a type of congressional-executive agreement. Through fast track, Congress authorizes the executive to depart from the more burdensome Article II treaty process, but retains the authority to approve or reject the final agreement. Once Congress accepts the agreement, it is also statutorily bound to simultaneously implement the agreement domestically.[164] In contrast to the normal legislative process, fast track shortens committee deliberation and bundles issues into an up-or-down vote subject to limited floor debate and no filibusters.[165] Congress may not hold formal hearings on the implementing bill, and may not offer amendments.[166]

Critics point out that by placing negotiations in the executive branch, by bundling subject matters into one agreement, and by limiting Congress to an up-or-down vote with no amendments, fast track offers less democratic accountability than the usual legislative process.[167] Proponents respond by pointing to a series of levers that limit the discretion of the executive branch. Fast track limits executive discretion in at least four ways: by specifying negotiating objectives, by creating sunset provisions, by requiring consultations with congressional and private sector advisers, and by imposing a range of certification and post-negotiation reporting requirements.[168] Congress can influence trade negotiations in at least three ways during the process itself: through a committee gatekeeping procedure, through the executive branch's awareness that it has to return to that

162. *Id.* at 1317.

163. *Id.* at 1307 (describing how in the Article II treaty process, "agreements are much more vulnerable to being held hostage by a small number of extreme political actors, are more difficult to implement, and can be easier for the President to unilaterally undo").

164. *Id.* at 1317 (noting that this one-step implementation process is a lower hurdle to international lawmaking than the usual two-step ratification and implementation process). In practice, however, Congress now rarely changes U.S. law.

165. Koh, *supra* note 8, at 163–64.

166. *Id.*

167. *See* Goldman, *supra* note 18, at 654–55 (arguing that fast track procedures "drastically reduce the opportunities for Congress and the public to shape the terms of an agreement"); Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT'L L.J. 699, 735–36 (1994) (noting that fast track agreements remove important issues from serious public consideration, are cloaked in secrecy, and involve agency action that is technically not subject to judicial review). *But see* Koh, *supra* note 8, at 163–66 (arguing that none of the features of fast track are by themselves "inherently undemocratic").

168. Koh, *supra* note 146, at 1204–05. Congress also embedded fast track with six legislative vetoes, but these were invalidated by *INS v. Chadha*. *Id.* at 1208–10.

committee, and by allowing either house to vote down the agreement after its conclusion.[169]

Thus, critics of fast track who claim it lodges too much authority in the executive branch find their criticisms falling on unsympathetic ears. The fast track process allows international law to get made, whereas Article II treaties often do not. The process is more democratically accountable than a pure delegation to the executive branch. Public interest groups can still go to Congress to rally for rejection of trade agreements or to check the negotiating agenda. Indeed, there have been several examples of successful use of Congressional mechanisms to influence U.S. trade.[170] For example, in 2007, the White House agreed under pressure from Congress to changes in the Peru and Panama Free Trade Agreements, including adding the formal recognition of public health exceptions to IP law to the agreements.[171]

The biggest argument in fast track's favor is that the alternative may be unilateral executive action. When fast track expired in 2007, the USTR had already begun negotiating the Anti-Counterfeiting Trade Agreement ("ACTA"). In the absence of fast track, the USTR initially claimed that ACTA was a sole executive agreement, subject to the President's inherent Constitutional authority.[172] The USTR then changed tactics and explained that ACTA was in fact a congressional-executive agreement, authorized ex ante by Congress in the 2008 Prioritizing Resources and Organization for Intellectual Property Act.[173] At no point did the executive branch suggest

169. For a description of the 1984 modification of fast track procedures, which generally provided that in future bilateral trade talks the President would have to notify and consult with various Congressional committees and obtain their consent, see *id.* at 1212–14. Under the new procedure, the President must additionally notify and consult with the House Ways and Means Committee and the Senate Finance Committee. If neither committee disapproves of negotiations during the consultation period, the negotiated agreement is subject to the fast track process. Trade and Tariff Act of 1984, Pub. L. 98-573, sec. 401(a), § 102(b), 98 Stat. 2948, 3013–15 (codified as amended at 19 U.S.C. § 2112(b)(4)(A) (2012)).

170. In the opening of negotiations over the U.S.-Canada Free Trade Agreement, for example, a majority of the Senate Finance Committee threatened to disapprove the negotiations and President Reagan had to make promises to Senate members in exchange for fast track authorization. Koh, *supra* note 8, at 149–50.

171. Sungjoon Cho, *The Bush Administration and Democrats Reach a Bipartisan Deal on Trade Policy*, AM. SOC'Y INT'L L. (May 31, 2007), http://www.asil.org/insights/volume/11/issue/15/bush-administration-and-democrats-reach-bipartisan-deal-trade-policy.

172. Sean Flynn, *ACTA's Constitutional Problem: The Treaty Is Not a Treaty*, 26 AM. U. INT'L REV. 903, 904 (2011); Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements*, 35 YALE J. INT'L. L. ONLINE 24, 27 (2009).

173. Letter from Harold Hongju Koh, Department of State Legal Adviser, to the Hon. Ron Wyden

that ACTA might be an Article II Treaty; it preferred, unsurprisingly, to operate unilaterally. Scholars and advocates—this author included—questioned the constitutionality of this approach.[174]

B. TRADE AND TRANSPARENCY

Proponents of the fast track process point to the existence of substantial structural checks on executive branch discretion.[175] But a feature of the trade regime makes it challenging for public interest groups to employ existing accountability levers: its reliance on secrecy.[176] Public interest groups are not given access to negotiating documents, including the text of proposed agreements.[177] They thus struggle to rally the support necessary to alter the trade agenda through Congress.

The USTR's lack of transparency has been criticized as both preventing accountability and undermining government legitimacy.[178] Secrecy prevents accountability because it prevents public debate over the substance of agreements.[179] Secrecy undermines government legitimacy because it prevents the public participation that legitimizes and creates ownership of public policy.[180]

(Mar. 6 2012), *available at* http://infojustice.org/wp-content/uploads/2012/03/84365507-State-Department-Response-to-Wyden-on-ACTA.pdf.

174. *See* Letter from Margot Kaminski et al. to U.S. Senate Committee on Finance (May 16, 2012), *available at* http://infojustice.org/wp-content/uploads/2012/05/Law-Professor-Letter-to-Senate-Finance-Committee-May-16-20122.pdf.

175. Koh, *supra* note 8, at 166–71.

176. Goldman, *supra* note 18, at 633 ("Secrecy pervades the entire system. Trade officials operate behind closed doors with no public record of their activities when they negotiate or implement trade agreements or when they resolve disputes arising under them."); Housman, *supra* note 167, at 732 ("Trade negotiations are conducted behind closed doors. Trade agreements and their implementing legislation are considered restricted documents. . . . This secrecy shelters the agreements and their implementing legislation from critical analysis." (footnotes omitted)).

177. *See* Goldman, *supra* note 18, at 667 ("As a matter of practice, the USTR does not make the text of the agreement available to the public until a final trade agreement has been completed. Of course, once the agreement has been completed, it is too late to ameliorate any adverse effects of its provisions. Even then, it often takes weeks, good connections, and money to obtain a copy of the agreement."); Katt, *supra* note 97, at 679–80 (observing that critics of secrecy in trade have tried with limited success "to gain access to negotiating documents shared by the United States with other governments prior to the conclusion of a free trade agreement" (footnotes omitted)).

178. *See, e.g.*, Katt, *supra* note 97, at 681 ("Too much secrecy can weaken accountability and undermine the legitimacy of government action in the public eye").

179. *See, e.g.*, Yu, *supra* note 35, at 1011 ("Without the release of the draft text, it was indeed hard for lawmakers and the public at large to debate whether the treaty reflected appropriate standards and policies.").

180. *See* Bridy, *supra* note 96, at 160 ("[T]he process associated with SOPA/PIPA has the greater normative claim [over the process associated with ACTA] to democratic legitimacy. . . . [L]awmaking processes meet the conditions for democratic legitimacy only if they remain porous, sensitive, and

Critics have expressed a third problem with secrecy that comes close to identifying the capture problem. They express concern over the inequality of input into the negotiating process.[181] While the public is not able to provide input into the trade agenda, select private industry groups can and do. This concern over input is a concern about fairness, but it also indicates a presumption of capture, and gives a hint as to the underlying source of transparency concerns.

In their proposed solutions, critics of the USTR's lack of transparency tend to focus on voluntary measures and the role of FOIA exemptions.[182] Many also criticize the trade advisory system.[183] But none directly identify the problem of institutional capture, or link it to how the advisory committee system works at the USTR.

C. WHAT THE CAPTURE LENS REVEALS

Identifying the USTR as a captured institution reveals a way to reconcile—or at least reopen conversation between—opposing views of the trade negotiating process. The capture lens reveals that some of the accountability mechanisms identified by fast track proponents in fact exacerbate the capture problem. And the capture lens explains why making the USTR more transparent through FOIA is only a partial solution.

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receptive to the suggestions, issues and contributions, information and arguments that flow from a discursively structured public sphere, that is, one that is pluralistic, close to the grass roots, and relatively undisturbed by the effects of power." (internal quotation marks omitted)).

181. *See, e.g.*, Goldman, *supra* note 18, at 666 (arguing that secrecy's "detrimental effects are then compounded by the trade advisory committee system, which gives hundreds of industries access to information that is not shared with the general public"); Housman, *supra* note 167, at 742 ("Rather than preventing protectionism, secrecy allows for the inequitable status quo that at times favors the continuation of protectionism—protectionist players are already essentially in the room and the closed door just prevents others from entering."); Levine, *supra* note 9, 141–46 (arguing that trade negotiations should be more transparent in order to allow increased input by public experts); Yu, *supra* note 35, at 998, 1012 (explaining that ACTA had "very limited public, nonindustry participation" and that "[d]uring the negotiations, the U.S. administration provided key briefings to selected industry groups, even though it had kept the public in the dark").

182. *See* Katt, *supra* note 97, at 693–99 (proposing that the USTR withhold negotiating documents pursuant only to FOIA Exemption 5, which shields documents relating to agencies' deliberative processes, rather than Exemption 1, which sweeps more broadly to cover all documents related to national security); Levine, *supra* note 9, at 144 (proposing that FOIA weigh the necessity of input on trade agreements from public experts against the risk of disclosure of negotiating information to the interests of the U.S. or its negotiating partners).

183. Goldman, *supra* note 18, at 666 ("Modifying the trade advisory system . . . would decrease the preferred access industries have to information and the trade policy-making apparatus."); Levine, *supra* note 9, at 110 n.11 ("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 [which takes into account the advice of public experts] is clearly needed.").

Several of the features of fast track that look like accountability mechanisms to its proponents in fact contribute to the USTR's capture. The use of advisory committees may constrain executive discretion, but the committees encourage capture by distorting informational input into the regulatory process.

The capture lens also links transparency complaints to complaints about a lack of accountability mechanisms. Public interest groups are concerned about the lack of transparency because they are concerned about their inability to offset industry input into the substance of trade agreements. In the absence of transparency, public interest groups cannot avail themselves of accountability mechanisms because they cannot lobby Congress on substance they cannot see. Critics of the substance of trade negotiations thus default to advocating around the deficiencies of the process.

The capture lens shows why current proposals to resolve the lack of transparency through applying FOIA would not fully solve the capture problem. Few discussions of FOIA take into account the timing of possible input and the importance of gaining the agency's attention through formal input channels.[184] FOIA provides information after the fact, while formal input channels such as advisory committees allow participation during negotiations. Releasing information through FOIA would still leave public interest groups, left-out stakeholders, and the general public in the position of trying to catch the USTR's ear. Transparency criticisms also fail to take into account the USTR's historic biases. Being allowed to see negotiating documents may give public interest groups and others the needed leverage to better lobby Congress, but they will still face a USTR normatively skewed toward IP enforcement.

The capture lens thus lets us identify the role of the normative mandates Congress provides the USTR where transparency and accountability criticisms do not. It also explains why statutorily mandated accountability mechanisms fail to address criticisms from public interest groups. And it suggests that a holistic institutional solution is required.

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184. Annemarie Bridy has criticized David Levine's account of FOIA at the USTR for failing to take into account the importance of formal input channels. *See* Bridy, *supra* note 96, at 160–61 ("Lawmaking as institutionalized problem-solving relies on information and opinion inputs from the public as well as outputs to it, and the conduits through which those inputs and outputs flow must be structural, multiple, and open. Policymaking in the discourse-theoretic sense is not an autistic endeavor, although that is essentially what it became in the process that produced ACTA. Nor is it a process whose requirement for communicative openness can be satisfied by a FOIA document dump." (footnote omitted)).

Recent calls to take IP out of trade indicate that the trade regime remains problematic.[185] But revisiting existing conversations about the trade regime will result in a familiar impasse. As Congress considers reenacting fast track at the request of the executive branch, it should look at the USTR for what it is: a captured agency that resulted from Congress's attempts to shield the trade agenda from Congressional hold-outs. The next section of this Article explains the substantive consequences of the capture of the U.S. trade regime.

