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A Case Against ACTA

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A Case Against ACTA

Abstract
The Anti-counterfeiting Trade Agreement (ACTA) is being considered by the Obama Administration as an Executive Order. If signed, this Order will greatly enhance controls placed at the borders of 36 countries to attempt to stop the international flow of so-called counterfeit goods. To remove the social, political and emotional sensitivity, I adopt the value neutral term of “imitative commodity” to describe what some call counterfeits, knockoffs, pirates, etc. This article uses just three manufacturers of luxury status goods to consider whether the ACTA will have positive or negative consequences. It concludes that the data supporting the need for the ACTA is overstated and unverified, that the ACTA is actually not responsive to the precise problem which it purports to correct, that the ACTA merely acts a policy laundering getting the Obama Administration something they fear they could not get in the public law forum, and consists of vague and misdirected border measures and criminal provisions. The ACTA is raised in the context of international terrorism supporting and/or maintaining the imitative commodity industry. However, just like the value of the imitative commodity industry, the value of actual support the imitative commodity industry receives from terrorists and the benefit derived to terrorists is grossly overstated. In fact, there are many positive elements to imitative commodity. Some claim it is actually socially optimal to have some imitative commodity. Imitative commodities operate as free advertising for the legitimate good maker. Imitative commodities improve the goodwill of a legitimate good maker. The sheer existence of imitative commodities allows legitimate high-end makers to sustain otherwise unsustainable prices for their luxury status goods. In the end, we have vilified imitative commodities makers without giving thorough and analytical thought to the economic, social or legal advantages made possible by some imitative commodities. This article is about quantity not quality. The ACTA operates as a sledge hammer to kill an ant. The ACTA works to make public the intellectual property rights of some manufacturers that used to be private. As such, the ACTA also operates as a corporate bailout. What is required is a nuanced solution to a nuanced problem.

Keywords
Anti-Counterfeiting Trade Agreement, ACTA, Trademark, Counterfeit Goods, Knock-Off Goods, Imitative Commodities

Disciplines
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A CASE AGAINST THE ACTA

Kenneth L. Port*

ABSTRACT

The Anti-Counterfeiting Trade Agreement (ACTA) is being considered by the Obama Administration as an executive order. If signed, this order will greatly enhance controls placed at the borders of thirty-seven countries to attempt to stop the international flow of so-called counterfeit goods. To remove the social, political, and emotional stigma, I adopt the value-neutral term imitative commodity to describe what some call counterfeits, knockoffs, or pirated goods, among others. This Article uses just three manufacturers of luxury status goods to consider whether the ACTA will have optimal or negative consequences. It concludes that the data supporting the need for the ACTA is overstated and unverified; that the ACTA is actually not responsive to the precise problem that it purports to correct; that the ACTA merely acts as policy laundering, getting the Obama Administration something it fears it could not get through the public-law forum; and that the ACTA consists of vague and misdirected border measures and criminal provisions. The ACTA is raised in the context of international terrorism supporting or maintaining the imitative-commodity industry. However, just like the value of the imitative-commodity industry, the value of the actual support the imitative-commodity industry receives from terrorists and the benefit derived by terrorists is grossly overstated. In fact, there are many positive elements to imitative commodities. Some claim it is actually socially optimal to have some imitative commodities. Imitative commodities operate as free advertising for the legitimate good maker. Imitative commodities improve the goodwill of a legitimate good-maker. The sheer existence of imitative commodities allows legitimate high-end makers to sustain otherwise unsustainable prices for their luxury status goods. In the end, we have vilified imitative-commodities makers without giving thorough and analytical thought to the economic,

* Professor of Law and Director, Intellectual Property Institute, William Mitchell College of Law. I am deeply indebted to the following William Mitchell students for their research assistance, patience, and good humor: Chris Hansen, Lucas Hjelle, Sarah Berger, and Tara Murphy. Try as I might, I was not able to convince Ms. Murphy that I was right.
social, or legal advantages made possible by some imitative commodities. This Article is about quantity, not quality. The ACTA operates as a sledge hammer to kill an ant. It works to make public the intellectual property rights of some manufacturers that used to be private. As such, the ACTA also operates as a corporate bailout. What is required instead is a nuanced solution to a nuanced problem.

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**INTRODUCTION**

Many economists have made clear and persuasive critiques of the problems surrounding so-called counterfeit goods. These arguments are significant; however, many equally qualified economists and even social scientists have also argued that there may be some social benefit in
counterfeit goods. One thing is certain: economists do not agree on the role of, the size of, or the solution to the counterfeit-goods industry.

This Article, therefore, is an inquiry into whether or not there is anything positive about counterfeit goods. The arguments against counterfeit goods have been made clear. But is there a cogent counterargument? This Article argues that there is. The Obama and Bush Administrations have listened to only one side of this issue. The Administrations have created a new trade agreement called the Anti-Counterfeiting Trade Agreement (ACTA). This Agreement attempts to stem the tide of free movement of counterfeit goods in the developed world. It provides enforcement mechanisms to stop shipments of counterfeit goods across multiple international borders. In that sense, it may be a good thing.

On the other hand, the ACTA and its creators accept as truth one side of the analysis. The ACTA gives no apparent credence or even consideration to the idea that there may be some social good in counterfeiting. It paints with a very broad brush to address the problems surrounding counterfeit goods; however, counterfeit goods are an extremely nuanced problem. Some counterfeit goods seem normatively bad in any amount; other types of counterfeit goods, when produced in moderation, may benefit manufacturers. The ACTA, however, makes all counterfeit goods bad and treats them all the same way. The ACTA also criminalizes the possession of counterfeit goods, even though purchasers are often fooled into buying the counterfeit good. Therefore, we need a nuanced solution to this nuanced problem. This Article attempts to analyze some of this nuance.

To do this, I first attempt to remove the social, political, and emotional sensitivity from this subject by adopting the neutral term imitative commodities to describe what the literature and the press refer to as.

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1 This Article is not about nor does it in anyway defend the use of child labor or the working conditions, poor wages, or intimidation that may accompany the production of imitative commodities. That dark side is well-documented and may be a serious component of the production of these goods. The horrible stories that proliferate that discussion merit individual attention and are therefore beyond the scope of this piece. Also beyond the scope of this piece are products such as counterfeit drugs, car parts, and food products because the thesis of this Article is narrowly crafted to be responsive to status goods—and only some specific status goods at that.

2 The recently released report on Media Piracy in Emerging Economies contemplates this very question from the perspective of copyrights. It questions what will happen to world economies if the enforcement of illicit copyrights is successful. What will be the result of no pirated copyrighted subject matter? See SOC. SCI. RESEARCH COUNCIL, MEDIA PIRACY IN EMERGING ECONOMIES (Joe Karaganis ed., 2011), available at http://www.scribd.com/doc/50196972/MPEE-I-0-1 (concluding that media piracy around the world is more appropriately characterized as a pricing issue, because media goods are simply unavailable for purchase by most in the developing world, yet many do have at their disposal a computer with an Internet connection, making piracy of media goods inevitable).

3 The term appears to have been first used by history professor Maxine Berg and material culture curator Dr. Helen Clifford, both of the University of Warwick, in 1999. CONSUMERS AND
counterfeit goods or knockoffs, among other pejorative terms. To demonstrate that this is an extremely complicated question, this Article focuses on three manufacturers of luxury status goods. The conclusion that is reached by others is that any amount of imitative commodities is a negative that needs to be eradicated. This Article demonstrates that firms and governments should strive for equilibrium between the positive benefits of some counterfeit goods and the negative effects of too many. Lumping all counterfeiting activity together and labeling it all as qualitatively and quantitatively “bad” is misguided. This Article focuses

LUXURY: CONSUMER CULTURE IN EUROPE 1650–1850, at 164 (Maxine Berg & Helen Clifford eds., 1999). Professor Berg and Dr. Clifford have written many articles and books relating to the history of consumer consumption of luxury goods in Europe from the seventeenth to nineteenth centuries. In 2002, Professor Berg made the argument that copying luxury goods results in innovations and has, throughout history, led to improvements in welfare as more and better items become available to more people—a thought shared by the author of this Article as well. Maxine Berg, From Imitation to Invention: Creating Commodities in Eighteenth-Century Britain, 55 Econ. Hist. Rev. 1, 2 (2002).

The Lanham Act identifies trademark counterfeiting as the act of producing, selling, or distributing a product with a “spurious mark which is identical with, or substantially indistinguishable from, a registered mark.” 15 U.S.C. § 1127 (2006). The U.S. Department of State defines counterfeiting as:

The act of producing or selling a product containing a sham mark that is an intentional and calculated reproduction of the genuine mark. A “counterfeit mark” is identical to or substantially indistinguishable from the genuine mark. Often, counterfeit goods are made to imitate a popular product in all details of construction and appearance so as to deceive customers into thinking they are purchasing the genuine merchandise.


A knockoff is “[a]n identical copy of a work or product protected by patent, trademark, trade dress, copyright.” BUREAU OF INT’L INFO. PROGRAMS, supra note 4, at 94. “Knockoff products may seem the same as branded products, but they do not abuse the copyrights, patents or trademarks (intellectual property) of any manufacturer.” PEGGY CHAUDHRY & ALAN ZIMMERMAN, THE ECONOMICS OF COUNTERFEIT TRADE: GOVERNMENTS, CONSUMERS, PIRATES AND INTELLECTUAL PROPERTY RIGHTS 3 (2009).

There is an abundance of commentator and government remarks regarding the potential economic, social, and psychological dangers imitative commodities might bring upon man, thereby, either directly or indirectly insinuating that we are all better off without these items. See Kate Betts, The Purse-Party Blues, TIME MAG., Aug. 2, 2004, at 68 (“Ten years ago, we said [the counterfeit goods industry] wasn’t a problem, that it was even proof of our success.... Nobody says that now. We see it as an economic and even a social danger.” (quoting Marc-Antoine Jamet, then president of France’s anticounterfeiting lobby group, Union des Fabricants (UNIFAB), and secretary general of LVMH); Morality: Rose-coloured Spectacles?, ECONOMIST, June 26, 2010, available at http://www.economist.com/node/16422414 (discussing the results of a recent University of North Carolina, Chapel Hill study, released in Psychological Science, about the effect of counterfeit goods on our psyches) (“[W]earing fake goods makes you feel a fake yourself, and causes you to be more dishonest in other matters than you would otherwise be.”). Sometimes the titles of articles and reports alone clearly demonstrate the desperate tone and hyperdramatic viewpoints on counterfeit goods contained within. See, e.g., INT’L ANTICOUNTERFEITING COAL., WHITE PAPER: THE NEGATIVE CONSEQUENCES OF INTERNATIONAL INTELLECTUAL PROPERTY THEFT: ECONOMIC HARM, THREATS TO THE PUBLIC HEALTH AND SAFETY, AND LINKS TO ORGANIZED CRIME AND TERRORIST ORGANIZATIONS, available at http://counterfeiting.unicri.it/docs/International%20AntiCounterfeiting%20Coalition.White%20Paper.pdf.
on the quantitative issues surrounding and imbuing the analysis of imitative commodities.

In the U.S. government and public media, the hyperbole regarding the negative effects of imitative commodities has become replete. Some estimates claim that the United States is losing $250 billion a year to imitative commodities and that the total worldwide value of imitative commodities exceeds $600 billion. If this claim is correct, some 1.7% of the United States's gross domestic product (GDP) walks out the door each year in the form of imitative commodities. Further, some claim that 750,000 U.S. jobs are lost because of the existence of imitative commodities.

These numbers are suspicious. The claimants of these massive, fuzzy numbers make inaccurate assumptions about purchasing patterns. For example, it simply is not true that every sale of a counterfeit good displaces a sale of a legitimate good at the retail price commanded by that good. The motivations people have for purchasing imitative commodities vary greatly and sometimes appear unclear. One popular belief is that only people who cannot afford the legitimate good will buy imitative commodities. Others argue that education level contri-
butes to the decision to purchase imitative commodities. Still others claim that the decision to purchase an imitative commodity is simply an attempt to fit in with a society obsessed with status. Some research shows that it is not the extrinsic qualities of a person that drives him to make the purchase, but the intrinsic qualities, including his attitude toward counterfeiting, cultural values, ethical perspective, product attributes, and shopping experience. Motivations behind purchasing imitative commodities is beyond the scope of this Article; however, this fuzzy math and these fuzzy motivations are used to convince people that any amount of imitative commodities is bad, and that the public governments around the world need to enforce private intellectual property rights.

The claim that 750,000 jobs in the United States have been lost to imitative commodities has had a profound impact on policy generated by the Obama Administration. Behind closed doors in a tightly-kept secret process, the Administration has negotiated with thirty-six coun-

14 In 1995, researchers sought to determine who was buying counterfeit goods using age, household income, and education as relevant factors. See Chow-Hou Wee et al., Non-Price Determinants of Intention to Purchase Counterfeit Goods: An Exploratory Study, 12 INT'L MARKETING REV. 19, 24-25 (1995). The researchers expected to find that the frequency to buy counterfeit goods would vary across respondents in term of age, level of education, and income. Overall, the researchers felt that wisdom comes with age, judgment with more education, and the higher purchasing power related to increased income would co-vary with other non-price determinants of consumer complicity to buy fake products. However, in this study the researchers reveal that only “attitude towards counterfeiting” appeared in the majority of their models as an explanatory variable in terms of predicting a willingness to purchase counterfeit, and “age” could not be used as a segmentation variable. For one product, purchasing pirated software, one demographic variable, “educational attainment,” was determined to be a significant factor.

