

April 2012

## China and the Anti-Counterfeiting Trade Agreement - ACTA Faith, or ACT Futility?: An Exposition of Intellectual Property Enforcement in the Age of Shanzhai (山寨)

Leroy J. Pelicci Jr.

ISSN: 2168-7951

---

### Recommended Citation

Leroy J. Pelicci Jr., *China and the Anti-Counterfeiting Trade Agreement - ACTA Faith, or ACT Futility?: An Exposition of Intellectual Property Enforcement in the Age of Shanzhai (山寨)*, 1 PENN. ST. J.L. & INT'L AFF. 121 (2012).  
Available at: <http://elibrary.law.psu.edu/jlia/vol1/iss1/7>

Penn State  
Journal of Law & International Affairs

---

2012

VOLUME 1 No. 1

---

**CHINA AND THE ANTI-COUNTERFEITING  
TRADE AGREEMENT - ACTA FAITH, OR ACTA  
FUTILITY?:**

*AN EXPOSITION OF INTELLECTUAL PROPERTY  
ENFORCEMENT IN THE AGE OF SHANZHAI (山寨)*

Leroy J. Pelicci, Jr. \*

*This comment presents a snapshot of the current state of intellectual property (“IP”) enforcement in China in light of a controversial new treaty designed to address the illicit, yet by all accounts thriving, industry of trade in pirated and counterfeit goods. Beginning with an overview of IP-intensive industries, this comment highlights the significance and value of this unique form of property, both to individuals and to national economies. This comment then shifts in focus to the areas of commerce most affected by counterfeiting and piracy, discussing China’s prevalent role in the epidemic, and its copycat subculture known as “Shanzhai.” Thereafter, a discussion of IP rights evolution in China is presented, coupled with a general historical exposition to provide insight into the ideologies that inform current Chinese attitudes towards IP. With this cultural analysis as a backdrop, this comment addresses ACTA, examining its relevance in light of similar treaties that have preceded it, and the curious absence of China in ACTA’s negotiation and drafting. In turn, this comment suggests that even if China were to become a signatory to the treaty, IP theft in China would likely continue as usual because history suggests that any positive changes in the enforcement of IP rights in China will come about through internal means, and not through the imposition of a stringent treaty by China’s more economically developed neighbors. Finally, this comment discusses one such internal change, a new Chinese tort law which is expected to have a positive and far reaching effect on the protection of IP in China.*

---

\* J.D. candidate 2012, Penn State University Dickinson School of Law, and a former RCA recording artist. This comment was inspired by the author's personal experiences working in the entertainment industry for ten years and seeing first-hand the detrimental effects of intellectual property theft on individuals and businesses alike. The author would like to thank the following individuals for making this comment possible: Professor Barbara Brunner, Professor Geoffrey Scott, Harlan Glasser, Matthew Charles, and Benjamin Hackman.

## I. CLIFF'S NOTES<sup>1</sup>

The year 2006 may have marked the beginning of a more aggressive trend in the protection of intellectual property ("IP"); then again, it very well may not have. That year, the United States got together with Europe, Japan, and Switzerland to sketch out a new international trade agreement, called the Anti-Counterfeiting Trade Agreement ("ACTA"). The declared purpose of this "state-of-the-art"<sup>2</sup> agreement is to "combat counterfeiting and piracy."<sup>3</sup> Numerous international agreements on IP protection already exist; so why does the world need another one? Apparently because there is a need for "new, detailed rules on enforcement measures"<sup>4</sup> and a "new architecture for international cooperation."<sup>5</sup>

Several skeptical commentators have noted that without the cooperation of China, which is not yet a party to the negotiations but accounts for approximately 80% of IP-infringing goods seized at U.S. borders, ACTA will have at most a limited effect on global piracy and counterfeiting.<sup>6</sup> While that observation is poignant indeed, the purpose of this comment is to take it a step further. Accordingly, the comment will suggest that even if China *were* to sign ACTA, Chinese IP theft would continue as usual. It will also suggest that if a change in lax Chinese IP rights protection methods is to come about at all, it will come from within China, and not from a treaty imposed on it by its economically powerful neighbors.

On that account, Section II will examine the importance of IP in driving economic growth, supporting jobs, and protecting consumers. The section will also highlight existing international agreements that have been designed to protect IP. Section III will briefly describe ACTA's history and purpose, and will introduce a major deficiency in the treaty's negotiations that is highly likely to thwart the realization of its goals. Section IV will provide a glimpse into the wild world of Chinese IP infringers, focusing on selected areas of knock-off specialty, and will explore the phenomenon of Shanzhai.<sup>7</sup> Section V will present an overview of some key historic milestones in the

---

\* J.D. candidate 2012, The Pennsylvania State University Dickinson School of Law.

<sup>1</sup> "Cliff's Notes" is a registered trademark of John Wiley & Sons, Inc., has no affiliation with this comment, and is being used without permission.

<sup>2</sup> Office of the United States Trade Representative, Anti-Counterfeiting Trade Agreement (2010), <http://www.ustr.gov/acta>.

<sup>3</sup> *Id.*

<sup>4</sup> Aaron X. Fellmeth, *The Anti-Counterfeiting Trade Agreement in the Public Eye*, ASIL INSIGHTS (June 24, 2010), <http://www.asil.org/insights100624.cfm>.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *id.*; see also *China and ACTA: Why Is The Problem Not Made Part Of The Solution?*, IP DRAGON (Apr. 9, 2009) [hereinafter IP DRAGON], <http://ipdragon.blogspot.com/2009/04/china-and-acta-why-is-problem-not.html>.

<sup>7</sup> See generally Philipp Boeing, *Shanzhai – Dimensions of a Chinese Phenomenon* (2009), [http://www.frankfurtschool.de/content/en/ecbc/ecbc\\_portal/content\\_files/file33/CBR2009\\_001\\_Boeing\\_shanzhai.pdf](http://www.frankfurtschool.de/content/en/ecbc/ecbc_portal/content_files/file33/CBR2009_001_Boeing_shanzhai.pdf).

development of Chinese IP law, which in turn will provide some insight into the ideologies that inform modern Chinese IP enforcement. Section VI will afford an overview of current modes of recourse, both judicial and administrative, for injured IP rights holders (hereinafter "IPR holders") in China and the mechanisms in place that are supposed to enforce judgments. Section VII will highlight the inadequacies in these modes of recourse in light of the latest challenges facing IPR enforcement in China, and Section VIII will explore IP in China as it relates to its economic development. This section will include a glimpse of the shoddy enforcement practices that have developed as a result of China's narrow-minded view of the role of IP. Section IX will illustrate why ACTA is likely to have little or no effect on the problem of IP theft in China, whether or not China becomes a party, and will present trends in Chinese IP firms suggesting that if changes in shoddy IP enforcement practices are to come about at all, they are most likely to come from within China itself. This section will also include a discussion of one such change: the new Tort Law of the People's Republic of China, which is expected to have a far-reaching effect on the protection of IP in China. Finally, Section X will sum up the foregoing and leave you with the author's personal reflections.

## II. WHY SHOULD I CARE?

IP is wrapped up in everything. It can refer to anything from an inventor's life-saving creation<sup>8</sup> to an unflattering fleece toga, like The Snuggie.<sup>9</sup> A composer's revolutionary masterpiece is IP. A Justin Bieber song is IP.<sup>10</sup> Consider for a moment that creations protected by patents, trademarks, copyrights and trade secrets affect nearly every industry, including auto, medical, energy, entertainment, fashion, and electronics.<sup>11</sup> A couple of IP factoids may help illuminate the oft overlooked reach of this ideas-based ecosystem.

### A. For What It's Worth

As mentioned above, IP fuels economies, and as luck would have it, America is a net exporter of IP.<sup>12</sup> Of the twenty-seven U.S. tradable industries,<sup>13</sup> those relying heavily on innovation and creativity, that is, the IP-

---

<sup>8</sup> Global Intellectual Property Center, Frequently Asked Questions (2010) [hereinafter GIPC FAQ], <http://www.theglobalipcenter.com/faq>.

<sup>9</sup> Allen Salkin, *Snuggie on the Street: Watch Your Back*, N.Y. TIMES, Mar. 1, 2009, at ST1.

<sup>10</sup> JUSTIN BIEBER, EENIE MEENIE (Island Records, 2010), available at <http://www.mtv.com/videos/justin-bieber/512194/eenie-meenie.jhtml>.

<sup>11</sup> GIPC FAQ, *supra* note 8.

<sup>12</sup> SHAYERAH ILIAS & IAN F. FERGUSSON, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 11 (Nova Science Publishers, Inc., 2008).

<sup>13</sup> *The Impact of Innovation and the Role of Intellectual Property Rights on U.S. Productivity, Competitiveness, Jobs, Wages and Exports*, NDP CONSULTING 6 (Apr. 24, 2010) [hereinafter *The Impact of Innovation*],

intensive industries,<sup>14</sup> account for more than half of all U.S. exports and help drive forty percent of U.S. economic growth.<sup>15</sup> America's IP portfolio, with an estimated value of over \$5 trillion, is worth more than the gross domestic product ("GDP") of any other country.<sup>16</sup> Because IP-intensive industries are much more likely to rebound from economic downturns than non-IP industries,<sup>17</sup> IP will likely play a large role in recovering from the current economic crisis.<sup>18</sup>

In addition to being a hot commodity, IP creates high-paying jobs. As of 2008, IP-intensive industries employed 18 million Americans.<sup>19</sup> Some of these industries, such as pharmaceuticals, computers, and electronics, are slated to expand more over the next decade than the national average.<sup>20</sup> Moreover, IP jobs employ individuals at all educational and skill levels.<sup>21</sup> For example, between 2000 and 2007, the annual salaries of low-skilled workers in IP-intensive industries averaged forty percent higher than those in non-IP-intensive industries.<sup>22</sup> Finally, the benefits of IP can be seen from a demographic standpoint; manufacturing workers in IP-intensive states earn about \$7,000 per year more than their counterparts in non-IP-intensive states.<sup>23</sup>

Further, IP-intensive industries help keep jobs from disappearing by reducing the trade<sup>24</sup> deficit.<sup>25</sup> Among the twenty-seven U.S. tradable

---

[http://www.theglobalipcenter.com/sites/default/files/reports/documents/NDP\\_IP\\_Jobs\\_Study\\_Hi\\_Res.pdf](http://www.theglobalipcenter.com/sites/default/files/reports/documents/NDP_IP_Jobs_Study_Hi_Res.pdf).

<sup>14</sup> *Id.* at 4.

<sup>15</sup> Press Release, Bush Administration Officials Update Congress on Intellectual Property Enforcement Efforts (July 26, 2006) (on file with U.S. Department of Commerce), *available at* <http://www.uspto.gov/news/pr/2007/07-26-06ip.jsp>.

<sup>16</sup> ROBERT J. SHAPIRO & KEVIN A. HASSETT, THE ECONOMIC VALUE OF INTELLECTUAL PROPERTY 3, 15 (2005), *available at* <http://www.sonecon.com/docs/studies/IntellectualPropertyReport-October2005.pdf>.

<sup>17</sup> *The Impact of Innovation*, *supra* note 13, at 7.

<sup>18</sup> *World Intellectual Property Indicators*, World Intellectual Property Organization 57 (2009), [http://www.wipo.int/freepublications/en/intproperty/941/wipo\\_pub\\_941.pdf](http://www.wipo.int/freepublications/en/intproperty/941/wipo_pub_941.pdf).

<sup>19</sup> Press Release, Secretary of Commerce Carlos M. Gutierrez Opinion Editorial (May 11, 2008) (on file with U.S. Department of Commerce), *available at* [http://2001-2009.commerce.gov/NewsRoom/PressReleases\\_FactSheets/PROD01\\_005990](http://2001-2009.commerce.gov/NewsRoom/PressReleases_FactSheets/PROD01_005990).

<sup>20</sup> ROBERT J. SHAPIRO & NAM D. PHAM, ECONOMIC EFFECTS OF INTELLECTUAL PROPERTY-INTENSIVE MANUFACTURING IN THE UNITED STATES 6 (2007), *available at* [http://www.sonecon.com/docs/studies/0807\\_thevalueofip.pdf](http://www.sonecon.com/docs/studies/0807_thevalueofip.pdf).

<sup>21</sup> *The Impact of Innovation*, *supra* note 13, at 6.

<sup>22</sup> *Id.*

<sup>23</sup> Robert J. Shapiro & Nam D. Pham, *supra* note 20, at 6.

<sup>24</sup> A trade balance is the difference between exports, which create domestic jobs, and imports, which eliminate them. Generally speaking, when a country is importing more than it is exporting, the result is a trade deficit. When the opposite occurs, a trade surplus results. IP-intensive industries promote the latter. Robert E. Scott, *The U.S. Trade Deficit: Are We Trading Away Our Future?* (Mar. 4, 2002), [http://www.epi.org/publications/entry/webfeatures\\_viewpoints\\_tradetestimony/](http://www.epi.org/publications/entry/webfeatures_viewpoints_tradetestimony/); KEVIN

industries, only six reported trade surpluses annually between 2000 and 2007, five of which were IP-intensive industries, generating an average of \$14.6 billion in trade surplus each year.<sup>26</sup> As an example, in 2005 the American motion picture industry alone had a \$9.5 billion trade surplus, which represented twelve percent of the entire private-sector surplus that year.<sup>27</sup>

While the above data provide insight into IP's economic significance, the term "intellectual property" has been used somewhat ambiguously up to this point. This is due in part to the fact that IP, by definition, is a somewhat ethereal concept, referring to a number of intangible "creations of the mind."<sup>28</sup> However, as the discussion now turns to IP-theft, it will become both more concrete and more exciting because the focus shifts to the physical embodiment of those creations and the people stealing them - or because "piracy" makes us think of pirates, and everyone loves pirates.<sup>29</sup>

### B. Multiplicity

IP theft drains economies, costing the U.S. alone billions of dollars and hundreds of thousands of jobs per year.<sup>30</sup> At U.S. ports, IP-infringing products seized in 2009 had an estimated street value of more than \$260 million,<sup>31</sup> a conservative figure considering that it is difficult to estimate how many counterfeit U.S. goods are sold abroad.<sup>32</sup> Much easier to estimate is Americans' obsession with looking good and playing with gadgets. In 2009, counterfeit footwear was the top commodity seized by Customs and Border Protection, with a domestic value of \$99.78M and accounting for 38% [be consistent between numerals or text – you do it both ways in the first few

---

NELSON, EXPORTING AND IMPORTING, REFERENCE FOR BUSINESS (Encyclopedia of Business, 2nd ed. 2010), available at <http://www.referenceforbusiness.com/management/ExGov/Exporting-and-Importing.html>.

<sup>25</sup> *The Impact of Innovation*, *supra* note 13, at 6.

<sup>26</sup> *Id.* at 26.