V. THE EFFECTS ON IP LAW

The USTR exports intellectual property law that differs from domestic law, sometimes in subtle ways. While a number of academics and advocates have remarked on individual discrepancies, nobody has systematically explained what happens to U.S. law as it goes through the USTR.[186]

The USTR has been tasked by Congress with exporting U.S. intellectual property law, not binding the United States to new international standards.[187] But the USTR does not export the content of U.S. statutes. It exports a version of the law drawn carefully from both statutory provisions and judicial decisions, influenced by expert advice, and paraphrased to be amenable to the interests that are able to see, and advise on, the text of U.S. negotiating proposals during negotiations.

I call the process through which the USTR paraphrases U.S. law for export "regulatory paraphrasing." The process is "regulatory" in nature because it occurs through an agency of the executive branch. It is "paraphrasing" because, unlike domestic administrative lawmaking, it does not elaborate on gaps left by Congress, but repackages existing U.S. law.

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185. See Maira Sutton, *Stop Congress From Taking the Fast Track to One-Sided Copyright Laws*, ELECTRONIC FRONTIER FOUND. (Aug. 5, 2013), https://www.eff.org/deeplinks/2013/08/stop-congress-taking-fast-track-one-sided-copyright-laws ("Copyright policies do not belong in trade agreements—period.").

186. For a report that comes closest to systematically explaining the USTR's impact on domestic IP law, see Abbott, *supra* note 4, at 6–17.

187. *See* 19 U.S.C. § 3802(b)(4)(A)(i)(II) (2012) (describing one of the principal negotiating objectives of the United States in trade talks as "ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law"); Abbott, *supra* note 4, at 4 (explaining that "Congress has made a practice of expressly denying self-executing effect to the FTAs in its implementing legislation"). *See also*, Act to Implement the Dominican Republic-Central America-United States Free Trade Agreement, Pub. L. 109-53, § 102, 119 Stat. 462, 464–65 (2005) (codified as amended at 19 U.S.C. 4012 (2012)) (stating that nothing in the trade agreement should apply to the extent that it is inconsistent with American law).

Regulatory paraphrasing allows for changes to be made in the law through information capture. The effects of capture in other regulatory areas can be obvious: capture often buys concrete policy outcomes, like higher utility prices.[188] But here, the result of capture is unusual, and challenging to identify. Because policy outcomes are constrained by Congress's preference to not make new domestic law, capture takes an unfamiliar route. The USTR's output is subtly captured language, written within constraints.

There are indications that the USTR takes its mission to stay within U.S. law seriously. This restricts the extent to which information capture produces advisor-favoring results. Capture over information flow into the USTR thus does not result in agreements that perfectly benefit the advising industries. The agreements, for example, export a system of limitations on liability for online intermediaries, where the copyright-intensive industries on the advisory committee might prefer that no limitations exist at all. It is not clear, in fact, that the USTR recognizes what is happening as capture. When the advisory committees address the USTR, they characterize their advice as following existing U.S. law, but in fact propose changes to U.S. law or interpretations of U.S. law that favor them.[189] The USTR, relying on its advisors and not staffed with experts in intellectual property law, might not understand the consequences of the subtle changes it exports.

However, within the broader strokes that resemble U.S. intellectual property law, subtle—but important—changes have been made. The advisory committee members have specifically asked for a number of these changes. Other discrepancies may be unintentional. Even unintentional discrepancies, however, can be understood as the result of capture through informational asymmetry, because a stakeholder that could have seen the discrepancy and argued its importance was not party to the conversation about the text at the time.

Regulatory paraphrasing—paraphrasing law through an agency—need

188. *See, e.g.*, Dal Bó, *supra* note 43, at 203 (noting that "[m]ost of the literature that is explicitly concerned with regulatory capture has been developed in the context of utility regulation").

189. The IP advisory committee uses phrases like "this follows U.S. law" to actually propose an interpretation of U.S. law that favors its interests. ITAC PANAMA REPORT, *supra* note 54, at 12 ("Unfortunately, the text does not contain a provision *which follows U.S. law* (17 USC § 602) providing for the right of a copyright owner to prevent parallel imports of its products manufactured outside Panama that are not intended for distribution in that country. The failure to obtain such important protection is a deficiency in the copyright text." (emphasis added)). In *Kirtsaeng v. John Wiley & Sons*, the U.S. Supreme Court interpreted U.S. statutes to directly disagree with this conclusion. *See infra* note 262 and accompanying text. This shows that banning international first sale doctrine as suggested by the ITAC here does not "follow U.S. law."

not be inherently problematic. The USTR is unlikely to ever export U.S. statutory law word-for-word, nor should it have to. If a more balanced range of stakeholders were present to advise on the state of U.S. law, paraphrasing would not necessarily produce the same problems. A balanced group of stakeholders might steer the USTR away from taking a side in circuit splits, or leaving out key language, or including other language at such a level of detail.

The capture of regulatory paraphrasing exploits the natural elasticity of language. When the language of the USTR's free trade agreements is applied to U.S. law, it is read broadly; but when it is applied to other legal systems, it is read narrowly. If the language is read broadly, U.S. law can for the most part be read as consistent with the USTR's agreements—although there are now some unresolvable divergences between the free trade agreements and current U.S. law. But when the agreements are implemented in other countries, the language is often read narrowly, ignoring the space left for flexibilities.[190] Exploiting the flexibilities in language, through implementation or through judicial interpretations, is costly. So the capture of the USTR's paraphrasing is in large part concerned with shifting lawmaking costs.

Advising industries use paraphrasing to shift the domestic institutions in which lawmaking takes place, by departing from the legislative balance between broader and narrower language.[191] This changes how long it will take for a legal system to reach a particular decision, and thus shifts costs.[192] Specific legislative language draws bright-line answers now, while broader language leaves spaces for judicial or regulatory interpretations later.[193] Depending on whether advising industries like or dislike aspects of domestic law, they might advise the USTR to paraphrase broad language into narrower language, or narrow language into broader language. If they

190. CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 200 (2009) (observing that many developing countries' IP offices were particularly vulnerable to the influence of wealthy IP donors on their decisionmaking, since their IP officials tended to lack training and awareness of the relevant issues).

191. This distinction between broad and narrow language mirrors the classic distinction between rules and standards. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992) ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider.").

192. *See* Super, *supra* note 44, at 1377 ("One of law's most basic functions is to displace decisions across time. . . . Legal discourse is deeply ambivalent about the proper timing of decisions.").

193. For a distinction between bright-line rules and more open-ended standards based on the timing issues underlying their application, see Kaplow, *supra* note 191, at 559–60.

like a particular judicial holding, they may ask the USTR to fix it as a rule, because exporting a fixed rule will be less costly than having to litigate for a favorable holding in the implementing jurisdiction. And if they dislike a particular domestic rule, they may suggest that it be paraphrased into broader, more permissive language, so supporters of the rule will have to bear either the cost of litigation for its application abroad, or the cost of identifying and adding the abandoned rule to implementing legislation in other countries.

The process of regulatory paraphrasing similarly allows advising industries to advise the USTR to omit long-fought-for balancing measures that exist in U.S. law. The paraphrased law usually leaves space for measures that exist in the United States, but does not export them to other countries.[194] This is similar to the omission of unfavorable rules; but often what is omitted is an entire balancing mechanism, or contextual rights regimes, such as protections for speech and privacy.

Congress does not change U.S. law, and the USTR claims that the law it exports is consistent with U.S. law, or at least "coloring within the lines."[195] Because of this, the USTR's version of regulatory paraphrasing has flown under the radar of most scholars, except those most well-versed in affected subject matter areas. But a detailed examination of a particular subject matter such as intellectual property law shows that a USTR that listens to detailed textual advice from a small subset of stakeholder perspectives paraphrases U.S. law in distorting ways.

Intellectual property law is tasked with striking a delicate balance between creator and user interests. Intellectual property is justified by utilitarian reasoning in the United States, where it exists "not to provide a special private benefit . . . but to stimulate . . . creativity for the general public good."[196] Supreme Court caselaw often refers to this objective.[197] The IP law exported by the USTR in free trade agreements, however, is

194. For a discussion about how this process of selective exportation of U.S. IP law may lead to a disparity in the way free trade agreement rules are implemented, see Abbott, *supra* note 4, at 1 ("The United States already has in place a sophisticated system of checks and balances to offset the general intellectual property and regulatory standards which are reflected in the FTAs. . . . Developing countries may not have such checks and balances in place and may be limited in the technical capacity to implement such checks and balances effectively.").

195. Katz, *supra* note 53.

196. *See* Eldred v. Ashcroft, 537 U.S. 186, 245–46 (2003) (Breyer, J., dissenting) (citations omitted) (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) and Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (internal quotation marks omitted).

197. *See, e.g.*, *id.*; Mazer v. Stein, 347 U.S. 201, 219 (1954) ("[C]opyright law . . . makes reward to the owner a secondary consideration.").

filtered through detailed advice given from an imbalanced perspective. It unsurprisingly often reflects the interests of those stakeholders on the IP advisory committee, or fails to reflect the interests of those stakeholders least likely to be privy to the USTR's attention: the public.

There are recent indications that the balance within the USTR system may be changing, either in response to public pressures or as a matter of internal policy changes within the executive branch. For example, the USTR recently announced that it will seek a new copyright exceptions provision in the Trans-Pacific Partnership Agreement ("TPP").[198] And the USTR brought in public interest groups to see and comment on the text of the Anti-Counterfeiting Trade Agreement, subject to nondisclosure agreements. And just before this Article went to press, the USTR proposed the creation of a tier two Public Interest Trade Advisory Committee ("PITAC").[199] But these changes were made at the discretion of the executive branch. The system as it is statutorily set up allows for information capture that results in the substantive discrepancies visible in past free trade agreements.

A. CHANGING AMBIGUOUS LANGUAGE TO MORE PRECISE LANGUAGE

A USTR that is subject to informational asymmetry will export precise language in lieu of broad or ambiguous statutory language, to prevent the advising industry from having to litigate for favorable rules in the implementing jurisdiction. In several cases, the USTR has exported favorable judicial holdings as rules where statutory IP law instead leaves questions to court interpretation. This paraphrasing process creates a significant problem when caselaw later shifts, and the rule exported by the USTR no longer comports with domestic caselaw.

For example, U.S. statutory copyright law is ambiguous as to whether

198. *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, USTR.GOV BLOG (July 3, 2012), http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision ("For the first time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized '3-step test,' that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. These principles are critical aspects of the U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region.").

199. For this author's thoughts on the PITAC, see Margot Kaminski, *Fixing International IP Capture? Some Problems with the Public Interest Trade Advisory Committee (PITAC)*, CONCURRING OPINIONS (Mar. 13, 2014), http://www.concurringopinions.com/archives/2014/03/fixing-international-ip-capture-some-problems-with-the-public-interest-trade-advisory-committee-pitac.html.

the first sale doctrine applies to goods lawfully made abroad.[200] If the first sale doctrine does not apply to goods made abroad, this benefits IP-intensive industries because they can set up IP licensing schemes country-by-country. In the U.S.-Jordan Free Trade Agreement, the USTR exported an advisor-favoring rule that did not exist in U.S. statutory law: the USTR declared that first sale doctrine does not apply to goods lawfully made abroad.[201] The USTR also offered this same language in the leaked proposal for the Trans-Pacific Partnership Agreement ("TPP").[202] But in 2013 the Supreme Court decided that the first sale doctrine does apply to works lawfully made abroad, leaving the language of an existing free trade agreement now in conflict with current U.S. law.[203] As the USTR was responding to its IP industry advisors, the advisory committee report noted its preference that first sale doctrine should not apply abroad.[204]

The same question of international exhaustion—another term for international first sale—has arisen in the patent context. Rent-seeking industries would prefer the absence of patent exhaustion rules. As in copyright law, there is no clear rule in domestic statutory law allowing or prohibiting international patent exhaustion. The rules arise instead from a series of court decisions. Prior to 2001, courts were split on whether to allow parallel imports of patented goods.[205] In 2001, the Court of Appeals for the Federal Circuit found that parallel imports are not allowed.[206] After the Supreme Court decided that copyright first sale does apply abroad,

200. The first sale doctrine entitles the owner of a particular lawful copy of a copyrighted work to sell or dispose of that copy without the copyright owner's permission. 17 U.S.C. § 109(a) (2012). *See also* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1354–55 (2013) ("In copyright jargon, the 'first sale' has 'exhausted' the copyright owner's . . . exclusive distribution right.").

201. *See* Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, art. 4, para. 11, Oct. 24, 2000, *available at* http://www.ustr.gov/sites/default/files/Jordan%20FTA.pdf (permitting authors to "prohibit the . . . importation into each Party's territory of copies of works and phonograms, even where such copies were made with the authorization of the author").

202. WIKILEAKS, SECRET TPP TREATY: ADVANCED INTELLECTUAL PROPERTY CHAPTER FOR ALL 12 NATIONS WITH NEGOTIATING POSITIONS 50 (2013) ("Each Party shall provide to authors . . . the right to authorize or prohibit the importation into that Party's territory of copies of the work . . . made outside that Party's territory with the authorization of the author.").

203. *Kirtsaeng*, 133 S. Ct. at 1355–56.

