Comparative Study on Criminal Protection of Intellectual Property Rights in the EU and China

中国-欧盟知识产权刑事保护制度的比较研究

www.ipr2.org
Prepared January 2011

This publication has been produced with the assistance of the European Union. The contents are the sole responsibility of the IPR2 implementation team and can in no way be taken to reflect the views of the European Union nor other relevant authorities in Europe or China.

Content may be reproduced and disseminated, as long as it is attributed to the original source.
This publication takes the form of a comparative review of criminal protection approaches and mechanisms in the European Union and in China, including litigation modes and handling of cases. It is undertaken in the framework of the EU-China IPR2 Project. Since its launch in 2007, IPR2 has developed a series of activities in support of strengthening the legislative framework and administrative, civil and criminal enforcement capacity in China and to promote cooperation between the EU and China on the protection of IP and international standards of IPR enforcement.

IPR2 is a partnership project between the European Union and the People’s Republic of China on the protection of intellectual property rights in China, implemented between 2007 and 2011. This is done by providing technical support to, and building the capacity of the Chinese legislative, judicial and administrative authorities in administering and enforcing intellectual property rights; improving access to information for users and officials; as well as reinforcing support to right holders. IPR2 targets the reliability, efficiency and accessibility of the IP protection system, aiming at establishing a sustainable environment for effective IPR enforcement in China.

For further information visit www.ipr2.org or contact info@ipr2.org.
A Comparative Study on Criminal Protection of Intellectual Property in China and Europe

by

Zhongnan University of Economics & Law
Contents

CHAPTER 1 - GENERAL REVIEW OF CRIMINAL PROTECTION OF INTELLECTUAL PROPERTY IN EUROPEAN UNION AND CHINA

SECTION 1 - CRIMINAL PROTECTION SYSTEM FOR INTELLECTUAL PROPERTY IN EUROPEAN UNION
   I. Legal Protection System for Intellectual Property in European Union
   (i) Status quo of the legal protection system for intellectual property in European Union
   II. EU’s Criminal Protection System for Intellectual Property

SECTION 2 - CRIMINAL PROTECTION SYSTEM FOR INTELLECTUAL PROPERTY IN CHINA
   I. Chinese Criminal Protection System for Intellectual Property and Its Features
   II. Chinese Legislation of Criminal Protection for Intellectual Property and Its Features

CHAPTER 2 – COMPARISON OF CHINA AND EU’S POSITIONS ON CRIMINAL PROTECTION OF IPR

SECTION 1 - BALANCE OF INTERESTS: PERSONAL INTEREST AND PUBLIC INTEREST
   I. Conflicts and Balance of Interests in IPR Protection
   II. Balance of Interests in Criminal Protection of IPR in China and EU
   III. Conclusion: Evaluation on Balance of Interests in Criminal Protection of IPR in China

SECTION 2 - VALUE ORIENTATION: PERSONAL FREEDOM AND SOCIAL ORDER
   I. Conflicts between Personal Freedom and Social Order
   II. Value Orientation in Criminal Protection of IPR in China and EU
   III. Conclusion: Evaluation on Value Orientation in Criminal Protection of IPR in China

SECTION 3 - PROTECTION LEVEL: SUPER-HIGH LEVEL AND ULTRA-LOW LEVEL OF PROTECTION
   I. Two Tendencies of IPR Criminal Protection Levels
   II. EU’s Experience in Criminal Protection Level of IPR
   III. China’s choice in criminal protection level of IPR

CHAPTER 3 – MACROSCOPIC COMPARISON BETWEEN CHINESE AND EUROPEAN UNION’S INTELLECTUAL PROPERTY RIGHT CRIMINAL LEGISLATION

SECTION 1 - LEGISLATIVE DIRECTION OF INTELLECTUAL PROPERTY RIGHT CRIMINAL PROTECTION: LOCALISATION VS. INTERNATIONALISATION
   I. From Localisation to Internationalisation: Legislative Direction of EU Intellectual Property Right Criminal Protection
   II. Go Global: Legislative Direction of Chinese Intellectual Property Right Protection

SECTION 2 - LEGISLATION MODEL FOR CRIMINAL PROTECTION OF IPR: CENTRALISED VS. DISPERSIVE LEGISLATION
   I. Legislation Model for Criminal Protection of IPR in EU
   II. Legislation Model for Criminal Protection of IPR in China
   III. Evaluation on Legislation Model for Criminal Protection of IPR

SECTION 3 - PENAL SENTENCE OF INTELLECTUAL PROPERTY INFRINGEMENT
   I. EU’s Penal Sentence of Intellectual Property Infringement
   II. Chinese Penal Sentence on Intellectual Property Infringement
CHAPTER 4 – MICROSCOPIC COMPARISON BETWEEN CHINESE AND EUROPEAN UNION ON CRIMINAL LAW PROTECTION OF INTELLECTUAL PROPERTY RIGHT .............................................. 71

SECTION 1 - COMPARATIVE STUDIES ON CRIME OF TRADEMARK RIGHT INFRINGEMENT .................................................. 71
I. History and Current Legislation of Chinese Criminal Law Protection of Trademark Right .................. 71
II. Criminal Legislation for Trademark Right Infringement in Major European Union Countries .......... 75
III. Comparison of Criminal Legislation for Trademark Right Infringement in China and European Union ......................................................................................................................... 81
IV. Summary ..................................................................................................................................... 84

SECTION 2 - COMPARATIVE STUDIES ON CRIME OF PATENT RIGHT INFRINGEMENT .................................................... 84
II. Criminal Legislation of Patent Right Infringement in Major Countries of European Union .......... 85
III. Comparison of Criminal Legislation for Patent Right Infringement in China and European Union .......................................................................................................................... 90
IV. Summary ..................................................................................................................................... 92

SECTION 3 - COMPARATIVE STUDIES ON CRIME OF COPYRIGHT INFRINGEMENT ...................................................... 92
I. History and Current Legislation of Criminal Law Protection of Copyright in China ....................... 92
II. Criminal Legislation against Copyright Infringement in Major Countries of European Union ....... 96
III. Comparison of Criminal Legislation against Copyright Infringement in China and European Union ............................................................................................................................................... 100
IV. Summary ................................................................................................................................... 103

SECTION 4 - COMPARATIVE STUDIES ON CRIME OF BUSINESS SECRET INFRINGEMENT ........................................ 103
I. History and Current Legislation of Criminal Law Protection of Business Secret in China ........... 103
II. Criminal Legislation against Business Secret Infringement in Major Countries of European Union .......................................................................................................................... 106
III. Comparison of Criminal Legislation against Crime of Business Secret Infringement in China and European Union .......................................................................................................................... 110
IV. Summary ................................................................................................................................... 112

CHAPTER 5 – PROBLEMS IN CRIMINAL LAW PROTECTION OF INTELLECTUAL PROPERTY RIGHT AND ITS LEGISLATIVE PERFECTION IN CHINA ........................................... 114

SECTION 1 - PROBLEMS IN CRIMINAL LAW PROTECTION OF INTELLECTUAL PROPERTY RIGHT IN CHINA .................. 114
I. Problems in Criminal Legislation Protection of Intellectual Property Right in China ................. 114
II. Problems Existing in Protection of Criminal Justice of Intellectual Property Rights in China ....... 119

SECTION 2 - LEGISLATION IMPROVEMENT OF INTELLECTUAL PROPERTY RIGHTS PROTECTION BY CRIMINAL LAW IN CHINA .................................................................................. 122
I. Basic Principles for Improving Legislation of Intellectual Property Rights Protection by Criminal Law in China ............................................................................................................................................... 122
II. Specific Content of Legislation Improvement of Intellectual Property Rights Protection by Criminal Law in China .......................................................................................................................... 130

SECTION 3 - JUDICIAL IMPROVEMENT OF INTELLECTUAL PROPERTY RIGHTS PROTECTION BY CRIMINAL LAW IN CHINA .................................................................................. 134
I. Analysis of Reasons for the Existing Problems of Judicial Protection of Criminal Law ................. 134
II. Improvement of Intellectual Property Rights Protection by Criminal Law in China .................... 137
CHAPTER 6 – CHINA-EU EXCHANGES AND ASSISTANCES FOR CRIMINAL LAW PROTECTION OF INTELLECTUAL PROPERTY .................................................................................................................. 150

SECTION 1 - REVIEW ON CHINA-EUROPE INTELLECTUAL PROPERTY COOPERATIVE MECHANISMS .............................. 150
I. China-EU Intellectual Property Dialogue Mechanism ................................................................. 150
II. China-EU Intellectual Property Workgroup Meetings ................................................................. 151
III. IPR Experts Appointed in EU Commission Diplomatic Corps in China ..................................... 151
IV. Intellectual Property Related Technical Assistance .................................................................. 152

SECTION 2 - FURTHER DEVELOPMENT OF CHINA-EU COOPERATION ON CRIMINAL LAW PROTECTION OF INTELLECTUAL PROPERTY ..................................................................................................................... 152
I. Intellectual Property Criminal Legislation .................................................................................... 152
II. Intellectual Property Enforcement .............................................................................................. 152
III. Talent Training and Information Exchanges .............................................................................. 153

CHAPTER 7 – JURISDICTION OF CRIMINAL CASES CONCERNING INTELLECTUAL PROPERTY ...................................................... 154

SECTION 1 - PRINCIPLES AND CLASSIFICATION OF CHINA’S CRIMINAL PROCEDURAL JURISDICTION .......... 154
I. Principles for Criminal Procedural Jurisdiction ............................................................................ 154
II. Classification of Criminal Procedural Jurisdiction ....................................................................... 156

SECTION 2 - THE INSPECTION ON THE JURISDICTION OF CRIMINAL CASES CONCERNING INTELLECTUAL PROPERTY IN EU .................................................................................................................................. 160
I. Legislation and Practice of Major EU States ............................................................................... 160
II. Conclusions and Comments ...................................................................................................... 165

SECTION 3 - PROBLEMS IN CHINA’S JURISDICTION OF CRIMINAL CASES CONCERNING INTELLECTUAL PROPERTY ............................................................................................................................................ 167
I. Imperfection and Conflicts in Laws and Regulations for Division of Authority among Three Organs Involved ................................................................................................................................. 167
II. Jurisdiction over Placing Cases on File neither Reflects nor Considers Microscopic Framework of Action Structure and Flow of Procedures ................................................................................... 168
III. Provisions of Territorial Jurisdiction are not Detailed Enough to Prevent Jurisdiction Disputes and Local Protectionism ........................................................................................................................................... 170
IV. Unscientific Hierarchical Jurisdiction Goes against Juridical Fairness ..................................... 171
V. Relevant Supporting System is Lacking and the Remedy Mechanism of Procedures is Neglected ........................................................................................................................................................ 173

SECTION 4 - IMPROVEMENTS TO CHINA’S JURISDICTION SYSTEM OF CRIMINAL CASES CONCERNING INTELLECTUAL PROPERTY ..................................................................................................................... 174
I. Basic Principles for Improvements to Jurisdiction System .......................................................... 174
II. Basic Suggestions on Improvements of the Jurisdiction System ............................................... 175

CHAPTER 8 – STRUCTURE OF TRIAL ORGANISATIONS IN CHARGE OF INTELLECTUAL PROPERTY CRIMINAL CASES ...................................................................................................................... 178

SECTION 1 - STRUCTURE OF TRIAL ORGANISATIONS IN CHARGE OF INTELLECTUAL PROPERTY CASES IN MAJOR EU COUNTRIES .................................................................................................................. 178
I. Overview of structure of criminal trial organisations in major EU countries .......................................................................................................................................................................................... 178
II. Legislation and Practice of Trial Organisations in Charge of Intellectual Property Rights in
A Comparative Study on Criminal Protection of Intellectual Property in China and Europe

Contents

Germany and France ...................................................................................................................... 181
III. Review of Operation of IPR Trial Organisations in Germany and France ................................. 187

SECTION 2 - EXISTING DECISION-MAKING MECHANISMS AND MANAGEMENT SYSTEM OF CHINESE IPR TRIAL ORGANISATIONS ................................................................................................................................... 189
I. Structure of Trial Organisations .................................................................................................. 189
II. Management System of Trial Organisations .............................................................................. 192
III. Localisation of Judge Management ........................................................................................... 194

SECTION 3 - REFLECTION UPON THE OPERATION OF IPR TRIALS IN CHINA .................................................. 195
I. Defects of “Separation of Criminal, Civil and Administrative Trials” of China’s IPR Trial Organisations and Practice ............................................................................................................. 195
II. Reflection upon the Operation Mechanism of IPR Trials in China ............................................. 197

SECTION 4 - REFORM OF CHINA’S TRIAL ORGANISATIONS IN CHARGE OF IPR-RELATED CRIMINAL CASES 198
I. Basic Issues of Reform of IPR Trial Organisations ..................................................................... 198
II. “Unification of Jurisdiction in IPR-related Civil, Criminal and Administrative Cases”—an Innovation in Trial Organisation ...................................................................................................... 200
III. “Trinity”—Institutional Innovation of Management ...................................................................... 201
IV. Raise the Expertise Level of IPR Judicial Personnel ................................................................ 202

CHAPTER 9 – LITIGATION MODES OF INTELLECTUAL PROPERTY CRIMINAL CASE .................. 204
SECTION 1 -REASONABLE EVALUATION OF CRIMINAL PRIVATE AND PUBLIC ACTION.................. 204
I. Theoretical Basis of Distinction between Private and Public Actions ........................................... 204
II. Trend of Change of Distinction between Private Action and Public Action ............................... 208
III. Distinction Standard of Private Action and Public Action .......................................................... 210

SECTION 2 - AN INVESTIGATION TO ACTION MODEL OF EU COUNTRY INTELLECTUAL PROPERTY CASES ................................................................. 214
I. Fundamental Procedure of EU Major Countries .......................................................................... 214

SECTION 3 - IMPERFECTION OF CHINESE INTELLECTUAL PROPERTY CRIMINAL CASE PROCEEDING...... 222
I. Definition of Action Subject is not clear enough .......................................................................... 222
II. The Scope of Evidencing Object is too wide ................................................................. 224
III. The Evidence Preservation System does not Exist in the Case of Private Action ... 225

SECTION 4 - LEGISLATIVE IMPROVEMENT OF CHINESE INTELLECTUAL PROPERTY CRIMINAL CASES .... 227
I. Adjustment of the Action Modes and Expansion of the Action Subject ....................................... 227
II. Restriction of Objects of Proof .................................................................................................... 229
III. Structure of the Evidence Preservation System ........................................................................ 230

CHAPTER 10 – MECHANISM FOR INTERLOCKED CRIMINAL AND CIVIL CASES .................... 233
SECTION 1 -CLASSIFICATION AND CAUSES OF INTERLOCKED CRIMINAL AND CIVIL CASES .......... 233
I. Concurrent Relation: Interlocked Criminal and Civil Cases Caused by the Same Legal Fact .... 234
II. Implicated Relation: Interlocked Criminal and Civil Cases Caused by Several Legal Facts ...... 237

SECTION 2 - HANDLING MODE FOR INTERLOCKED CRIMINAL AND CIVIL CASES CONCERNING INTELLECTUAL PROPERTY IN MAJOR EUROPEAN COUNTRIES ................................................................. 240
I. France .......................................................................................................................................... 240
II. Germany .................................................................................................................................... 241
III. Britain ....................................................................................................................................... 242

SECTION 3 - MAJOR PROBLEMS CONCERNING THE HANDLING MECHANISM OF INTERLOCKED CRIMINAL AND CIVIL CASES IN CHINA .................................................................................................................. 243
I. Fuzzy Standard of Loss Identification for Interlocked Criminal and Civil Cases ........................................... 243
II. Conflict of Jurisdiction in Interlocked Criminal and Civil Cases Concerning IPR ........................................ 245
III. Diversity of Standard of Evidence for Interlocked Criminal and Civil Cases .................................................. 248

SECTION 4 - IMPROVEMENT OF HANDLING MECHANISM OF INTERLOCKED CRIMINAL AND CIVIL CASES

CONCERNING INTELLECTUAL PROPERTY IN CHINA ............................................................................................... 251
I. Selection of Handling Mode .......................................................................................................................... 251
II. Improvement of Specific Procedure Mechanism .......................................................................................... 253

CHAPTER 11 – VICTIM’S RIGHTS PROTECTION AND REMEDY MECHANISM IN CRIMINAL CASES OF INTELLECTUAL PROPERTY RIGHTS .................................................................................. 259

SECTION 1 - INVESTIGATION ON VICTIM’S RIGHTS PROTECTION AND REMEDY MECHANISM IN CRIMINAL CASES OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPEAN UNION COUNTRIES ................................................................. 259
I. Specific Practice of Major EU Countries ......................................................................................................... 259
II. Basic Situation of Victim’s Rights Protection and Remedy Mechanism in Criminal Cases of Intellectual Property Rights in China .................................................................................................................. 263

SECTION 2 - IMPROVEMENT OF VICTIM’S RIGHTS PROTECTION AND REMEDY MECHANISM IN CRIMINAL CASES OF INTELLECTUAL PROPERTY RIGHTS IN CHINA .......................................................................................... 266
I. Overall Thought for Mechanism Improvement Enhancement of Victim’s Constitutional Position .............................................................. 266
II. Reinforcing Procedure Mechanism of Victim’s Rights Protection: Criminal Reconciliation ............................ 270
III. Implement Safeguarding System of Victim’s Rights Remedy: National Compensation ........................................... 272

SECTION 3 - ESTABLISHMENT OF RELEVANT FITTED MEASURES FOR SOUND OPERATION OF VICTIM’S RIGHTS PROTECTION AND REMEDY MECHANISM IN CHINA .................................................................................. 277
I. Improve and Complete Suspension of Sentence Applicability and Monitoring System of China’s Intellectual Property Rights Crime ............................................................................................................. 277
II. Establish Independent Sentencing Procedure and Safeguard Victim’s Participation Right .................................. 282
III. Establish Legal Assistance and Social Assistance System for Victims ................................................................ 285
Chapter 1 - General Review of Criminal Protection of Intellectual Property in European Union and China

Section 1 Criminal Protection System for Intellectual Property in European Union

The European Union (EU) is a supranational organisation composed of member states which voluntarily turn over some national sovereignty. It developed from the European Communities, which came from the idea of establishing a “United States of Europe” raised by Sir Winston Churchill, a former prime minister of Britain, in 1946. In the next 20 years, through multilateral treaties European countries started integration in different fields, and European Coal and Steel Community, European Economic Community and European Atomic Energy Community were established successively. On April 8, 1965, France, the Federal Republic of Germany, Italy, the Netherlands, Belgium and Luxemburg signed the Treaty of Brussels to merge the three communities into a new “European Community”. The Treaty of Brussels officially became effective on July 1, 1967.

On December 11, 1991, the European Community held a summit conference in Maastricht, the Netherlands. At this conference the Treaty on European Union, also known as Maastricht Treaty, which aimed to establish the European economic and monetary union and the European political union, was approved. On February 7, 1992, the Maastricht Treaty was signed by ministers of foreign affairs of the member states, and, upon approval of the governments of the member states, officially became effective on November 1, 1993, indicating the official establishment of European Union. Since its establishment, the European Union has expanded for six times and now includes 27 member states: the U.K, Ireland and Denmark joined in 1973; Greece joined in 1981; Spain and Portugal joined in 1986; Austria, Finland and Sweden joined in 1995; Malta, Cyprus, Poland, Hungary, Czech, Slovak, Slovenia, Estonia, Latvia and Lithuania joined on May 1, 2004; and Romania and Bulgaria joined on January 1, 2007.

I. Legal Protection System for Intellectual Property in European Union

(i) Status quo of the legal protection system for intellectual property in European Union

As to the legislation of European Communities concerning intellectual property, the first law on intellectual property that has the effect of statute law is the First Council Directive of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks. With the issuance of this Directive as dividing date, the establishment and development of the legal protection system for intellectual property in European Union can be approximately divided into two stages.

The first stage is from early 1960s to 1988. During this stage there was no statute law on intellectual property in the European Communities. However, during this stage there were some very influential precedents. Such precedents basically established a legal framework to solve the conflicts between intellectual property rights and EC laws. The period after 1988, especially from 1990s to the present, is the second stage, during which the development is mainly featured by the issuance of many directives, regulations and green papers.
(ii) Characteristics of the legal protection system for intellectual property in European Union

1. The sources of EU legislation concerning intellectual property including two major types, i.e. primary law and secondary laws

The legal protection system for intellectual property in European Union generally consists of two major types: primary law and secondary laws.

The primary law refers to the basic treaty upon which the European Community is based, i.e. the Treaty on European Union. In the whole legal system of EU, the Treaty on European Union is in a position similar as the constitution in a country’s national laws, and its authority and legitimacy are materialised by that the Treaty is the legal basis for all legislative and judicial measures taken by the EC; either cases of EC courts or directives and regulations concerning intellectual property issued by EC organs must be based upon authorisation by the Treaty on European Union, and such cases and legislative measures must not go against the provisions and the tenet of the Treaty. Therefore, although there are no specific articles concerning intellectual property in the Treaty on European Union, its position as the primary law of the EC’s legal protection system for intellectual property is not affected.

Secondary laws are legal documents, for example, regulations, directives and resolutions, established by the EC Council and European Commission according to the provisions of and the authorisation by the basic Treaty. Directives and regulations, as the secondary or tertiary legislation of the EC, are derived from the Treaty on European Union, and are measures of the EC for developing and approximating national laws or independent legislation of its member states under authorisation of the Treaty. As the EC lacks of unified rules, these directives and regulations make the principal part of the laws and regulations of the EC concerning intellectual property. They mainly include regulations and directives established by the EC Council and resolutions of the European Commission for specific issues.

2. Two modes of EU’s legislation concerning intellectual property: harmonisation and unification

There are mainly two modes of EU’s legislation concerning intellectual property: harmonisation and unification. Harmonisation of laws concerning intellectual property refers to the legislative measures taken by the EC upon authorisation by the Treaty to approximate the member states’ national laws concerning intellectual property; and unification of laws concerning intellectual property refers to the EC’s establishing unified laws concerning intellectual property that apply to all EC member states according to the authorisation by the Treaty. Therefore there are mainly two approaches to unification of EU laws: the first is to issue relevant directives according to Article 100 of the Treaty on European Union to harmonise national laws of the member states to approximate the laws, regulations or administrative rules of the member states that directly affect the establishment and operation of a common market; the second is to establish unified laws that apply to all member states according to Article 235 of the Treaty on European Union.

3. The principal part of the legal protection system for intellectual property in European Union: directives and regulations

A directive refers to a legal document issued to member states to be executed before a defined date. Its purpose is usually to harmonise and approximate laws and policies of the member
Chapter 1 - General Review of Criminal Protection of Intellectual Property in European Union and China

states. Generally, directives are only indirectly applicable in the member states, and each member state has the autonomy on the forms and methods of executing the directives, but under certain conditions the directives may have direct legal effect in the member states. There are many such legal documents for the purpose of harmonising or approximating laws in the legal protection system for intellectual property in European Union. In practice, harmonising directives concerning intellectual property issued by the EU are usually specific legal rules for a certain aspect of national laws, and there is no such thing as the harmonisation of copyright law system or patent system as a whole. That’s to say, the harmonising measures of the EU don’t affect the independence of the intellectual property law system of each member state, but only require the member states to execute the rules in their national laws, so that the law systems of all member states can be approximated, and the national laws of the member states are still the substantive laws and procedural laws for determining the granting of intellectual property rights.

As to regulations, according to paragraph (2) of Article 189 of the Treaty on European Union, legislative measures taken by the EU in the form of regulations shall be directly applicable in all member states. Any regulation, once promulgated in the official journal of the EC, shall automatically come into force in the member states and shall be executed as a part of the laws of the member states, without making relevant measures for execution through national legislation to endow it with the validity of direct application.

Currently, because of the lack of unified laws and rules concerning intellectual property among the member states, most of EU’s transnational laws in the area of intellectual property are regional treaties and directives, and regulations are only adopted when a few issues, geographic indication for example, are involved.

4. The process of the unification of EU’s legal system for intellectual property is slow

Although the European Union has made years of effort to unify the intellectual property laws of the member states, not much progress has been made. In other areas concerning intellectual property except the trademark area, so far the EU hasn’t had any actually valid unified law. The Community Trade Mark Regulation that became effective in 1996 is EU’s first and only valid unified intellectual property law, which generated the “Community Trade Mark” that has uniform validity in the EU. While the EC patent treaty and EC design regulation, though modified and discussed for many times, still hasn’t come into force. The reason to this is that the effort of the EU to establish a unified intellectual property law system is limited by the European Council’s voting procedure of unanimity. On the other hand, the member states, considering their own respective national interests, lack the political will to place common interests above their respective national interests; this, to some extent, also delays the EC’s unification process of intellectual property law.

5. The EU has made significant achievement in harmonising the member states’ national intellectual property laws

Although the EU hasn’t achieved much in establishing a uniform intellectual property law, it has made significant achievement in harmonising the member states’ national intellectual property laws. It is because the EU’s harmonisation of intellectual property laws is made in the form of directives, which is not directly applicable in the member states, and the member states have the discretion of choosing the form of realising the purposes of the directives as well as whether
legislation is needed. Besides, before promulgating a directive concerning intellectual property, the EU usually prepare and issue a relevant “Green Book”, which has no legal effect but usually indicates the EU’s policy and standpoint in respect of intellectual property, especially in respect of IPR protection of new technologies.

II. EU’s Criminal Protection System for Intellectual Property

(i) EU’s unified legislation of criminal protection for intellectual property

EU’s unified protection of intellectual property dates back to the Green Paper on Combating Copyright Infringement and Illegal Reproduction approved by the European Commission on October 15, 1998. On November 30, 2000, the European Commission submitted the follow-up report of the Green Paper to the European Council, the European Parliament and the European Economic and Social Committee for review. On March 20 and 21, 2003, the European Council asked the European Commission and all member states to take effective measures to reinforce protection in this area. On April 29, 2004, the European Parliament and the European Council approved Directive 2004/48/EC on the Enforcement of Intellectual Property Rights, which aims to further reinforce the fighting against piracy and counterfeiting within the European Union by coordinating the national legislations concerning protecting intellectual property rights of the member states. This indicated that all the member states of the European Union would take uniform actions against violation of intellectual property rights. This Directive mainly provides some measures in respect of civil affairs and administration. However, since infringements are increasing these years, especially organised crimes, it became necessary to protect intellectual property rights with criminal law. On July 12, 2005, the European Commission presented the Proposal for a European Parliament and Council Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights (COD 2005/0127) and the Proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences (COD 2005/0128). On September 30, 2005, the European Court of Justice pointed out in the judgment of Case C-176/03, Commission v. Council, that the European Union shall be entitled to present proposals about criminal sanction to guarantee the validity of the legislation of the European Union; thus the European Commission cancelled the above-mentioned Proposals and included relevant regulations in the Proposal for a Directive, and presented on April 26, 2006 the Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006)0168). On April 25, 2007, the European Parliament approved in Strasbourg at first reading the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (T6-0145/2007, hereinafter referred to as the “Draft for Criminal Measures on Intellectual Property Rights” or the “Draft”) with 374 pros and 278 cons (with 17 councilor being absent). The legislation of this Directive adopts a co-decision procedure, i.e. it needed to be approved with majority votes after three readings at the European Parliament and the European Council. However, up to the end of March 2008, the Draft was still waiting for the first reading at the European Council.

The substantive contents of the Draft for criminal measures on aimed at ensuring the enforcement of intellectual property rights include three areas, i.e. scope of application, crimes and punishments. Concerning the scope of application, the Draft prescribes necessary criminal
measures to ensure the enforcement of intellectual property rights in the context of counterfeiting and piracy; such measures shall apply to all intellectual property rights except patent right prescribed in the laws of the Community. Concerning crimes, Article 3 of the Draft prescribes that “Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and aiding or abetting and inciting the actual infringement, are treated as criminal offences”. 1 Concerning punishment, first, Article 4 of the Draft prescribes the categories of punishment, requiring all member states to make provisions on the following punishments: (a) for natural persons: custodial sentences; (b) for natural and legal persons: i) criminal fines for natural persons and criminal or non-criminal fines for legal persons; ii) confiscation of the object, instruments and products stemming from infringements or of goods whose value corresponds to those products. In proper cases, the following punishment can also be applied: (a) destruction of the goods, including materials or equipment used for infringing an intellectual property right; (b) total or partial closure, on a permanent or temporary basis, of the establishment used to commit the offence; (c) a permanent or temporary ban on engaging in commercial activities; (d) placing under judicial supervision; (e) judicial winding-up; (f) a ban on access to public assistance or subsidies; (g) publication of judicial decisions; (h) an order requiring the infringer to pay the costs of keeping seized goods. Second, Article 5 of the Draft prescribes the extent of punishment, asking the member states to take necessary measures to make sure that, when a natural person commits the crime indicated in Article 3, if such crime is a severe crime in the context of paragraph 5, Article 3 of the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, or if such crime is committed under the aegis of any criminal Organisation within the meaning of the Framework Resolution on the fight against organised crimes, or if such crime is dangerous to health or safety, he shall be punishable by a maximum sentence of at least four years’ imprisonment. When a natural person or legal person has committed a crime concerning intellectual property rights, effective, proportionate and dissuasive penalties shall be imposed; such punishment shall include criminal and non-criminal fine of (1) to a maximum of at least EUR 100 000 for cases other than those referred to in paragraph 1; (2) to a maximum of at least EUR 300 000 for cases referred to in paragraph 1. It also prescribes that member States shall take the necessary measures to ensure that repeated offences within the meaning of Article 3 committed by natural and legal persons in a Member State other than their country of origin or domicile are taken into account when determining the level of penalties in accordance with paragraphs 1 and 2 of this Article. Third, Article 6 of the Draft prescribes the jurisdiction of confiscation. The member states shall take necessary measures to, according to Article 3 of the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, where the offences are serious crimes within the meaning of Article 3(5) the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the

---

1 Two situations of exclusion are stated in paragraph 2 and paragraph 3 of this article: first, criminal penalties shall not apply to parallel import of products launched into the markets in countries not in the European Union; second, all member states shall make sure that reasonable use of protected works, including reasonable use by reproduction or other means in the purpose of criticism, comment, news reporting, teaching (including multiple reproduction for class), study or research, etc., shall not constitute criminal offense.
purpose of money laundering and terrorist financing, or when such crime is committed under the aegis of any criminal Organisation within the meaning of the Framework Resolution on the fight against organised crimes, it is allowed to confiscate all or part of the goods of the natural person or legal person who is found guilty.