15 See supra notes 12-13 and accompanying text.
16 See supra note 10 and accompanying text.
17 The ACTA negotiation process seems to be a direct contradiction to the transparency-in-government platform that President Obama pushed since running for office in 2008. In fact, on January 21, 2009, his first full day in office, Obama signed an executive order and two presidential memoranda heralding what he called a “new era of openness.” President Obama Embraces Openness on Day One, as Urged by the National Security Archive and a Coalition of More than 60 Organizations, NAT’L SEC. ARCHIVE (Jan. 21, 2009), http://www.gwu.edu/~nsarchiv/news/20090121/index.htm. That same theme of transparency was extended in 2010 to intellectual property enforcement when the Obama Administration explicitly stated that “information and information sharing are critical to effective enforcement. The U.S. Government will thus support transparency in the development of enforcement policy. . . . The Administration supports improved transparency in intellectual property enforcement policy-making and international negotiations.” EXEC. OFFICE OF THE PRESIDENT OF THE U.S., 2010 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 8 (2010) [hereinafter 2010 JOINT STRATEGIC PLAN], available at http://stopfakes.gov/pdf/IPEC_Joint_Strategic_Plan.pdf. In a reply letter concerning the transparency of the ACTA, Ambassador Ron Kirk wrote that the Obama Administration had

CHAUDHRY & ZIMMERMAN, supra note 5, at 69.
tries a new framework to respond to what they claim is necessary to combat counterfeit goods. Taking its lead from Japan, rather than negotiating a multinational treaty that would have taken years to create and ratify, the Administration, with its thirty-six partner countries, has created the ACTA. It may sound like a treaty, but it is not. The ACTA will likely be implemented in the United States as an executive order. The initial step in the process was to have Ambassador Miriam Shapiro, the Deputy U.S. Trade Representative, go to Tokyo to attend a signing

taken “unprecedented” steps “to promote transparency around the nation’s international trade agenda.” Letter from Ron Kirk, U.S. Trade Representative, to Ron Wyden, U.S. Senator from Oregon 5 (Jan. 28, 2010), available at http://www.ustr.gov/webfm_send/1700. Ambassador Kirk then went on to list specific steps his office took to improve transparency and stakeholder outreach in connection with the ACTA negotiations. For example in 2009, USTR:

- established a dedicated ACTA webpage on the new USTR website;
- issued and updated the first public summary of issues under negotiation, which is also available on the ACTA web page;
- started releasing public agendas on the ACTA web page before each meeting;
- sought advice from a broad group of experts, including representatives of IP right holders, Internet intermediaries, NGOs, and others, about prospective U.S. positions on IPR enforcement in the digital environment; and
- provided links on the ACTA web page to relevant portions of past agreements, for review by members of the public who are interested in understanding the U.S. approach to possible legal framework positions of the ACTA.

While all of this may be true, it is minor compared to the vast amount of undisclosed information, discussions, and revelations of the parties involved in creating the ACTA, something Ambassador Kirk appears to quickly brush away at the end of his letter by adding, “The Administration also recognizes that confidentiality in international negotiations is sometimes necessary to enable officials of participating governments to engage in frank exchanges of views, positions, and specific negotiating proposals, and thereby facilitate agreement on complex issues.”

18 Parties to the ACTA include thirty-seven countries: Japan, United States, Canada, European Union (twenty-seven countries), Switzerland, Australia, Mexico, Morocco, New Zealand, South Korea, and Singapore.

19 Timothy P. Trainer & Vicki E. Allums, Protecting Intellectual Property Rights Across Borders Database, WL § 6:1 (2010) (“In 2005, Japan’s Strategic Council on Intellectual Property had called for tougher government measures and promoted the idea of an international treaty aimed at tightening border enforcement. Japan’s idea has evolved and in October 2007, the U.S. and numerous other governments, including Japan and members of the European Union, announced that they would begin negotiating the Anti-Counterfeiting Trade Agreement (ACTA).”).

ceremony on October 1, 2011.\textsuperscript{21} As of this writing, the executive order has not been signed.

As an executive order, it is not subject to the normal ratification process in the Senate.\textsuperscript{22} It has the effect of law when executed.\textsuperscript{23} Although subsequent presidents can disagree and are free to end the prior president’s executive orders at will,\textsuperscript{24} for the next two years, it would be the law of the land.

Although the media and Congress have come to believe that any amount of imitative commodities are unacceptable,\textsuperscript{25} in fact, a certain

\begin{quotation}
\begin{itemize}
\item \textsuperscript{22} See ERWIN CHEMERINSKY, \textit{CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} 368 (3d ed. 2006).
\item A treaty is an agreement between the United States and a foreign country that is negotiated by the president and is effective when ratified by the Senate. An executive agreement, in contrast, is an agreement between the United States and a foreign country that is effective when signed by the president and the head of the other government. In other words, if the document is labeled “treaty,” Senate approval is required. If the document is labeled “executive agreement,” no Senate ratification is necessary.
\item \textsuperscript{23} United States v. Pink, 315 U.S. 203, 230 (1942) (stating that under the Supremacy Clause a treaty is “Law of the Land” and that international executive agreements have a “similar dignity”); CHEMERINSKY, supra note 22, at 369 (“Executive agreements, like treaties, prevail over state law and policy.”).
\item \textsuperscript{24} See Stack, supra note 22 (“The president may issue or repeal prior presidential orders on his own initiative, and in almost all cases, may do so without having to satisfy any procedural requirements. Moreover, with appropriate constitutional or statutory authorization, these orders may have the force and effect of law. As a result, presidential orders often leave other institutions, such as Congress, administrative agencies and the courts, as well as the public in the position of responding to or implementing the policy and law they embody.”).
\item \textsuperscript{25} See, e.g., News Release, U.S. Immigration & Customs Enforcement, ICE and CBP Release 2010 Report on Counterfeit Seizures (Mar. 16, 2011), http://www.ice.gov/news/releases/1103/110316washingtondc.htm?f=f ("The risks of counterfeit products go beyond damaging the reputation of a name on a label; consumers can put their health, or even their lives, at risk when they purchase seemingly harmless items such as medicines, perfume and holiday lights. Ultimately, the cost of purchasing a fake product is much greater than the savings and may result in catastrophic consequences." (quoting Alan Bersin, Commissioner, U.S. Customs and Border Protection) (internal quotation marks omitted)); \textit{id.} ("The protection of intellectual property is a top priority for Homeland Security Investigations, as counterfeit products represent a triple threat by delivering shoddy and sometimes dangerous, goods into commerce, by funding organized criminal activities and by denying Americans good-paying jobs." (quoting John T. Morton, Director, U.S. Immigration & Customs Enforcement) (internal quotation marks omitted)); \textit{id.} ("Trade in counterfeit and pirated goods poses significant threats to the United States innovation-based economy, the competitiveness of our businesses, the livelihoods of U.S. workers, and in some cases, national security and the health and safety of consumers."); John Crudele, \textit{Terror-Tied Goods: Knockoff Profiteering Caught on Spy Cam}, N.Y. POST, Mar. 15, 2011, at 30 ("While the cheap fakes are produced in China, the US wholesale operation of these counterfeiters is dominated by Middle Eastern men, many of whom are sympathetic to Hezbollah, the Middle East terrorist
\end{itemize}
\end{quotation}
level of imitative commodities have positive effects for some status goods. That is, if the ACTA is successful in eliminating imitative commodities, some manufacturers would recognize economic damage. Their very role as a status good might be threatened. The existence of imitative commodities reduces the pressure on manufacturers of legitimate goods to ever put status goods on sale. The existence of imitative commodities operates as a powerful advertising tool, free of charge, for the legitimate-good manufacturer. Finally, the goodwill behind legitimate goods actually improves with the existence of imitative commodities in the marketplace. All of these benefits accrue at no cost to the manufacturer of the legitimate good.

organization. . . . Once [an undercover investigator] was speaking Arabic and another buyer, who was checking out handbags, started discussing Middle East politics. The other guy said he liked Hezbollah, the Middle East terrorist organization, and he was a particular fan of Iranian President Mahmoud Ahmadinejad.

Beth DeFalco, Authorities Crack Down on Flea Market Fakes, Wash. Times, Jan. 2, 2011, http://www.washingtontimes.com/news/2011/jan/2/authorities-crack-down-on-flea-market-fakes ("You support organized crime, gang activity, and terrorist organizations that use [sales of counterfeit goods] as a funding mechanism. . . . This isn't a victimless crime." (quoting Robert Barchiesi, President, Int'l AntiCounterfeiting Coal., as he comments on a recent flea market raid in New Jersey) (internal quotation marks omitted)). While the New York Post claims that the investigation was originally an attempt to show how many millions of tax dollars were lost as a result of the "foreign-made knockoffs," the focus of the article shifted to the "bigger problem": proving that counterfeit goods are supporting terrorism because one man interested in counterfeit goods expressed that he may be partial to Middle Eastern topics that the United States has deemed wrong or bad. Id.; see also Targeting Websites Dedicated to Stealing American Intellectual Property: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 1 (2011) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) ("Copyright piracy and the sale of counterfeit goods are reported to cost the American economy billions of dollars annually and hundreds of thousands of lost jobs."); Jennifer Martinez, U.S. Unveils Broad Anti-Piracy Effort, L.A. TIMES, June 23, 2010, at B2 ("Whether we're talking about fake drugs that hurt . . . or knock-off car tires that fail apart at 65 miles per hour causing injury and death, counterfeiters kill . . . ." (quoting Vice President Joe Biden's comments on Obama Administration counterfeit-goods initiatives) (internal quotation marks omitted)); Nicholas Schmidle, Inside the Knockoff Factory, N.Y. TIMES, Aug. 22, 2010, at MM38 ("Counterfeiters played a low-budget game of industrial espionage, bribing employees at the licensed factories to lift samples or copy blueprints.").

Ironically, the benefit of counterfeit goods seems to be most touted by the actual designers of the original goods themselves. For example, Marc Jacobs, an internationally acclaimed and highly successful designer of high-end luxury goods for Louis Vuitton as well as his own lines, Marc Jacobs and Marc by Marc Jacobs—all also owned by LVMH—sees nothing wrong with counterfeit goods. In fact, when asked about counterfeiting, he said he thought it was "fantastic" because "as long as I've been here, everything we have done has been copied. . . . We hope to create a product that is desirable." DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 276 (2007). The feeling that imitation is the best indicator of success seems to be echoed by Prada CEO Patrizio Bertelli, who has said that counterfeiting is simply a part of "the game of fashion." Id. In fact, Bertelli stated that he "would be more worried if [his] product wasn't copied." Id. The general consensus among designers seems to be that if their goods are not being counterfeited then they have a much bigger problem on their hands: failure to achieve status, desirability, and commercial success. See also infra Part II (observing per-units are higher in a marketplace including counterfeiter manufacturers than in a marketplace without counterfeiter manufacturers).
The challenge, of course, is in determining the extent to which imitative commodities should be tolerated and the extent to which they have a deleterious effect on the manufacturer of legitimate goods. One thing is clear, extinguishing imitative commodities—the express intent of the ACTA\textsuperscript{27}—may have a negative effect on the makers of legitimate goods. In short, manufacturers of status goods like Coach, Richemont, and Louis Vuitton should be careful with their lobbying objectives.

Imitative commodities are vilified both because of exaggerated claims of their connection to international terrorism and because of the conditions under which some imitative commodities are produced. Painting with such a broad brush as the ACTA does, including criminalizing the possession of imitative commodities while not squarely addressing the source, will likely have no better success than the various "Drug Czars" that the various administrations have appointed to deal with illicit drugs in the United States. A "just say no"\textsuperscript{28} approach to imitative commodities may make some feel better; however, it will do nothing to stop the creation of these commodities. Moreover, it is not clear what we really ought to do. As the data relied on to make the claims of the horrific economic consequences of imitative commodities is unreliable, what is called for is a complete rethinking of how to address imitative commodities.

Before we shift the burden of enforcement of private intellectual property rights from private parties to public entities, we ought to gather and rely on better data. We ought not to simply vilify all imitative commodities. If the various federal governments are to be asked to come to the aid of some manufacturers who claim they are being imitated (as if that is a new and shocking occurrence) in the form of the ACTA, we need to have better, verifiable data that imitative commodities are doing the harm claimed.

This Article first defines the narrow scope of imitative commodities to which it relates. Next, it describes luxury status goods as the subset of imitative commodities most affected by the ACTA, and highlights the performance of three manufacturers of luxury status goods. The Article then explains the confines of the ACTA and the claimed effects. The Article next addresses the positive effects of imitative commodities on the marketplace. Finally, the Article argues that when accounting for the cost of enforcement (including the enactment of laws

\textsuperscript{27} Press Release, Office of the U.S. Trade Representative, \textit{supra} note 20 ("Consistent with the [Obama] Administration's strategy for intellectual property enforcement, ACTA establishes a state-of-the-art international framework that provides a model for effectively combating global proliferation of commercial-scale counterfeiting and piracy in the 21st century.").

\textsuperscript{28} This not so thinly veiled reference to Nancy Reagan's "Just Say No" antidrug campaign is, of course, meant to highlight the fact that this campaign against imitative commodities is no better than her ineffective attempt to stop the use of illicit drugs in America.
like the ACTA), it is counterproductive for some manufacturers to attempt to stop all imitative commodities.

I. IMITATIVE COMMODITIES

Imitative commodities are sometimes referred to as counterfeit goods, knockoff goods, or various combinations of these and other terms. However, there is a technical distinction between knockoff goods and counterfeit goods.

Knockoff goods are goods manufactured with the intent to be similar to a legitimate trademark holder’s goods but made in a way that would not create a likelihood of confusion. An example of this is where a producer of imitative commodities manufactures purses with a large, brown letter on the goods that appears to be a “C,” thereby suggesting the purse was manufactured by Coach. However, a brief look or inquiry by a potential purchaser immediately discloses that the letter is actually the letter “G” made to resemble the Coach “C.” When no consumer confusion is likely, the appropriate label is knockoff. When there is no fraud involved, merely an attempt to so imitate a status good as to require a purchaser to look closely at the products to determine that they are not genuine, a mere knockoff good is produced, not a counterfeit.

