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Intellectual Property in Practice: Filtering Testimony at the United States Trade Representative

Policy is made in small-scale situations mediated by language. This article examines the ways in which the United States Trade Representative establishes a mandate by esoterically interpreting canonical texts and then using that mandate to filter testimony. Its goal is to maintain a watch list of countries that disrespect intellectual property. This involves managing intertextual relations in ways that efface some perspectives and highlight others, while creating three subjectivities: industry, public interest, and foreign governments. The end result is a policy document of markedly partial epistemology that combines direct citation of industry statements with obscure pronouncements that lack empirical basis. The article concludes by considering the ways in which policy-makers modulate between specificity and non-specificity in order to build their authority. In this case, as in others, this authority supports corporations over public-interest groups. [intellectual property, policy, intertextuality, subjectivity, trade]

The edges of these bones are fringed with hairy fibres, through which the right whale strains the water, and in whose intricacies he retains the small fish, when open-mouthed he goes through the seas of brit in feeding time.

– Herman Melville, *Moby Dick, or The Whale* (1902:290)

More Than Just Watching

The United States Trade Representative (USTR) is a cabinet member who advises the President of the United States on trade with other countries, acts as America's spokesperson, and establishes American policy on matters concerning international trade. As part of these duties, the office that supports him or her (also called the USTR) annually produces the Special 301 Report, which contains a two-tiered "watch list" of countries that provide "inadequate" protection of intellectual property (IP). Countries deemed to be comporting themselves badly are put on the "priority watch" list, while those with only a few difficulties appear on the "watch" list.¹ Countries placed on one or the other list between 2010 and 2012 have included Brazil, Canada, China, India, Mexico, and Russia—in other words, the world's largest emerging economies, together with America's largest trading partners. In total, 42 countries have been placed somewhere on the watch list in the last three years. As a result of this placement, these countries are subject to more than just watching; the opening of official dispute-settlement proceedings with the World

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Trade Organization and the imposition of tariffs, in addition to considerable public and private censure, are possible consequences of inclusion (Masterson 2004:21). Being placed in the highest-priority category starts a 30-day countdown within which countries must begin “good faith negotiations” or face trade sanctions (Section 301 of the Trade Act of 1974, quoted and discussed in Flynn 2013).

The process by which the USTR creates its Special 301 Report involves research on the part of an interagency governmental committee,² private meetings with corporate interests, and, since 2010, a “public hearing” in Washington, D.C., at which interest groups from across the political spectrum may share their opinions. In this hearing, lobbyists for the pharmaceutical and copyright industries frequently request stricter IP policies, while “public-interest” groups express concerns about how strict IP policy diminishes access to medicine and popular culture, placing low-income Americans and residents of emerging economies at risk.³ But the hearings always begin with the testimony of listed countries, which sets the tone. Because of the amount of pressure that being on the watch list generates, some representatives of governments come to plead for their country’s removal (three to four governments of the forty or so on the list come each year). They implore committee members to hear how they have increased punitive raids, cut off Internet sites that lead to “piracy,” confiscated and destroyed offending goods, imposed heavy prison sentences on known “counterfeiters,” increased attention to American patents in the use of generic drugs for the treatment of HIV, and generally created a climate that honors American copyrights, patents, trademarks, and brands.⁴ To give examples of the extent to which countries seem prepared to go: in one statement from the government of Thailand in 2011, Thailand’s representative announced having placed employees of American pharmaceutical companies on committees deciding medical policies—a move that met with the USTR’s approval but was nevertheless insufficient to change Thailand’s status on the list that year (USTR 2011a:22).⁵ Along similar lines, in the previous year, the representative from Mexico stated that his government had put “covert agents” into movie theaters on opening nights so that no one could illegally video-record; the notion that spies, of a sort, were being placed into movie theaters seemed like a good idea to the USTR, but, as in the case of Thailand, it was insufficient to change Mexico’s position on the list (USTR 2010a:22–23).

This article focuses on the Special 301 watch list from the time when public hearings began, in 2010. It focuses not only on the hearings, but also on the relationship between the hearings (with their pre- and post-hearing submissions) and the actual Special 301 Reports themselves. We begin in 2010 because the initiation of public hearings created a sudden increase in participation: there were 571 pre-hearing submissions, compared to fewer than 60 in previous years. This article is attentive to the role of language in facilitating participant modes of engagement, as well as to the outcomes of the hearings, particularly the inclusion or non-inclusion of elements of testimony in the final report. The analysis includes treatment of transcripts from the hearings (2010–2012) and pre- and post-hearing submissions, as well as the actual Special 301 watch lists that the USTR eventually generated in each year.⁶ Field notes and interviews of participants also play an important role in this article’s conclusions.

Based on the analysis of these materials, we will see that the USTR’s attempts to foster participation from “the public” are an important means by which it maintains its tight collaboration with the American pharmaceutical, film, and music industries. This governmental collusion with corporations fits into a broader context of such co-operation, most obvious in the case of oil companies (as seen in Steiner 2003), but also evident in regard to a host of other industries. These contentions require some unpacking. During the hearings, critics of an IP policy that vastly favors corporations over “public interests” (such as low-cost treatment of HIV or malaria, or the equitable pricing of music, movies, and software) are reined in by the committee and its chairman; after the hearings, these critical perspectives, which claim that the Special 301 list has been used to bully foreign countries into actions that are not good for their

citizens' physical and cultural health, fail almost entirely to enter the substance of the completed reports. Indeed, when one scans the reports for traces of the testimony of public-interest groups, or evidence of their pre- and post-hearing submissions, it is easy to conclude that the USTR simply ignores them, while contributions from pharmaceutical, film, and music companies appear on about half of each report's approximately sixty pages.⁷