(ii) Comment on EU’s unified legislation of criminal law for intellectual property

1. EU’s unified legislation of criminal protection for intellectual property

The European Union as a group is a member of WTO, so TRIPS is binding on the whole European Union and its member states. Although Article 61 of TRIPS became a common standard that can be applied to the whole world, there are still big differences among the member states of the European Union. Furthermore, Article 61 only provides certain requirements on the member states’ legal systems and has no provision on the effect of enforcement. So, the significance of EU’s criminal legislation on intellectual property at the community level for the first time is just as expressed by the text, i.e. to complete the provisions on the enforcement of directives concerning intellectual property rights with a punishment system that is sufficiently dissuasive and applicable for the entire community, to coordinate certain criminal rules among member states so as to effectively fight against counterfeiting and piracy in the community market, and to effectively fight against crimes, especially the most serious crimes against intellectual property rights.

2. The Draft excludes criminal protection for patent right

Article 61 of TRIPS only takes “willful trademark counterfeiting or copyright piracy on a commercial scale” as the compulsive obligation, while whether criminal protection will be given to other cases of infringement of intellectual property rights” depends on each member state. The European Commission’s original proposal tried to require the criminal measures be applicable to intellectual property rights prescribed by the laws of the community and all member states and make sure all willful intellectual property right infringements on a commercial scale as well as unaccomplished offences, assistance, abetment and inciting are handled as criminal offense, so its scope of crimes is much wider than that prescribed in TRIPS. The Draft approved by the European Parliament excludes patent right from the scope of the directives, meeting the requirements of industries and governments of the member states that have opposite ideas.

3. The Draft specifies the meanings of relevant terms

Article 2 of the Draft includes “Definitions”, which specifies the scope of “intellectual property rights” in the directives, and defines the concepts of “commercial scale”3, “intended infringement”

---

2 “Intellectual property rights” refers to one or several of the following rights: copyright; rights related to copyright; the sui generis right of a database maker; rights of the creator of the topographies of a semiconductor product; trademark rights, in so far as extending to them the protection of criminal law is not inimical to free market rules and research activities; design rights; geographical indications; trade names, in so far as these are protected as exclusive property rights in the national law concerned; and in any event the rights, in so far as provision is made for them at Community level, in respect of goods within the meaning of Article 2(1)(a) and (b) of Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (10), and in any event with the exclusion of patents.
and “legal person”.

4. The criminal provisions in the Draft are more operational

About punishment, Article 61 of TRIPS only prescribes that “Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.” But it is not easy to say what is “sufficient to provide a deterrent”. The World Intellectual Property Organisation (WIPO) pointed out in a report that “punishment has failed to provide an effective deterrent”, many feedbacks believed that statutory maximum punishment and actual punishment decided by the court were seldom severe enough to deter actual infringers or potential infringers; and due to the lack of statutory minimum punishment, too much discretion of the court leads to lenity, which is unacceptable.

In contrast, the provision of the Draft on punishment is more operable: the punishment categories are properly optional; the extent of punishment is more clear and detailed, and imprisonment, criminal and non-criminal fines are quantified; also the jurisdiction of confiscation is extended, so as to define what is “sufficient to provide a deterrent” and provide specific institutional provisions.

(iii) Features of EU’s criminal protection for intellectual property

Although EU’s unified legislation of criminal protection for intellectual property has great significance, since the EU’s legislation of criminal protection for intellectual property mainly adopts two modes, i.e. unification and harmonisation, EU’s criminal protection for intellectual property is not only unified but also diversified. On one hand, through EU’s legislation and other harmonisation approaches within the European Union, the intellectual property system is highly unified; on the other hand, the member states still keep their own national independent criminal protection systems for intellectual property rights, and among these systems there are still gaps and differences.

According to a questionnaire report of the EU, there are major differences among national legislations of the member states of the European Union. Such major differences mainly include the following areas:

---

3 “Infringement on a commercial scale” refers to infringement against any intellectual property right committed to obtain a commercial advantage; this excludes acts carried out by private users for personal and not-for-profit purposes

4 “Intended infringement against intellectual property right” refers to deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale

5 “Legal person” refers to any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.


7 Study on a possible modified proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights – FINAL REPORT JLS/2009/A1/FWC/023
First, the scopes of crimes against intellectual property are different. According to the result of the questionnaire, although all member states provide criminal protection for copyright and neighboring rights, different member states have different specific scope of criminal protection for intellectual property rights. For example, Luxemburg doesn’t consider trademark infringement an act of crime, so it doesn’t meet the requirements of Article 61 of TRIPS. Besides, 6 EU member states (Bulgaria, the UK, Greece, Ireland, Luxemburg and Latvia) haven’t provided criminal protection for patent infringement. Such differences are mainly due to different traditional legal practices of the countries in punishing infringement against intellectual property rights. For example, some member states (like Malta) are not willing to provide specific criminal sanction on infringement against intellectual property rights, and as they see it, general criminal clauses on fraud can also allow courts to punish the infringers, therefore, specific criminal sanction clauses concerning intellectual property is not only unnecessary but also inappropriate.

Second, the constitutive requirements of crime are different. Firstly, as to objective elements of a crime (actus reas), there are many differences between the member states. For example, some member states use general definitions like “infringing exclusive right”, “unauthorised use” and “breach of regulation”, etc., while other member states tend to make specific definition on actions of crime; most EU member states adopts the mode of combining general and specific definitions, but the wording can be quite different. Secondly, as to subjective elements (mens rea) of a crime, there are also major differences between different member states. Most EU member states believe that the finding of a crime must have a criminal intent, which is usually defined as “intentional” or “knowingly”. Generally speaking, simple negligence is not punishable as a crime. However, in other member states, especially northern European countries like Denmark, Sweden and Finland, it is considered that major negligence can constitute a crime. Besides, about half of the member states require that a crime must have subjective “profitable” or “commercial purpose”.

Third, the provisions on criminal penalties are different. As to criminal penalties for crimes against intellectual property rights, all EU member states adopt fine and imprisonment, but their specific provisions on fine and imprisonment are very different. For example, except 6 member states (Belgium, Spain, Luxemburg, Malta, Poland and Romania), most member states haven’t stipulated the minimum sentence of imprisonment but leave it to the courts’ discretion. As to the maximum sentence of imprisonment, about half of the member states adopt 2 to 3 years, and 6 states adopt 4 to 5 years. The UK stipulates that crimes against copyright and trademark rights can result in imprisonment for 10 years at most, while Sierra Leone stipulates 8 years. A few states adopt a maximum sentence of 18 months.

Fourth, the prescribed conditions for aggravated punishment are different. In the member states that have provisions on aggravated punishment, the provisions on the conditions of aggravated punishment are also different. For example, most member states prescribed that recidivists will receive aggravated punishment; 10 member states (Austria, Bulgaria, Czech, Germany, Denmark, Greece, Hungary, Lithuania, Holland and Romania) consider “commercial scale” or “commercial purpose” as the condition for aggravated punishment; 8 member states (Bulgaria, Spain, France, the UK, Lithuania, Poland, Romania and Slovakia) consider “organised criminal group” as a condition for aggravated punishment.
Section 2 Criminal Protection System for Intellectual Property in China

I. Chinese Criminal Protection System for Intellectual Property and Its Features

(i) Chinese criminal protection system for intellectual property

The protection of Chinese laws for intellectual property rights are at multiple levels. There are judicial protection for intellectual property rights and administrative protection for intellectual property rights. The judicial protection for intellectual property rights can be divided into civil judicial protection and criminal judicial protection. In terms of remedy for rights, victims have three options, civil remedy, criminal remedy and administrative remedy.

1. Civil protection for intellectual property rights

In different countries’ legal protection systems for intellectual property rights, civil remedy is the most important remedy system. In China it is also unexceptional. Generally, the protection of civil laws for ownership is realised by endowing the obligee the right of claim, for example, petition to verify ownership and title, petition for exclusion of hindrance, petition for restitution, rei vindication, petition for remedy for losses and etc. These petitions include action of confirmation, action of property right and action of creditor's right. Since intellectual property rights are different to regular property ownership, in action of property right, the owner of intellectual property rights cannot use traditional civil remedy measures like petition for restitution and rei vindication. What is most important in civil remedy measures for intellectual property is petition to cease the infringing act and petition for remedy for losses. Petition to cease the infringing act is an action of property right. When intellectual property right is damaged, the obligee may request the infringer to cease the infringing act or request the court to order the infringer to cease the infringing act. Petition for remedy for losses is an action of creditor's right. When intellectual property right is damaged, the obligee may request the infringer to pay a sum of money as compensation.

2. Administrative protection for intellectual property rights

In order to reinforce the administration of intellectual property rights, China has established and completed national and local intellectual property administrative departments. Currently, Chinese administrative structure for intellectual property mainly include the National IPR Leading Group, the State Intellectual Property Office, the National Copyright Administration, the State Administration for Industry & Commerce, the Customs and other departments having the function of IPR administration as well as local branch offices of the above-mentioned departments.

The State Intellectual Property Office, once called China Patent Office, was established in 1980 under the approval of the State Council. During the restructuring of the State Council, it was renamed as the State Intellectual Property Office, which, as a department directly under the State Council, is in charge of patent work as well as overall planning and coordination of IPR affairs concerning foreign countries.

The State Council’s copyright administrative department is the National Copyright Administration of the People’s Republic of China (hereinafter referred to as the National Copyright Administration). In all provinces, autonomous regions and municipalities directly under the Central Government, and also in some major cities, there are local copyright offices. The functions of the National Copyright Administration include investigating and prosecuting infringement against copyright and copyright related rights and interests, handling copyright
related disputes, registration of authorisation contracts and copyright pledge contracts for
publishing foreign books, audio-visual products, electronic publications and computer software,
and voluntary registration of works. At the same time, copyright administrative departments are
also administrative enforcement departments, and the National Copyright Administration and
local copyright administrative departments can impose administrative punishment on some
infringers according to relevant laws.

The Trademark Office of the State Administration of Industry & Commerce is responsible for
administration and administrative law enforcement of trademark.

Customs at all levels are responsible for Cross-Border Protection of Intellectual Property Rights
In 1995, “Customs Protection of Intellectual Property Rights Ordinance of the People’s Republic
of China” was published and implemented, and an IPR Border Protection System conforming to
WTO rules began to be established. The Ordinance was amended in 2003: on one hand, the
Ordnance deleted the stipulation that an obligee may seek Customs protection only if the IPR
record is fulfilled; on the other hand, Customs’ authority in investigating and dealing with
infringing goods was enhanced and its responsibilities were specified.

The administrative responsibilities of administrative organs in IPR protection and relief mainly
include: for IPR infringements that haven’t reached the degree of a crime, administrative organs
may order the infringer to stop the infringement, impose a fine, confiscate illegal gains, or
confiscate/dispose pirated products etc. according to the circumstances.

3. Criminal protection for intellectual property rights

Aiming at severe intellectual property infringements, relevant legislation of many countries has
stipulations for criminal proceedings and criminal sanction system. Section 7, Chapter 3 of the
Criminal Law of the People’s Republic of China, has stipulations for “Intellectual Property
Infringement”, including 7 crimes related to trademark right, copyright, patent right and
commercial secret respectively. In “Criminal Law of the People’s Republic of China”, there are
two crimes infringing copyright, i.e., Copyright Infringement (Article 217) and Crime of Selling
Pirated Products (Article 218); three crimes infringing trademark right, i.e., Crimes of
Counterfeiting Trademarks (Article 213), Crimes of Selling Products with Counterfeit Registered
Trademarks (Article 214) and Crime of Manufacturing and Selling Illegal Registered Trademarks
(Article 215); one crime infringing patent right, i.e., Crime of Counterfeiting Patents (Article 216);
one crime infringing commercial secret, i.e., Commercial Secret Infringement (Article 219).

(ii) Features of legal protection of intellectual property in China

China’s laws and regulations for intellectual property protection have the following features:

1. Combination of administrative and judicial protection

China adopts the double-track system for intellectual property protection, i.e. combination of
administrative and judicial protection. Administrative protection for intellectual property refers to a
legal protection method that the intellectual property administration settles intellectual property
disputes and investigates intellectual property infringement behaviors. Administrative protection is
applied extensively and stipulated in three most important intellectual property laws. What’s more,
the administrative protection is gradually intensified. In particular, investigation and handling
Chapter 1 - General Review of Criminal Protection of Intellectual Property in European Union and China

intellectual property infringement always occupy the core position. The combination of administrative and judicial protection is an outstanding feature in intellectual property protection in China.

2. Combination of national and international protection

China is geared to international conventions rapidly as the framework of basic legal institutions for intellectual property protection is established. On one hand, China’s existing laws and regulations are constantly revised and improved. On the other hand, China joins in a series of international organisations and conventions and exercises the combination of national and international protection for intellectual property. Since China joined in the World Intellectual Property Organisation in 1980, China has participated in a series of international conventions for intellectual property protection (See Tab 1.1), thus forming a national and international intellectual property protection system.

Table 1.1 International conventions of Intellectual Property Protection that China has acceded to

<table>
<thead>
<tr>
<th>Item</th>
<th>Name of Agreement</th>
<th>Date of Signature</th>
<th>Date of Accession</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Paris Convention for the Protection of Industrial Property</td>
<td>March 20, 1883</td>
<td>March 19, 1985</td>
</tr>
<tr>
<td>3</td>
<td>Madrid Agreement for International Registration of Trade Marks</td>
<td>April 14, 1891</td>
<td>October 4, 1989</td>
</tr>
<tr>
<td>4</td>
<td>Berne Convention for the Protection of Literary and Artistic Works</td>
<td>September 9, 1886</td>
<td>October 15, 1992</td>
</tr>
<tr>
<td>5</td>
<td>Universal Copyright Convention</td>
<td>September 6, 1952</td>
<td>October 30, 1992</td>
</tr>
<tr>
<td>6</td>
<td>International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations</td>
<td>October 29, 1971</td>
<td>April 30, 1993</td>
</tr>
<tr>
<td>8</td>
<td>Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks</td>
<td>June 15, 1957</td>
<td>August 9, 1994</td>
</tr>
<tr>
<td>10</td>
<td>Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks</td>
<td>June 27, 1989</td>
<td>December 1, 1995</td>
</tr>
</tbody>
</table>
II. Chinese Legislation of Criminal Protection for Intellectual Property and Its Features

China has established the legal system of IPR protection and provided multi-angle and multi-level legal protection to IPR obliges, including civil remedies, administrative remedies and criminal remedies, etc. In contrast with civil protection and administrative protection for intellectual property rights, criminal protection for intellectual property rights, as the most powerful and fierce mode of protection, criminalises IPR infringing behaviors and regulates IPR infringements with criminal approaches.

(i) Chinese legislative provisions on criminal protection for intellectual property rights

For some actions that severely infringe intellectual property rights, relevant legislation of many countries has defined the criminal procedures and criminal sanction system. Section 7 of Chapter 3 of the Criminal Law of the People’s Republic of China specifically defined the “crime of infringement against intellectual property rights”. There are 8 articles in the Criminal Law, including:

Article 213 Whoever, without permission from the owner of a registered trademark, uses a trademark which is identical with the registered trademark on the same kind of commodities shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.

Article 214 Whoever knowingly sells commodities bearing counterfeit registered trademarks shall, if the amount of sales is relatively large, be sentenced to fixed-term imprisonment of not more
than three years or criminal detention and shall also, or shall only, be fined; if the amount of sales is huge, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.

Article 215 Whoever forges or without authorisation of another makes representations of the person’s registered trademarks or sells such representations shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also, or shall only, be fined; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.

Article 216 Whoever counterfeits the patent of another shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.

Article 217 Whoever, for the purpose of making profits, commits any of the following acts of infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined:

reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner;

publishing a book of which the exclusive right of publication is enjoyed by another person;

reproducing and distributing an audio or video recording produced by another person without permission of the producer; or

producing or selling a work of fine art with forged signature of another painter.

Article 218 Whoever, for the purpose of making profits, knowingly sells works reproduced by infringing on the copyright of the owners as mentioned in Article 217 of this Law shall, if the amount of illegal gains is huge, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.

Article 219 Whoever commits any of the following acts of infringing on business secrets and thus causes heavy losses to the obligee shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined:

(1) obtaining an obligee’s business secrets by stealing, luring, coercion or any other illegitimate means;

(2) disclosing, using or allowing another to use the business secrets obtained from the obligee by the means mentioned in the preceding paragraph; or

(3) in violation of the agreement on or against the obligee’s demand for keeping business secrets, disclosing, using or allowing another person to use the business secrets he has.
Whoever obtains, uses or discloses another’s business secrets, which he clearly knows or ought to know falls under the categories of the acts listed in the preceding paragraph, shall be deemed an offender who infringes on business secrets.

“Business secrets” as mentioned in this Article refers to technology information or business information which is unknown to the public, can bring about economic benefits to the obligee, is of practical use and with regard to which the obligee has adopted secret-keeping measures.

“Obligee” as mentioned in this Article refers to the owner of business secrets and the person who is permitted by the owner to use the business secrets.

Article 220 Where a unit commits any of the crimes mentioned in the Articles from 213 through 219 of this Section, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the Articles respectively.

(ii) Legislative features of criminal protection for intellectual property in China

Legislation of criminal protection for intellectual property in China presents the following features:

1. The criminal law of China is rapidly brought in line with international conventions through evolution of legislation. It is generally considered that legislation for intellectual property protection system in China can trace back to about one hundred years ago. China’s intellectual property protection system at the end of the Qing Dynasty is the outcome of Chinese learning of the west and the adoption of new policies, but more important reason is the imposition of western laws by western powers. It was the result of learning western laws under the threat of canons and guns. After the autocratic monarchy was overthrown, the legal institutions including intellectual property protection could not be established because of social unrest and years of war. After the new China was founded in 1949, it was still impossible to put intellectual property protection into agenda due to national and international factors. Until 1979, Criminal Law of the People’s Republic of China specified criminal protection of intellectual property for the first time with its Article 127 on the crime of counterfeit registered trademarks. With the development of the reform and opening up advocated by Deng Xiaoping, criminal protection of intellectual property became more and more important. For example, Article 63 of Patent Law of the People’s Republic of China passed on March 12, 1984 formulated regulations of counterfeit patent. Since 1990s, China’s criminal protection of intellectual property enters a new stage of development and improvements. The NPC standing committee enacted documents of criminal acts which added the crime of selling products bearing counterfeit registered trademark, the crime illegal manufacturing and sales of registered trademarks, the crime of copyright infringement, the crime of sales of infringing copies and so on, such as Supplementary Provisions on Punishing Crimes of Counterfeit Registered Trademark on February 22, 1993 and Decisions of Punishing Crimes of Copyright Infringement on July 15, 1994. Criminal Law of the People’s Republic of China added the crime of infringing commercial secrets in 1997. In a word, China has realised the revolution from low to high level of intellectual property protection. Dr. Arpad Bogsch, former Director-General of the World Intellectual Property Organisation pointed out that “China had accomplished
all this at a speed unmatched in the history of intellectual property protection.\(^8\)

2. Chinese Criminal Law adopts the centralised legislative mode, which is also called penal code mode and refers to the mode that constitutive elements and the criminal liabilities of intellectual property infringement are specified in the penal code. In China, crimes of intellectual property infringement are collectively specified in Section 7 of Chapter 3 of the Criminal Law of the People’s Republic of China, while administrative laws and regulations like Trademark Law, Patent Law and Copyright Law do not contain provisions on criminal liabilities of intellectual property infringement. Criminal Law of the People’s Republic of China experienced the change from the scattered legislative mode to the centralised one. In the opinions of the legislators and criminal law scholars, the centralised legislative mode is conducive to make the criminal law more unified and systematic, and also favorable for the systemisation and centralisation of relevant crimes.

3. The crimes in the Chinese criminal law are relatively complete. Currently, Criminal Law of the People’s Republic of China provides for 7 crimes for intellectual property infringements, i.e. copyright infringement (Article 217), sales of infringing copies (Article 218), counterfeit trademarks (Article 213), sales of products bearing counterfeit registered trademarks (Article 214), illegal manufacturing and selling illegally manufactured registered trademarks (Article 215), counterfeit patent (Article 216), crime of business secret infringement (Article 219). Those crimes involve copyright, trademark right, patent right and business secrets and roundly specify criminal liabilities for intellectual property infringement.

4. The Chinese criminal law specifies facts of crimes in detail. Taking crimes of business secret infringement for example, provisions of Criminal Law of the People’s Republic of China may be the most extensive and strictest. Clause 3 of Paragraph 1 of Article 219 proclaims acts “that violate agreements or requirements of the right holders to keep business secrets, and that reveal, use or allow others to use the business secrets” constitute crimes of business secrets infringement. That breach of agreement is criminalised is rare in the world.

5. The Chinese criminal law has specified threshold for crimes. For example, “serious circumstances” in Articles 213, 215 and 216, “large gross sales” in Article 214, “large illegal gains” and “other serious circumstance” in Article 217 and “large illegal gains” in Article 218. Threshold for crimes of intellectual property infringement is determined by the features of China’s criminal system. The criminal systems in western countries consist of heavy offense, minor offense and police offense (which are similar to security punishment, re-educations through labor and severe administrative penalty) or fall into felony, petty crimes and security measures. The U.S., Germany, Japan and Taiwan bring intellectual property infringement into the category of criminal offense and do not differentiate administrative and criminal liabilities. At present, within the criminal framework of China, Criminal Law of the People’s Republic of China just punishes the serious infringing acts, but minor infringing acts are restricted though a series of administrative enforcement of laws. China’s administrative punishment is close to the sanction for petty crimes in western countries and it is China’s felony system that makes the criminal law set the threshold for crimes of intellectual property infringement.

6. *Criminal Law of the People’s Republic of China* is quite strict in punishment, which is the necessary outcome of felony system implemented in China. The punishments for crimes of intellectual property infringement can be divided into two levels (See Tab.2). Acts that constitute crimes of intellectual property infringement basically are sentenced to imprisonment up to three years with or without criminal fines; serious infringing acts and huge illegal gains will be sentenced to imprisonment of three to seven years and criminal fines. The degree of severity is rare in the world.

**Table 1.2 Punishments for Crimes of Intellectual Property Infringement in the Criminal Law of the People’s Republic of China**

<table>
<thead>
<tr>
<th>Article</th>
<th>Crime</th>
<th>Punishment</th>
<th>Aggravated Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 213</td>
<td>Crime of registered trademark infringement</td>
<td>Imprisonment for up to three years or detention, with or without criminal fines</td>
<td>Imprisonment of three to seven years and criminal fines</td>
</tr>
<tr>
<td>Article 214</td>
<td>Sales of products bearing counterfeit registered trademark</td>
<td>Imprisonment for up to three years or detention, with or without criminal fines</td>
<td>Imprisonment of three to seven years and criminal fines</td>
</tr>
<tr>
<td>Article 215</td>
<td>Illegal manufacturing and sales of illegally manufactured registered trademark</td>
<td>Imprisonment up to three years, detention or control, with or without criminal fines</td>
<td>Imprisonment of three to seven years and criminal fines</td>
</tr>
<tr>
<td>Article 216</td>
<td>Crime of counterfeit patent</td>
<td>Imprisonment up to three years or detention, with or without criminal fines</td>
<td>no</td>
</tr>
<tr>
<td>Article 217</td>
<td>Crime of copyright infringement</td>
<td>Imprisonment up to three years or detention, with or without criminal fines</td>
<td>Imprisonment of three to seven years and criminal fines</td>
</tr>
<tr>
<td>Article 218</td>
<td>Crime of selling infringing copies</td>
<td>Imprisonment up to three years or detention, with or without criminal fines</td>
<td>no</td>
</tr>
<tr>
<td>Article 219</td>
<td>Crimes of business secret infringement</td>
<td>Imprisonment up to three years or detention, with or without criminal fines</td>
<td>Imprisonment of three to seven years and criminal fines</td>
</tr>
</tbody>
</table>
Chapter 2 – Comparison of China and EU’s Positions on Criminal Protection of IPR

The criminal protection of intellectual property always involves various conflicts, including conflicts on balance of interests (personal interest and public interest), value orientation (personal freedom and social order) and protection level (super-high level and ultra-low level of protection). The different choices of the aforesaid positions are the fundamental reasons for the differences in IPR protection systems of various countries. Therefore, in criminal protection of intellectual property, analysis on the focuses and priorities of China and EU on the above issues can facilitate us to understand the reasons for the differences in IPR criminal protection systems of various countries, and avoid the excuse for copying from criminal legislations of other countries on IPR protection.

Section 1 Balance of Interests: Personal Interest and Public Interest

I. Conflicts and Balance of Interests in IPR Protection

(i) Conflicts and balance of interests

Interest is a common concept in our daily life, as it were, “in commodity economy, all the things that people are fighting for are related with their own interests.”9 Despite the difference in specific definitions of interest, the interest is essentially the targeted demand of the subject for the object. Therefore, conflicts of interests unavoidably arise. On one hand, as the stakeholders, people have diversified, unlimited and calculative demands, i.e. under the guidance of rationality, the stakeholders are always pursuing the maximum interests for them and embodying the calculative character. On the other hand, under specific space and time conditions, there are always limited resources of the object for the subject to build up the interest relationship. The limited social resources are insufficient to meet the demand of different stakeholders. Therefore, conflicts of interests inevitably arise between the infinite desire of the subject for the interest and relatively scarce resources of the object. This conflict seems to exist only between the subject and the object, but after all, it arises between subjects.

The unbalanced conflicts of interests between subjects will definitively result in the emergence and spread of destruction of social order and infringement upon others’ interests. Therefore, it is a historical necessity to seek an interest distribution mechanism that will not undermine the wealth creation capacity of the society but achieve the balance among various interests. The original concept of balance in physics has become an important tool and approach to explain social phenomena. As a way to solve conflicts of interests, balance of interests can also be called equilibrium of interests, which refers to a relatively harmonious and balanced state among different interests under certain interest patterns and systems.

According to the development history of human society, although morality, religion and law all serve as the means of social control, with the expansion of rational tools, universal

materialisation of human desire, extension of stakeholders involved in conflicts of interest and diversified content of conflicts, simple moral regulation has gradually lost its effectiveness. “Law has become a main tool of social control in contemporary world.” The reason for law to serve as the regulatory mechanism on conflicts of interests can be attributable to its legal norms focusing on rights and obligations. The relationship between rights and obligations under the law is fundamentally a kind of relationship between different interests, as it were, “One of the main functions of law is to regulate conflicting interests.”

(ii) Conflicts and balance of interests in IPR protection

The legal system on intellectual property has been confronted with conflicts of interests since the day of its birth and embodied dual characters: on one hand, if patent right is granted to IPR owners, it can encourage their innovation, but patent rights can directly turn into monopoly rights, limiting the public access to knowledge and information and damaging public interest; on the other hand, if no patent right is granted to IPR owners, although the maximum public interest can be realised, it cannot effectively stimulate knowledge creation, increase nationwide knowledge storage and in turn promote economic growth. As was said, “Sufficient information can only be produced with legal monopoly; while legal monopoly will not allow the public use of too much information.” Therefore, as a system designed to balance the monopoly interest of IPR owner and public interest of the society, intellectual property law assumes two functions that are constraining each other: one is to protect the rights of knowledge creator; the other is to promote public interests. To achieve the peaceful coexistence and mutual promotion of these two functions, it is imperative to balance the personal interest of IPR owner and public interest of the society: while dividing exclusive domain for protecting personal interest of IPR owner, impose necessary restrictions on monopoly rights of IPR owner, and preserve certain public domain for promoting public interests.

The exclusive domain of intellectual property is under the direct control of exclusive right of IPR owner. In the exclusive domain, IPR owner can fully exercise their own rights, and others cannot get access to this domain without permission or specific regulations in law; otherwise, it will constitute the infringement of exclusive right of IPR owner. So the exclusive domain is a “defensive line” to effective guarantee the personal interest of IPR owner.