Counterfeit goods are intentionally fraudulent goods. With the intent to displace the sales of legitimate goods, counterfeit goods are passed off as the real good, confusing consumers into believing that they are buying the legitimate good when, in fact, they are not. Some

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30 Cf De Castro et al., supra note 11, at 78 n.3.
32 Cf. Nicole Giambarrese, Comment, The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry, 26 TOURO L. REV. 243, 258 (2010) (“The purse that is identical to the Chanel original, but bears interlocking ‘O’ s, [sic] [instead of the distinctive interlocking ‘C’s,] may not be illegal to sell or manufacture. This purse is not counterfeit; rather, it is a knock-off.”).
34 BLACK’S LAW DICTIONARY 402 (9th ed. 2009) (defining counterfeit as “[t]o unlawfully forge, copy, or imitate an item . . . with the intent to deceive or defraud by presenting the item as genuine”).
counterfeit goods are difficult to detect. For example, some producers of counterfeit goods employ small children to create an accurate replica of the fine stitching on a handbag to conceal the fact that it is a counterfeit good.\(^{35}\)

There turns out to be a large amount of overlap between the uses of these terms in literature.\(^{36}\) These terms are sometimes used synonymously,\(^ {37}\) despite their definitional and connotative differences. In addition, a knockoff good becomes a counterfeit once it is adjudicated to have gone too far.\(^ {38}\) That is, when a knockoff good is determined by a court to be confusingly similar and therefore in violation of the legitimate-good manufacturer’s trademark, it ceases to be a mere knockoff and becomes a counterfeit good. When the manufacturer of an adjudicated counterfeit good prevails on appeal, it ceases being a counterfeiter and becomes a mere knockoff producer again.\(^ {39}\)

Also, the terms counterfeit goods and knockoff goods have various political connotations.\(^ {40}\) These terms are used most frequently in a negative way to claim that their existence somehow harms all Americans, as they allegedly harm the producers of the status goods for which some people strive.\(^ {41}\)

Therefore, as the terms are used interchangeably and defined inconsistently, it becomes rather difficult to determine which is the correct nomenclature for the various goods in the marketplace. In this Ar-

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\(^{35}\) Andrea Thompson, The Human Cost of a Fake Label, DAILY MAIL (UK), Mar. 14, 2005, at 37 ("Seventy per cent of counterfeit items seized worldwide last year came from factories in China, where young children are preferred because their nimble, small fingers are deemed more suitable for the intricate stitching on small handbags that make the copies look so convincing.").

\(^{36}\) Instead of distinguishing between the terms counterfeit, knockoff, and the like, some economists categorize counterfeits or knockoffs as deceptive or nondeceptive. See Gene M. Grossman & Carl Shapiro, Counterfeit-Product Trade, 78 AM. ECON. REV. 59, 60 (1988).

\(^{37}\) See, e.g., Singh II, supra note 33, at 1 ("In the world [m]arket . . . counterfeit goods are commonly known as Knock Offs.").

\(^{38}\) See, e.g., People v. Rosenthal, No. 2002NY075570, 2003 WL 23962174, at *1 (N.Y. Crim. Ct. Mar. 4, 2003) ("While it is perfectly legal to sell merchandise that copies the design and style of a product often referred to as 'knock-offs' it is against the law to sell goods that bear a counterfeit trademark.").

\(^{39}\) Cf. Louis Vuitton S.A. v. Lee, 875 F.2d 584 (7th Cir. 1989) (reversing, for the second time, the district court’s failure to find trademark infringement, false designation of origin, and unfair competition).

\(^{40}\) See, e.g., Sandra L. Rierson, Pharmaceutical Counterfeiting and the Puzzle of Remedies, 8 WAKE FOREST INTELL. PROP. L.J. 433, 433 (2008).

\(^{41}\) Much of the negativity stems from counterfeit pharmaceutical products and automobile parts, which can cause substantial physical injury. See, e.g., Amir H. Khoury, A Neoconventional Trademark Regime for "Newcomer" States, 12 U. PA. J. BUS. L. 351, 379 (2010) ("[N]o data proves widespread injuries from the use of counterfeit items of clothing or parts thereof. In the case of counterfeit pharmaceutical products, the danger appears more plausible."); Adam Powell, Note, Benchmark Legislation: A Measured Approach in the Fight Against Counterfeit Pharmaceuticals, 61 HASTINGS L.J. 749, 751 (2010) ("[C]ounterfeit pharmaceuticals often contain the wrong or no active ingredients, or are contaminated by additional toxic chemicals or poor sterilization practices. . . . As a result, counterfeiters cause more damage in the realm of pharmaceuticals than in more traditionally counterfeited products.").
A CASE AGAINST THE ACTA

I. IMITATIVE COMMODITY

In this Article, I adopt the term *imitative commodity* to describe a combination of products that might be infringing and might not be infringing, or may have formerly not been infringing but have been adjudicated to be infringing. Since it is impossible to say at any given moment which goods might be infringing and which might not be infringing, I adopt the value-neutral term of *imitative commodity*, which does not have the politically, socially, or legally negative connotations of other terms.

By adopting a neutral term, I do not mean to minimize the plight of many people engaged in the manufacture of imitative commodities. Some suffer horrible fates in the hands of monsters to make these goods. However, at a minimum, sound policy creation requires investigating all aspects of an effected industry to determine the best course of action. This Article asks the reader to suspend the more commonly discussed dark side of the manufacturing of imitative commodities. If one is able to momentarily suspend these serious and legitimate concerns, one sees that using the ACTA to paint with a broad brush may not be in the best interest of even the unfortunate people who are forced into laboring to produce imitative commodities.

II. LUXURY STATUS GOODS AT ISSUE

Economists have long recognized the "Veblen Effect." According to the Veblen Effect, people tend to acquire objects for the status that those objects represent, even if they are functionally equivalent to a cheaper alternative. Another term for the Veblen Effect is *conspicuous consumption*.

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42 Some of the cases involving child labor and counterfeit luxury goods are horrific. After accompanying Chinese investigators on a raid of a counterfeit luxury goods factory where dozens of children were present as workers, author Dana Thomas recalls a harrowing story one investigator told her:

"I remember walking into an assembly plant in Thailand a couple years ago and seeing six or seven little children, all under ten years old, sitting on the floor assembling counterfeit leather handbags," the investigator told me as we drove away from the raid.

"The owner had broken the children's legs and tied the lower leg to the thigh so the bones wouldn't mend. He did it because the children said they wanted to go outside and play."

THOMAS, supra note 26, at 288.

43 See Singh II, supra note 33, at 9 ("[The] ACTA . . . extends the meaning of counterfeiting to much subjectivity and thus, increases its ambit to [a] variety of goods.").

44 See generally THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY IN THE EVOLUTION OF INSTITUTIONS (1899).


46 See id. at 349.
Fred Hirsch coined the term *positional goods* to describe goods whose value is derived from their scarcity or congestion through excessive use.\(^\text{47}\) Positional goods may be a result of a “pure” social scarcity, where “satisfaction is derived from scarcity itself,” or a “by-product of positional goods,” where “satisfaction is influenced by the extensive-ness of use by others.”\(^\text{48}\) Later, Gene Grossman and Carl Shapiro used the term *status goods* to describe “goods for which the mere use or display of a particular branded product confers prestige on their owners, apart from any utility deriving from their function.”\(^\text{49}\) Status goods start out as expensive, highly sought-after products and, over time, slowly become attainable by all segments of society.\(^\text{50}\)

Status goods comprise a substantial component of research and development within developed economies around the world.\(^\text{51}\) Evolutionary economist Keith Hudson, for example, argues that if the supply of status goods falters, economic growth would also falter.\(^\text{52}\) He suggests that if the availability of status goods falters, developed nations will have to readjust if their economies are to survive.\(^\text{53}\)

I do not claim, as Hudson seems to, that the existence of status goods makes the American way of life itself possible; however, status goods do play an important role in the American economy. To be sure,

\(^{47}\) FRED HIRSCH, SOCIAL LIMITS TO GROWTH 27 (1978) (“The positional economy, which is the basis of Harrod’s oligarchic wealth, relates to all aspects of goods, services, work positions, and other social relationships that are either (1) scarce in some absolute or socially imposed sense or (2) subject to congestion or crowding through more extensive use.”).

\(^{48}\) *Id.* at 28–29. “[T]he satisfaction that individuals derive from goods and services depends in increasing measure not only on their own consumption but on consumption by others as well.” \(\text{Id. at 2; see also}\) Fredrik Carlsson et al., *Do You Enjoy Having More than Others? Survey Evidence of Positional Goods*, 74 ECONOMICA 586, 586 (2007) (“The idea that relative income and consumption are important for people is far from new. Many prominent economists in the past, including Adam Smith, John Stuart Mill, Karl Marx, Alfred Marshall, Thorstein Veblen, Arthur Pigou, John Maynard Keynes, John Kenneth Galbraith and Tibor Scitovsky, have seriously discussed the observation that people seem to be concerned with their own income and consumption relative to that of others.”).


\(^{50}\) “Like Hirsch’s positional goods, status goods confer utility only at the expense of someone who consumes less of the good.” Ben Cooper et al., *Status Effects and Negative Utility Growth*, 111 ECON. J. 642, 644 (2001). “The increased supply then entails a reduction in quality, in the sense that a congested road is of lower quality than a clear one, which is a restraining influence on demand.” HIRSCH, supra note 47, at 31.

\(^{51}\) Cooper et al., *supra* note 50, at 644 (“[T]he increased activity in the economy is increasingly directed at the innovation of status goods . . . “).


\(^{53}\) *Id.* (“Economic growth therefore needs this succession of status goods. But, as one becomes widespread with lower and lower profit margins, another one is needed in order to keep the momentum going.”).
if they do falter, it would affect the American economy significantly, and that effect would certainly be negative.

In light of the intricate nature of the imitative commodities industry, status goods make a nicely confined segment to study. However, others claim that there is a positive side to this story. Some economists even claim that imitative commodities are socially optimal. Imitative commodities could reduce inefficiencies that result from monopoly pricing and thereby expand output.

If an equilibrium with imitative commodities can be attained where there exists some imitative commodities and where the number of firms is fixed (as opposed to a situation where imitative commodities are purged), profits might actually be enhanced. Rational consumers are willing to pay more for better quality, and provided the claim is credible and the good has not disappointed the consumer in the past, price markups for the good increase with quality. The degree to which a particular manufacturer can claim exclusivity depends on its ability to maximize quality and charge a corresponding price. To the extent that high-end status-goods manufacturers can claim exclusivity, perceptions of quality increase correspondingly. The perception of quality is enhanced as imitative commodities hold the market for reduced-priced goods. Thereby, the per-unit profits go up. If sales due to the imitative commodities do not fall by too much, total profits increase. When profits increase in this scenario, it is because of the presence of imitative commodities, not the converse. When imitative commodities enter the market place, they reduce the pressure on firms to engage in mutual-

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56 Grossman & Shapiro, supra note 36, at 70.
57 "Price markups rise as we move up the credibility constraint, so if quality increases due to counterfeiting, so too do per-unit profits." Id. at 68.
58 See id. at 68 ("Home producers select (credible) prices and qualities to maximize quality-conscious consumers' utilities . . . .").
59 See id. at 60 ("When governments grant firms exclusive property rights to their marks, they protect firms' investments.").
60 Id. at 73 ("With a fixed number of home firms, however, brand-name producers may raise their quality in an effort to battle counterfeiters, and this quality enhancement may cause both home and global welfare to rise . . . .").
ly destructive competition.61 In the end, imitative-commodity producers reduce the need for legitimate firms to compete by reducing prices, quality, or both.62

This raises the question of how best to protect luxury status goods from faltering. The Obama Administration and thirty-six other nations believe the best course of action is to stamp out what they refer to as counterfeit goods by adopting the ACTA. In order to test that idea against my hypothesis, that some amount of imitative commodities would be better for luxury status goods than none at all, this Article presents a detailed analysis of Coach, Richemont, and Louis Vuitton. Collectively, I refer to products that emanate from these three manufacturers as luxury status goods. This Article concludes that, at least for these goods, the existence of some imitative commodities has a net positive effect, and that eliminating imitative commodities entirely, as the ACTA attempts to do, would have a net negative effect on the manufacturers of these luxury status goods.

A. Coach

Coach reports that they are a very successful company. Especially in the last three years, Coach has outperformed the Dow Jones Industrial Average (Dow) and the Standard & Poor's 500 Index (S&P 500) by a rather healthy margin. If one had invested $100 in Coach in 2000, that $100 would be worth nearly $2000 in October of 2010.63 This outperforms the S&P 500 by a factor of one to twenty. In other words, as an investment, Coach has been a very viable option.

61 Id. at 68 (“When profits increase, it is because the presence of counterfeiters limits the intensity of mutually harmful competition among the legitimate firms.”).

62 Id.

63 All available Coach stock data (NYSE:COH) was downloaded from Yahoo Finance, which is available at http://finance.yahoo.com/q/hp?s=COH+Historical+Prices. After normalizing the first available stock price to $100 and accounting for stock splits on July 5, 2002, October 2, 2003, and April 5, 2005, the value of Coach stock on February 18, 2011 was $2376.35, or 23.76 times greater than its original value. All data is on file with the author.
Regarding revenues, Coach has also performed very well, maintaining an average annual revenue growth of twenty-four percent⁶⁴:

B. Louis Vuitton

Louis Vuitton is owned by LVMH Moët Hennessy–Louis Vuitton S.A. Similarly to Coach, LVMH has also drastically outperformed the Dow and the S&P 500.⁶⁵

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⁶⁴ All available Coach revenue data was downloaded from YCharts.com, which is available at http://ycharts.com/companies/COH/revenues. All data is on file with the author.

⁶⁵ All available LVMH Moët Hennessy–Louis Vuitton S.A stock data (PAR:MC.PA) was downloaded from Yahoo Finance, which is available at http://finance.yahoo.com/q/hp?s=MC.PA+Historical+Prices. After normalizing the first available stock price to $100, the value of LVMH stock on February 21, 2011 was $354.52, or 3.54 times greater than its original value. All data is on file with the author.
Most importantly, LVMH has maintained a very impressive record for revenue generation. Even including the most serious recession in U.S. history since the Great Depression, LVMH has maintained an average annual revenue growth of nearly eight percent:

In LVMH’s annual report, the company proudly says that it is a “growing” and “profitable” company. Nowhere in the annual report does LVMH claim that counterfeit goods (or any other synonymous term) amounted to any risk at all.

