

Research on the Improvement of Criminal Judicial Protection for Intellectual Property in China

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Abstract

Strengthening the rule of law for intellectual property is an important path to promote the Chinese-style modernization. Criminal judicial protection of intellectual property is an important aspect of the rule of law for intellectual property rights. Through the case analysis in practice, there are many predicaments in criminal judicial protection of intellectual property. By combining the basic national conditions and objective development in China, this paper puts forward specific ways to improve criminal judicial protection of intellectual property, such as improving criminal laws and regulations of intellectual property and exploring centralized jurisdiction of criminal investigation.

Key words: Intellectual property; Criminal justice; Judicial protection

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1. INTRODUCTION

Intellectual property has covered the results of all human intellectual creation and carried out the progress of technology and the display of creativity. With the development of knowledge economy and economic globalization, intellectual property rights have increasingly become the core element of strategic resources and international competitiveness of national development.

Additionally, it is an important support for building an innovative country and a key to mastering the initiative of development.¹ It requires the countries who rely more on intellectual property to pay more attention to the impact of the possible flaws of intellectual property protection on their political and economic development. In the process of building the community of human destiny, the 19th National Congress of the Communist Party of China clearly proposed to strengthen the creation, protection and application of intellectual property rights. Chairman Xi has repeatedly emphasized the importance of intellectual property protection.² Premier Li Keqiang promised that China will strictly protect intellectual property, never allow mandatorily transfer technology (Wang and Wang, 2018). The report of the 20th National Congress further pointed out that it is necessary to strengthen the legal protection of intellectual property rights.

However, in reality, the problems of infringement in the field of intellectual property, such as multiple infringement, easy occurrence, long period of rights protection, difficulty in obtaining evidence and low income have not been solved well. Criminal judicial protection of intellectual property rights is even more difficult. There are three main ways to protect intellectual property rights in China, Civil litigation, administrative

¹ See the preface of “the National Outline of Intellectual Property Rights”.

² While presiding over the 16th meeting of the Central Leading Group for Financial and Economic Affairs, President Xi Jinping stressed that protection of property rights, especially intellectual property rights, is an important aspect in shaping a sound business environment. In his keynote speech at the opening ceremony of the Boao Forum for Asia Annual Conference 2018, he pointed out that strengthening intellectual property protection is the most important part of improving the property rights protection system, as well as the biggest incentive to improve China’s economic competitiveness. And in his speech at the 2018 G20 Summit, he reiterated that China will continue to deepen market-oriented reforms, protect property rights and intellectual property rights, encourage fair competition, and take the initiative to expand imports.

procedures and criminal sanctions. Among them, criminal protection is the most severe intellectual property protection model, and it is also the last judicial defense line. Therefore, it is necessary to analyze the main dilemmas existing in criminal judicial protection for intellectual property in China and explore ways to improve them in order to integrate into the new era of international economic and trade development situation, promote the overall improvement of the national intellectual property protection environment.

2. THE ENVIRONMENT AND PROBLEMS OF CRIMINAL JUDICIAL PROTECTION FOR INTELLECTUAL PROPERTY IN CHINA

2.1 The Environment of Criminal Judicial Protection for Intellectual Property

The century-old history of the intellectual property system in China is a history of legal change from “forcing me” to “working for me”. And it is also a history of policy development from passive transplant to active creation (Wu, 2009). The first stage of criminal judicial protection of intellectual property was from 1992 to 1997, before the adoption of the new Criminal Law, which established a criminal judicial protection mechanism for intellectual property in China. In the second stage, from the revision of the Criminal Law in 1997 to the accession to the WTO in 2001, the content and standards of intellectual property crimes were standardized and improved. The third stage is the comprehensive development of intellectual property criminal justice protection after China entered WTO in 2001. Intellectual property criminal judicial protection pathway in China is mainly based on the punishment structure. And intellectual property rights are distributed through criminal prosecution. Criminal justice of intellectual property mainly relies on the coercive force of the state, which is different from civil litigation that mainly relies on the independent choice of the parties. At present, three departments of public security, procuratorial and court jointly carry out criminal judicial protection, and together form intellectual property criminal judicial protection system in China.