<sup>27</sup> Motion Picture Association of America, *The Economic Impact of the Motion Picture & Television Production Industry on the United States 11* (2006), [http://universitytoolkit.org/press\\_releases/mpa%20us%20economic%20impact%20report\\_final.pdf](http://universitytoolkit.org/press_releases/mpa%20us%20economic%20impact%20report_final.pdf).

<sup>28</sup> World Intellectual Property Organization, *About Intellectual Property* (2010), <http://www.wipo.int/about-ip/en/>.

<sup>29</sup> Sandy Hemphill, *International Talk Like A Pirate Day*, BELLAONLINE (Sept. 19, 2010), <http://www.bellaonline.com/articles/art68577.asp>.

<sup>30</sup> Lauren McCurdy, *Top 10 Seized Counterfeit Goods*, CNBC (July 9, 2009), [http://www.cnbc.com/id/37824359/Top\\_10\\_Seized\\_Counterfeit\\_Goods?slide=1](http://www.cnbc.com/id/37824359/Top_10_Seized_Counterfeit_Goods?slide=1).

<sup>31</sup> Customs and Border Protection, *Intellectual Property Rights - Seizure Statistics: Fiscal Year 2009 2, 7* (2009) [*hereinafter Seizure Statistics*], available at [http://www.cbp.gov/linkhandler/cgov/trade/priority\\_trade/ipr/pubs/seizure/fy09\\_stats.ctt/fy09\\_stats.pdf](http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/pubs/seizure/fy09_stats.ctt/fy09_stats.pdf).

<sup>32</sup> Office of the United States Trade Representative, *Anti-Counterfeiting Trade Agreement* (2010), <http://www.ustr.gov/acta>; Lauren McCurdy, *supra* note 30; Laura Zakaras, *Film Piracy and Its Connection to Organized Crime and Terrorism*, RAND PROJECT (2009), [http://www.randproject.org/pubs/research\\_briefs/RB9417/index1.html](http://www.randproject.org/pubs/research_briefs/RB9417/index1.html).

pages] of the entire value of infringing goods.<sup>33</sup> Consumer electronics came in at number two, with a value of \$31.77M (12% of total seizures), and Handbags/Wallets/Backpacks went neck and neck with Apparel (value of \$21.46M - 8% of total seizures), taking third place with a value of \$21.50M, or 8% of total seizures.<sup>34</sup>

While "traditional" knock-offs continue to top the charts,<sup>35</sup> products posing serious health risks are by no means wanting. According to the World Health Organization, up to 10% of medicines worldwide are counterfeit - a purportedly deadly hazard that experts say costs the pharmaceutical industry around \$46 billion a year.<sup>36</sup> One such group of experts, the U.S.-based Center for Medicine in the Public Interest, predicts that counterfeit drug sales will reach \$75 billion globally in 2010, an increase of more than 90% from 2005.<sup>37</sup> Similarly, counterfeiting of food<sup>38</sup> and other consumer products is estimated to cost those industries \$10 to \$15 billion per year.<sup>39</sup> On the transportation front, the Federal Trade Commission reports that the counterfeiting of vehicle components is out of control and poses major safety risks, costing the global auto parts industry \$12 billion a year in lost sales.<sup>40</sup> Thus, effective enforcement of IP transcends mere economic interests; it encompasses the protection and well-being of society.

### C. Agree to Disagree

A little more than a century ago, the United States was a piracy Mecca, making unauthorized copies of British books to its heart's content.<sup>41</sup> Everyone hated the United States. Things changed, however, not because of

---

<sup>33</sup> *Seizure Statistics*, *supra* note 31.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Balfour, Frederick, Amy Barrett, Diane Brady, Kerry Capell, Paul Magnusson, Carol Matlack, Dexter Roberts, William C. Symonds, and Johnathan Wheatley, *Fakes!*, BUSINESSWEEK, Feb. 7, 2005, at 54, available at [http://www.businessweek.com/magazine/content/05\\_06/b3919001\\_mz001.htm](http://www.businessweek.com/magazine/content/05_06/b3919001_mz001.htm).

<sup>37</sup> Center for Medicine in the Public Interest, Counterfeit Drugs and China (May 31, 2006), <http://www.cmpi.org/in-the-news/testimony/counterfeit-drugs-and-china-new>.

<sup>38</sup> For example, Pennsylvania's own Heinz Tomato Ketchup (or Catsup depending on locale) is a favorite among counterfeiting pros. Robert C. Bird, *Symposium: Counterfeit Drugs: A Global Consumer Perspective*, 8 WAKE FOREST INTELL. PROP. L.J. 387, 403-4 (2008) (discussing brazen pirates in China, counterfeiting not only the Heinz products, but using fake Heinz delivery trucks and uniforms for distribution).

<sup>39</sup> Grocery Manufacturers Association and A.T. Kearney, Consumer Product Fraud: Deterrence and Detection 3 (2010), [http://www.atkearney.com/images/global/pdf/Consumer\\_Product\\_Fraud.pdf](http://www.atkearney.com/images/global/pdf/Consumer_Product_Fraud.pdf).

<sup>40</sup> INTELLECTUAL PROPERTY: PROTECTING VALUABLE ASSETS IN A GLOBAL MARKET 2-4 (MEMA Brand Protection Council, 3rd ed. 2009), <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/IntellectualPropertyVers3.pdf>.

<sup>41</sup> See ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 159 (University of Chicago Press, 2009); see also *Battle of Ideas*, ECONOMIST, Apr. 25, 2009, at 68 (noting that America was the great copyright and patent infringer when it was a developing country in the 18th century).

morals, but because of economics.<sup>42</sup> Once America embraced its own innovations, it wanted some protection overseas and was willing to protect foreign IP domestically in exchange.<sup>43</sup> To this end, bilateral agreements usually did the trick.<sup>44</sup> Nowadays, however, the demands of multinational trade and economics require major creativity and cooperation among multiple nations with all kinds of special needs. Accordingly, there have been numerous international agreements that attempt to achieve a "transnational harmonization" of IP law.<sup>45</sup>

Two of the first were the Paris Convention, signed in 1883,<sup>46</sup> followed by the Berne Convention three years later.<sup>47</sup> The mandates of the agreements were pretty unobtrusive, and states had lots of flexibility to achieve the substantive balance they wanted in their own domestic laws.<sup>48</sup> There were no real enforcement mechanisms though, rather a consolidation of norms on which the world already agreed.<sup>49</sup>

Yet these treaties laid the foundation for the World Intellectual Property Organization ("WIPO"), a multilateral organization established in 1967 as a specialized agency of the United Nations.<sup>50</sup> With a mission to "promote the protection of intellectual property throughout the world through cooperation among States,"<sup>51</sup> WIPO was a good forum for treaty negotiations and soft law; yet, like Berne, WIPO produced no uniform standards or enforcement measures.<sup>52</sup>

The next promising venue for enforcement of IPR didn't hit the scene until 1994; this was the World Trade Organization (WTO).<sup>53</sup> This

---

<sup>42</sup> CRAIG JOYCE, MARSHALL LEAFFER, PETER JASZI, & TYLER OCHOA, COPYRIGHT LAW 30 (LexisNexis, 8th ed. 2010).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See generally Kim Nayyer, *Globalization of Information: Intellectual Property Law Implications* (Dec. 27, 2001), [http://131.193.153.231/www/issues/issue7\\_1/nayyer/index.html](http://131.193.153.231/www/issues/issue7_1/nayyer/index.html).

<sup>46</sup> THE PARIS CONVENTION LAWS (2010), <http://patent.laws.com/the-paris-convention>; WIPO Database of Intellectual Property: Legislative Texts, Paris Convention for the Protection of Industrial Property (1883) [*hereinafter Paris Convention*], [http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs\\_wo020.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/paris/pdf/trtdocs_wo020.pdf).

<sup>47</sup> See *id.*

<sup>48</sup> Graeme Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 57 CASE W. RES. L. REV. 751, 756 (2007).

<sup>49</sup> *Id.*

<sup>50</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO TREATIES - GENERAL INFORMATION (2010), <http://www.wipo.int/treaties/en/general/>.

<sup>51</sup> UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, GUIDE TO ARCHIVES OF INTERNATIONAL ORGANIZATIONS: WIPO (2010), [http://www.unesco.org/archives/sio/Eng/presentation\\_print.php?idOrg=1038](http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1038).

<sup>52</sup> Margot Kaminski, *Recent Development: The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT'L L. 247, 248 (2009).

<sup>53</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [*hereinafter TRIPS*].



intergovernmental forum was created to deal with the "regulation of trade between participating countries, provide a framework for negotiating and formalizing trade agreements, and offer a dispute resolution process aimed at enforcing the participants' adherence to WTO agreements."<sup>54</sup> The part of the WTO that deals with IP is another agreement called the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>55</sup> Admittedly, this can get confusing. The WTO didn't *replace* WIPO.<sup>56</sup> WIPO still exists, providing various important resources to the IP community.<sup>57</sup> Similarly, TRIPS didn't replace the WTO, but, rather, it is an agreement within an agreement.<sup>58</sup> Important to note, however, is that TRIPS essentially removed IP enforcement from the WIPO's "to do" list, and put it on the WTO's.<sup>59</sup> The significance of this will become clearer during the discussion of "forum shifting" below.

Nonetheless, TRIPS was revolutionary in that it set the first minimum international standards for IP law and created obligations that could actually be enforced through trade sanctions.<sup>60</sup> Because of TRIPS, the WTO was a favorite of both the U.S. and the European Community. As one scholar noted:

The U.S. and the European Community benefited from a shift to the WTO for three reasons: they had more negotiating power in the WTO than in WIPO; they could link IP to numerous other trade concerns; and the WTO dispute settlement system was seen as extremely effective. In other words, the WTO had teeth, and WIPO did not.<sup>61</sup>

However, once folks start suggesting "more negotiating power" as a motivator, things start to smell fishy and claims of "forum shifting" inevitably follow.<sup>62</sup> In the IPR context, forum shifting refers to the practice by countries seeking to "ration" IP ("IP protectionists"), of switching to a more hospitable venue when the current venue becomes less responsive to a "high protectionist agenda,"<sup>63</sup> - like when cool kids take their ball to play somewhere else, and anyone who wants to play has to follow. Remembering, however,

---

<sup>54</sup> World Trade Organization, What Is the World Trade Organization? (2010), [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm).

<sup>55</sup> TRIPS, *supra* note 53.

<sup>56</sup> Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 25 (2004).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2.

<sup>59</sup> Kaminski, *supra* note 52, at 247.

<sup>60</sup> U.S. Dep't of State, Focus on Intellectual Property Rights 16 (2006), <http://www.america.gov/media/pdf/books/iprbook.pdf#popup>.

<sup>61</sup> Helfer, *supra* note 56, at 21-2.

<sup>62</sup> *Id.*

<sup>63</sup> SUSAN K. SELL, THE GLOBAL IP UPWARD RATCHET, ANTI-COUNTERFEITING AND PIRACY ENFORCEMENT EFFORTS 5 (June 9, 2008) (unpublished manuscript), *available at* <http://www.ip-watch.org/files/SusanSellfinalversion.pdf>.

that the U.S. went through an infringement phase in its adolescence, it is understandable that developing countries are not thrilled about agreeing to heightened levels of enforcement that might be against their immediate interests. Accordingly, there have been numerous TRIPS-related backlashes from developing countries<sup>64</sup> and non-governmental organizations.<sup>65</sup>

Nonetheless, the IP protectionists have forged ahead, pushing for a "TRIPS-plus" regime by adding new requirements through bilateral trade agreements.<sup>66</sup> One commentator suggests the trend in IP protectionism is getting so crazy that it is headed towards a "TRIPS-Plus-Plus regime."<sup>67</sup> The theory is that through copious references to consumer "safety" and "security," IP protectionists will continue to get law enforcement agencies involved in the IP maximalist cause,<sup>68</sup> resulting in a "fear-mongering"<sup>69</sup> agenda that at present already includes initiatives such as Interpol's SECURE; the U.S. Chamber of Commerce's "Coalition against Counterfeiting and Piracy Intellectual Property Enforcement Initiative: Campaign to Protect America"; and the Security and Prosperity Partnership of North America.<sup>70</sup>

### III. ACTA FAITH

In 2006, the U.S. and several key trading partners (Europe, Japan & Switzerland) launched negotiations for what some believe to be the ultimate act of forum shifting:<sup>71</sup> ACTA,<sup>72</sup> a new plurilateral<sup>73</sup> treaty with the declared

---

<sup>64</sup> *Id.*; PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 135 (2002); U.N. World Intellectual Prop. Org. [WIPO] Gen. Assembly, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, P II, WO/GA/31/11 (Aug. 27, 2004).

<sup>65</sup> Helfer, *supra* note 56, at 4-6.

<sup>66</sup> See Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 792-807 (2001) (describing the bilateral agreements negotiated by the European Community and the United States with developing country governments as "TRIPS-plus").

<sup>67</sup> Sell, *supra* note 63, at 4.

<sup>68</sup> Jay Fraser, *Counterfeiting - A Matter of National Security* (May 12, 2008), <http://threatswatch.org/rapidrecon/2008/05/counterfeiting-a-matter-of-nat/>.

<sup>69</sup> Sell, *supra* note 63, at 4.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., Kaminski, *supra* note 52, at 247 (proposing that "ACTA reflects a form of international bullying, whereby economically powerful countries, frustrated by the blockades erected in international fora they once supported, have stepped outside those fora to create new standards"); Margot Kaminski, *Treaty Targets Internet, Not Purses*, HUFFINGTON POST (2010), [http://www.huffingtonpost.com/margot-kaminski/the-anti-counterfeiting-t\\_b\\_554480.html](http://www.huffingtonpost.com/margot-kaminski/the-anti-counterfeiting-t_b_554480.html) (calling ACTA a departure from existing international law and noting that it is more than likely that developing countries will end up joining ACTA's terms without having helped to negotiate them); GENNADY STOLYAROV II, ACTA: THE WAR ON PROGRESS, FREEDOM, AND HUMAN CIVILIZATION (2010), <http://mises.org/daily/4593> (stating that ACTA contravenes every principle of civilized society, both in its content and in the nature of the proceedings leading to its creation).

<sup>72</sup> Global Intellectual Property Center, Conclude Ambitious and Comprehensive ACTA (2010) [hereinafter GIPC A&C], <http://www.theglobalipcenter.com/pages/acta-0>; see also Aaron X. Fellmeth, *The Anti-Counterfeiting Trade Agreement in the Public Eye*, ASIL INSIGHTS (June 24, 2010), <http://www.asil.org/insights100624.cfm>.

purpose "to establish international standards for enforcing IP rights in order to fight more efficiently the growing problem of [trademark] counterfeiting and [copyright] piracy."<sup>74</sup> Since 2006, countries that have accepted invitations to join the festivities include Australia, Canada, Jordan, Mexico, Morocco, New Zealand, Singapore, South Korea, and the United Arab Emirates.<sup>75</sup> Curiously, not invited to the party was the People's Republic of China<sup>76</sup> [enter sad trombone sound effect<sup>77</sup> HERE].