Coexisting with exclusive domain, “public domain” is realised by imposing restrictions on the intellectual property right. For instance, the United States of America imposes restrictions on the exclusive domain of IPR by a 3-P policy in constitutions, i.e. policies on the promotion of learning,

---

the preservation of the public domain and the preservation of the author.14

II. Balance of Interests in Criminal Protection of IPR in China and EU

With respect to the balance of interests in criminal protection of IPR, we will take the criminal protection of copyright for example and conduct empirical analysis, for copyright law is regarded as the legal regime to achieve delicate balance between copyright owner and the public, and “balance of interests is not only the basic spirit of modern copyright law, but also a guide to revision of copyright law and design of copyright system” 15. Generally speaking, there are two fundamental reasons for criminal penalties on copyright infringement in various countries, i.e. to protect the private rights of the copyright owner and protect the public interest of the society, and the difference lies in their different choices of interest balance points, i.e. with more emphasis on the former or the latter.

(i) Emphasis on public interest in criminal protection of IPR in China

Generally speaking, there are two fundamental reasons for criminal penalties on copyright infringement in various countries, i.e. to protect the private rights of the copyright owner and protect the public interest of the society, and the difference lies in their different choices of interest balance points, i.e. with more emphasis on the former or the latter.

Firstly, according to the status of the crime of copyright infringement in Chinese Criminal Law, Chinese Criminal Law gives priority to the protection of social interest rather than personal interest of copyright owner. Because the crime of copyright infringement is first deemed as the crime that undermines social interest in Chinese Criminal Law, and listed as the crime of IPR infringement among crimes that disrupt the order of the socialist market economy in Section VII, Chapter III in Specific Provisions of Criminal Law. Thus, from the prospective of the legislator, the primary object of crime of copyright infringement is the order of the socialist market economy, and the secondary object is personal interest.

Secondly, according to the “property values” of Chinese mainland on copyright, China places more emphasis on the protection of social interest rather than personal interest of copyright owner. Although the entire legal system on IPR in China has embodied the characteristics of civil law system, Chinese legal system on IPR including copyright has been fundamentally established under the pressure of common law countries led by America.16 Therefore, the

---

15 Lei Qun’an, *On the Theory of Interest Balance in Copyright Distribution*, Journal of Shaoguan University (Social Science Edition), No. 5 in 2004
16 For example, before China stipulated the criminal liabilities of copyright infringement, on Jul. 7, 1979, China and U.S. signed Trade Agreement between People’s Republic of China and the United States of America, and Item 5, Article 6 stipulates that, “Both parties agree to take proper measures to offer copyright protection to legal person or natural person of the other party according to respective laws, regulations and international practice, and corresponding to the copyright protection offered by the other party”. U.S. Copyright Law has already stipulated the criminal liabilities of copyright infringement. In comparison, China’s Criminal Law in 1979 had no relevant provisions, so that China could not fulfill the obligations specified in this agreement. Afterwards, trade conflicts between China and U. S. on intellectual property frequently arose. In November 1991, U. S. listed
copyright law of Chinese mainland adheres to the “property values” of common law system. Based upon “property values”, common law countries pursue the theory of “Commercial Copyright”, and believe that the essence of the copyright is the right to copy a work for commercial purposes, and the value of copyright lies in that it is a transferrable property. When this value applies to legislation, “the priority of copyright law is not given to personal interest of the author but to the development of science and technology”. Therefore, with respect to balance of interests, the copyright law based upon “property values” places more emphasis on safeguard of public interest. This position is reflected in the criminal protection of copyright, and determined a significant feature of criminal protection system on copyright in China, i.e. the scope of copyright under criminal protection is only limited to part of right to use and right to get payment, namely, right to copy, right to publish, and right to permit others to copy, publish and get payment, still including the exclusive publishing rights of the publisher, but excluding the personality rights of the author entitled by the work.

(ii) Emphasis on personal interest in criminal protection of IPR in EU

Due to numerous countries in European Union and their different legal systems, we take the criminal protection of copyright in Germany for example to explore the current status of interest balance and its root causes. Germany places more emphasis on the protection of personal interest of copyright owner rather than public interest of the society.

In terms of copyright protection, as the typical representative of civil law system, Germany adheres to “personality values”, i.e. upholding the ideas of “inborn human rights” as the philosophical basis of copyright legislation, and building up the concept of copyright protection centered on moral rights of the author. As German philosopher Immanuel Kant once said, “Works is not a kind of ordinary commodity, but in some sense, the extension of a person’s (the author) spirit and the reflection of personality.” Guided by this idea, the legislator gives meticulous care and concern to the natural rights of individuals, especially their personality rights, proceeding from the position of the author, placing the focus of legislation on the protection of moral rights of individuals, and emphasising that law should not only protect the property rights of the author, but more importantly, protect the personal rights of the author. From the prospective of balanced interests, “personality values” have raised the copyright to the lofty level of fundamental human rights, and demonstrated its commitment to personal values and interests. This idea is reflected in the criminal protection of copyright, and determined a significant feature of criminal protection system on copyright in Germany, i.e. the scope of copyright under criminal protection covers a wide range of areas, not only judging the infringement upon the right to use and other rights of copyright owners as crimes, but also imposing criminal penalties on infringement upon the personal rights of copyright owners. As stipulated in Article 107 of German Copyright Law, “(1) without the permission of copyright owner, mark the copyright symbol of copyright owner on the original piece of finished art works, or distribute the original piece of works with this mark; (2) Marking and spreading the duplicate, processed or modified products of finished art works will be

China as “Special 301” country. It is under this external pressure that the first separate criminal law on copyright protection in China came into being, i.e. Decision Concerning Punishment of Crime of Copyright Infringement.

17 Japan, Abe Kouzi, Differences and Similarities between Copyright Laws of Different Countries and the Reasons, Legal Translations, No. 1, 1992
punished by imprisonment under three years or a fine, provided this kind of behavior cannot be punished by other stricter provisions. (3) The attempted crime shall receive criminal penalties."

III. Conclusion: Evaluation on Balance of Interests in Criminal Protection of IPR in China

In recent years, a general trend of studies on criminal protection of IPR in China is suggesting tightening the criminal law on IPR in China and expanding the scope of intellectual property crimes. Taking copyright for example, criminal circle has put forward many suggestions on legislative improvement, specifically\(^\text{18}\): the scope of criminal protection of copyright is suggested to be extended to technical information and rights management, in an effort to fully protect the lawful rights of copyright owner in the Internet environment and promote the development of network technology; in terms of legal interest, despite the different focuses on legal interests under the criminal protection of copyright in each country, equal protection has generally been given to copyright, neighboring rights, personal rights and property rights of copyright owner. With respect to expanding the scope of criminal protection of copyright in China as mentioned above, we believe that it shall be implemented and evaluated according to the characteristics of interest balance in China.

(i) Dynamic balance of interests determines the inevitably gradual expansion of the scope of IPR criminal protection

Under intellectual property system, exclusive domain and public domain are clearly defined to achieve the perfect balance between personal interest of intellectual property owners and public interest of the society. However, balance of interests has always been a dynamic process. According to philosophy, balance is a relatively static condition between counterbalanced sides of a contradiction. Because the two sides are always contradictory against each other, it is impossible to achieve absolute static condition. In this sense, balance is only a temporary state or condition, which can break down anytime. The dynamic balance of interests requires us to recognise the existence of large quantities of unbalanced cases in reality, i.e. "balance is always needed to address the imbalance, that is, coordination is always the result of addressing the existing uncoordinated movements."\(^\text{19}\) Throughout the history of intellectual property law, due to the special relationship between intellectual property and science and economy, as the product of science and commodity economy, the development of intellectual property system has been a dynamic process of continuously breaking the original balance and pursuing new balance of interests along with the technological and social progresses. It is safe to say that intellectual property system has been developing amid the contradictions of balanced and unbalanced interests, as jurists said, "law is always adjusting the unstable, threatened and constantly-reconstructed balance in contradictions and tensions".\(^\text{20}\) In particular, nowadays, the development of science and technology is exerting more and more influence on the dynamic balance of interests in the intellectual property system. With the scientific progress and improved understanding among the people, on one hand, new and creative intellectual achievements are emerging. Taking copyright for example, the invention of printing technology gave rise to the


\(^{19}\) Karl Marx and Frederick Engels, volume 26, People's Publishing House, 1973, Page 604

proposal for reproduction and publishing rights of books. Afterwards, the further development of reproduction and communication technology gradually expanded the scope of copyright protection to film products and photographic works. On the other hand, the scope, contents and forms of established intellectual property rights have gone through changes. Still taking copyright for example, the right of reproduction is the most important property right in copyright protection, and it has shown different contents and forms in different stages of technical development. In the early era of mechanical reproduction, the scope of reproduction rights is only limited to printed publications. While in today’s digital age, the scope of reproduction rights has expanded dramatically, covering new forms of reproduction such as computer data storage and online downloads besides printing.

Dynamic balance of interests in IPR indicates that, in order to coordinate the interests between IPR owners and the society in the context of new technology, it is necessary to adjust the legal system for IPR protection, redefine the exclusive domain of IPR owners and the public domain of the public. The suggestion for expanding the scope of IPR criminal protection is the inevitable outcome of dynamic balance of interests in IPR.

(ii) Conditional balance of interests determines the reasonable scope of IPR criminal protection in China at present

Conditional balance refers to the balance that arises under certain circumstance and condition; once the specific circumstance or condition is not available, it would break down. Therefore, the analysis on the balance of interests in specific fields, such as intellectual property law, shall be based on the specific circumstance and condition, e.g. the intellectual property system of a specific country at a specific stage. Thus it can be seen that, the conditional balance of interests in IPR system can determine the recognition of disparity in balance of interests.

Since intellectual property system has to take both personal interest of IPR owners and public interest of the society into account, balance of interests in IPR system is seeking for the focus while giving consideration to both interests as well. The conditional balance of interests in IPR means, the content of balanced interests in IPR varies from one country to another and from one time to another. In other words, the intellectual property system has different inclinations in the balance between personal interest and public interest. On one hand, in different historical stages of a same country, the balance of interests in IPR has varied inclinations. In the early stage of intellectual property system, the incentives for knowledge creation seemed to be more important, for at that time the activities of knowledge innovations was in a state of separation and disorder, and creative activities developed slowly due to the previous absence of IPR incentives. At the beginning of industrialisation, due to immature development of the market, to enhance the interests of IPR owners, stimulate their creation and promote the marketing of their achievements can accelerate the production and circulation of intellectual products.21 On the other hand, in different countries at the same stage, the balance of interests in IPR has varied inclinations, too. For instance, in judicial practice, the common law countries emphasise the inclination of IPR (especially copyright) stakeholders to the general public, and even propose the principle of “public interest comes first”. For example, in the legislative and judicial practice of copyright in

America, the public interest always prevails over the personal interest of authors. While in civil law countries, under the influence of natural rights notions, the rights of creators always take a more significant position.

Therefore, the conditional and differential balance of interests has determined that the different criminal law systems for IPR protection in different countries cannot be naturally used as the reason for improving the criminal law of a certain country. For instance, with respect to criminal protection of copyright, such countries as Germany and Japan provide criminal protection to personal rights of copyright owners, while China does not. Compared with the scope of criminal protection of copyright in foreign countries or other regions, the scope of copyright protection in Chinese criminal law seems to be relatively narrower. This is a reality, but it does not mean “China should follow the practice of other countries”, for “we often fall into the habit of argumentation by directly quoting notions and legal documents, and ignore the studies on the social, historical, political and economic conditions based on which the legal documents were compiled”. If we blindly copy the contents of criminal protection for IPR in foreign countries and expand the scope of criminal legislation on IPR without considering the development stage of our society, this may lead to irrational expansion of personal right of copyright owners and over-pressure on the realisation of public interest of the society. This may finally result in the loss of balance, or even intensify the conflicts between personal interest and public interest in IPR protection, and consequently affect the realisation of such basic values as equity, justice and effectiveness of intellectual property system.

Section 2 Value Orientation: Personal Freedom and Social Order

I. Conflicts between Personal Freedom and Social Order

Law is created by human beings and can only be interpreted according to the purpose of creation or values of human beings. So we should not be illiterate about the values behind all the laws. Although the legal value has various definitions, just like the concept of “justice”, as a special form of values, the legal value can be regarded as a special relationship of needs & satisfaction between law and humankind.

Human beings have various and diversified needs. On one hand, the various needs can determine the diversity of legal values. Although Chinese and overseas scholars have different understandings about the specifics of legal values, they basically agree that order and freedom are the most basic values in law. As some scholars mentioned, “Law is bothered by all kinds of values, among which, order, equity and personal freedom, have been regarded and widely accepted as values that should be expressed by law, and they generally belong to legal values”. On the other hand, as a result of diversified needs, the needs of different subjects in

---


the same society often cannot be met or realised simultaneously, leading to the conflicts in legal values. With respect to the conflicts between personal freedom and social order, the thoughts and answers of human beings generally follow the two basic directions hereinafter. Some philosophers and ideologists emphasise collectivity, suggesting that general interest prevails over personal interest and social interest comes before individual interest. Others take the opposite view and emphasise individuality, suggesting that personal freedom prevails over social order. The contradictory thoughts of philosophers on the relationship between freedom and order indicate that, the opposition and conflict between the society and individuals as well as the conflicts between personal freedom and social order have existed throughout the history of human society.

II. Value Orientation in Criminal Protection of IPR in China and EU

Theoretically speaking, the criminal protection of IPR is generally based on the following two theories, one is to protect private property, and the other is to maintain the order of competition. The differences among countries lie in their focus between the two interests.

(i) Emphasis on social order in criminal protection of IPR in China

The object of a crime “performs the function of judging the social attribute and values of the criminal behavior, and makes the final value judgment on the other three constitutive elements in a crime”. Therefore, the study on value orientation in criminal protection of IPR in China will be centered on the objects of intellectual property crimes.

According to the theory on object of crime in Chinese criminal law, the complex object of crime refers to two or more direct objects that are simultaneously infringed by a criminal behavior. The direct object of a crime is a certain part of social relations that is directly infringed by the crime. In case that a crime simultaneously infringes two direct objects, one object of the crime can be considered as primary object, and the other as secondary object. The primary object of the crime determines the nature of the crime’s harmfulness to the society, and thereby determines the categorisation of this crime in specific provisions of criminal law. In Chinese criminal law, what intellectual property crimes infringe is complex object, the personal rights of IPR owners and the state administration order. Therefore, the criminal protection of IPR has taken both personal freedom and social order into account. However, in the current criminal law, the crime of infringing upon intellectual property right is listed among crimes that “disrupt the order of the socialist market economy”, rather than “crimes of property violation”. So in Chinese criminal law, the primary object of intellectual property infringement is the state administration order on intellectual property. According to the categorisation of intellectual property crimes in specific provisions of Chinese criminal law, Chinese criminal law gives priority to social order while striving to keep the balance between personal freedom and social order.

The value orientation of Chinese criminal law at social order has determined the following characteristics of criminal legislation on intellectual property infringement in China: first, the names of crimes infringing upon intellectual property are incomplete. In terms of the number of these crime names, only 7 specific names of crimes infringing upon intellectual property have

---

been defined from Article 213 to Article 219 in the Criminal Law of China; in terms of the contents of these crimes, Chinese criminal law has only defined these criminal behaviors in a narrow scope, e.g. only four types of criminal behaviors have been specified for copyright protection, and only involving property right of copyright owners; the crime of trademark infringement is established under the condition that “the same trademark is used on the same kind of commodity”; and the crime of patent infringement has only one name, i.e. crime of counterfeiting a patent, etc. Secondly, the constitution of a crime has high threshold. Objectively speaking, the crimes of intellectual property infringement are generally multi-factor offense, with “illegal gains” as a key factor. The severity of IPR infringement is judged by the amount of illegal gains, and mostly, the harm to social and economic order caused by the infringer. The larger the amount of illegal gain, the severer disruption the social and economic order suffers. However, smaller amount of illegal gains does not mean the copyright owner suffers smaller loss, especially when the infringer conducts mass replication and sells products at low prices. As a consequence, many copyright infringers have escaped from penalties by criminal code or even law due to a small amount of illegal gains, while the copyright owner have suffered a lot and gone bankrupt for the non-recovery of huge resource and time invested in works creation and software development. Subjectively, the copyright infringement shall be “for the purpose of making profits” as stipulated in law, but in fact, when the infringer is not driven by profit, the crime can also cause great loss to copyright owner.

(ii) Emphasis on personal freedom in criminal protection of IPR in EU

The value orientation in legislation of major western developed countries, including the EU, is generally as follows, i.e. the maintenance of public interest and competition order, full respect and priority to private rights. When this value is adopted by specific legislation, criminal law system on intellectual property protection is established and centered on the right holders. This is reflected in the following two aspects:

On one hand, the criminal law on intellectual property infringement is quite strict. In principle, almost any illegal use of intellectual property right can constitute a crime. Intellectual property right covers a wide range of fields, mainly including the following 11 items: copyrights and neighboring rights, database, semiconductor integrated circuit layout design, trademark rights, industrial design, patents, geographical indication, utility model, plant diversity and trade name, etc. According to the status of criminal protection concerning the above 11 intellectual property rights in EU, 18 member states have provided criminal protection for over 9 items, 9 member states have provided criminal protection for 3 to 8 items listed above. Among EU member states, Austria, Germany, Denmark, Spain, Finland, Hungary and Italy have provided criminal protection for all the 11 intellectual property rights listed above.

On the other hand, the threshold for intellectual property crime is relatively lower. Taking the

---

26 Liao Zhonghong, Comparative Study on IPR Criminal Protection Between China and USA, Science of Law, No. 3, 1997, Page 73
28 Study on a possible modified proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights – FINAL REPORT JLS/2009/A1/FWC/023
copyright for example, British Copyright Law has stipulated 11 criminal types for copyright infringement, including crime for occupying infringing goods and crime for distributing infringing reproductions, not only covering a wide range of protective scope, but also setting a lower requirement for the finding of a crime. For instance, British Copyright Law has objectively stipulated that, unless the permission has been obtained from copyright owner, the infringing reproductions can constitute a crime regardless of their profitability. In Germany, any illegal use of copyrighted works can constitute a crime. While Chinese Criminal Law places greater emphasise on maintaining social order, and stipulates that “huge illegal income” (crime for selling infringing reproductions) or “large illegal income or other serious offenses” (crime of copyright infringement) is required to constitute the crime of copyright infringement. It is thus clear that, the determination of a crime regardless of the illegal profits is based on the private rights of copyright owners, reflecting more emphasis on protecting personal rights.

III. Conclusion: Evaluation on Value Orientation in Criminal Protection of IPR in China

(i) Methodology: unity and priority between personal freedom and social order

There are both conflicts and balance between personal freedom and social order. Therefore, we should first establish a methodology that can unify them together to study the value orientation in criminal protection of IPR in China.

1. “Unity” requires us to recognise the unity between personal freedom and social order

The diversified and conflicting legal values "not only simply mean tragedy, but also mean that human beings can thrive in various lifestyles". Therefore, some scholars have put forward a third thought for handling the relationship between individuals and the society. Dewey, American pragmatist philosopher, believed that, “The society is composed by people. This obvious and fundamental truth cannot be questioned or denied by any philosopher who considers himself can come up with a novel idea. There arise three ideas: society must exist for individuals; or individuals have to obey all the purposes and lifestyles set for them by the society; or the society and individuals are interdependent, the society needs ability and belonging of individuals, and also exists to serve the purpose of individuals. Apart from the above three ideas, theoretically speaking, we cannot come up with any other opinions”. As we can see, the third thought proceeds from the unity of individuals and the society, attempts to avoid the one-sided theory between the two, and emphasises the unity and balance between personal freedom and social order.

The unity between the two can be simply described as follows, individuals and the society are inseparable, individuals belong to the society, the society also belongs to individuals, and

29 Zhao Bingzhi, Comparative Study on Crime of Copyright Infringement, China Renmin University Press, 2008, Page 36
30 Zhao Bingzhi, Comparative Study on Crime of Copyright Infringement, China Renmin University Press, 2008, Page 43
personal freedom and social order form a unity of opposites. Personal freedom cannot be guaranteed without social order; the absence of personal freedom will surely result in rigid social order, or even stiffness. Therefore, social order is the guarantee for personal freedom, and personal freedom is the basis for social order. No order, no freedom; unless for freedom, the order exists without complete value.

2. “Priority” requires us to prioritise personal freedom or social order

It would be quite difficult for us to solve the problem if we only talk about the abstract ideas about the opposition or unity between individuals and the society, personal freedom and social order, just like asking “which came first, the chicken or the egg?” Therefore, to recognise the opposition and unity between personal freedom and social order means, on one hand, we have to take the both into account and oppose the one-sided theory; on the other hand, there are inevitable conflicts between the two sides, plus, individuals and the society, personal freedom and social order are closely related to the specific economic, political and cultural traditions under certain historical conditions, so in the specific historical stage, although we take the both into consideration, it is still impossible for us to focus on both sides. Therefore, the historical features of legal values indicate that, we should give priority to either side while taking both sides into account, i.e. while keeping a balance between personal freedom and social order, we should prioritise either side.

(ii) Practical rationality for prioritising social order in criminal protection of IPR in China

The criminal protection of intellectual property in China faces the value option between personal freedom and social order. In recent years, some scholars suggest, “under the ‘rights-based’ principle, we should take the social order into account while vigorously promoting personal rights. Only in this way can we establish a scientific and effective market system and market mechanism for IPR protection; otherwise, the criminal law system on IPR protection that is not based on personal rights would only have limited and incomplete functions in IPR protection”. 33 However, in my opinion, it is both realistic and reasonable for Chinese criminal law to prioritise social order at present.

First, traditionally, China did not advocate private rights. In ancient China, there were no concepts of personal independence and freedom. Individuals had never been living independently from the society, nor did any personal values ever exist in the society. It is the family-based value system to define the relationship between individuals and families, families and the society. In particular, in Confucianism, “interests” are considered inconsistent with “morality” and “courtesy” and severely criticised, as it is said “Gentlemen pursues righteousness, while ordinary people pursues interests”. Since Tang and Song Dynasties, it has gradually become the moral tendency of the whole society to “avoid mentioning benefits”. 34 In the traditional culture centered on the “courtesy”, there was little space for personal rights to survive and develop in the society. Since the Opium War, Chinese people have been pursuing the path to make the country rich and

33 Zhao Bingzhi, Tian Hongjie, Comparative Study on Crime of IPR Infringement, Law Press China, 2004, Page 68
34 Liang Qichao, Liang Qichao’s Legal Essays, compiled by Fan Zhongxin, China University of Politic Science and Law Press, 2000, Page 29
strong. During the May Fourth Movement, some Chinese people attempted to introduce the individualism from the west. However, at that time, saving the nation was the overriding priority. Intellectuals have chosen Democracy and Science, but failed to choose Liberty.\textsuperscript{35} With respect to intellectual property, as for China, a country without traditions of private law, it is quite impossible to develop the complete concept of private rights here. In ancient China, those practices resembling IPR protection were mostly the mind control of the empire. In modern China, the intellectual property system was input by western powers’ invasion. In contemporary China, the rebuilding of intellectual property system is a price forced to pay for creating favorable environment for reform and opening-up of China.

Second, the practice of Chinese market economy has determined that competition order is more important. Although Chinese criminal law theoretically advocates rights-based values, intellectual property right is quite different from traditional property rights, i.e. it is naturally linked to competition order. As an institutional tool, intellectual property right can bring the right-holders a monopolistic position, and help them gain competitive edge and monopoly profits by ruling out the imitation of their competitors. This monopolistic feature of intellectual property and the freedom advertised by market competition is contradictory, arising from the natural tension\textsuperscript{36} between intellectual property and market competition, especially when right-holders abuse their rights. As for the criminal law of a nation, it is of great significance to protect both private rights and market order, but when there arise conflicts between the two, the latter should prevail over the former. This is because market competition can improve the efficiency of resource allocation and maximise the welfare of the majority, and it is “the most effective means to gain and ensure prosperity”.\textsuperscript{37} “Only competition can ensure consumers to benefit more from economic development, and ensure the people can ultimately enjoy the various benefits brought by increased productivity”.\textsuperscript{38} “Any practice that goes against the principle of market competition will bring about irreparable loss and damage to the whole society”.\textsuperscript{39} Therefore, the pursuit of competition order is manifested in stricter restrictions on the abuse of intellectual property right, maintaining the competition order by anti-unfair competition law and antimonopoly law. Although intellectual property rights had been originally protected as private right in western developed countries, now these countries have gradually given priority to such public interests as competition order. In view of economic order, it is more impossible for China to give priority to personal freedom.

(iii) Denial of the crime of patent infringement by China because of its priority on social order

In China’s present Criminal Law, Article 216 has stipulated only one patent crime, i.e. the Crime

\textsuperscript{39} Ota Sik, \textit{A Future Economic System}, translated by Wang Xijun, et al, China Social Sciences Press, 1989, p245
of Passing off the Patent. Compared with patent crimes in other countries, in recent years, scholars have continuously proposed to add “crime of patent infringement” to patent crimes in Chinese criminal law. This is because the patent infringement is not only a widespread phenomenon in real life, but also cause no less harm to patent system and legal rights of patentees and consumers than passing off patent rights, or even more serious damage. Therefore, it is undoubtedly unfavorable for maintaining the authority of patent system and fully protecting the legal rights of patentees that China’s present criminal law has only stipulated criminal sanctions for passing off the patent.  

As for the proposal for adding crime of patent infringement, in my opinion, Chinese Criminal Law gives priority to social order in IPR protection, and opposes to incorporate patent infringement into its regulatory scope.

1. Patent infringement does not infringe on social order

As for the scope of criminal law to intervene with intellectual property rights, scholars have earlier pointed out the only three circumstances, “the first case is intellectual property infringement that can directly damage public interest of the society, e.g. producing and selling products counterfeiting any registered trademark of others and passing off any patent of others; the second case is intellectual property infringement that can threaten the general public; the third case is intellectual property infringement that cynically defies national authority”. “Cynical defiance of national authority” mainly includes two cases, one is to rely on intellectual property infringement as main business, including counterfeiting any registered trademark, passing off patent and infringing on copyrights; the other case is to continue infringing upon intellectual property rights after repeated administrative punishments. The former case reflects the defiance of infringer against the national legal system on IPR protection, while the latter indicates that the administrative punishments cannot have due deterrent effect on the infringer”. Therefore, the criminal protection of IPR cannot be enforced only for infringing upon the personal rights of intellectual property owners, and only the infringement upon the social order and damage on public interest can be the decisive base for enforcing criminal law. With respect to patent infringement, the patent laws in most common law countries do not stipulate criminal sanctions on it, because “copyright and trademark right are announced to the public. Infringement on these two rights has not only damaged the interests of right-holders, but also deceived the general public in many cases; and the behavior to deceive the general public can only be handled by administrative and criminal means rather than any civil compensations. In contrast, infringement on patent right does not directly deceive the general public, but only damages the interests of right-holders, so it does not violate the criminal law”.  

2. Adding the crime of patent infringement can damage the social order

The patent infringement has not infringed upon social order and public interest. Meanwhile, if the

---

crime of patent infringement was added to the criminal law, it may bring about serious consequence to the society and violation on legal purpose, i.e. the patentees may abuse the criminal procedures to combat their competitors and disrupt the market order of fair competition.\textsuperscript{43} As a matter of fact, according to the current situation of patent grant and protection in China, China’s patent system currently mainly protects overseas inventions and patents.\textsuperscript{44} The multinationals of developed countries use patent rights to control the technology implementation and product sales of Chinese enterprises. It is safe to say that the patent right is developing into a new trade barrier in global economy. The patent right is “the fuel of interest added to the fire of wisdom”, if it is out of control, it may spark off a terrible fire. Therefore, it is hard to say that to protect a large amount of patent rights that cause technical barrier to China’s enterprises complies with our national interests and social order.\textsuperscript{45}

In fact, the legislative changes of Taiwan and EU on patent infringement are vivid examples of how the crime of patent infringement disrupts the social order. Before October 2001, Taiwan patent law stipulated that, anyone infringing upon patent rights (including patent for invention, utility patent and design patent) has criminal liability, and a total of 11 accusations have been established.\textsuperscript{46} “Based on many years of practice, the right-holders took advantage of the criminal provisions and used the inspective power of procurators to combat their competitors and search and detain competitors’ property, and caused irreparable damage to the business and reputation of their competitors. Therefore, the industrial circle has repeatedly suggested abolishing criminal liability of patent infringement. In amendments to the Patent Law in October 2001, the legislature deleted the criminal liability for infringing upon patent for invention at higher technical level; on January 3, 2003, the newly-revised patent law abolished the criminal liability for infringing upon utility patent and design patent. Upon the new law’s coming into effect, the cases regarding patent infringement will be solely handled by civil procedures, and procurators will no longer handle cases of patent infringement”.\textsuperscript{47} On April 25, 2007, the European Parliament approved “Order of European Parliament and European Union Council on Ensuring the Criminal Enforcement of Intellectual Property Rights (Amendment)”, and its most important amendment to the proposal of The European Commission is probably to exclude the crime of patent infringement from the crimes applicable for the order. During this process, governments of member states, institutions of EU, industrial circle and academic circle of EU (German Max-Planck Institute for Intellectual Property Law, Competition Law and Tax Law, etc), all urged the EU to prevent the crime of patent infringement and restrict the crime within the scope of piracy and counterfeiting.