2.2 Case Studies of Criminal Judicial Protection for Intellectual Property

The first case is about the difficulty of protecting the rights of corporate piracy. Since its establishment, an education company has always paid attention to the protection of intellectual property rights. In terms of copyright, it has published a series of best-selling works by adhering to the combination of introducing foreign excellent and basing on original works. At present, it is the leader of the market pioneer of the three-dimensional interaction and

new children’s books in China. However, the best-selling children’s books have been pirated endlessly, causing the company’s intellectual property rights to be seriously infringed. Therefore, the company has carried out a series of rights protection. But it is very difficult. firstly, the complaint is hopeless, and there is no leading department to handle. Secondly, the source of piracy is difficult to find and the civil litigation cycle is long and the cost is high. Lastly, criminal procedures are difficult and the jurisdiction of the case is not clear.

Case two is about the crime of infringing trade secrets. B Telecom Material Co., Ltd. is the first company in China to develop its own aluminum-plastic composite strip scuttling machine, accounting for more than 70 % of the domestic market. The technical personnel illegally leaked to the other three companies, so as to the market was occupied. B company started to protect its rights in 1999, which lasted 11 years and four trials, among which the criminal cases were listed as the top 10 typical criminal cases in C City. So far, the provincial high-level people’s court has not yet completed the trial, and the infringer has not been arrested in accordance with the law. According to the survey, Company B has not been able to continue operations locally. There are three main reasons for the delay. First, it is difficult to investigate the case, and the judicial appraisal cannot be used as a direct basis. Second, the jurisdiction of intellectual property crimes is unclear, and the progress of the early trial is slow. Third, the judges were hesitant because of the professional technology involved.

2.3 The Major Problems of Criminal Judicial Protection for Intellectual Property in China

Firstly, how to convict in the existing criminal law is not clear enough

There are many cases of intellectual property crime in reality, but less investigation (He & Huang, 2010). It reflects insufficient criminal judicial protection, and also exposes the problems existing in the criminal law of intellectual property entity. The current charges have a high starting point for conviction but light penalties and poor clarity. The amount of money involved in the seven kinds of intellectual property crimes stipulated in the criminal law is too high, which makes some criminals dare to do it. According to the provisions of criminal law, the highest crime of infringing intellectual property can be imprisoned for a maximum of seven years, which is significantly lower than other economic crimes. At the same time, the setting of criminal name has caused some serious violations of intellectual property rights to escape criminal sanctions. For example, the consequences of negligent disclosure of business secrets are far more than some other negligent crimes. However, due to the absence of explicit provisions in the law, the right holder can only bear the losses himself, which violates the principle of justice and fairness.

Secondly, the territorial jurisdiction, level jurisdiction and internal division of intellectual property criminal investigation are not clear

Intellectual property criminal judicial protection is the strictest protection and the last protection barrier. However, the victim was difficult to ask for help. First, in terms of territorial jurisdiction, “the Opinions on Several Issues concerning the Application of Law to Criminal Cases of Intellectual Property Infringement” jointly issued by the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security stipulate that criminal cases of intellectual property infringement shall be registered and investigated by the public security organs in the place where the crime is committed, or, if necessary, by the public security organs in the place where the suspect lives. But due to local protection problems, it is difficult for many victims to be rescued in the place where they are infringed. Second, in terms of level jurisdiction, relevant laws and judicial interpretations do not clearly stipulate the level of jurisdiction of case investigation, which is difficult to effectively protect the legitimate rights of citizens, legal persons or other organizations involved in judicial activities (Chen & Xiao, 2011). Last, in the aspect of internal division of labor, in reality, the seven crimes of intellectual property crimes are not under the jurisdiction of the same department in the public security system. Among them, the public security department is responsible for two crimes of copyright infringement, while the economic investigation department is responsible for the crimes of trademark, trade secret and patent. The specific division of labor in the public security department comes from the historical internal division of labor, and most citizens do not know such a source, which leads to the delay in filing a case after the subject of piracy rights reports to the Economic investigation section.