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66 All available LVMH revenue data was downloaded from LVMH.com, which is available at http://www.lvmh.com/comfi/pg_rapports.asp. Euros were converted to dollars at the April 11, 2011 exchange rate of one euro per 1.4453 U.S. dollars. All data is on file with the author.

C. Richemont

Richemont is the parent company of several luxury brands, including Cartier and Montblanc. Though stock data was only available for two years, Richemont has consistently outperformed the Dow and S&P 500:

Richemont’s revenue also increased by an average of nine percent between 2004 and 2010:

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68 All available Richemont stock data (FRA:RITB.F) was downloaded from Yahoo Finance, which is available at http://finance.yahoo.com/q/hp?s=RITB.F+Historical+Prices. After normalizing the first available stock price to $100, the value of Richemont stock on February 21, 2011 was $251.21, or 2.51 times greater than its original value. All data is on file with the author.

69 All available Richemont revenue data was downloaded from Richemont.com, which is available at http://www.richemont.com/investor-relations/reports/archive.html. Euros were converted to dollars at the April 11, 2011 exchange rate of one euro per 1.4453 U.S. dollars. All data is on file with the author.
D. Analysis of These Three Firms

According to the stock and revenue data for Coach, LVMH, and Richemont, these firms have performed well even despite it being the most challenging financial times since the Great Depression. Stock prices have gone up rather remarkably. And revenue for each firm has gone up when averaged over the last five years. Without the ACTA, these luxury-status-goods makers are, in their words, “growing” and “profitable” companies.

If the existence of imitative commodities had a significant negative effect, one would not expect such bright forecasts for these firms during a time when imitative commodities are supposedly skyrocketing. If all status goods were imperiled, as the U.S. government claims\(^7\) and as many of the signatories to the ACTA have alleged,\(^7\) one would not expect these three firms to be performing so sufficiently.

The ACTA, then, is setting out to cure an ill that does not exist for these three firms. Their stock prices are not down. Their net sales are not down. And, most importantly, their revenue is not down. Without the ACTA, these three firms are performing as well as we might expect. They are doing a perfectly adequate job of taking care of themselves.


\(^{71}\) ACTA Final, supra note 20, at 1 (“Noting further that the proliferation of counterfeit and pirated goods, as well as of services that distribute infringing material, undermines legitimate trade and sustainable development of the world economy, causes significant financial losses for right holders and for legitimate businesses, and, in some cases, provides a source of revenue for organized crime and otherwise poses risks to the public.”).
According to these three firms' annual reports, they all are doing amazingly well. For example, they do not complain of depressed sales due to imitative commodities. In fact, there is no mention of them at all (as either counterfeit goods or knockoffs). If imitative commodities present a significant negative effect on these three firms, one would expect some sort of disclosure in their annual reports. Complaining to the government that imitative commodities are negative, but failing to disclose that on one's respective annual report is a violation of the Securities Exchange Act of 1934. Therefore, either imitative commodities are truly not such an issue, or these firms have committed securities fraud in reporting one thing in their annual reports while complaining of something else to the U.S. government.

Each U.S. corporation must file an annual report. In that annual report, each corporation must identify issues that may pose "serious problems" for that company. None of the makers of the luxury status goods discussed here disclosed counterfeit goods, knockoff goods, pirated goods, etc. as a material risk in their annual reports. We must presume, therefore, that each firm does not recognize imitative commodities as a serious problem.

At the same time, however, each corporation has complained of the role of imitative commodities. If imitative commodities are such a problem as each company says in public, why are they not disclosed in their annual reports as a material risk? There exists a serious and disingenuous disconnect at this crucial point. Luxury-status-goods makers complain of the deleterious effect of imitative commodities to the U.S. government. Meanwhile, they boast of their economic successes to

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72 Not to be outdone, privately held Prada just announced that 2010 was their most profitable year yet, with net profits of $250.8 million euros, or $336 million, a 150.4 percent surge compared to 100.2 million euros, or $140.2 million, in the previous year." Luisa Zargani, *Prada Profits Hit Record*, WOMEN'S WEAR DAILY, Mar. 29, 2011, at 2, available at http://www.wwd.com/business-news/prada-profits-hit-record-3566669.

73 15 U.S.C.A. § 78d(g)(6)(B)(i) (West 2011) ("Not later than December 31 of each year after 2010, the Investor Advocate shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report on the activities of the Investor Advocate during the immediately preceding fiscal year.").


75 Id.

76 See, e.g., *Counterfeit Education*, supra note 31 ("Counterfeiting has been linked to organized crime, child labor, and terrorism. It is estimated that counterfeiting costs the United States economy 250 to 500 billion dollars a year."); *FAQ*, LOUIS VUITTON, http://www.louisvuitton.com/front/#/eng_US/faq (last visited Jan. 3, 2012) (click on "Questions About Louis Vuitton?" then "What is Louis Vuitton Doing to Combat Counterfeiting?") ("The fight against counterfeiting is a long-term element in Louis Vuitton's worldwide sustainability strategy. Louis Vuitton believes that it is essential to preserve the house's ancestral know-how and the work of its craftsmen by fighting the illegal networks that infringe on human rights, the environment and global economy.").
prospective and current investors. In the United States’s current economic circumstances, it seems extremely problematic to grant these luxury-status-goods makers federally funded protection in the form of the ACTA.

If there is no material risk, and firms are merely attempting to convince the governments to perform their intellectual property enforcement for them, then the ACTA acts as another dreaded and hated corporate bailout.77 Before we make law and policy oriented toward supplanting private corporate self-policing, we ought to make sure that imitative commodities really are the problem that they are made out to be. Claiming one thing in one’s annual reports for public consumption and another thing to the U.S. government for private consumption (between the government and the corporation) smacks of the duplicitous conduct that got banks into trouble for dealing in mortgage-backed securities and the like.

If imitative commodities are a significant drain on American corporate wealth, such corporations should be asked to document this with verifiable data. If it is a major issue, Congress should determine an appropriate response. We, certainly, should not simply believe the conclusions of the CEOs from various companies and sign an executive order in response to those claimed harms. In this Article, I am really asking one question: where is the evidence and is it verifiable?

In fact, Levi Strauss & Co. is a very good example of a firm that has been able to use imitation to its advantage and reverse a downward trend in the value of their product. Immediately after World War II, Levi’s blue jeans became ubiquitous.78 Levi’s denim was desired worldwide by aspiring youths.79 It became so popular and so desired that many imitators were born.80 These imitators had remarkable suc-

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78 See RACHEL LOUISE SNYDER, FUGITIVE DENIM: A MOVING STORY OF PEOPLE AND PANTS IN THE BORDERLESS WORLD OF GLOBAL TRADE 141 (2009) ("The real evolution of jeans both as a symbol and as a style began during World War II. The grainy black-and-white photographs by Walker Evans of Depression-era families, unsmiling, with haunted eyes and uniforms of stained jeans, seemed to suggest something uniquely American, the will to believe in your own strength and dignity against overwhelming circumstances.").

79 See id. at 142 ("Because they were rare, jeans in Japan could cost upwards of nearly half a month’s salary in the immediate postwar period. Around Tokyo, secondhand markets for soldier’s cast-off jeans thrived. Like cars, jeans had become mass-produced, and they suggested almost endless economic possibility and industry.").

80 Other postwar manufactures included Lee, Wrangler, Pay Day, Tuff Nut, Hercules, Buckhide, Union Made, Big Ben, and Carhart. Id.
There was so much success in the blue jean industry that "designer jeans" were born. Today, some designer jeans sell for thousands of dollars a pair.

Though Levi Strauss was the largest clothing maker in the world in 1977, the company encountered significant financial difficulties in the early 1980s as the global demand for denim stabilized. But Levi Strauss did not run to the government and ask for a new law to prevent copying of their blue jeans. Rather, it engaged in the ancient American tradition: competition.

Levi Strauss began to imitate the imitators. Today, Levi's is a very strong brand and Levi Strauss is a healthy firm. The company accomplished this by raising prices. It began its own stand-alone stores and started imitating the designer jeans brands. Today, some pairs of Levi's jeans retail for as much as $198. According to the Guinness Book of World Records, the most expensive pair of jeans ever sold was a 115-year-old pair of Levi's 501 jeans, sold on eBay in 2005 for $60,000.

Levi Strauss learned an important lesson. Imitation is the key to success. While Levi Strauss also engaged in an aggressive campaign to take back their brand by enforcing its trademark in the mere stitching used to sew the rear pockets, they also imitated success. The result for Levi's: success.
Some goods play a larger role for their bearer than simply the function of carrying their goods, covering their feet or keeping them warm. Although that is an obvious truism, less obvious is whether and to what extent governments around the world should become involved in maintaining the status of these goods. Should this remain a largely private endeavor, or should we make it more of a public one? If the ACTA prohibits all or nearly all imitation, it may, at some point, also hinder competition—precisely the converse of the ACTA’s stated objective.

III. THE ANTI-COUNTERFEITING TRADE AGREEMENT

The ACTA is a marvel in international law. There are two ways to create multilateral agreements. The first, and most common, is to create a treaty. The most important treaty in intellectual property is the TRIPS Agreement. One important part of the TRIPS Agreement is the requirement that signatory states may create agreements that are more rigid regarding intellectual property, but not less. That is, states may create more rights than the TRIPS Agreement contemplates, but not fewer. The ACTA, therefore, is considered a “TRIPS-plus”

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90 The ACTA has progressed at an alarming pace for an international trade agreement. There have been eight rounds of talks:
   - Geneva, Switzerland: June 3–4, 2008;
   - Tokyo, Japan: October 8–9, 2008;
   - Paris, France: December 15–18, 2008;
   - Rabat, Morocco: July 16–17, 2009;
   - Seoul, Korea: November 4–6, 2009;
   - Guadalajara, Mexico: January 26–29, 2010; and
91 Treaties are most commonly used in the United States because they are explicitly authorized by the Constitution. See U.S. CONST. art. II, § 2. Treaties are also the most commonly used form of agreement internationally. Onuma Yasuaki, International Law in and with International Politics: The Functions of International Law in International Society, 14 EUR. J. INT'L L. 105, 124 (2003).
94 Emily Ayoob, Note, Recent Development: The Anti-Counterfeiting Trade Agreement, 28 CARDOZO ARTS & ENT. L.J. 175, 182 (2010).
agreement, as it claims to make intellectual property rights stronger than the TRIPS Agreement requires.

The ACTA is not a treaty, however. Other than by treaty, the other way to bind the United States to some international agreement is to create an executive order.\textsuperscript{95} Other countries have differing laws on this subject; however, in the United States, an executive order has the force of law for as long as the President is (or subsequent Presidents are) interested in maintaining that order.\textsuperscript{96}

Executive orders are usually reserved for times of war or when there is not sufficient time to go through the democratic process of creating an international treaty.\textsuperscript{97} For example, President Franklin D. Roosevelt signed an executive order to create a lend-lease agreement with Britain prior to the United States's entry into World War II when he tried and failed to get Congress to act.\textsuperscript{98}

First President Bush and then President Obama—both apparently considering the ACTA negotiations and process to be vital to the interests of the United States—subverted the treaty process and proceeded directly with an executive order.\textsuperscript{99} As a result, the usual democratic process has not been followed throughout the enactment of the ACTA.\textsuperscript{100} Nowhere in the TRIPS Agreement is there an indication that states could or should subvert the democratic process when arriving at TRIPS-plus agreements.

The fact that this has been negotiated as an executive order rather than a multilateral treaty is not even the worst of the ACTA. The ACTA

\textsuperscript{95} William J. Aceves, Lost Sovereignty? The Implications of the Uruguay Round Agreements, 19 FORDHAM INT'L L.J. 427, 457 n.180 (1995) (citing United States v. Belmont, 301 U.S. 324 (1937) (upholding the president's authority to enter into international agreements without the consent of Congress)).

\textsuperscript{96} See id. at 458 (noting that there is "no significant" difference in the domestic application of a treaty versus a congressional-executive agreement, and that the difference is one of "form and not substance").

\textsuperscript{97} See Dames & Moore v. Regan, 453 U.S. 654, 658 (1981) (reaffirming presidential action without the consent of Congress where "the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute"); Gordon Silverstein & John Hanley, The Supreme Court and Public Opinion in Times of War and Crisis, 61 HASTINGS L.J. 1453, 1457, 1483-84 (2010) (highlighting some key historical executive agreements during times of war or national emergency).

\textsuperscript{98} See GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 6 (2009).