According to the U.S. Chamber of Commerce, ACTA will:

build upon existing international rules . . . to help ensure that 'like minded' trading partners address counterfeiting and piracy and its damaging effects by raising the bar on enforcement, improving cooperation among partners, harmonizing how countries confront IP theft, and 'setting a positive example' for nations that aspire to have strong IP enforcement regimes.<sup>78</sup>

Drafts of ACTA<sup>79</sup> were formally made public on April 21, 2010,<sup>80</sup> and several provisions would require participants to adopt laws replicating U.S. copyright

---

<sup>73</sup> A plurilateral treaty is a special type of multilateral treaty between a limited number of states with a particular interest in the subject of the treaty. The primary difference between a plurilateral treaty and other multilateral treaties is the limited availability in the former of reservations [unilateral statements, however phrased or named, made by a sovereign state when signing, ratification accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state]. Due to the limited nature of a plurilateral treaty, the full cooperation of the parties to the treaty is required in order for the object of the treaty to be met. As a result, reservations to plurilateral treaties are not allowed without the consent of all other parties to the treaty. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 67, 71 (Cambridge Univ. Press 2005), *available at* <http://www.ebookbyte.com/admin/upload/Law/Handbook%20of%20International%20Law%20www.eBookByte.com%29.pdf>.

<sup>74</sup> Off. of the U.S. Trade Rep., ACTA - Summary of Key Elements Under Discussion (2009), <http://www.ustr.gov/about-us/press-office/factsheets/2009/november/acta-summary-key-elements-under-discussion>. The original ACTA drafts dealt with patent infringement only peripherally, in a few scattered sections. *See generally* Anti-Counterfeiting Trade Agreement, [Public Predecisional/Deliberative Draft] §§ 1, 4, Apr. 20, 2010, at 7, 18 [hereinafter ACTA APRIL 2010 DRAFT], [http://www.ustr.gov/webfm\\_send/1883](http://www.ustr.gov/webfm_send/1883). The most current draft has eliminated any provisions regarding patents. *See generally* Office of the U. S. Trade Rep., ACTA [Public Predecisional/Deliberative Draft], Oct. 2, 2010 [hereinafter ACTA OCTOBER 2010 DRAFT], [http://www.ustr.gov/webfm\\_send/2338](http://www.ustr.gov/webfm_send/2338).

<sup>75</sup> Off. of the U.S. Trade Rep., Anti-Counterfeiting Trade Agreement (ACTA) (2010), <http://www.ustr.gov/acta>.

<sup>76</sup> Kaminski, *supra* note 52 at 250; IP DRAGON, *supra* note 5.

<sup>77</sup> For a good "sad trombone" sound effect, *see* SADTROMBONE.COM, <http://www.sadtrombone.com/>.

<sup>78</sup> GIPC A&C, *supra* note 72 (emphasis added).

<sup>79</sup> *See generally* ACTA APRIL 2010 DRAFT, *supra* note 74.

<sup>80</sup> GIPC A&C, *supra* note 72.

and trademark law (America! F\*\*k Yeah!<sup>81</sup>), including procedures and remedies that are unfamiliar to many countries (for example, cease-and-desist orders, punitive or statutory civil damages for IP infringement, and injunctions to prevent infringing goods from being exported).<sup>82</sup> Nonetheless, according to a press release by the Office of the U.S. Trade Representative (USTR), "participants have affirmed their commitment to continue their work with the aim of concluding ACTA."<sup>83</sup> Naturally, one might wonder why an initiative that is so heavy on enforcement has excluded from the negotiating process developing countries<sup>84</sup> that are most often identified as infringement culprits and would probably be affected the most by ACTA's provisions.<sup>85</sup> Some say that this is not an oversight, but, rather, a strategic maneuver intended to single out bad eggs like China and pressure them into compliance.<sup>86</sup> Unsurprisingly, current ACTA negotiators deny such claims, although unconvincingly.<sup>87</sup>

---

<sup>81</sup> This is a reference to a song played throughout various parts of the 2004 action comedy film, *Team America: World Police*.

The chorus proclaims: "America! F\*\*k yeah!  
Comin' again to save the mother f\*\*kin' day yeah!  
America! F\*\*k yeah!  
Freedom is the only way yeah!"

TEAM AMERICA: WORLD POLICE, AMERICA, F\*\*K YEAH (Atlantic Records 2004). As its title suggests, the film plays off of domestic and international political criticisms that the U.S. frequently and unilaterally attempts to "police the world" through its interventionism. ACTA is a prime example of just such unilateral policing.

<sup>82</sup> See ACTA OCTOBER 2010 DRAFT, *supra* note 75 at 9; *see also* Fellmeth, *supra* note 72 (discussing key provisions of the April 2010 draft).

<sup>83</sup> Press Release, Off. of the U.S. Trade Rep., The Office of the U.S. Trade Rep Releases Statement of ACTA Negotiating Partners on Recent ACTA Negotiations (Apr. 16, 2010), <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/office-us-trade-representative-releases-statement-ac>.

<sup>84</sup> Nations excluded from negotiations include the "BRICS" (*that is*, Brazil, Russia, India, and China), as well as Argentina, Chile, Egypt, South Africa, and Indonesia. Michael Geist, *The ACTA Threat to the Future of WIPO* (Apr. 14, 2009), <http://www.ip-watch.org/weblog/2009/04/14/the-acta-threat-to-the-future-of-wipo/>.

<sup>85</sup> IP DRAGON, *supra* note 5; Geist, *supra* note 84.

<sup>86</sup> Even though developing countries are not party to the ACTA negotiations, it is likely that accession to, and implementation of, ACTA by developing countries will be a condition imposed in future free trade agreements. *Anti-Counterfeiting Trade Agreement*, Electronic Frontier Foundation (2010), <http://www.eff.org/issues/acta>; *see also* Geist, *supra* note 84; *and* Kaminski, *supra* note 52, at 250.

<sup>87</sup> For example, in a recent ACTA fact sheet, the European Trade Commission (ETC) maintained that "the ultimate objective is that large emerging economies, where IP rights enforcement could be improved, such as China . . . will sign up to the global pact. ACTA is not intended to isolate these countries or point the finger at their enforcement efforts." However, only a few paragraphs later, the fact sheet reminds the reader that "the EU is consistently pushing countries like China to enforce anti-counterfeiting legislation and to make the legal penalties for IP theft more effective [and that] the EU is . . . continuing to work with countries like China . . . to stop widespread and systematic piracy of . . . intellectual assets." European Trade Commission, *Anti-Counterfeiting Trade Agreement (ACTA) Fact Sheet* (Jan. 5, 2009), [http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc\\_142039.pdf](http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142039.pdf). If China were

It is reasonable to conclude there is some merit to the intentional exclusion theory. The following section paints a rather vivid picture of how China is flouting the international community's IP-enforcement conventions.

#### IV. BIG TROUBLE IN LITTLE CHINA<sup>88</sup>

The knock-off industry in China can be summed up by a well-known Shanghai saying, "we can copy everything except your mother."<sup>89</sup> Perhaps with advances in human genetic cloning technology underway in China,<sup>90</sup> the "mother exception" will be dropped. For the time being, the saying as it reads is by all accounts an accurate one. In an article appropriately entitled, *China Officially Almost Out of Things to Counterfeit*, one commentator noted that "while it's not news to anyone that China has a minor counterfeiting problem, you really sort of have to give these guys credit for the creativity displayed."<sup>91</sup>

Today, China holds a seat as the global leader in copyright, patent, and trademark infringing goods,<sup>92</sup> and estimates put the market value of its IP-infringing goods between \$19 billion and \$24 billion a year<sup>93</sup> (8% of its GDP), costing the companies that produce the originals tens of billions of dollars in lost sales worldwide.<sup>94</sup> In China, some 40,000 wholesale shops sell about 100,000 products, 90 percent of which are fake.<sup>95</sup> On the home front, the USTR estimates that some 80% of IP-infringing goods seized at U.S. borders

---

trying to date the ETC, romantically that is, it would be reasonable to conclude that the EU is sending mixed signals.

<sup>88</sup> Okay, so China isn't little at all; but how can one pass up the opportunity to reference a classic 80s movie featuring Kurt Russell and a young Kim Cattrall when writing a piece that deals with China. *BIG TROUBLE IN LITTLE CHINA* (Twentieth Century Fox Film Corp. 1986).

<sup>89</sup> *The Sincerest Form of Flattery*, *ECONOMIST*, Apr. 7, 2007, at 64-5.

<sup>90</sup> Philip Cohen, *Dozens of Human Embryos Cloned in China*, *NEW SCIENTIST* (Mar. 6, 2002), <http://www.newscientist.com/article/dn2012-dozens-of-human-embryos-cloned-in-china.html>.

<sup>91</sup> Justin Rohrlach, *China Officially Almost Out of Things to Counterfeit*, *Minyanville* (Sept. 8, 2010), <http://www.minyanville.com/dailyfeed/china-officially-almost-out-of/>.

<sup>92</sup> Ernie Siciliano, *Faking It: China's Slow Battle Against Counterfeiting* (2007), <http://bionicteaching.com/journalism/?p=16>; Caroline Dobson, *China: World's 'Single Largest Source' of Counterfeit Goods*, *THE EPOCH TIMES*, May 20-26, 2010, at A6, available at [http://epocharchive.com/a1/en/us/was/2010/05%20%20May/20/A6\\_EET20100520-DCUS.pdf](http://epocharchive.com/a1/en/us/was/2010/05%20%20May/20/A6_EET20100520-DCUS.pdf).

<sup>93</sup> *Counterfeiting and China's Economic Development*: Hearings Before the U.S.-China Economic and Security Review Commission, 109th Cong. 216 (2006) (testimony of Prof. Daniel C. K. Chow), available at [http://www.uscc.gov/hearings/2006hearings/transcripts/june7\\_8/06\\_06\\_7\\_8\\_trans.pdf](http://www.uscc.gov/hearings/2006hearings/transcripts/june7_8/06_06_7_8_trans.pdf).

<sup>94</sup> Ed Young, *A 'Real' Steal*, *Brandchannel* (Apr. 9, 2001), [http://www.brandchannel.com/features\\_effect.asp?pf\\_id=30](http://www.brandchannel.com/features_effect.asp?pf_id=30); Jeffrey Hays, *Pirating and Counterfeiting In China* (2010), <http://factsanddetails.com/china.php?itemid=356&catid=9&subcatid=61>.

<sup>95</sup> Mark Litke, *China Big in Counterfeit Goods* (Apr. 21, 2010), <http://abcnews.go.com/WNT/story?id=130381&page=1>.

come from Chinese exporters.<sup>96</sup> Not surprisingly, China has had a rotating seat on the USTR's "watch list" for years and has recently graduated to the "priority watch list" [for whatever that's worth<sup>97</sup>]. Still, infringers remain so brazen that one of the most popular markets in China for knock-offs is located right across the street from the U.S. Embassy.<sup>98</sup>

As mentioned *supra*, the modern knock-off regime extends far beyond Gucci sunglasses and Rolex watches; however, the extreme to which China has taken the copycat industry borders on the artistic. To illustrate, consider the following items that Chinese knock-off artisans have passed off as the real McCoy: Honda and Yamaha Motorcycles;<sup>99</sup> Porsches;<sup>100</sup> Ferraris;<sup>101</sup> BMWs;<sup>102</sup> space equipment (inadvertently purchased by NASA);<sup>103</sup> military electronic systems for high-tech weaponry (inadvertently purchased by the U.S. Army);<sup>104</sup> baby formula;<sup>105</sup> The Snuggie;<sup>106</sup> industrial mining pumps;<sup>107</sup> Kentucky Fried Chicken Restaurants;<sup>108</sup> American Standard Toilets;<sup>109</sup> Head & Shoulders shampoo;<sup>110</sup> Skippy peanut butter;<sup>111</sup> and yes fellas - even Viagra.<sup>112</sup>

---

<sup>96</sup> Off. of the U.S. Trade Rep., *2010 Special 301 Rep.* at 19 (Apr. 30, 2010), [http://www.ustr.gov/webfm\\_send/1906](http://www.ustr.gov/webfm_send/1906).

<sup>97</sup> Several countries do not take the U.S. Trade Representative's (USTR) watch lists very seriously. For example, Canadian politicians have told the U.S. that Canada "does not recognize the 301 watch list process" because it "lacks reliable and objective analysis," and that since 4.3 billion people live in countries that the USTR finds problematic, perhaps the problem is with the U.S., rather than those other countries. Mike Masnick, USTR Announces What Countries Have Been Naughty When It Comes To Intellectual Property (Apr. 30, 2010), <http://www.techdirt.com/articles/20100430/1153579257.shtml>; *see also* Mike Masnick, Human Rights Groups Complain About Special 301 Process (July 19, 2010), <http://gamma.serverbox.net/blog.php?tag=special+301&edition=techdirt>.

Further, commentators have noted that in the past (through Reagan, G.H.W. Bush, Clinton, and G.W. Bush presidencies), that the list has been deeply biased, that is, basically an edited version of one-sided submissions from a handful of corporate lobby groups representing the pharmaceutical, entertainment and publishing industries, reviewed by an advisory board made up entirely of lobbyists for these same industries. James Love, *Thailand and Medicine Patents: An Early Test for Obama Trade Policy*, HUFFINGTON POST (2009), [http://www.huffingtonpost.com/james-love/thailand-and-medicine-pat\\_b\\_173839.html](http://www.huffingtonpost.com/james-love/thailand-and-medicine-pat_b_173839.html).

<sup>98</sup> Litke, *supra* note 95.

<sup>99</sup> *Phonies galore*, *ECONOMIST*, Nov. 10, 2001, at 58; *see also* Litke, *supra* note 95.

<sup>100</sup> *Knock-offs catch on*, *ECONOMIST*, Mar. 6, 2010, at 81-2 [*hereinafter* *Knock-offs catch on*].

<sup>101</sup> *Id.*

<sup>102</sup> Rohrllich, *supra* note 91.

<sup>103</sup> *Knock-offs catch on*, *supra* note 100.

<sup>104</sup> *Id.*

<sup>105</sup> Nicholas Schmidle, *Inside the Knockoff Factory*, *N.Y. TIMES*, Aug. 22, 2010, at 38.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Rohrllich, *supra* note 91.