However, the hearing is much more than just a way of whitewashing pro-industry policy decisions. Despite the fact that the public hearings seem not to be true to their stated aim of collecting a diversity of opinions for inclusion in the report—favoring only the information that comes from “IP maximalists” (Sell 2010)—the ritual is, in fact, significant for the fashioning of American trade practice with respect to IP. Far from being an obfuscatory instrument of trade policy, the hearing facilitates the classification of perspectives critical of the corporate-driven IP policy that currently guides the list as shrill and inappropriate, disqualifying them from substantive inclusion. Most significantly, the USTR judges industry discourses to be congruent with its “mandate,” and therefore worthy of inclusion in the list and its accompanying explanations. It is therefore crucial that perspectives critical of an industry-oriented platform *and* those supportive of it should be presented in the same arena, so that the USTR can use the hearing to legitimate the latter while relegating the former to the dustbin. In sum, American governmental IP policy is an ongoing process whereby suitable and unsuitable positions are *produced* at linguistically mediated sites such as the Special 301 public hearings and the Special 301 Report. Policy is enacted through “situated activity structures” (Goodwin 1997) and is hence subject to continuing negotiation. The momentum of these negotiations has been especially brisk since 2010, and reveals little concrete policy change between the Bush and Obama administrations.

The language-oriented analysis of policy undertaken in this article is aimed at bringing culture and history into studies of governance. More specifically, it demonstrates some of the ways in which small-scale, localized, language-oriented instances of policy “making” can have far-reaching impacts (Brenneis 1999; Groth 2010; Lempert 2011; Silverstein 2011). A model of intertextuality proves useful here (Briggs and Bauman 1992), in that persons giving testimony must attempt to maintain a narrow intertextual gap with respect to the USTR's “mandate” if they hope to make an impression. The establishment of the mandate is, itself, a deeply language-mediated process by which originary texts (two Trade Acts and one “round” of negotiations) are esoterically interpreted; quite different “mandates” could easily have emerged from straightforward readings of these texts, but the USTR's is the one that holds sway (Brenneis 1999). Once the mandate has been firmly stated at the beginning of the hearing, it is then used to *filter* the proceedings—bringing some positions forward (those of “industry”) and pushing others into the background (those of “public-interest” groups). This filtration produces trading policy and subsequent selected applications of American power.

“Filtration,” as it is conceptualized here, involves more than just pushing some perspectives to the side; it leaves some gold in the pan. This pushing-to-the-side and bringing-forward produces an understanding of the hearings as being divided into three linguistically constituted “subject positions,” one for each of the three major categories of participants: governmental representatives from listed countries, industry lobbyists, and public-interest groups. These subject positions (subjectivities, or, following Bourdieu, position-takings; see Ortner 2005) present opportunities for alignment with the USTR's mandate—and one subject position, that of industry, will be absorbed into the USTR's “commitments” (Kockelman 2004) to truth. As the opinions of industry line up with those of the USTR, the USTR codes a given message as being “on task;” narrow intertextual gaps provide opportunities for the USTR to accept an opinion and, frequently, appropriate it without citation into the completed report. The testimony given by representatives of foreign governments, however, and, even more frequently, that of public-interest groups, becomes coded as

“off task” through its departure from industry terminology and opinion, and is pushed almost entirely out of the completed report.

At the broadest level, this article is not only directed at debates about the importance of language for real-time instances of policy-making (Chock 2001; Silverstein and Lempert 2012). It also says something important about culture and practice in the United States: namely, that Americans are increasingly dependent on notions of property (Lessig 2004; Boyle 2008) for the understanding of diverse aspects of material and expressive practice (Coombe 1998). This propertization of social reality reinforces the union of individuation with entrepreneurship in circumstances increasingly portrayed as “competitive.” Propertization is thus significant in politics and social theory, since communicatively and materially productive activities once acknowledged to have been assembled using shared materials are now often regimented by notions of individual “genius” and “authorship” (Foucault 1977). This, in turn, means that collectivist modes of thinking that emphasize the importance of group process, including the culture concept itself, are increasingly under attack in domains of law, politics, and commerce. The public-interest groups, using their often structural-functionalist or Marxian understandings of the importance of groups to social life, find their vocabularies and concepts rigorously omitted from the discussion.

“Mandate” Filtration

As noted above, “filtration” not only pushes some material to the side; it also brings selected material forward and highlights it. At the USTR’s Special 301 public hearings, those who have the capacity to align their argument with a highly specific interpretation of an originary set of dialogically linked texts—in this case, the 1974 Trade Act, amplified by the 1988 Omnibus Trade Act, and finally, modified by the Uruguay Round of trade negotiations—will win reproduction of their opinions in the report. Those who are perceived to have wandered “off message” (Silverstein 2003) will not have their arguments included. One of the most important things for the USTR to do at the outset, then, is to establish its mandate. It does this by citing the relevant texts and then pronouncing its interpretation of the relationship *between* them. Importantly, it must efface the particularities of its interpretive process; the mandate “is what it is,” the chair of the hearings says at one point, in response to criticism (USTR 2011b:124).⁸ In the course of the hearings, the USTR elucidates how its interpretation will result in particular procedures for the hearing that will have repercussions for the construction of the finished report. The USTR’s take on the mandate does not go unquestioned; critical testimony challenges the USTR’s definition as well as the pertinent texts. Many public-health non-governmental organizations (NGOs, included in “public-interest groups” for the purposes of this analysis) assert, for instance, the importance of the Doha Declaration (to which the USTR pays lip service) and the Declaration of Helsinki (which the USTR ignores).⁹ By and large, though, during the hearings, the USTR and its committee members are successful in establishing and maintaining their delimited interpretations of the texts that they deem relevant; and they are entirely successful in doing so in the report, a document that they “author” (often by appropriating text from industry submissions and testimony, without citing the sources).