\textsuperscript{43} Zhang Yumin, Ling Xiao, \textit{Criminal Protection for Intellectual Property}, Journal of Southwest University for Nationalities (Social Science), No. 8, 2005, p45
\textsuperscript{45} Chen Jianmin, \textit{Trial Exposition of the Protection of Patent Right by Criminal Means}, Science Technology and Law, No. 1, 2001
Section 3 Protection Level: Super-high Level and Ultra-low Level of Protection

I. Two Tendencies of IPR Criminal Protection Levels

IPR protection level has had two different tendencies, i.e. super-high level and ultra-low level of IPR protection. “Ultra-low level of IPR protection” refers to no legal protection or only low-level protection is given to the producers of intellectual products; “super-high level of IPR protection” refers to support for protecting IPR and expanding the scope and promoting the level of IPR protection. The debate between ultra-low level of IPR protection and super-high level of IPR protection has been going on ever since the establishment of intellectual property system. Generally speaking, the debate mainly focuses on economic growth and technical innovation:

(i) Ultra-low level of IPR protection

1. Negative correlation between intellectual property and economic growth

With respect to the relationship between intellectual property and economic growth, the effect of intellectual property on economic growth has been denied in the first place by people in favor of ultra-low level of IPR protection. As for these people, the ultra-low level of IPR protection can reduce cost, promote local industry, help obtain technology and reduce dependence.48 Up to now, although people in favor of ultra-low level of IPR protection have recognised that intellectual property can promote economic growth to some extent, they have also observed the negative effects of IPR protection from these two aspects, distribution justice and ultimate goal of economic growth. (1) From the prospective of distribution justice, IPR protection brings about economic monopoly and economic hegemony. On one hand, those companies holding intellectual property right and enjoying advantages in technology, brand and scale economy will conduct exclusive business and cause economic monopoly. On the other hand, high-level IPR protection will widen the gap between the Northern Hemisphere and the Southern Hemisphere and result in economic hegemony of developed countries. (2) IPR protection cannot achieve the goal of enhancing the overall benefits of the whole society and improving human culture.49 On one hand, while promoting economic growth, intellectual property system has ignored the sustainable development of the economy. Intellectual property system promotes the production of intellectual goods by protecting the intellectual interests of right-holders, but lacks foresight in the ultimate distribution status of intellectual interests, and prevents the general public, different nationalities and future generations from sharing the benefits of economic development brought by intellectual products. On the other hand, while promoting economic growth, intellectual property system cannot really improve people’s living standard. The economic growth driven by intellectual property system is accompanied by more severe monopolistic interests, or intellectual property system only stimulates people’s demand for more material interests; IPR doesn’t gave people self-respect and self-love or help them gain peace and enjoyment, and the intellectual property system gets far from the humanistic goal it should have.

2. Negative effects of intellectual property on independent innovation

According to theoretical or empirical studies of many scholars, intellectual property can only play

a limited role in promoting innovation. First, intellectual property can restrain the sharing of knowledge and free flow of information, and thereby reduce efficiency. As Joseph Stiglitz, winner of Nobel Prize in Economic Science once pointed out, "The patent system makes medicine development 'despise the poor and curry favor with the rich'. The fundamental problem of patent system is to limit the use of knowledge and bring about extra cost to knowledge sharing, and thereby cause low efficiency." Secondly, intellectual property can only promote innovation in limited industries. Research has long shown that, intellectual property can only significantly promote innovation in such industries as medical and chemical industries, without obvious effects on other industries, especially infrastructure. Moreover, intellectual property can promote innovation only in limited regions. Large quantities of data have shown that, "U.S. patent system has always been quite successful in offering incentives to promote more and greater inventions. While in those countries with less developed or less perfect patent systems, the number of patented inventions is far smaller than the United States". Finally, intellectual property system is not the only incentive system. Control on secret, market leadership, technological complexity and complementary assets can also play the incentive role. For example, in history, both science and technology awarding system and intellectual property system had once served as the policy instruments for promoting innovation, so we cannot ignore the irreplaceable role of awarding system while affirming the potential incentive power of intellectual property.

(ii) Super-high level of IPR protection

1. Positive correlation between intellectual property and economic growth

The coming of knowledge-based economy age has accelerated economic globalisation and trade integration, and thereby upgraded the role of intellectual property in social and economic development. The former Director General of the World Intellectual Property Organisation, Kamil Idris believed that, intellectual property is a power tool for economic growth. Moreover, trade of intellectual property has gradually become an integral part of domestic and foreign trade, and thereby spurred the domestic economic growth. Meanwhile, IPR protection can attract investment, especially foreign investment. Dunning, a theorist of international investment, put forward the Eclectic Paradigm of International Production in the late 1970s, and suggested three advantages required for an enterprise to be engaged in foreign direct investment, i.e. ownership advantage, location advantage and internalisation advantage. According to this theory, the enhanced IPR protection in host country can enhance the ownership advantage and location advantage of multinational enterprises, in turn reduce their internalisation advantage, and thereby promote the increase of foreign direct investment and technology transfer. Mansfield has further indicated that, powerful IPR protection can encourage investors to establish manufacturing enterprises instead

---

of simple processing and assembling factories. Otherwise, foreign investors tend to set up sales subsidiaries, rather than local production enterprises. Therefore, enhanced IPR protection can change the entry mode of foreign investment, improve the utilisation of foreign capital, optimise industrial structure, guide the investment direction, promote technology transfer, and substantially improve the industrial efficiency of the country.

2. Positive effects of intellectual property on technological innovation

People in favor of super-high level of IPR protection believe that, the independent intellectual property right is the fundamental guarantee for sustainable innovation. If innovation is the source of profit, accordingly, intellectual property will constitute the core and basis of new economy. The intellectual property system has become the basic legal system and important policy means of countries, especially innovative countries, to promote independent innovation. Most scholars believe that, intellectual property has three main functions in promoting independent innovation. The first function is the integrative function. Independent innovation not only needs huge funding, but more importantly, the concerted efforts of the innovative team. The IPR protection mechanism is needed to establish the benefit sharing pattern among individuals, enterprises and research institutes involved in independent innovation, protect their interests and ensure the smooth progress of independent innovation activities. The second function is the incentive function. The intellectual property system can add the firewood of benefit to the fire of genius. IPR protection means prohibition of the competition from counterfeit products after the innovative products are launched in the market, and means deterrence of all kinds of criminal behaviors by law enforcement mechanism and insurance of the investment returns through application, implementation or industrialisation. In this sense, innovators may further improve the quality and service, put more time and resources into new technical research fields, and build up a virtuous circle of development. The third function is the guarantee function. The intellectual property system is throughout the whole process of innovation, i.e. the preparations and implementation of technical development needs intellectual property protection. If IPR protection is not available, people’s enthusiasm for innovation will be restrained, investment and technology import will also be affected, and thereby directly or indirectly damage the national interest, social interest and personal interest.

II. EU's Experience in Criminal Protection Level of IPR

(i) EU's practice in IPR protection level

Modern Britain set a successful model in promoting intellectual property policy. Britain is the birthplace of traditional intellectual property system. In 1623, Britain enacted the first patent law with modern meanings in the world (The Statute of Monopolies), and in 1709, the British Parliament approved the first copyright law in the world (The Statute of Anne). In British history,

since the year of 1559 under the reign of Queen Elizabeth I (from 1558 to 1603), the British government granted foreigners and traders possessing overseas technologies with patent rights in an attempt to introduce foreign technologies.\(^{57}\) Therefore, the Great Britain experienced a time of technology introduction, when the country called for free trade. But in the 18\(^{th}\) and 19\(^{th}\) centuries, when the Britain surpassed other European countries (including other countries in other parts of the world) in technology, Britain advocated monopoly protection on IPR, e.g. James Watts (1736-1819) only rented out his steam engine rather than selling it, which had triggered people’s strong opposition to the steam engine patent system. For another example, Britain supported Paris Convention and Berne Convention.\(^{58}\) It is safe to say that, the intellectual property law in modern Britain laid an important institutional foundation for the Industrial Revolution in 1770s. In this regard, North, a U. S. economist and winner of Nobel Prize for Economics, commented that the sustained economic growth in Britain in the 18\(^{th}\) century is attributable to the context suitable for ownership evolution, which promoted the institutional arrangement ranging from inheritance right, unrestricted land ownership, to free labor, protection of private property, patent law and other incentives for intellectual property ownership, to a series of systems aiming to reduce the defect of product and capital market. After the comparative analysis on China in the 14\(^{th}\) century and Britain in the 17\(^{th}\) and 18\(^{th}\) centuries, he pointed out the tendency of industrial revolution, i.e. Britain had set up a special category of property system at that time, i.e. intellectual property system, which had protected the interests of inventors, stimulated the enthusiasm of inventors, let the inventions to spring up and bring about the waves of technical innovation, and in turn triggered the industrial revolution and created the miracle of modern economic growth.\(^{59}\)

Just like Britain, the intellectual property protection level of other countries in EU has also evolved with the ever-changing domestic circumstances. Taking the patent right protection in Germany for example, in 1815, Prussian Patent System started the invention examinations with an aim to revitilise domestic industry. This patent system was more of a system rewarding inventions than protecting the inventors.\(^{60}\) Moreover, the patented products were closely related to the technical features of Germany. The technological advantages of Germany lay in organic chemical synthesis, e.g. dyes and drugs synthesised by chemical methods, which all belonged to life necessities and consumed products in large quantity. Therefore, the German patent law only recognised the patent rights of compound manufacturing methods. In World War I, the German patent law had subtle changes in the relationship between personal rights and war, and stipulated that the patent right of civilians from enemy nations could be confiscated, which resulted in that Britain and other enemy nations also declared no longer to protect the patent right of Germans. After World War I, starting from 1911, Germany began to enforce the patent system

---

58 However, due to the absence of mandatory sanctions, IPR protection was not linked to trade sanctions, so UK had not achieved good effects. Some economic historians considered it as one of the reasons for UK’s backwardness. Lewis W. Arthur, Growth and Fluctuation (1870-1913), George Allen AND Unwin, 1978
in the country to revitalise the economy.

The evolvement of British and German intellectual property systems tells us that, under the condition of no external pressure, it is the most appropriate practice for a country to protect its intellectual property according to its reality and development need, and it is a wise policy choice for a country to march towards modern civilisation.

(ii) EU’s experience in IPR protection level

1. IPR protection level is adjusted according to the economic development level of the country.

The changes of IPR protection level in foreign countries give us a vivid impression that, the IPR protection in any country has gone through a development process, and the intellectual property policy is always being adjusted according to the country’s economic, scientific and social status.

Take the efficient operator of IPR policy, America, for example. The earlier IPR policy of America obviously followed the practice of protectionism, e.g. not protecting the works of foreigners or interfering with foreign-related piracy, charging high fees from foreigners applying for patent and protecting domestic technologies, refusing to participate in the Berne Convention launched by European countries for a long time. After World War II, the rise of America as a super power spurred America to transform low-level IPR protection to high-level IPR protection, and promoted the U.S. standard on IPR protection to the international standard for all the countries around the world. In particular, 1980s marks the beginning of high-level IPR protection in the United States. This policy choice is consistent with the economic development level of America at that time. In 1980s, America was in the turn-down or recession period of the product cycle, mainly reflected by the expansion of US international trade deficit. After World War II, America had always been the largest trading nation in the world. Before 1960s, America’s foreign trade had always maintained trade surplus. In 1970s, except for some years, such as 1970, 1973 and 1975, America had seen years of trade deficit, which was also expanding. In 1980s, America’s foreign trade deficit dramatically increased, and the accumulated total deficit in this decade was 8 times of that in 1970s. 61 “On the whole, it is an undisputed fact that American industries are in the downturn, e.g. America’s competitive edge in such precision manufacturing industries as automobile, truck, machine tool, semiconductor and consumer electronics has dramatically weakened; American economy is developing at a sluggish pace”. 62 On the other hand, the technology is gaining increasing significance in international trade, and America has potential competitiveness in this regard. According to statistics, America has possessed one third of the world’s leading technologies that are key to industrial competitiveness, in particular, America has played a dominative role in 25 information technologies. 63 According to the “Hegemonic Stability Theory” developed by Robert Gilpin, the system constraining the economic relations among countries is determined by economic strength (through bilateral or multilateral agreements), and hegemonic

countries shall undertake the responsibility of maintaining the system. Therefore, the most effective means of hegemonic countries is probably to link trade issues with intellectual property, i.e. no IPR protection means not opening domestic market.

2. There was a relatively easy international environment in the era of low-level IPR protection.

IPR policies in foreign countries have experienced a slow and gradual development process from formation to comprehensive protection and from low-level protection to high-level protection. There has always been a rather long time of preparation for every country to choose its IPR protection level. As for developed countries, intellectual property system has long been established in these countries, so the developed countries have enough time to evolve from low-level IPR protection to high-level IPR protection before signing the Trade-related Aspects of Intellectual Property Rights. While the successful industrialisation of some developing countries such as South Korea is also closely related to the relatively easy international environment on IPR protection at that time, expect for their technical efforts and government guidance. Although some mature technologies in foreign countries had obtained patent at that time, the local government had failed to strictly implement the intellectual property system; and foreign owners of patent rights had overlooked the influence of duplicates on the international competitiveness of their enterprises, and tolerated the infringing behaviors of this kind. Consequently, they had provided a favorable time for developing countries to improve IPR protection level.

3. The strength of IPR protection is positively related to economic development level.

The international quantitative research on IPR protection level or strength has confirmed that the IPR protection level is positively related to the economic development level of a country. For instance, Rapp and Rozek first created RR index, rated the conformity level of other countries’ legal provisions on patent rights to the minimum standards proposed by the American Chamber of Commerce, and put forward five levels from "0" (no patent law at all) to "5" (completely comply with the minimum standard). 64 Based on RR index, Ginarte and Park further divided the patent protection into five aspects (scope of protection, membership of international treaty, protection against loss of rights, enforcement measures and duration of protection), graded the multiple factors that determine the effective strength of each aspect, and finally summed up to obtain a national score (GP index) ranging from "0" to "5". 65 They also conducted further research on GP index. All these empirical studies proved that, the strength of IPR protection is positively related to per capita GNP, and the intellectual property system is the endogenous outcome of economic development. As the income rises to a certain level, the IPR protection driven by social demand will be accordingly strengthened. 66

66 Wang Xiaochun, Intellectual property, Competition Among Enterprises and Economic Growth of Developing Countries, PhD thesis of Fudan University in 2004, p22
As a matter of fact, the three-tier system for adjustment of IPR protection level, proposed by experts of UN Millennium Project later, is just based on this practical rule to allow different countries to choose different levels of IPR protection according to their own development levels. According to experts’ suggestions, a country may and also should consider its economic development level when choosing the IPR protection level.

III. China’s choice in criminal protection level of IPR

Different people always have different opinions on positioning and choosing the criminal protection level of IPR in China. Some people think that, the IPR criminal protection level in China has not only failed to meet the minimum standard stipulated in international conventions, but also fallen far behind that of developed countries. Therefore, the legislative improvement of Chinese criminal law on IPR is always on the grounds that the criminal protection of IPR in China does not meet the requirement of international conventions. Others think that, IPR protection in China has gone “beyond international standards”, i.e. “some existing provisions for IPR protection has inappropriately gone beyond the relevant requirements of international conventions”. Still others think that, after China’s entry into the World Trade Organisation, IPR protection shall comply with international standard, and there is no point to discuss about the “ultra-low” or “super-high” level of IPR protection.

People’s different understanding about criminal protection level of IPR mainly results from the different evaluation standards and references they choose. Some scholars proposed that, the positioning of China’s IPR protection shall take both domestic and global factors into account. The so-called global factor is the global reference factor for measuring IPR protection level of a nation, mainly including protecting standards specified in international conventions and laws of other countries; the domestic factor is the domestic reference factor for measuring IPR protection level of a nation, mainly including the political, economic, scientific and cultural factors of this country. In my opinion, the criminal protection level of IPR in China shall take both domestic and global factors into account.

(i) Opposition to emphasising ultra-low level of IPR protection regardless of international environment

Based on foreign countries’ practice in IPR protection policy, we can make the following conclusion: under the condition of no external pressure, it is the most appropriate practice for a...
country to protect its intellectual property according to its reality and development need. At present, China is still a developing country, so it is a wise choice for China to adopt low-level IPR protection policy according to the conclusion that IPR protection is positively related to economic development level. Therefore, it is still a matter of time for China to choose its IPR policy at present, and it seems that we can only “wait for” the most appropriate IPR policy: as the income rises to a sufficient level, the IPR protection driven by social demand will be accordingly strengthened, just like the environmental protection and labor protection levels will be automatically adjusted by the economic development level. However, the permissive way is not necessarily feasible in reality.

Compared with the era when other countries were implementing the ultra-low level of IPR protection policy, the international environment has changed dramatically. Under the background of global politics and economy in 1970s, the developing countries were in the favorable position concerning the issue of IPR; it was the theme of that time to promote the technology transfer from north to south, and the globalisation of intellectual property system was universally resisted. However, since the middle 1980s, the developed countries led by America had imposed increasing pressure on IPR protection of developing countries, and greatly reduced the degree of freedom in IPR policy of developing countries by formulating and promoting the strict and universal international standards for IPR protection, especially TRIPS. Hence, we cannot learn from the experience of other countries that have gone through several decades or even a century before upgrading from the low level to high level of IPR protection. Although the WTO has incorporated the high level of IPR protection into the international framework for trade, China as a developing country has lost the long-term, slow and necessary transitional and preparatory period that the western developed country have gone through to upgrade the IPR protection level. This is the reality that China has to face. As IPR protection enters the phase of globalisation, developing countries’ decision on IPR protection level is affected by more external factors, which has spurred many developing countries to implement IPR protection stronger than “endogenous” level. “The world is going through an unprecedented test, i.e. swiftly introducing higher level of IPR protection to those countries and regions that are originally unwilling to accept it”.

As for China, since its entry into the WTO, there is no point in emphasising the ultra-low level of IPR protection under the framework of TRIPS. If we still insisted on the IPR protection level that we had considered as appropriate, with no regard to economic globalisation or relevant international conventions, it may be reasonable in the closed economic environment in the past, but in today’s global economic framework, we would end up being eliminated in the fierce competition. As a matter of fact, when a developing country finally accepts the new rules for international trade including IPR protection as it joins the WTO, this country also has considered its own interests. Although they have to pay the cost of IPR protection, developing countries can enjoy the most-favored-nation treatment at the same time. Therefore, the key of the problem lies in how we can make use of the international coordination mechanism to have a certain voice in international trade and IPR protection, and obtain great benefits from cooperation with developed countries.

(ii) Opposition to pursuing super-high level of IPR protection in developed countries regardless of China’s reality

First, the criminal protection level of IPR in China is no lower than the minimum standard
specified in international conventions. Article 61 of TRIPS stipulates the minimum standard for criminal protection of IPR around the world. With respect to the scope of this international obligation, WTO expert group thinks that, the provision that “all the members shall provide criminal procedures and criminal penalties” as stipulated in Article 61 of TRIPS, has at least four restrictions: (1) only limited to trademark and copyright, rather than all the intellectual property rights involved in TRIPS; (2) only applicable to counterfeiting and piracy, rather than all the infringing behaviors upon trademark and copyright; (3) only limited to malicious counterfeiting and piracy, all the members are not obligated to formulate penalties on unintentional infringing behaviors; (4) a case shall reach a certain commercial scale. Although America criticised China for falling short of the standard on commercial scale, the expert group did not support the view of U.S. Therefore, Chinese criminal law on the crimes of IPR infringement has reached the minimum standard stipulated in TRIPS. Like other countries, China is not obligated to provide higher level of criminal protection for IPR beyond the standard stipulated in TRIPS. In fact, even some developed countries have failed to meet the minimum standard stipulated in TRIPS, e.g. Luxembourg does not consider trademark infringement as criminal behaviors, which has failed to meet the provisions in Article 61 of TRIPS.

Secondly, there is a certain gap between the IPR criminal protection levels in China and developed countries. Because the scientific, cultural and economic development levels of developed countries are much higher than that of developing countries, the IPR protection level of developed countries generally exceeds the minimum standard and these countries keep seeking for a higher IPR protection level. They either adopt the unilateral protection mode through domestic law, e.g. U.S. Copyright Law makes its own decisions on extending copyright term, or adopts bilateral and multilateral consultation mechanism through relevant international treaties, e.g. U.S., Japan and Europe proposed to establish a global patent system, and EU has implemented the unified trademark registration system. With respect to the criminal protection of IPR, developed countries generally choose high protection level as well, manifested in broad scope of protection and criminal protection for various types of rights. For instance, 21 countries in EU have stipulated the criminal liabilities concerning geographical indications. In terms of new plant varieties, 20 countries in EU have stipulated the Trade Name Right, and 19 countries in EU have stipulated the criminal liabilities.

The IPR protection in China was once on the wrong track of blindly pursuing the high standard of developed countries. For instance, Regulations for the Protection of Computer Software implemented on Jan. 1, 2002, was widely considered “going far away from the reality in China, not only stricter than the provisions of WTO, but also much higher than the protection level of computer software in such developed countries as America and Japan”. The criminal protection

---

73 Wu Handong, A Multi-Dimensional Reading of the Nature of Intellectual Property, China Legal Science, 2006 (5)
74 Yu Minsun, Yong Jihua, Controversy Triggered by Newly-issued Regulations for the Protection of Computer Software, Government Legality, 2002(8), p17
of IPR in China also had made similar mistakes. During theoretical research, all the legislative proposals are simply based on differences between China’s legislation and TRIPS or legislations of other countries. These legislative proposals generally believed that China did not have a strict criminal law on IPR protection, and we needed to add more accusations or reduce the restrictions on constitutive elements of a crime. This criminal legislation directly copied from developed countries regardless of the domestic political, economic and cultural development levels, may be only for the purpose of reducing the difference in legislation and satisfying the desire for superiority rather than really improving the domestic legislation. In fact, a United Nations report in 2005 said, “IPR protection is of great significance for technical innovation, but over protection has negative effect on innovation”. The World Bank has offered similar suggestions: “In most low-income countries with weak technology management organisations, IPR protection as stipulated in TRIPS is not a critical and decisive factor to drive their economic growth. On the contrary, the rapid economic growth is usually associated with weak IPR protection. In the developing countries with advanced technologies, some evidences have shown that, IPR protection can play a very important role in a specific development stage, which only lasts until the country ranks among developing countries at middle-income level”.

Therefore, as the criminal protection of IPR in China has already reached the minimum standard of international conventions, it is unadvisable for China to blindly copy from the criminal legislation of developed countries. China’s criminal law on IPR protection shall act inactively, for intellectual property right is a private right in essence, and it shall be handled by civil and administrative procedures. “From the long-term prospective, if the development conditions for cultural industries can be met in developing countries, stronger protection of private right is conducive to drive the local cultural industry”. As the UK Intellectual Property Office mentioned in the report of Integrating Intellectual Property Rights and Development Policy, it is our sincere hope that both rich and poor countries can regard IPR protection as a tool for development, and rectify the concept that “the stricter the IPR protection is, the better the result is”.

Chapter 3 – Macroscopic Comparison between Chinese and European Union’s Intellectual Property Right Criminal Legislation

Section 1 Legislative Direction of Intellectual Property Right Criminal Protection: Localisation vs. Internationalisation

I. From Localisation to Internationalisation: Legislative Direction of EU Intellectual Property Right Criminal Protection

The legislation of EU Intellectual Property Right Criminal Protection is a process from localisation to internationalisation.

(i) Intellectual property right system originates from Europe

Intellectual property right system derives from science and technology as well as the development of commodity economy in modern times. It is generally acknowledged that intellectual property right system first appeared in Europe in the 15th century. In 1474, Venice promulgated the world’s first law that is most similar to modern patent system. In 1623, the British Parliament passed the world’s first patent law, namely the Statute of Monopolies. After that, France in 1791, the Netherlands in 1817 and Germany in 1877 successively promulgated the patent laws of their own countries. As for the copyright system, in 1709, the British House of Commons passed the world’s first copyright law, namely the Statute of Anne. After the Great French Revolution, in 1793, France promulgated its first copyright law. As for trademark system, there were judicial precedents for trademark right protection in Britain in the 17th century. In 1804, the French Code Napoleon affirmed for the first time that trademark rights are also part of property rights. In 1857, France promulgated a more systematic trademark law. Britain in 1862 and Germany in 1874 successively enacted written trademark laws. Besides, anti-unfair competition laws which are closely related to intellectual property laws root in Europe as well. In 1896, Germany enacted the world’s first law against unfair competition. All in all, from the 17th century to the late 19th century, with the emergence of industrial evolution and the arrival of machine age, European countries have gradually established intellectual property right protection system. Intellectual property right system was, so to speak, born European and still is. At this stage, intellectual property right protection is, technically, a domestic issue.

(ii) Internationalisation of European local system

European countries have established perfect intellectual property right protection system. Moreover, with the development of international commerce and for the sake of understanding the contradiction and tension between regional limitations of intellectual property rights and international needs for intellectual products, European countries have extended their legal system of intellectual property rights to other regions all over the world by concluding international conventions concerning copyright, industrial property right and trademark right and have thus realised the internationalisation of local system.
In terms of patent right, in the mid 19th century, most European countries established patent system and many countries’ patent technologies entered the market as a measure of trading. However, due to the regionalism of international trades, many patentees are unwilling to carry out international trades in fear that their patent technologies cannot be protected abroad. Here is an example. In 1873, at the exhibition in Vienna held by Austro-Hungary Empire, many countries were unwilling to carry out international trades in fear that their patent technologies cannot be protected abroad. On that account, in 1883, 11 European countries including Belgium, Spain, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Serbia and Switzerland initiated and signed in Paris the Paris Convention for the Protection of Industrial Property (Paris Convention for short).

In terms of copyright, in the 19th century, there emerged a group of masters in literature with extraordinary achievements, such as Balzac, Hugo, Maupassant, Stendhal, Alexandre Dumas Pere and Alexandre Dumas Fils, to name just a few. Their masterpieces, such as The Human Comedy, Les Miserables, and The Red and the Black, are considered as classics of world literature. These works were popular among the French as well as people around the world. However, the regionalism of intellectual property rights determined that intellectual property right protection was limited to domestic laws. Except in France, their works could hardly be protected in other countries and regions. For the sake of understanding the regional limitations of intellectual property rights and international needs for intellectual products, French writer Victor Hugo initiated the establishment of the French Writer Association, advocating the protection of literary works and the establishment of international protection system for copyrights. In 1878, he hosted the first World Literature Conference in Paris and founded the International Literature Association. The Conference passed a resolution to implement national treatment principle on foreign literary works. Thereafter, owing to the promotion of the association and under the support of the Swiss government, 10 European countries including Britain, France, Germany, Italy, Belgium and so on launched in 1886 the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention for short).

In terms of trademark right, due to trademark regionalism, the rights of trademark owners who have attained the exclusive rights to use a registered trademark in a certain country is in lack of effective protection in other countries. In order to enable his registered trademark to be protected in different countries, the trademark owner shall apply to each country for registration of trademarks and prepare application procedures according to the requirements on language, format, time and alike specified in laws of different countries. Such a situation is not only inconvenient to the trademark owners of each country, but also unfavorable to international trade contacts. On April 14th, 1891, the earliest countries then that adopted trademark registration system including France, Spain, Belgium and Swiss and so on initiated and signed the Madrid Agreement, in Madrid, the capital city of Spain.

Even today, the internationalisation and integration of EU intellectual property laws are still under way. On April 25th, 2007, the European parliament approved the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (T6-0145/2007) on first reading by 374 votes.

---

against 278 at Strasbourg, which contributed to the coordination of law enforcement in member states.

II. Go Global: Legislative Direction of Chinese Intellectual Property Right Protection

The history of the establishment and improvement of Chinese intellectual property right system tells us that China lacks social conditions for the emergence of intellectual property rights and that it has been forced into the international path for a century of legislative history since modern times.

1. The historical origin of intellectual property rights: thought control under the feudal monarchies

Though China is an ancient civilization with a long history and has made the four world-renowned great inventions, it failed to be the first to establish the legal system of intellectual property rights as it should logically have. In terms of the generating conditions for intellectual property rights, some scholars have proposed a generating pattern from the perspective of economics: large machine production – ideology – profitable opportunities. Only by simultaneously meeting all these conditions can a country enact intellectual property laws.\(^79\)

In terms of technical conditions for large machine production, Chinese science and technology have always been at the leading level until the 15\(^{th}\) century. “The essential conditions that economists and historians consider to have generated the British industry in the 18\(^{th}\) century almost all existed in China in the 14\(^{th}\) century.”\(^80\) However, “why didn’t the scientific and technological resolution take place in China instead of Europe in the 16\(^{th}\) and 17\(^{th}\) centuries?” Or put it another way, why wasn’t China the first to enact intellectual property laws? The key issue is the lack of ideology and profitable opportunities.

