Since October 2007, the United States, Europe and a few close allies[1] have been negotiating a new intellectual property enforcement treaty, Anti-Counterfeiting Trade Agreement (ACTA)[2]. Although China is identified as the main target of counterfeiting activities, it has not been invited to the negotiation table of ACTA. It appears that ACTA negotiating partners have deliberately opted for a plurilateral approach to circumvent possible opposition from developing countries such as China, Brazil and India. However, the long-term aim of ACTA is to establish it as a global standard for intellectual property right (IPR) enforcement and developing countries will face a great pressure to adhere to the treaty. Therefore it is necessary to analyze ACTA in China’s perspective and discuss its potential impacts on China and other developing countries.

This paper will analyze ACTA’s impact on China in both legislative and practical perspectives. Part I will take a text analysis of ACTA and compare it with Chinese intellectual property (IP) law. Part II will discuss the practical problem of IP enforcement in China and the potential impact of ACTA on it. Part III will give the conclusion that ACTA will not improve the IP enforcement in China even if it becomes a global standard.

I. Legislation—Text Comparison of ACTA and Chinese IP Laws

The main body of the draft ACTA has four sections, making provisions on "Civil Enforcement", "Border Measures", "Criminal Enforcement" and "Intellectual Property Rights Enforcement in the Digital Environment." The following paragraphs will analyze the key issues in these sections and compare them with the corresponding parts in Chinese IP laws.

A. Intermediary Liability

The draft text of ACTA proposes to impose intermediary liability on Internet service providers (ISPs) and other third parties. This provision is broadly criticized for its threat to free speech and access to information. Moreover, some worry that governments would take advantage of this provision for censorship.

Similar to ACTA, China also imposes the intermediary liability on ISPs and adopts “notice and take down” system. The main legislation regulating Internet piracy and liability of ISPs is Measures for the Administrative Protection of Internet Copyright of China (MAPIC). Effective on May 30, 2005, the MAPIC provides that an ISP will be liable for administrative penalties if it clearly knows an Internet content provider’s copyright-infringing act through its network or if it fails to remove copyright infringed material upon the request of a copyright holder. [3] Different from ACTA, to balance the rights between copyright holders and Internet content providers, MAPIC also provides that where any ISP removes relevant content in light of the notice of a copyright owner, the Internet content provider may send a counter-notice to both the ISP and the copyright owner, stating that the removed content...
does not infringe upon the copyright.\[4\] After the counter-notice is sent, the ISP may immediately reinstate the removed content without liabilities for the reinstatement.\[5\]

However, MAPIC then provides that if an ISP fails to take measures to remove relevant content after it receives the copyright owner’s notice and meanwhile the content damages the “public benefits,” it may be punished by administration departments.\[6\] But the content providers do not have equal remedy when the ISP ignores theirs counter-notice. Thus, the law induces ISPs to perform in favor of copyright holders’ interests. Moreover, the definition of “public benefit” under MAPIC is very ambiguous and it often used by government as justification for censorship. Accordingly, people worry that if ACTA put liability for file sharing on ISPs, then they will be forced to create their own censorship campaigns, especially in the countries with a lack of democracy. The facts in China prove that such anxiety is not groundless. The burden on ISPs to act as gatekeepers is likely to be onerous. Their liabilities are not limited to IP infringement but also cover defamation, privacy and sensitive political content. With the limited resources of ISPs and special political environment in China, the intermediary liability makes Chinese ISPs play an active role in censorship but rather ineffective role in IPR protection.

**B. Damage**

With respect to damage assessment, ACTA would require courts to consider certain measures of damage submitted by the right holder, including “the lost profits, the value of the infringed good or service, measured by the market price, \[0\] or the suggested retail price.” Compare to ACTA, the assessment of damage in Chinese IP laws is more general and abstract. Chinese IP laws (including copyright, trademark and patent law) only provide that the damage awards are based on the losses suffered by the right holders or the profit obtained by the infringers.\[7\] But no provision in these laws provides the specific measures to determine the losses and profits. Thus in practice, different courts and different cases in the same court share different criteria when determining the amount of damages. The recoveries are also usually quite low by Western standards. That is an important reason for West claiming weak IPR enforcement in China.