<sup>109</sup> Litke, *supra* note 95.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

*A. Grasshopper! To The Mountain Fortress!*

If ever a word has evolved in meaning, it is "Shanzhai." Literal translations include "mountain village,"<sup>113</sup> "a fenced place in the forest" and "villages in the mountain that have stockade houses."<sup>114</sup> However, it was during the fourteenth and fifteenth centuries, when Chinese authors were anonymously publishing (for political reasons) tons of "cops and robbers" novels<sup>115</sup> that the term began to take on its contemporary meaning. The outlaws in these stories were painted as righteous good guys operating from mountain strongholds (Shanzhai), and the corrupt imperial officials were cast as the villains.<sup>116</sup> Thus, the term was adopted by these authors as a metaphor, either to highlight corrupted authority vis-a-vis their purportedly justified acts, or "simply to describe the lack of state control."<sup>117</sup>

However, with that history as a backdrop, Shanzhai began to refer to a new category of products with the help of Cantonese slang.<sup>118</sup> Many of the knock-off factories in operation today originated from Shenzhen (Guangzhou province, China), where they started as low-end family-owned factories<sup>119</sup> operating in little wood houses on the hills around the Cantonese area.<sup>120</sup> Eventually, people started calling them Shanzhai factories and their products Shanzhai products,<sup>121</sup> and the similar pronunciation of Shenzhen and Shanzhai contributed to the association of the products to the region.<sup>122</sup> Finally, because of the low economic status of the area, Shanzhai became a term used to suggest something cheap or inferior.<sup>123</sup>

Today though, with the help of the Internet, the term has come to represent a "certain Chinese cleverness and ingenuity."<sup>124</sup> For multitudes of Chinese, "Shanzhai Culture" represents a lifestyle "from the grass roots and for the grass roots" giving people "another choice and the possibility of

---

<sup>113</sup> Xiaobo Wu & Wei Zhang, *Business Model Innovations in China: From a Value Network Perspective* (2009), <http://www.indiana.edu/~rccpb/uschinacooperation/papers/P8%20Wu%20Xiaobo.pdf>.

<sup>114</sup> Philipp Boeing, *Shanzhai – Dimensions of a Chinese Phenomenon* (2009), [http://www.frankfurt-school.de/content/en/ecbc/ecbc\\_portal/content\\_files/file33/CBR2009\\_001\\_Boeing\\_shanzhai.pdf](http://www.frankfurt-school.de/content/en/ecbc/ecbc_portal/content_files/file33/CBR2009_001_Boeing_shanzhai.pdf).

<sup>115</sup> William O. Hennessey, *Sixth Annual Baker Botts Lecture: Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257, 1262 (2009).

<sup>116</sup> *Id.*

<sup>117</sup> Sky Canaves & Juliet Ye, *Imitation Is the Sincerest Form of Rebellion in China*, WALL ST. J., Jan. 22, 2009, at A1.

<sup>118</sup> Boeing, *supra* note 114.

<sup>119</sup> *Id.*

<sup>120</sup> CHINA'S SHANZHAI CULTURE - ORIGIN, SHANZHAI PRODUCTS AND IMPLICATIONS, <http://www.targetchinese.com/targetpedia/chinas-shanzhai-culture-origin-shanzhai-products-and-implications/>.

<sup>121</sup> *Id.*

<sup>122</sup> Boeing, *supra* note 114.

<sup>123</sup> Canaves & Ye, *supra* note 117.

<sup>124</sup> *Id.*

resisting dominant cultural values."<sup>125</sup>

However, to fully appreciate the resistance towards dominant cultural values requires a basic understanding of the ideologies that have led to the Shanzhai phenomenon.

## V. UNDERSTANDING THEIR DEAL

Some commentators make simplistic conclusions about China's enforcement failures<sup>126</sup> rather than attempting to understand "the complex reasons for Chinese inability or reticence to enforce obligations they seem to have accepted willingly."<sup>127</sup> Others chalk the failures up to China's communist rule and censorship, positing that respect for IP in such an environment is far-fetched.<sup>128</sup> However, real clarity<sup>129</sup> on IPR enforcement in China requires an understanding of the traditional ideologies that inform contemporary Chinese attitudes.

### A. Confucius Say...

China's leaders have never been big on giving credit to (much less protecting the rights of) China's innovators, whether in the realm of technology or popular arts.<sup>130</sup> In fact, it wasn't until 1979 that China even publicly recognized the concept of IP,<sup>131</sup> which given its history of multiple dynasties spanning thousands of years,<sup>132</sup> is kind of unbelievable. Maybe that doesn't seem like a big deal, but think about it this way. England, for example, is a baby compared to China, the Kingdom of England being established as a nation state in 927 A.D.,<sup>133</sup> the Kingdom of Great Britain in 1707.<sup>134</sup> Yet as early as 1710, Great Britain enacted the Statute of Anne,<sup>135</sup>

---

<sup>125</sup> *Id.*

<sup>126</sup> See M.D. Pendelton, *Chinese Intellectual Property - Some Global Implications for Legal Culture and National Sovereignty*, 4 EURO. INTEL. PROP. REV. 119, 119-121 (1993) (noting in reference to China that countries do not have the right to cheat in matters of international trade and if they do, then like a dishonest merchant, they must be coerced into compliance).

<sup>127</sup> Assafa Endeshaw, *Commentary: A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 335 (1996).

<sup>128</sup> Alex Newman, *Communist Pirates Staling for Censorship?* (Jan. 7, 2010), <http://www.jbs.org/jbs-news-feed/5821-communist-pirates-stealing-for-censorship>.

<sup>129</sup> As one scholar has noted, such clarity requires "an understanding of traditional public attitudes in Chinese society toward innovators and artistic creators (mostly indifferent if not negative), the extent to which those attitudes have changed (or not changed) over time, and how far China has yet to go in recognizing the IP rights of authors, entrepreneurs, and inventors." Hennessey, *supra* note 115, at 1260.

<sup>130</sup> See generally *id.*

<sup>131</sup> See Roderick MacFarquhar, *The Succession to Mao and the End of Maoism, 1962-82*, in THE POLITICS OF CHINA 278, 315-20 (Roderick MacFarquhar ed., 2d ed. 1997).

<sup>132</sup> See generally JOHN KING FAIRBANK, CHINA: A NEW HISTORY (1992); see also *China History Table* (2010), <http://www.history-of-china.com>.

<sup>133</sup> BARBARA YORKE, KINGS AND KINGDOMS OF EARLY ANGLO-SAXON ENGLAND 96 (1990).

<sup>134</sup> KENNETH O. MORGAN, THE OXFORD HISTORY OF BRITAIN 672 (2010).



which vested every author with the exclusive right to make copies of his or her works.<sup>136</sup> Likewise, the U.S., declaring independence from the Kingdom of Great Britain as recently as 1776, had its first copyright law, influenced by the Statute of Anne, as early as 1790.<sup>137</sup> So comparatively speaking, China's lag time is quite monumental.

In China, the philosophies behind recognizing innovation stand in harsh contrast to the principles informing those of most other countries, which range from incentivizing creativity<sup>138</sup> for the enrichment of the public domain<sup>139</sup> to rewarding individual creators economically for their efforts.<sup>140</sup> As one expert noted, there is a notion in China that innovations should be viewed as "a social enterprise rather than ... breakthroughs by individual geniuses."<sup>141</sup> This conception originates from an idea prevalent in one of China's most influential philosophical traditions, Confucianism, that is, "that learning must be transmitted from master to student and, consequently, that there must exist a master to be credited for the student's achievements - the student being validated among his or her own peers only by the master's favor."<sup>142</sup>

However, validation hasn't been easy to come by in China. A prime example is the traditional Confucian hierarchical society of the Han Dynasty (206 B.C. - A.D. 220),<sup>143</sup> in which there were four classes of people, that is (in order of status), scholars, farmers, artisans, and merchants.<sup>144</sup> The elite scholar officials defined what was an "accepted literary form," which was usually something very traditional, something they were good at, like poetry or calligraphy.<sup>145</sup> The commoners' contributions (for example, ceramics, music/songs, drama, storytelling, architecture, etc.), which were more akin to what would be considered art today, were looked down upon as mere "entertainment."<sup>146</sup> In fact, even technology was considered "nonsense."<sup>147</sup>

---

<sup>135</sup> LIONEL BENTLY, UMA SUTHERSANEN & PAUL TORREMANS, GLOBAL COPYRIGHT: THREE HUNDRED YEARS SINCE THE STATUTE OF ANNE, FROM 1709 TO CYBERSPACE 1 (2010).

<sup>136</sup> *Id.* at 2.

<sup>137</sup> EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 15 (2000).

<sup>138</sup> RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 139 (2006).

<sup>139</sup> *Id.* at 83.

<sup>140</sup> *Id.* at 4 n14.

<sup>141</sup> Nathan Sivin, *Introduction* to 6 JOSEPH NEEDHAM, SCIENCE AND CIVILISATION IN CHINA, pt. VI, at 1, 1 (Nathan Sivin ed., 2000).

<sup>142</sup> Hennessey, *supra* note 115, at 1270.

<sup>143</sup> FAIRBANK, *supra* note 132, at 47.

<sup>144</sup> *Id.* at 108.

<sup>145</sup> Hennessey, *supra* note 115, at 1270.

<sup>146</sup> *Id.*

<sup>147</sup> See JOSEPH R. LEVENSON, THE PROBLEM OF INTELLECTUAL CONTINUITY 13 (1968) (noting that traditional Chinese scholars did not consider scientific discovery prestigious); see also Hennessey, *supra* note 115, at 1278-9 (noting that under traditional Confucian ideology, technological advances and popular literary creations did not merit cultural or legal recognition, and pointing out that the Old Chinese bureaucrat could express no interest or recognize value in such "nonsense").

Every once in a while, the pop culture of the commoners (who were known as "artisans," never "artists") would come to the attention of the scholar elite and would be converted into an accepted literary form,<sup>148</sup> but the original creators were rarely, if ever, credited.<sup>149</sup>

To be sure, this is but one example from one dynasty in a string of dynasties that has spanned hundreds of years. Nonetheless, multiple changes in power over the centuries have seemed only to ossify the disconnect between China's rulers and its innovators.<sup>150</sup> Striving for ideals of social stability, Chinese aristocracy has fought the notions of change and originality, opting for social forms "in line with Confucian ideology" and "family values."<sup>151</sup> The quest for social harmony through a "top-down approach" (akin to listening to elders) continued to foster atmospheres hardly conducive to "stirring things up or 'new ideas,'" <sup>152</sup> which inevitably (and perhaps catastrophically<sup>153</sup>) has colored modern Chinese attitudes toward IP.<sup>154</sup>

### B. *The Orient Express*

Until TRIPs became an integral part of the international trade regime, the main problem that any industrial power would have with another country was whether the other country had promulgated adequate IP laws.<sup>155</sup> Incidentally, China's fast track creation of an IP regime over the past thirty years has been pretty amazing.<sup>156</sup>

While Chinese IP law passed through various stages of infancy beginning as early as 1904,<sup>157</sup> it was given a sudden thrust in the 1980s, in line with economic reforms, the intent being "to neutralize any misgivings of the industrialized countries about the weakness or inadequacy of China's IP laws."<sup>158</sup> In March 1984, China's National People's Congress passed the first comprehensive Chinese patent law.<sup>159</sup> In 1985, China acceded to the Paris Convention, and the Chinese Patent office signed its first agreement for

---

<sup>148</sup> Hennessey, *supra* note 115, at 1272 (noting that as China's urban society grew, a new form of scholarly elite lyric poetry developed, the subjects of which were often popular customs the officials encountered among the commoners).

<sup>149</sup> *Id.*

<sup>150</sup> *See generally id.*

<sup>151</sup> *Id.* at 1275.

<sup>152</sup> *Id.*

<sup>153</sup> RAY HUANG, 1587, A YEAR OF NO SIGNIFICANCE 221 (1981) (calling Old China a "highly stylized society wherein the roles of individuals were thoroughly restricted by a body of simple yet ill-defined moral precepts," and noting that "the empire was seriously hampered in its development, regardless of the noble intention behind those precepts").

<sup>154</sup> Hennessey, *supra* note 115, at 1280.

<sup>155</sup> Endeshaw, *supra* note 127, at 305.

<sup>156</sup> Hennessey, *supra* note 115, at 1281.

<sup>157</sup> Endeshaw, *supra* note 127, at 310.

<sup>158</sup> *Id.*

<sup>159</sup> Patent Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective April 1, 1985), 1984 FAGUI HUIBIAN 529, available at <http://iprchina.blogspot.com/2009/10/patent-law-1984.html>.

international cooperation.<sup>160</sup> It joined the Madrid Agreement Concerning the International Registration of Marks in 1989 and Berne in 1992.<sup>161</sup> With a few exceptions, China's IP laws enacted pursuant to its entry into WTO in 2001 are compliant with the minimum standards of TRIPS,<sup>162</sup> and today its laws are nearly, if not completely, in conformity with its WIPO obligations.<sup>163</sup> In short, in a span of ten years, China promulgated the entire gamut of IP laws, with constant revisions at all stages.<sup>164</sup>

However, bad IP protection won't disappear just because there are laws or treaty obligations; the adoption of laws is a good place to start,<sup>165</sup> but naturally, the inquiry next turns to states' commitment to enforcement.<sup>166</sup> Therefore, it will be helpful at this point to briefly analyze complaining IPR holders' avenues of recourse, both judicial and administrative, and the mechanisms in place for the enforcement of judgments.

## VI. CHINESE LEGAL SYSTEM FOR DUMMIES

China has a developing legal system that is weak in many respects compared to legal systems in advanced industrialized countries.<sup>167</sup> Generally

---

<sup>160</sup> See European Patent Office, China and Korea, <http://www.epo.org/about-us/office/international-relations/projects/china.html> (discussing the June 1985 agreement between the EPO and "the former Chinese Patent Office"); WIPO, Paris Convention for the Protection of Industrial Property: Accession by the People's Republic of China (Dec. 19, 1984), [http://www.wipo.int/edocs/notdocs/en/paris/treaty\\_paris\\_114.html](http://www.wipo.int/edocs/notdocs/en/paris/treaty_paris_114.html) (denoting China's date of accession to the Paris Convention).

<sup>161</sup> See, e.g., WIPO, Status of Madrid Agreement Concerning the International Registration of Marks (Jul. 15, 2009), [http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid\\_marks.pdf](http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf) (recognizing China as a party to the Madrid Agreement as of October 4, 1989); WIPO, Berne Convention for the Protection of Literary and Artistic Works: Contracting Parties, [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15) (recognizing China as a party to the Berne Convention as of October 15, 1992).

<sup>162</sup> See Guo Shoukang & Zuo Xiaodong, *Are Chinese Intellectual Property Laws Consistent With the TRIPS Agreement?*, in INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA 11-12 (Paul Torremans et al. eds., 2007) (discussing amendments to Chinese IP laws to comply with TRIPS); see also Panel Report, *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, at 7.72-139 (Jan. 26, 2009) [hereinafter PANEL REPORT] (concluding that China's copyright law violates the TRIPS Agreement because it does not protect "prohibited works"). After the WTO panel decision, China "pledged . . . to cooperate with other countries to strengthen its protection of copyrights and trademarks." *China Vows Copyright Cooperation After WTO Case*, REUTERS, Jan. 27, 2009, <http://www.reuters.com/article/technologyNews/idUSTRE50Q1NX20090127>. However, a second ruling of the panel was that China's regulations on the release of seized counterfeit goods were not compliant with TRIPS Article 46. PANEL REPORT, *supra*, at 7.395.

<sup>163</sup> Hennessey, *supra* note 115, at 1288.

<sup>164</sup> Endeshaw, *supra* note 127, at 311.