Take copyrights for example. China has the technical foundations for being the first to enact copyright laws. It mastered papermaking technology and the art of printing earlier than any other country. The key reason lies in that the protection systems similar to those of intellectual property rights that occurred in ancient China were nothing more than “the spread of empire control concept”. For example, in 835 AD, Emperor Wenzong in Tang Dynasty announced the edict that the people cannot duplicate calendars, ephemerises and related documents without permission. Though time and astronomy are nothing mysterious, ancient emperors, as Son of Heaven, regards them as the medium connecting man with nature and exclusive to emperors. As a result, calendars and ephemerises were under the tight control of royal astrologers. During the Song Dynasty, in 1009, Emperor Song Zhenzong announced the edict that private printers shall present the works to be published to local authorities to be censored and registered, which was mainly for the sake of preventing private duplication of state-controlled materials and private printing of heresy materials. During the Qing Dynasty, Emperor Qianlong went in for literary inquisition in a big way, starting to censor all the documents and to ban and destroy all publications containing heresy opinions. Every dynasty had, so to speak, rules to ban heresy publications and to gag heresy speeches. “Before the 20\(^{th}\) century, all the existing examples of the authorities’ efforts to protect intellectual property rights seemed to be the protection of

---


imperial authority." Therefore, "it is more exact to regard the censorship before publication and strict banning of heresy materials as part of the efforts to further spreading thought control instead of establishing intellectual property right system for printers, bookmen, authors or other people."81

2. Emergence of Modern Intellectual Property Rights: Formalistic Import under Foreign Forces

To China, intellectual property right, as a legal system, is an imported product from the West. At the end of the Qing Dynasty, legal systems related to intellectual property rights began to appear in China with the invasion of western powers. "China learned and developed its early protection of intellectual property rights, as it were, under the guns of western countries."82

After western powers broke China’s gate which had been closed for thousands of years with solid boats and mighty guns, cases of intellectual property right infringement began to happen frequently with the penetration of western economy into the Chinese market. Some Chinese businessmen and enterprises started to counterfeit the names and trademarks of western enterprises during the production and marketing of the goods. In the early 20th century, the issue of infringement worsened. Western countries began to coerce China into protecting intellectual property rights and lifting admission tax, offering some reciprocal strings in return including abolishing extraterritoriality and restricting opium import.83

The humble and coward Qing government, on the one hand, had no alternative but to meet the requirements of the western powers, and on the other hand, hoped that the western powers would abolish extraterritoriality if it amended the laws. On that account, the Qing government successively and respectively signed a series of commercial treaties with the U.K., the U.S. and Japan, the essence of which is trademark protection.84 In 1904, a British man named Hart, the then Inspectorate General of the Imperial Maritime Customs, drafted the trademark law which was practically the same with the British trademark law. In 1910, the Qing Government drafted the Copyright Law. It consists of 5 chapters, namely Common Practice, Duration of Rights,

83 According to the 12th Article of the Sino-British Commercial Navigation Treaty revised on Sep. 5th, 1902, “China is eager to amend its laws in order to agree with foreign laws. Britain is willing to help out. When the Chinese laws, judicial methods and other related issues are appropriately set, Britain will abolish extraterritoriality.” See the Donghua Gate Record for the Guangxu Reign (Vol. 5: 4919). See also Cao Quanlai, Internationalization and Localization: the Formation of Modern Chinese legal System. Ph. D. Diss, China University of Political Science and Law, 2004: 57.
84 According to the stipulation of the Sino-British Business Treaty signed in 1902, the Chinese government shall protect the British trademarks from being infringed or counterfeited. According to the stipulation of the Sino-U.S. Business Treaty signed in 1903, the Chinese government shall provide national treatment to patentees who have been patented under the U.S. judicial system, that is to say, the rights of the obliges who have been patented by the U.S. shall be protected for a period of time no less than that of its own citizens. See Qu Sanqiang, Principles of Intellectual Property Law. Chinese Procuratorial Press, 2004: 52-55.
Obligation of Reporting, Limitation of Rights and Bylaw, altogether 55 Articles. Many of the stipulations in this draft imitated foreign laws. In terms of the definition of copyright and the scope of works, it imitated the German and Belgian laws which only stipulated the right of reproduction, but not the right of publication. In terms of the copyright registration institutions, it imitated the Japanese laws which stipulated that copyright registration was in the charge of administrative offices, unlike common property right registration which was in the charge of judicial offices. In terms of the duration of rights, it imitated the German, Austrian and Japanese laws which stipulated that the rights of its owner shall be protected for another 30 years after the owner’s death.\(^{85}\)

The development history of Chinese intellectual property right system tells us that the motivation of China’s cooperation with western powers in building its intellectual property right system by copying the relevant laws of western countries is not for intellectual property right protection itself. The Chinese government only hoped that the western powers would abolish extraterritoriality in China if it enacted intellectual property laws and conducted some other reform as required.

The threat of extraterritoriality, namely consular jurisdiction, in fact promoted the overall introduction of intellectual property right system in China. As early as in 1843, China was forced to give the British consular jurisdiction.\(^{86}\) Until 1918 when China signed a treaty with Swiss, all foreign counties in China had attained consular jurisdiction. Since “extraterritoriality not only affects ‘national decency’ as is advocated by materialists, but also jeopardizes the happiness and safety of the Chinese nation”\(^{87}\), the government strived to abolish extraterritoriality.\(^{88}\)

The Chinese government had no intention at all to protect intellectual property rights or foster free-thinking. It had to make perfunctory attempts to meet the requirements of western powers.

---


\(^{86}\) According to the 7\(^{th}\) Article of the Sino-British Five Treaty Ports Agreement in Oct., 1843, “it is inevitable for British businessmen trading in Chinese treaty ports to get involved in litigations with Chinese local residents. Hereby the agreements expressly stipulate that British businessmen are in the charge of Britain and Chinese people are in the charge of China, so that disputes could be avoided. This stipulation does not apply to businessmen from other countries. Now that this stipulation shows the Emperor’s wisdom and grace, the Emperor sees it proper and orders it to be done.” See Zhan Hengju, *Modern Chinese Legal History*. Taiwan Commercial Press, 1973: 94.

\(^{87}\) There are usually three biggest detriments of consular jurisdiction: (1) People from countries enjoying consular jurisdiction are hardly in the charge of Chinese government agencies or any Chinese law; (2) The abuse of power by countries enjoying consular jurisdiction helps other foreigners or a certain kind of Chinese people escape the ruling of Chinese courts or other government agencies and the punishment by law; (3) When the rights of China and Chinese people are infringed by people from countries enjoying consular jurisdiction or other foreigners or a certain kind of Chinese people, no appropriate and effective measures could be adopted.” See Yang Zhaolong, Selected Works in Law by Yang Zhaolong. Eds. Hao Tiechuan, Lu Jinbi. China University of Political Science and Law Press, 2000: 450.

\(^{88}\) Kang Youwei (1858-1927) wrote in *the Sixth Petition to the Qing Emperor*: “It is indeed a national humiliation to allow foreigners in our country to have their own jurisdiction and preferential rights.”
out of political or diplomatic concerns. As a result, when it turned out that western powers were in no hurry to abolish extraterritoriality as was stipulated in the treaty, the Chinese government lost its scarce interest in intellectual property right protection. When the Chinese government was aware that western powers had no intention at all to surrender their political and legal privileges in China, it explicitly expressed its unwillingness to accede to the Berne Convention in 1913, considering it harmful to the Chinese economy and education system.


On entering the 1980s, China has begun to embark on the establishment of an overall intellectual property right protection system. From the investigations based on Sino-U.S. relations as thread of time, we may say that the establishment of intellectual property right during this period and each time of legislation ever since have been meeting not so much as the needs of intellectual property right protection itself as the internal demand of reform and opening up. All this was an impelled response to the external political and economic pressure after weighing the pros and cons.


At the beginning of China’s reform and opening up, “China’s intellectual property right system was almost blank. With the development of Chinese economy, the increase of diplomatic exchanges and the expansion of international trade, the lack of intellectual property right protection was apparently going against China’s development….What’s more, as more and more countries established diplomatic relations with China and foreign countries increased their trade in Chinese products and technology, foreigners called more vigorously for intellectual property right protection in China.” Here is an example. To provide modernisation construction with a more relaxed international environment, China regarded the U.S. to be a key object of realising opening up, introducing capital and technology and expanding trade. It valued the Sino-U.S. relations more than the Sino-Soviet relations. Therefore, the Sino-U.S. trade developed rapidly. In 1979 when Deng Xiaoping visited the U.S., the Sino-U.S. High-Energy Physics Agreement was signed in Washington. The U.S. suggested that a clause concerning reciprocal protection of copyrights should be added to the agreement. For the overall situation of reform and opening up, China agreed to this clause of legal principles even though there was no intellectual property law in China at that moment. In July of the same year, China and the U.S. signed the Sino-U.S. Trade Agreement, the 6th Article of which stipulated the commitment of both sides to intellectual


92 According to China Statistical Yearbook, China and the U.S. resumed their relations in 1972. The trade volume was $12.88 million that year. In 1978, China adopted the policy of reform and opening up. The trade volume rose to $991 million that year.

(2) Passive Establishment of Chinese Intellectual Property Right System after the 1990s under the background of Sino-U.S. relations.

Due to the dominant position of information technology in the U.S. foreign trade, intellectual property right shall be effectively protected in order to safeguard the leading role of the U.S. in international trade. To fully defend the national interests, the U.S. gives a priority to intellectual property right protection in legislation as well as bilateral and multilateral negotiations. In 1987 when China and the U.S. concentrated their attention on the renewal of the science agreement, the U.S. pointed out China's inadequacy of intellectual property protection. "In the software business between Chinese and U.S. companies, the deciphering of U.S. software codes by Chinese companies led to $10 million worth of loss for U.S. companies. Since China had not enacted copyright law yet and lacks protection for computer software, U.S. manufacturers were unwilling to sell their most advanced technologies to China." Until 1989, the two sides had held several negotiations on intellectual property right disputes and no agreements had been reached. In March, 1989, Assistant U.S. Trade Representative Joseph Messi visited China and explained the Special 301 Provisions of the Omnibus Trade and Competition Act to Chinese authorities.

93 According to the 6th Article of Sino-U.S. Trade Agreement, “Firstly, both contracting parties acknowledge the significance of the effective protection of patents, trademarks and copyrights in their trade relations. Secondly, both contracting parties agreed that on the basis of mutual benefit, natural and legal persons of either side are entitled to the right of applying for registration of trademarks according to the laws and regulations of the other side and to the exclusive right of using the trademarks within the territory of the other side. Thirdly, both contracting parties shall seek to ensure that the patent or trademark protection it provided to the natural and legal persons of the other side corresponds to that the natural and legal persons of its own received from the other side according to their respective laws and with due regard for international practices. Fourthly, both contracting sides shall permit and facilitate the implement of industrial property right protection terms in the contracts signed by bilateral firms, companies and trade organisations, and restrict unfair competition of those not entitled to the rights according to their respective laws. Fifthly, both contracting sides agree to take appropriate measures to ensure that the copyright protection it provided to the natural and legal persons of the other side corresponds to that the natural and legal persons of its own received from the other side according to their respective laws and with due regard for international practices.”


95 The U.S.-China Science Agreement on Science and Technology Agreement is the largest-scale agreement on science and technology that the two countries have ever signed respectively with a foreign country. The agreement was expired on Jan. 31st, 1989.


97 Here are the enforcement measures for Special 301 Provisions. Within 30 days after the release of annual trade and economic report by each country, the U.S. trade representatives will determine which countries refuse to protect the U.S. intellectual property right or to open a fair market for U.S. companies based on intellectual property, that is to say, they will determine the list of Priority Countries. Then the trade representatives will conduct a 6-month investigation towards these countries. If their situations of intellectual property right protection...
on this matter. He “complained China had no copyright law and no protection for computer software, pointed out the 25th Article of the Patent Law stipulated that chemical medicines cannot be patented, and also expressed his disappointment to Chinese intellectual property right legislation.” In May, 1989, Chinese government sent a delegation to negotiate with the U.S. on intellectual property right of bilateral trade. After that, in 1989 and 1990, U.S. trade representatives included China in the Priority Watch List twice. On April 26, 1991, according to the Special 301 Provisions, U.S. trade representatives included China in the list of Priority Countries due to China’s infringement on U.S. intellectual property right. From June 12th of the same year to Jan. 17th, 1992, the two sides had held several rounds of tough negotiations on intellectual property right and finally signed the Memorandum of Understanding between the Government of the People’s Republic of China and the Government of the United States of America on the Protection of Intellectual Property Right. To meet the needs of deepening reform and opening up, China made several commitments as follows: (1) The Chinese government will amend patent laws. The duration of patent rights will be extended from 15 years to 20 years; importation right will be added to patent right granting, that is to say, according to patent laws, patentees are entitled to the right of forbidding their patented products from being imported to China without their permission; China will provide patent right protection for medicines and pesticides from Jan. 1st, 1993. (2) The Chinese government will accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention for short) before Oct. 15th, 1992 and the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms (Phonogram Convention for short) before June 1st, 1993; China will acknowledge computer software as a kind of literary works as mentioned in Berne Convention and provide protection without the need for formalities for the duration of 50 years. (3) The Chinese government will forbid those who disclose, obtain or use the trade secrets without the owners’ permission by way of violating the business practice of honesty; the Chinese government will pass laws achieving the aforementioned levels of protection before Jan. 1st, 1994. (4) The Chinese government will protect phonograms, etc.

Under the U.S. pressure, a series of amendments were added to our laws. See Table 3-1.

---

96 From May 18th to 19th, 1989, the two sides drafted the Memorandum on the protection of intellectual property right. China made a commitment to include the protection of computer software into the system of copyright protection during the enacting of copyright laws and agreed to summit a draft amendment to the Patent Law to the State Council by China Patent Bureau, expanding the protection of production methods to the products produced with the methods and extending the duration of patent rights from 15 years to 20 years. See Duan Ruichun, Xie Guanwu, Coordination and Guidance Institutions of Intellectual Property Right of the State Council: Review of the Sino-U.S. Negotiations on Intellectual Property Right. Ed. Liu Chuntian, Chinese Intellectual Property Right for 20 Years. Patent Literature Publishing House, 1998: 270.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent Right</td>
<td>The duration of patent rights should be extended from 15 years to 20 years.</td>
<td>The 45th Article extends the duration of patent rights from 15 years to 20 years</td>
</tr>
<tr>
<td></td>
<td>The importation right should be added to patent right.</td>
<td>The 11th Article adds the importation right to patent right.</td>
</tr>
<tr>
<td></td>
<td>Patent right protection should be provided for medicines and pesticides.</td>
<td>The 25th Article was amended, providing patent right protection for food, drink and condiment as well as medicines and pesticides.</td>
</tr>
<tr>
<td></td>
<td>China should accede to the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms (Phonogram Convention for short) before June 1st, 1993</td>
<td>China acceded to the Phonogram Convention in April, 1993.</td>
</tr>
<tr>
<td></td>
<td>China should acknowledge computer software as a kind of literary works as mentioned in Berne Convention and provide protection without the need for formalities for the duration of 50 years.</td>
<td>On Sep. 25th, 1992, the State Council released the Regulations for the Implementation of International Copyright Treaties, the 7th Article of which stipulates that foreign computer software shall be protected as a kind of literary works without the need for formalities for the duration of 50 years from the end of the publishing year of the program.</td>
</tr>
<tr>
<td></td>
<td>China should protect phonograms.</td>
<td>The 9th Article of the Regulations for the Implementation of International Copyright Treaties stipulates that foreign phonograms shall be protected as</td>
</tr>
</tbody>
</table>
Trade

| Secrets | The Chinese government should pass laws on the protection of trade secrets before Jan. 1\(^{st}\), 1994. | In 1993, China promulgated the Law of the People’s Republic of China against Unfair Competition, the 10\(^{th}\) and 25\(^{th}\) Articles of which stipulate the infringement on trade secrets and legal liabilities. |

The investigations on the origin, emergence and improvement of intellectual property right indicate that there is no innate need for intellectual property right protection in China. Modern intellectual property right originated from the formalistic import under foreign forces. The current improvement of intellectual property right system presents a tendency of passive development under foreign pressure. The legislation of Chinese intellectual property right passively takes the path of internationalisation.

Section 2 Legislation Model for Criminal Protection of IPR: Centralised vs. Dispersive Legislation

The legislation models for crime of IPR infringement around the whole world can be generally divided into the following three models: the first is dispersive legislation model. The dispersive legislation model can also be called as subsidiary criminal legislation, i.e. set up the independent charges and prescribed punishments in intellectual property law, and exclude relevant intellectual property crimes from the criminal code. The second is centralised legislation model. The centralised legislation model can also be called as criminal code model, i.e. stipulate the constitutive elements and criminal liabilities of all the crimes of IPR infringement in criminal code. The third is the combined legislation model. The combined legislation model means to incorporate the crimes of IPR infringement into both criminal code and intellectual property law. The specific combination mode can be further divided into “corresponding combination” and “complementary combination”. “Corresponding combination” means to make the relevant provisions of criminal law and intellectual property law corresponding to each other. “Complementary combination” means to make the relevant provisions of criminal law and intellectual property law complementary to each other.

I. Legislation Model for Criminal Protection of IPR in EU

(i) Legislation model for criminal protection of IPR in UK: dispersive legislation

The criminal protection of IPR in UK has adopted the dispersive (subsidiary) legislation model, i.e. stipulate all the criminal liabilities for crimes of IPR infringement in intellectual property law.

As for the criminal protection of copyright, UK has adopted the legislation model of stipulating criminal liabilities in copyright law. UK is a pioneer in copyright legislation in the world. The current UK Copyright Law was enacted in 1956, and revised in 1988. Now, the UK Copyright Law generally refers to the Chapter 1: “Copyright Law” in “Copyright, Industrial Design and Patent Law of United Kingdom in 1988”. UK has stipulated the criminal liabilities for trademark infringement in its trademark law. In history, UK has two trademark laws. The trademark law in 1938 stipulated the crime of infringing upon trademark registration records. In October 1994, UK enacted the new trademark law, which is the current trademark law. The new trademark law has
stipulated the trademarks that can be registered in UK and protected by trademark law and criminal law of UK, including commodity trademark, service trademark, collective trademark, series trademark and certification trademark. With respect to registered trademark infringement, once it is confirmed as intentional infringement, the infringer may undertake criminal liabilities apart from the obliged civil liabilities. The court can sentence the infringer 6 months ~ 10 years in jail according to the circumstances. As for serious trademark counterfeiting, the infringer can be sentenced to life imprisonment. The criminal liabilities for infringement of patent rights have been stipulated in Article 109 ~ 113 of UK Patent Law. The Patent Law in 1949 has been amended and supplemented in 1977 to form this law and its detailed rules.

(ii) Legislation model for criminal protection of IPR in Germany: dispersive & combined legislation

In Germany, the criminal liabilities for crimes of IPR infringement have generally been stipulated in intellectual property law, belonging to dispersive or subsidiary legislation model. In Germany, all the criminal liabilities for copyright infringement have been stipulated in copyright law, without any criminal penalties on crimes of copyright infringement in criminal code. In 1837, Kingdom of Prussia enacted "Anti-Copy or Duplicate Law for Protecting the Owners of Scientific and Artistic Works", which marks the beginning of modern copyright law in Germany. However, Germany did not pay much attention to the criminal protection of copyright. It was not until 1960s that the criminal protection of copyright began to draw attention of Germany. In 1985, in the revised "Law on Copyright and Relevant Protective Rights of the Federal Republic of Germany", the criminal protection of copyright had finally received wide attention in Germany and secured its due position in copyright legal system. After the unification of German Democratic Republic and German Federal Republic on Oct. 3, 1990, this law had gone through a major revision and officially brought into force on June 24, 1993. The German Anti-piracy Law that took effect on July 1, 1990, has gone through further revisions for criminal protection of copyright. The first revision is the crime of IPR infringement would never be counted as minor offence; the second revision is to explicitly stipulate the constitutive elements of crime of IPR infringement, e.g. crime of copyright infringement. Germany has stipulated the crime of patent infringement in its patent law, which was enacted on Jan. 2, 1968 and revised on Dec. 3 1976. The Article 49 of the patent law stipulates that, unless there is a statutory license, any use of the invention without the permission of the patentee will constitute the crime of patent infringement, and the infringer shall be fined or sentenced in jail for less than 1 year. The crime of trademark infringement has been stipulated in Articles 24~ 26 of Trademark Law. This law was first enacted in 1968, and later revised in 1979 and 1987.

However, the crime of infringing trade secrets is stipulated in criminal code and anti-unfair competition law of Germany. The Articles 17, 18 and 20 of Anti-Unfair Competition Law of Germany have stipulated the crimes of infringing trade secrets. In addition, German Criminal Law has specifically stipulated the criminal liabilities of trade secret infringement in Chapter 15: Infringing upon private life and secret. Therefore, as for the criminal protection of trade secrets, Germany has adopted the combined legislation model, with criminal code and anti-unfair competition law complementing each other.

(iii) Legislation model for criminal protection of IPR in France: combined legislation
The criminal protection of IPR in France has adopted the typical combined legislation model, i.e. stipulate the punishments on crime of IPR infringement in both criminal code and intellectual property law, with respect for the authority of criminal code and consideration of the specific features of IPR infringement.

In France, the crime of copyright infringement was originally stipulated in Articles 424~429 of Criminal Code. Literature and Art Property Law inherited the provisions of criminal code, and stipulated the crime of copyright infringement in Articles 70~74. Intellectual Property Law incorporated the relevant provisions in Literature and Art Property Law into its Article 335, and added the crime of infringing upon broadcasting rights of audiovisual materials. The crime of patent infringement is stipulated in Articles 60 and 61 of French Invention Patent Law. This law is based on the Law No. 68-1 on Jan. 2, 1968, supplemented by Law No. 70-489 on Jun. 11, 1970, and finally revised and supplemented by Law No. 78-742 on Jul. 13, 1978. France has defined both patent counterfeiting and fake patent application as crimes, and stipulated criminal penalties. France has implemented harsh sanctions on trademark infringement, prosecuting the criminal liabilities of the party involved in passing off the registered trademark of another, storing, selling or providing any commodity with fake trademarks, using others’ registered trademarks without permission, and counterfeiting others’ trademarks, and punishing by fines and imprisonment or both according to circumstances. The crime of trademark infringement is stipulated in Articles 27~34 in French Industrial, Commercial and Service Industries Trademark Law, quoted from Articles 422 and 423 of French Criminal Code.

(iv) Legislation model for criminal protection of IPR in Spain: centralised legislation

With respect to the criminal protection of IPR, Spanish Criminal Code has stipulated the criminal liabilities of IPR crimes. This is a centralised legislation model. Chapter 13 “Crimes of infringing upon property rights and disrupting social and economic order”, Volume II “Crimes and Penalties” of Spanish Criminal Code, has systematically stipulated “Crimes concerning copyright, industrial property, market and consumption”. Article 270 under Section 1 “Crimes concerning copyright” of this chapter has stipulated the crimes of infringing upon copyright, producing, selling or possessing the tools used to remove unauthorised works; Article 273 under Section 2 “Crimes concerning industrial property” has stipulated the crime of unlawful use of patent, and Article 274 has stipulated the crime of counterfeiting the registered trademark, Article 275 has stipulated the crime of infringing upon original mark; Article 278 under Section 3 “Crimes concerning market and consumption” has stipulated the crime of obtaining commercial secrets by illegal means, Article 279 has stipulated the crime of perfidiously spreading and showing business secrets, and Article 280 has stipulated the crime of disclosing business secrets.99

II. Legislation Model for Criminal Protection of IPR in China

(i) Dispersive legislation: legislation model for criminal protection of IPR in China before 1997

During the enforcement period of first criminal law in China from 1949 to 1979, the whole society was based on planned economy, and this tightly-controlled planned economy policy and the Anti-elitist Ideology were against the private property system on knowledge assets. Therefore, at that

time, China had no intellectual property law, especially without copyright system. The alternative for intellectual property law was the rewarding system, which proved to be ineffective at all. After China issued the first criminal code in 1979, the reform and opening-up policy was vigorously promoted. In order to ensure the profitability from international trade, China should introduce advanced technology from other countries, and meanwhile face the pressure from these countries on IPR protection. Considering the overall situation of China’s reform and opening up, under both internal and external pressures, China began to set up the criminal law system on IPR protection.

1. Trademark right protection by criminal code, accessory criminal law and separate criminal law

   Article 127 of China’s first criminal law in 1979 stipulated that, “the personnel of enterprises directly involved in counterfeiting the registered trademark of other enterprises violating the trademark regulations shall be sentenced less than 3 years in jail, imprisonment or fines”. The criminal law has explicitly stipulated the crime of counterfeiting the registered trademark, and confirmed the trademark right protection by criminal code.

   The criminal liabilities for trademark infringement stipulated by Trademark Law have been gradually perfected and formed the model of trademark right protection by accessory criminal law. On Aug. 23 1982, the Standing Committee of 5th National People’s Congress passed the special law for trademark protection, i.e. Trademark Law. Article 40 of this law stipulates, “The criminal liabilities of people directly involved in counterfeiting the registered trademark of others, including forging or selling others’ registered trademark without permission, shall be investigated by judicial organ according to the law, apart from imposing fines to compensate the loss of the infringed”. This law has defined the subject of crime counterfeiting the registered trademark as the directly responsible personnel in enterprises, and stipulated the manners of trademark counterfeiting. On Feb. 2, 1993, the Standing Committee of 7th National People’s Congress passed the Decision on Amending the Trademark Law of the People’s Republic of China, and amended Article 40 of Trademark Law in 1982 into 3 clauses, “The criminal liabilities of people involved in counterfeiting the registered trademark of others and constituting a crime shall be investigated according to the law, apart from imposing fines to compensate the loss of the infringed”; “The criminal liabilities of people involved in forging others’ registered trademark without permission, or selling the forged registered trademark and constituting a crime shall be investigated according to the law, apart from imposing fines to compensate the loss of the infringed”; “The criminal liabilities of people deliberately selling commodity with forged registered trademark and constituting a crime shall be investigated according to the law, apart from imposing fines to compensate the loss of the infringed”. The revised Article 40 in Trademark Law concerning the criminal liabilities of trademark infringement has two additional criminal behaviors, one is forging others’ registered trademark without permission or selling the forged registered trademark, the other is deliberately selling commodity with forged registered trademark.

   On Feb. 22, 1993, the Standing Committee of National People’s Congress passed Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks (hereinafter referred to as Supplementary Provisions), and formed the model of trademark right protection by separate criminal law. The Supplementary Provisions have comprehensively amended and supplemented Article 127 of Criminal Law in 1979. First, it added the crime of selling commodities bearing counterfeit registered trademarks and crime of illegally
manufacturing or selling illegally-manufactured signs of registered trademarks, and explicitly stipulated the accusations and legal punishments for each crime. Second, it expanded the scope of subject involved in crime of trademark infringement. The subject of crime concerning trademark infringement has been expanded from the special subject of "industrial and commercial enterprises" specified by the Criminal Law in 1979 to general subject, and the provisions have specifically stipulated that enterprises can commit the crime of trademark infringement as well. Third, it expanded the scope of protection target concerning crimes of trademark infringement. In the Criminal Law of 1979, the protection target in the crime of counterfeiting registered trademarks is only confined to "registered trademarks of other enterprises". The Supplementary Provisions has revised the target of the crime to "others’ registered trademarks", and expanded the target of the crime from enterprises’ registered trademarks to registered trademarks of any units or individuals. Fourth, it raised the legal punishments on crime of trademark infringement. The Criminal Law in 1979 had only stipulated one legal punishment on person counterfeiting registered trademarks, i.e. less than 3 years in prison, detention or fines. Under the principle of proportionality between crime and punishment, Supplementary Provisions in 1993 has stipulated two sentencing criteria according to criminal circumstances and illegal gains, i.e. as for criminal case with large illegal gains or serious circumstances involved, the person involved is sentenced to fixed-term imprisonment of not more than three years or criminal detention, and sentenced concurrently or exclusively to a fine; as for criminal case with huge illegal gains, the person involved is sentenced to fixed-term imprisonment of 3~7 years and a fine.

2. Patent right protection by accessory criminal law

China’s Criminal Law in 1979 did not stipulate the crime of patent infringement. On Mar. 12, 1984, the 4th session of the Standing Committee of 6th National People’s Congress passed the first patent law of new China. Article 63 of this law stipulates, "The criminal liabilities of people directly responsible for serious cases of patent counterfeiting shall be investigated according to Article 127 of Criminal Law (crime of counterfeiting the registered trademark)". It is generally acknowledged that Article 63 of patent law has clearly stipulated the criminal liabilities of patent counterfeiting in China in the form of accessory criminal law, filled up the gap of China’s criminal law in crime of patent infringement, and significantly supplemented China’s Criminal Law. Afterwards, on Sep. 4, 1992, the 27th session of the Standing Committee of 7th National People’s Congress passed the Decision on Amending the Patent Law of the People’s Republic of China, but did not alter the criminal provisions for crime of patent infringement.