Thirdly, the separation of jurisdiction and trial from civil, criminal and administrative litigation of intellectual property damages judicial justice and effectiveness

At present, most of the civil and administrative cases of first instance in Beijing, Shanghai and Guangzhou are heard in intellectual property courts, while the corresponding civil cases of first instance in other regions are heard in intermediate people’s courts. Criminal cases concerning intellectual property shall be accepted by criminal divisions of ordinary courts at different trial levels. Intellectual property administrative litigation cases are divided into different tribunals. Intellectual property crime cases involve criminal responsibility for investigation. Compared with ordinary civil cases, it has a stronger deterrence. And in terms of the perspective of evidence, the evidence in civil cases only requires the degree of advantage of evidence, but the demand for criminal evidence is relatively high in criminal cases (Ma,

2008). In addition, due to the inherent characteristics of intellectual property rights, the same dispute cases will often involve criminal, civil and administrative proceedings. If the three trials are separated, the same facts will be repeated for multiple investigations, evidence collection, trial and other links, affecting the efficiency.

3. REALISTIC DEMAND AND STRATEGIC SIGNIFICANCE FOR IMPROVING THE CRIMINAL JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY

At present, China has established an intellectual property system in line with international standards, acceded to nearly 20 international conventions, extensively participated in bilateral and multilateral exchanges and cooperation, and constantly explored intellectual property protection modes suited to China’s national conditions.³ However, compared with the relatively complete national intellectual property protection system, criminal judicial protection is still obviously insufficient. In the context of strengthening intellectual property protection, comprehensive improvement is urgently needed. On the one hand, it is the need to safeguard the legitimate rights and interests of intellectual property rights holders. On the other hand, it is the need to maintain the socialist economic order.

3.1 Improving the Criminal Judicial Protection of Intellectual Property Will Help Promote the Improvement of the Regional Business Environment

The business environment is a systematic project involving economic and social reforms and opening up in many areas. The good business environment is beneficial to the improvement of regional economic soft power and comprehensive competitiveness. On the one hand, attract domestic investment and international capital input, and promotes the “import”. On the other hand, promote the innovation and business expansion of market entities through various measures to create a convenient and efficient investment environment, honesty and standardized market environment and fairness and justice legal environment. Thus, provide a good soft environment support for enterprises to “go out”. At present, competition in the business environment has become a core aspect of international competition, and the key to creating a sound business environment is intellectual property, which promotes the high-end concentration of innovation factors through institutional and technological supply

³ See the “New Progress Report on IPR Protection and Business Environment in China” released by the Office of the National Leading Group on Combating IPR Infringement and Manufacturing and Selling Counterfeit and Shoddy Commodities in September 2017.

(Chen, Wang, & Jiang, 2017). President Xi emphasized many times that “protection of property rights, especially intellectual property rights, is an important aspect of shaping a good business environment”. Therefore, an all-round improvement of the regional business environment requires a sound market and legal environment, the core of which is an environment for intellectual property protection. The improvement of criminal judicial protection of intellectual property rights is an important way to improve the environment for intellectual property protection and a necessary condition for improving the regional business environment.

3.2 Improving the Criminal Judicial Protection of Intellectual Property Will Help Promote the Development of National Independent Innovation

Independent innovation is of great significance to forming new advantages in international competition, accelerating the transformation of the economic development pattern and improving the ecological environment. The level of independent research and development is affected by institutional factors. Insufficient protection of intellectual property rights will lead to the lack of independent innovation power (Li, Gong, & Qi, 2013). The best way to protect and stimulate innovation is to strengthen intellectual property protection. The improvement of criminal judicial protection of intellectual property is a necessary condition for the development of domestic independent innovation. On the other hand, the criminal judicial protection of intellectual property rights has been improved, which is conducive to stimulating regional innovation enthusiasm and innovative development. In particular, whether enterprises are willing to invest huge costs in R&D and innovation, and publicize it to promote social scientific and technological progress depends on whether they enjoy a fair and just market environment for protecting intellectual property rights. Once the corresponding environment is guaranteed, market players do not need to worry about the loss of R&D investment and are naturally willing to innovate and create, constantly form intellectual property rights and enhance competitiveness. Therefore, the improvement of criminal judicial protection of intellectual property is also a necessary condition for domestic independent innovation and development.