<sup>165</sup> *Id.* at 299.

<sup>166</sup> *Id.*

<sup>167</sup> See *Pirates of the 21st Century: The Curse of the Black Market, Hearings Before the Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce, and D.C. of the S. Comm. on Homeland Sec. and Governmental Aff.*, 108th Cong. 22-23 (2004) (testimony of Daniel C.K. Chow, Law Prof.,

speaking, enforcement of China's IP laws is inadequate and fails to create sufficient deterrence to counterfeiting and piracy.<sup>168</sup>

China enforces IP rights through both administrative and judicial proceedings.<sup>169</sup> According to one authority, while the administrative track has proven decent, the judicial track is a nightmare.<sup>170</sup> The following illustrates the grounds for that sentiment.

In terms of state structure, the Chinese Supreme People's Court (SPC) is not a co-equal branch of the Chinese government,<sup>171</sup> but, rather, is supervised directly by the National People's Congress, and indirectly through the promulgation of regulations and guidelines by the State Council,<sup>172</sup> which is charged with "administration on the basis of law."<sup>173</sup> Currently, there is no mechanism for judicial review of such regulations or guidelines to determine if they have been drafted "on the basis of law".<sup>174</sup> Plus, provincial governments can enact their own laws and regulations that may have the same effect as those issued directly by the State Council,<sup>175</sup> and it is not entirely clear what happens if the two are at odds.<sup>176</sup>

However, since 2001, particularly in IP cases, the SPC has issued a series of judicial interpretations that are presumably binding on the lower courts,<sup>177</sup> and decisions of the most important courts<sup>178</sup> that hear numerous IP cases may be influential.<sup>179</sup> Still, the bulk of published judicial opinions carry

---

Ohio State Univ.) [*hereinafter Pirates of the 21st Century*], available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=7cc7d588-c422-4ac4-9e06-216a9e66a2ce](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=7cc7d588-c422-4ac4-9e06-216a9e66a2ce).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>169</sup> PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 16 (2d ed. 2003).

<sup>170</sup> Compared to the impressive achievements that have been made in IP law-making, the enforcement of IP could be described as unsatisfactory if not dismal or in crisis. See JIANQIANG NIE, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 217-18 (2006).

<sup>171</sup> *Id.* at 244-45.

<sup>172</sup> See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 198-99 (2d. ed. 2009) (describing the hierarchy of the Chinese government).

<sup>173</sup> The desire for formal legal legitimation of the exercise of the state's administrative power is captured by the slogan "administration according to law." JOHN GILLESPIE & PIP NICHOLSON, *ASIAN SOCIALISM & LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* 212 (Matthew May ed., 2005).

<sup>174</sup> See NIE, *supra* note 170, at 245 (2006).

<sup>175</sup> *Id.* at 246 ("The court has no judicial power to interpret the local regulations, or the administrative regulations and rules.").

<sup>176</sup> Hennessey, *supra* note 115, at 1294.

<sup>177</sup> FENG, *supra* note 169, at 9-10 (2d ed. 2003) (noting that "law is a diluted concept in China and comes from a variety of sources, e.g., an IP right can be instituted by a national law, its ancillary administrative regulations, or related judicial interpretations - all of which are proper legal rules; and the Constitution is not a direct source of enforceable rights, but rather constitutes programmatic or ideological declarations").

<sup>178</sup> An example of such a court is the Intermediate People's Courts in Beijing. Hennessey, *supra* note 115, at 1294.

<sup>179</sup> See FENG, *supra* note 169, at 9-10 (observing that the publication of exemplary cases serves as judicial guidance, supervision, and further training for judges).

no precedential weight whatsoever.<sup>180</sup>

Finally, judicial officials are only theoretically independent of local governments,<sup>181</sup> and judges, even in their own courts, are not higher in rank than prosecutors from the local branch of the Supreme People's Procuratorate,<sup>182</sup> which among other tasks, performs "legal supervision over judicial proceedings."<sup>183</sup> The professional qualifications of judges, while advancing, vary widely with distance from urban centers,<sup>184</sup> and "home court" advantages abound, with recent evidence indicating that corruption of judicial officials may be extremely prevalent.<sup>185</sup>

Yet, judicial qualifications are getting better and IP rights are at the forefront of priorities in China's judicial system,<sup>186</sup> so it is reasonable to conclude that IP protection has a bright future in China. But if perceptions of illegitimacy deter IPR holders' choice to pursue judicial recourse, there is another option.

Because of inadequacies in China's judicial channels, including the slow and expensive nature of pursuing IP infringement claims through such channels,<sup>187</sup> many IPR holders turn to China's administrative agencies for relief.<sup>188</sup> However, while these agencies have the power to order the cessation of infringing acts and are authorized to confiscate and destroy the infringing

---

<sup>180</sup> See *id.* at 33 ("As in most civil law jurisdictions, judgments of the People's Court are not precedents.").

<sup>181</sup> Hennessey, *supra* note 115, at 1294.

<sup>182</sup> See generally Legal System of China, LawInfo China (2011), [http://www.lawinfochina.com/legal/Display\\_2.asp](http://www.lawinfochina.com/legal/Display_2.asp); see also Judicial Protection of IPR in China: The Organization, Functions and Powers of the People's Courts, China IPR Law (2011), <http://www.chinaiprlaw.com/english/courts/court1.htm>.

<sup>183</sup> Supreme People's Procuratorate of China, News Guangdong (May 14, 2003), <http://www.newsgd.com/government/govdepart/200305140343.htm>.

<sup>184</sup> Brad Luo, *Economic Crisis Tests China's Enterprise Bankruptcy Law*, CHINA BUSINESS LAW BLOG, <http://www.chinabusinesslaw.blogspot.com>.

<sup>185</sup> In a recent report on bribery, data indicated that 11% of 148 bribery reports it received on China from July 2007 to June 2008 involved judicial officials. Trace Int'l, Business Registry for International Bribery and Extortion: China Report 1 (July 15, 2008), available at [https://secure.traceinternational.org/news/pdf/China\\_PR\\_and\\_Report.pdf](https://secure.traceinternational.org/news/pdf/China_PR_and_Report.pdf).

<sup>186</sup> U.S. Embassy Beijing, IP Toolkit, <http://beijing.usembassy-china.org.cn/copyright.html> [*hereinafter* IP Toolkit].

<sup>187</sup> Ryan Ong, *Tackling Intellectual Property Infringement in China*, CHINA BUS. REV., Mar.-Apr. 2009, at 17, available at <http://www.chinabusinessreview.com/public/0903/ong.html>.

<sup>188</sup> *Id.*; Godfrey Firth, *IP Protection Best Practice Tips*, CHINA BUS. REV., Jan.-Feb. 2006, at 18, available at <http://www.chinabusinessreview.com/public/0601/firth.html>; Rouse Sophia Hou, *Increasingly Litigious IP Owners Change Enforcement Landscape*, CHINA L. & PRAC., Dec.-Jan. 2009-10, at 11, available at <http://www.chinalawandpractice.com/Article/2351743/Channel/9937/Increasingly-litigious-IP-owners-change-enforcement-landscape.html> (describing administrative action as the usual "first line of attack" against infringers).

goods and any instruments used to manufacture them,<sup>189</sup> most IPR holders find that infringers are often back in business almost immediately following a shut-down.<sup>190</sup> In addition, these agencies issue laughably small fines and award meager damages amounts<sup>191</sup> that rather than deterring infringers, are viewed by them as the cost of doing business.<sup>192</sup> This scenario is a product of the purpose of compensation in the present system, which is to award the rights holder the profits earned by the counterfeiter after deducting all expenses (as represented by the counterfeiter!) and is not based upon economic losses suffered.<sup>193</sup> Therefore, taking the administrative route is unlikely to curb the disgruntled IPR holder's frustrations.

---

<sup>189</sup> JONATHAN REUID & YONG LI, *DOING BUSINESS WITH CHINA* 158-9 (5th ed. 2006); *see also* Thomas Stiebel, Hillary Wucherer & Karen Dickinson, *Chinese Counterfeit Goods - How to Protect Your Firm* (2010), [http://www.asiapacificforum.com/sub/sub\\_news/ns\\_20100108\\_counter.html](http://www.asiapacificforum.com/sub/sub_news/ns_20100108_counter.html).

<sup>190</sup> Allison Jackson, *Counterfeiting in China Thrives Despite Crackdowns*, AGENCE FRANCE PRESSE, Jan. 4, 2010, LEXIS, News Library (noting that "You can easily get a raid but there are no consequences to the counterfeiter, who usually pays a light fine and is back in business in two to three weeks.").

<sup>191</sup> Some statistics of one such agency, the State Administration of Industry and Commerce (SAIC) (which is responsible for the enforcement of Chinese Trademark Law, Anti-Unfair Competition Law for the Protection of Consumers' Rights and Interests, and Advertising Law) prove illustrative of this point. *See generally* STATE ADMINISTRATION OF INDUSTRY AND COMMERCE OF THE PRC (2010), <http://www.saic.gov.cn/english/aboutus/Mission/>. According to enforcement statistics reported by SAIC, 22,001 complaints were filed in 2000 and the average fine imposed on a counterfeiter or infringer at that time was \$794. Moreover, the average amount of compensation (that is, damages) awarded to the complaining rights holder was \$19! In 2005, while the number of complainants more than doubled (49,412), the average fine only increased to \$1017, the average amount of compensation awarded to the complaining rights holder being \$40. In addition, according to the most recent data, while complaints in 2008 reached a high of 56,634, the average fine imposed on the infringer saw hardly any increase, rising to a mere \$1,212. Data on compensation awarded to complainants is not available beyond 2006, however at that time \$53 was the average. Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach is Making Counterfeiting Worse*, 41 GEO. J. INT'L L. 749, 757 (2010) [*hereinafter* *Multi-National Companies in China*] (discussing the annual reports of the State Intellectual Property Office of the PRC (SIPO)); *see also* State Intellectual Property Office of the PRC, *Annual Reports (2009-10)* [*hereinafter* *PRC Reports*], <http://www.sipo.gov.cn/sipo2008/zfxxgk/ndbg/>.

<sup>192</sup> Ong, *supra* note 187, at 17.

<sup>193</sup> *See, e.g.*, Trademark Law of the People's Republic of China (Revised) (Zhonghua Renmin Gonghe Guo Shangbiao Fa (Xiuzhen), Di Sanshiba Tiao) (adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on Aug. 23, 1982, revised by the 30th Session of the Standing Committee of the Seventh National People's Congress on Feb. 22, 1993, and effective Jul. 1, 1993, and revised for the second time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on Oct. 27, 2001), art. 56 (P.R.C.), *available at* <http://www.chinaiprlaw.com/english/laws/laws11.htm>; *see also* *Pirates of the 21st Century*, *supra* note 167.

### A. No Jail For You!

According to present practices, administrative authorities are to transfer cases that involve criminal liability to judicial authorities for criminal prosecution.<sup>194</sup> Standards for criminal liability are set forth in the Chinese Criminal Law of 1997.<sup>195</sup> According to Article 140, a producer or distributor of infringing goods with sales between \$6,000 and \$24,000 is to be sentenced to a term of imprisonment of up to two years and must also pay fines,<sup>196</sup> the severity of the criminal punishment increasing accordingly with increases in the level of sales.<sup>197</sup> However, as is illustrated by statistics provided by China's State Administration for Industry and Commerce (SAIC),<sup>198</sup> the rates of prosecutions are much too low to serve as a meaningful deterrent;<sup>199</sup> and thus, as things stand, a career infringer has a pretty decent shot at avoiding criminal liability under the present system.

The low criminal prosecution rate can be attributed in part to the reluctance of administrative authorities to transfer cases to judicial authorities.<sup>200</sup> The agencies expend time and resources in conducting raids and seizures, and although the fines issued are low, all potential for collection is eliminated when cases are transferred.<sup>201</sup> In addition, because of evidentiary requirements, an agency is required to give judicial authorities all confiscated products and machinery - items that might otherwise be sold at a public auction and provide revenue for the agency.<sup>202</sup> Moreover, under current PRC practices, the evidentiary bar for criminal cases is high, requiring physical evidence of completed transactions in the form of sales orders, sales receipts,

---

<sup>194</sup> See Zhonghua Renmin Gongheguo Xing Fa [Criminal Law of the P.R.C.], arts. 141-8 (1997) [*hereinafter Criminal Law of the P.R.C.*], reprinted in Zhonghua RENMIN GONGHEGUO XING FA (Renmin Chubanshe 1997), available at <http://www.china.org.cn/english/government/207320.htm>; see also *Pirates of the 21st Century*, *supra* note 167.

<sup>195</sup> See *Criminal Law of the P.R.C.*, *supra* note 194.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> For example, in 2001, the number of cases transferred by administrative agencies for criminal prosecutions was a mere 86 out of 22,813. That's 1 transfer for every 265 cases. In 2003, as the number of cases rose to 26,488, the number of transfers actually dropped by almost half to 45, which is 1 transfer for every 589 cases. And while the most recent data indicates a rise in transfers, that is, 137 in 2008, this number must be considered in light of the drastic increase in the number of cases (56,634), which makes the number of transfers a measly 1 in every 413 cases. *Multi-National Companies in China*, *supra* note 192 (discussing the annual reports of the State Intellectual Property Office of the PRC (SIPO)); see also *PRC Reports*, *supra* note 191.

<sup>199</sup> Ong, *supra* note 187, at 17; see also *Pirates of the 21st Century*, *supra* note 167.

<sup>200</sup> NIE, *supra* note 170, at 225; see also *Pirates of the 21st Century*, *supra* note 167.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* See also *IP Toolkit*, *supra* note 186 (noting that administrative agencies may have a financial incentive to adjudicate cases that are more appropriate for criminal prosecution because the administrative fines paid by the respondent go to the coffers of the administrative agency).

ledger and account books, and tax documents;<sup>203</sup> and counterfeit goods seized on the premises, packaging, or equipment used in illegal manufacture, no matter how large the quantity, are not considered evidence of sales.<sup>204</sup> Physical records of illegal activities are rarely if ever kept, and thus, gathering probative evidence has proven to be a formidable obstacle for most IPR holders.<sup>205</sup>

Another reason for the low criminal prosecution rate is the growing sophistication of infringers.<sup>206</sup> For example, because thresholds exist delineating which offenses subject infringers to criminal liability, many infringers maintain supplies (and thus sales) at a level just under minimum thresholds.<sup>207</sup> In addition, infringers are increasingly seeking legal advice and have begun to use legal weapons to protect themselves.<sup>208</sup> For example, many have initiated administrative reviews and commenced lawsuits against their local agency, which not only creates a burden for the agency in terms of time and manpower, but also damages its reputation.<sup>209</sup> Moreover, in order to avoid the risk of being sued for wrongdoing, procedurally or substantively, agencies have responded by taking action only in the most clear cut cases.<sup>210</sup> This pattern is further exasperated by the agency officials who, without legal backgrounds, are not confident to take action that might be the subject of dispute.<sup>211</sup> Thus, from the perspective of many infringers, the prospect of continuing with impunity to flood the market with infringing products remains a tempting one.<sup>212</sup>

---

<sup>203</sup> See, e.g., *IP Toolkit*, *supra* note 186 (noting that "Many foreign rights holders complain that the criteria for referral of criminal cases are too vague, permit too much discretion, and that the minimum evidentiary threshold for prosecution is too high."); see also *Pirates of the 21st Century*, *supra* note 167.