The basis upon which the USTR constructs its mandate is best stated by Ambassador Miriam Sapiro, the Deputy United States Trade Representative, at the opening of the 2010 hearings (the first year that public hearings were held). Stanford McCoy, the Assistant United States Trade Representative for IP and Innovation, who will chair the hearing (and all hearings between 2010 and 2012), introduces her. From her superior position in the hierarchy of the USTR, Sapiro says:

As you deliver your statements today, I encourage you to bear in mind the statutory mandate that Congress has given to [the] USTR: to identify countries that deny adequate and effective

protection of intellectual property rights, or deny fair and equitable market access to persons that rely on IP protection. (USTR 2010b:10)¹⁰

This statement, by and large a narrow interpretation of the 1988 Omnibus Trade Act, will be translated into a series of procedures for organizing the hearings: the ways in which the USTR uses “mandate” to direct the hearings and construct the report. Essentially, the USTR believes that testimony is only relevant if it contains information about how particular companies that sell particular products have had IP “problems” abroad. The USTR refuses to discuss changing the broad approaches that it takes in formulating the report. Were such approaches to change, they would entirely restructure the status of specific countries; but the USTR, it seems, will not hear of it. It is worth explaining this a little more, by way of a specific example, in order to clarify the USTR’s procedures. Were the USTR to decide that pricing of digital media was simply too high in foreign markets, and that “piracy” of digital media was therefore a reasonable response to this pricing—as was argued in testimony by the Social Science Research Council in 2011, based on a large empirical study (SSRC 2011)—it would radically alter the position of *almost all* of the countries on the watch list. Indeed, by encouraging public-culture-producers to lower prices of legitimate products, the USTR would be protecting IP, its stated aim. The SSRC was ignored by the USTR, however. Even when public-interest groups attempt to address specific countries, if they do not provide information on how particular products have had IP-related problems, the USTR looks away. The most common sort of problem cited is that law enforcement proves insufficiently responsive in confiscating unauthorized copies and arresting the copiers. Another common “problem” occurs when a foreign government decides that it needs to create a low-cost generic drug in order to combat a local health crisis.

To sum up this consideration of mandate, then, the USTR’s main filtration device is portrayed by the USTR itself as revolving around specificity, whereas it is actually about the type of information that is presented (information on IP “problems” with respect to specific products) and who is presenting it (private companies).

Three Subject Positions

As noted above, filtration for mandate sorts participants in the public hearings into three distinct groups: representatives of foreign governments, lobbyists for the pharmaceutical and copyright industries, and NGOs referring to themselves as public-interest groups. We should not understand each of these groups to possess some pre-existing “identity;” rather, following more processually and semiotically attuned models, we should attend to the ways in which the lineaments of these groups emerge in the course of the hearings, and in the relationship between the hearings and the eventual reports. Put differently, the USTR’s rigorous maintenance of its mandate is an important factor in “performing” (and thereby differentiating) three subject positions (Bauman and Briggs 1990; Dent 2009). One of the reasons for this is that the USTR employs quite different strategies in dealing with members of the three aforementioned groups, both during the hearings themselves and in the use of each group’s materials in the construction of the Special 301 Report.

Evidence from the hearings shows that the foreign-country representatives see them as a rite of supplication. Their desire to appease the bureaucrats present is evident not only in the substance of their statements, but in their earnest tone, which goes unrecorded in the versions of the transcript that the government makes available to Internet users. Consider the opening of Dr. Komolsiri’s testimony on behalf of Thailand in 2010:

[delivered decisively, with force] Today, I would argue before you that since January 2009 under the leadership of Prime Minister Abhisit Vejjajiva and his Deputy Minister of Commerce, Mr. Alongkorn Pollabutr, Thailand has launched an *unprecedented* effort in its intellectual property right[s] protection with *significant* success in many dimension[s]. Given that, Thailand should be removed from the Special 301 priority watch list for the following

reasons. First, there has been an *unyielding* political will to elevate intellectual property protection as a national agenda. (USTR 2010b:37–38; italics added)

Similar broad claims about good intentions and ongoing efforts characterize all of the country testimonies between 2010 and 2012. In his role as chair of the hearings, McCoy usually gives warmly expressed thanks to these representatives after their testimony. These countries' representatives are never brought up short and reminded about the mandate, as representatives of public-interest groups are (see below). Though their information is highly suspect, from the perspective of the USTR, one of the reasons that the testimony of the individual countries fits so smoothly into the hearings is because what they are doing is perfectly congruent with at least a part of the USTR's mandate; each country representative is being highly specific, since they speak only for themselves and never criticize broad USTR policies. The material that they present only enters into the reports as brief acknowledgment that things have improved a touch, but their submissions do not change their status.

As an example of the contrast between a country's self-presentation at the hearings and its presentation in the report: in the 2011 public hearing, Mexico's spokesman spoke effusively about the successes of Mexican enforcement with respect to co-ordination:

[animated] In 2010, in close co-ordination with [the] Attorney General's Office, Customs, and the Mexican army and in collaboration with state enforcement authorities seized more than 146 million counterfeited products and search [sic] more than 1899 properties. (USTR 2011b:55)

The USTR, however, seems to have received submissions from industry groups that contradict Mexico's enthusiasm. Who is to be believed? The question has a simple answer for the USTR: industry. A sliver of the spokesman's testimony enters the report, vastly abridged; he had spoken about numerous other efforts in the course of his ten minutes. The section of the eventual 2011 report that explains why Mexico is still on the watch list, even after having taken the trouble to testify, is decidedly different from Mexico's presentation of its efforts: "Cooperation among enforcement officials has continued to improve, but coordination at the federal, state and municipal levels remains weak" (USTR 2011a:37).