\textsuperscript{100} See, e.g., Margot Kaminski, The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA), 34 YALE J. INT'L L. 247, 247-50 (2009) ("With no open negotiating process, and no draft publically available, [the] ACTA is a black box that could contain a bomb.").
was developed in extreme secrecy.\footnote{See Charles R. McManis, The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty, 46 Hous. L. Rev. 1235, 1236-37 (2009).} Although Wikileaks was able to leak drafts prior to the Agreement’s official release date, the first formal draft of the ACTA was published on April 21, 2010.\footnote{On April 21, 2010, the Office of the U.S. Trade Representative released the first official draft of the ACTA. See 2010 Joint Strategic Plan, supra note 17, at 44.} The final draft was finally published a mere nine months later by the Commerce Department in December of 2010.\footnote{See, e.g., Anti-Counterfeiting Trade Agreement (ACTA), Austl. Dep’t of Foreign Affairs & Trade, http://www.dfat.gov.au/trade/acta (last visited Mar. 18, 2011) (providing a link to the final ACTA text, published on December 3, 2010); Monika Ermert, “Final Final” ACTA Text Published: More Discussions Ahead for EU, Intell. Prop. Watch (Dec. 6, 2010, 10:05 PM), http://www.ip-watch.org/weblog/2010/12/06/%E2%80%98final-final%E2%80%99-acta-text-published-more-discussion-ahead-for-eu (“Now the ‘final final’ text has been published by several negotiating partners and is open to more interpretation . . .”).} The only people that were invited to comment on drafts of the ACTA were members of the U.S. Trade Representative’s twenty-eight Industry Trade Advisory Committees,\footnote{Created by Congress in 1974 and managed by the Office of the U.S. Trade Representative, the twenty-eight advisory committees are made up of roughly 700 people and divided by industry. See Advisory Committees, Office of the U.S. Trade Representative, http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees (last visited Mar. 21, 2011). The committees were created “to ensure that U.S. trade policy and trade negotiating objectives adequately reflect U.S. public and private sector interests.” Id.} and some of the CEOs and other corporate leaders of the largest corporations in America.\footnote{See James Love, Who Are the Cleared Advisors that Have Access to Secret ACTA Documents?, Knowledge Ecology Int’l (Mar. 13, 2009, 2:44 PM), http://keionline.org/blogs/2009/03/13/who-are-cleared-advisors (listing various Industry Trade Advisory Committees). Members of these committees include, among others, the Director of Commercial Trade Policy from Boeing Company; the Director of International Programs Defense and Space from Honeywell International; the Vice President of International Programs from GE Aviation; the Manager of International Strategy and Trade from Ford Motor Company; the Chief Economist of General Motors Corporation; the Senior Director of International Relations from Medtronic, Inc.; the Vice President of International Affairs from Johnson & Johnson; the Vice President of Global Operations from Proctor & Gamble; the Vice President of Industry Relations from Halliburton; the Director of Global Trade and Competition Policy from Intel Corporation; the Executive Director of International Affairs from AT & T; the Director of Worldwide Government Affairs and Public Policy from Levi Strauss & Co.; and the Vice President of Verizon Communications. See Industry Trade Advisory Committees, Int’l Trade Admin., http://www.ita.doc.gov/itac/committees/index.asp (last visited Mar. 18, 2011).}

ACTA membership is acquired through what is known as the “club” principle.\footnote{See Claudio Brenni, 3D Three, The Anti-Counterfeiting Trade Agreement (ACTA): A New Obstacle to Human Rights? (2010), http://www.3dthree.org/pdf_3D/201006ACTAInformationnote.pdf (describing the ACTA as an exclusive club).} Multilateral treaties are published to the world and every country is asked to join.\footnote{See D.W. Greig, Reciprocity, Proportionality, and the Law of Treaties, 34 Va. J. Int’l L. 295, 321 (1994).} The basic international principle of equality presupposes every country is considered equal. While Saddam
Hussein ruled Iraq, Iraq ratified the 1975 Algiers Agreement.\textsuperscript{108} No one objected to Iraq joining the 1975 Algiers Agreement because every country is considered equal on the international stage.

This is not true of the ACTA. The ACTA is a plurilateral agreement.\textsuperscript{109} ACTA membership is by invitation only.\textsuperscript{110} The ACTA was actually first proposed by Japan. The United States and then the European Union quickly joined. These countries negotiated the initial framework of the ACTA.\textsuperscript{111} Conspicuously absent from the list of members, however, is any developing country, let alone any least-developed country. That is, at least at first, the ACTA is designed for and written by the developed world.\textsuperscript{112} The ACTA is set up as an “us versus them” proposition. As such, it is inconsistent with the way international law usually develops. Though the Obama Administration has committed itself to transparency, the secrecy with which the Administration has kept the ACTA is reason for true skepticism as to its real purpose.

Many organizations have expressed their opposition to the ACTA. The Electronic Frontier Foundation (EFF) opposes the ACTA, calling for a greater public spotlight on the proposed agreement.\textsuperscript{113} The EFF claims that the goal of the ACTA is to create a “new standard of intellectual property enforcement, above the current internationally-agreed standards in the TRIPs Agreement,” and that the Agreement “raises considerable concerns for citizens’ civil liberties and privacy rights, and the future of Internet innovation.”\textsuperscript{114}

\textsuperscript{108} The Algiers Agreement of March 6, 1975 “provided for some territorial adjustments, including the demarcation of the Shatt al-Arab waterway’s boundary.” Efraim Karsh, \textit{Military Power and Foreign Policy Goals: The Iran-Iraq War Revisited}, 64 INT’L AFF. 83, 86 (1988). Five years later, “the Iraqi invasion in September 1980 reflected President Saddam Hussein’s ambitions—which ranged from the occupation of Iranian territories (the Shatt al-Arab and Khuzestan), through the overthrow of the Khomeini regime, to the desire to assert Iraq as the preeminent Arab and Gulf state.” \textit{Id.} at 83.


\textsuperscript{112} Singh II, \textit{supra} note 33, at 23 (“The implications of ACTA will be [far-reaching] and devastating for the third world.”).

\textsuperscript{113} \textit{Anti-Counterfeiting Trade Agreement, ELECTRONIC FRONTIER FOUND.}, \textit{http://www.eff.org/issues/acta} (last visited Mar. 19, 2011).

\textsuperscript{114} \textit{Id.}
The Free Software Foundation (FSF) argues that the ACTA will make it more difficult and expensive to distribute free software via file-sharing and peer-to-peer (P2P) technologies like BitTorrent, technologies currently used to distribute large amounts of free software. The FSF claims that the ACTA "will have a far broader scope, and in particular, will deal with new tools targeting 'Internet distribution and information technology.'" The Agreement "increases the chances of getting your devices taken away" and creates a "culture of surveillance and suspicion." Until recently, negotiations for the ACTA were conducted completely behind closed doors. Both the Bush and Obama Administrations have rejected requests to make the text of the ACTA public. In 2009, Knowledge Ecology International filed a Freedom of Information Act (FOIA) request, but their request was denied because it was deemed to be for material "properly classified in the interest of national security."

A major concern in the United States is the "Border Measures" proposal of the ACTA. Prior versions of the ACTA seemed to empower security officials at airports and at international borders to search laptop computers, handheld MP3 players, and similar electronic devices for content not paid for by the possessor. Possessors of unpurchased content would be subject to fines and confiscation of their devices.

In June of 2008, Canadian academic Michael Geist argued that the government should lift the veil on the ACTA’s secrecy. Geist argued that public disclosure "might put an end to fears about iPod searching border guards" and that "[g]reater transparency would . . . lead to a more inclusive process," highlighting that the ACTA negotiations have excluded both civil society groups as well as developing countries.

A number of civil rights organizations have argued that "the current draft of ACTA would profoundly restrict the fundamental rights and freedoms of European citizens, most notably the freedom of expression and communication privacy."

116 Id.
117 Id.
118 Protecting national security has been proffered as the reason the ACTA text has been kept secret. See Ayoob, supra note 94, at 188; McManis, supra note 101, at 1238.
120 Michael Geist, Government Should Lift Veil on ACTA Secrecy, MICHAEL GEIST (June 9, 2008), http://www.michaelgeist.ca/content/view/3013/135/.
121 Id.
122 Id.
A. Objections

1. The ACTA Is Not Responsive to Imitative Commodities

One of the most obvious objections to the ACTA on a substantive level is whether and to what extent it would actually influence the importation and sale of imitative commodities. Much like various "Drug Czars" in the United States that have had no appreciable impact on the importation and consumption of controlled substances, the ACTA focuses on penalizing the consumption of imitative commodities rather than addressing the source of their manufacture. This presumes, of course, that we actually want to stop the manufacture of imitative commodities.

Interpol has attempted for some years to interdict the manufacture of imitative commodities in South America, including through what is known as "Operation Jupiter." If all of their numbers are to be believed, however, the first phase of Operation Jupiter resulted in the seizure of $290 million worth of goods. That is an impressive amount until one compares it to the alleged $600 billion worth of sales of imitative commodities worldwide. That means that all of Interpol's efforts and all of their expenditures in South America have netted less than 0.05% of imitative commodities last year. It is unclear from Interpol's web site whether this $290 million is for one year or the entire life of the operation. To be sure, the claim that the imitative commodity industry is worth $600 billion is for one year. That is, the amount of imitative

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commodities interdicted by Interpol on an annual basis may be significantly less than 0.05%.

By creating the ACTA in such a secretive manner, the creators have not only failed to investigate whether elimination of imitative commodities is a desirable outcome, but have also neglected to conduct research into how to effectively stop or reduce the creation of imitative commodities. Are there other, more effective ways to eliminate imitative commodities? Some of the more effective terms (though of harsher constitutional and civil rights relevance) of the ACTA were eliminated or curtailed in the final rounds of the drafting of the agreement.129

Therefore, although ACTA compliance allows a country to interdict sales of a commercial nature, it allows countries to exclude application of the ACTA to private luggage. As a result, a package shipped through FedEx containing multiple imitative commodities could be seized, but a person's suitcase containing the same amount of imitative commodities may not be seized. How long will it be before importers of imitative commodities learn this detail?

If we want to effectively eliminate the importation of imitative commodities, more draconian methods may be necessary. However, groups campaigning against the ACTA have opposed these efforts.130 The creators of the ACTA relinquished harsher border measures and instead put in place exceptions for personal luggage.

That is, the ACTA might be somewhat responsive to massive shipments from countries outside of the United States; however, it is completely unresponsive to imitative commodities produced within the United States. As such, the ACTA has become a protectionist measure.131 It allows all signatory states to discriminate against the importation of imitative commodities, while failing to address domestic imita-

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129 See Margot E. Kaminski, An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement (ACTA) 5 (Am. Univ. Wash. Coll. of Law, PIJIP Research Paper No. 17, 2011), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1019&context= research ("The latest draft of ACTA . . . is relatively less draconian than previous incarnations."). Compare ACTA Final, supra note 20, with ACTA Draft, supra note 20. But see Kaminski, supra, at 27–29 (claiming the December draft of the ACTA can be considered more extensive due to the expansion of some definitions since the April draft).


131 J. Janewa OseiTutu, A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law, 15 MARQ. INTELL. PROP. L. REV. 147, 214 (2011) ("Unfortunately, the recent negotiations on the Anti-Counterfeiting Trade Agreement ('ACTA') serve as yet another example of an expanding protectionist intellectual property model that predominantly favors industrialized countries' interests.").
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In effect, the ACTA acts as a border protection measure, allowing domestic imitative-commodities producers in each signatory state to prosper, while encouraging the exclusion of imitative commodities from importation into those same states. As such, the ACTA is inconsistent with Article 1 of the TRIPS Agreement, which states: “Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.” Since the ACTA includes protectionist measures to allow participants to except their policies and their laws from international scrutiny, it acts to contravene the provisions of the TRIPS Agreement. The underlying point of the World Trade Organization (WTO), of which TRIPS is a part, is to increase the free movement of goods and services on an international basis. To the extent that the ACTA interferes with this basic notion, it contravenes the provisions of the TRIPS Agreement. Therefore, the ACTA, from the start, is ineffective in prohibiting the conduct it purports to address.

2. The ACTA Is Policy Laundering

Policy laundering is the act of taking an unpalatable policy position and “laundering” it through some international organization that then presents it back to the domestic law-generating body in the form of a treaty. Thus, a policy is laundered through the international sphere to make it more palatable in the domestic sphere. The ACTA takes this a step further. Rather than taking a controversial or unpalatable position from the domestic sphere, it presumes opposition to that position and circumvents the entire domestic legislative sphere.

Since the rhetoric castigating all imitative commodities is so aggressive, it is difficult to predict what response the ACTA would have elicited if it had been submitted to the normal treaty or legislative

133 TRIPS Agreement, supra note 92, at art. 1, ¶ 1.
process. It is, of course, possible that either domestic legislation or the treaty process would have been successful in the United States, at least in creating some type of obstacle to the importation of imitative commodities.

Rather, using a secretive process to which many groups and individuals have objected, both the domestic sphere and the public international-law sphere (treaties) were obviated. That makes the ACTA a policy-laundering launderer. In other words, the Agreement is insulated from Congress, public input, and from the international multinational sphere by avoiding the treaty-making system contemplated by the TRIPS Agreement regime.

As an executive order, the ACTA becomes law without legislative involvement, without involvement of truly multilateral public international law, and without involvement of the U.S. judiciary. In that sense, the ACTA operates as an overreach by an administration that had seemingly committed itself to transparency. One wonders what is so special about the problem of imitative commodities that would drive a government to such extremes.

3. The ACTA’s Criminal Provisions Are Overbroad or Vague

The ACTA requires signatory states to make it a criminal violation to import or use trademarks or copyrighted material as an imitative commodity. The penalties must be significant, or at least significant enough to deter people from engaging in imitative-commodity behavior.

Although these provisions might be significant for some developing countries, all countries that are on the initial list of signatory states are either well-developed or significantly-developed states. There should be no need, for example, to increase penalties for trademark infringement in the European Union or Japan. These countries already have significant bodies of law relating to trademark-infringing activity. By adding criminal provisions to the ACTA and requiring these countries to follow them, one of two things seems to be occurring.

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137 See ACTA Final, supra note 20, at ch. II, art. 23.
138 See id. Due to the lack of a clear definition in the ACTA’s text, this vague standard will prove difficult to enforce consistently across the member countries.
139 ACTA Final, supra note 20, at ch. II, art. 24 ("[E]ach Party shall provide penalties that . . . [are] sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity.").
The first possible explanation for including criminal provisions is that we may not be satisfied with the level of enforcement for trademark infringement in the various member states. As each country has very well-developed systems of trademark enforcement, this seems spurious. Do we really want to tell France that it does not enforce its trademark rights soundly enough, and that we are worried about this level of protection so much that we need to make France agree to the criminal provisions of the ACTA?

The second possible explanation for including the criminal provisions of the ACTA is that there is something more to be gained from their inclusion. If every country already has adequate civil enforcement of trademark protection, the criminal provisions of the ACTA must add something to this inquiry. That is, ACTA compliance achieves a level of criminalization of intellectual property that may or may not be possible if the normal route of legislation in each country were to be followed. If it were so important for each country to terminate the conduct of imitative commodities, it would be better to include the legislatures of each country, especially in the United States, if we are to expect compliance as a policy objective.

The United States's influence on the international sphere is at its lowest point in many years. The public international arena is looking to the United States to lead the world out of an economic downturn, and away from terrorism and extremism. As such, the United States has an increased burden not to dictate. When the United States appears to be dictating, the rest of the world merely tunes it out. If we want to lead the world away from imitative commodities, we need to lead by example.
It may be counterproductive to use an executive order to make the importation of goods that are deemed to be of a commercial nature for purposes of the ACTA into a criminal event that requires harsh criminal penalties commensurate with equal crimes. Rather, it might be more effective to lead by example and have an open, transparent discussion of the ills of imitative commodities. Maybe, as is suggested here, there are positive ramifications for some level of imitative commodities. Without a debate about this, we will never know. Societies around the world should then judge if imitative commodities are so horrible as to warrant harsh penalties and strict enforcement. If not, it just looks as though the United States is dictating once again.

