Exploring China’s Copyright Criminal Enforcement System
--Using Relevant Provisions of Major International Conventions as a Reference

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Abstract
In this manuscript, relevant terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Anti-Counterfeiting Trade Agreement (ACTA), and the Trans-Pacific Partnership (TPP) addressing the criminal law enforcement of copyright are taken as points of reference. Comments and suggestions are made regarding the current criminal law enforcement system that exists in China, with the aim of revealing how the system can be improved.

Keywords
Criminal Enforcement; Copyright; TRIPS; ACTA; TPP.

1. Introduction
Criminal sanctions are generally the final resort for authorities seeking to protect copyright. As the most severe form of enforcement, the criminal law is a double-edged sword. On one hand, it acts as an effective deterrent to copyright infringement, which other sanctions are unable to replicate. For this reason, whether in international conventions or in the domestic law of countries around the world, criminal enforcement of copyright exists in various forms. On the other hand, the overly-broad application of the criminal law may not only increase the cost of law enforcement, but also infringe citizens’ property rights as well as their personal rights. This represents a departure from the purpose underlying the creation of copyright law. Therefore, the question of how to appropriately apply the criminal law in theory and in practice remains unresolved.

In this paper, relevant terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Anti-Counterfeiting Trade Agreement (ACTA), and the Trans-Pacific Partnership (TPP) addressing the criminal law enforcement related to copyright are taken as points of reference. Comments and suggestions are made regarding the current criminal law enforcement system that exists in China, with the aim of revealing how the system can be improved.

2. Relevant provisions concerning criminal law enforcement related to copyright in international conventions
2.1. “Commercial scale”
2.1.1. “Commercial scale” in TRIPS
According to the criminal procedure provisions in Article 61 of TRIPS, members shall provide for criminal procedures and penalties to be applied at least in cases of copyright piracy on a “commercial scale”; however, the term “commercial scale” is not defined. Due to this ambiguity, member countries have enacted domestic laws in accordance with their own understanding of the term, resulting in national differences in the wording of statutory rules. China and the
United States differ in their interpretation of “commercial scale.” For this reason, in April 2007, the United States submitted a complaint to the World Trade Organization’s (WTO) dispute settlement body regarding China’s criminal measures in respect of the protection of intellectual property rights. In the WTO’s resulting report, it defined the term “commercial scale” as requiring a consideration of both the qualitative word “commercial” and the quantitative word “scale.”[1] Exploring other terms found within TRIPS[2], however, such as “can effectively contain,” the term “commercial scale” still remains imprecise. The definition has a different meaning with respect to different forms of trademark counterfeiting and copyright privacy, and its application depends on the specific conditions of commodities and markets. [3] For this reason, China won the Sino-US dispute of 2007 on the threshold of criminal protection.

The definition of “commercial scale” is not found within the text of TRIPS, but can be discerned from the WTO’s expert report that TRIPS acknowledges the differences among various countries in terms of market and economic development, and allows countries to enact different standards and regulations with regard to the term “commercial scale” in compliance with their own national conditions and domestic criminal law system. However, in subsequent international treaty negotiations on the subject of intellectual property, the United States has remained committed to the same opinions that it advanced in the 2007 WTO Sino-US dispute.

2.1.2. “Commercial scale” in ACTA

The final text of ACTA Paragraph 1 of Article 23 specifies that, “for the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.” Here, the term “at least” provides a minimum standard for assessing “commercial scale.” This means that the criteria of being “carried out as commercial activities for direct or indirect economic or commercial advantage” are the basic elements that must be considered by various countries in assessing whether acts are carried out on a commercial scale. The fact that ACTA defines “commercial scale” as including “basic elements” as well as “other elements” (rather than defining commercial activities as the only element required) permits legislators in ACTA member countries to specify what constitutes a “commercial scale” according to their level of domestic economic development and the size of the commodity market. For example, if a country specifies that the “commercial scale” assessment is determined by two elements, including “acts carried out on a scale exceeding a specific amount,” this also complies with ACTA. It can be seen that ACTA provides a partial explanation of “commercial scale”, but remains compliant with the relevant provisions of TRIPS while providing freedom for member countries to enact laws in accordance with national conditions.