With respect to the enactment of the three subject positions that were identified above, those who are strongly supportive of stronger IP protection, such as individual corporations and their trade-group representatives, entreat the USTR to do *more* of what it is already doing. In this regard, there may also be plaintive appeals of the "pirates and thieves are hurting our business, please help" variety. Frequently, these spokespersons employ numbers, which are often the outcome of "research" that they have paid for. The kind of information that the industry groups are presenting, interpreted, as it is, in terms of foreign-country inadequacies, is a perfect fit to the USTR's mandate, and McCoy frequently thanks these groups, during questions, for the "specificity" of their submission and/or testimony (see, for example, USTR 2012b:35). An exquisite fit to the genre of "useful" testimony, from the perspective of the USTR, came in 2012 from Jimmy Webb, a songwriter whose material has been performed by the Supremes, Frank Sinatra, Elvis Presley, Isaac Hayes, and Linda Ronstadt, among others, and who was representing the American Society of Composers, Authors, and Publishers (ASCAP) at the hearings. ASCAP is what is called a performing-rights organization, which means that it collects fees for the playing of songs on radio, on television, and in bars; ASCAP then pays its members for those performances. Webb was there to say that some countries, particularly China and Jamaica, were not paying up. His testimony, however, was not just based on his institutionally derived role, but on his own heartfelt experiences:

My name is Jimmy Webb. I'm Vice Chairman of the American Society of Composers, Authors and Publishers, and I write songs for a living and have been lucky enough to support myself

since I was a teenager. I'm here on behalf of thousands of other writers who have not been so fortunate, and I thank you for allowing me to testify before you today. (USTR 2012b:29–30)

Later, his comments aligned perfectly with the USTR's mandates by naming names:

It's crucial that the U.S. government step in, [and] use the Special 301 Report to call out these Caribbean scofflaws and to vindicate the rights of U.S. songwriters and composers. (USTR 2012b:33)

He goes on to call out specific countries within the region, particularly Trinidad and Tobago, Barbados, and Jamaica. We should notice the incorporation of these remarks into the 2012 report. In the section called "Trends in Trademark Counterfeiting and Copyright Piracy," there is extensive discussion of Jamaica specifically, and of the Caribbean more broadly—the same discussion that had animated both Mr. Webb's testimony and ASCAP's pre-hearing submission. The 2012 report is worth quoting at length in order to underscore the extent to which industry testimony and submissions are incorporated into these reports:

Growing challenges facing rights holders seeking to collect royalties that are legally owed for the public performance of their musical works in certain regions. [italics in original, indicating a subsection heading] This is a significant issue in the Caribbean region, including the Bahamas, Barbados, Jamaica, and Trinidad and Tobago. For example, in Trinidad and Tobago, there is ongoing litigation concerning the collection of unpaid performance royalties from cable system operators, a problem which occurs in Jamaica and the Bahamas as well. In addition, a government owned broadcasting service in Barbados has reportedly refused to pay for a license to broadcast U.S. musical works on its network. Despite a ruling against this broadcasting service by the Barbados Supreme Court in 2007, U.S. composers have been unable to receive royalties because the government has not established a Copyright Tribunal to determine the appropriate compensation. (USTR 2012a:15)

This material represents very close paraphrasing of Webb's comments, together with the pre-hearing submission of ASCAP (see Metalitz 2012:5). Note the marked contrast with the case of Mexico, as described above, in terms of whether or not a particular group's information gets incorporated into the report.

The third group is treated quite differently. The testimony of public-interest groups is sometimes acknowledged in the report, particularly in introductory sections; but nowhere do the specifics of public-interest testimony or submissions make it into the report, and nowhere does their testimony seem to have had an influence on the actual formation of the list. Noteworthy in this respect was the testimony of administrators of state health and drug-reimbursement programs in 2010 (from Maine and Vermont). These administrators were concerned that the Special 301 Report was singling out foreign countries for censure when those countries were simply pursuing precisely the same pricing controls and preferences for generics that many state governments were using to meet Medicaid budgets. They feared that the application of the USTR's policies to state governments in the United States would radically boost the revenues of pharmaceutical companies while unbalancing state healthcare budgets. While no one had suggested applying the USTR's policies meant for foreign governments to states, the possibility that they might alarmed these administrators, and suggested to them that American governmental departments were working at cross purposes; while the USTR was helping big pharmaceutical companies boost their prices abroad, the Department of Health was celebrating the "generic competition" that was driving drug prices *down* in the United States. Sharon Treat, a member of the Maine state legislature and also the executive director of the National Legislative Association on Prescription Drug Prices, stated her opposition to "any expansion of the 301 report into the realm of disciplining countries for implementing effective and non-discriminatory pharmaceutical pricing policies. . . . We believe these programs will directly and negatively effect [sic] the capacity of states to provide health care and pharmaceuticals to their residents" (USTR 2010b:204–205). She mentioned Thailand

as having been targeted, in particular, by the USTR policies in question—policies that seemed to her to have been written largely by big pharmaceutical companies.

Her concerns were briefly acknowledged on page two of the 2010 report, where the USTR claimed that, in assembling the report, they worked “closely with other agencies to ensure consistency of United States trade policy with other Administration policies. For example, the USTR works closely with the Department of Health and Human Services to ensure consistency of the Administration’s trade policy . . . with the Administration’s health policy” (USTR 2010a:2). But evidence for this in the actual formation of the list is absent. Instead, the report’s citation of Thailand and several other countries, chief among them India, revolved around industry problems with pricing policies. It was as though Treat’s testimony and submission had never taken place.

Finally, we should attend to the way in which the USTR receives testimony by either reinforcing or questioning the subject position of the individual who is testifying. Jimmy Webb finishes testifying with self-effacement in 2012:

Mr. Webb:

And I thank you very much for your time and attention. I hope I haven’t gone over.

Chairman McCoy:

[with excitement] No. In fact, you’ve gone *under*, so we really welcome your participation and—

Mr. Webb:

Oh, thank you very much.

Chairman McCoy:

—your perspective as a songwriter on this is valuable. Can I just ask you—I mean, I *thank* you for the substance of all your submissions in the particular countries. Can I just ask you to reflect a little bit on how the music business is changing on an international stage and what makes the payments of royalties from overseas, as you’re suggesting, particularly significant? (USTR 2012b:34–35)

Here, Webb is being asked to reiterate an argument that he has already made several times in the course of his submission: the argument that, since artists often get substantial royalties from abroad (as much as one-third of their income, we are told), the shortcomings of the Caribbean are particularly hurtful. Thus Webb is given an opportunity to underscore his argument, and McCoy takes the opportunity to praise a contributor of testimony to the hearing for following “the mandate.”