204. ITAC PANAMA REPORT, *supra* note 54, at 12.

205. Abbott, *supra* note 4, at 12.

206. *See* Jazz Photo Corp. v. ITC, 264 F.3d 1094, 1105 (Fed. Cir. 2001) ("United States patent rights are not exhausted by products of foreign provenance. To invoke the protection of the first sale doctrine, the authorized first sale must have occurred under the United States patent.") (citing Boesch v. Graff, 133 U.S. 697, 701–03 (1890)). *See also* Ninestar Tech. Co. v. ITC, 667 F.3d 1373, 1378 (Fed. Cir. 2012) (rejecting the appellant's argument that *Jazz Photo* was incorrectly decided and overruled by a subsequent case), *cert. denied*, 133 S. Ct. 1656 (2013).

patent attorneys waited to see if such exhaustion would apply in the patent context as well. In the meantime, the USTR has been exporting the Federal Circuit's 2001 standard. In the U.S.-Morocco free trade agreement, the USTR created a rule banning the parallel importation of patented goods.[207] The rule the USTR has exported exists only subject to a court interpretation that may, like the copyright exhaustion rule, change. As with copyright first sale, the IP advisory committee has expressed a clear preference for exporting a ban on international patent exhaustion.[208]

There are other examples. In its digital copyright enforcement provisions, the USTR has been exporting a 1993 Ninth Circuit interpretation of the statutory term "temporary copies," which suggests that all temporary electronic copies qualify as copies for purposes of copyright infringement.[209] The IP advisory committee has lauded the USTR for this move, describing the trade agreement's text as "[c]lear language assuring that temporary and transient copies (such as those made in the RAM of a computer) are nevertheless copies and fully subject to the reproduction right. This treatment is critical in a digital, networked world in which copyrighted material can be fully exploited without a permanent copy ever being made by the user . . . ."[210] This rule benefits rent-seeking industry because it defines a broad scope of what counts as copyright infringement online. U.S. courts have since split on their interpretations of this language, however, with the Second Circuit ruling in 2008 that copies of copyrighted

207. Agreement on Free Trade, U. S.-Morocco, art. 15.9, para. 4, June 15, 2004 [hereinafter U.S.-Morocco FTA], *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file797_3849.pdf.

208. ITAC PANAMA REPORT, *supra* note 54, at 16 ("ITAC-15 is particularly disappointed that the PTPA does not contain the obligation that each country must provide effective legal means to enable a patent owner to prevent the unauthorized importation of goods put on the market in another country by it or its agent. This provision, which is found, for example, in the Morocco FTA, ensures that a patent owner can prevent the international exhaustion of patent rights via a right of action to enforce contractual provisions that are violated outside the territory of Panama. ITAC-15 believes that it is critical that future FTAs include these restrictions on . . . international exhaustion . . . .").

209. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993) ("[W]e hold that the loading of software into the RAM creates a copy under the Copyright Act."). The USTR has been exporting the Ninth Circuit's interpretation of the Copyright Act. *See*, KORUS FTA, *supra* note 55, art. 18.4, para. 1 ("Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works . . . in any manner or form, permanent or temporary (including temporary storage in electronic form)." (footnotes omitted)). *See also* Jonathan Band, *The SOPA-TPP Nexus*, AM. U. WASHINGTON C. L. PROGRAM ON INFO. JUST. & INTELL. PROP. RES. PAPER SERIES, PAPER NO. 2012-06 28–29 (2012), *available at* http://digitalcommons.wcl.american.edu/research/28 (noting that several U.S. free trade agreements have incorporated *MAI Systems*' "controversial" interpretation of the Copyright Act into their language).

210. ITAC PANAMA REPORT, *supra* note 54, at 11.

works lasting 1.2 seconds did not constitute fixed copies for purposes of the Copyright Act.[211]

The effects of information asymmetry are visible in trademark law as well. In trademark law, courts of appeals have split over whether the United States recognizes foreign well-known marks.[213] The USTR has ignored the circuit split, and included a requirement that countries recognize the well-known marks doctrine even for unregistered marks.[214] This rule benefits advising industries when it is applied abroad, because it requires other countries to recognize well-known foreign marks, whether registered or not, and thus lowers the international costs of trademark registration. The language also extends this protection to dissimilar goods and services. The IP advisory committee has explained that it is "pleased with the broader scope of protection that will be required for well-known marks."[215]

The danger in exporting such court-made rules in lieu of statutory ambiguities is that the law can change as court interpretations diverge. If the Supreme Court eventually resolves these differences in interpretation, U.S. law may end up directly conflicting with language the USTR has

211. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008).

213. For an international convention proposal that well-known marks receive international protection, see Paris Convention for the Protection of Industrial Property, art. 6*bis*, Sept. 28, 1979, 53 Stat. 1748, 828 U.N.T.S. 3, *available at* http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html. For an example of the circuit split over the well-known marks doctrine in the United States, compare ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 155–65 (2d Cir. 2007) (discussing the well-known marks doctrine, and finding that it does not apply in the United States), with Grupo Gigante SA DE CV v. Dallo & Co., 391 F.3d 1088, 1098 (9th Cir. 2004) (holding that a non-U.S. trademark holder may qualify for a well-known mark exception to the territoriality rule if the owner can show the mark has acquired secondary meaning and "a *substantial* percentage of consumers in the relevant American market is familiar with the foreign mark." (emphasis in original)).

214. *See, e.g.*, Free Trade Agreement, U.S-Austl., art. 17.2, para. 6, May 18, 2004 [hereinafter U.S.-Australia FTA], *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf ("Article 6*bis* of the *Paris Convention* shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known mark, whether registered or not, provided that use of that mark in relation to those goods or services would indicate a connection between those goods or services and the owner of the mark, and provided that the interests of the owner of the mark are likely to be damaged by such use." (alteration in original) (footnote omitted)).

215. ITAC PANAMA REPORT, *supra* note 54, at 8 ("Industry is pleased with the broader scope of protection that will be required for well-known marks under 15.2.5. Similar to the Singapore FTA and CAFTA, this Agreement extends protection of well-known marks to dissimilar goods and services, whether registered or not, with the proviso that the expanded protection is based on an association between the goods/services and the owner of the well-known mark and when the interests of the trademark owner are likely to be damaged. In view of the frequency of infringements of well-known marks, the ability of well-known trademark owners to protect their marks on unregistered and dissimilar goods and services is critical to protecting these valuable assets.").

exported.

B. CHANGING PRECISE LANGUAGE TO MORE AMBIGUOUS LANGUAGE

Conversely, where specific rules exist that disfavor advising stakeholders, captured paraphrasing can fail to export them. The USTR fails to export domestic rules from within both statutory schemes and regulatory implementations of statutes. This allows advising industries to attempt to implement more favorable rules in other countries.

For example, the Digital Millennium Copyright Act ("DMCA") requires that online intermediaries reinstate taken-down material within ten to fourteen business days.[216] This rule benefits consumers because it prevents material that has not been affirmatively found to be copyright infringement from remaining offline indefinitely. The free trade agreements, however, contain no time limit at all, and simply require that the intermediary take "reasonable steps" to restore the material online.[217] Similarly, U.S. criminal copyright law contains a precise monetary standard for criminal copyright infringement: $1000 of infringement in six months.[218] This rule arguably benefits consumers in that it sets a minimum threshold for infringement to be deemed criminal—although it is a low threshold. The USTR, however, has been exporting a standard that maintains only that willful infringement with no motivation of financial gain be "significant" in size before criminal liability attaches.[219] Courts in other countries might interpret "significant" to be less than $1000. By contrast, the USTR exports precise numerical rules in other places in the agreements.

On the one hand, changing narrower rules to broader, more ambiguous guidelines allows greater domestic flexibility in interpretation.[220] On the other hand, many countries—developing countries in particular—tend to import language word-for-word, and thus leave the decision about what is

216. Digital Millennium Copyright Act, 17 U.S.C. § 512(g)(2)(C) (2012).

217. For example, the U.S.-Australia FTA does not set out any time limit for online intermediaries to restore taken-down material. Rather, it just exempts them from liability so long as they take reasonable steps to restore material online in response to an effective counter-notification. U.S.-Australia FTA, *supra* note 214, art. 17.11, para. 29(b)(x).

218. 17 U.S.C. § 506(a)(1)(B) (2012).

219. *See* U.S.-Australia FTA, *supra* note 214, art. 17.11, para. 26(a)(i) (defining criminal infringement as including "significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain").

220. *See* Margot Kaminski, *Positive Proposals for Treatment of Online Intermediaries*, 28 AM. U. INT'L. L. REV. 203, 209 (2012) ("Waiting to establish a standard based on principles, rather than specific requirements, would better respect the sovereignty of individual countries to choose whether to implement intermediary liability.").

"reasonable" or "significant" in the hands of courts.[221] Exporting ambiguous language instead of more precise rules shifts the cost of obtaining the original rules onto the advising industry's adversaries, and gives industries the opportunity to establish a more favorable rule for themselves abroad.

Sometimes these seemingly small changes can be extremely significant. The DMCA, for example, statutorily requires intermediaries to use standard technical measures to monitor for copyright infringement.[222] But it also contains a statutory check on those measures by requiring them to be developed subject to multi-party consensus by a balanced group of interests.[223] In practice, this seemingly small rule has resulted in there being no "standard technical measures" employed by online U.S. intermediaries.[224] The USTR has exported language that requires accommodation of standard technical measures but omits the words "fair" and "multi-industry."[225] In other countries, this could result in the use of technical measures agreed to by big Internet and big content, and become costly for smaller businesses to obtain.

Attorneys know quite well that battles can be fought over attorneys' fees. In U.S. copyright law, the provision that governs misuse of the copyright notice-and-takedown system, 17 U.S.C. § 512(f), provides that the losing party shall be "liable for any damages, including costs and attorneys' fees, incurred . . . ."[226] The possibility of being held liable for attorneys' fees discourages abuse of the system by those people or entities

221. Yu, *supra* note 35, at 1040 ("[C]ountries may simply transcribe provisions in international agreements onto their domestic laws. Such transcription leaves out important limitations or exceptions that the agreement allows, but fails to mention explicitly.").

222. 17 U.S.C. § 512(i)(1)(B) (2012) ("[L]imitations on liability . . . shall apply to a service provider only if [it] . . . accommodates and does not interfere with standard technical measures.").

223. 17 U.S.C. § 512(i)(2)(A) (stating that standard technical measures must "have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process").

224. *See* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 92 (2010) ("Perhaps because the incentives of the parties whose consensus is required have historically been misaligned, the standard technical measures provision of § 512(i) has not yet resulted in any concrete obligations for [internet service] providers . . . .").

225. *See, e.g.*, KORUS FTA, *supra* note 55, art. 18.10, para. 30 (b)(vi)(B) (stating that eligibility for liability limitations for service providers shall be conditioned on the provider "accommodating and not interfering with standard technical measures accepted in the Party's territory that protect and identify copyrighted material, that are developed through an open, voluntary process by a broad consensus of copyright owners and service providers, that are available on reasonable and nondiscriminatory terms, and that do not impose substantial costs on service providers or substantial burdens on their systems or networks.").

226. 17 U.S.C. § 512(f) (2012).

requesting takedowns of copyrighted material. The exported version of this provision, however, requires only the payment of "monetary remedies," whereas other provisions of the agreements' copyright chapters do require payment of attorneys' fees.[227] This benefits advising industries because they may be able to use the notice-and-takedown system in other countries without fear of the costs of a lawsuit over misuse where attorneys' fees are at issue.

U.S. patent law has a statutory rule that attorneys' fees may be awarded "in exceptional cases."[228] In practice, interpretation of what is considered "exceptional" is left to the courts.[229] The Federal Circuit has found that "many forms of misconduct can support a district court's exceptional case finding, including inequitable conduct before the U.S. Patent and Trademark Office ("PTO"); litigation misconduct; vexatious, unjustified, and otherwise bad faith litigation; a frivolous suit; or willful infringement."[230] The IP advisory committee encouraged the USTR to include a provision in free trade agreements extending attorneys' fees to patent cases.[231] In several free trade agreements, the USTR included a requirement of attorneys' fees in patent cases "at least in exceptional

227. *Compare, e.g.*, U.S.-Australia FTA, *supra* note 214, art. 17.11, para. 29(b)(ix) (explaining that for misrepresentations in the notice-and-takedown process, monetary remedies provisions shall be adopted), *with, e.g.*, Free Trade Agreement, U.S.-Colom., art. 16.11, para. 9, Nov. 22, 2006 [hereinafter U.S.-Colombia FTA], *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text ("[T]he prevailing party shall be awarded payment of court costs of fees and reasonable attorneys' fees by the losing party.").

228. *See* 35 U.S.C. § 285 (2012) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party.").

229. In fact, consideration of when a circumstance is exceptional came before the Supreme Court in 2014. *See* Adam Liptak, *A Supreme Court Patent Case Comes Down to a War of Adjectives*, N.Y. TIMES (Feb. 26, 2014), http://www.nytimes.com/2014/02/27/us/politics/a-supreme-court-patent-case-comes-down-to-a-war-of-adjectives.html; *infra* note 230.

230. Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd., 726 F.3d 1359, 1366 (Fed. Cir. 2013). For a description of how these misconduct standards have been applied differently to patent plaintiffs versus patent defendants, see Dennis Crouch, *Attorney Fees and Equal Treatment for Plaintiffs and Defendants*, PATENTLY-O (July 9, 2010), http://www.patentlyo.com/patent/2010/07/attorney-fees-and-equal-treatment-for-plaintiffs-and-defendants.html. It is also worth noting that the Supreme Court in April 2014 interpreted "exceptional" in broader terms than the Federal Circuit, finding that trial courts should award fees "in the case-by-case exercise of their discretion, considering the totality of the circumstances." Daniel Nazer, *Watch out Trolls: Supreme Court Expands Fee Shifting in Patent Cases*, ELECTRONIC FRONTIER FOUND. (Apr. 29, 2014), https://www.eff.org/deeplinks/2014/04/watch-out-trolls-supreme-court-expands-fee-shifting-patent-cases.

231. *See, e.g.*, INDUS. TRADE ADVISORY COMM. ON INTELLECTUAL PROP. RIGHTS (ITAC-15), THE U.S.-COLOMBIA TRADE PROMOTION AGREEMENT: THE INTELLECTUAL PROPERTY PROVISIONS 21 (2006) ("Article 16.11.9 provides for mandatory payment (except in exceptional circumstances) of reasonable attorneys' fees to the prevailing party, but ITAC-15 is disappointed that this remedy was not extended to patent cases as in the CAFTA-DR and to Morocco, Bahrain and Oman FTAs . . . .").

circumstances."[232] This language functions as changing a narrow rule to a broader requirement. While in the United States, the statutory rule is that attorneys' fees may be awarded in patent law only in exceptional cases, adding "at least" turns what functions in the United States as a ceiling into a floor. It allows advising stakeholders to try to obtain a broader application of attorneys' fees in patent cases abroad, as a matter of statutory law. This may benefit some stakeholders and harm others, depending on which stakeholders consider themselves likely to win patent claims.

Another example of the exportation of more ambiguous language where the U.S. system has precise rules unfavorable to advising interests also comes from patent law. Here, the consumer-favoring rules are spelled out in regulations, rather than in a statute.[233] In the United States, the Food and Drug Administration ("FDA") allows generics to declare that they do not consider a patent valid when applying for FDA approval. The patent holder then has a window to block generic market entry via litigation. This regulatory system is designed to encourage generics to seek early entry and challenge existing patents.[234] In addition, this system arguably benefits consumers because it encourages cheaper generic drugs to reach the market sooner when a patent is no longer valid. However, the language exported by the USTR does not require a patent owner to affirmatively intervene in order to prevent marketing approval as the U.S. system does.[235] It thus allows industries to establish regulatory systems abroad that default toward respecting the validity of patents challenged by generics, rather than toward assuming their invalidity if a patent owner fails to intervene.

C. OMITTING BALANCE AND CONTEXT

In addition to changing the statutory balance between precise and

232. *See* U.S.-Morocco FTA, *supra* note 207, art. 15.11, para. 8 ("[E]ach Party shall provide that its judicial authorities, at least in exceptional circumstances, shall have the authority to order, at the conclusion of civil judicial proceedings concerning patent infringement, that the prevailing party shall be awarded payment of reasonable attorneys' fees by the losing party.").

233. Abbott, *supra* note 4, at 11 (observing that the language of one trade agreement "permits but does not spell out the conditions and qualifications that are part of the U.S. regulatory system").

234. Whether the system works to the public advantage or not is another question. *See* FTC v. Actavis, Inc., 133 S. Ct. 2223, 2232 (2013) ("[T]he public interest in granting patent monopolies exists only to the extent that the public is given a novel and useful invention in consideration for its grant." (internal quotation marks omitted)).

235. *See* Abbott, *supra* note 4, at 11 (discussing how the language of the U.S.-Morocco FTA is crafted in a way "that does not appear to contemplate a system which requires the patent holder to affirmatively intervene to protect effective marketing approval," which is different from the marketing approval system in the U.S.). For the exact language of the U.S.-Morocco agreement, see U.S.-Morocco FTA, *supra* note 207, art. 15.10, para. 4.

ambiguous language, the USTR fails to export the full scope of balancing measures, even when those measures are statutorily enshrined and even when they have been found crucial for maintaining the constitutionality of the IP system. The USTR also leaves out references to other rights regimes or government policies that check the range of domestic IP law.

The Supreme Court has explained that fair use is one of copyright law's constitutional safety valves. Indeed, fair use allows copyright to be reconciled with the First Amendment.[236] The USTR has not exported fair use in free trade agreements but instead references and includes the Berne Convention's three-step test for copyright limitations and exceptions.[237] This reference to the three-step test is deficient in two ways. First, the three-step test is not equivalent to fair use and may restrict some exceptions that the more flexible fair use standard allows.[238] Second, even if the three-step test allows for the full scope of fair use, other countries have been slower to implement permitted copyright exceptions than they have been to implement enforcement requirements. This is in part because exceptions are not enumerated and countries sometimes implement trade agreements

236. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[T]he 'fair use' defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances."). The Court in *Eldred* noted that "copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression." *Id.* (emphasis in original) *See also* Golan v. Holder, 132 S. Ct. 873, 890 (2012) (reaffirming *Eldred's* characterization of fair use as one of copyright's built-in accommodations to the First Amendment).

237. *See, e.g.*, U.S.-Colombia FTA, *supra* note 227, art. 16.7, para. 8 ("With respect to [copyrights and related rights], each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder."); U.S.-Australia FTA, *supra* note 214, art. 17.4, para. 10(c) ("[U]nless otherwise specifically provided in this Chapter, nothing in this Article shall be construed as reducing or extending the scope of applicability of the limitations and exceptions permitted under the agreements referred to in Articles 17.1.2 and 17.1.4 [which include the Berne Convention] and the TRIPS Agreement."). For a discussion of the Berne Convention's three-step test, see Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 110–111 & n.137 (2000).

238. Okediji, *supra* note 237, at 148. *See also* Panel Report, *United States–Section 110(5) of the US Copyright Act*, WT/DS160/R, (June 15, 2000) (finding that TRIPS criteria for making limitations to the exclusive rights of copyright holders were consistent with the Berne Convention); Yu, *supra* note 35, at 1067–68 (noting that while many countries have incorporated U.S. fair use factors into their laws, they "remain troubled by the incongruence between the U.S. fair use provision and the limitations permissible under the three-step test as enunciated in the Berne Convention, the TRIPS Agreement, and the WIPO Internet Treaties"); Jacob Zweig, *Fair Use as Free Speech Fundamental: How Copyright Law Creates a Conflict Between International Intellectual Property and Human Rights Treaties*, 64 HASTINGS L.J. 1549, 1573 (2013) ("A flexible, fair use-like copyright exception might violate the three-step test and hence be inconsistent with TRIPS [which adapted the Berne test in a more restrictive form].").

word-for-word.[239] As mentioned previously, the USTR for the first time in the Trans-Pacific Partnership Agreement aims to include an expanded text on copyright limitations and exceptions.[240] However, the extent to which that text will solve existing imbalances and introduce something closer to fair use, is debated.[241]

The USTR exports provisions on digital rights management ("DRM") similar to the provisions of the DMCA. In U.S. law, the DMCA contains seven exemptions to the ban on circumvention of DRM. One of those exemptions is for reverse engineering to achieve interoperability.[242] The language of the reverse engineering exemption resulted from extensive negotiations between domestic stakeholders.[243] U.S. law not only protects a person who reverse engineers DRM to develop an interoperable program, but also protects the distribution of both information about interoperability and tools that allow interoperability. The information and tools "may be made available to others if the person . . . provides such information or means solely for the purpose of enabling interoperability . . . ."[244] In

239. *See* DEERE, *supra* note 190, 196–203 (explaining that developing countries had difficulties implementing agreements like TRIPS because of their limited capacities for working on IP issues).

240. *USTR Introduces New Copyright Exceptions and Limitations Provision at San Diego TPP Talks*, USTR PRESS OFFICE BLOG (July 3, 2012), http://www.ustr.gov/about-us/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision ("For the first time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized '[three]-step test,' that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.").

241. *See* James Love, *Leak of TPP Text on Copyright Limitations and Exceptions*, KNOWLEDGE ECOLOGY INT'L (Aug. 3, 2012), http://keionline.org/node/1516 (arguing that proposed TPP language on copyright will make the agreement "more restrictive" than agreements like TRIPS incorporating the three-step test).

242. 17 U.S.C. § 1201(f) (2012).

243. *See* Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 137–38 (2006) (explaining that at Congressional hearings regarding § 1201, a witness testified that § 1201(f) showed a "compromise position on reverse engineering that [the Computer and Communications Industry Association] negotiated with the Business Software Alliance" representing "a fair and balanced solution that required long hours of intense negotiations.").

244. 17 U.S.C. § 1201(f)(3) (2012). The first subsection of the reverse-engineering exception provides a defense for a person circumventing technical protection to develop an interoperable program. *Id.* § 1201(f)(1). The second subsection provides a defense where a person develops a tool that allows circumvention of software protections for purposes of enabling interoperability. *Id.* § 1201(f)(2). The third subsection may mean one of two things: it may cover the outsourcing of reverse engineering to discover information related to interoperability, or it may cover the distribution of a product that includes such information. *Id.* § 1201(f)(3) *See also* Daniel Laster, *The Secret is Out: Patent Law Preempts Mass Market License Terms Barring Reverse Engineering for Interoperability Purposes*, 58 BAYLOR L. REV. 621, 688 (2006) (explaining that Congress created an exception to the general federal rule against reverse engineering of copyrighted works to allow parties to develop independent

comparison, the free trade agreements allow only an exemption for reverse engineering for interoperability, but do not mention whether the exemption extends to the means alone, or to the distribution of information or means to others.[245]

The USTR also fails to export balancing measures created by courts in their interpretation of statutory language. In the patent context, for example, the Supreme Court has held that the statute that governs the unlicensed use of patented inventions for conducting research "leaves adequate space for experimentation and failure on the road to regulatory approval."[246] Meanwhile, the exported language acknowledges no such judge-made expansion of the research exception to patent law.[247]

The USTR has omitted explicit references to other statutory systems that prevent IP from impinging on civil liberties. Domestic copyright law, for example, refers to U.S. statutory privacy law, explaining that Internet intermediaries should not violate U.S. wiretap law to enforce copyright law.[248] But this reference did not get exported. Instead, U.S. trade partners tried to include references to privacy in the ACTA and received pushback from the USTR.[249]

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interoperable products, with the aim of fostering innovation and competition in the computer industry).

245. *See* KORUS FTA, *supra* note 55, art. 18.4, para. 7(d)(i) (permitting "noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs").

246. Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193, 207 (2005). In *Merck*, the Court found that 35 U.S.C. § 271 (e)(1), which offers a safe harbor from patent infringement claims when use is reasonably related to obtaining information for purposes of making submissions pursuant to federal law, was broad enough to encompass the act of researching patented compounds that might yield results successful enough to include in a submission to regulators. *Id.* at 202, 207.

247. Abbott, *supra* note 4, at 7–8.

248. 17 U.S.C. § 512(m)(2) (2012) (stating that intermediaries should not read the statute as requiring them to access material in a manner prohibited by law). The Copyright Office's 1998 summary of the DMCA explains that "Section 512 also contains a provision to ensure that service providers are not placed in the position of choosing between limitations on liability on the one hand and preserving the privacy of their subscribers, on the other. Subsection (m) explicitly states that nothing in section 512 requires a service provider to monitor its service or access material in violation of law (such as the Electronic Communications Privacy Act) in order to be eligible for any of the liability limitations." U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, U.S. COPYRIGHT OFFICE SUMMARY 9 (1998), *available at* http://www.copyright.gov/legislation/dmca.pdf.

249. Margot E. Kaminski, *An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement*, 21 ALB. L.J. SCI. & TECH. 385, 412 (2011) (discussing the late addition of privacy-protective language in ACTA). *See also* Margot Kaminski, *The Anti-Counterfeiting Trade Agreement*, BALKINIZATION (Mar. 25, 2010), http://balkin.blogspot.com/2010/03/anti-counterfeiting-trade-agreement.html (noting that the leaked draft of ACTA showed that the EU proposed the inclusion of data privacy provisions).

In the United States, federal funding policies have introduced common exceptions to patents developed with federal funding. For example, in the United States, the patenting of transgenic animals is permitted, whereas such subject matter is not covered in many other countries. The IP advisory committee has asked that the USTR explicitly include an obligation to allow patenting of transgenic animals.[250] And in some free trade agreements, the USTR has explicitly addressed the patentability of transgenic animals.[251]

In the United States, however, the government uses federal funding to create research exceptions to these patents. Since at least 2004, the National Institutes of Health ("NIH")—an agency of the U.S. Department of Health and Human Services—has required that when transgenic animals are developed with federal funding, they must be shared between researchers, regardless of who owns the patent.[252] In 2010, the Alzheimer's Institute of America ("AIA"), which owns a gene patent for one such transgenic mouse, attempted to sue a research laboratory for using the mice and distributing them to other labs. A district court refused to allow the lab to be added to the patent-infringement suit, citing the lab's claim that "prolonging the litigation in this case would harm . . . the public by extending the chilling effect of the litigation on mice research on Alzheimer's disease."[253] The NIH contacted the lab in support, prompting the AIA to agree to drop the case.[254] While this series of events is not captured in U.S. statutes, it indicates that U.S. health policy, established by the NIH, balances patent rights against other interests, and that common practice follows from this federal policy.[255] However, that common

250. ITAC PANAMA REPORT, *supra* note 54, at 16 (2007) ("ITAC-15 believes that it is critical that future FTAs include . . . obligations to provide patent protection for transgenic animals.").

