
TRIPs Agreement and Enforcement of the Intellectual Property Rights in China*

Zhongfa Ma ** & Yan Zhang ***

It is generally accepted that China's legislation including the provisions on enforcement of intellectual property rights has met the requirements of the TRIPS agreement and its government has exerted best efforts to enforce intellectual property laws, as illustrated by the institution of executive bodies, the dual-track approach system for protecting IPRs and other actions in this field. However, enforcement of IPRs is still a critical problem for China to solve because the protection standards of IPRs are beyond its economic development and education level, local protectionism interferes with enforcement, insufficient severity of punishment against infringers fails to deter, the price of genuine IP products is overinflated and a legal culture of not observing laws in China. To eliminate the roots of difficulties in enforcing IP laws, awareness of protecting IPRs and abiding by IP laws should be improved. Also, the IPR enforcement system should be further perfected by, centralizing the power of IPR enforcement by merging the current executive bodies into fewer ones with certain focuses, increasing the severity of punishment against infringers of IPRs and cracking down against local protectionism.

* The paper is the fully revised version of the draft manuscript submitted to and presented at the International Conference on "New Legal Order in Asia and Europe" organized by Law Research Institute, University of Seoul, Korea on January 11, 2012. Our great thanks shall be extended to the organizers, Professor Yong-soo Won and Professor Chang-wee Lee, the Discussant, Professor Chan-mo Chung (Inha University Law School) and the participants, especially to Professor Deok-young Park (Yonsei University Law School). The authors would also like to acknowledge the sponsorship from Shanghai Municipality Education Commission which supports the Project on "Studies on Legal System of Technology Transfer and Construction of an Innovative Country" (No: 10ZS07).

** Associate Professor of Law at Fudan University School of Law, P.R. China. B.A.(Anhui Normal Univ.), LL.M./Ph.D.(Fudan). The author may be contacted at: zfma@fudan.edu.cn / Address: Law School, Fudan University, 2005 Songhu Road, Shanghai, P.R. China, 200438.

*** Associate Professor of Law at the Teaching and Research Institute of Political Theory, Zhejiang University, P.R. China. LL.B./Ph.D. (Zhejiang). The author may be contacted at: zhangyanzju@zju.edu.cn / Address: 866 Yuhangtang Road, Hangzhou, Zhejiang Province, 310058 P. R. China.

Keywords

Enforcement of Intellectual Property Rights, Intellectual Property Laws, TRIPS Agreement, Dual-Track Approach System, Special Campaign against IPR infringement

I. Introduction

Thirteen years after the entry into force of the Agreement on Trade-related Aspects of Intellectual Property Rights (hereinafter TRIPs Agreement), strengthening enforcement¹ of the intellectual property rights (“IPRs”) became a critical issue in many multi- and bilateral negotiations.² A current and clear illustration of this is the conclusion of the Anti-Counterfeiting Trade Agreement (“ACTA”),³ which focuses on issues of enforcing intellectual property (“IP”) laws has its own inherent rules and particular characteristics. The enforcement of IPRs requires the close collaborations of governments, enterprises, nongovernmental organizations and individuals. In addition, the enforcement utilizes a severe comprehensive sanction mechanism. If these rules and characteristics are neglected or dealt with inappropriately, the results may run counter to the intent, and gross inefficiencies can occur.⁴

Currently, it is commonly recognized that the People’s Republic of China has

¹ There are some differences between law enforcement and law implementation. Law enforcement broadly refers to any system by which some members of society act in an organized manner to promote adherence to the law by discovering and punishing persons who violate the rules and norms governing that society. See K. HESS & C. ORTHMANN, INTRODUCTION TO LAW ENFORCEMENT AND CRIMINAL JUSTICE 1 (2008). In legal science, law implementation means laws made by legislatures are executed by public servants working in bureaucratic agencies, enforced by judicial branches and respected by enterprises, other organizations and individuals in a country or a territory; enforcement of laws may be thus key parts of implementation of laws. In this paper, enforcement of law refers to executions of law by the executives and enforcement of law by the judicatures.

² Xuan Li, *Ten General Misconceptions About the Enforcement of Intellectual Property Rights*, in INTELLECTUAL PROPERTY ENFORCEMENT - INTERNATIONAL PERSPECTIVES 14 (Xuan Li & C. Correa eds. 2009).

³ It is a proposed plurilateral agreement for establishing international standards on the IPR enforcement and is open for signature until March 31, 2013. The idea to create a plurilateral agreement on counterfeiting was developed by Japan and the United States in 2006. For the details of the development history of ACTA, see Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 68-72 (2012). For details on the parties signing it, see Jason Walsh, *Europe's Internet Revolt: Protesters See Threats in Antipiracy Treaty*, THE CHRISTIAN SCIENCE MONITOR, Feb. 11, 2012.

⁴ One scholar used a Chinese proverb, “You can lead a horse to water, but you cannot make it drink” to express the similar meaning. See G. Feder, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make It Drink*, 37 VA. J. INT'L L. 223.