Notice the contrast between Webb’s treatment and that received by the representative of an admittedly confrontational public-interest group. The testimony of Krista Cox of Essential Inventions, an American NGO that assists in the distribution and promulgation of generic medicines, was strongly critical of USTR policy in 2011. Cox began, like Webb, with a clear explanation of her organization and personal experiences. She then faulted what she perceived to be the USTR’s use of the list to bully foreign countries in the interest of American companies and, in the process, fly in the face of American global health initiatives and local health policies (like those of Maine and Vermont). So critical were her remarks that she employed the terms “unilateral,” “monopoly rights,” and “cultural imperialism” to describe the USTR’s actions, and she spoke, in particular, about the injustice of the USTR’s placement of India, Ecuador, Thailand, and the Philippines on the list based on their pharmaceutical policies. In her view, the policies of these countries are perfectly transparent and aligned with international treaties, and so these countries should not even be criticized, much less placed on a watch list. In response to Ms. Cox’s testimony, McCoy is polite and appropriate. But we should notice what is *missing* from his response to her testimony, as compared to his response to Webb’s:

Thanks, Ms. Cox. We appreciate your contribution today. [flatly] You have about a minute and a half left in your 10 minutes. I would personally be interested to hear more about Essential Inventions and what it is that you do. (USTR 2012b:55–56)

Since Cox, like Webb, had taken about thirty seconds of her time to explain her organization, McCoy's request sounds odd. Also like Webb, Cox spoke from a personal perspective: from her own experiences of doing work with trade-related aspects of IP. But very much *unlike* Webb, Cox is asked to re-state the validity of the organization on behalf of which she is testifying. Essential Inventions is far less well known than ASCAP, of course, but Cox has already explained clearly the organization that she represents. She is not given the opportunity, as was Webb, to reinforce her main talking points. Not only is her perspective as a policy analyst and NGO representative *not* deemed valuable; she is also called upon to explain her very presence at the hearing.

Other important differences exist. For example, it is, almost categorically, public-interest groups that are reminded about the mandate in the course of the hearings (USTR 2010b:131,165,175,178; USTR 2011b:12,66,80,82,124; USTR 2012b:63). This occurs regardless of the degree of specificity of their testimony. In 2010, for instance, Rashmi Rangnath of the NGO Public Knowledge has just finished being critical of what she believes to be the USTR's use of Special 301 to create monopolistic practices for American pharmaceutical firms abroad. She has, in fact, been quite specific, requesting an alignment of USTR approaches to limitations and exceptions practiced within American borders, increased transparency on the part of the USTR with respect to how it gets information for the report, and scrutiny of industry claims abroad. Not only has she been specific, but even when she has not discussed particular countries, she has presented material that, if it were to be duly incorporated, would transform the entire structure of the report. Were the USTR to heed her request for more balanced information, for example, the report would include information on specific countries other than that provided by industry, and would, hence, be a much longer document. But rather than asking her to address these specifics further, or giving her an opportunity to speak more about her central message, McCoy reiterates Sapiro's earlier statement, suggesting that Rangnath has somehow erred in her testimony. Because she is not speaking from the industry perspective, Rangnath's testimony will not be accorded the same fit to mandate, and hence will not be included in the report.

[sounding irritated] Just a question from- a question of my own [as] it relates back to what Ambassador Sapiro said at the outset about our focus being on our mandate from the Congress, here, to identify countries that *deny* adequate and effective intellectual property protection or fair and equitable market access to U.S. persons who rely on that protection. That's what the statute calls for, that's [what] this committee is set up to do. I appreciate your country-specific comments on Israel and India, [but] I guess beyond that, are there other country-specific issues that you feel we need to look at or look at from a different perspective . . . ? (USTR 2010b:80-81)

McCoy's question is jarring because it contrasts so sharply with what industry witnesses have been asked. In different words, McCoy is saying, with a touch of irritation that may have resulted in his stumble in the first line, that only specific information on violations against industry—and information that is delivered *by* industry—will “count.”

This is further reinforced in the 2012 hearings. Taking to heart McCoy's comments from 2011, Rangnath devotes her entire presentation to the case of Canada, providing by far the most detailed testimony that was offered between 2010 and 2012:

In response to concerns expressed at last year's hearing that comments should be focused on *specific* countries, my comments today will focus on Canada and explain why Canada should *not* be placed on the Priority Watch List *or* Watch List of this year's Special 301 Report. We believe that Canada is a clear example of a country whose laws and practices are similar to those of the U.S. and therefore does *not* qualify for increased attention under the Special 301 process. (USTR 2012b:58)

She then provided considerable information about Canada's approach to pharmaceuticals and copyrighted material, detailing the strictness of its laws and the proximity of those laws to those of the United States. Like her testimony from 2010 and 2011, her remarks went unacknowledged in the eventual report, which relied upon submissions by the pharmaceutical and copyright industries in order to retain Canada in its highest-priority watch category. The report's entry on Canada contained very few details and stated only that Canada was left in the highest level of "watch" because of its ostensible failure to fully address "the challenges of piracy over the Internet," weaker-than-desired border-enforcement, and concerns about "the availability of rights of appeal in Canada's administrative process for reviewing the regulatory approval of pharmaceutical products" (USTR 2012a:25–26).¹¹

Table 1 (below) summarizes the ways in which participants in the hearings combine various attributes of testimony. In the context of the USTR's hearings and eventual reports, these combinations of attributes, in turn, form the basis for the three subject positions that have been described and examined above.