However, the damage assessment based on market price or suggested retail price as proposed in ACTA is also unreasonable, especially in developing countries like China. The IPR holders from developed countries always complain about the great losses they suffer in China. The lost profits they claimed are based on the market price of a genuine item multiplied by the number of illegal copies sold in Chinese market. But they may ignore the fact that the number of consumers of genuine items cannot be as many as the consumers of fake ones. For example, suppose the market price of genuine software is $100, while the price of the pirated one is only $5. Then suppose ten million consumers would buy the pirated software, but you cannot imagine the same amount of consumers in China can afford the genuine ones. Therefore, the normal measure of damage in China’s court is usually based on the defendant's illicit gains rather than the plaintiff’s own losses due to the uncertainty associated with calculating theoretical losses. Since the infringers usually sell their illegal copies at a much lower price than the market price charged by IPR holders, such illicit gains is often modest compared to the lost profits the right holders claim.

**C. Criminal Liability**

Article 61 of TRIPS requires that criminal liability should be applied “in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.” China applies this provision to its domestic laws providing that infringers shall be prosecuted for his criminal liability for IPR infringement on a commercial scale where circumstances are serious.\[8\] By clarifying “serious circumstances,” Chinese IP laws raise the threshold for criminal prosecution—the illegal profits gained from trademark counterfeiting or copyright piracy must exceed $8,500 and the burden of the proof rests on prosecutors or police. Thus in practice, the criminal enforcement of IPR infringement is rare and unusually, and most IP cases continue to be handled through the civil procedure or administrative system. Developed countries often criticize the high threshold for China to initiate criminal enforcement. However, it is groundless to say Chinese IP law is beyond the scope of TRIPS since “commercial scale” under TRIPS means “counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market.”

In contrast, ACTA dramatically lowers the bar for individuals to be found criminally liable for a variety of offences. As Kimberlee Weatherall\[9\] summarizes, ACTA “redefines ‘commercial scale’ to include: 1. Any IPR infringement for purpose of commercial advantage or private financial gain (no matter how low the number); and 2. Significant willful infringement without motivation for financial gain.” Since ACTA asserts to target at criminal and commercial activities rather than private acts, then there is no justification for extending criminal liability beyond large scale infringement that is direct and intentional.

Nevertheless, were China forced to adopt criminal provisions as ACTA provides, there would still be flexibility in enforcement. The definition of “significant willful” in ACTA is ambiguous, thus signatory parties have discretions to detail their own criteria to determine the infringers’ “significant willfulness.”
D. Border Measure

In terms of border measure, TRIPS only applies custom measures to copyright piracy and trademark counterfeiting. However, ACTA expands the provision to patent infringement. Many people question the practicability of this provision since patent infringement is usually less obvious compared to trademark counterfeiting. As Kimberlee Weatherall[10] points out, for trademark-infringing goods, such as fake Louis Vuitton bags, the infringing nature is clear on the face of the goods. For patent-infringing goods, the infringement is not so obvious on surface and thus it would impose heavy burden on custom resources.

Similar to ACTA, the border measures in China include trademark, copyright as well as patent infringement.[11] But in practice, the great majority of cases dealt with by Chinese Customs involved trademarks, with only a few cases related to copyrights or patents. One key reason is the relative ease of discovering and distinguishing infringing trademarks.