251. INDUS. FUNCTIONAL ADVISORY COMM. ON INTELLECTUAL PROP. RIGHTS FOR TRADE POLICY MATTERS (IFAC-3), THE U.S.-MOROCCO FREE TRADE AGREEMENT: THE INTELLECTUAL PROPERTY PROVISIONS, 12–13 (2004), *available at* http://www.ustr.gov/archive/assets/Trade_Agreements/Bilateral/Morocco_FTA/Reports/asset_upload_file164_3139.pdf (calling the U.S.-Morocco FTA's patent protection for transgenic plants and animals "a significant improvement over the commitments made by Chile and CAFTA in their FTAs").

252. *See NIH Model Organism Sharing Policy*, NATIONAL INSTITUTE OF HEALTH, http://grants.nih.gov/grants/policy/model_organism/ (follow "sharing mice" hyperlink) (last updated Oct. 20, 2004). *See also* Erika Check Hayden, *Patent Dispute Threatens US Alzheimer's Research*, 472 NATURE 20, 20 (2011), *available at* http://www.nature.com/news/2011/110405/full/472020a.html ("The NIH requires scientists to share transgenic mouse strains developed using NIH money . . . .").

253. Hayden, *supra* note 252, at 20.

254. Howard Lovy, *Jackson Lab off the Hook in Alzheimer's Mice Lawsuit*, FIERCE BIOTECH RES. (Aug. 15, 2011), http://www.fiercebiotechresearch.com/story/jackson-lab-hook-alzheimers-mice-lawsuit/2011-08-15#ixzz2fdM1ZLVD.

255. Hayden, *supra* note 252, at 20 (noting that the defendant laboratory's house counsel had stated that "asserting rights in such cases runs counter to common practice, which is established by NIH

practice does not get exported by the USTR when it exports the patentability standard.

Finally, the USTR exports relatively new IP enforcement standards that have not yet been tested against the checks of U.S. constitutional law.[256] The USTR exports criminal copyright enforcement mechanisms, such as civil asset forfeiture, which have been used to seize websites.[257] These enforcement mechanisms have not yet been tested in court against the First Amendment, and raise serious constitutional questions, such as the imposition of prior restraints.[258]

VI. THE CONSEQUENCES

The decision to conduct international IP lawmaking through the USTR has both domestic and international consequences. Domestically, this decision can put U.S. domestic IP law in tension with agreements negotiated by the USTR. Free trade agreements are non-self-executing agreements; they require implementation by Congress to take effect on U.S. soil. But the tension between U.S. domestic law and free trade agreements can still have domestic effects. Depending on the provision, this tension can directly affect domestic consumers and businesses. Because the Internet is global, paraphrasing can also affect what content U.S. consumers can access on the "foreign" Internet. Internationally, this paraphrasing undermines effective lawmaking, creates a vast institutional tangle that disfavors consumer rights and stakeholders not at the table, and favors advising stakeholders' interests.

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policy").

256. For example, the 2008 PRO-IP Act established civil asset forfeiture that was then used to seize websites. Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act), Pub. L. No. 110-403, 122 Stat. 4256 (2008) (codified at 15 U.S.C. § 8101 (2012)). *See also* Hiawatha Bray, *Amid Recent Protest, US Already Able to Shut Websites*, BOSTON GLOBE (Jan. 23, 2012), http://www.bostonglobe.com/business/2012/01/23/federal-government-has-power-shut-down-registered-websites/USiFgcGkNm46VoJTsho0LN/story.html (discussing the Justice Department's use of the PRO-IP Act to shut down a popular file-sharing website, and describing the Act as "a major expansion of the government's power to regulate the Internet").

257. U.S.-Australia FTA, *supra* note 214, art. 17.11, para. 27(b) ("[J]udicial authorities shall have the authority to order the seizure of suspected . . . goods, [and] any related materials and implements that have been used in the commission of the [offense]."); Margot Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587, 613 & n.205 (2014).

258. *See* Christina Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 157, 174 (2013) (discussing how the imposition of liability for copyright violations can suppress speakers via prior restraint of the press, in violation of the Free Press Clause).

A. DOMESTIC CONSEQUENCES

The current relationship of free trade agreements to U.S. law is a strange limbo. Again, free trade agreements are non-self-executing agreements; they require Congressional action to be implemented domestically. Congress does not domestically implement the IP portions of free trade agreements. Instead, it implements the agreements with a section clarifying that the agreements do not change domestic law.[259] This approach is an oddity, given that Congress is not supposed to be able to amend trade agreements produced through the fast track process.[260] But the executive branch includes this provision in implementation acts because it recognizes that Congress requires this check on executive authority.[261] As a result, Congress does not officially recognize—or, evidently, implement—any substantive inconsistencies between recent free trade agreements and U.S. domestic law. However, Congress's decision not to address inconsistencies does not mean that there are none or that the captured process has no domestic consequences.

Through captured regulatory paraphrasing, the USTR competes with judicial and regulatory interpretations of U.S. statutes. The most telling example of this is the conflict between the USTR decision that the first sale doctrine does not apply to goods manufactured lawfully abroad and the Supreme Court decision in *Kirtsaeng v. John Wiley & Sons, Inc.* that held that it does.[262] A second example comes from trademark law. A number of courts of appeals have recently disagreed over the application of the well-known foreign marks doctrine in the United States.[263] The Second Circuit held that the Paris Convention is not self-executing and therefore the well-known marks doctrine does not apply in the United States.[264] But Congress has in fact implemented free trade agreements that reference this same

259. *See, e.g.*, KORUS FTA Implementation Act, *supra* note 51, § 102(a) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.").

260. *See* Hathaway, *supra* note 94, at 261–62 (discussing how the adoption of a fast track process limits Congress's ability to amend and debate an agreement).

261. *See, e.g.*, KORUS FTA Implementation Act, *supra* note 51, Statement of Administrative Action 4 ("[T]he section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by the Agreement.").

262. *See* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1358 (2013) (adhering to a national exhaustion framework rather than the international exhaustion rule).

263. *Compare* ITC, Ltd. v. Punchgini, Inc., 482 F.3d 135, 172 (2d Cir. 2007) (holding that the well-known marks doctrine does not apply in the United States), *with* Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1094 (9th Cir. 2004) (holding the well-known marks doctrine does apply in the United States).

264. *ITC Ltd.*, 482 F.3d at 172.

provision of the Paris Convention.[265] Does a Congressional statement that free trade agreements do not change U.S. IP law leave intact these divergent interpretations of whether international law has been implemented in the United States? Congress's quasi-implementation of the agreement might leave such questions open.[266]

The USTR also stands to influence the domestic judiciary in other ways. Two recent copyright cases before the Supreme Court have developed the precedent that international harmonization can serve as a rational basis for copyright policy, defeating a First Amendment challenge.[267] In both *Eldred v. Ashcroft* and *Golan v. Holder*, Justice Ginsburg, writing for the majority, held that harmonization of international standards is a rational basis for the enactment of domestic copyright laws. As long as the USTR avoids directly altering the two "built-in First Amendment accommodations" in copyright law, fair use and the idea-expression dichotomy, it can alter U.S. copyright law with relative First Amendment impunity.[268] If Congress at some point chooses to fully implement changes made by the USTR in free trade agreements, a First Amendment challenge to those changes would likely fail under rational basis review.

The Court's current understanding of international IP harmonization fails to recognize the central role of U.S. industries in establishing international law. Justice Breyer, dissenting in *Golan*, recognized that the harmonization problem is "a dilemma of the Government's own making" that cannot excuse constitutional deficiencies with the domestic implementation of the law.[269] But the majority held otherwise. It may then be possible for industries to make unconstitutional law through international agreements and rely on the Court's deference to Congress when it implements agreements as a way to get around First Amendment

265. KORUS FTA, *supra* note 55, art. 18.2, para. 7.

266. *But see* Medellín v. Texas, 552 U.S. 491, 505–06 (2008) (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)) (explaining that a treaty is not self-executing unless it conveys the intention to self-execute).

267. *See* Golan v. Holder, 132 S. Ct. 873, 890–91 (2012) (finding no basis for heightened review under the First Amendment given that the copyright statute at issue, among other things, included measures adopted "to ease the transition from a national scheme to an international copyright regime"); Eldred v. Ashcroft, 537 U.S. 186, 205–206 & n.10 (2003) (noting Congress's intent to harmonize domestic and international copyright law, and accordingly adopting a rational basis approach to reviewing the constitutionality of copyright statutes).

268. *Golan*, 132 S. Ct. at 890–91 (quoting *Eldred*, 537 U.S. at 219).

269. *Id.* at 911–12 (Breyer, J., dissenting). Justice Breyer also expressed some skepticism regarding the opinions of industry experts on the validity of the copyright protections at issue in *Golan*. *Id.* at 909–10 (Breyer, J., dissenting).

protections.

The USTR also affects the legislative branch. Through regulatory paraphrasing, the executive branch competes with Congress, despite the fact that Congress ostensibly has the final say over free trade agreements. It does so in two ways: through "legislative entrenchment," and by assuming Congressional intent to bind other countries to a standard that deviates from U.S. law.

The USTR binds the hands of congresses of the future by entrenching current standards through international agreements and discouraging future legislative reform.[270] For example, copyright term length has recently been criticized domestically, but the U.S. is bound to a long-term length through a network of international agreements. When a current congress binds the options of a future congress, this is known domestically as "legislative entrenchment."[271] Congress can, however, decide to withdraw from an international commitment. The issue is more one of friction bolstered by the possibility of sanctions: by agreeing to these standards now and committing to regimes that could subject the United States to trade repercussions, the USTR makes it much more difficult for Congress to withdraw later. Indeed, the Supreme Court in *Golan* recognized the difficulty of deviating from agreements in the international trade regime due to the possibility of trade sanctions.[272]

In a more theoretical sense, the USTR invades Congress's domain by assuming Congress's intent to participate in the making of new international law that deviates from U.S. law. Congress has not explicitly asked the USTR to make new international IP law, and Congress's method of quasi-implementation indicates that it does not wish for new international law departing from current U.S. law to get made. So the USTR establishes new international laws without fully informing Congress that it is doing so.

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270. Yu, *supra* note 35, at 1066–70.

271. *See* HAL S. SHAPIRO, FAST TRACK: A LEGAL, HISTORICAL, AND POLITICAL ANALYSIS 57–58 (2006) (describing the theory of legislative entrenchment, and noting that "entrenched rules are anomalies"); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1795 (2003) (arguing that legislative entrenchment is unconstitutional). *See also* United States v. Winstar Corp, 518 U.S. 839, 872 (1996) ("[O]ne legislature may not bind the legislative authority of its successors . . . ."); Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years.").

272. *Golan*, 132 S. Ct. at 880–81 (2012) ("Berne . . . did not provide a potent enforcement mechanism . . . . [But] the WTO gave teeth to the Convention's requirements: Noncompliance with a WTO ruling could subject member countries to tariffs or cross-sector retaliation.").

Finally, this captured lawmaking may have a domestic "boomerang effect," impacting local consumers and businesses that rely on existing IP exceptions by raising the IP standards abroad.[273] The Supreme Court recently recognized the intertwined nature of international IP markets and how they can impact companies in the United States.[274] U.S companies that rely on IP exceptions have a real financial interest in what happens to legal systems abroad.[275] Those companies that rely on fair use, such as search engines, may find themselves facing a more hostile legal regime abroad.

B. INTERNATIONAL CONSEQUENCES

The USTR's exportation of law made through captured regulatory paraphrasing also creates a wealth of international consequences. The capture of the USTR creates a complicated tangle of international law as agreements made by the USTR compete with international law made through more participatory forums. The capture of the USTR makes it substantially more costly and sometimes impossible for others to intervene in the lawmaking process through other institutions once the agreements have been signed. It co-opts the authority of the United States on the international stage for private interests. And it undermines U.S. attempts to promote democratic values and civil liberties in other areas and other institutions.

Captured free trade agreements affect law negotiated in other forums. Not all international IP law undergoes the regulatory paraphrasing process, as the United States also negotiates IP agreements outside of the international trade regime in other forums and through actors from other agencies. It is possible for domestic U.S. public interest groups to affect the outcome of international IP agreements in a number of international negotiating forums. This is most recently evidenced by the success of the Marrakesh Treaty To Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled at the World Intellectual Property Rights Organization ("WIPO"), which established international copyright exceptions for the visually impaired.[276]

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273. Yu, *supra* note 35, at 1045 & n.426.