Epistemological Commitments and the Force of Sporadic Specificity

The Special 301 Report does not include direct citations or a list of references. Beyond its re-statement of Congressional mandate to protect IP abroad, a statement so broad as to be interpretable in a variety of ways, the USTR does not include clear criteria for inclusion in the list. Furthermore, it is inconsistent with respect to whether it offers specific information on particular countries; the public-interest contention that no specifics are provided by the list is not, strictly speaking, true, since the entry on Russia is moderately detailed, and the entry on China is highly detailed. However, it is only in cases of strong economic competitors who *also* have a history of ideological and political opposition to capitalism that the report provides detailed information. In all other cases, countries that get placed on the list are given no clearly stated standard that they need to aim for if they want to get off it. And in all cases, the information that *is* provided comes straight from submissions from industry, with no indication that the USTR has done any fact-checking of its own.

Let us bracket the cases of Russia and China and consider the cases where there is *no* history of ideological opposition to capitalism. In these cases, as noted, the report oscillates between specificity and occlusion. Consider the justification for Brazil's presence on the 2012 watch list. "The United States encourages Brazil to follow through with arrests and prosecutions of intellectual property rights (IPR) violators" (USTR 2012a:41–42). Here, we lack an explanation for what might be meant by "following through." Should Brazilian law enforcement arrest more people? How many? And must prosecutions be successful? If they "should" be successful, then what influence will this have on the due process that is taken for granted in the United States? Further statements clarify Brazil's status little: "The United States continues to be concerned about the widespread availability of pirated and counterfeit products in Brazil, especially pirated books, and about the growing challenge of piracy over the Internet . . . Brazil should also continue to strengthen its border enforcement efforts" (USTR 2012a:42). Once again, these broad statements raise more questions than they answer. What sorts of "concerns" does the USTR have? In the 2011 hearings, the Social Science Research Council gave testimony on extensive research showing that media piracy in emerging economies was the result of extremely high prices for "legitimate" goods (SSRC 2011). There is no mention of this testimony—not even to reject it—in either the 2011 or 2012 report. And how, precisely, might Brazil strengthen its laws and its border enforcement? Throughout the report, and at the end of each section devoted to a specific country, the USTR invites all countries to engage with it in solving these "problems," and perhaps, in this subsequent process, such questions might be answered. However, as a blueprint for concrete actions, the actual report provides little guidance.

Table 1
Subject Positions

Group name	Supports USTR's process	Affect	Goals	Information	USTR handling	Included in report
Country representatives	Yes, but under duress	Supplicative	To get their country off the watch list	Specifics about their own country's pro-IP actions	Polite mistrust; must respond to industry submissions	Rarely; and <i>never</i> successful in self-removal from the watch list
Industry (either lobbying groups or actual companies)	Yes	Righteously indignant; plaintive	Get a country on the watch list; get a country higher up on the list; ratchet up pressure	Specifics about their experiences in particular countries; testimonials	Sympathetic requests to elaborate further on points already made	Constantly
Public-interest groups	No	Confrontational; disgusted	Get countries off the watch list; get USTR to clarify the process by which the list is made	Comments on the inadequacies of the process; specifics about ways in which countries have been unfairly listed; encouragement to rethink the "mandate"	Reminders about sticking to mandate; occasional interruption	Almost never, and only in general sections of the report; never in the details of the watch list

This lack of specificity sometimes gives way to a starkly contrasting specificity, and the oscillation between the two is significant for the way in which policy documents function in practice. Returning to the case of Brazil in the 2012 Special 301 Report, we can identify sentences containing quite specific information:

The United States . . . encourages Brazil to take the necessary steps to formalize the Federal Attorney General opinion clarifying that Brazil's sanitary regulatory agency, ANVISA, does not have the authority to review patentability requirements when analyzing pharmaceutical patent applications. . . . The United States encourages Brazil to clarify and strengthen its system for protecting against unfair commercial use, as well as unauthorized disclosure, of test and other data generated to obtain marketing approval for pharmaceutical products. (USTR 2012a:42)

The first part of this quotation faults ANVISA (the National Agency for Sanitary Vigilance) for having been hostile to American pharmaceutical companies. The second part requires a touch more explanation. Here, the pharmaceutical industry is seeking to protect the test data on drugs that it developed, even if those drugs began to be produced as generics long ago. Pharmaceutical Research and Manufacturers of America (PhRMA), the lobbying arm of the industry, wants countries hoping to create generics to pay to do the testing all over again; this would act as a disincentive to the creation of generics, thereby forcing those countries to pay for much more expensive drugs created by American companies. With respect to both of these points, drawn directly from the USTR, we might ask, what explains this sharply contrasting specificity? The answer is that the USTR, much as it did in the case of ASCAP's submission (discussed above), has appropriated, almost verbatim, a few of the specific requests made by the pharmaceutical industry in their pre-hearing submission; see PhRMA's submission (Hunter 2011:83–86) for what can only be read as the USTR's plagiarism.

Once again, then, industry has been treated quite differently from public-interest groups. But here, the significant point is not just that industry is portrayed, in the course of the hearings and in the relationship between the hearings and the creation of the finished report, as aligned with mandate. Rather, the point is about the report's epistemology, and how we can read that epistemology in the way in which its authors "commit" (Kockelman 2005) to the information that they provide. Along these lines, we can tell a great deal about the way the USTR knows what it knows by looking at the many places in which "industry" is invoked as a source of actionable knowledge (see Table 2, below). Within the hearings, for instance, representatives of foreign countries are sometimes asked to respond to the concerns of industry; they are never asked to comment on the submissions of public-interest groups. But the emphasis on industry is even greater in the reports that follow, becoming dramatized in self-referential sentences such as this, from 2012: "Industry continues to express concern about the pharmaceutical industry's general lack of ability to meet with the Ministry of Health to provide their perspectives on policy initiatives" (USTR 2012a:21). The drama here lies not in the probable conflict of interest in allowing private companies to weigh in on public-health policies, but, rather, in the possibility that a sentence in which "industry" finds itself concerned about "industry" might even *appear* in an official government report.