2.1.3. “Commercial scale” in the TPP

In Article 18.77 of the TPP on “Criminal Procedures and Penalties,” Paragraph 1 specifies that each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale, and then provides an explanation of “commercial scale.” This provision differs from those of TRIPS and ACTA in two ways:

① The scope of criminal protection is expanded. The TPP specifies the same scope of criminal protection that is found in ACTA[4], and changes “criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy” in Article 61 of TRIPS to “criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights.” This change renders compulsory the TRIPS provision allowing members the discretion to choose whether or not to provide for criminal sanctions in cases of privacy infringement, and means that members do not have the option of
excluding this requirement from their domestic laws. This represents a radical expansion of the scope of criminal protection.

② “Commercial scope” is expressly defined. According to Paragraph 1 of Article 18.77 in the TPP, the term “commercial scope” includes at least: (i) acts carried out for commercial advantage or financial gain; and (ii) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright or related rights holder in relation to the marketplace. Based on the explanation the TPP provides with regard to “commercial scope,” the subjective aspect in the constitutive elements of crime is not only limited to acts carried out “for commercial advantage or financial gain,”[5] but also includes those “not carried out for commercial advantage or financial gain.” This provision not only compresses the elastic space wherein the contracting parties have the discretion to define “commercial scope” according their domestic market, but also further expands the scope of crimes and raise the threshold for criminal protection.

2.2. Criminal procedures and penalties for unauthorized copying of cinematographic works

TRIPS includes no provision addressing acts of unauthorized copying of cinematographic works. Paragraph 3 of Article 23 of ACTA specifies that a party “may” provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public. The agreement uses the word “may,” so it is clear that this is not a compulsory term, and that members are allowed to choose whether to apply it. However, the discretion to choose whether to apply this provision has been replaced by a compulsory term in the TPP. According to the provisions in Paragraph 4 of Article 18.77 of the TPP, recognizing the need to address the unauthorized copying of a cinematographic work from a performance in a movie theatre that causes significant harm to a right holder in the market for that work, and recognizing the need to deter such harm, each Party “should” adopt or maintain criminal procedures and penalties for the unauthorized copying of cinematographic works.

TRIPS does not comment on the need for criminal procedures and penalties for unauthorized copying of cinematographic works, whereas ACTA contains compulsory provisions on this issue, and the TPP modifies those compulsory provisions. It can be seen that developed countries have begun to seek criminal sanctions for the unauthorized copying of cinematographic works so as to crack down on such acts. The compulsory provisions in the TPP reflect the lobbying efforts of special interest groups from the United States. On the other hand, the specification of sanctions for the unauthorized copying of cinematographic works also increases the types of intellectual property crimes that fall within the scope of these provisions, which further expands the scope of criminal protection of intellectual property.

2.3. Standard of criminal penalties and remedies

Comparing TRIPS, ACTA, and the TPP with respect to the standard of criminal penalties, the three deals expressly mention penalties “sufficient to provide a deterrent” and “[consistent] with the level of penalties applied for crimes of a corresponding gravity.” With regard to remedies, the deals all include the remedial measures of criminal law enforcement, such as imprisonment, monetary fines, seizure, forfeiture, and destruction.[6] On the whole, however, there is no clear statement in TRIPS about what kind of criminal penalty is to be used in specific circumstances, and the term “in appropriate cases” in Article 61 seems ambiguous. This creates problems for the application of these provisions by members. ACTA and the TPP, however, include express provisions. Article 25 of ACTA specifies that competent authorities may seize, render forfeit, and/or destroy indirect or indirect interests obtained through infringing activities [7], and may seize and render forfeit the assets equivalent to the interests obtained
through infringing activities[8]; if seizure is ordered, the description of the goods to be seized is required to include only the information necessary to identify them for the purposes of seizure [9]; and the principle of not compensating the infringer is established [10]. Paragraph 6 of Article 18.77 of the TPP expressly specifies the standard of criminal penalties and remedies to be applied for the infringement in seven specific cases. In addition, the cases where judicial authorities have the authority to order the forfeiture or destruction of relevant goods are specified, and, in exceptional cases where counterfeit trademarked goods and pirated copyrighted goods are not destroyed, the measures that judicial or other competent authorities may take are specified.