274. *See Golan*, 132 S. Ct. at 889 (noting that copyright harmonization "would expand the foreign markets available to U.S. authors and invigorate protection against piracy of U.S. works abroad, . . . thereby benefitting copyright-intensive industries stateside and inducing greater investment in the creative process").

275. *See* Katz & Hinze, *supra* note 172, at 34 ("U.S. technology exporters looking to expand into new markets will confront foreign laws lacking the flexibility that was key to their innovation.").

276. *See* Marrakesh Access Treaty, *supra* note 29, art. 3–4 (making exceptions to national copyright laws in order to facilitate access to copyrighted materials by people with disabilities).

Scholars have long recognized that international IP law is negotiated in a complex tangle of international regimes.[277] What happens in one regime does not stay in that regime. When rules are negotiated to higher and higher levels in one regime, they affect the ability of states to negotiate public interest exceptions in other regimes.[278] Thus captured regulatory paraphrasing creates "strategic inconsistencies" between regimes, where new rules, such as bilateral trade agreements, are crafted in one forum "in an effort to alter or put pressure on an earlier rule."[279] Captured regulatory paraphrasing not only creates strategic inconsistencies between trade and other international law, but it also creates strategic inconsistencies between international law and U.S. law.

The capture of the USTR shifts costs onto those who want to push back against the capturing industries in implementing countries. Instead of industries bearing the cost of influencing implementing language and court decisions, opponents bear those costs. In some areas, regulatory paraphrasing forecloses the participation of advocates during implementation and litigators during domestic interpretation by exporting as law judicially-made rules that favor industry.

Finally, captured regulatory paraphrasing has two broader international consequences. It co-opts the international voice of the United States, enabling the USTR to appear to speak on behalf of the country's needs when it in fact speaks on behalf of a subset of private industry. And it thus undermines U.S. attempts to promote human rights, civil liberties, the domestic process, and the rule of law in other spheres.[280]

C. ARE THE CONSEQUENCES JUSTIFIED?

The capture of the USTR is arguably one side effect of creating a streamlined trade regime that is intended to result in concluded international agreements. In creating the trade negotiating regime, Congress prioritized getting things done. One way to reach concluded

277. *See, e.g.*, Helfer, *supra* note 21, at 10 (describing the way international relations scholars have responded to the complexity of arrangements that states use to address issues of mutual concern).

278. *See* Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004) (describing a "regime complex" as "an array of partially overlapping and nonhierarchical institutions governing a particular issue-area").

279. Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1027–28 (2007). *See also* Helfer, *supra* note 21, at 21–22 (explaining that a country can pressure other countries to sign bilateral agreements to bypass or alter their national IP laws).

280. *See, e.g.*, Yu, *supra* note 35, at 1050 (predicting that U.S. efforts to negotiate ACTA may undermine its concurrent efforts to promote human rights and civil liberties).

agreements is to minimize the disagreement on the domestic side, by closing the domestic negotiating process and including interest groups that prioritize trade.

As a consequence of the USTR's institutional structure, a number of domestic constituents are unable to participate in the domestic side of trade negotiations. Some domestic constituents have an easier time getting involved in more open international forums, such as WIPO at the UN, than in the domestic process.[281] Even the formerly closed WTO has increased participation by private parties. The USTR is thus one of the most democratically deficient nodes of international IP lawmaking.

Proponents of the trade negotiating process argue that this domestic democratic deficit can be justified by success in the international realm. The deficit could be justified if the USTR completes efficient and effective agreements that serve U.S. interests. However, identifying the capture of the USTR shows us that the process is neither consistently efficient nor effective.[282]

The trade negotiating process does not consistently result in more efficient agreement-making. The negotiation of the Anti-Counterfeiting Trade Agreement ("ACTA") was in fact quite slow compared to negotiations of other agreements conducted in more open forums.[283] This may be because disagreements that would have taken place at the domestic level were instead shifted to the international arena, where public interest groups approach other countries' delegates to get the public interest heard.

Second, the current trade negotiating process does not result in more effective treaties. It results in the signing of agreements, but signed agreements might not be effective. If we define "effective" only as "completed," we miss what efficacy actually means. An international agreement can be seen as effective when it is adopted locally and is both domestically enforceable and legitimate.[284] Free trade agreements have

281. *See, e.g.*, Sean Flynn, *WIPO Treaty for the Blind Shows that Transparency Can Work (And is Necessary)*, INTELL. PROP. WATCH (June 26, 2013), http://www.ip-watch.org/2013/06/26/wipo-treaty-for-the-blind-shows-that-transparency-can-work-and-is-necessary/ (describing the successful conclusion of the Marrakesh Access Treaty, and noting that "the end outcome is nearly universally considered to be 'balanced'").

282. *See* David S. Levine, *Transparency Soup: The ACTA Negotiating Process and "Black Box" Lawmaking*, 26 AM. U. INT'L L. REV. 811, 832–35 (2011) (describing the practical failings of non-transparent trade negotiation strategies).

283. *Id.* at 832 ("[E]vidence suggests that ACTA has actually taken longer to negotiate than many similar international IP agreements.").

284. Hathaway, *supra* note 94, at 233 ("Strong and effective international agreements require widespread political support. . . . When we focus attention not simply on the negotiating stage of

failed to conclude because of resistance by our negotiating partners.[285] The implementation of free trade agreements has been locally resisted because of the illegitimacy of the lawmaking process.[286] Free trade agreements have been fully rejected before implementation, as was the case with the ACTA, which was rejected by both the EU and Mexico.[287]

Even when the substance of free trade agreements is adopted locally, the efficacy of international trade lawmaking can still be questioned. If the laws are seen as illegitimate, this makes enforcing consumer compliance substantially more challenging.[288] And there is also the question of whether direct transcription of the substance of free trade agreements counts as an effective result, since the substance of the agreements does not in fact reflect the substance of U.S. law.[289]

Our current trade negotiating system does not result in effective agreements; it also does not result in effective trade policy as a whole. Eventually, our negotiating partners may realize that the trade agreements are unreliable commitments, because Congress does not change U.S. law to match their substance. And the insistence by capturing industries that free trade contain high IP standards may result in other countries rejecting an entire agreement to avoid the IP provisions. The capture of the USTR on certain subject matter areas may thus result in the United States being left

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international law but also at what comes after, we see that international law that is more difficult to make can in fact be much more effective—precisely because it requires more widespread political support to be made.").

285. *See* Lindstrom, *supra* note 4, at 974–77 (describing the failure of negotiations on a Thailand-U.S. Free Trade Agreement due to Thai resistance toward U.S. demands for strict patent standards).

286. See Maira Sutton, *A Victory for Colombia: Constitutional Court Strikes Down Draconian Copyright Expansion Bill*, ELECTRONIC FRONTIER FOUND. (Jan. 24, 2013), https://www.eff.org/deeplinks/2013/01/victory-colombian-internet-users-constitutional-court (explaining that the Colombian Constitutional Court struck down the copyright enforcement law implementing the U.S.-Colombia free trade agreement "because [the Colombian] Congress had fast tracked the bill and overstepped various legislative procedures").

287. Press Release, European Parliament, European Parliament Rejects ACTA, (July 4, 2012), *available at* http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA; Ellery Roberts Biddle, *Mexico: Congress Resolves to Reject ACTA*, GLOBAL VOICES ADVOC. (July 22, 2012), http://advocacy.globalvoicesonline.org/2012/07/22/mexicos-congress-issues-resolution-to-reject-acta/.

288. Kimberlee Weatherall, *The Anti-Counterfeiting Trade Agreement: What's It All About?* (June 2008) (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=kimweatherall ("Since neither copyright, nor trade mark, are readily 'self-enforcing' laws they depend for their effectiveness on a certain amount of support among the public. Secret negotiations on IP policing powers are not an ideal way to garner such support." (footnote omitted)).

289. *See* Yu, *supra* note 35, at 1040 (noting that the "unquestioned transcription of the treaty language could likely lead to higher protection [in other countries] than is currently offered in the developed world").

out of regional agreements that would benefit the U.S. economy as a whole.[290]

VII. PROPOSED SOLUTIONS

The problem of USTR capture can be solved, or at least mitigated, by changing the institutional design of the USTR. Institutional design can help insulate agencies from capture.[291] Traditionally, the literature discussing institutional design has looked to whether an agency is an "independent agency"—an agency designed to be subject to less control by the executive branch.[292] But the USTR needs to be immunized from different kinds of political pressure, including direct industry influence, so we must look to other design features.[293] In this section, I provide a number of suggestions for fixing the institutional design of the USTR.[294] Some of these suggestions are more practicable than others, and Congress need not employ all of them to effect change. Finally, I show that past changes to the way the trade negotiating system treats environmental law provide a concrete precedent for how the treatment of IP might also be changed.

Fast track expired in 2007, and Congress is currently considering

290. *See* Weatherall, *supra* note 288 (discussing arguments against ACTA at a broad level of principle, and suggesting that the secrecy surrounding the agreement's negotiations, along with its stringent terms, may deter potential trade partners from signing ACTA or from negotiating other agreements with the U.S.).

291. *See, e.g.*, Barkow, *supra* note 40, at 42 (arguing that the "traditional hallmarks" of agency independence are "insufficient if the goal is to create a buffer against one-sided interest group pressure and capture," and proposing further changes to agency institutional design); Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 347 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (describing some of the institutional design choices Congress can make in order to better insulate U.S. administrative agencies from outside pressures).

292. *See* Barkow, *supra* note 40, at 26 (explaining that the three traditional design elements used to make an agency independent are: "the President's ability to remove an agency head only for cause; freedom from oversight by the President's Office of Information and Regulatory Affairs; and a multimember design . . . ."). *See also* Gersen, *supra* note 291, at 347 ("Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. . . . In the economics and political science literature, however, the idea of independence has a more functional meaning, referring to the degree of actual or effective control exerted over the agency by other political institutions . . . .").

293. Barkow, *supra* note 40, at 19 (explaining that "[t]he main aim in creating an independent agency is to immunize it . . . from political pressure," but that "one person's political pressure is another person's democratic accountability").

294. Barkow identifies a number of "'equalizing' insulators" that can be beneficial for agencies charged with protecting diffuse public interests from one-sided interest group pressure: the agency's funding source, restrictions on agency personnel, rulemaking and enforcement relationships between the agency and other agencies, and political tools that make the public interest more salient. *Id.* at 42. Of these insulators, funding source is least relevant here, since the USTR is currently subject to direct industry pressure, not financial pressure through Congress.

reinstating it at the request of the executive branch.[295] A number of public interest groups have already called for Congress not to reenact fast track. They criticize the trade regime's lack of democratic accountability.[296] These groups currently have no way of influencing the substance of USTR policymaking, and so would prefer a trade negotiating system that places more authority in the legislative branch. Ideally, because of current capture, they would prefer a regime that does not conclude agreements at all. Reverting to the Article II treaty process could accomplish the goal of taking IP out of trade—by eliminating trade.

This path, however, is risky. A failure to reenact fast track might result instead in unilateral executive action, as happened with the Anti-Counterfeiting Trade Agreement ("ACTA"), which would in turn result in less oversight over the USTR and possibly worsen capture. Instead, it is possible to use renewed Congressional interest in the USTR and the proposed reenactment of fast track to address the problem of regulatory capture more directly, through addressing the USTR's institutional design. The problem of USTR capture can be fixed, and we need not abandon fast track—or trade—to do so.

One way to address USTR capture is to close the revolving door that currently allows agency staff to be employed by capturing industries.[297] Addressing the revolving door problem would reduce incentives for agency staff to negotiate rules that benefit industry. Congress could statutorily establish hiring requirements for USTR personnel, or restrict subsequent industry employment.[298]

Another way to mitigate capture would be to involve other agencies that are tasked with broader public interest mandates.[299] For example, the USTR could be required to clear its proposals for data exclusivity

295. Doug Palmer, *White House Wants Trade Promotion Authority: Kirk*, REUTERS (Feb. 29, 2012), http://www.reuters.com/article/2012/02/29/us-usa-trade-kirk-idUSTRE81S1FF20120229.

296. Lori Wallach & Ben Beachy, *Obama's Covert Trade Deal*, N.Y. TIMES (June 2, 2013), http://www.nytimes.com/2013/06/03/opinion/obamas-covert-trade-deal.html; Maira Sutton, *Stop Congress From Taking the Fast Track to One-Sided Copyright Laws*, ELECTRONIC FRONTIER FOUND. (Aug. 5, 2013), https://www.eff.org/deeplinks/2013/08/stop-congress-taking-fast-track-one-sided-copyright-laws; *Congress Must Reject Fast Track Trade Authority*, PUB. CITIZEN, https://action.citizen.org/p/dia/action3/common/public/?action_KEY=12263 (last visited May 6, 2014).

297. *See supra* note 41 and accompanying text.

298. *See, e.g.*, Barkow, *supra* note 40, at 48–49 (explaining how the Consumer Product Safety Act requires that agency staff must not be employed by those selling consumer products; and how the Federal Board of Governors and the Board of Farm Credit Administration both limit subsequent industry employment).