3.3 Improving the criminal judicial protection of intellectual property will help promote the reshaping of the international economic and trade pattern

International trade relations are issues that need to pay attention to long-term attention after the integration of China’s initiative to integrate into the world trade system. In the process of turbulent, it is necessary to make the correct strategic choice. It is an effective way to speed up the adjustment of its own trade growth methods from long-term development. As Montesquieu said, freedom

of trade is not the freedom of the merchant to do as he pleases, but the slavery of trade (Xu, Trans., 2011). It has always set restrictions on the export of some labor-intensive products and encouraged industries and enterprises with competitive advantages to “go global”. It can promote the change of foreign trade structure and growth mode, and help realize trade freedom to a greater extent, through exporting excess domestic production capacity, raw materials and spare parts to foreign markets (Qiu, 2009). Studies have shown that China’s current intellectual property protection intensity has not reached the optimal value (Cai, Wu, & Jiang, 2014). In the long-term equilibrium state, strengthening the degree of intellectual property protection has a positive effect on economic growth, and the important channel to play a role is international trade and activities. The improvement of criminal judicial protection of intellectual property is conducive to the protection of technology-intensive enterprises’ dominant position in the market and the protection of the external environment for innovation and development. As well as effectively promote the survival and development of innovative enterprises, and changes in the structure of market entities will inevitably affect the proportion of technology-intensive and labor-intensive exports, the mode of national trade growth can be effectively adjusted. At the same time, the increase and strengthening of innovative enterprises and the improvement of their innovation ability will reduce the dependence on innovative products and technologies of technologically developed countries, which is conducive to the promotion of initiative in international economic and trade relations. Therefore, the improvement of criminal judicial protection of intellectual property rights can promote the improvement of international economic and trade relations, and is a sufficient condition for reshaping the international economic and trade pattern.

4. SUGGESTIONS FOR IMPROVING THE CRIMINAL JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY

4.1 Perfect the Criminal Laws and Regulations of Intellectual Property Rights

For the criminal protection of intellectual property rights, it is needed to formulate and perfect the relevant legal system according to the right patterns of different intellectual property rights (Wang, 2014). The criminal legislation should respond to the constant demands of intellectual property protection in judicial practice in order to meet the substantive requirements of the concept of justice. Firstly, the legislative mode of punishing intellectual property crime can be changed from the centralized type to the integrated type. In the criminal code of intellectual property crime and its criminal

responsibility, the function of the subsidiary criminal law should be better brought into play through the revision of the subsidiary criminal law related to the crime of intellectual property infringement in the patent law, copyright law, trademark law and other intellectual property laws. Secondly, the provisions of criminal charges should be perfected. Clarify the calculation standard of the amount of crime involved, and abolish the subjective requirements of “profit-oriented” crime of copyright infringement by referring to the international practice, and add some criminal charges to punish those who infringe patent rights in huge amounts that meet certain standards and negligently infringe business secrets that meet certain conditions. Finally, adjust the punishment regulation of intellectual property crime which include increasing the limit of fine and perfecting fine punishment, perfecting the types of penalty and adding qualification penalty, raising the maximum length of partial prison sentences.

4.2 Explore Centralized Jurisdiction Over Criminal Filing and Investigation

Integrate the division of jurisdiction within the criminal investigation of public security departments, and set up a special intellectual property economic investigation department. According to the types of intellectual property crimes stipulated in the Criminal Law of the People’s Republic of China, the intellectual property economic investigation department shall handle the cases uniformly. In view of the current situation that crimes of intellectual property infringement are characterized by diversified means, highly sophisticated technologies, broad areas involved, tight organization and complicated crime composition, the jurisdiction can be determined as long as one of the elements meets the conditions, such as the place where the crime was committed and the place where the crime result occurred. When there is only one element that the victim lives in the region, the application can be accepted by the local intellectual property economic investigation department if there is certain evidence to support it. After the public security department accepts a case, the procuratorate at the same level and the people’s court naturally acquire jurisdiction. So as to avoid that the procuratorate cannot file a case due to jurisdiction issues when the intellectual property investigation department transfers the case, and the court cannot file a case when the procuratorial organ initiates an indictment.

4.3 Unify the Jurisdiction of Civil, Criminal and Administrative Litigation Over Intellectual Property

On the basis of the current Judicial powers and jurisdictional division of intellectual property courts and intellectual property tribunals, the level jurisdiction of criminal litigation cases shall be referred to the corresponding intermediate people’s courts. Intellectual

property rights belong to private rights and generally constitute civil infringement as well as criminal crime. The pattern of separation of civil and criminal adjudication results in the double unfairness and irrationality of form and substance. Reform of administrative and criminal cases shall be carried out with reference to the jurisdiction of civil intellectual property cases to ensure that the same cases can be tried at the same level. The Intellectual Property Court has solved part of the problem about separation of trials and has achieved remarkable results since its establishment. As the current intellectual property courts are only concentrated in the eastern region, they still cannot meet the needs of the vast central and western regions of the country, so the establishment of intellectual property courts should be expanded and improved. On this basis, the jurisdiction of patent and other technical cases should be handled well, and it is suggested to set up intellectual property appeals courts in accordance with administrative regions.