3. Copyright protection by separate criminal law

From the founding of People’s Republic of China to the year of 1990, China has never enacted a systematic copyright law. Although the regulations on copyright protection have been successively issued, the copyright infringement had never been handled by the means of criminal penalty. Both the Criminal Law in 1979 and Copyright Law in 1990 did not stipulate the crime of copyright infringement. However, there has once been a hot debate on whether it is necessary to offer special criminal protection for copyright before drafting the copyright law. The several drafts of copyright law from May, 1986 to Dec. 1989, have stipulated the criminal provisions for crime of

---

100 He Binsong, *Criminal Textbooks*, China Legal Publishing House, 1995, p353
copyright infringement, and stated that the serious cases shall undertake criminal liabilities. However, the submissions of copyright law after June 1990 and the first copyright law of People’s Republic of China issued in September 1990 had deleted the provisions for criminal liabilities of copyright crimes. It is mainly based on the consideration that it is unnecessary to apply criminal penalties because the social harmfulness of copyright infringement is generally lower than the hazard degree of crimes. Moreover, Chinese citizens have weak awareness of copyright law. The effective protection of copyright has long been ignored in the past, and people have been accustomed to use others’ works for free. It would be unacceptable for the general public if the criminal liabilities of copyright infringement were investigated all of a sudden. So the copyright law has left certain space and did not stipulate the criminal provisions. Nevertheless, NPC Law Committee has explicitly stated in the deliberation report on draft of copyright law, “the criminal penalties can be otherwise specified or added to criminal law during amendment”. 101

Since 1980s, as the piracy becomes increasingly serious, the serious cases of copyright infringement can only be handled as crime of speculation in judicial practice. In order to solve the difficulties in law application in judicial practice, on July 5, 1994, the 8th session of the Standing Committee of 8th National People’s Congress passed the Decisions Concerning the Punishment of Crimes of Infringing Copyright, which stipulated in detail the criminal liabilities of copyright infringement, improved China’s legislation on criminal protection of copyright, and established the model of copyright protection by separate criminal law.

As we can see, there had been dispersive regulations on criminal protection of IPR before 1997. The law that can determine conviction and discretion of punishment includes criminal code (crime of trademark infringement in Criminal Law of 1979), separate criminal law (e.g. Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks, Decisions Concerning the Punishment of Crimes of Infringing Copyright) and accessory criminal law (Patent Law passed in 1984).

(ii) Centralised legislation: legislation model of criminal law on IPR after the issue of criminal law in 1997

When the criminal code was amended in 1997, one of the guiding principles for this amendment is “to formulate a unified and fairly complete criminal code; to incorporate the supplementary provisions and decisions on amending the criminal law made by the Standing Committee of National People’s Congress during the past 17 years since the criminal law was implemented into the new criminal law; change those provisions in civil, economic and administrative laws concerning investigating criminal liabilities “in accordance with” or “according to” relevant provisions in criminal law into specific terms in criminal law”. 102 Therefore, all the crimes of IPR infringement have been stipulated in Section 7 of Chapter III: Crimes of disrupting the order of the socialist market economy” of the current Specific Provisions of Criminal Code.

Afterwards, in order to enter the WTO, China has continuously amended Copyright Law (2001),

102 Wang Hanbin, on Amendment to the Criminal Law of the People’s Republic of China, on the 5th session of 8th National People’s Congress, Mar. 6, 1997
Trademark Law (2001) and Patent Law (2000 and 2008), and only stipulated that “as for IPR infringement constitutes a crime, the criminal responsibility shall be investigated according to law”. These provisions cannot be considered as accessory criminal law because they did not stipulate the accusations (criminal behaviors) and legal punishment (legal consequence) that are indispensible for crime and punishment norms. Because “only the non-criminal law with crime and punishment norms can be regarded as accessory criminal law in the real sense, and only these accessory criminal laws are the origin of criminal law of our country”.103 As Japanese scholars said, “In China, at least at the present stage, all the criminal regulations are included in the criminal code, with seldom criminal provisions beyond the criminal code. Therefore, the so-called administrative criminal law in Japan does not exist in China”.104 Therefore, after the criminal code was amended in 1997, the legislation model for criminal protection of IPR in China has transferred from dispersive legislation to centralised legislation model in criminal code.

III. Evaluation on Legislation Model for Criminal Protection of IPR

(i) Analysis on advantages and disadvantages of different legislation models

1. Analysis on advantages and disadvantages of centralised legislation model

The centralised legislation model, i.e. stipulating the crimes of IPR infringement in the criminal code, has many advantages: first, it can enhance the authority and deterrent power of criminal law. Despite the same effect and equal authority of criminal regulations in any laws, the ordinary citizens still consider that the criminal regulations in criminal code have higher authority than those in non-criminal laws. In addition, the criminal code is a strict logic system that has gone through scientific arrangement. In the origin of the criminal law, criminal code has the most systematic legal content. Second, it can systematize and centralize all the criminal charges. The centralised legislation model can gather the origins of criminal regulations, fully reveal the common traits of IPR-related crimes, facilitate the comparison and analysis on the differences and relationship among all kinds of IPR-related crimes, coordinate the accusations and legal punishment of crimes, enhance the coordination among crimes, and applicable for judicial organs.

The centralised legislation on IPR-related crimes in criminal code has also many disadvantages: first, the centralised legislation model may cause lag in legislation, and fail to adapt to the actual need of judicial practice. Due to the limited rationality of legislator and complexity of the society, it is impossible to formulate an all-inclusive and eternally applicable criminal code. So any criminal code has loopholes and hysteresis quality, and unable to adapt to the rapidly-developing society. For instance, confronted with the ever-changing cases of IPR infringement, the centralised legislation model in criminal code may face a dilemma, i.e. any timely amendment to criminal law on IPR protection may undermine the stability of criminal code; but if the criminal law stays unchanged, the criminal regulation on IPR protection may lag behind the social and economic changes, and fail to play its due role in IPR protection. Second, the centralised legislation model may lead to simple and careless criminal regulations, and inevitably cause the separation

103 Zhang Mingkai, Criminal Law, Law Press China, 2007, p21
between criminal regulations and their affiliated law.\textsuperscript{105}

2. Analysis on advantages and disadvantages of dispersive legislation model

Compared with centralised legislation model, the dispersive legislation model also has both advantages and disadvantages. On one hand, the dispersive legislation model has many advantages: the first advantage is timeliness and flexibility, i.e. the legislator can timely formulate and enact the law according to the changing situations. So this legislation model is most adaptable to the changing situations. In particular, intellectual property system is characterized by openness and incompleteness, and the relevant legal provisions are being constantly formulated. So the old law has been frequently amended, and the new law has been enacted successively, e.g. China’s Patent Law enacted in 1984 was amended in 1992, 2002 and 2008 respectively; Trademark Law enacted in 1983 was amended in 1993 and 2002. Second, the dispersive legislation model can incorporate civil, administrative and criminal liabilities into the same law, link these three legal responsibilities together, build up a complete legal system, and effectively enhance the seriousness and stability of law, ensure the scientific legal system. Furthermore, the dispersive legislation model can ensure detailed description of criminal behaviors, and facilitate judicial practice. It can also closely link the penal sanctions to rights and obligations in intellectual property law, and thereby tremendously enhance the social effect of intellectual property law.\textsuperscript{106}

However, on the other hand, this dispersive legislation model cannot maintain the stability of criminal code, and more likely to undermine the core status of criminal code.

3. Analysis on advantages and disadvantages of combined legislation model

Under the combined legislation model, crimes of IPR infringement have been stipulated in each intellectual property law, meanwhile, these dispersive regulations are compiled in the uniform Intellectual Property Code, so as to form a unified legal system on IPR protection and effectively settle any potential disputes. However, the combined legislation model of stipulating IPR-related crimes in both criminal code and other intellectual property laws, may not only cause heavy burden on legislation, but also can easily lead to conflicts between laws. This is because any amendment to intellectual property law will result in the amendment to the criminal code, and vice versa. Otherwise, the conflicts among laws will arise and cause various interpretations. Therefore, under the combined legislation model, the amendment of intellectual property law and criminal law shall be conducted simultaneously, which will not only undermine the stability of criminal code, but also waste legislative resources.

(ii) Conclusion

Each legislation model for criminal protection of IPR has both advantages and disadvantages. Therefore, there is no good or bad choice for countries to choose the legislation model for criminal protection of IPR. As commentators pointed out, with respect to crime of IPR infringement, “the legislation mode shall be chosen based on the legislative traditions and culture of different countries or regions. UK and U.S. with common law system generally adopt dispersive legislation model; while civil law countries with statute law often adopt centralised or

\textsuperscript{105} Chu Huaizhi, Comment on Modernization of Criminal Law, Criminal Integration, Law Press, 2004, p453

combined legislation model”. Therefore, the legislation model for criminal protection of IPR shall comply with the country’s legal traditions and features.

Section 3 Penal Sentence of Intellectual Property Infringement

I. EU’s Penal Sentence of Intellectual Property Infringement

Major EU nations have provided criminal law protection for intellectual property. However, subject to different politics, economies and cultures, the laws of intellectual property infringement vary from country to country. Major EU nations’ statutory penalty rules of intellectual property infringement also have some features in common due to the influence of modern criminal law ideas and criminal policy.

(i) Emphasis on the idea of light punishment in the setting of statutory penalty.

Modern criminal law ideas have gradually abandoned the idea of retribution punishment but paid attention to the benefits of the penalty and set up different statutory penalties according to the different crimes. Although infringing upon intellectual property can do harm to the society, it is generally believed that its damage is not serious. Because intellectual property infringement as a statutory crime, compared with traditional property crimes, should bear less social morality condemnation and its subjective culpability of the mind is less intense than natural crimes. Therefore, based on the principle of suiting punishment to crime, relevant statutory penalty allocation generally stipulates lightly, though major EU nations’ legal provisions about intellectual property infringement are strict and comprehensive. For example, for statutory penalty allocation of infringing upon copyright, EU member states’ maximum statutory penalties are light in general. Except Britain and Slovenia stipulate a penalty of freedom above 8 years, other countries’ maximum statutory penalties are above 5 years (see Table3.2).

Table 3.2 EU member states’ allocation table of freedom penalty of copyright infringement

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum statutory penalty</th>
<th>Maximum statutory penalty</th>
<th>Country</th>
<th>Minimum statutory penalty</th>
<th>Maximum statutory penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>6 months</td>
<td>5 years</td>
<td>Ireland</td>
<td>5 years</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>3 months</td>
<td>3 years</td>
<td>Italy</td>
<td>4 years</td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td>5 years</td>
<td>Lithuania</td>
<td>3 years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>4 years</td>
<td>Luxembourg</td>
<td>3 months</td>
<td>2 years</td>
<td></td>
</tr>
<tr>
<td>Czech</td>
<td>2 years</td>
<td>Latvia</td>
<td>5 years</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>3 years</td>
<td>Malta</td>
<td>4 months</td>
<td>1 year</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>18 months</td>
<td>Netherlands</td>
<td>1 year</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

From the above-mentioned EU countries’ statutory penalty provisions, we can see that the statutory penalty allocation of infringing upon intellectual property is not very severe in those countries. Most punishments of intellectual property infringement are stipulated as a set term imprisonment of not more than 3 years. The idea of light punishment is carried out in the criminal penalty allocation.

(ii) Emphasis on economic punishment in the setting of statutory penalty

Intellectual property infringement belongs to economic crimes. Normally the ultimate purpose of the offender is economic interests. To effectively control and prevent the intellectual property infringement, “under the condition that the economic cost of intellectual property infringement (i.e. the basic production and selling cost of the infringing products) is the same, there are two ways to control the intellectual property infringements and crimes: 1. to reduce their economic interests, that is to lower the price of legal products via lessening the normal transaction cost to make the infringing products lose market; 2. to increase their behavior’s legal costs by perfecting the legal system”\(^{108}\). The second approach is adopted widely by countries because of its pertinence and adaptability. To increase the legal costs of intellectual property infringement, the statutory penalty must be set reasonably. Because the intellectual property offenders are usually very greedy, to set property penalties (such as a fine) can weak the criminal’s ability of recommitting the crime in a broadest sense and make the offender realise that infringing upon intellectual property will certainly result in great economic loss. Hence, countries in the world pay more attention to strengthen the effect of property penalties when setting statutory penalty of infringing upon intellectual property and the amount of the fine usually is much greater than other criminal offenses’. For instance, current French Intellectual Property Code article L.335-2 stipulates the criminal responsibility of piracy crime\(^{109}\): in France, pirating works published in France or in other countries will be sentenced a 3-year imprisonment and a fine of €300,000. Same punishment will be applied to those who sell, export or import piracy works. If it is a crime conducted by an organised criminal group, the punishment will be a 5-year imprisonment and a fine of €500,000. If the crime is committed by a legal person, the fine will be five times that of the natural person.

<table>
<thead>
<tr>
<th>Country</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estonia</td>
<td>3 years</td>
</tr>
<tr>
<td>Poland</td>
<td>1 month</td>
</tr>
<tr>
<td>Spain</td>
<td>6 months</td>
</tr>
<tr>
<td>Portugal</td>
<td>1 month</td>
</tr>
<tr>
<td>Finland</td>
<td>2 years</td>
</tr>
<tr>
<td>Romania</td>
<td>6 months</td>
</tr>
<tr>
<td>France</td>
<td>3 years</td>
</tr>
<tr>
<td>Slovenia</td>
<td>8 years</td>
</tr>
<tr>
<td>Britain</td>
<td>10 years</td>
</tr>
<tr>
<td>Slovakia</td>
<td>3 years</td>
</tr>
<tr>
<td>Greece</td>
<td>1 year</td>
</tr>
<tr>
<td>Sweden</td>
<td>2 years</td>
</tr>
<tr>
<td>Hungary</td>
<td>3 years</td>
</tr>
</tbody>
</table>


committing the crime. That is €1.5 million, almost RMB 15 million. In most cases, this punishment is enough to make the criminal legal person completely lose the economic foundation to recommit the crime.

(iii) Starting to pay attention to the function of qualification penalty in the setting of statutory penalty.

Since the implementation of intellectual property infringement requires the performer to have relevant expertise or be engaged in certain business, to deprive the offender of some qualifications is an effective way and measure to control the intellectual property infringement. Because “opportunities have greater effect of controlling human behaviors than social objectives”\textsuperscript{110}, “by legally depriving or restricting intellectual property criminal’s qualification to engage in the business of the production and circulation of intellectual property works, the opportunity for the offender to recommit the crime of intellectual property infringement can be eliminated and the purpose of special prevention can be achieved. Besides, it can also warn other relevant workers and legal persons (units) and impel them to value their qualifications of being engaged in the business of intellectual property works so that the purpose of general prevention is achieved.”\textsuperscript{111} So a prominent trend of criminal legislation for intellectual property in countries all around the world is to increasingly lay stress on the application of qualification penalty. For example, paragraph 5 of Article 133 of the 2004 French Intellectual Property Code prescribed the penalties of shutting down or stopping operations for infringing upon literacy and artistic property: when penalizing crimes mentioned in the three paragraphs hereinabove (paragraphs 2-4 of Article 133), the court can order the infringing corporation to completely or partly shut down, stop or suspend operations and the duration of suspension is not more than 5 years. For another instance, French Intellectual Property Code article L. 343-3 also set rules to restrict some qualifications of the offender: if the doer conducts a criminal act mentioned in the Intellectual Property Code article L. 343-1\textsuperscript{112}, “the perpetrator can be deprived of the right to vote and the right to be elected of holding a post in commercial court, chamber of commerce and industry, industry association, and labor conciliation court, but the time limit is not more than 5 years”\textsuperscript{113}.

II. Chinese Penal Sentence on Intellectual Property Infringement

The penal sentence of intellectual property in Chinese criminal law has the following features:

(i) Laying equal stress on freedom penalty and fines

After examining the provisions of statutory penalty of intellectual property infringement in Chinese

\textsuperscript{110}Quoted from Lin Fei: Logical and Economical Analysis on Economy Illegal Activities, 6 Legal Forum, (2001).
\textsuperscript{112}This Article stipulated: act that infringes upon the right of data base builder, especially act that infringes upon the right Code article L.342-1 stipulated, shall be sentenced to 3-year imprisonment and fine of €300,000. If the criminal behavior is conducted by a criminal group, the offender shall be sentenced to 5-year imprisonment and fine of €500,000.
A Comparative Study on Criminal Protection of Intellectual Property in China and Europe
Chapter 3 - Macroscopic Comparison between Chinese and EU’s IPR Criminal Legislation

criminal law, we may find that all the statutory penalty allocations of intellectual property infringement adopt the method of combining fine penalty with freedom penalty. In other words, after all crimes stipulate freedom penalty as the principal penalty, they can also “concurrently be sentenced” or “concurrently or independently be sentenced to a fine” as the accessory punishment. There is no situation that only stipulates the principal penalty without the accessory punishment. For instance, for crime of infringing upon registered trademarks, according to Criminal Law article 213: “if the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine; if the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine.”

On the one hand, the provisions of “concurrently or independently be sentenced to a fine” and “concurrently be sentenced to a fine” in the criminal law show that applying to fine penalty is not selective. It reflects the importance of fine penalty in punishing intellectual property crimes. The intellectual property crime is a kind of economic crimes so property penalty represented by fine penalty is an effective way of punishing economic crimes. For example, Chinese penal code article 220 clearly defined the cases of units infringing upon intellectual property. The most appropriate sanction measure is property penalty for units. On the other hand, the freedom penalty cannot be reduced. For economic crimes, it is difficult to bring the deterrent function of criminal penalty into full play if a fine is independently sentenced. It will often strengthen the offenders’ belief of “falling down, standing up and continuing the job”. Therefore, the statutory penalty allocations of economic crimes need to realise the combination of freedom penalty and fine penalty.

(ii) The setting of freedom penalty is too severe

In Chinese criminal system centering on freedom penalty, the statutory penalty setting of intellectual property infringement is divided into two levels in Chinese criminal law: for those basic crimes of intellectual property infringement, generally the punishment shall be fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine; if the circumstances are serious and the sum is huge to aggravate the constitution of crime of intellectual property infringement, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine. Throughout the provisions of Chinese criminal law, for five out of seven charges, the maximum statutory penalty of intellectual property infringement is imprisonment of 7 years; for only two charges, the maximum statutory penalty is imprisonment of 3 years (see Table 3.3). However, we can see from penalty provisions of all countries about intellectual property infringement that most countries’ criminal responsibility and undertaking provisions trend towards light punishments.114 Apparently the sanction of Chinese criminal law is quite severe about infringing upon intellectual property. This does not conform to the economy and austerity requirements of punishment application and deviates from the trend of light punishments that other countries in the world adopt to punish crimes of intellectual property

114Sun Wanhuai: Comparison of Criminal Responsibility Base Structure of Intellectual Property Infringement, 2
A Comparative Study on Criminal Protection of Intellectual Property in China and Europe
Chapter 3 - Macroscopic Comparison between Chinese and EU’s IPR Criminal Legislation

Table 3.3 Maximum statutory penalty of intellectual property infringement in Chinese criminal law

<table>
<thead>
<tr>
<th>Stipulation of criminal law</th>
<th>Specific charge</th>
<th>Maximum statutory penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 213</td>
<td>Crime of infringing upon registered trademarks</td>
<td>7-year imprisonment</td>
</tr>
<tr>
<td>Article 214</td>
<td>Crime of selling goods bearing counterfeited registered trademarks</td>
<td>7-year imprisonment</td>
</tr>
<tr>
<td>Article 215</td>
<td>Crime of making representations of registered trademarks without authorisation or selling representations of registered trademarks which are made without authorisation</td>
<td>7-year imprisonment</td>
</tr>
<tr>
<td>Article 216</td>
<td>Crime of forging other’s patent</td>
<td>3-year imprisonment</td>
</tr>
<tr>
<td>Article 217</td>
<td>Crime of infringing upon copyright</td>
<td>7-year imprisonment</td>
</tr>
<tr>
<td>Article 218</td>
<td>Crime of selling infringing reproductions</td>
<td>3-year imprisonment</td>
</tr>
<tr>
<td>Article 219</td>
<td>Crime of infringing upon commercial secrets</td>
<td>7-year imprisonment</td>
</tr>
</tbody>
</table>
Chapter 4 – Microscopic Comparison between Chinese and European Union on Criminal Law Protection of Intellectual Property Right

Section 1 Comparative Studies on Crime of Trademark Right Infringement

I. History and Current Legislation of Chinese Criminal Law Protection of Trademark Right

1. History of criminal law protection of trademark right in China

Criminal law protection of trademark right in China has experienced a process of development from scratch.

In the era of small-scale subsistence economy, the dominant ideology was favoring farming and curbing commerce. In those ages, the concept of trademark right was unimaginable in China, let alone the criminal law protection of trademark right. As a complete new thing for China, the origin of trademark right protection can be traced back to Renewal Sino-British Commercial Treaty, Sino-American Trade Treaty and Sino-Japanese Trade Treaty contracted with Britain, the United States and Japan respectively during 1902 and 1903. The three treaties provided some terms concerning the protection of foreign trademarks, but did not mention any specific regulation on criminal law protection of trademark right. In June 1904, the Qing Dynasty drafted and promulgated “Experimental Regulations for Trademark Registration”. This legislation came into force in September of the same year. “Experimental Regulations for Trademark Registration” is the first Chinese law on trademark rights. In May, 1923, the Beiyang government summarized previous versions of trademark law, and issued “Trademark Law” and “Rules for the Implementation of Trademark Law”. This is the first trademark law of China which was actually implemented. After its establishment in Nanjing, Kuomintang government proclaimed that: “All the substantive laws, procedural laws and other laws, except those contradictory with Party policy, principles and new government laws, will continue to be valid.” With “Trademark Law” of 1923 as chief source, the Nanjing Kuomintang government amended the “Trademark Ordinance” issued by Guangdong Kuomintang government in 1925, and renamed it as “Trademark Law”, which was promulgated in May, 1930 and implemented in the next year.115

After establishment in 1949, the new Chinese government attached high importance on trademark right protection. In 1950, “Provisional Regulations for Trademark Registration” was promulgated, and in 1964, “Regulations for Trademark Administration” was promulgated. In Article 127 of Criminal Law, the first criminal law of new China promulgated in 1979, the crime and penalty of trademark counterfeiting are defined: “If any industrial or commercial enterprise breaches trademark regulations by counterfeiting the registered trademarks of other companies, the directly responsible person will be imposed up to three years of imprisonment, criminal detention or a fine.” In 1982, “Trademark Law of the People’s Republic of China” was adopted by

---

115 Refer the above references to Xiong Fangyuan: Comparative Studies on Criminal Law Protection of Trademark Right, thesis of master’s degree in 2007, East China University of Political Science and Law, P.10-11.
the fifth session of the NPC standing committee. After China’s entry into “Paris Convention for the Protection of Industrial Property” and “Madrid Agreement for International Registration of Trademarks” in 1985 and 1989 respectively, to meet the demands of criminal law protection of trademark right, the NPC standing committee adopted in 1993 “Supplementary Regulations on Punishing Counterfeiting of Registered Trademarks” which redefined the subject, object and penalty of trademark counterfeiting, and added some new crimes, such as selling counterfeited registered trademarks or goods, counterfeiting or unauthorised manufacturing of registered trademarks, and selling counterfeited or unauthorised registered trademarks, etc.

On the basis of “Supplementary Regulations” mentioned above, Article 213 and Article 214 of Criminal Law amended in 1997 defined the crimes of counterfeiting of registered trademarks, selling of counterfeited registered trademarks, unauthorised manufacturing of registered trademarks, and selling of illegally manufactured registered trademarks. On December 8, 2004, the Supreme People’s Court and the Supreme People’s Procuratorate issued “Interpretation on Several Issues of Applicable Laws Concerning Enforcement of Intellectual Rights Infringement” (hereinafter referred as “Intellectual Property Criminal Protection Interpretation 1”) which further clarified the definition of trademark right infringement and convictive standard, and provided powerful legal weapon of standardizing enforcement against trademark right infringement.

2. Current regulations on trademark right infringement

The Criminal Law amended in 1997 defined three crimes of trademark right infringement, namely counterfeiting of registered trademark, selling of counterfeited trademarks, unauthorised manufacturing and selling of registered trademarks.

(1) Counterfeiting of registered trademarks

Article 213 of Criminal Law stipulates that: A person who, without the permission of a registered trademark owner, uses a trademark identical with the registered trademark on the same kind of goods, shall be sentenced to a fixed-term imprisonment of not more than three years or criminal detention and, concurrently or independently, to a fine if the circumstance is serious and; if the circumstance is especially serious, to a fixed-term imprisonment of not less than three years and not more than seven years and concurrently to a fine.

The crime of trademark counterfeiting has the following constitutive requirements:

First, the object of such infringement is the national regulations concerning trademark right and the exclusive trademark right held by other person.

Second, the objective condition of this crime is the unauthorised using of a trademark identical with a registered trademark on same kind of goods, and the circumstance is serious. According to “Interpretation on Several Issues of Applicable Laws Concerning Enforcement of Intellectual Rights Infringement” adopted by the Supreme People’s Court and the Supreme People’s Procuratorate in November, 2004, the word “using” in Article 213 means using the registered trademarks or counterfeited trademarks in goods, goods packages, containers, product manual, goods transaction document, or using the registered trademarks or counterfeited registered trademarks in advertising, exposition or other commercial activities, etc. The so-called “registered trademarks” means the trademarks registered in trademark administration bureau. The “identical trademarks” means completely identical trademarks or visually identical trademarks that can
mislead the consumers. The using of similar trademarks does not constitute a crime. The following are serious circumstances: (1) Illegal operation revenue is more than 50,000 Yuan or illegal income is more than 30,000 Yuan; (2) counterfeiting of more than two registered trademarks, with illegal operation revenue of more than 30,000 Yuan or illegal income more than 20,000 Yuan; (3) other serious circumstances. “Especially serious circumstances” means one of the following: (1) Illegal operation revenue is more than 250,000 Yuan or illegal income is more than 150,000 Yuan; (2) counterfeiting of more than two registered trademarks, with illegal operation revenue of more than 150,000 Yuan or illegal income of more than 100,000 Yuan; (3) other especially serious circumstances. The so-called “illegal operation revenue” means the value of infringement products under manufacturing, storage, transportation and selling. The value of sold infringement goods is calculated on the basis of actual price. The value of unsold infringement products under manufacturing, storage and transportation will be calculated on the basis of price label or actual average price. For the infringement products without price labels or without actual sales price, the value of infringement products will be calculated on the basis of average market price.

Third, the subject of the crime can be natural person of at least 16 years old with - the ability of discernment and self-control, or any corporation. Anyone who is aware that someone is committing the crime of trademark counterfeiting but still provides the criminal with loan, capital, account, invoice, certificate, license, production or operation premise, and conditions or help for transportation, storage and importation/exportation etc., will be convicted as an accomplice.

Fourth, the subjective condition of this crime is intentional action. The contents of intentional actions include: the perpetrator is aware that he is using a trademark identical to a trademark already registered by any other person, and that his action is unauthorised by the trademark owner, but he still intentionally uses the identical trademark on the same kind of goods. The intentions of the perpetrator might be diversified, but such diversity doesn't influence conviction against such crime.

(2) Crime of selling goods with counterfeit registered trademarks

Article 214 of Criminal Law stipulates that: whoever knowingly sells commodities bearing counterfeit registered trademarks shall, if the amount of sales is relatively large, be sentenced to a fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of sales is huge, he shall be sentenced to a fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.

The crime of selling commodities bearing counterfeit registered trademarks has the following constitutive requirements: first, the sales revenue of the commodities bearing counterfeit registered trademark is fairly high. The object of the behavior is the commodities bearing counterfeit registered trademarks, namely the same kind of products bearing identical trademarks without authorisation of the trademark right owner. It doesn't matter whether the quality of such product is different from that of the product bearing genuine registered trademark. Big sales revenue means the sales revenue of more than 50,000 Yuan, and the sales revenue of more than 250,000 Yuan can be deemed as especially big sales revenue. Second, the subject of the crime can be natural person or Organisation. Third, the crime is intentionally committed. The perpetrator is “aware that he is selling commodities bearing counterfeit registered trademarks”.

73
The following situations can be deemed as being “aware”: (1) aware that the registered trademarks of commodities have been obliterated, changed or covered; (2) the perpetrator has received administrative punishment or has born civil liabilities for the crime of selling commodities bearing counterfeit registered trademarks, and still continues to sell the same kind of commodities bearing counterfeit registered trademarks; (3) the perpetrator tampers or counterfeits license document of the trademark owner, or is aware that the license document has been counterfeited or tampered; (4) other circumstances in which the perpetrator is aware or should be aware that he is selling commodities bearing counterfeit registered trademarks. The crime of selling commodities bearing counterfeit registered trademarks might also be convicted as the crime of selling fake and shoddy products, since the products bearing counterfeit registered trademarks are often fake and shoddy products. Such crime can be deemed as a single crime covered by more than one criminal provision (imagined concurrence), and it will be punished as a single crime.

(3) Crime of unauthorised manufacturing and selling of counterfeit registered trademarks

Article 215 of Criminal Law stipulates that: Whoever forges or makes others’ trademark representation without authorisation or sells such representations shall, if the circumstances are serious, be sentenced to a fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also, or shall only, be fined; if the circumstances are especially serious, he shall be sentenced to a fixed-term imprisonment of not less than three years but not more than seven years.