299. *Id.* at 50–53 (suggesting that one way to prevent agency capture is to create a hierarchical, consulting, or monitoring relationship between agencies).

regulation with the FDA, to ensure that these proposals represent current U.S. law. Or it could be required to consult with more state representatives to ensure that its rules do not conflict with state public health policies. A few state legislators are on a tier 2 advisory committee, but not enough to counterbalance the other advice the USTR receives. Using oversight to counter information capture would require, however, that the supervising entities themselves are not subject to capture, and represent a balancing influence rather than a reinforcing perspective. Currently, the PRO-IP Act of 2008 requires the USTR to coordinate with a host of other agencies, but all are given an IP enforcement mandate and thus do not add balance to the USTR's mandate.[300]

Commenters have called for Congress to take IP out of trade entirely.[301] This outcome is unlikely, given that the linkage between IP and trade dates back to at least the 1970s, and has been institutionalized at the World Trade Organization through TRIPS. However, Congress could make one of several IP-specific changes to mitigate capture within the specific subject-matter area.

Congress could alter the fast-track process to allow amendments to the intellectual property chapters of free trade agreements.[302] This would allow public access to the text of agreements before they are implemented, and would permit more public input through congressional representation. It would also address the current problem of bundling, which forces Congress to either vote down an entire trade package in the interest of one subject matter area, or accept whole chapters with which it disagrees. But this solution would radically change the fast-track process, and potentially give rise to the same problems of congressional protectionism that inspired delegation of trade to the executive branch in the first place.

Alternatively, Congress could change the USTR's negotiating mandates on IP to better reflect the balance inherent in U.S. law.[303] Congress could require that the USTR negotiate IP provisions with the goal of protecting the public interest in freedom of expression, privacy, due process, and public health. As Congress has already recognized the Doha

300. 15 U.S.C. §§ 111–113 (2012). Section 8113 of the Act, for instance, includes among the objectives of the coordinating agencies reducing counterfeit and infringement, identifying and eliminating obstacles to IP enforcement, and "strengthening the capacity of other countries to establish international standards to protect and enforce [IP] rights . . . ." *Id.* § 113(a)(1)–(5).

301. Bill Watson, *For Free Trade's Sake, Get IP Out of the TPP*, HUFFINGTON POST (Nov. 22, 2013), http://www.huffingtonpost.com/bill-watson/for-free-trades-sake_b_4325963.html.

302. *See* sources cited *supra* note 132.

303. For the current statutory principal negotiating objectives of the USTR with regard to IP, see 19 U.S.C. § 3802(b)(4) (2012).

Declaration in its normative goals for IP negotiations, adding additional nods to the public interest would not greatly depart from precedent. In fact, a faction of Internet industries recently proposed that Congress change the USTR's negotiating mandates to include both fair use and limitations on online intermediary liability in a non-IP context.[304]

A change to the USTR's normative mandates would be valuable, but might be unenforceable in any meaningful way.[305] Another suggestion is to link enforcement of new negotiating objectives to the ability to use fast track. Congress could write the statute to allow a departure from fast track and return to the Article II process when the USTR fails to adhere to its negotiating mandates.

A more targeted solution is for Congress to apply some or all of the Federal Advisory Committee Act ("FACA") to trade. This would change the structure of informational input into the trade system.

FACA has received its share of criticism.[306] There are substantial limits to FACA's effectiveness, because it contains vague and undefined terms, and lacks enforcement mechanisms.[307] But FACA has also been praised for its effectiveness in ensuring government openness, and for striking a "balance between public access and effective process."[308] By reinstating some or all of FACA, Congress could enable more direct and specific input into the trade process to counter the effects of industry capture. There are a variety of possible changes to the structure of the system; I address the benefits and shortcomings of each below.

One approach is to focus on interrupting the current close relationship between USTR and industry. There are at least two ways to do this within

304. *See* Jutta Hennig, *House GOP Opposition to TAA Complicates Already Slow TPA Process*, 31 INSIDE US TRADE Vol. 36 (2013) ("In the digital trade area, Internet companies are demanding that the fast-track bill include negotiating objectives that reflect policies largely covered by current U.S. law in terms of intermediary liability, fair use exceptions to copyrights, and easing restrictions to the free flow of data across borders." (citation omitted)).

305. *See* SHAPIRO, *supra* note 271, at 20 ("At most, these objectives establish priorities and give general direction, but they provide little detail and leave the President with broad discretion as to how such matters are to be addressed in agreements.").

306. *See, e.g.*, Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 54 (1994) ("Properly construed, FACA violates separation of powers by limiting the terms on which the President can acquire information from nongovernmental advisory committees."). It is unlikely that the executive branch would challenge the constitutionality of FACA with respect to trade, however, because such a challenge would imply a return to a constitutional separation of powers. This could cause the court to evaluate the congressional-executive agreement in light of Article II's requirements, which the executive branch would not want.

307. Palladino, *supra* note 79, at 235–36.

308. Perritt & Wilkinson, *supra* note 67, at 726.

the context of applying FACA to trade. The first would be to statutorily shorten the tenure of trade advisory committees. The ITAC-15's charter was renewed in 2010, and again in February 2014. Congress could revert back to FACA's default tenure of four years, which would allow industry to develop only short-term relationships with trade negotiators. [309] Constantly establishing new advisory committees could be costly, however, and interrupting the relationship would also interrupt the provision of expertise to the agency.

The second, more blunt-force way of cutting the relationship between industry and the USTR would be to cut the direct informational input entirely. Congress could revoke its approval of sectoral trade advisory committees, or explicitly mandate that such committees cannot see the text of the negotiating proposals. The cost of this approach is that USTR would lose its access to any industry expertise on the specific language of the agreements.

An alternative approach to changing the informational input into the USTR is to enhance participation mechanisms for nonindustry actors and other kinds of industry rather than interrupt the relationship between the USTR and capturing industry. Congress could require that the USTR take FACA's balanced membership requirement seriously. [310] Rather than limiting membership to a balanced membership of sectoral businesses, Congress could mandate the inclusion of public interest representatives and academics on advisory committees.[311] Empirical research shows that like-minded groups tend to make more extreme decisions.[312] Filling an advisory committee membership with balanced viewpoints is thus critical. Congress could ensure that balanced membership of sectoral advisory committees is a statutory requirement, instead of restricting sectoral advisory committees to businesses.

Congress could, as the executive branch has done, establish new

309. *See* 19 U.S.C. § 2155(f)(2)(B) (2012) (stating that committees established pursuant to FACA may be terminated by the President within four years of their establishment).

310. A 2002 report of the General Accounting Office (GAO) pointed out that the composition of trade advisory committees was not optimal to provide advice to the executive branch and assure Congress that "negotiated agreements [were] fully in U.S. interests." U.S. GEN. ACCOUNTING OFFICE, GAO-02-876, INTERNATIONAL TRADE: ADVISORY COMMITTEE SYSTEM SHOULD BE UPDATED TO BETTER SERVE U.S. POLICY NEEDS 29 (2002) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d02876.pdf.

311. *See* 19 U.S.C. § 2155(c)(2) (stating that sectoral or functional advisory committees should be representative of various industry interests, but should also consult with interested private organizations and take into account a number of other factors).

312. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–75 (2000).

higher-tier advisory committees dedicated to the public interest.[313] Congress could establish policy level advisory committees for information policy and public health.[314] The policy level advisory committees have been less active than the sectoral advisory committees, and do not provide as much input into specialized areas.[315] In 2014, just before this Article went to press, the executive branch proposed the creation of a policy level Public Interest Trade Advisory Committee. This committee, however, will likely be too broad in subject matter to be effective.[316]

The trade regime's treatment of environmental law proves instructive. In response to heavy criticism, the executive branch established a policy-level advisory committee for environmental issues in 1994.[317] Congress also altered trade negotiating objectives in 2002 to make them more considerate of the environment.[318] A 2002 report of the General Accounting Office highlighted the problems of imbalanced advisory committees.[319] And while the law did not pass, Congress considered allowing subject-matter-specific amendments to chapters that affected the environment.[320] These precedents show that the U.S. trade regime struggles with information capture with respect to public goods, but can be changed at least within specific subject matter areas to mitigate that capture.

The current Congress may be receptive to these proposals.[321] The Congress we have now is not the same as the Congress that enacted fast track in 1974, or renewed it in 2002. Congress experienced significant public backlash to copyright enforcement legislation proposed in 2011, the

313. *See* Exec. Order No. 12,905, *supra* note 131, 59 Fed. Reg. at 14,733 (establishing the Trade and Environmental Policy Advisory Committee).

314. *See* 19 U.S.C. § 2155(c)(1) (2012) (giving the President authority to establish individual general policy advisory committees).

315. *See* GAO REPORT, *supra* note 310, at 22–24 (discussing how the USTR has not been able to satisfactorily communicate with tier 2 committees during trade negotiations); Rangnath, *supra* note 106, at 8 ("[T]ier 2 committees have been less active than tier 3 committees.").

316. For more discussion of the PITAC, see Kaminski, *supra* note 199.

317. Exec. Order No. 12,905, *supra* note 131, 59 Fed. Reg. at 14,733.

318. 19 U.S.C. § 3802(b)(11)(C)–(E) (listing a number of goals with regard to trade in the area of the environment, including promotion of environmental protection and sustainable development).

319. GAO Report, *supra* note 310, at 29.

320. *See* sources cited *supra* note 132.

321. Congress now is not the same actor as Congress in 2002, or in 1974, and thus the inside/outside fallacy does not arise here, since the Congress being analyzed today is a different being, with different capacities and motivations, than previous ones. *See* Eric A. Posner & Arian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 ("The inside/outside fallacy occurs when the theorist equivocates between the external standpoint of an analyst of the constitutional order, such as a political scientist, and the internal standpoint of an actor within the system, such as a judge . . . . This equivocation yields a kind of methodological schizophrenia.").

Stop Online Piracy Act ("SOPA") and Protect IP Act ("PIPA").[322] Intellectual property enforcement is, after these events, a toxic topic in Washington. It is likely that Congress will be more receptive to public calls for reform than if these problems had been identified in 2002.

A related reason that these solutions are viable is that the Internet has lowered the costs of public participation in policymaking, so as to solve some of the collective action problems that were in play when fast track was first enacted and then renewed. Those who advocate for the public interest in intellectual property law still face collective action problems in the face of consolidated industry interests with direct access to politicians. But as the SOPA protests showed, online communication has lowered the cost of participation in policymaking by large groups of individuals. The framing of IP enforcement as censorship and a threat to public health has convinced more individuals of the potential harms. This combination of effective framing and reduced participation costs for the public means the past political economy problems of IP may not be as evident in the future. In other words, if Congress does not show interest in adopting these proposals, public pressure may succeed in convincing Congress, where it could not in the past. Finally, a faction of Congress has expressed concern over the lack of transparency in trade negotiations.[323] And some members of Congress have expressed concerns that the trade policy does not produce balanced IP law.[324]

In 2010, the USTR considered expanding the membership of its industry advisory committees, after NGOs and nonindustry stakeholders called for expanded representation in the wake of ACTA negotiations.[325] The then-chairs of the ITACs strongly disagreed with the idea of bringing NGOs onto the ITACs. The chairs characterized the job of the ITACs as

322. Larry Magid, *What are SOPA and PIPA and Why All the Fuss?* FORBES (Jan. 18, 2012), http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/.

323. *See* Zach Carter, *Elizabeth Warren Free Trade Letter Calls for Trans-Pacific Partnership Transparency*, HUFFINGTON POST (June 13, 2013), http://www.huffingtonpost.com/2013/06/13/elizabeth-warren-free-trade-letter_n_3431118.html (describing the frustrations expressed by several members of Congress regarding the USTR's restrictive information access policies).

324. Ali Sternburg, *Growing Consensus Around Balanced Copyright Policy*, DISRUPTIVE COMPETITION (July 18, 2013), http://www.project-disco.org/intellectual-property/071813-growing-consensus-around-balanced-copyright-policy/ (describing "a recent bipartisan letter to [the USTR] about intellectual property provisions in the TPP," which called for more balance in IP trade agreements).

325. Transcript of Industry Trade Advisory Committee's Meeting of the Committee Chairs 5 (Oct. 12, 2010) [hereinafter ITAC Meeting Transcript], *available at* http://www.ustr.gov/webfm_send/2449 ("We are exploring the possibility of narrowly expanding the industry representation on our jointly administered ITACs, and we initiated this joint review in response to requests from NGOs and nonindustry stakeholders to expand the representation of this committee system.").

giving "highly technical advice," from the perspective of "producing" businesses.[326] The chairs suggested setting up another committee within the three-tiered structure to provide a voice for NGOs, pointing to legislation introduced to create a tier 2 global health care committee (that never passed).[327] The chairs strongly disagreed with the idea of including nonindustry stakeholders on the ITACs. One chair explained that environmental representatives had in fact at one point participated in ITAC-3.[328] "When they chose to participate, it made life very, very difficult."[329] The chairs also characterized the ITACs as simply responsible for the implementation of policy, rather than policy creation.[330]

However, speaking on behalf of Public Knowledge, an advocacy organization related to copyright policy, Rashmi Rangnath explained that "the nitty gritty of how trade agreements are written" does affect the public interest.[331] Rangnath pointed out that when public interest groups were allowed to see the draft text of ACTA, they were able to highlight "extremely detailed provisions in the agreement that were problematic in the sense that they were not in accordance with U.S. law, or would affect policy in a direction that was not conducive to the welfare of the general public . . . ." [332] The idea that ITACs are responsible only for implementation rather than for policy decisions is belied by this observation—which amounts to an observation of the use of paraphrasing for policymaking discussed at length in this article.