Furthermore, the ACTA is said to provide “teeth” to the TRIPS Agreement. However, the TRIPS Agreement is said to provide teeth to the enforcement of intellectual property-law treaties. Therefore, the statement that the ACTA gives the TRIPS Agreement teeth implicitly concludes that the TRIPS Agreement has been a failure. If the TRIPS Agreement still needs teeth to be effective, it seems that there is something wrong with TRIPS as it was billed as providing the enforcement capacity that the various then-existing treaties lacked. This, of course, raises the point: where is the TRIPS Agreement in this imitative-commodity issue? Prior to making a TRIPS-plus agreement, it is incumbent upon its advocates to articulate precisely how and why the TRIPS Agreement is inadequate to respond to the claims of inappropriate importation and exportation of imitative commodities. That, too, seems to be absent from the public discussion of the ACTA.

144 ACTA Final, supra note 20, at ch. II, art. 24 (“[P]arties to the ACTA] shall provide penalties that include imprisonment as well as monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity.”).
145 See Ayoob, supra note 94, at 182–83 (“[T]he USTR has indicated that one reason for ACTA has been a general desire for certain countries to regulate beyond TRIPS’ minimum standards.”).
147 See Cliff Sosnow & Alison Hopkins, Impact of ACTA on Chinese-Canadian Trade, BLAKES (Feb. 18, 2011), http://www.blakes.com/english/view.asp?ID=4576 (“From the view of the ACTA negotiating countries, the impetus for the negotiation of ACTA stems from unsuccessful efforts to have enforcement discussions considered at the TRIPS Council meetings.”).
The border measures of the ACTA are both vague and frightening to a free society. Although the final draft of the ACTA has reduced the initial severity of these measures, the ACTA still applies to "small consignments" of goods that are of a commercial nature. Rather than prohibiting the provisions of the ACTA from applying to personal luggage, the ACTA states that "[p]arties may exclude from the application of this Section small quantities of goods of a non-commercial nature contained in travellers' personal luggage." The ACTA still allows countries to apply the criminal provisions of the ACTA to personal luggage. That is, while prior leaked versions of the ACTA appear to have required the application of the ACTA to personal luggage, the final version allows the application to personal luggage.

It is not precisely clear what the ACTA does that the U.S. Customs Service does not already do. Customs currently interdicts commercial shipments of infringing goods. To enable Customs to prevent a shipment into the United States of infringing goods, a right holder must file an application to record its trademark, trade name, or copyright with Customs. It appears that this is precisely what Article 2.X of the ACTA contemplates.

Furthermore, the Lanham Act already has provisions addressing counterfeit marks. In fact, they are rather harsh. A trademark holder who claims its mark has been used on counterfeit goods can elect statutory damages in the amount of $1000 to $200,000 per counterfeit mark, per type of good. If a court finds that use of the counterfeit mark was willful, the court could increase this award up to $2,000,000 per mark, per type of product sold. That is, there are already very strict financial penalties in the United States for trading in counterfeit goods.

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149 ACTA Final, supra note 20, at ch. II, art. 14, ¶ 1.
150 Id. at ch. II, art. 14, ¶ 2.
151 Id.
153 19 C.F.R. §§ 133.1–133.7 (2011).
154 ACTA Final, supra note 20, at ch. II.
157 See id. § 1117(c)(2).
It appears that the ACTA harmonizes customs activities of the various member states to the United States’s standard. This harmonization happens with no input from legislatures and through no treaty process. As the United States and Japan were the initial countries to pursue the ACTA, it appears that the other thirty-five signatory States are harmonizing their customs laws to the United States and Japanese standards. Whether or not this should happen is an issue of public concern in which every democratic citizen should have a voice.

5. The ACTA Will Raise Search Costs

The primary function of the very trademarks the ACTA is attempting to protect is to decrease or maintain search costs. Strong trademarks reduce search costs because consumers have to think less about making a purchase. Strong trademarks act as shortcuts to the product or service. McDonald’s for hamburgers is ubiquitous. No one needs to think about the nature of the goods provided at McDonald’s. Love them or hate them, McDonald’s provides a low-quality, low-priced meal. It does this worldwide. When a purchaser is confronted with the McDonald’s sign, there is no confusion as to what he or she will get.

The ACTA changes this analysis in significant ways. The ACTA not only shifts the burden of source recognition from the producer to the consumer, it criminalizes nonrecognition. Therefore, a person who goes through Tokyo customs might be too tired to carry their extra purse. It turns out that this extra purse is an imitative commodity of Prada. If searched, regardless of probable cause, and the bag is determined not to be a genuine Prada bag, the person’s baggage is not only excludable under the ACTA, but also the act of attempting to import an imitation Prada bag is criminal conduct.

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162 This is a byproduct of criminalizing the possession of counterfeit goods. See generally ACTA Final, supra note 20, at ch. II, art. 23.
163 See id. at ch. 2 art. 23. But see id. at ch. II, art. 14.2.
165 See ACTA Final, supra note 20, at ch. II, art. 23. But see id. at ch. II, art. 14, ¶2.
When the ACTA makes the accidental importation of imitation Prada merchandise criminal, it changes the inquiry from who made the good to who is carrying the good. When that happens, everyone naturally will attempt to avoid criminal prosecution. In order to avoid criminal prosecution, purchasers of imitation Prada bags will need to take steps to assure that they are not carrying an imitation, but are carrying a genuine good.

That is, purchasers will not be able to rely merely on the trademark itself. In order to avoid criminal prosecution, purchasers will have to educate themselves on the difference between a genuine Prada bag and an imitation Prada bag. As makers of imitative commodities improve their ability to imitate genuine goods, this becomes more difficult. If the ACTA is to criminalize the mere possession of imitative commodities, the very nature of the search-cost equation of trademarks will change.

From the manufacturers' point of view, at first this may seem positive. Requiring that purchasers make informed choices and avoid imitative commodities is important. However, that is precisely the purpose of private trademark law. Criminalizing the possession of unknown imitative commodities simply goes too far. It will result in increased search costs as consumers stop relying on the trademark alone to make purchases. As such, the ACTA will have the unintended consequence of changing an age-old cost-benefit equation, allowing manufacturers to exclude others from using certain signs on or in connection with the sale of their goods, to a regime of strict enforcement against individuals who may possess imitative commodities, thereby destroying trust in the very trademarks that the ACTA intends to protect.

6. The Existing Data Does Not Support the ACTA

There are many claims as to the value of imitative commodities in the world. All numbers are simply unreliable. Interpol puts the total value of worldwide imitative commodities at $600 billion. Trade

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166 See supra note 165.
167 Cf. Landes & Posner, supra note 160, at 269-70 (noting that consumers, after having a positive experience with a trademarked product, will purchase products based on that trademark alone and consequently reduce their search costs).
168 See, e.g., Pollinger, supra note 128, at 98 (citing Felix Salmon, Thompson's Counterfeit Numbers, Op-Ed, N.Y. SUN, Dec. 2, 2004, at 11) (criticizing the unrealistic statistics proffered by the New York City Comptroller as "an attempt to pander to influential lobbying forces"); Susan Scafidi, The Cost of Counterfeits? GAO Doesn't Know, COUNTERFEIT CHIC (Apr. 15, 2010), http://counterfeitchic.com/2010/04/the-cost-of-counterfeits-gao-doesnt-know.html ("[A] major part of the problem is that experts can't agree on a methodology for evaluating the various harms—and even potential offsetting benefits—attributable to counterfeit goods.").
groups claim counterfeits cost "millions of lost jobs and dollars[.]") A 2007 study indicated that the United States loses $58 billion each year, in addition to 373,375 jobs. Havoscope, a self-professed "premier global information provider of black market activities," claims that the value of global trade in counterfeit goods is $585.38 billion. Only one thing seems for certain: no one really knows for sure.

There are several questions entities fail to answer when they state the amount of imitative commodities. First, of course, is what "value" really means. Is it the value of the goods as produced to the producer of imitative commodities? Is it the value of the goods once sold to wholesalers of imitative commodities? Is it the value of the imitative commodities on the street as retailers attempt to sell these goods? Or is it the value of genuine goods, presuming there is a one-for-one exchange between genuine goods and imitative commodities? This issue is never made clear in these fantastic claims about the size of the imitative-commodity market.

To be clear, I am not arguing that the value of the imitative-commodity market is zero. However, if we are to make significant changes to international policy based on the size of this market, we ought to have better data than that which currently exists, or data that exists and is shared with the public.

To obtain accurate data on the value of imitative commodities, one would have to employ a team of appraisers who would go to the source of the production of the imitative commodities. As they roll off the...
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assembly line, the appraiser would judge the "value" of the good. To
determine "value," we would have to agree on the moment within the
life cycle of an imitative commodity at which we would be assigning
value and be consistent in this assignment perpetually and worldwide.
Is it in the beginning, end, or middle? The "value" at each point, of
course, will change significantly. Moreover, we would have to do this
on a consistent basis worldwide. That is, it seems impossible to obtain
verifiable data to support any conclusion about the true amount of imita
tive commodities at play at any given time throughout the world.
Therefore, this data-based argument is extremely prone to manipula
tion.

Before we make major international policy decisions based on the
motivation to erase imitative commodities, we should have solid data as
to the value of those imitative commodities. Without solid data, we are
assuming that taking some action is better than taking no action at all.\textsuperscript{174} However, there is no data to support that conclusion. It may very well
be that taking no action at all (i.e., not adopting the ACTA) is better
than adopting it. Other than looking at how the ACTA will affect three
producers of legitimate goods,\textsuperscript{175} I have no support for concluding it
will produce some unintended consequence; however, the supporters of
the ACTA only have statistically unreliable data to conclude that it will
have a positive effect.

Before making significant, international, game-changing policy
decisions on the effect of imitative commodities, we ought to be sure
about the numbers.

B. Link to Terrorism Overstated

Although there seems to be some connection between terrorism
and the manufacture of imitative commodities, the significance of that
connection is as overstated as the raw data of imitative commodities. It
is so overstated that the U.S. government has labeled the ACTA a state
secret.\textsuperscript{176} The Federal Bureau of Investigation (FBI) has apparently
established to its satisfaction that the primary source of funding for the
group that carried out the plot in the 1993 World Trade Center bombing
was a small t-shirt shop on Fifth Avenue in New York City that sold

\textsuperscript{174} Because "the net effect [of counterfeiting] cannot be determined with any certainty," any
action to combat counterfeiting must be predicated on the assumption that affirmatively combat-
ing counterfeiting is financially or socially more beneficial than inaction. See id. at 28.

\textsuperscript{175} See supra Part II.

\textsuperscript{176} See James Love, Obama Administration Rules Texts of New IPR Agreement Are State
Secrets, HUFFINGTON POST (Mar. 12, 2009, 5:05 PM), http://www.huffingtonpost.com/james-
love/obama-administration-rule_b_174450.html.
counterfeit or knockoff shirts. However, nowhere in the relevant FBI report are actual numbers used. This story, stated by the otherwise infallible FBI or not, seems to be too fantastic to be accurate.

Objectively, one t-shirt vendor on Fifth Avenue would not have the volume of sales that would be required to raise the millions of dollars needed to carry out that plot. Apparently, this vendor was a contributor to the fund that was used to attack the World Trade Center in 1993. Even if that part were true, nowhere in the FBI report does it say that it was the exclusive funder of the attack. Nowhere does it say how much money it took or how much money was raised. The FBI merely makes the fantastical claim that this t-shirt vendor, selling nongenuine shirts, contributed some unspecified amount to the effort.

Commentators conclude that all imitative commodities in the world support terrorism, or more specifically, that buying an imitative commodity is supporting Al Qaeda. There is no real evidence that this is true.

Professor Charles McManis from Washington University espoused the most convincing argument. He described how Interpol is engaged in a multiyear, multijurisdictional effort in South America to interdict the production of imitative commodities. Professor McManis has very exhaustively described Operation Jupiter—Interpol’s effort in South America to stop the flow of imitative commodities.

However, even Professor McManis’s sources for this exhaustive study are predicated upon two statements: first, a report submitted to Congress by Ronald K. Noble, the Secretary General of Interpol, and second, a hearing involving four senators testifying before Congress. I am not impugning either source, and Professor McManis was right to rely on these sources. However, these are only two, unverified sources. Many people make claims to Congress. This does not make them normatively true statements.

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177 See, e.g., Dana Thomas, Terror’s Purse Strings, N.Y. TIMES, Aug. 30, 2007, at A23 (citing the International AntiCounterfeiting Coalition).


179 See Pollinger, supra note 128, at 98 (“Ultimately, very little is certain in assessing the magnitude of the counterfeiting industry and the proposed connection between the industry and international terrorism.”); Singh II, supra note 33, at 21 (“The [GAO] study also reveals that the online film piracy, one of the targets of ACTA’s internet chapter has no apparent connection to organized crime or terrorism.”).

180 See McManis, supra note 101.


Academic scholarship\(^\text{183}\) and popular media\(^\text{184}\) consider these two sources as verified when they are not. To compound the problems, it appears that the Obama Administration, as well, takes these statements at face value. Based on these two statements, not only is there policy laundering happening where the public process is subverted to enact the ACTA, but the Administration also feels it necessary to commit the ACTA to absolute secrecy.

Americans should demand substantial, verified data regarding the significance of this problem before we commit ourselves to major policy changes in how we deal with or approach imitative commodities. Two entities’ testimonies to Congress should not be enough to conclude that there is a significant link between imitative commodities and terrorism. Short of having verifiable data, it appears that the Administration is failing on another front: using fear as a weapon to attain its goals. This is also something the Obama Administration claimed it would not do.\(^\text{185}\)

IV. THE BENEFIT OF IMITATIVE COMMODITIES

There are many benefits that luxury-status-goods makers should realize. The benefits listed below may apply to other goods in other categories of imitative commodities as well. I leave that question open for further study.