A brisk quantitative analysis of the reports strengthens our understanding of the omnipotence of private interests in the Special 301 epistemology. Table 2 conservatively summarizes the number of times the complaints of the "industry" are cited in the reports of 2010, 2011, and 2012.¹²

By contrast, public-interest groups' concerns, experiences, or information, either as presented during the hearings or in pre- or post-hearing submissions, require no table, since they are not offered once in any of the three years. This is to say that the information presented by public-interest groups is never held up as authoritative or actionable.

Table 2
Instances of the Phrase “Industry Reports that . . .” in Special 301 Reports, 2010–2012

2010	2011	2012
35 instances	33 instances	34 instances
Breakdown:	Breakdown:	Breakdown:
“industry reports” – 29	“industry reports” – 25	“industry reports” – 18
“rights holders report” – 6	“rights holders report” – 5	“rights holders report” – 13
“stakeholders report” – 1	“stakeholders report” – 3	“stakeholders report” – 3

The point of this section of this article’s analysis, however, is not simply to indict the USTR for an overemphasis on industry. This much has been done by several public-interest groups at the public hearings and in pre- and post-hearing submissions over the last three years (among them, Oxfam, Doctors Without Borders, and Program on Information Justice and Intellectual Property). Rather, the point is for us to notice that this policy document relies on an *oscillation between* a lack of specificity, with respect to expectations, citations, and methodology, and short bursts of very specific attention to industry concerns. This sends two messages, both of which are important for Special 301’s intended audiences. First, and most obviously, the USTR is saying, “We trust industry, and we ground our conclusions in their information.” But the second message is also crucial: “We have our reasons, which we make clear only sporadically. You must frequently take it on faith that you belong on the watch list.” Foreign countries seeking to understand why they were placed on the list could simply read the submissions of industry groups in order to decide how to act, bypassing the report altogether. But this would miss an important part of the process, which is the USTR’s performance of its own numinous authority, grounded in a mysterious interplay between sparse specifics and its own non-specific knowledge. It is by “committing” (Kockelman 2004) to both states of affairs at the same moment, despite the fact that the states of affairs seem opposed, that the USTR creates its own authority as an advocate for industry while purporting also to represent the public interest.

Conclusion

In her opening remarks in 2010, the first year in which the USTR decided to hold public hearings for its Special 301 process, Ambassador Miriam Sapiro stated that “input from the public is absolutely critical to ensuring that we make effective use of the Special 301 process” (USTR 2010b:10). If “input from the public” is defined as input from the institutions that call themselves “public-interest groups,” then this statement seems to be true only insofar as “input from the public” needs to be “filtered” through the mandate as a way of demonstrating its irrelevance. Note, in this respect, an interchange between lawyer Sean Flynn, of the Program on Information Justice and Intellectual Property, and hearing chairperson Stanford McCoy in 2012. Flynn has just finished criticizing the way in which the USTR has been, in his view, ignoring the opinions of public-interest groups over the last two years:

Chairman McCoy:

[with a touch of amusement] Okay. Thank you for your comments. We appreciate them, and we’ll take them into consideration as we prepare the report.

Mr. Flynn:

And just to be clear, I’d like to ask you to do more than consider. I’d like to ask you to respond in writing to the various submissions that have been made.

Chairman McCoy:

[more irritated now] Noted, thanks. (USTR 2012b:88–89)

Here, Flynn points out one of the rhetorical devices that the USTR uses when it wants to suggest that public-interest testimony is not being taken seriously: "We'll take it into consideration." It is difficult to say whether something has been taken into consideration, since the thought processes of the USTR are invisible and its discussions are private. Nonetheless, one can assert that public-interest statements and information are categorically absent from reports.

The Special 301 Report of 2012 made no mention, once again, of public-interest-group testimony. It is possible to see this as a simple bias against these groups, but another, more alarming, possibility presents itself. It is possible that Sapiro and the USTR think that, in accepting *only* the testimony of industry, they are, in fact, taking the feedback of "the public" seriously. Were this to be true, such a perception would fail to adhere to conventional ways of delimiting the terms "public" and "private." But it would also signal that, in a neoliberal mode, for the USTR and its industry supporters, the public interest *has become* the interests of corporations. Furthermore, in reading the reports and listening to the hearings, we might speculate that this is accompanied by an actual suspicion of public-interest groups and a belief that they are irrelevant, perhaps even malicious. We cannot know for certain. We also cannot know the internal motivations of the USTR.

However, we *can* offer some advice to foreign countries that read the Special 301 Report. First, countries attempting to understand why they have been put on the list should supplement their readings of the Special 301 Report with careful scrutiny of industry submissions. Fortunately, these are available online. In effect, with the exception of the brief lucid and specific moments where the report appropriates industry submissions without citation, representatives of foreign countries should understand that they will receive only very broad statements of the sort that we saw in the case of Brazil, as described above. This has an unfortunate consequence of contributing to a general privatization of social life. More specifically, public officials of foreign countries must orient toward private interests in the United States, not toward government institutions. Put differently, foreign countries concerned with their status on the report need not concern themselves much with the USTR; they need only look at industry submissions. Some of those "industry reports" made positive comments about ways in which countries had "made some progress." If foreign governments could chalk up enough of these, they might get off the list; but industry would be the arbiter, not the USTR.