Thus far, I have discussed FACA's balanced membership requirements, but have avoided discussing a more obvious solution: to apply FACA's requirements of transparency, and reveal both the interactions between the USTR and advisory committees, and the negotiating texts of the agreements. There are a number of good policy reasons for maintaining secrecy in the advisory context, including efficiency, expertise, and possible inhibitory effects of transparency. But as discussed previously, transparency can alternatively lead to both greater efficiency and greater expertise.

Viewed from a domestic perspective, the deep secrecy afforded to interactions between the USTR and its advisory committees may not be

326. *Id.* at 9.
327. *Id.* at 11–12.
328. *Id.* at 17–18.
329. *Id.* at 17.
330. *Id.* at 14–15.
331. *Id.* at 21.
332. *Id.* at 21–22.

necessary. The more uniform the membership on a committee and the more the committee maps the normative values of the agency itself, the less the need for secrecy to protect collective bargaining that takes place within the committee.[333] The current membership of ITAC-15 is fairly uniform in perspective. Thus, there is little need for secrecy to protect the relationship between the advisory committee and the USTR.

To defend its policy of secrecy, the USTR must thus rely on the idea that there is something special about international negotiations. If the justification is to protect the secrecy of the U.S. position in negotiations between states, then advisory committee secrecy would be tangential to but not necessary for this purpose. Negotiations between states more closely resemble collective bargaining, with a need for participants to take preliminary positions. One possible solution to the puzzle would be to release negotiating documents with time delays, to allow for free negotiations at the time, but still permit public accountability afterwards.[334]

The burden should be on the USTR and Congress to more adequately explain what is exceptional about protecting the secrecy of international trade negotiations in the IP context. In other areas of international lawmaking, the executive branch remains subject to FACA's transparency requirements. The State Department, for example, publishes online summaries of meetings of the Advisory Committee on International Economic Policy.[335] It has published online minutes of meetings for the Federal Advisory Committee for Secretary Clinton's Strategic Dialogue with Civil Society.[336] Members of the public are invited to attend meetings of the recently established Advisory Committee on International Communications and Information Policy, and notice of the meetings is published online.[337] The committee includes a mixed membership of

333. Perritt & Wilkinson, *supra* note 67, at 741 (observing that when views of members "are relatively homogenous" and there is "little controversy between the membership and the agency," the incidence of collective bargaining problems in advisory committee activities is small).

334. *See generally* David S. Levine, Extended Abstract, *Game Over: Secrecy and Collective Interests In International [IP] Lawmaking,* (IPSC 2013 Working Paper) (on file with author) (discussing the appropriate timing of publication for draft international IP law negotiating texts).

335. *Advisory Committee on International Economic Policy Meeting Summaries*, US DEP'T OF ST., http://www.state.gov/e/eb/adcom/aciep/mtg/ (last visited Mar. 14, 2014).

336. *Fourth Meeting of the Federal Advisory Committee for Secretary Clinton's Strategic Dialogue with Civil Society*, U.S. DEP'T ST. (Oct. 24, 2012), http://www.state.gov/s/sacsed/201394.htm.

337. U.S. DEP'T OF STATE, CHARTER OF THE ADVISORY COMMITTEE ON INTERNATIONAL COMMUNICATIONS AND INFORMATION POLICY para. 9 (Apr. 6, 2012) *available at* http://www.state.gov/e/eb/adcom/acicip/rls/188151.htm. ("Members of the general public who wish to attend a meeting will be admitted up to the limits of the capacity of the meeting room, unless it is formally determined to be in the public interest that the meeting or any part thereof be closed to the public in accordance with Section 10(d) of the Federal Advisory Committee Act.").

academics, industry, and public interest organizations.[338] It is not clear why FACA requirements should apply to the State Department, but not to the USTR. If the sole justification is that the USTR's advisory committees are permitted to comment on the text of negotiating proposals, where these state department advisory committees are not, then Congress must contemplate whether it is appropriate to allow advisory committees to have this relationship to trade in the IP context where they do not have it with other kinds of international lawmaking.

VIII. IMPLICATIONS AND FURTHER RESEARCH

This Article has closely examined a domestic institution that writes international law. The USTR is the author of law implemented in other countries, often word-for-word, even though structurally it is an executive branch agency within the United States. The institutional design of the USTR thus implicates both the authority and legitimacy of the international law it makes.

The realist conception of international lawmaking identifies states as the relevant actors in international law, explaining that states compete for power on the international stage.[339] This Article joins the host of voices that challenge the realist conception of states as unitary lawmakers. It instead provides support for the liberal theory of international law, which "opens the black box of the state" to look at private actors.[340] This Article suggests that liberal theorists in particular, and international law scholars in general, should look closely at the domestic institutions through which private actors engage in international lawmaking. The structure of domestic institutions affects the ability of private actors to engage in the international lawmaking process, which in turn affects the substance of international law.[341]

Just as focusing on the institutional structure of the USTR pushes back

338. *Id.* para. 12(b) ("The membership will be representative of private industry, the academic community, labor, the private bar, [and] other professionals involved in the subject matter of the Committee . . . .").

339. Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 717, 722–23 (1995).

340. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1961 (2002). *See also* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) (describing liberal international relations theory as the proposition that "state-society relations . . . have a fundamental impact on state behavior in world politics").

341. *See, e.g.*, SELL, PRIVATE POWER, *supra* note 2 (describing institutional structure as "a significant causal force" and as a key determiner of "who gets to play the 'game' in the first place").

against the conception of states as unitary actors, it also pushes back against the idea of the unitary and nationalist executive.[342] Separation of powers discourse often assumes that the president has stable and nationalist preferences, while Congress's preferences tend to be more parochial.[343] The president is consequently entrusted with expressing national preferences, while Congress is considered an obstacle to sound policy.[344] This Article again suggests a more complicated reality. Institutions within the executive branch can be as myopic and captured as Congress is feared to be. What matters is institutional structure, not necessarily placement within a particular governmental branch.

This Article advises international law proponents to take caution when looking for ways to reach finished international agreements. The current focus on successfully completing international law overlooks that it might be possible to make international law too easily, through captured regimes. The trade negotiating mechanism, which is often held up as a paragon of efficiency and balance, is not, on closer examination, as successful as it appears.

This Article also contributes to the growing body of literature addressing the collaborative regulation of private actors, both domestically and on the international stage.[345] This Article suggests that this literature should be sure to examine participating institutions through the capture lens. If government is going to collaboratively regulate private actors, it must ensure that the collaborating government entities are shielded from the possibility of capture by the regulated actors. Governments should be especially careful not to shift the regulation of private actors from domestic institutions into a more easily captured international regime.

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342. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1218 (2006) ("One of the most widespread contemporary assumptions in the discourse about the separation of powers is that while the president tends to have preferences that are more national and stable in nature, Congress is perpetually prone to parochial concerns.").

343. *Id.*

344. *Id.* at 1219.

345. *See, e.g.*, Durkee, *supra* note 142, at 100 (arguing that effective international regulation requires reliance by the state upon collaboration among regulated entities). *See also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000) (describing the role of "[n]ongovernmental actors" in performing legislative and adjudicative tasks in "a broad variety of regulatory contexts"). *See generally* Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411 (2005) (developing a framework for understanding the role of corporations and corporate collaboration in international rulemaking and negotiation); Lesley K. McAllister, *Co-Regulation in Mexican Environmental Law*, 32 UTAH ENVTL. L. REV. 181 (2012) (discussing collaborative regulation in the context of Mexican environmental regulatory law).

Ultimately, this Article argues that the institutional authorship of international agreements matters. When agreements are reached in participatory international forums, the authorship is more diversely representative and agreements are more legitimate. But when international agreements are made by closed institutions in closed regimes, the institutional authors of an agreement might not be representative of the views or interests of those represented by the negotiating state. This matters for those who implement the agreements. Like all law, international law is often subject to multiple interpretations. It can be implemented word-for-word, or implemented in ways that legislatively incorporate domestic concerns. As countries sign U.S. free trade agreements and debate how to implement or interpret them, it is important that implementing countries recognize that the author of the agreements is not the U.S. Congress, but a captured executive branch agency. This recognition legitimizes efforts by academics and activists who encourage other countries to implement balancing measures present in U.S. IP law.[346]

International lawmaking often consists of creating international frameworks for legal transplants, defined as "the moving of a rule or a system of law from one country to another . . . ." [347] This Article emphasizes the importance of maintaining the broader civil liberties contexts in which specific regulatory systems exist. Transplanting a specific regulatory system at the behest of interested private entities can result in significantly different law on the ground, if the receiving country lacks the same contextual protection of civil liberties. International lawmaking can strategically delink substantive legal areas that interact domestically, and place them in different negotiating regimes. The consequence observed here is that countries are sometimes required to import a complex regulatory system, but with none of the background rights available in the broader legal system of the exporting country. In future research, I expect to study how free trade agreements are implemented in different countries, to examine the importance of context for transplanted regulatory regimes.

The paraphrasing examined in this Article illustrates the close relationship between law and language, and the myth of perfect harmonization. Lawmaking is often an adversarial process, and that

346. Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571, 1633–42 (2009) (proposing means by which developing countries might implement IP law that better reflects the balancing measures in the law of "dominant" countries).

347. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21 (1974).

adversarial process plays out in the interpretation of flexibilities inherent in language. The USTR's capturers exploit the fact that law can be read in multiple ways: one way to allow for U.S. law, and another on implementation abroad. This suggests that even if statutory law were exported word-for-word, the ways in which an importing country both implemented and interpreted that law would give rise to incomplete harmonization.[348]

This Article also contributes to conversations about transparency, and the extent to which it can produce policy changes. Transparency can increase accountability, and provide for oversight. But different kinds of transparency affect policy-making differently. FOIA, for example, is after-the-fact, while FACA transparency occurs in real-time.

Finally, this Article provides a case study of the shifting complexities of governance in the digital age. The most interesting dynamic at play here may be the developing power of digital involvement in governance. A balanced membership requirement could function as mere whitewashing; an agency could put new members on a committee, and then decide to ignore them. But in the digital age, the dynamics of governance are different. Trade policymaking occurs against the backdrop of an increasing government awareness of the large volume of Internet users who have been successfully politically activated on digital policy issues in the past. If Congress and the USTR change the form but not the substance of trade lawmaking, online protests may occur. These protests could ensure that the USTR listens to its changed advisory committees. Whether this protest or threat of protest would extend beyond the digital content of the agreements is unclear.

After much stonewalling, the USTR gave a few public interest groups access to the text of the Anti-Counterfeiting Trade Agreement.[349] When public interest groups requested changes to the text of the agreement, the USTR responded. Something happened to make the USTR responsive to their requests. A balanced membership requirement coupled with the latent threat of public digital protests may be uniquely powerful in the case of IP and trade policymaking.

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348. *See* Kapczynski, *supra* note 346, at 1575 (discussing how India has fully entered into TRIPS "while also creatively interpreting its terms," suggesting that "the age of TRIPS implementation will constitute a new kind of global community of disagreement about the terms of IP law").

349. *See* ITAC Meeting Transcript, *supra* note 325, at 23–24 (detailing the approval by the ITAC Committee of Chairs of a draft letter containing recommendations on the issue of transparency in trade negotiations).

IX. CONCLUSION

As Congress readies itself to reenact fast track, the usual debate will arise over democratic accountability in the U.S. trade regime.[350] This Article suggests that instead of falling into the familiar impasse over fast track, Congress and critics should focus on ameliorating the institutional capture of the USTR. This capture has affected the substance of international intellectual property law, and likely the substance of other areas of trade law. It has resulted in the exportation of a paraphrased version of U.S. intellectual property that favors vested interests. Congress should recognize that in the case of IP lawmaking, enabling a plurality of interest groups to participate is necessary not just for the legitimacy of the process, and the quality of the law being made, but possibly for the sustainability of free trade agreements going forward.

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350. Congress began to consider a fast track bill in early 2014. *See* Wingfield, et al., *supra* note 17 (describing the introduction of new fast track legislation in Congress in January 2014). As of publication, however, it is widely seen to be dead. *See* Laura Litvan & Kathleen Hunter, *Reid Says He Opposes Renewing Fast-Track Trade Authority*, BLOOMBERG (Jan. 29, 2014), http://www.bloomberg.com/news/2014-01-29/reid-says-he-opposes-renewing-fast-track-trade-authority.html (reporting broad Congressional opposition to the new fast track proposal). *See also* Daniel R. Pearson, *Congress Likes at Least One Type of Fast Track*, CATO AT LIBERTY (Mar. 26, 2014), http://www.cato.org/blog/congress-likes-least-one-type-fast-track (noting "the reluctance of Congress to pass fast-track negotiating authority," and making a tongue-in-cheek argument that approval may yet be imminent).