A. Amorphous Price Point

Some argue that the reason why status goods can maintain and command a high price is because of the existence of imitative commod-

\(^{183}\) See, e.g., Laura C. Nastase, Made in China: How Chinese Counterfeits are Creating a National Security Nightmare for the United States, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 143, 153–55 (2008) (reporting that Lieberman “cited an unclassified FBI document which revealed that Hezbollah used the sale of counterfeit goods to raise cash in the United States”) (“Interpol has confirmed that the worldwide counterfeit trade has become a low-cost, high-return enterprise favored by terrorist organizations such as Hezbollah [sic].” (citing Ronald K. Noble’s Interpol testimony)).

\(^{184}\) See, e.g., David Johnston, Threats and Responses: The Money Trail; Fake Goods Support Terrorism, Interpol Official Is to Testify, N.Y. TIMES, July 16, 2003, at A11 (noting Secretary General of Interpol Ronald K. Noble’s testimony that the “link between organized crime groups and counterfeit goods is well established”).

Without imitative commodities, it would become impossible to maintain high price points for some goods. It is the existence of imitative commodities that props up the price of status goods.

Some economists even believe that entry into a market of imitative commodities can actually increase the price point for some goods. Yi Qian, an associate professor at Northwestern University’s Kellogg School of Management, studied how the entry of imitative-commodities producers into the market impacted Chinese footwear companies. Qian found that prior to the entry of imitative shoe producers, the adjusted price of a high-end authentic shoe was forty-three dollars. After the entry of imitative-shoe producers, the price went up to sixty-one dollars. Overall, the price rose nearly forty-five percent after the introduction of imitative commodities to the market. Qian reasoned that the entry of imitative commodities supported the authentic shoe manufacturer when people became aware of the substantial difference in material used between the authentic shoe and the imitative shoe. So it is with the luxury status goods that are the subject of this study. As imitative commodities enter the market, they have a positive effect on the price points that luxury status goods can command, not a negative one. Imitative commodities have apparently been increasingly prevalent in recent years. During this increased role of imitative commodities, the luxury-status-goods makers’ stock prices rose an average of 181% and their net profits rose an average of eighteen percent. If imitative commodities are either as prevalent or in as large of a quantity as is claimed, one would expect a different effect on the luxury-status-goods makers. A lack of evidence for any such effect

187 See id. at 1399–1403.
188 Id. at 1402 ("To the extent that counterfeits increase the status benefits conferred by visibly using the original version of the relevant luxury good, the introduction of counterfeits should increase the profit-maximizing price that producers of the original can demand . . . ." (using the term counterfeit in this context to describe products that are "obvious imitations"); see also Grossman & Shapiro, supra note 36, at 68.
189 See Yi Qian, Impacts of Entry by Counterfeiters, 123 Q.J. Econ. 1577 (2008).
190 Id. at 1588.
191 See id. at 1599 ("[A]uthentic companies upgraded quality dimensions that could most directly distinguish their products from those of counterfeiters.").
192 Of course, the dark side of this story, see supra note 1, notwithstanding.
193 See The Truth About Counterfeiting, supra note 8 (stating that counterfeiting has grown over 10,000 percent in the past two decades). But see Part III.A.6 (noting the lack of empirically-supported or rationally-calculated statistics to explain the impact of counterfeit goods on businesses).
194 Stock prices for Coach, LVMH, and Richemont are on file with author.
indicates that either the claim of imitative commodities being all bad is wrong, the data is wrong, or merely our understanding of the role imitative commodities play is wrong. One way or the other, before international policy is set in the form of an executive order, we ought to know the answers to these questions.

B. Effect on Price Reductions

When manufacturers compete, the prime goal is market share. When economies cycle through good times and bad, firms survive based on the share of the market that they each command. When economic times improve, the successful firm improves exponentially because it fills a market share, not a specific sales volume.

Obtaining market share is, of course, the challenge. Most manufacturers must compete in harsh business climates for market share. Invariably, they compete by having sales. That is, they charge significantly less for a good in order to encourage customers to educate themselves about the producer, its products, and its quality. Once market share has been established, the firm increases prices, but not to a degree or at a rate that causes a steep reduction in market share.

If a large market share is obtained, a slight reduction in market share can accompany a price increase if the price increases enough to overcome the loss in market share.

However, luxury status goods never go on sale and they maintain a very healthy market share. These types of goods violate the basic rule of market-share procurement. The reason for this apparent violation is that the makers of the luxury status goods do not recognize a need to

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196 This is likely due to the strong correlation between market share and profitability. See Robert D. Buzzell et al., Market Share—A Key to Profitability, HARV. BUS. REV., Jan.–Feb. 1975, at 97, 98 (discussing empirical data collected from fifty-seven companies, and analyzing business profitability factors); see also David M. Szymanski et al., An Analysis of the Market Share–Profitability Relationship, J. MARKETING, July 1993, at 1 (discussing, with a more critical tone, empirical studies documenting a correlation between market share and business profitability).

197 Buzzell et al., supra note 196, at 99–102.


199 TOM GORMAN, THE COMPLETE IDIOT'S GUIDE TO MBA BASICS 157 (2d ed. 2003) ("Companies are driven to sell because ultimately all their money comes from sales.").


201 There are four strategies for market share management: "(1) share building, (2) share maintenance, (3) share reduction, and (4) risk reduction." Paul N. Bloom & Philip Kotler, Strategies for High Market-Share Companies, HARV. BUS. REV., Nov.–Dec. 1975, at 63, 67–72.

202 See id. at 68.
put their goods on sale. The market-share procurement cycle happens through imitative commodities. Imitative commodities occupy the low end of the price-competition cycle. The makers of the luxury status goods do not need to lower prices to compete for market share in the lower price ranges because imitative commodities play that role for them.

C. Advertising Function

The existence of imitative commodities also plays the role of giving free advertising to the makers of the luxury status goods. Sometimes imitative commodities are recognizable as such; sometimes they are not.

One study ranked all status-goods purchasers into four categories based on their status and wealth. Based on a given consumer’s status-wealth category, the study predicted what level of luxury product the consumer would purchase. Then each luxury product was assigned an average loudness rating. Typically the lower the need for status (and typically the higher the wealth of the consumer), the lower the loudness rating of a desired luxury product. The poorer you are, the more you need status, and therefore the louder you want your luxury item to be. Fully aware of this phenomenon, luxury goods companies make the louder luxury goods cheaper and therefore more accessible to the target market for that product, and the quieter products more expen-

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203 See Barnett, supra note 186, at 1399–1400, 1415.
204 See id.
206 Young Joe Han et al., Signaling Status with Luxury Goods: The Role of Brand Prominence, J. MARKETING, July 2010, at 15, 17–18 (2010) (dividing purchasers into the categories of the “patricians,” having more wealth and less need for status, the “parvenus,” having more wealth and more need for status, the “proletarians,” having less wealth and less need for status, and the “poseurs,” having less wealth and more need for status).
207 Id. at 19 (“If our premise is correct, we expect to observe a quieter, more subtle brand identification on the more expensive products and a louder, more conspicuous brand identification on the relatively less expensive products. Thus, we predict a negative correlation between price and brand prominence—the extent to which the product advertises the brand by displaying the mark in a more visible or conspicuous manner (e.g., larger logos, repeat prints). We hypothesize that for luxury goods, on average, as the price goes up, brand prominence goes down.”).
208 In the study, three judges gave each handbag a loudness rating on a seven-point scale where “1” was the quietest and “7” was the loudest. To make the loudness determination, judges considered two questions: “1. How prominently does this bag display its trademark? (A trademark is a distinctive name, symbol, motto, or emblem that identifies a product, service, or firm.) 2. To what extent would this bag be recognizable as a Gucci (LV) product?” The more affirmative or positive the responses, the higher the loudness rating the judge would give. Id. at 19–20.
209 Id. at 20.
It follows then that what are most often knocked off are the louder, lower-priced items, because people who buy knockoffs are looking for a deal on an authentic-looking product and therefore want it to be seen.\textsuperscript{211} Loud imitative commodities advertise for the status-goods makers. Status-goods makers benefit because this is free advertising. In fact, it is precisely targeted advertising, as only the people who want to or do buy the product recognize the bearer of the imitative commodity.

D. \textit{Goodwill of Status Goods Is Improved by Counterfeit Goods}

Goodwill in trademark law has always been a rather amorphous concept to define.\textsuperscript{212} Its role in imitative commodities is also counterintuitive. Firms gain or lose goodwill in odd ways. Many times, a firm’s goodwill is not entirely under its control.\textsuperscript{213} So it is with imitative commodities. A firm’s goodwill is closely pegged to whether it is worth imitating. There are three forms of goodwill: (1) brand goodwill, (2) firm goodwill, and (3) inherent goodwill.\textsuperscript{214}

Brand goodwill is the most limited concept of goodwill. It implies a direct knowledge of the product being sold and who manufactures that good. An example of brand goodwill is a consumer who chooses to buy a Diet Coke because he is familiar with the company and he likes the product. This brand goodwill is appropriated only by direct confusion, where the defendant makes sales in a confusing manner, convincing the plaintiff’s purchasers that it is the plaintiff, not the defendant, attempting to make the sale.\textsuperscript{215}

Firm goodwill implicates the corporation itself and transcends any knowledge of or information about a particular brand or product. However, many people extend the positive feeling they have for one particular brand to all products manufactured by one, consistent firm. For a plaintiff to bring an actionable claim, a defendant corporation needs to

\textsuperscript{210} See \textit{id.}.
\textsuperscript{211} \textit{Id.} at 22 ("[T]he handbags counterfeiters choose to copy are the loud ones . . . ").
\textsuperscript{212} See, e.g., Robert G. Bone, \textit{Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law}, 86 B.U. L. Rev. 547, 583–84 (2006) ("Some judges and commentators defined goodwill probabilistically, as the tendency or likelihood that a consumer would return to the same product or firm and make repeat purchases. . . . Another approach . . . defined goodwill in terms of favorable mental states. . . . Yet another definition simply equated goodwill with the value of a business above and beyond its tangible assets.").
\textsuperscript{213} See \textit{id.} at 589 ("Retailers could build goodwill by their direct dealings with customers, but importers, manufacturers, and other agents more remote in the distribution chain had to rely almost exclusively on marks.").
\textsuperscript{214} See \textit{id.} at 551.
\textsuperscript{215} See \textit{id.}.
sell or market a good or service in a way that implicates sponsorship or authorization.\textsuperscript{216}

Inherent goodwill is critical to the notion of imitative commodities. That is, people come to believe that there is something inherently positive in carrying a Prada accessory. Because of the existence of imitative commodities, we know that there are many consumers who simply do not care that the bag they carry is not actually manufactured by Prada. They carry it, nevertheless.\textsuperscript{217}

Related to inherent goodwill, brands themselves have come to express consumer identity or philosophy.\textsuperscript{218} Branding offers an interesting way for people to express themselves, and this expression relates to the inherent goodwill of a firm.\textsuperscript{219} When a handbag costs ten dollars at Target, what is accomplished by an individual spending $1000 or more for the same functional article at Louis Vuitton? What is accomplished, of course, is that the purchaser signals to others on the street a certain status.\textsuperscript{220} The purchaser of the ten-dollar Target bag signals a different status. When this happens, brands themselves become "socially-embedded institutions."\textsuperscript{221}

By merely glancing at a person on the street, we can place the person in specific categories, much like sumptuary codes from long ago.\textsuperscript{222} As Barton Beebe has pointed out, intellectual property today acts much like sumptuary codes of the distant past.\textsuperscript{223} "Haves" and "have-nots" are identified, not by whether they alone can wear gold, like the sumptuary codes allowed, but whether or not one produces or consumes intellectual property.\textsuperscript{224} The very same thing can be said about status goods.

\textsuperscript{216} See id. at 551–52.
\textsuperscript{217} See id. at 552, 598, 608.
\textsuperscript{218} How many times have brands suffered in the marketplace when it was determined that a product was made for slave wages in Central America? Or how many times do manufacturers signal their superiority by saying they sell only coffee grown in ethical ways farmed by people in ethical manners? The manner in which the good was made has no real effect on the goodwill of the firm; however, the perception of ethical treatment of persons or animals has a significant impact on inherent goodwill.\textsuperscript{220}


\textsuperscript{220} Of course, there are many and various other factors to the status-good equation. These factors are network effects, signaling effects, bandwagon effects, herding effects, and standard-setting effects. However, these factors are all beyond the scope of this Article. \textit{See generally} Grossman \& Shapiro, supra note 49.


\textsuperscript{223} See id. at 814 ("We are thus increasingly relying on intellectual property law not so much to enforce social hierarchy as simply to conserve ... our system of consumption-based social distinction and the social structures and norms based upon it.").

\textsuperscript{224} See id. at 818–19 ("With their ability rapidly to reproduce and disseminate imitations of distinctive material goods, [mimetic] technologies are destroying the capacity of material goods
The possessor of status goods implies some sort of social success.\textsuperscript{225} We signal this social success by possessing status goods.\textsuperscript{226}

This is all possible because of institutional goodwill. A certain manufacturer possesses this institutional goodwill to become and to maintain its position as a producer of "status goods." Of course, entities in the position of being well-regarded producers of a status good want to maintain that position. This, then, begs the question of why Prada or Louis Vuitton can maintain their positions as status-goods makers? The answer seems to be that they have tolerated, to a certain extent, the existence of imitative commodities.

Therefore, although these luxury-status-goods makers report that they have attempted to terminate imitative commodities, actual termination of imitative commodities would harm their bottom line rather than help it. At the very least, lumping luxury-status-goods manufacturers such as Coach, Prada, and Louis Vuitton together with music CD and movie producers whose products are pirated seems counterproductive.

E. Vilification

To be certain, there is much to despise about the creators of some imitative commodities. There are dreadful stories of maltreatment of workers.\textsuperscript{227} There are simply horrifying stories of the use of child labor.\textsuperscript{228} There are even stories of mass intimidation\textsuperscript{229} and the use of reliably to confer distinction and are shifting the emphasis of our system of social distinction toward the consumption of distinctive intellectual properties.