As can be seen, compared with the provisions regarding relevant principles, there are more express provisions and explanations regarding the standard of criminal procedures and remedies in ACTA and the TPP, such that these international conventions have stronger enforceability.

3. Commentary on the current criminal enforcement system of Copyright of China

3.1. Relevant provisions that comply with international conventions

3.1.1. Legal provisions about “commercial scale”

With regard to the definition of “commercial scale” in Chinese domestic law, there are a number of provisions setting out crimes related to copyright.

With respect to copyright, two crimes are set out in the Criminal Law, including the crime of infringing copyright [11] and the crime of selling works reproduced by infringing a copyright [12]. Here, the expression “for the purpose of profit” is used to reflect the requirement of “commercial” activity. And this expression is remained under the Amendment (XI) to the Criminal Law which was enforced on March 1st, 2021. In the judicial interpretation of 2011, [13] the term “for the purpose of profit” is expanded upon, specifying that, except for the term “sell,” other circumstances such as placing advertisements, charging a member registration fee, and seeking profits using others’ works also fall within the scope of the term “for the purpose of profit.” On the other hand, the Criminal Law and relevant jurisprudence [14] also expand on the term “scale” in terms of the quantity of works reproduced by infringing on the copyright, the amount of illegal turnover, incidences of online communication, and the number of registered members.

In sum, in China’s legislative system, there are provisions governing the use of the term “commercial,” such as “for the purpose of profit,” “sell,” and “operate,” as well as limitations on “scale” and on the “amount standard” that must be reached for a conviction. The combination of these two elements informs the interpretation of “commercial scale” in China’s legislative system.

3.1.2. Relevant provisions concerning the standard of criminal penalties and remedies

The crime of pirating copyrighted works have been the subjects of severe crackdowns in China. In recent years, China has lowered the threshold for obtaining convictions for the crime of pirated copyright[15], and has enacted more severe criminal penalties for copyright piracy compared with patent crimes. Current penalties for such crimes in China include fixed-term imprisonment, criminal detention, public surveillance, and monetary fines. On the whole, these penalties meet the requirement of TRIPS. Clear provisions regarding specific applicable cases do not exist within ACTA and the TPP, but local laws and administrative laws at all levels confer upon competent authorities in charge of copyright the powers of ordering investigations, seizure, and imposing penalties. In general, these provisions are consistent with China’s law punishing the crime of copyright infringing.
3.2. **The need for improvements to parts of the current framework in China**

The Criminal Law of China does not yet include provisions setting out criminal offences and penalties for the act of unauthorized copying of cinematographic works in a movie theater, and there is still no case on the matter of criminal penalties for the act of unauthorized copying of cinematographic works in mainland China. However, Article 48 of the Copyright Law specifies that criminal liability can be imposed for copying works protected by copyright without consent, which provides a legislative basis for assessing criminal liability for copying cinematographic works. The Film Industry Promotion Law of the PRC provides that “whoever violates provisions of the law and constitute a crime shall be investigated for criminal liability.” However, there is no provision for assessing criminal liability for the act of copying cinematographic works in the current Criminal Law of China. For this reason, there is no clear law addressing the extent and scope of the crime of copying cinematographic works.