II. Practice—The Impact of ACTA on the IP Enforcement in China

After having access to WTO, China has made great progress in IP law legislation. And according to the above text comparison, we can see the gap between ACTA and Chinese IP law is much narrower than many people’s imagination. However the effective enforcement of IPR has been little explored in China. Therefore, it is important to explore not only legislative but also practical cause of the problem and evaluate the impact of ACTA on China’s IPR progress. Examining the history and reality in Chinese society, there are three rooted reasons leading to the enforcement deficiency of IP law: China’s cultural uniqueness, innovation insufficiency and institutional impediments.

A. Culture Uniqueness

In contrast to individualism in the West, collectivism -- a traditional and socialist value -- substantially influences the cultural, social and legal areas in China. Collectivism has a long tradition based on Confucianism, which prioritizes the needs of the group over the rights of individuals. [12] Historically, there was little protection of individual rights, especially in the intellectual property field. [13] Copying and sharing created works without any compensation was widely accepted in traditional China. Moreover, intellectuals, much esteemed in Chinese society, wanted their work to be copied because the highest form of admiration is in the imitation and recreation of writings, art, or other works.

With the establishment of Socialist China in 1949, the Chinese government set up a political and legal system based on the Soviet model, which deemed individual property rights to be the antitheses of socialist principles. As China Expert Dr. Robert Weatherley has pointed out, for the sake of maintaining a stable and harmonious community, Chinese citizens are strongly promoted to abandon any rights in favor of the society. [14] IPR, as a form of individual right, is often sacrificed in favor of collective interests. Thus collectivist ideology is bound to erode the foundation of IPR protection. In a word, communal property is a part of Chinese culture that dates from the teaching of Confucianism through the birth of Communism. Questioning the idea of public property and recognizing the importance of private property takes great resources and social will.

However, collectivism has been facing new challenges since 1979, when the Chinese government initiated economic reform. The dramatic transformation in the economic, cultural and social areas fundamentally reshaped the mind of Chinese citizens. Unfortunately, the government did not bring political reform in line with its economic reform. A consequence has been that “individual aspirations of the citizens are fostered and fulfilled without a corresponding regulatory system.” [15] The increasing social and political problems, due to the unbalanced economic growth, frustrate the effort of ordinary Chinese citizens to earn their living through normal channels. In order to survive in such disordered society, people have to try every possible approach. Ironically, the money worship that socialist society criticized over decades ago now has been upheld as a recognized credo of many people, [16] who are shameless to earn money even through illegal ways like piracy and counterfeiting. Therefore, traditional values have been dramatically diminished and replaced by extreme pragmatism, which gives rise to moral vacuum and thus undermines the ethical foundation of IPR protection.

From the analysis above it is evident that the problematic IPR enforcement in China results from its cultural and political uniqueness. Now China has been moving towards establishing a legal system that increasingly seeks to restrain the power of the state, and promises individuals the ability to assert their rights and interests in reliance on law. Chinese authorities note that China is “trying to achieve in a dozen years what it had taken the Western world a century to do.” [17] In only a quarter century, China has evolved from a country with no IP protection to one with a broad system of IP laws. However, Rome was not built in a day. The standards developed in ACTA in protection and enforcement of IPR are much higher than what already exists under the TRIPS Agreement and IP laws in most developing countries. As Professor Peter Yu points out, developing countries have struggled to meet their obligations under TRIPS Agreement. [18] It is unreasonable to require them to abide by the much more
stringent ACTA standards. Moreover, the efficient enforcement of law depends on healthy political and legal environments; it is impossible for a society with upheaval and extreme pragmatism to perfectly enforce a stringent treaty like ACTA. As the largest developing country in the world facing many challenges, such as political reform, adopting ACTA to improve IPR enforcement is unpractical and unlikely to be the top priority in China.

**B. Innovation Insufficiency**

As scholars John R. Allison and Lianlian Lin observed, “China has followed the typical pattern of a developing nation by depending heavily on foreign investment and imported technology before being able to generate substantial internal growth and technological advancement on its own.”[19] Due to the lack of technological innovation in China, strict IPR enforcement cannot bring great benefit to current Chinese companies. In contrast, it means many Chinese companies have to pay a large sum of royalties to foreign proprietors, thereby resulting in increasing production costs. Correspondingly, the Chinese government finds neither political will nor domestic pressure to substantially enforce IPR.