\textsuperscript{225} See Roger Mason, Modeling the Demand for Status Goods, in Meaning, Measure, and Morality of Materialism 88 (Floyd Rudmin & Marsha Richins eds., 1992), available at http://www.acrwebsite.org/volumes/display.asp?id=12198 ("[Consumers] use product price as a means of ostentatiously displaying wealth in order to gain in social status. Satisfaction derives not from the utilitarian attributes of any given purchase but from audience reaction to the wealth displayed by the purchaser.").

\textsuperscript{226} See id. ("Satisfaction derives not from the utilitarian attributes of any given purchase but from audience reaction to the wealth displayed by the purchaser.").

\textsuperscript{227} Author Dana Thomas discussed the dark side of the luxury industry, writing:

While customs seizures of counterfeit goods continue to rise, a vast amount makes it through. The shipping containers are put directly onto trucks and are hauled either to warehouses to be stored or to workshops to be assembled or stamped by clandestine workers. This is where human trafficking fits into the puzzle: the workers, sometimes children, have been sold into labor. They, too, have been shipped over and smuggled in. They are taken to tenement factories and often locked in. There they live, work, sleep. "I went on a raid in a sweatshop in Brooklyn, and illegal workers were hiding in a rat hole," Barbara Kolsun, senior vice president and general counsel for Kate Spade, told me. "It was filthy, and it was impossible to know how old the workers were."

THOMAS, supra note 26, at 285.

\textsuperscript{228} Thomas describes a harrowing experience she had while accompanying Chinese law enforcement on a raid of a factory in Guangzhou while looking for luxury-counterfeit-goods manufacturers:
We hoofed it up the steps, over empty Coke cans and other trash, and as we approached the top, the acute toxic smell of glue burned in our noses. We walked into the workshop—a long, wide room with barred windows—and before us stood two dozen Chinese boys and girls, roughly eight to fourteen, sitting at old sewing machines and standing behind plywood worktables littered with scraps of black leather, gooey pots of glue, and a cookie tin filled with stamps reading Versace, Boss, Dunhill. The children stopped midwork. One bag was stuck in a machine, half sewn. In the corner were big cardboard cartons filled with counterfeit luxury brand handbags in black leather.

The cops told the children to line up single file. They looked at us with their sweet faces filled with confusion, their eyes tired and sad: they didn’t know why they were told to stop working. As they walked out, some stopped to punch their time cards in hope of getting paid. Some glared at the owner, an overweight middle-aged Chinese man, and his factory manager, a Chinese woman in her thirties who sat in the small office next to the door, glum over a cold pot of tea.

When it was time to leave, we had to run across the courtyard to the vans to shield ourselves from debris that the kids threw from the balconies. To the children, the cops are the bad guys. Many of the children in counterfeit workshops have been sold into labor by their families in the countryside. The children used to be picked up at the train station and taken to the factories, but the police started to stake out the stations and make arrests. Now factories hire agents, usually a man and woman who will pose as a married couple and go to the country in a truck to get one or two children. If the agents are stopped by police, the agents say that the children are theirs. Some families in the country sell their children because they believe that the children will have a better life in the city. But selling children has become a big business in China. The children work in factories or turn to prostitution and send their money home or bring it to their parents when they return home for the Chinese New Year. Most earn between $50 to $100 a month in factories.

The children who work in counterfeit factories are usually housed by the owners; the kids in the raid I witnessed lived across the courtyard in slum dorms. When a counterfeit factory is raided and the owner arrested, the children are left not only out of work but also homeless.

Id. at 286–88.

Actual counterfeit good production has become a professional racket run by organized crime. In New York, from the 1980s until the mid-1990s, gangs “like a group of Asian American kids called the Born to Kill Gang—were in charge.” Id. at 293. One security expert, who regularly participated in counterfeit raids on Canal Street in downtown Manhattan recalled:

If we showed up to do a raid, women would take counterfeit watches, shove them up their shirts, and say, “I’m pregnant, don’t touch me!” . . . Once I saw a three-month-old baby in a milk crate that sat on top of a case of M-80 explosives. The gangs came after us with bats, they’d slash our tires, throw knives and significant explosives. It was terrorism.

Id. The gangs that currently run the counterfeit operations on Canal Street are “grown-up gangs from China, like the Fukienese gang, as they are known in New York, whose members come from Fujian, a province along China’s southeastern coast just across the straits from Taiwan.” Id. The Fukienese gang differs from its predecessors as its members are grown-up and don’t partake in random killings because “[i]t’s bad for business.” See id.

During a two day sweep in November 2004, New York police arrested fifty-one members of two violent gangs and charged them with a host of crimes ranging from racketeering to trafficking in counterfeit goods. Police seized $150,000 in cash and $4 million in counterfeit merchandise carrying the names of Chanel, Gucci, and Coach. U.S. Attorney David N. Kelley told [sic] said the gangs “achieved their dominance through unflinching use of violence and fear.” During their reign, a man who was suspected of cooperating with police received “a beating with pipes until his bones snapped,” Kel-
torture\textsuperscript{230} to accomplish the manufacturing of some imitative commodities. Even though there are some stories of rampant use of underprivileged people manufacturing licensed, genuine goods,\textsuperscript{231} none of them compare to the stories of the making of imitative commodities.

However horrible those stories, one should not allow them to affect the analysis of whether these practices also inflict an economic harm on all producers. The point of this Article is to demonstrate that the claims of economic harm suffered by makers of all status goods are overstated. It appears that the reason they overstate their claims, include references to imitative commodities being linked to terrorism, and even use over-inflated numbers to describe imitative commodities, is to get the public sphere to do what has heretofore been a private cause of action. Louis Vuitton spends almost $20 million a year to fight imitative commodities.\textsuperscript{232} On one hand, this seems significant. On the other hand,

\textsuperscript{230} When discussing the use of child labor and torture used to create counterfeit goods, the International Chamber of Commerce (ICC) unveils stories of factories producing fake Gucci and Burberry bags where workers under the age of 16 are drafted into sweatshops. The children many of whom are orphans or separated from their parents sew and put together goods day and night in the counterfeit factories where many also live in squalor, some sleeping on the rotten wooden floors. The only education they receive are the skills needed for assembly line work and they eat what little they are given which is usually rice. These are the humble foot soldiers of counterfeiting, the young, the vulnerable, the oppressed, and the exploited. Yet their labour fuels a multibillion-dollar trade every year.

It's not just China though where such workers are found—raids carried out by well known luxury goods manufacturers have encountered similar conditions in counterfeiting factories in New York’s Brooklyn suburb. Illegal workers hiding in filthy cellars serving as counterfeiting sweatshops. Sometimes these workers are actually locked in so that they cannot escape even in the event of a fire. Vulnerable illegal workers in Europe and North America provide a perfect target for exploitation not only in counterfeiting sweatshops but also for other activities run by organised crime rings.

\textsuperscript{231} Id. at 293–94.

\textsuperscript{232} See Dana Thomas, The Cost of Counterfeiting, LOST MAG., Jan. 2009, http://www.lostmag.com/issue29/counterfeiting.php ("Louis Vuitton, one of the world's most copied brands, . . . spends approximately $18.1 million each year fighting counterfeiting . . . ."); see also FAQ, supra note 76.
given that the gross income of LVMH approaches $28 billion,\textsuperscript{233} LVMH spends less than 0.07% of its gross income on enforcement.

That is, as a society, we have become convinced that all manufacturers of imitative commodities are bad. In fact, we vilify the makers of all imitative commodities.\textsuperscript{234} Some makers entirely deserve our vilification. Maybe others do not. However, the ACTA simply vilifies makers of imitative commodities; acquiesces to the use of pejorative terms like counterfeiter, knockoff, or pirate; and lumps all such producers into a class, labeling them as “bad.” What if some are not? What if some are legitimately competing in the market place? What if some are simply using similar trademarks in a noninfringing way in order to compete?

What if the numbers upon which the ACTA is based are not accurate? What if the claim of the connection to terrorism is overstated? The point is that under the ACTA, we will never know the answers to these questions, and imitative-commodities producers will be treated as a class of bad people. Historically, these so-called counterfeiters were sometimes called competitors. We may not have sanctioned the manner in which they produced their goods, but they were competitors nevertheless.

John Dower has written a fascinating book called The Cultures of War.\textsuperscript{235} In it, he describes the blinding nature of vilification. Just as the Japanese were blind to what America’s response would be when they decided to bomb Pearl Harbor, vilification blinded America’s eyes as to the response from the Iraqi people and the world at large when it engaged in pre-emptive war and invaded Iraq.\textsuperscript{236} Obviously on a much smaller scale, the ACTA’s vilification blinds us as to the significance of imitative commodities. When the problem is extremely complex and nuanced, the ACTA is like using a sledge hammer to kill an ant. The ACTA provides vilification blinders.

With vilification blinders on, any amount of imitative commodities are labeled as “bad.” This vilification prevents us from asking hard questions. How do we really know imitative commodities are bad? The data supporting this claim are unverified and unverifiable, if not covertly inflated. The ties to terrorism are overstated and only lead to fear and further vilification. The positive effect of some imitative commodities goes unnoticed and unmentioned. In fact, by raising these issues, I am concerned that I will be labeled as “un-American.” This vilification gives great satisfaction to something like the ACTA. Some appear to feel good to be doing anything in response to imitative commodities.

\textsuperscript{233} ANNUAL REPORT 2010, supra note 67, at 6 (2010 revenue was €20,320,000,000, equivalent to approximately $28,000,000,000).

\textsuperscript{234} In media and public discourse, seldom are distinctions made between different manufacturers of imitative commodities. See, e.g., supra note 14 and accompanying text.

\textsuperscript{235} See JOHN W. DOWER, THE CULTURES OF WAR (2010).

\textsuperscript{236} See id. at 3–21.
However, imitative commodities have become the weapons of mass destruction of international trade. Before pulling out the big guns, we ought to think carefully about the effects. The ACTA acts in total disregard of the effects.

In 1906, William James wrote an essay titled "The Moral Equivalent of War." In it, James argues as a pacifist that war is "a transitory phenomenon in social evolution." Pacifists (in the form of those questioning the ACTA) should first understand the ethical point of view of their opponents (in the form of those supporting the ACTA). Understand first and then move to the point of the argument and "your opponent will follow." That is, the vilification of imitative commodities is the natural growth of a society that seems condemned to seeing war as perpetual. The so-called "War on Terror," with no beginning and no end, leads our society to this conclusion. Therefore, when confronted with a significant issue, such as imitative commodities, our society vilifies it as we would vilify any enemy. What James would argue here is that we need a moral equivalent to the war on imitative commodities that the ACTA necessitates.

What would we see if we removed the vilification blinders? Is the vilification of imitative commodities appropriate? Do we allow the manner in which some imitative commodities are manufactured blind us to the role that all imitative commodities play in the world's marketplace?

F. Equilibrium Point

Based on the data gathered regarding the three luxury-status-goods makers considered herein and various economic studies, there seems to exist an equilibrium point at which a given business can function optimally. This equilibrium point is where a given manufacturer has the largest benefit-to-loss ratio from sharing its given market with imitative commodities. Said another way, this point is where the legitimate good manufacturers derive the most benefit from having the imitative commodities in their industry. Since this is an industry-by-industry or even product-by-product analysis, different manufacturers will experience varying equilibrium points. Consequently, articulating a single sweet spot for all manufacturers, industries, or products would be nearly im-

238 Id. at 464.
239 Id. at 466 (quoting J. J. Chapman).
240 See generally Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals (2009).
possible without an extensive amount of data collection. Furthermore, it has already been established that no accurate methods of this sort of data collection have yet been established; and to rely on the current data collection practices would be to indulge in the very conduct this Article reproaches.

Although there is an equilibrium with imitative commodities for which all rational firms manufacturing legitimate goods ought to strive, these very firms and thirty-seven governments around the world are placing all bets on killing an ant with a nuclear bomb. Rather, each government and each manufacturer needs to determine where the equilibrium is for each good and craft a nuanced countermeasure to imitative commodities that will reach a socially, economically, and legally optimal outcome.

CONCLUSION

It is irrational to apply a one-size-fits-all solution to the notion of imitative commodities. To be sure, some imitative commodities are normatively bad to any extent. However, this Article has demonstrated that a counterfeit equilibrium must be sought out and understood for each and every imitative commodity. Given the fact that no solid public data exists for the value of current imitative commodities, and given that this issue is fraught with vilification and distortions, this will be a difficult inquiry at best. For the luxury status goods that have been the subject of this Article, terminating imitative commodities entirely would not be optimal. Therefore, it appears that the signers of the ACTA accepted an economic theory of imitative commodities rather than dealing with a nuanced problem in a nuanced manner.

In the end, the real issue is whether we should make the international enforcement of intellectual property rights against producers of imitative commodities a public, rather than a private, matter. To date, this has largely been conceived of as a private cause of action, where intellectual property rights holders sue to prevent the importation or distribution of imitative commodities. As such, a judge or jury considers the matter and issues an opinion; the government does not take an immediate enforcement role.

The ACTA turns this private enforcement activity into a public duty of the state. With the ACTA, various governments are now standing firmly beside producers of imitated goods. These governments are doing this based on unverified data, relying on a document that is not even responsive to imitative commodities, and which was generated in a way that allows for central governments to engage in policy laundering with vague criminal sanctions. This will harm rather than benefit the
fundamental goal of providing trademark protection in the first place: the reduction in search costs.

All of this is done in a secret manner that violates any semblance of transparency. The ACTA should not be signed into law; it should be rethought from the ground up, taking all thinkers' views into consideration, not just those who vilify producers of imitative commodities and antiterrorist conspiracy hawks, and not just the CEOs of major producers of occasionally imitated goods.

We ought to have a real dialogue about the real data on imitative commodities, the real role they play in terrorism, and the real effect on each producer of legitimate goods. We ought to avoid painting with such a broad brush that silences all the nuances to an incredibly complex topic: the role that imitative commodities play in modern, democratic markets. Finally, we need a nuanced approach to deal with an extremely nuanced problem.