The crime of forging and selling unauthorised registered trademarks has the following constitutive requirements: first, the objective behavior is forging or making others’ trademark representations without authorisation or selling such representations, and the circumstances are serious. The object of the behavior is other person’s registered trademark representation. The trademark representation means the substantial objects bearing words, graphic forms or the combination of words and graphic forms on the products or their packages, such as trademark paper, trademark sign, trademark ribbon, etc. The first constitutive requirement of this crime is that the circumstances are serious. The following circumstances can be deemed as serious: (1) the volume of forging, unauthorised manufacturing or the selling of forged and unauthorised trademarks is more than 20,000 pieces, or the revenue of such illegal operation is more than 50,000 Yuan, or the illegal income is more than 30,000 Yuan; (2) the volume of forging, unauthorised manufacturing or selling of forged or unauthorised two or more kinds of trademarks is more than 10,000 pieces, or the illegal revenue is more than 30,000 Yuan, or the illegal income is more than 20,000 Yuan; (3) other serious circumstances. “Piece” means a trademark representation bearing complete trademark form. Especially serious circumstances include: (1) the volume of forging, unauthorised manufacturing or the selling of forged and unauthorised trademarks is more than 100,000 pieces, or the revenue of such illegal operation is more than 250,000 Yuan, or the illegal income is more than 150,000 Yuan; (2) the volume of forging, unauthorised manufacturing or selling of forged or unauthorised two or more kinds of trademarks is more than 50,000 pieces, or the illegal revenue is more than 150,000 Yuan, or the illegal income is more than 100,000 Yuan; (3) other especially serious circumstances.
II. Criminal Legislation for Trademark Right Infringement in Major European Union Countries

1. Germany

Articles 24 to 26 of “Trademark Law” define the crime of trademark right infringement. According to the German “Trademark Law”, the crimes of trademark infringement include: ¹¹⁶

First, illegally use the name, trade name or trademark of other person. In this crime, the perpetrator illegally uses the name, trade name or trademark protected by this law in its products, product packages or cartons, or in advertisement, price list, business letter, user’s manual, shipment list or similar documents, and has launched such products into the market or offered them for sale. The victim can demand the termination of such behavior. The intentional or unintentional criminal of such behavior must compensate the victim for related losses, and shall be sentenced to an imprisonment of no more than 6 months or a fine of no more than 180 days.

Second, illegally use the external mark of a product. In this crime, the perpetrator uses the external mark which can differentiate one product from other same or similar products in a product, product package or cover, advertisement, price list, business letter, user’s manual, shipment document or similar documents in common transaction, or launches such product into the market or offers it for sale. The victim can ask for termination of such behavior, and the intentional or unintentional perpetrator must compensate the victim for relevant losses, and receive an imprisonment of no more than 6 months and a fine of no more than 180 days.

Third, provides false information of a product. In this crime, the perpetrator intentionally or unintentionally provides false information concerning product origin, quality or price on the product, product package or cover, and such information can mislead the consumers, or launches such product into the market or offers it for sale, or uses such information in advertisement, business letter or other documents. The perpetrator will receive an imprisonment of no more than 6 months, and a fine of no more than 180 days except when more severe punishment is provided.

2. France

The French “Code of Intellectual Property Rights” defines the following crimes concerning infringement of manufacturing, commercial or service trademarks and other obvious marks:

Article L.716-9 stipulates that the following behaviors will receive a two-year imprisonment and one million franc penalty: (1) infringement of registered trademark right and the derived right which prohibit the copying, reproduction, use, attaching, deletion or changing of trademark, group trademark or group certificate trademark; (2) the importation/exportation of products bearing counterfeited trademarks in the frame of customs regulations.

Article L.716-10 stipulates that behaviors as below will receive the above-mentioned punishments: (1) unjustified possession of products bearing counterfeited trademarks, or intentionally selling, distributing, supplying or providing products or services with such trademarks; (2) intentionally supplying or providing products or services which disagree with designated trademarks.

Article L.716-11 stipulates that the following behaviors will receive the above-mentioned punishments: (1) intentionally not use the trademark in accordance with the condition in application of group certificate trademark; (2) intentionally sells or distributes products with improper group certificate trademark; (3) use of group certificate trademark whose protection has expired for less than ten years, or intentionally use the reproduced or counterfeited version of such trademark, or intentionally sells, distributes, supplies or provides product or service with such trademark. This term applies to the trade union mark designated in Article 4.1.3 of the "Code of Labor".

Article L.716-11-1 stipulates that: besides the punishments in Article L. 716-9 and Article 716-10, the court can provide punishment including complete, partial, ultimate or provisional suspension of business to an infringing Organisation. During provisional suspension of business, it is not allowed to terminate employment contract, or cause any economic losses to the employees. If an employee is laid off because of ultimate suspension of business, fixed compensation and laying off compensation, as well as compensation related to employment contract termination must be provided to the employee. The responsible person will receive a six-month imprisonment and 25,000 franc penalty.

Article L.716-11-2 stipulates that: according to Article 121-2 of Criminal Law, the legal person that breaches Articles L.716-9 to Article L.716-11 of this code will receive criminal liability indictment, and punishments as follows: (1) a fine in accordance with Article 131 to Article 138 of Criminal Law; (2) other punishments in accordance with Article 131 to Article 139 of Criminal Law.

Article L.716-12 stipulates that: for recidivist in Articles L.716-9 to L.716-11, or the first offender who has or had an agreement with the victim, two-fold punishment will be provided. Besides, the criminal's right to vote and the right to be elected in commercial court, chamber of commerce, industry association and trade union can be suspended for no more than five years.

Article L.716-13 stipulates that: the court can demand the losing party to put up the court verdict in accordance with Article 132 to 135 of Criminal Law, and publish the complete contents or excerpt of the verdict on a designated newspaper, but the publishing expense should not exceed the amount of fine.

Article L.716-14 stipulates that: for indictment in accordance with Article L.716-9 and Article L.716-10, the court can confiscate the products and crime tools. The court can transfer the confiscated products to the owner of trademark, and this does not influence the compensation for other losses. The court can also destroy such products.

Article 422 of Criminal Law published in 1994 stipulates that: the following behaviors constitute crimes: (1) counterfeiting or infringement of other person’s mark; (2) unauthorised using of the mark. For the manufacturer of product accessories, the using of mark for the purpose of explaining the utilization method of product will be exempted from punishment; (3) unjustified possession of products bearing counterfeited or infringed marks, or intentional selling, distributing, supplying or providing of products or services with such marks; (4) intentionally sells one product or provides one service without registered mark designated by the other party. Any one of the above behaviors will receive a fine of 500 to 15,000 franc, and an imprisonment of 3 months to 3 years, or any of them.

Article 422-1 of the Criminal Law stipulates that: the following crimes will receive a fine of 500 to
10,000 franc, and an imprisonment of 1 month to 1 year, or any one of them: (1) cheating the buyer by infringement of registered mark, or using counterfeited mark; (2) intentionally cheating the buyer by using the registered marks with information concerning the nature, quality, content, category and origin of the product; (3) unjustified possession of products with counterfeited or infringed marks, or intentional selling, distributing, supplying or providing of the products or services with such marks.

Article 422-2 of Criminal Law stipulates that: the following crimes will receive a fine of 500 to 5,000 franc, and an imprisonment of 1 month to 1 year, or any one of them: (1) not use the mark which is supposed to be attached on a product; (2) sell or offer for sale one or several pieces of products without the mark which is supposed to be attached on the product; (3) breach the regulations which demand for mandatory application of such marks; (4) Add legally-prohibited signs on the marks.

3. Britain

The common law rules concerning products with misleading marks appeared as early as 1862. The Trademark Act of 1938 has profound influence on the trademark laws of other countries and regions in the world. Though the law treated trademark infringement only as civil tort, it treated infringement of trademark register as a crime which posed damage to administration of trademarks. It shows the British government’s attention on trademark registration and management. The current Trade Marks Act was adopted on Oct. 31, 1994.

Article 92 stipulates the crime of “unauthorised use of trade mark” as follows:

(1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or

(b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or

(c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

(2) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used—

(i) for labelling or packaging goods,

(ii) as a business paper in relation to goods, or

(iii) for advertising goods, or

(b) uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, or

c) has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

3. A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—

(a) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or

(b) has such an article in his possession, custody or control in the course of a business, knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

4. A person does not commit an offence under this section unless—

(a) the goods are goods in respect of which the trade mark is registered, or

(b) the trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark.

5. It is a defense for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.

6. A person guilty of an offence under this section is liable—

(a) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.

Article 94 defines “falsification of register”, according to this article:

1. It is an offence for a person to make, or cause to be made, a false entry in the register of trademarks, knowing or having reason to believe that it is false.

2. It is an offence for a person—

(a) to make or cause to be made anything falsely purporting to be a copy of an entry in the register, or

(b) to produce or tender or cause to be produced or tendered in evidence any such thing, knowing or having reason to believe that it is false.

3. A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both;

(b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not
other person other person Article 95 defines the behavior of “falsely representing trade mark as registered” as follows:

(1) It is an offence for a person—

(a) falsely to represent that a mark is a registered trade mark, or

(b) to make a false representation as to the goods or services for which a trade mark is registered knowing or having reason to believe that the representation is false.

(2) For the purposes of this section, the use in the United Kingdom in relation to a trade mark—

(a) of the word “registered”, or

(b) of any other word or symbol importing a reference (express or implied) to registration, shall be deemed to be a representation as to registration under this Act unless it is shown that the reference is to registration elsewhere than in the United Kingdom and that the trade mark is in fact so registered for the goods or services in question.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Article 101 defines the “offences committed by partnerships and bodies corporate” as follows:

(1) Proceedings for an offence under this Act alleged to have been committed by a partnership shall be brought against the partnership in the name of the firm and not in that of the partners; but without prejudice to any liability of the partners under subsection (4) below.

(2) The following provisions apply for the purposes of such proceedings as in relation to a body corporate—

(a) any rules of court relating to the service of documents;

(b) in England and Wales or Northern Ireland, Schedule 3 to the M1Magistrates’ Courts Act 1980 or Schedule 4 to the M2Magistrates’ Courts (Northern Ireland) Order 1981 (procedure on charge of offence).

(3) A fine imposed on a partnership on its conviction in such proceedings shall be paid out of the partnership assets.

(4) Where a partnership is guilty of an offence under this Act, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly.

(5) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

4. Italy

On June 25, 1942, the royal court of Italy promulgated decree No.929 concerning the implementation of Trademark Law of Italy. To gear up with directives of the European Community
in the concern of trademark protection, the new trademark law amended in accordance with edict No.480 was adopted in the senate of Italy on December 4, 1992.

According to the Italian trademark law, the constitutive requirements of trademark infringement include: (1) using a mark identical or similar to a famous brand other person without the approval of the owner of registered trademark, and providing goods or service which are identical or similar to the goods or service whose trademark has been registered and may create misleading effect among the public; (2) using a mark which is identical or similar to a famous trademark of other person others, though the mark is used for goods or services which are different from the designated goods or services of the famous trademark other person; or using a mark similar with other person famous trademark as company name or trade name to obtain illegal profits without any justifiable reason, or such behavior damaging the presence or reputation of other person the famous trademark; (3) any mark which is identical or similar to other person trademark, and is capable of creating misleading effect among the public, especially when the owners of two trademarks are doing the business activities which are difficult to differentiate, or the trademark is used in product or service that is misleading, such mark should not be used as company name, trade name or company logo; (4) attach false words or description on the product to create the impression that such mark has been registered or such product is invented by the perpetrator.

But not all of the above infringement behaviors constitute crime. The Italian trademark law only treats the fourth behavior mentioned above as a crime, namely, the perpetrator will receive a fine of 100,000lira if he attaches false words or description on the product to create the impression that such mark has been registered or such product is invented by him.118

5. Spain

Article 274 of Spanish Criminal Law stipulates that:119

Clause 1: in industrial production or commercial activities, make, reproduce, modify or use through other methods a special mark which can differentiate identical or similar product, service, activity or business from the counterparts to which a trademark is registered, without the approval of the owner of industrial property right registered in accordance with Trademark Law, and knowing in advance that the trademark has been registered, such behavior will receive punishments, including an imprisonment of 6 months to 2 years, and a fine for 6 to 24 months.

Clause 2: knowing the regulation of Clause 1, but the perpetrator still commercializes the product or service with special trademark or launches them into commercial circulation and infringes the exclusive right of the owner of this trademark, even though the product is introduced from foreign countries, the perpetrator will receive the same punishments.

6. Finland

Article 2 (1995/No.578) of Chapter 49 “Crime of Infringement on Some Intangible Property

---

Chapter 4 - Microscopic Comparison between Chinese and EU on Criminal Law Protection of IPR

III. Comparison of Criminal Legislation for Trademark Right Infringement in China and European Union

1. Comparison of the model of legislation against trademark right infringement

In China and European Union, there are the following models of criminal legislation against infringement of trademark right:

Model 1: Criminal Law only model. That is to say, the constitutive requirements and criminal penalties of trademark right infringement are only specified in Criminal Law. For example, in Romania, Bulgaria and other countries, the Criminal Law specifies the crime of trademark right infringement as a crime of illicit competition. In China, the crime of trademark right infringement is also specified in the Criminal Law.

Model 2: Appendix of Criminal Law model, that is to say, the crime of trademark right infringement and relevant punishments are specified in Trademark Law instead of the Criminal Law. Britain, Germany and Italy take this model.

Model 3: combination of Criminal Law and its appendixes, that's to say, the crime of trademark right infringement is specified in both Criminal Law and Trademark Law. For example, as mentioned above, France specifies crime of trademark right infringement in both Criminal Law and French Intellectual Property Right Code.

2. Comparison of crime categories concerning trademark right infringement

In China and major countries of European Union, there are the following crime categories concerning trademark right infringement:

First, the crime of infringement of trademark’s exclusive right, for example, in China, the Criminal Law specifies the crime of trademark counterfeiting, selling of counterfeited trademark, as well as illegal manufacturing and selling of counterfeited trademark; in Germany, the Trademark Law specifies the crime of illegal use of product’s external mark; in Britain, the Trade Mark Act of 1994 stipulates that: those who use identical or similar trademark in the same or similar product’s manufacturing, transportation, storage or sale or in the same or similar service without the approval of the trademark owner or its authorised user, which constitutes illicit use of the reputation of registered trademark or causes damage to the reputation or presence of the registered trademark. Such behavior will be deemed as infringement, and serious circumstances will trigger criminal liabilities; in France, Article 422 of Criminal Law stipulates that the following behaviors, including counterfeiting or unauthorised use of other person’s trademark, unauthorised use of trademark without the approval of the owner, unjustified and intentional possession of products with counterfeited or unauthorised trademark, intentional sale, distribution, supply or provision of products or services with such trademark, and intentionally selling of one product or

---

providing of one service without the designated trademark, will constitute the crime of infringement of trademark’s exclusive right.

Second, the crime of breaching the administration system of trademark registration, such behavior doesn’t necessarily infringe trademarks’ exclusive right, but it damages national administration system of trademark registration. For example, the Trademark Law of Germany stipulates the crime of false description of product; in Britain, Article 94 of Trade Mark Act stipulates the behavior of “falsifying the trademark register”; in France, Article 422-2 of Criminal Law specifies the behavior of not attaching a mark which is supposed to be attached on a product. All these behaviors constitute the crime of breaching the administration system of trademark registration.

3. Comparison of crime terminology

1) China

In China, there are three crimes of trademark right infringement, namely counterfeiting registered trademark, selling product with counterfeited trademark, and illegal manufacturing and selling of counterfeited trademark.

2) Britain

The British Trade Marks Law stipulates three crimes, namely:

First, the crime of “unauthorised use of trademark” which concerns the following behaviors: (1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or (c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b). (2) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used—(i) for labelling or packaging goods, (ii) as a business paper in relation to goods, or (iii) for advertising goods, or (b) uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, or (c) has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b). (3) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) has such an article in his possession, custody or control in the course of a business, knowing or having reason to believe that it has been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

Second, the crime of “falsifying trademark register” includes the following behaviors: (1) to make, or cause to be made, a false entry in the register of trademarks, knowing or having reason to
believe that it is false. (2) to make or cause to be made anything falsely purporting to be a copy of an entry in the register, or to produce or tender or cause to be produced or tendered in evidence any such thing, knowing or having reason to believe that it is false.

Third, the crime of “falsely proclaiming that a certain mark is a registered trademark” includes the following behaviors: (a) falsely to represent that a mark is a registered trade mark, or (b) to make a false representation as to the goods or services for which a trade mark is registered knowing or having reason to believe that the representation is false.

3) Germany

The German Trademark Law also stipulates three crimes:

First, illegally use the name, trade name or trademark of other person. In this crime, the perpetrator illegally uses the name, trade name or trademark protected by this law in its products, product packages or covers, or in advertisement, price list, business letter, user's manual, shipment list or similar documents, and launches such products into the market or offers them for sale.

Second, illegally use the external mark of a product. In this crime, the perpetrator uses the external mark which can differentiate one product from other same or similar products in a product, product package or cover, advertisement, price list, business letter, user's manual, shipment document or similar documents in common transaction, or launches such product into the market or offers it for sale.

Third, provides false information of a product. In this crime, the perpetrator intentionally or unintentionally provides false information concerning product origin, quality or price on the product, product package or cover, which can mislead the consumers, or launches such product into the market or offers it for sale, or uses such information in advertisement, business letter or other documents.

4) France

The French Intellectual Property Right Code stipulates the following crimes concerning trademark: (1) infringement of registered trademark right and the derived right which prohibit the copying, reproduction, use, attaching, deletion or changing of trademark, group trademark or group certificate trademark; (2) the importation/exportation of products bearing counterfeited trademarks in the frame of customs regulations; (3) unjustified possession of products bearing counterfeited trademarks, or intentional selling, distributing, supplying or providing of products or services with such trademarks; (4) intentionally supplying or providing products or services which disagree with designated trademarks; (5) intentionally not using the trademark in accordance with the condition in application of group certificate trademark; (6) intentionally selling or distributing products with improper group certificate trademark, etc.

5. Italy

The Italian Trademark Law only stipulates one crime: attaching false words or description on the product to create the impression that such mark has been registered or such product is invented by the perpetrator.
IV. Summary

According to the above comparison, there are the following differences between China and the major countries of European Union in the concern of legislation against trademark right infringement:

1. For object of protection, Chinese Criminal Law only protects the registered trademark of goods, and the trademark of service is not in the scope of protection; whereas in major countries of European Union, the trademarks for both goods and service are protected. Our country’s protection scope is relatively small. The protection scope of German Trademark Law is very extensive, including trademark, other person’s name, trade name, product, product package, advertisement, similar documents, external mark that can differentiate one product from its counterparts.

2. For behaviors of counterfeiting trademark, China only treats the use of trademark identical with another registered trademark on the same product as a crime of counterfeiting registered trademark, whereas the use of similar trademark used on the same product, use of same trademark on similar product or use of similar trademark on similar product are only treated as trademark infringement. While European Union, Germany and Spain treat these three behaviors as crimes.

3. For amount limit of trademark infringement, Chinese Criminal Law treats big amount and serious circumstances as constitutive requirements of such crime, while the European Union member countries have no such limitation. But this does not mean that our fight against trademark infringement is not as powerful as that of European Union member countries. This is because of the difference between different penal systems. Our punishment system of public law is composed of criminal penalties and administrative punishment, and the behaviors that are treated as police offense and minor offense in European Union member countries are punished by administrative measures.

Section 2 Comparative Studies on Crime of Patent Right Infringement

I. History and Current Legislation of Criminal Law Protection of Patent Right in China

1. History of criminal law protection of patent right in China

China’s commencement of criminal law protection of patent right is rather late. The Criminal Law of 1979 has no stipulation concerning patent right infringement. In January 1980, China Patent Office was established upon approval of the State Council. In March of the same year, China formally joined World Intellectual Property Organisation. Then in December 1984, China joined Paris Convention for the Protection of Industrial Property. To make Chinese patent regulations in pace with international standard and in conformity with requirements of international conventions, "Patent Law of the People’s Republic of China" was formally issued in 1984. Since the Criminal Law of 1979 provides no definition for patent right infringement, so Article 64 of Patent Law in 1984 offers the following rules as supplement to the Criminal Law: “counterfeiting of other people’s patent will receive punishments as specified in Article 60 of this law. For serious circumstances, the immediate responsible person will be punished in accordance with Article 127 of Criminal Law.” Article 127 of Criminal Law in 1979 defines crime of counterfeiting registered
trademark. This can fill in the gap of regulation concerning patent right infringement, but Article 64 of Patent Law is only an analogical measure.

Article 2.1.1 of “Notice on Several Problems Concerning Trial of Patent Right Infringement” (published on February 16, 1985) stipulates that: “for patent right infringement, if the circumstance is serious, the directly responsible person will be punished as perpetrator of counterfeiting other person’s patent in accordance with the regulation of Article 127 of Criminal Law.

On such basis, when the Criminal Law was revised in 1997, the legislators took into account of various opinions and established patent counterfeiting as an independent crime, and gave clear regulations on criminal liabilities for any Organisation which committed such crime. In “Criminal Explanation for Intellectual Property Right—Part 1” (issued on December 8, 2004, further clarified the behaviors and convictive standard of this crime). This provided a powerful legal weapon to fight against crime of patent counterfeiting.

2. Chinese regulations concerning patent right infringement

Article 216 of the Criminal Law revised in 1997 stipulates that: “For perpetrator who counterfeits other person’s patent, if the circumstance is serious, he will receive an imprisonment of no more than 3 years or detention, or a fine, or both of them.

The constitutive requirements of the crime of patent counterfeiting are as follows: I. The object of this crime is the national patent right regulations and other people’s patent right. II. The objective behavior of this crime is counterfeiting of other person’s patent, and the circumstance is serious. According to “Criminal Explanation for Intellectual Property Right—Part 1”, the following behaviors constitute serious circumstances: (1) Illegal operation revenue is more than 200,000 Yuan or illegal income is more than 100,000 Yuan; (2) cause more than 500,000 Yuan direct loss to the patent right owner; (3) counterfeiting of two or more patents of other people, illegal operation revenue is more than 100,000 Yuan, or illegal income is more than 50,000 Yuan; (4) other serious circumstances. The subject of this crime is common natural person and Organisation. III. The subject of this crime is a natural person more than 16 years old or an Organisation. IV. Only intentional behavior can be treated as crime.

According to Article 216 and Article 220 of Criminal Law, perpetrator of this crime will receive an imprisonment of no more than 3 years or detention and a fine or only a fine. For an Organisation accountable for this crime, a fine will be imposed on it, and the direct leadership and other directly responsible persons will be punished as mentioned above.

II. Criminal Legislation of Patent Right Infringement in Major Countries of European Union

1. France

Article L.521-4 to L.521-6 of French “Intellectual Property Right Law” stipulates the criminal law protection of industrial design.

Article L.521-4 stipulates that: those who infringe patent right will be punished by up to two years of imprisonment and a fine of one million franc. For an Organisation committing such crime, it will be punished by up to five years of complete, partial, ultimate or temporary suspension of business. But it is not allowed to terminate employment contract during temporary suspension of
business, or cause any economic loss to the employees. For laying-off caused by ultimate suspension of business, besides pre-determined compensation and laying off compensation, compensation for loss related to employment contract suspension must also be provided in accordance with Labor Law. Otherwise, those who are responsible will be punished by an imprisonment of 6 months and a fine of 25,000 franc.

Article L.521-5 stipulates that: at the condition specified in Article 121-2 of Criminal Law, the legal person can be held accountable for the behavior specified in Article L.521-4 and be imposed with the following punishments: (1) a fine as specified in Article 131-38 of Criminal Law; (2) criminal penalties specified in Article 131-39 of Criminal Law, and also suspension of business.

Article L.521-6 stipulates that: recidivist of patent right infringement or first offender who has or had agreement with the victim will be imposed with two fold punishments, and suspension of the right to vote and to be elected in commercial court, chamber of commerce, industry association and trade union.

Article L.615-12 to L.615-14 of French "Intellectual Property Right Law" stipulates the protection of invention and technologies.

Article L.615-12 stipulates that: for impostor of patent owner or patent applicant, a fine of 50,000 franc will be imposed while the recidivist will receive two fold punishments. If the suspect committed the same crime in the last five years, it will be treated as a recidivist.

Article L.615-13 stipulates that: besides the behaviors that might pose threats to national security therefore deserving more severe punishments, those behaviors including intentional breach of regulations in Article L.612-9 and Article L.612-10 will be imposed with a fine of 30,000 franc. If the infringement causes damage to national defense, an imprisonment of one to five years will also be imposed.\(^{121}\)

Article L.615-14 stipulates that: intentional infringement of patent rights specified in Article L.613-

---

\(^{121}\) Article L612-9: The patented invention shall not be disclosed or used freely without authorization. In such time, patent applications shall not be made available to the public and no copy of the patent application shall be issued without authorization. Subject to Article L612-10, the authorization referred to in the first paragraph of this article may be granted at any time. Authorization will be obtained automatically after expiry of a period of five months from the submitting date of the patent application. The authorizations referred to in the first and second paragraphs of this article shall be granted by the Minister responsible for industrial property after considering the opinions of Ministry of National Defense.

Article L612-10: Prior to expiry of the period referred to in the second paragraph of Article L612-9, the prohibitions laid down in the first paragraph of that article may be extended, at the demand of the National Defense Minister, for a renewable period of one year. The extended prohibitions may be cancelled at any time under the same procedure. Where a prohibition has been extended under this article, patent owner application shall be entitled to compensation commensurate with the loss incurred. Failing amicable agreement, such compensation shall be laid down by the First Instance Court. Proceedings at all levels of jurisdiction shall take place in court chambers. A petition for revision of the compensation provided for in the foregoing paragraph may be filed by patent owner on expiry of one year after the date of the final judgment determining the amount of the compensation. Patent owner shall furnish evidence showing that the loss he suffered is in excess of the assessment of the court.
3 to L.613-6 will be punished by two years of imprisonment and a fine of one million franc.  

Article L.615-14 stipulates that: for recidivist or first offender that has or had agreement with the victim, two fold punishments will be imposed, or suspension of the right to vote and to be elected in commercial court, chamber of commerce, industry association and trade union for no more than five years.

2. Germany

Article 25 of German Utility Model Patent Right Law stipulates that:

(1) For those who have the following behaviors without the approval of utility model patent owner, an imprisonment of no more than three years or a fine will be imposed:

1. Manufacture, distribute, trade, use, import or possess products with utility model patent marks, or

2. Fail to perform the patent rights in accordance with Article 14.

---

122 Article L613-3: The following shall be prohibited, save consent by patent owner: 1) Making, offering, putting on the market or using a patented product, or importing or stocking a product for such purposes; 2) Using a patented process or, when the third party knows or it is obvious in the circumstances that the use of the process is prohibited without the consent of patent owner, offering the process for use on French territory; 3) Offering, putting on the market or using the product obtained directly from a patented process or importing or stocking for such purposes.

Article L613-4: 1). It shall also be prohibited, save consent by patent owner, to supply or offer to supply, on French territory, to a person other than the person entitled to use the patented invention, the means of implementing, on that territory, the invention with respect to an essential element thereof where the third party knows or it is obvious from the circumstances that such means are suited and intended for putting the invention into effect. 2). Paragraph 1 shall not apply where the means of implementation are staple commercial articles, except where the third party induces the its supplying object to commit acts prohibited by Article L613-3. 3). Persons carrying out the acts referred to in items (a), (b) and (c) of Article L613-5 shall not be deemed as persons entitled to use the invention within the meaning of paragraph 1.

Article L613-5: The rights afforded by the patent shall not extend to: 1) Acts done privately and for non-commercial purposes; 2) Acts done for experimental purposes relating to the subject matter of the patented invention; 3) The extemporaneous preparation of a medicine for individual cases in a pharmacy in accordance with a medical prescription or acts concerning the medicine so prepared.

Article L613-6: The rights afforded by a patent shall not extend to acts concerning a product covered by that patent which are done on French territory after such product has been put on the market in France or on the territory of a State party to the Agreement on the European Economic Area by patent owner or with his express consent.

123 Article 1 of New German Patent Law: protection condition of new patents: (1) Patents shall be granted for inventions that are new, involve an inventive step and are susceptible of industrial patent application. (2) The following in particular shall not be regarded as inventions within the meaning of subsection (1): 1. discoveries, scientific theories and mathematical methods; 2. aesthetic creations; 3. schemes, rules and methods for performing mental acts, playing games or doing business and programs for computers; 4. presentations of information. (3) The provisions of subsection (2) shall exclude patentability only to the extent to which protection is sought for the above-mentioned subject matter or activities as such.
(2) Profit-oriented behaviors of the perpetrator will be imposed with an imprisonment of no more than five years and a fine.

(3) Also impose punishments on attempted perpetrator.

(4) In circumstance (1), the perpetrator is only criminally liable if the victim makes an accusation. However, if the prosecutor deems it necessary to make a public prosecution for public interests, he is not prohibited from doing so.

(5) The goods related with crime must be confiscated in accordance with Article 74a of the Criminal Law. If claim right designated by Article 24a is provided to facilitate the compensation litigation (Articles 403 to 406c) of the victim in accordance with the Code of Criminal Procedure, the above rule of confiscation will not apply.

(6) If the victim files litigation and proves a justifiable interest, the verdict must be proclaimed openly in the form designated therein.

3. Britain

The current 1977 Patent Act and its implementation rules are based on the revision of and supplement to 1949 Patent Act. According to regulations of Article 109 to 113 of British Patent Act, the crimes of patent right infringement are as follows:

(1) Crime of falsification of register etc. If a person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy or reproduction of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be liable—(a)on summary conviction, to a fine not exceeding £1,000, (b)on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(2) Crime of unauthorised claim of patent rights. (1)If a person falsely represents that anything disposed of by him for value is a patented product he shall, subject to the following provisions of this section, be liable to—summary conviction, to a fine not exceeding £1,000, on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(3) Unauthorised claim that patent has been applied for. (1)If a person represents that a patent has been applied for in respect of any article disposed of for value by him and—(a)no such application has been made, or (b)any such application has been refused or withdrawn, he shall,

---

subject to the following provisions of this section, be liable on summary conviction to a fine not exceeding level 3 on the standard scale. (2) Subsection (1)(b) above does not apply where the representation is made (or continues to be made) before the expiry of a period which commences with the refusal or withdrawal and which is reasonably sufficient to enable the accused to take steps to ensure that the representation is not made (or does not continue to be made). (3) For the purposes of subsection (1) above a person who for value disposes of an article having stamped, engraved or impressed on it or otherwise applied to it the words “patent applied for” or “patent pending”, or anything expressing or implying that a patent has been applied for in respect of the article, shall be taken to represent that a patent has been applied for in respect of it. (4) In any proceedings for an offence under this section it shall be a defense for the accused to prove that he used due diligence to prevent the commission of such an offence.