<sup>204</sup> See Keys To Enforcing Intellectual Property Rights In China (2008), <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=January&artYear=2011&EntryNo=9144> (noting that criminal cases require high thresholds and direct evidence of criminal activity); see also Douglas Clark, *Counterfeiting in China: A Blueprint for Change*, CHINA BUS. REV., Jan.-Feb. 2006, at 14 (noting the extreme difficulty in locating and obtaining evidence against counterfeiters); and *Pirates of the 21st Century*, *supra* note 167.

<sup>205</sup> Betsy Lowther, No End for China's Counterfeiting Contagion (2004), <http://www.betsylowther.com/counter1.html> (discussing that under current law, only violators with extremely high monetary amounts of counterfeit activity are punished in criminal courts which is difficult for police and brand owners to prove since records are rarely kept by pirates; and pointing out that the monetary thresholds are currently calculated on the infringer's prices, almost always much lower than the legitimate product); see also *Pirates of the 21st Century*, *supra* note 167.

<sup>206</sup> See generally Hou, *supra* note 188; see also Loke-Khoon Tan, *Anti-counterfeiting: The Law Now, in 2010 and Beyond*, CHINA L. & PRAC., June 2007, at 1 [*hereinafter 2010 and Beyond*] (noting that around 80-90% of counterfeiting cases are dealt with by administrative bodies).

<sup>207</sup> *2010 and Beyond*, *supra* note 206, at 2 (noting that counterfeiters circumvent rules by maintaining inventories below threshold amounts and proposing the removal of such thresholds).

<sup>208</sup> Hou, *supra* note 188.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*



## VII. WITHIN YOU, WITHOUT YOU

Because ACTA's scope is not limited to matters of domestic infringement,<sup>213</sup> the following section will examine new hurdles facing IPR enforcement in China, namely, the elimination of the state monopoly on export rights,<sup>214</sup> the role of the internet,<sup>215</sup> and China's efforts to reduce goods-entry requirements with its trading partners.<sup>216</sup>

In 2003, to fulfill its pledges to the WTO, China amended its foreign trade laws to give *individuals* import and export rights, which were once the sole domain of powerful state monopolies.<sup>217</sup> Prior to the amendment, only designated state trading companies could lawfully engage in trade with other countries.<sup>218</sup> As a result, if infringers wanted a piece of the international market, they were limited to the state trading companies willing to work with them.<sup>219</sup> Granted, as pre-2003 seizure statistics stand to prove,<sup>220</sup> there were a plethora of such companies; however, in removing the costs and hassles associated with finding them, the amendments have made the export of illegal goods a more attractive option to infringers.<sup>221</sup>

In addition to the elimination of export restrictions, the Internet has

---

<sup>213</sup> See *ACTA October 2010 Draft*, *supra* note 74, at 9.

<sup>214</sup> James P. Zumwalt, *How WTO Membership Affects China*, in 7, No.1 Economic Perspectives: An Electronic Journal of the U.S. Dept. of State - Trade in the Post-Doha Global Economy 14 (2002); *Individuals to Get Import-Export Rights* (2002), [http://www2.chinadaily.com.cn/en/doc/2004-01/06/content\\_295915.htm](http://www2.chinadaily.com.cn/en/doc/2004-01/06/content_295915.htm) (discussing amendments to the nation's then decade-old Foreign Trade Law); *see also* Chinese Marketing & Communications, [http://www.china-britain.org/sistem\\_china/6\\_exporting.html](http://www.china-britain.org/sistem_china/6_exporting.html) (discussing the Chinese government move to dismantle the near monopoly on import-export rights previously enjoyed by a few state-owned firms).

<sup>215</sup> See generally Traffic Report: Online Piracy and Counterfeiting, MarkMonitor Inc. (Jan. 2011) [*hereinafter* *Traffic Report*], [http://www.markmonitor.com/download/report/MarkMonitor\\_-\\_Traffic\\_Report\\_110111.pdf](http://www.markmonitor.com/download/report/MarkMonitor_-_Traffic_Report_110111.pdf) (identifying a sample of rogue internet sites that are responsible for trafficking counterfeit and pirated goods); John Leyden, *Faking It: Internet Fuels Trade in Counterfeit Goods* (July 28, 2005 11:46 GMT), [http://www.theregister.co.uk/2005/07/28/gieschen\\_counterfeit\\_report/](http://www.theregister.co.uk/2005/07/28/gieschen_counterfeit_report/) (noting that in addition to entertainment, software, clothing and accessories, the internet is also widely used as a forum for selling forged financial and identification documentation).

<sup>216</sup> Scott M. Flicker & Hamilton Loeb, *Opening the Door to Freer Trade with China*, CHINA MATTERS (Hastings' Newsletter for Investing & Operating in the P.R.C.) Sept. 2006 [*hereinafter* *Hastings' Newsletter*], available at <http://www.paulhastings.com/assets/publications/571.pdf>.

<sup>217</sup> *Individuals to Get Import-Export Rights*, *supra* note 214.

<sup>218</sup> See *Pirates of the 21st Century*, *supra* note 167.

<sup>219</sup> *Id.*

<sup>220</sup> Interpol - First Global Congress on Combating Counterfeiting, The Impact And Scale of Counterfeiting (2004), <http://www.interpol.int/Public/News/2004/Factsheet51PR21.asp> (noting that 66% of counterfeit goods seized in Europe in 2002 came from Asia, Thailand and China in particular).

<sup>221</sup> See *Pirates of the 21st Century*, *supra* note 167.

become an increasingly popular tool for infringers.<sup>222</sup> The prevalence of the internet in the world's daily activities, combined with rapid download speeds, the perfection of digital copies, the boom in e-commerce and the complexity of policing online transactions,<sup>223</sup> has made trade in illegal goods<sup>224</sup> an operation capable of being run from the privacy of one's home.<sup>225</sup> Moreover, the policies of many sites (for example, auction sites like eBay) often create significant and frustrating hurdles<sup>226</sup> for IPR holders to quell rampant IP theft.<sup>227</sup>

Finally, China is actively engaged in free trade agreement ("FTA") negotiations with trading partners old and new to procure more flexible trade terms than those imposed by its membership under the WTO.<sup>228</sup> These

---

<sup>222</sup> *Traffic Report*, *supra* note 215, at 9 (noting that while counterfeiting and piracy in the physical world are serious problems, the issues are "growing at a significant rate online and pose unique challenges in remediation, due to the inherent nature of the internet with its global reach, cost efficiencies, and anonymity").

<sup>223</sup> *Id.*; B. C. Tan, *Anti-counterfeiting Initiatives: Internet Distribution*, WORLD-CHECK (2009), [http://www.world-check.com/media/d/content\\_industryvoices\\_reference/IndustryVoices\\_Jun09\\_v.1\\_18.6.09.pdf](http://www.world-check.com/media/d/content_industryvoices_reference/IndustryVoices_Jun09_v.1_18.6.09.pdf) (discussing how the low risks attributed to the high levels of anonymity result in ideal conditions for the sale of illegal goods over the internet; and pointing out that because a significant proportion of infringers distribute very small volumes of goods and because the number of small-scale vendors increases on a daily basis, the enforcement costs of taking action against every infringer will eventually become prohibitive).

<sup>224</sup> For example, a 2011 study of 10 major media brands identifying 43 unique sites as "digital piracy" centers found that the traffic generated to the sites was over 146 million visits per day, representing more than 53 billion visits per year. The combined traffic to 48 sites selling counterfeit goods identified in the study is more than 240,000 visits per day on average or more than 87 million visits per year. *Traffic Report*, *supra* note 215, at 5.

<sup>225</sup> Maura Kutner, *The Fight Against Fakes Online*, HARPER'S BAZAAR, Dec. 14, 2010, available at <http://www.harpersbazaar.com/fashion/fashion-articles/fight-against-fakes-online-0111> (discussing a young mother from a suburb of San Francisco who recently found herself in court for selling counterfeit handbags from her home via the internet).

<sup>226</sup> For instance, in 2004, Tiffany & Co. sued eBay for contributory trademark infringement after users were selling fake Tiffany wares on the site. In 2010, the 2nd U.S. Circuit Court of Appeals, agreeing with a 2008 lower court ruling that it was not eBay's job to monitor and prevent the sale of infringing products, said that eBay was not liable because, among other things, eBay will remove auctions of bogus goods "upon request." Global Intellectual Property Center, *Global Anti-Counterfeiting Efforts Set To Rise Further* (2010) [*hereinafter Global Anti-Counterfeiting Efforts*], <http://www.theglobalipcenter.com/news/global-anti-counterfeiting-efforts-set-rise-further>; see also David Kravets, *Appeals Court Sides With eBay in Tiffany Trademark Suit*, WIRED, Apr. 1, 2010 [*hereinafter Tiffany Trademark Suit*], available at <http://www.wired.com/threatlevel/2010/04/ebay-trademark-flap/> (discussing a similar legal battle that is playing out in the lower courts in a \$1 billion copyright lawsuit brought against Google by Viacom).

<sup>227</sup> See *Tiffany Trademark Suit*, *supra* note 226; see also *Global Anti-Counterfeiting Efforts*, *supra* note 226 (discussing that social networking sites such as Facebook are new outlets for such sales, as are virtual gaming worlds such as Second Life).

<sup>228</sup> See Yang Jiang, *China's Free Trade Agreements and Implications for the WTO* 5, paper presented at the Int'l Studies Ass'n 49th Annual Convention, BRIDGING MULTIPLE DIVIDES, Hilton S.F., S.F., CA, USA, Mar 26, 2008, available at [http://www.allacademic.com/meta/p250869\\_index.html](http://www.allacademic.com/meta/p250869_index.html) (noting that China lists the slow progress at the WTO as one of the reasons for its interest in FTAs and that it believes trade

include the lessening of quantitative restrictions, customs requirements, and other trade barriers for the importation of its goods.<sup>229</sup> While the primary aim of these efforts is firming up market access for legitimate Chinese goods,<sup>230</sup> the removal of impediments will likely also benefit the flow of illegal goods, as they too will enter countries with less scrutiny.<sup>231</sup> Moreover, once illegal goods enter these countries, they can then be transshipped to other countries,<sup>232</sup> attenuating the source of the infringement and making the potential for enforcement of IP rights less likely.<sup>233</sup>

## VIII. SEA CHANGE

As evidenced by the running mantras of "enforcement" and "cooperation" in the ACTA negotiations, there has been a switch in the position of industrialized countries, the U.S. in particular, from insisting on the availability of laws to the level of effectiveness of those laws.<sup>234</sup> Repeated threats of trade war by and against China,<sup>235</sup> the perpetual signing of bilateral agreements that go unenforced,<sup>236</sup> and the lack of clear and pronounced

---

liberalization among a small group of countries is easier to negotiate); *see also generally* Hastings' Newsletter, *supra* note 216.

<sup>229</sup> *Id.* at 207.

<sup>230</sup> *Id.*

<sup>231</sup> *See Pirates of the 21st Century*, *supra* note 167.

<sup>232</sup> For a discussion on transshipping practices, *see* Marian Ladner, *The Trials and Tribulations of Transshipping*, SHIPPING DIGEST, July 11, 2005, at 5, available at <http://ladnertradelaw.com/documents/publications/The%20Trials%20and%20Tribulations%20of%20Transshipping.pdf>; and for a discussion focusing on illegal transshipment practices, *see* Brian Murphy & Roy Delbyck, *What is Illegal Transshipment?*, HONG KONG LAWYER, Jan. 1999, at 24, available at [sunzi.lib.hku.hk/hkjo/view/15/1502346.pdf](http://sunzi.lib.hku.hk/hkjo/view/15/1502346.pdf).

<sup>233</sup> Informed Trade Int'l, *What is Transshipment?* (2007), <http://www.itintl.com/what-is-transshipment.html> (discussing transshipment as a commonly used tool to disguise the point of origin of goods from Customs officials); *see also* United Nations Office on Drugs and Crime, *A Transnational Organized Crime Threat Assessment 178* (2010), [http://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit\\_products.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit_products.pdf) (noting that Finding the source of any given counterfeit in the labyrinth of potential sources can be a daunting task).

<sup>234</sup> Endeshaw, *supra* note 127, at 305.

<sup>235</sup> China and the United States have participated in a continuous cycle of threats of sanctions, followed by negotiations, and resolutions. Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 335 (2006); *See, e.g.*, David H. Bernstein & Diane M. Glass, *The Great Wall of China: Is It Still Standing in Wake of New Trade Agreement?*, N.Y.L.J., May 15, 1995, at 51; Tiffany Brown, *U.S. Businessmen in China Welcome Copyrights Agreement*, AGENCE FR. PRESSE, Feb. 27, 1995, available in WESTLAW, ALLNEWS Database (noting that trade war could derail a planned one billion dollar auto assembly joint venture between the Shanghai Automotive Industry Corp. and both Ford and General Motors); *see also* Evelyn Iritani, *Boeing Likely Loser if U.S.-China Talks Fail*, L.A. TIMES, Feb. 24, 1995, at D1.

<sup>236</sup> *See US, China Sign Agreement, Trade War Averted*, DEUTSCHE PRESSE-AGENTUR, Feb. 26, 1995, LEXIS, World Library; *see also* A Lasting Trade Peace With China?, CHI. TRIB., Mar. 15, 1995, at 24 (reporting that China has made promises and signed agreements before, only to renege on them or fail to enforce them).

Chinese policies<sup>237</sup> seem to have become the norm. Therefore, before even reaching ACTA's substantive provisions, one has to wonder if China is among the "like minded" trading partners mentioned in ACTA's statement of purpose. The evidence suggests not, that is, to borrow a concept from contracts, there just doesn't seem to be a "meeting of the minds"<sup>238</sup> with China.

*A. Perception and the Bug in the Rug*<sup>239</sup>

Unlike in the U.S., IP protection in China today isn't *perceived* to be about the rights of authors, inventors, and entrepreneurs; rather, it is all about "economic development."<sup>240</sup> The need for major economic development and hence, the reason for China's individual perception of IP rights, was succinctly summarized by one observer:

Why does China need this super fast economic growth? While the country has made huge progress from the 1970s, when they had 250 million people living in extreme poverty, they still have 29 million or so who are barely subsisting. Additionally, the Chinese had a baby boom in the early 1960s and an echo boom in the early 1980s, creating demand for 25 million jobs or so a year, while the economy is only creating about 10 million per year.<sup>241</sup>

Additionally, despite the country's booming economic development in the past two decades, at the end of 2009, China had 35.97 million rural people living below the internationally recognized poverty line, and as many as 150

---

<sup>237</sup> Burton Levin, *On Taiwan: Why Rock the Boat?*, INT'L HERALD TRIB., June 19, 1995, at 8 (suggesting that "the Chinese cling to their secretive ways and tend to see conspiracy all around, particularly when the United States is involved.").