In the event that the USTR changes its policies and begins to consider input from groups seeking to increase global access to medicines and popular culture, this critique of the way it fashions its Special 301 Report will become obsolete. But a few broader points will remain, whether or not the USTR changes its approach. The first is that policy gets made in very small-scale situations, which are mediated by language. The USTR establishes and upholds its "mandate" by maintaining a small intertextual gap with reference to a group of canonical texts and, in so doing, *filtering* the testimony that is presented in its hearings. The establishment of this mandate will, like everything else, be an interpretive process through and through (Geertz 1973). But this interpretation will be effaced, and those responsible for the process will espouse a pre-interpretive *emergence* of the mandate from the texts in question; the mandate, in McCoy's words, "is what it is." Next, a process of filtration will push some perspectives into the background and bring others forward, into the limelight. This will result in the creation of policy documents the epistemological basis of which can be read in "commitment events" where certain sorts of information are aligned with the authors of the report. At the same time, policy documents will also contain amorphous pronouncements so that their readers, unaware of the locally instantiated cultural politics of reading such documents, will have little idea of how to translate a given document into action. Instead, readers will have to engage with private actors in order to use the document as a basis for concrete practice. In considering the interpretive practices associated with reading and responding to policy documents, we might wonder about the degree to which a document influences its readers to

action *because of* its oscillation between specificity and lack of specificity. And finally, by examining the intertextual politics of policy-making, we can understand more about how certain subjectivities coalesce around particular “issues.” In other words, we can understand how mandates of various sorts create situationally relevant position-takings that are sometimes able to accomplish what they set out to do, but are, at other times, doomed to failure.

Notes

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1. The ties between trade policy and intellectual property are now taken for granted in North America, but it has not always been so. Indeed, the notion that there might be a close relationship between the two had to be rigorously constructed in the late 1970s and early 1980s, and can, thus, be added to the long list of attributes of neoliberal economic and social theology. For an historical treatment of the actors and institutions involved in this expert reconceptualization of IP, see Sell (2003). Scholarly engagements with neoliberalism are becoming too numerous to cite, but a few examples include Comaroff and Comaroff (1999), Dent (2012), Ferguson (2007), Harvey (2003), O’Dougherty (1999), Ong (2006), and Williams (2002).

2. The committee includes representatives from the Council of Economic Advisors, the Council on Environmental Quality, the Environmental Protection Agency, the Agency for International Development, the National Economic Council, the National Security Council, the Office of Management and Budget, the U.S. International Trade Commission, as well as the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, Homeland Security, Interior, Justice, Labor, State, Transportation, and Treasury.

3. The USTR and the “public-interest groups” are using different definitions of “public,” neither of which attend to the circulatory complexities outlined by Warner (2002). The USTR and the pharmaceutical and copyright industries that it represents believe that private corporations embody the public interest when they pursue their own interests. However, the organizations that apply the term “public-interest group” to themselves are generally NGOs that exclude corporations from their understanding of “the public,” since they believe that corporations are “private.” Included in this group are organizations such as Doctors Without Borders, Oxfam, Public Citizen, and American University’s Program on Information Justice and Intellectual Property.

4. The fact that many of these measures potentially impinge upon the freedom of speech and expression that Americans hold dear, and may even violate trade and health practices within the United States, will not be the subject of this article.

5. Public-interest groups that were there to testify that day about the way the USTR’s IP maximalism was hampering access to medicines were horrified by Thailand’s admission, which, it seemed to them, would create a conflict of interest.

6. The author relied in part on government-prepared transcripts and reports, which are available at www.ustr.gov. Pre- and post-hearing submissions were also significant for this study, and are available through www.regulations.gov. The transcripts were cross-checked for accuracy with the author’s field recordings of the 2011 and 2012 hearings. The author attended the 2011 and 2012 hearings as a spectator, and then interviewed participants after the hearings based on his perception of the importance of their testimony: how much their testimony seemed either to have been supported by the USTR itself, in the course of the hearings, or to have been ignored. These interviews were between 15 minutes and 2 hours long. The 2010 and 2011 hearings occupied a full day, whereas the 2012 hearings were only a half-day—in part, because fewer public-interest groups requested an opportunity to testify. I am currently carrying out a fuller study of policy-making at the USTR in which I analyze other contexts, including handlings of dispute settlements at the World Trade Organization and negotiation processes with foreign governments.

7. Precisely this point was made by Sean Flynn of American University’s Program on Information Justice and Intellectual Property in his testimony in 2012 (USTR 2012b).

8. Notice considerable overlap with Richard Harper’s (1997) description of reports at the International Monetary Fund.

9. The Doha Declaration of 2001, drafted by the World Trade Organization, emphasized that member states should be able to circumvent patent rights when a medicine was deemed "essential." The World Medical Association's 1964 Declaration of Helsinki proposed ethical-treatment guidelines for research on human subjects; it has been adopted by most institutional review boards in the United States, though the USTR continues to ignore its interdiction on repeating testing when the results are already known. The Declaration of Helsinki is relevant because pharmaceutical companies want foreign governments to do their own testing, thereby replicating tests that have already been done by the companies. In other words, pharmaceutical companies want to use IP policy to protect tests that have already been done and have already shown the benefits of a given drug.

10. The transcripts, completed by local firms specializing in government transcribing, contain frequent errors that seem to be the result of the use of transcription software (several times in the 2010 transcripts, for instance, the phrase "et cetera, et cetera" is rendered as "Ethiopia, etc." (see, for example, USTR 2010b:34). These errors become particularly frequent when representatives of foreign governments testify. In any case, for the 2010 hearings, which I did not attend, I have called on the memories of those who were present to correct the transcripts. For the 2011 and 2012 hearings, I have used my own field notes, recordings, and memory. It is also important to understand that the transcriber paid no attention to natural pauses, much less suprasegmentals. This raises important questions about the role of transcripts in policy-making that will have to await another article.

11. Analysis of the three years of hearings and reports reveals other times at which McCoy raises the issue of country-specificity. However, when he raises the issue with industry testimony, it is, with one exception, to praise industry players for having provided the necessary specificity. When the issue of "mandate," "statute," or "Congress" is raised in the context of public-interest testimony, it is a way of stating, publicly, that that testimony has been faulty and will not be included in the report.

12. "Conservative" here means that only explicit references to industry were included. Myriad constructions in which "The United States is concerned," followed almost directly by uncited appropriations of industry pre- and post-hearing submissions, have not been included in this table. Were such references to be counted, the numbers would be considerably higher (about double).

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