4.4 Promote the Effective Connection Between Administrative Law Enforcement and Criminal Justice

On the basis of the “Opinions on Strengthening the Linking Work of Administrative Law Enforcement and Criminal Justice” issued by the General Offices of the CPC Central Committee and The State Council, local governments should formulate detailed rules for the implementation of the “connection between the two Laws” in light of their actual conditions. The functions and powers, status and responsibilities of judicial organs and administrative law enforcement organs shall be clarified, as well as the limitation of transfer of administrative law enforcement cases and the consequences of failure to transfer cases within the time limit, so as to facilitate the operation and implementation of judicial organs and administrative law enforcement organs. Moreover, the law enforcement standards of judicial organs and administrative law enforcement organs should be unified. Judicial departments such as public security, procuratorial and courts shall set up joint meetings with administrative law enforcement departments for industry and commerce, patent and copyright to strengthen communication and contact.

4.5 Improve Intellectual Property Judicial Appraisal and Temporary Measures Before Litigation

The intellectual property system is highly specialized and needs to be supplemented by relevant supporting systems. At present, criminal cases of intellectual property basically rely on intellectual property judicial appraisal by third parties. Therefore, we should further strengthen the standard of forensic report, and improve the expert witness court appearance and other related systems. The third section of the third part of the TRIPs Agreement

is related to the provisions of “interim measures”, the purpose of which is mainly to stop the occurrence of infringement and preserve the relevant evidence of alleged infringement.⁴ Since such measures are made without a clear right or wrong decision, The TRIPs agreement imposes strict conditions, as well as review requirements to prevent further damage. In China, interim measures refer to the cessation of tort and evidence preservation before prosecution. The procedure of taking and implementing such measures should be further standardized and relevant provisions should be strictly followed.

4.6 Enhance the Professionalism of Judicial Personnel and Citizens’ Awareness of Intellectual Property Protection

Intellectual property judicial work has special professionalism, high complexity and abstract policy, which puts forward high requirements for intellectual property judges in terms of judicial ability and comprehensive quality. It is necessary to establish a judicial personnel management system in line with professional characteristics and improve the classified management system of judicial personnel. Specialized technical examiners could be deployed in the proper courts, and a group of technical personnel can also be selected from research institutes, technology companies and other research or practice departments to participate in the trial as “jurors”. Besides, effectively increase publicity efforts, and take full advantage of World Intellectual Property Day on April 26 and media tools such as the Internet, newspapers, magazines, television and radio. Publicity and education on intellectual property protection should be strengthened to raise the awareness of the whole people on intellectual property protection, and at the same time to warn criminals of intellectual property infringement.

5. CONCLUSION

By analyzing the cases of about infringement of copyright and infringement of trade secrets, it is found that the main problems of the criminal judicial protection of intellectual property exist in the entity criminal law including the determination of charges and the judicial discretion existing, the unclear region, level jurisdiction and internal division of criminal investigation for intellectual property, as well as the separation of jurisdiction and trial of civil, criminal and administrative litigation for intellectual property. Combining the basic national conditions and objective development reality, the six concrete paths for improving intellectual property criminal judicial

protection were put forward, including improving intellectual property laws and regulations from the aspects of legislative mode, crime establishment and penalty regulation, unifying the jurisdiction of civil, criminal and administrative litigation over intellectual property rights, promoting the effective connection between administrative law enforcement and criminal justice, improving the series of systems for intellectual property judicial appraisal and pre-trial interim measures, and enhancing the professionalism of judicial personnel and citizens’ awareness of intellectual property protection in order to further strengthen the construction of judicial credibility, independent and fair judge the intellectual property criminal disputes in accordance with the law, constantly improve the authority of the judiciary, respond positively to the development of international economy and trade, and provide a solid judicial guarantee for building an intellectual property power.

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