<sup>238</sup> Aaron Larson, *Contract Law - An Introduction*, ExpertLaw (2003), [http://www.expertlaw.com/library/business/contract\\_law.html](http://www.expertlaw.com/library/business/contract_law.html).

<sup>239</sup> The Bug in the Rug is an anecdote about changing one's perspective and seeing a preexisting situation completely anew. Birdonmyshoulder\*, *The Bug in the Rug*, EVERYTHING2 BLOG, <http://everything2.com/title/the+bug+in+the+rug>.

<sup>240</sup> See generally Andrew T. Pham, *IP Made in China - Real or Fake?*, INTELL. PROP. TODAY 30 (Dec. 2010), available at <http://www.iptoday.com/issues/2010/12/ip-made-in-china-real-or-fake.asp> (noting that consistent with its economic growth, IP in China is more about economic development than rights of innovators, which is unlikely to change in the near future); see also RICHARD BAUM, *BURYING MAO* 57 (1994) (discussing the post-1976 era in China and the idea of science and technology as "productive forces"); see also *Chinese Premier Meets U.S. Vice-President on Bilateral Ties*, XINHUA NEWS AGENCY, Mar. 13, 1995, LEXIS, News Library (containing the following statement by Premier Li to United States Vice-President Al Gore during the March 1995 environment conference in Berlin: "To China, the supreme conviction is to develop [the] economy, improve the living standards of the people and maintain a long stability . . . It is unrealistic and harmful to handle world affairs with the wills and requirements of a certain country or country blocs.").

<sup>241</sup> Posting of Jeff Bernstein, *China Update - Olympian Challenges*, to Urban Digs (Apr. 14, 2008, 07:52 EST), [http://www.urbandigs.com/2008/04/china\\_update\\_olympian\\_challeng.html](http://www.urbandigs.com/2008/04/china_update_olympian_challeng.html).

million Chinese were actually living on less than \$1.25 a day.<sup>242</sup> In addition, college graduates are not finding work.<sup>243</sup> Naturally, in light of these conditions, the PRC fears that any downturn in China's economic growth will result in social and political upheavals.<sup>244</sup>

### B. *From Cobwebs to Cables*<sup>245</sup>

As a result of the need for economic growth, China has developed some bad habits. One such habit stems from China's unprecedented receipt of foreign direct investment (FDI) from multi-national enterprises (MNE).<sup>246</sup> Generally speaking, when an MNE wants to set up shop in China, in addition to the capital that is injected, FDI often involves the transfer of patents, copyrights, trademarks and other forms of IP.<sup>247</sup> This IP is typically worth much more than the capital necessary to establish a physical plant.<sup>248</sup> In addition, MNEs often hire local scientists and engineers, teaching them how

---

<sup>242</sup> Jin Zhu, *China To Raise Poverty Line*, CHINA DAILY (Nov. 8, 2010), [http://www.chinadaily.com.cn/china/2010-10/28/content\\_11467561.htm](http://www.chinadaily.com.cn/china/2010-10/28/content_11467561.htm).

<sup>243</sup> In July, China's Ministry of Education revealed that over 25 percent, or roughly 1.5 million of the 6.3 million students who had graduated this year, were unemployed. Of those who graduated last year, 800,000 remained unemployed. In fact, according to the state-run *China Daily*, roughly one million graduates (termed "ant tribes" for their low social status, poor living conditions and frenzied job seeking) live in squalor on the outskirts of China's major cities, commuting into the cities daily to look for work. Zac Hambides, *China's Growing Army of Unemployed Graduates*, WORLD SOCIALIST (Oct. 4, 2010), <http://www.wsws.org/articles/2010/oct2010/chin-o04.shtml>; see also *Horde of Unemployed Worries Stability-Obsessed China*, CNBC (Dec. 17, 2008), <http://www.abs-cbnnews.com/business/12/17/08/horde-unemployed-worries-stability-obsessed-china>.

<sup>244</sup> See Andrew Marshall, *Asia Exits Crisis But Threat of Political Unrest Lingers*, JAKARTA GLOBE (Jan. 5, 2010), <http://www.thejakartaglobe.com/business/asia-exits-crisis-but-threat-of-political-unrest-lingers/350940> (noting that unemployment is a lagging indicator, and many political risk consultants are warning that 2010 may hold nasty surprises); see also Paul Maley, *China Could Face Political Unrest If It Fails To Prevent An Economic Slump*, THE AUSTRALIAN (Jan. 27, 2009), <http://www.theaustralian.com.au/news/danger-of-unrest-in-chinese-decline/story-e6frg6t6-111118673790> (noting that [the Communist Party's] big worry is large demonstrations about the lack of jobs).

<sup>245</sup> Habits are at first cobwebs, then cables. Spanish Proverb. QUOTATIONS ABOUT HABITS (2011), <http://www.quotegarden.com/habits.html>.

<sup>246</sup> China is far and away the largest recipient of FDI among developing countries and in fact, ranks third in the world, behind only the U.K. & the U.S. See *generally Rising FDI Into China: The Facts Behind The Numbers*, UNCTAD Investment Brief No. 2 (Jan. 4, 2007), [http://www.unctad.org/en/docs/iteiamic20075\\_en.pdf](http://www.unctad.org/en/docs/iteiamic20075_en.pdf); see also *Pirates of the 21st Century*, *supra* note 167.

<sup>247</sup> See 4 PETER K. YU, *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 192 (2007); see also *Pirates of the 21st Century*, *supra* note 167.

<sup>248</sup> See Kelvin King, *The Value of Intellectual Property, Intangible Assets and Goodwill*, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS VOL. 7, May 2002, at 245-8, available at <http://nopr.niscair.res.in/bitstream/123456789/4919/1/JIPR%207%283%29%20245-248.pdf>. An example is the value of the Coca-Cola trademark, which is worth many times more to the company than the millions of dollars in capital that it has invested in China; and the same holds true for the patents and copyrights owned by pharmaceutical and software companies doing business in China today. See *Pirates of the 21st Century*, *supra* note 167.

to use the company's patents and other forms of technology (see where this is going?).<sup>249</sup> Thus, while MNEs create a transfer of technology through FDI that is absorbed into China's legitimate economy, a significant amount of this IP is stolen and diverted into China's illegitimate economy.<sup>250</sup> Then, perpetuating the cycle of non-enforcement, MNEs fear retaliation to their businesses in China and avoid taking actions that might offend the Chinese government.<sup>251</sup>

Another bad habit supported by China's need for economic growth is its heavy reliance on counterfeiting and piracy to support local economies. The distribution of infringing goods takes place through a myriad of wholesale markets located throughout China, many of which are financed and established by local governments.<sup>252</sup> Retail and secondary-level wholesale distributors travel to these wholesale markets to order infringing goods that are then shipped to urban areas, rural locations, and overseas.<sup>253</sup>

The most notorious example of such an operation is the Yiwu, the location of the Zhejiang China Small Commodities City Group ("CSCCG" [?]), a wholesale market established with the aid of a ten million dollar

---

<sup>249</sup> See Sumon Kumar Bhaumik, Saul Estrin & Klaus E. Meyer, *Determinants of Employment Growth at MNEs: Evidence from Egypt, India, South Africa and Vietnam*, COMPARATIVE ECONOMIC STUDIES VOL. 49, Mar. 2007, at 61-80, available at [http://www.entrepreneur.com/tradejournals/article/162790053\\_3.html](http://www.entrepreneur.com/tradejournals/article/162790053_3.html); accord *Pirates of the 21st Century*, *supra* note 167.

<sup>250</sup> One such example is the Suzhou laser disc factory, which reportedly produced authorized copies for the California-based Microlink Systems during the day and produced pirated copies at night. Hays, *supra* note 95; see also Georgios A. Antonopoulos, Anqi Shen & Klaus von Lampe, *Cigarette Counterfeiting in the PRC*, NEWSL. NO. 55 (Int'l Inst. for Asian Studies, Leiden, Netherlands) Autumn/Winter 2010, at 8, available at [http://www.iias.nl/files/iias\\_nl55\\_08.pdf](http://www.iias.nl/files/iias_nl55_08.pdf) (noting the diverse set of venues used for the production of counterfeit cigarettes, including legitimate factories); accord *Pirates of the 21st Century*, *supra* note 167.

<sup>251</sup> See Andrew Mertha, *Putting Your Mouth Where Your Money Is: How U.S. Companies' Fear of Chinese Retaliation Influences U.S. Trade Policy*, in CHINA'S FOREIGN TRADE POLICY: THE NEW CONSTITUENCIES 59, 63 (Ka Zeng ed., 2007); see also *Pirates of the 21st Century*, *supra* note 167.

<sup>252</sup> See *The Wholesale Markets in China*, LI & FUNG RESEARCH CENTRE - 4 INDUSTRIAL CLUSTER SERIES 12 (May 2006), [http://www.idsgroup.com/profile/pdf/industry\\_series/LFIndustrial4.pdf](http://www.idsgroup.com/profile/pdf/industry_series/LFIndustrial4.pdf); see also *Pirates of the 21st Century*, *supra* note 167.

<sup>253</sup> Pirated and counterfeit items make their way to a seemingly endless network of ultimate sellers in China. For example, some products are sold by women who roam the streets with catalogues looking for customers and who can direct an interested potential buyer to a back alley warehouse where the items are sold. Similarly, CDs and DVDs are often sold on the streets of Chinese cities by teenage boys who make small pay-offs to the police. Hays, *supra* note 94.

Other operations are less mobile. In Shenzhen, e.g., where officers actually patrol for counterfeit items, and where indeed shop windows are devoid of counterfeits, pushy sales representatives approach every shopper and whisper what is really available in their stores. Customers can enter a special kiosk where a wall of dresses is pulled back, or handbags pushed aside, to reveal a library of catalogues featuring items that, if chosen, will be handed over in a room up a back staircase, behind a tattoo parlor, in a nearby warehouse, or for the ultra-unadventurous, back in the shop. *Mind games*, ECONOMIST, Nov. 10, 2007, at 82; see also *Pirates of the 21st Century*, *supra* note 167.

government investment.<sup>254</sup> With a total floor space of over 500,000 square meters containing over 24,000 booths and over 400,000 different varieties of items, the market is visited by about 200,000 people daily, who purchase an estimated two tons of goods per day.<sup>255</sup> It is estimated that about 80-90% of all goods offered for sale in Yiwu are IP-infringing goods.<sup>256</sup>

Not surprisingly, the CSCG has become essential to Yiwu's economy, accounting for nearly 26% of the entire tax revenue and becoming the single largest taxpayer in its municipality,<sup>257</sup> which is essential because it integrates the CSCG and the trade in infringing goods into the local economy, the taxes supporting a host of public services.<sup>258</sup> In addition, the illegitimate trade has given rise to a host of legitimate businesses that support it; for example, hotels, restaurants, night clubs, transportation companies, and warehouse and storage facilities all depend on the trade in counterfeit and pirated goods.<sup>259</sup> Thus, shutting down Yiwu's trade in IP-infringing goods would essentially result in shutting down the local economy.<sup>260</sup> Moreover, the resultant high levels of unemployment would likely lead to social chaos and unrest, which as mentioned *supra*, the PRC government fears more than anything else.<sup>261</sup> Finally, there are hundreds of other towns like Yiwu in China that depend upon the trade in IP-infringing goods to sustain the local economy; all told, there are likely millions, if not tens of millions, of people in China who depend directly or indirectly on such trade for their economic livelihood and survival.<sup>262</sup> Thus, of late it has become somewhat of a social statement to buy Shanzhai goods because they support workers and factories in China.<sup>263</sup>

Finally (and this list is non-exhaustive) a third bad habit supported by China's need for economic growth is local protectionism. After substantial efforts by both the U.S. government and industry lobbying groups, it appears that central level leaders understand the importance of protecting IP for promoting China's long-term economic development; however, central level

---

<sup>254</sup> See *The Wholesale Markets in China*, *supra* note 252; see also *Pirates of the 21st Century*, *supra* note 167; and Litke, *supra* note 95.

<sup>255</sup> See On China Commodity City, A City Based on the Market (2011), <http://en.onccc.com/yiwu/view1.htm>; and Litke, *supra* note 96; see also *The Wholesale Markets in China*, *supra* note 252; and *Pirates of the 21st Century*, *supra* note 167.

<sup>256</sup> See WILLIAM BERGH GAMBLE, FREEDOM: AMERICA'S COMPETITIVE ADVANTAGE IN THE GLOBAL MARKET 141 (2007) (referencing the research of Professor Daniel Chow).

<sup>257</sup> See *Pirates of the 21st Century*, *supra* note 167.

<sup>258</sup> *Id.*

<sup>259</sup> See *The Wholesale Markets in China*, *supra* note 252; and *Pirates of the 21st Century*, *supra* note 167.

<sup>260</sup> See *Pirates of the 21st Century*, *supra* note 167.

<sup>261</sup> See *Horde of Unemployed Worries Stability-Obsessed China*, CNBC (Dec. 17, 2008), <http://www.abs-cbnnews.com/business/12/17/08/horde-unemployed-worries-stability-obsessed-china>; accord *Pirates of the 21st Century*, *supra* note 167.

<sup>262</sup> See Report: Asian Counterfeits Hurting U.S. Companies (2007), <http://www.manufacturing.net/Asian-Counterfeits-Hurt-US.aspx?menuid=282>; and TED C. FISHMAN, CHINA INC. 235-8 (2005) and *Pirates of the 21st Century*, *supra* note 167.

<sup>263</sup> Hays, *supra* note 94.

authorities are legislative and policy-making bodies located in Beijing, and enforcement of the law occurs at the local level where commitments to suppressing IP theft are questionable.<sup>264</sup> As the Chinese proverb says, "heaven is high and the emperor is far away."<sup>265</sup>

In addition, local level leaders are evaluated by the economic performance of their local political units and because trade in IP-infringing goods can create a boom to the local economy, these leaders are often reluctant to shut down productive economic activity in which, as explained *supra* in the case of Yiwu, local government entities often have a direct financial interest.<sup>266</sup> Furthermore, former and current government officials and Party leaders who often own the large corporate conglomerates running wholesale markets are able to exert enough influence on local enforcement authorities to protect the flourishing trade in IP-infringing goods.<sup>267</sup> Moreover, local enforcement officials, prosecutors, and judges beholden to the local governments that appointed them likely face pressures to protect the local trade in such commodities.<sup>268</sup> According to one report, the odds of going to jail for counterfeiting or piracy are, "at most, 3 out of 100."<sup>269</sup>

## IX. ACTA FUTILITY

To be sure, it is not the purpose of this comment to suggest that ACTA is void of any good ideas. Nor is the intention of the comment to summarize ACTA's provisions ad nauseam. There are plenty of materials available that achieve those ends.<sup>270</sup> Rather, the aim of the discussion has been to propose that ACTA, as a treaty, is merely a promise to honor other promises, with a few additional promises. However, isn't there an implication in the making of a promise that it will be honored? Is it at all realistic to think that a promise intended to secure the honoring of previous promises gone un-honored will be honored (read that again slowly; it really does make sense)? Framed in such a manner, the absurdity of the reasoning hopefully becomes apparent. In short, it is not the substance of ACTA that is questionable (though there are ample opinions to the contrary<sup>271</sup>), but rather the logic on which its creation is premised.