4. **Recommendations for the Copyright Criminal Enforcement in China**

As the harshest recourse and the method of last resort, criminal law procedure can only be applied where other methods of social governing prove inadequate. It is the same with copyright. If civil and administrative procedures can provide adequate and efficient relief, there is no need to employ criminal procedure and protection in the context of copyright. When designing a system of criminal law enforcement, a country should not blindly expand the application and scope of criminal procedure or raise the level of criminal punishment to comply with new international agreements. As a developing country, on the basis of its national conditions, China should take its economic, technological, and cultural development into account in order to achieve the basic goal of implementing “minimum standards of protection” in the copyright protection through the criminal law. At the same time, the relevant clauses of international agreements can provide inspiration for China to improve its current system of copyright criminal enforcement. In practice, China can establish its own domestic criminal system with Chinese characteristics and make appropriate decisions with regard to law and policy.

4.1. **Adherence to the “Commercial Scale” Reflected in the Current Legal System**

As noted earlier, Chinese criminal protection and punishment regulations concerning copyright include not only qualitative “commercial” rules, but also quantitative “scale” rules. The combination of “commercial” and “scale” rules together constitute the explanation of Chinese law regarding “commercial scale.” Some scholars propose that the subjective condition “for lucrative purpose” should be abolished when confirming copyright infringement, and that a penalty structure that places equal emphasis on “freedom punishment and fine punishment” should be implemented.[18] However, once the condition “for lucrative purpose” is abolished, the explanation that Chinese law provides with regard to the term “commercial scale” will lack qualitative definition. This thesis argues that China should adhere to the relevant provisions stipulating that commercial activity in a copyright crime must reach a certain quantity and scale, which complies with the international standards established by TRIPS, the verdict rendered by the WTO expert panel, and the regulations of ACTA and the TPP.

4.2. **Pirating Movies is Excluded from Criminal Protection System**

At the beginning, TRIPS made no stipulation that pirating movies should face punishment. Later, non-mandatory provisions and compulsory provisions related to pirating movies were included in ACTA and the TPP, which reflects the fact that the international community is paying increasing attention to the harms of pirating movies.
While some scholars posit that China should seize the opportunity to enact the Motion Picture Industry Promotion Law or resort to an amendment to its Criminal Law to intensify criminal punishment against pirating[19], this thesis argues that China is restricted by limited resources in terms of law enforcement and a laggard judiciary, such that making pirating movies a crime would not reflect the current reality. In addition, pirating movies can be governed according to the right of reproduction in the Copyright Law. As a result, once the illegal gains of pirating movies reach 30,000 yuan, the illegal turnover reaches 50,000 yuan, or the number of works reproduced exceeds 1,000, the individual can be prosecuted irrespective of any other charge in the Criminal Law. Of course, China should learn from members of the international community that have enacted laws governing the pirating of movies. The mechanism of providing administrative protection instead of criminal protection for movies to curtail piracy in cinemas is an issue worthy of consideration for China.

5. Conclusion

In TRIPS, ACTA, and the TPP, we have witnessed a tendency to transform specified principles into concrete measures in terms of the criminal law enforcement of copyright. The requirements of criminal enforcement in international agreements have changed from “soft law” to “hard law,” as an emphasis has been placed on the effective implementation of the regime, in addition to strengthening the requirements to which domestic laws must adhere. As mentioned earlier, in terms of the protection of copyright by means of criminal law, the law in China meets the requirements and standards set out in TRIPS. With regard to the provisions of the TPP that might expand the scope of Chinese criminal protection, China should account for national conditions, reserving or borrowing those provisions to address the concern that criminal punishment against copyright crimes represents a high level of copyright protection, and exercise appropriate restraint in its application of punishments.

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References

[4] Refer to Paragraph 1 of Article 23 in ACTA: “Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.”
[15] The minimum standard for criminal prosecution of copyright crime is adjusted to illegal gain RMB 30,000 or illegal turnover RMB 50,000 or more than 10000 copies of works from illegal gain RMB 50,000 or illegal turnover RMB 200,000.
[16] Article 56 of Film Industry Promotion Law of PRC.