Moreover, the enforcement of the international IP agreements like ACTA is difficult for many developing countries partly because the developed countries have set the intellectual property standards. Although commentators and policymakers in developing countries have questioned the fairness of the agreement, developed countries won the negotiation game by forming coalitions among themselves and by convincing their less-developed counterparts to join them. However, since China and many other developing countries lack technological innovation, the incentives provided by IPR (for investment in research and development) are not meaningful.

Admittedly, it is necessary to create home-grown intellectual property in China. Although imitation provides many Chinese companies with great short-term profits, it discourages domestic innovation, which is a long-run driver of economic growth. However, as Yu point out, the linkage between IP protection and innovation ability depends on whether the intellectual property system is struck at the right balance.[20] If the IP system overprotects, it will limit public access to needed knowledge and eventually impede innovations based on existing technologies. Unfortunately, ACTA is a treaty that prioritizes enforcement of IP through a strong penalty scheme without the essential protection like fair use that provide much needed balance. Therefore, enforcing such treaty will favor foreign rights holder at the expense of the local constituents.

**C. Institutional Impediments**

Intellectual property protection in China follows a two-track system. The first is the judicial track, where complaints are filed through the court system. The second and most prevalent is the administrative track, where an IPR holder files a complaint at the local administrative office. Unfortunately, the lack of legal formalism in judicial system and ambiguous responsibility in administrative agencies contribute to inefficiencies in IPR enforcement. Accordingly, if these specific problems are not solved, the adoption of ACTA will still be inefficient in improving the IPR enforcement in China.

The lack of judicial independence, which results in local protectionism, greatly harms the efficiency of IPR enforcement. Although China’s Constitution gives a textual commitment to an independent judiciary, the practical operation of the institutional system precludes any true independence. Judges are subject to removal by the local congresses, which create political pressure to rule in favor of local agencies and businesses rather than foreign rights holders.

Another element that harms the efficiency of IPR enforcement is overlapping jurisdictions among national ministers and between central and local government administrations. Effective enforcement of IPR protection requires reasonable arrangement of responsibility and resources among different authorities. However, China’s vertical administration system not only results in overlapping jurisdiction between enforcement administrations, but it also causes parallel enforcement mechanisms.

Although China’s IP enforcement through judicial and administrative tracks is imperfect, it is by no means a good way to solve the problem by adopting the uniform rules of ACTA. Because of differences in political, economic and cultural conditions, laws that work well in one country do not always suit the needs and interests of another.[21] Many westerners believe the main cause of IP infringement is that the penalties in developing countries are too light to prohibit the infringing activities. Thus many provisions in ACTA provide civil and criminal liabilities. However, according to China’s specific condition, it is more important to establish judicial independence and arrange reasonable responsibilities between different IP authorities, without which other strategies are meaningless. In a word, people in different countries should decide by themselves what laws they want to adopt to make the legislation process more accountable to the local conditions.

**III. Conclusion**
The goal of ACTA is to create a new standard of intellectual property enforcement above the TRIPs Agreement, and then establish the treaty as global standard. However, the universal provisions of ACTA ignore the uniqueness of different countries, especially the unique conditions in developing countries. The extremely high standards provided in ACTA for IPR enforcement are beyond the ability of China and many other developing countries. And for developed countries, strong IP protection in treaties with weak enforcement in global practice is meaningless.

[1] The negotiating parties include: the United States, the European Community, Switzerland, Japan, Australia, the Republic of Korea, New Zealand, Mexico, Jordan, Morocco, Singapore, the United Arab Emirates and Canada.


[5] Id.

[6] Id. §11.


[10] Id.


[13] Id. at27.


[16] Id.


[20] Yu, supra note 17


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