---

<sup>264</sup> See *Pirates of the 21st Century*, *supra* note 167.

<sup>265</sup> Hennessey, *supra* note 115, at 1292.

<sup>266</sup> See *Pirates of the 21st Century*, *supra* note 167.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Willi Paul, *Throwing Away Our R&D: Counterfeiting in China*, SUSTAIN LANE BLOG (May 28, 2010), <http://www.sustainlane.com/reviews/throwing-away-our-r-d-counterfeiting-in-china/V7RBSHQV43HWORHA44BHAZLUWBRN>.

<sup>270</sup> For an overview of ACTA's April 2010 Predecisional/Deliberative Draft's key provisions, see Fellmeth, *supra* note 72; for more detailed analyses, see generally Kaminski, *supra* note 52, at 247; and Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales Of A Treaty*, 46 HOUS. L. REV. 1235 (2009).

<sup>271</sup> Most commentators take issue with ACTA on human rights grounds, positing that the effects, though directed to cure infringement problems like those of China's, will fall primarily on innocent consumers. See, e.g., Danny O'Brien, *Blogging ACTA Across the*



Thus, the final section will expound upon what commentators have duly noted, that is, that China has and will continue to develop its laws on its own terms despite the "confrontationist"<sup>272</sup> approaches of more developed nations and the imposition of IP law "at gunpoint."<sup>273</sup>

#### A. *Le Monde Tremblera*<sup>274</sup>

In a perfect world, the nations of the globe would have developed socially and economically at an equal pace, and along similar ideological lines. That unfortunately is not how things have shaken down. No matter, there is still hope for an international scheme in which the rights and privileges of respective powers are both respected and enforced, and China in due time, will likely follow suit with the ideals of its neighbors, if for no other reason than its own self-interest.

Long the workshop of the world,<sup>275</sup> China aspires to be the brains as well.<sup>276</sup> Driven by its concern for economic development, China has focused

---

Globe: Lessons From Korea, Electronic Frontier Foundation (Jan. 29, 2010), <http://www.eff.org/deeplinks/2010/01/acta-and-korea> (expressing concerns that ACTA risks undercutting the principle of the rule of law and discussing possible conflicts with human rights); and Claudio Brenni, *The Anti-Counterfeiting Trade Agreement (ACTA): A New Obstacle to Human Rights?*, 3D Three (June 2010), [http://www.3dthree.org/pdf\\_3D/201006ACTAInformationnote.pdf](http://www.3dthree.org/pdf_3D/201006ACTAInformationnote.pdf) (hating on ACTA in a major way, calling it the emblem of the maximum protection approach of IP rights through the use of offensive implementing strategies); and for a bizarre, hysterical and dramatic visual depiction of the horrors that ACTA holds in store for the world, see Posting of Ramenlover7000, *ACTA - Destroying Your Rights Since 2010*, YouTube (Aug. 22, 2010), <http://www.youtube.com/watch?v=BRttJJ18Spw>; but for a more civilized discussion of possible negative ACTA implications, see Kaminski, *supra* note 52, at 250 (positing that ACTA represents a form of "international bullying" that attempts to impose "IP maximalism" from the top down, rather than letting individual countries choose appropriate levels of sanctions and protection).

<sup>272</sup> U.S. *Intellectual Property Talks "Frank and Businesslike,"* AUSTL. FIN. REV., Feb. 24, 1995, available in LEXIS, World Library, TXTLNE File.

<sup>273</sup> See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30-55 (Stanford Univ. Press 1995); and for an account by an author who studied twenty international crises between 1905 and 1971, see Russell J. Leng & Hugh G. Wheeler, *Influence Strategies, Success, and War*, 23 J. CONFLICT RESOL. 655, 681 (1979) (noting that "an assertive, bullying, strategy is both less effective and more risky than much of the folklore of power policies would have it").

<sup>274</sup> Although accounts vary, Napoleon Bonaparte, upon visiting St. Helena in 1816, is said to have pointed to China while surveying a map saying, "China is a sickly, sleeping giant. But when she awakes the world will tremble." WILLIAM SAFIRE, *SAFIRE'S POLITICAL DICTIONARY* 666 (Oxford Univ. Press 2008) (1968). Behold. She stirreth.

<sup>275</sup> See generally *Battle of Ideas*, *supra* note 41; see also Karen E. Klein, *Outsourcing in China Today*, BUS. WEEK ONLINE, Oct. 15, 2007, at 24, available at [http://www.businessweek.com/smallbiz/content/oct2007/sb20071015\\_563438.htm](http://www.businessweek.com/smallbiz/content/oct2007/sb20071015_563438.htm) (positing that anybody looking to grow a long-term business has to look at China as a sourcing option).

<sup>276</sup> *Battle of Ideas*, *supra* note 41.

its attention on patents as the engine of technological development.<sup>277</sup> Even as far back as April 1, 1985, (the first day the Chinese Patent Office opened) 3,455 patent applications were filed - apparently a world record.<sup>278</sup> More recently, in 2006, the Chinese government set ambitious goals for China to become an "innovative nation" and to reduce reliance on foreign technology to below thirty percent.<sup>279</sup> Reflective of this goal, the number of patent applications in China is expected to surpass the number of applications in both the U.S. and Japan in 2011.<sup>280</sup> Chinese firms are increasingly seeking patents abroad, a sign that they plan to protect their technology when exporting it.<sup>281</sup> This is the result of government officials' realization that no one will create anything without some guarantee of protection.<sup>282</sup> And protect they will, as evidenced by recent infringement cases by Chinese companies against foreign firms.<sup>283</sup>

Still, many point to the pervasive, yet rarely articulated belief among Chinese officials that China can protect and enforce IP rights in high-tech industries while completely ignoring the counterfeiting of luxury brands or piracy in media industries.<sup>284</sup> To these officials, "uneven development" is a positive virtue,<sup>285</sup> and IP protection is just an engine of economic

---

<sup>277</sup> See Ronald S. Fernando, *Understanding Judicial Patent Enforcement in China*, CHINA PAT. & TRADEMARKS, Apr. 2008, at 24, 25-27 (noting the efficacy of patent enforcement in China).

<sup>278</sup> PING LIN & JING A. ZHANG, R&D INCENTIVES, INDUSTRIAL STRUCTURE AND TECHNOLOGY TRANSFER IN CHINA'S SCIENCE AND TECHNOLOGY SECTOR AND THE FORCES OF GLOBALISATION 47, 49 (Elspeth Thomson & Jon Sigurdson eds., 2008).

<sup>279</sup> *China Sets Goal for Developing Science, Technology in 15 Years*, PEOPLE'S DAILY ONLINE (Feb. 9, 2009), [http://english.peopledaily.com.cn/200602/09/eng20060209\\_241328.html](http://english.peopledaily.com.cn/200602/09/eng20060209_241328.html); see also *Battle of Ideas*, *supra* note 41 (noting that "since 2006 it has pursued a deliberate policy of gathering as many patents as possible and developing home-grown technologies—not least because Chinese companies pay around \$2 billion a year in licensing and royalties to American firms alone, according to America's Bureau of Economic Analysis").

<sup>280</sup> *Annual Number of Chinese Patent Apps of Surpass Japan and U.S.*, People's Daily Online (Oct. 28, 2010), <http://english.peopledaily.com.cn/90001/90778/90862/7180676.html>.

<sup>281</sup> *Battle of Ideas*, *supra* note 41 (noting the rise in patents won in America by Chinese firms from 90 in 1999 to 1,225 in 2008).

<sup>282</sup> *Mind Games*, *supra* note 253.

<sup>283</sup> See Freshfields Bruckhaus Deringer, *Largest Damages Award for Patent Infringement*, Int'l Law Office (Dec. 15, 2008), <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=0b0a92e6-3305-4d9a-8469-02ee61a0db79>; see also Brad Lou, *Zhejiang Courts Making a Mark on China's IP Law*, CHINA BUS. LAW BLOG (Feb. 18, 2009), <http://chinabusinesslaw.blogspot.com/2009/02/zhejiang-courts-making-mark-on-chinas.html>; see also Dr Kening Li, *China's New Strategy Puts Intellectual Property First* (2009), <http://www.out-law.com/page-10472> (observing that China became the most litigious country in 2005 for IP cases, surpassing the U.S. and advising that "foreign companies should be prepared to face substantial new global and domestic competition from the growing output of China's increasingly well-subsidized and well-supported IP generators").

<sup>284</sup> Hennessey, *supra* note 115, at 1289.

<sup>285</sup> See, e.g., Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT 173, 220 (Daniel J. Gervais ed.,

development that can run with some of its "working parts" missing.<sup>286</sup> However, it is worth remembering that the U.S. was the great IP rights infringer when it was a developing country in the 18th century.<sup>287</sup> The difference is just one of degree; that is, the development of a global economy<sup>288</sup> and the surge in global population make the effects of infringement more pronounced.

In any event, although China is a little "patent heavy" in its focus, it is still good news for the rest of the world because as one commentator noted, "countries that create IP eventually enforce it as well."<sup>289</sup> For example, in former copycat countries like Japan, Hong Kong, South Korea and Taiwan, infringers were put out of business when their activities began to threaten legitimate domestic producers of clothes and other goods.<sup>290</sup> Thus, it is reasonable to conclude that when legitimate Chinese companies are producing the world's favorite handbags and cell phones, laws will be better enforced to protect them.<sup>291</sup>

Finally, as IP continues to assume a more prevalent place among China's priorities, China's laws will likely develop accordingly. For example, in 2008, China's top legislature approved a revision of the Patent Law, which made a number of amendments to the patent application process and expanded patent protection.<sup>292</sup> Specifically, the revision included the adoption of a so-called "absolute novelty" standard that is applied internationally and requires Chinese patent examiners to consider public use evidence both domestically and abroad when processing applications.<sup>293</sup> In addition, the law for the first time contains a provision that the People's Court can fine infringers between \$1,500 and \$150,000 when damages cannot be specifically identified.<sup>294</sup> Other areas of reform include China's new PRC Tort Liability Law, which for the first time determines through definitive rules the responsibility of network service providers regarding online infringement matters.<sup>295</sup> Specifically, the scope of application of the "Notice and Take

---

2007) (noting that China's uneven development is a factor in making China's crossover to self-interested IP enforcement difficult to predict).

<sup>286</sup> Hennessey, *supra* note 115, at 1297.

<sup>287</sup> See Johns, *supra* note 41.

<sup>288</sup> For an explanation of the magnitude of the global economy, see Economy Watch (2011), [http://www.economywatch.com/world\\_economy/world-economic-indicators/global-economy/define-global-economy.html](http://www.economywatch.com/world_economy/world-economic-indicators/global-economy/define-global-economy.html).

<sup>289</sup> *Battle of Ideas*, *supra* note 41 (quoting Dominique Guellec of the Organization for Economic Cooperation and Development (OECD)).

<sup>290</sup> *Handbags at Dawn*, *ECONOMIST*, Apr. 21, 2006, at 24.

<sup>291</sup> *Id.*

<sup>292</sup> Tuo Yannan, *New China Patent Law is Unveiled*, *CHINA DAILY*, Feb. 9, 2009 at 9, available at [http://www.chinadaily.com.cn/bw/200902/09/content\\_7455384.htm](http://www.chinadaily.com.cn/bw/200902/09/content_7455384.htm).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Tort Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) 2009 China Law LEXIS 668 [*hereinafter P.R.C. Tort Law*]; Yang Xun, *Online Accountability*, *CHINA L. & PRAC.*, Jun. 2010,

Down" rule, which mirrors the "Notice and Take Down" rule under the U.S. Digital Millennium Copyright Act,<sup>296</sup> is expanded from copyright infringement to all types of rights, including trademark, patent, and privacy.<sup>297</sup> Under the new law, even if no notice is received, network service providers may be found liable if the aggrieved party can prove that the providers knew that the infringement had taken place but failed to take necessary measures.<sup>298</sup> In short, legal developments like these evince a sense of confidence that China can and will take steps necessary for the protection of IP rights as those rights become increasingly important to China's economic development.

Therefore, as Chinese companies continue to develop their own patents, copyrights and trademarks and seek to protect them both inside and outside China, the nation as a whole will likely become more sensitive to the protection and enforcement of IP rights.<sup>299</sup>

## X. CONCLUSION

As long as valuable property exists, there will be those willing to steal it; accordingly, as long as IP remains a valuable asset, which it most certainly will, there will be counterfeiters and pirates. Moreover, as long as Johnny Depp is alive, there will likely be more Pirates of the Caribbean movies, but that is a discussion for another day.

IP protection is a constant game of cat-and-mouse. Frustrating as that is, the evidence suggests that the more developed economies are going to have to grin and bear it for the time being. As China's economic progress continues, it may actually end up being the Chinese that define the rules of IP enforcement.

As for ACTA, while it has some new potentially beneficial features, it would be unfortunate if those features translate into burdens for the mostly-law-abiding citizens of the world as some suggest, because indeed, it is virtually certain that ACTA's effects are intended to be felt by China, one way or the other. It might as well be called ACCTA (the Anti-Chinese-Counterfeiting Trade Agreement).

Therefore, ACTA will most definitely be useless without the ultimate cooperation of China, and only marginally effective with its cooperation. Cooperation is a relative term. After all, China is, for all purposes, a cooperating member of other pro-IP agreements. Moreover, if ACTA were really intended for "like-minded trading partners," it would certainly miss its

---

at 2 (discussing the law as it applies to the liability of network service providers regarding online infringement matters).

<sup>296</sup> See Digital Millennium Copyright Act, 512(c), 17 U.S.C. §§ 1201-1205 (2000) (providing that upon receiving proper notification of claimed infringement, the internet service provider must expeditiously take down or block access to the material).

<sup>297</sup> P.R.C. *Tort Law*, *supra* note 295; see generally Yang Xun, *supra* note 295.

<sup>298</sup> P.R.C. *Tort Law*, *supra* note 295; see generally Yang Xun, *supra* note 295.

<sup>299</sup> *The Boot is on the Other Foot*, *ECONOMIST*, Apr. 1, 2006, at 55-6.

mark because China's "mind" is not "like" those of its Western neighbors, as its unique and brilliant history illustrates.

In any event, it's highly unlikely that the Chinese will hold a grudge for not being involved in the big ACTA roll-out or for not being made privy to its provisions. Is there really any question that they don't have a nice counterfeit copy by now?

**结束**