4. Spain

In Section 2 of Spanish Criminal Law, regulations concerning infringement of industrial property right provide criminal law protection of patent right. Article 273 stipulates that:

Item 1: in industrial production or commercial transaction, the perpetrator produces, introduces, possesses, leases or offers the patented goods for sale without the approval of patent inventor although he knows that the patent has been registered. Such crime will receive an imprisonment of 6 to 24 months, and a fine of 6 to 24 months.

Item 2: uses or provides patented procedure explanation, possesses, leases or offers it for sale, or uses the product made in accordance with patented procedure for the same purpose as mentioned above, same punishment will be imposed.

Item 3: for behaviors in Item 1, and the patented articles are other person’s product sample, industrial or artistic patterns or circuit diagram, same punishments will be imposed.

Article 276 stipulates that:

Item 1: for the above behaviors, if the circumstances are especially serious, based on the illegal income and damage to the victim, an imprisonment of 2 to 4 years, a fine of 8 to 24 months, and suspension of practicing the business related to crime for 2 to 5 years will be imposed.

Item 2: in such case, the judge or court can impose provisional or permanent suspension of business on the factory or business location. Provisional suspension shouldn’t be more than 5 years.

Article 277

For intentional disclosure of patented inventions which have been classified, and such disclosure poses damage to national defense, an imprisonment of 6 to 24 months and a fine of 6 to 24 months will be imposed.
III. Comparison of Criminal Legislation for Patent Right Infringement in China and European Union

1. Model of legislation

In China and European Union, there are the following models of criminal legislation against infringement of patent right:

Model 1: Appendix of *Criminal Law*. In Germany, France and Britain, the crime of patent right infringement and relevant punishments are specified in *Patent Law* (or *Intellectual Property Law*) but not mentioned in *Criminal Law*.

Model 2: stipulated in *Criminal Law*. Patent right infringement crimes are stipulated in *Criminal Law*. For example, Article 216 of Chinese *Criminal Law* stipulates patent counterfeiting crime.

2. Comparison of crime terminology

For patent right infringement crime terminology, there is a big difference between China and European Union, and between the member countries of European Union: according to French "*Intellectual Property Right Code*, intentional infringement of industrial design right and patent right will constitute crimes, personating of patent owner or patent applicant, illegal patent application, illegal announcement of patent application and other behaviors that breach the patent right administrative rules will also constitute crimes; in Germany, *Patent Law* only stipulates the crime of infringing the exclusive patent right, namely the crime of illegally using other person’s patent, but patent counterfeiting and forging of patent records will not be treated as crimes; in Britain, the stipulation of relevant crimes are very complete, the *Patent Act* not only stipulates the crime of counterfeiting personal patent right, but also behaviors that breach patent right administrative rules, such as forging patent records, counterfeiting of patent application, abuse of patent office authority, etc.; in Spain, the *Criminal Law* stipulates crime of producing, introducing, possessing, leasing or selling patented products, and the crime of using, providing, possessing, leasing or selling patented procedure explanation.

Chinese *Criminal Law* only stipulates that behavior of counterfeiting other person’s patent will constitute a crime, and the illegal using of other person’s patent is not treated as crime. It is only treated as a tort.

The above differences indicate that these countries have different value orientations concerning patent right crimes: for Britain, the crimes of counterfeiting patent, forging patent records, counterfeiting patent application, and abusing the authority of patent office are the behaviors that disturbing market order and national patent management, damaging consumer interest and other public or national interests, while the infringement of personal patent right without approval of the patent owner is not treated as a crime. This indicates that Britain attaches more importance on public interests in legislation against patent right crimes; in Germany, it is the contrary case. The German Patent Law only treats using of personal patent right without approval of the patent owner as a crime, this is a legislation value oriented on personal interest, and in Spain, the legislation value orientation is quite similar; in France, the *Intellectual Property Right Code* ...

---

stipulates patent right crimes including illegal patent application and illegal announcement of patent application that breach patent right administrative rules, also the behavior of infringing industrial design and patent right. This is a value oriented on both public and personal interests. Chinese Criminal Law only stipulates crime of patent counterfeiting. This indicates the importance attached on patent owner and market order.

3. Comparison of punishments

For punishments of patent right crimes, there are the following features in China and member countries of European Union:

First, fine is most widely used punishment method. Article L.521-4 and Article L.615-14 of French Intellectual Property Right Code stipulates that the crimes of infringing industrial design right and patent right will receive an imprisonment of no more than 2 years and a fine of one million franc. The German Patent Law imposes an imprisonment of no more than 3 years and a fine on illegal use of patent right, and imposes an imprisonment of no more than 5 years or a fine on profit-oriented crime. Britain imposes a fine of no more than 1000 pound sterling on patent records forging, an imprisonment of no more than 2 years and/or a fine on convicted crime, and a fine of no more than 500 pound sterling on abusing the authority of patent office. The Spanish Criminal Law stipulates a fine of 6 to 24 months for crimes of producing, introducing, possessing, leasing and offering for sale of patented goods without approval. Chinese Criminal Law also stipulates a fine in punishment of counterfeiting patent right.

Second, the imprisonment term is very short. France stipulates 2 years of imprisonment, Germany stipulates up to 3 years of fixed-term imprisonment and 5 years of fixed-term imprisonment for profit-oriented crime, Britain stipulates an imprisonment of no more than 2 years, and Spain stipulates an imprisonment of 6 to 24 months and an imprisonment of 2 to 4 years for especially serious circumstances. China stipulates a fixed-term imprisonment of no more than 3 years or detention.

Third, some countries apply the suspension of qualification in patent right crime. For example, the Article L.521-4 of French Intellectual Property Right Code stipulates that the legal person that infringes industry design will receive ultimate or provisional suspension of complete or partial business for no more than 5 years, or the punishment stipulated in Articles 131-39 of Criminal Law; Article L.615-14-1 stipulates that the criminal that infringes patent right will be deprived of the right to vote and to be elected in commercial court, chamber of commerce, industry association and labor union for no more than 5 years. Spain also stipulates that criminal of serious patent right infringement will be deprived of the right to practice the business related with the crime he has committed for 2 to 5 years, and the factory or business location can be ordered to suspend business permanently or provisionally. The provisional suspension of business should be no more than 5 years.

4. Prosecution methods

For patent right crimes, most countries apply private prosecution rule, namely the crime of patent right infringement will only be prosecuted after reporting of the victim.126 For example, Article 49

of German Patent Law stipulates that: criminal litigation starts from claim of the victim, and such claim can be withdrawn. Article 287 of Spanish Criminal Law also stipulates that: Cause 1: crimes in this chapter will be prosecuted only after reporting of the victim or its authorised agent. If the victim is a minor or disabled, the Ministry of Justice can also file the litigation. Cause 2: if the crimes damage public interests or majority interests, the previous clause will not apply. The Swedish Patent Law stipulates that: only when the infringement of patent right damages public interests and the victim files a claim will the prosecutor file a prosecution.

Chinese Criminal Law doesn’t explicitly stipulate that patent right infringement is a private prosecution crime. But Article 1 of Interpretations on Several Issues in Enforcing Criminal Procedure Law of the People’s Republic of China adopted by the Supreme People’s Court on June 29, 1998 stipulates that: “Private prosecution crimes include…… (2) Minor crimes not yet prosecuted by the People’s Procuratorate but the victim has evidence to prove it…… 7. Infringement of intellectual property right (except those pose serious damage to society order and national interests according to Article 3.7 of Criminal Law); …… ” This indicates that China also applies private prosecution rule for patent right infringement crimes. And judicial enforcement is also based on the reporting of victim.

IV. Summary

The above comparisons indicate that Chinese regulations concerning punishments and prosecution methods of patent right crimes are suitable and reasonable.

Currently, the major controversy in criminal law theories and judicial enforcement is that whether forging of patented goods can be treated as crime of patent counterfeiting. The damage of behaviors of forging patented goods or patented procedures is no less than that of counterfeiting other person’s patent, because both of them cheat the public, breach national patent right administrative rules, damage national and public interests and disturb normal economic order, and cause negative impact on the reputation and credit of the patented products. Therefore forging of patented products or methods with serious circumstances must also be prosecuted. Because such behavior is not incriminated by Chinese Criminal Law, so the perpetrator will often forge a patent mark or patent number instead of counterfeiting other person’s patent. The Patent Law of both the Anglo-American Legal System and the Continental Law System doesn’t discriminate the forging of patented products or counterfeiting of other person’s patent, therefore it’s unnecessary to create the crime of patent forging. Instead, deletion of “other person’s” in Article 216 of Criminal Law is enough to incorporate both patent forging and patent counterfeiting. This approach protects the integrity of Chinese patent right regulations, and also keeps domestic criminal legislation against patent forging in pace with international standard.”

Section 3 Comparative Studies on Crime of Copyright Infringement

I. History and Current Legislation of Criminal Law Protection of Copyright in China

1. History of criminal law protection of copyright in China

From establishment of New China to 1990, China had no copyright law. In 1985, National

---

Copyright Administration was established. In May 1986, the bureau submitted *Copyright Law of the People’s Republic of China (draft)* to the State Council. In September 1990, the law was adopted. This law is the first copyright law since the establishment of New China. And this indicated that China’s criminal law protection of copyright had entered standardized period. But this *Copyright Law* only stipulates the civil and administrative liabilities of copyright infringement, and there are no criminal liabilities for serious infringement behaviors. This lies in the fact that China’s protection of copyright had been absent previously, and the public’s copyright awareness was quite weak, so the abrupt incrimination of serious copyright infringement might be difficult to be accepted. Though copyright infringement crime is absent, the *Notice on Severe Criminal Enforcement on Illegal Publication Crimes* issued by the Supreme People’s Court and the Supreme People’s Procuratorate on November 27, 1987, indicating that serious infringement of copyright will be punished as crime of speculation.

With rapid economic development, the piracy of literary works and audio-visual products in China are becoming more and more rampant. Massive piracy not only harms the interests of the copyright owner, but also damages normal economic order. On the other hand, with China’s entry into World Intellectual Property Organisation, it must fulfill its commitment of intellectual property right protection. In this context, *Decision on Enforcement against Copyright Infringement* was adopted on the eighth meeting of the Standing Committee of the Eighth National People’s Congress in 1994. This is the first criminal law for protection of copyright in China. Its adoption filled the previous gap. On January 16, 1995, *Explanations on Several Problems of “Decision on Enforcement against Copyright Infringement”* was issued by the Supreme People’s Court.

In 1997, the revised Criminal Law of the People’s Republic of China was issued. This Criminal Law incorporated the contents of *Decision on Enforcement against Copyright Infringement*, and stipulated crimes of copyright infringement and sale of infringed reproduces. On December 8, 2004, the Supreme People’s Court and Supreme People’s Procuratorate jointly issued *Explanations on Several Problems Concerning Applicable Laws for Enforcement against Intellectual Property Right Infringement* (here forth referred to as “Intellectual Property Right Criminal Enforcement Explanations (1)”). It lowered the standard of copyright infringement conviction, clarified definitions of several terms, and provided explanations for infringement via internet, namely, the proliferation of literary works, music, film, TV program, audio-visual products, computer software and other works via the internet should be treated as “reproduction and distribution” in *Article 217 of Criminal Law*. On April 5, 2007, the People’s Supreme Court and the People’s Supreme Procuratorate jointly issued *Explanations on Several Problems Concerning Applicable Laws for Enforcement against Intellectual Property Right Infringement* (2) (here forth referred to as “Intellectual Property Right Criminal Enforcement Explanations (2)”). It further lowered the standard of copyright infringement conviction and clarified definitions of several terms, which can help standardize the enforcement of intellectual property right.

The above review of criminal law protection of copyright indicates that China has established fairly complete protection of copyright by civil, administrative and criminal measures. This can be attributed to the pressure and need from global copyright protection trend and also the internal need of building China into an “independent innovative country.”
2. China’s current regulations concerning copyright infringement

The revised edition of Criminal Law in 1997 stipulated two crimes of copyright infringement, namely copyright infringement and sale of infringed reproduces.

(I) Crime of copyright infringement

Copyright infringement means the profit-oriented behavior that infringes other person’s copyright with high incomes or behaviors of other serious circumstances. The constitutive requirements of this crime include:

1. First, the object of this crime is the national copyright management rules and other person’s copyright.

2. Second, objective behavior of this crime is the breach of copyright law and the infringement of other person’s copyright with fairly high illegal incomes or other behaviors of serious circumstances. According to Article 217 of the Criminal Law, there are four such behaviors as follows: (1) reproducing and distributing other person’s literary works, music, film, TV program, audio-visual works, computer software and other works without approval of the copyright owner. According to “Intellectual Property Right Criminal Enforcement Explanation (1)”, “without approval of the copyright owner” means the absence of approval of the copyright owner, or forged and tampered authorisation document of the copyright owner, or the circumstances of exceeding the authorisation range. First, reproduction and distribution are necessary. Reproduction means the behaviors of making one or several copies of original works by printing, carbon copying, copying, inscription rubbing, recording, cam-recording, photo copying and other methods. Distribution means the behaviors of offering certain amount of reproduces to the public by selling, leasing or other methods. According to the regulations of Intellectual Property Right Criminal Enforcement Explanations (1), the behaviors of distributing other person’s literary works, music, film, TV program, audio-visual product, computer software and other works via the internet will be deemed as “reproduction and distribution”. According to regulations of Intellectual Property Right Criminal Enforcement Explanations (2), “Reproduction and distribution” includes the behaviors of reproduction, distribution or both of them. If the owner of infringed products sells its products via advertising, subscription or other methods, it will be deemed as “distribution”. Second, the object of reproduction and distribution is other person’s works with copyright, including literary works, music, film, TV program, audio-visual product, computer software and other works. (2) Publishing other person’s books with exclusive publishing right. Publishing means to edit the works, copy it and then offer to the public for sale. According to the regulations of Copyright Law, the book publisher has exclusive publishing right of works authorised by the copyright owner within the term specified in the contract. If the book publisher obtains such exclusive right, any other third party including the copyright owner should not publish the works. Any publishing without approval of the book publisher will constitute infringement. (3) Reproducing and distributing audio-visual works without approval of the producer of such works. (4) Producing and selling artistic works with fake signature of other person. Artistic works means painting, calligraphy, sculpture and other aesthetic 2-D or 3-D artistic works with lines, colors or other forms.

The constitutive requirements of this crime also include fairly high illegal income or other serious circumstances. According to Intellectual Property Right Criminal Enforcement Explanations (1), “fairly high illegal income” means an amount of more than 30,000Yuan. Other serious
circumstances include: (1) illegal income is more than 50,000 Yuan; (2) reproducing and distributing more than 500 copies of literary works, music, film, TV program, audio-visual product, computer software and other works without approval of the copyright owner; (3) other serious circumstances.

3. Subject of this crime is natural person or corporate body meeting normal subjective conditions. If a publishing house sells, leases or transfers its publication name, book number, magazine number or edition number to other person who undertakes copyright infringement, the publishing house will be deemed as accomplice.

4. This crime must be intentional behavior, namely the perpetrator knows that his behavior will infringe other person’s copyright but he still commits it. The perpetrator must also have the purpose of obtaining profit from his behavior. Income directly or indirectly obtained from commercial advertisements will be deemed as “profit-oriented”.

According to Article 217 and Article 220 of Criminal Law, crime of copyright infringement will receive a fixed term imprisonment of no more than 3 years or detention, and/or a fine. For crime with high illegal income or other especially serious circumstances, an imprisonment of 3 to 7 years and a fine will be imposed. For corporate body, a fine will be imposed. And the directly responsible person and other directly involved persons will be punished according to the above rules. According to criminal enforcement explanations, for profit-oriented behaviors specified in Article 217 of Criminal Law with an illegal income of more than 150,000 Yuan, it will be deemed as “huge amount of illegal income”; and the following circumstances will be deemed as especially serious: (1) illegal income is more than 250,000 Yuan; (2) reproducing and distributing more than 2500 copies of literary works, music, film, TV program, audio-visual product, computer software and other works without approval of the copyright owner; (3) other especially serious circumstances.

(II) Selling of infringed reproduces

Crime of selling infringed reproduces means the behavior of intentionally selling infringed reproduces for the purpose of obtaining profit, with fairly high illegal incomes. The constitutive requirements of this crime have the following features:

The object of this crime is national copyright management rules or other person’s copyright. Objective behavior is the selling of infringed reproduces with fairly high illegal incomes. Infringed reproduces mean the reproduces specified in Article 217 of Criminal Law. According to criminal enforcement explanations, high illegal income means an illegal income of more than 100,000 Yuan. The subject of this crime can be natural person or corporate body meeting normal subject conditions. The subject of this crime must intentionally sell the infringed products for profit. For the crime of selling infringed reproduces, it will be treated as crime of copyright infringement. For the crime of intentional selling of infringed reproduces, it will receive combined punishment for several offenses.

According to Article 218 and Article 220 of Criminal Law, this crime will receive a fixed-term imprisonment of no more than 3 years or detention, and/or a fine. For corporate body, a fine will be imposed. The directly responsible person and other directly involved persons will be punished according to the above rules.
II. Criminal Legislation against Copyright Infringement in Major Countries of European Union

1. Britain

*Article 107 of British Copyright Act* stipulates the crime of copyright infringement as follows:

(1) The following behaviors will constitute crimes if carried out without approval of the copyright owner: (a) produce for the purpose of sale or lease, or (b) import into the United Kingdom for purposes other than personal or household purposes, or (c) possess during business operation with the purpose of infringing any copyright, or (d) in business operation, (i) sell or lease, or (ii) propose or announce for sale or lease, or (iii) openly display, or (iv) distribute, or (e) distribute infringed reproduces of products with copyright to the extent of damaging the interest of the copyright owner, with the perpetrator knowing or reasonably knowing that such reproduces will infringe copyright.

(2) The following behaviors also constitute crimes: (a) make an article which can design or recreate reproduces of the works with copyright, or (b) possess such article, with the perpetrator knowing or reasonably knowing that such article will be used to make infringed reproduces for sale, lease or utilization in commercial operation.

(3) Infringements related to the following methods (except receiving radio or cable TV programs): (a) open performance of literary, opera or musical works, or (b) open broadcast or presentation of audio recordings or films, if the perpetrator knows or reasonably knows that such behavior will infringe copyright. Any person that causes such performance, broadcasting or presentation will constitute crime.

(4) Crimes of items (a), (b), (d)(iv) or (e) of (1) will receive the following legal liabilities: (a) with simple indictment, a detention of no more than 6 months, or a fine of no more than maximum amount, or both of them; (b) indictment with jury, a fine or imprisonment of no more than 2 years, or both of them.

(5) Other crimes under this article will receive a detention of no more than 6 months, or a fine of no more than Grade 5 amount, or both of them.

(6) Regulations of *Article 104 to 106* don't apply to criminal prosecution procedure, but this doesn't influence the application of *Article 108*.

2. France

*Articles L.335-2 to L.335-9* of French Intellectual Property Right Code stipulates the crimes of copyright infringement.

*Article L.335-2* stipulates that: behavior that breaches legal proprietary right of the author by completely or partially reproducing words, musical works, painting, oil painting, printing or other sculptures will constitute infringement, and all infringements will constitute crimes. For infringement of French or foreign works in France, an imprisonment of 2 years and a fine of one million franc will be imposed. Same punishments will be imposed on sale, importation and exportation of infringing works.

*Article L.335-3* stipulates that: any behavior that infringes copyright by copying, performing or distributing intellectual works, if there are relevant legal regulations, will also constitute crime.
Infringement of copyright of the software author as specified in Article L.122-6\(^{128}\) will also constitute crime of copyright infringement.

**Article L.335-4** stipulates that: any payable or non-payable fixing, copying, broadcasting or offering to the public, or distant delivering of performance, audio-visual products or programs without approval of the performance artists, audio-visual producers or audio-visual publishing company will be punished by two years of imprisonment and a fine of one million franc. For importation or exportation of audio-visual products without approval of performance artist and audio-visual producer, same punishments will be imposed. For personal copying, public broadcasting or distant delivery of audio-visual products without paying due compensation to the author, performance artist or audio-visual producer, a fine mentioned above will be imposed.

**Article L.335-5** stipulates that: for behaviors punishable mentioned in above three articles, the court can impose complete or partial suspension of business on permanent or provisional basis for a period no more than 5 years. Provisional suspension of business shouldn’t be reason for termination or suspension of employment contract, or any loss to the employee. If permanent suspension of business causes laying-off of employees, besides pre-determined compensation and laying-off compensation, compensation for employment termination will also be provided. Otherwise an imprisonment of 6 months and a fine of 25,000 franc will be imposed.

**Article L.335-6** stipulates that: for any behavior mentioned in the above four circumstances, the court can order the confiscation of all or partial infringement income, and all the illegally produced or reproduced audio-visual products, copies and devices that facilitate such crime. The court can also order the defendant to post the verdict on commercial banner as specified in Article 131-35 of Criminal Law, and publish full text or excerpt of the verdict on newspaper designated by the court, but the announcement expense should not exceed maximum fine.

**Article L.335-7** stipulates that: under the five circumstances mentioned above, the confiscated devices, articles and income will be handed over to the victim or its successor to compensate its loss. If the compensation is not enough, or there is no confiscation of devices, articles or income, full compensation will be arranged through other channel.

**Article L.335-8** stipulates that: under the circumstance of Article 121-2 of Criminal Law, the legal person can be held for the criminal liabilities for behaviors that breach regulations of Articles L.335-2 to L.335-4. The punishments on the legal person include: 1) a fine as specified in Articles 131-38 of Criminal Law; (2) punishments specified in Articles 131-39 of Criminal Law.

---

\(^{128}\) Article L.122-6: The exploitation right belonging to the author of the software shall include the right to do or to authorize: 1) the permanent or temporary reproduction of software by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the software necessitate such reproduction, such acts shall be possible only with the authorization of the author; 2) the translation, adaptation, arrangement or any other alteration of software and the reproduction of the results thereof; 3) The placing on the market for consideration or gratuitously, including rental, of the software or of copies thereof by any process. However, the first sale of a copy of software on the territory of a Member State of the European Community or of a State party to the agreement on the European Economic Area by the author or with his consent shall exhaust the right of placing on the market of that copy in all Member States, with the exception of the right to authorize further rental of a copy.
Article L.335-9 stipulates that: for recidivism as per Articles. L.335-2 to L.335-4, or the first offender that has or had contract with the victim, two fold punishments will be imposed.

3. Germany

Articles 106 to 108 of German Copyright Law and Neighboring Rights Law stipulate the crimes of copyright infringement.

Article 106 [illegal use of works protected by copyright law]

(1) Except otherwise allowed by law, if the perpetrator reproduces, distributes or publicly re-plays the works, performance and adaption without approval of copyright owner, an imprisonment of no more than 3 years or a fine will be imposed.

(2) The attempted action of above behavior also constitutes crime.

Article 107 [illegal marking of author name]

(1) The perpetrator marks the author name on artistic original copies or distribute them, use the author name on reproduces, performance or adaption of artistic works to the extent that the reproduces, performances or adaption can be falsely taken as the original copies, or distribute reproduces, performance or adaption bearing above marking. If other laws haven’t specified more severe punishments, the perpetrator will receive an imprisonment of no more than 3 years or a fine.

(2) Attempted action of above behavior also constitutes crime.

Article 108 [illegal infringement of neighboring rights]

Though allowed by law, the perpetrator reproduces, distributes or re-displays scientific publication or its rendition or adaption without approval of the copyright owner; breaches Article 71 by illegal use of posthumous work or its rendition or adaption; reproduces, distributes or re-plays the photos or their rendition or adaption; breaches Article 77.1, Article 77.2 and Article 78.1 by illegal use of performance of the original artist; breaches Article 85 by illegal use of audio-visual products; breaches Article 87 by illegal use of radio and TV programs; breaches 94 and/or Article 95 by illegal use of performance of the original artist; breaches Article 87b by illegal use of database. The perpetrator will receive an imprisonment of no more than 3 years or a fine.

(3) Attempted action of the above behavior will also constitute crime.

Article 108a [illegal use for business operation]

(1) If for the purpose of business operation, the perpetrator commits behaviors mentioned in Articles 106 to 108, an imprisonment of no more than 5 years or a fine will be imposed.

(2) Attempted action of above behavior also constitutes crime.

Article 108b [behaviors of illegally infringing technical protection measures and right protection information]

(1) To help himself or third party to access the work or other object with copyright protection, the perpetrator intentionally evade effective technical protection measures without approval of the

copyright owner; or delete the copyright information though he knows that he is not entitled to do so, or modify relevant information on work or object's reproduces, or publish above mentioned work or object; or publish, import, broadcast, publicly re-display or distribute the work or other objects whose copyright information has been deleted or revised, to the extent of causing, hiding or simplifying other person's infringement of copyright or neighboring rights. If such behavior is not personal, and it is intended for use by other person related with the perpetrator, the perpetrator will receive an imprisonment of no more than 1 year or a fine.

(2) Similarly, if the perpetrator breaches Article 95a.3 by producing, importing, distributing, selling or leasing relevant devices, products or components for the purpose of business operation, such behavior also constitutes crime.

(3) If the perpetrator commits behavior of article 1 for the purpose of business operation, an imprisonment of no more than 3 years or a fine will be imposed.

4. Italy

For Italy, the criminal law protection of copyright is specified in Articles 171 to 174 of Copyright Law. The regulations of copyright infringement crime attach importance on protection of the copyright owner's economic right, and also his right of personality.

Article 171 of this law stipulates the protection of copyright owner's economic right as follows: one of the following unauthorised behaviors will constitute infringement of copyright owner's economic right: first: read, publicly recite, broadcast, sell, offer for sale, distribute other person's work in other commercial method, reveal the contents of other person's unpublished work, or import and circulate reproduces that breach Italian laws; second, openly perform, recite or present other people's work or composition (performances include public presentation of films, public broadcasting of film soundtracks, and public broadcasting through the loudspeakers) that are intended for public performance; third, any performance of the above mentioned behaviors; fourth, copy of reproduces or times of performance exceeds the number of copy or times of performance agreed; fifth, reproduce recordings or similar sound recordings in any way, or offer them for sale; sixth, breach the regulation of protecting the right of radio stations as specified in Article 79 of Copyright Law by transmitting the radio or TV programs via cable or radio network, or make recordings of CD or other sound recordings, or offer such recordings for sale. Any one of the above behaviors will receive a fine of 500 to 20,000 lira.

For infringement of the right of personality, the Copyright Law stipulates that: when the perpetrator infringes the economic right of copyright owner, if his behavior involves other person's works not intended to be published, the author's identity not to be revealed, or the original work not to be tampered, and such behaviors have damaged the reputation of the author, the perpetrator will receive an imprisonment of no more than 1 year or a fine of 5,000 lira or more.

5. Spain

Articles 270 to 272 of Spanish Criminal Law stipulate the criminal liabilities for infringement of copyright.

---

Article 270 stipulates that: if the perpetrator copies, distributes, publishes or publicly broadcasts full body or part of a literary work, artistic work or scientific work, or adapts, translates or artistically performs the above works, causing damages to the third party, no matter such behaviors are undertaken on which media carrier or broadcasting platform, the perpetrator will receive an imprisonment of 6 to 24 months and a penalty of 6 to 24 months. If the perpetrator intentionally imports, exports or stores above works or products, same punishments will be imposed. Making, selling or possessing of any tool that can delete unauthorised works or compromise the technical protection of computer software will also receive the same punishments.

Any one of the following behaviors will receive an imprisonment of 1 to 4 years and a fine of 8 to 24 months, and the suspension of business related with the crime for 2 to 5 years: (1) behavior is intended for especially large economic interests; (2) the damage is especially big. In such cases, the judge or court can also order provisional or permanent business suspension of factory or business location, and the provisional suspension of business should not be more than 5 years.

Article 272 stipulates that: if the perpetrator stops the illegal behaviors mentioned above and provides compensation to the victim, only civil liabilities will be imposed on him according to Copyright Law. The judge or court can order the defendant to announce the verdict on official newspaper at his own expense.

6. Finland

Article 49.1 of Finish Criminal Law revised in 2003 concerning “crimes of infringing some intangible assets” specifies the crime of copyright infringement as follows:

1. For breach of Copyright Law (1961/No.404), if it is intended for profit, and it is carried out to the extent of causing considerable inconvenience or damage to the copyright owner, it will be deemed as the infringements of following rights of the other person: (1) literary or artistic works; (2) performance of literary or artistic works; (3) recorder or other devices that have stored sound tracks; (4) films or other devices that have stored motion pictures; (5) TV or radio; (6) records, tables, procedures or other works containing massive information as specified in the Copyright Law, or the database for editing, verification or demonstration; or (1998/No.251); (7) photos; all these behaviors will be counted as crime of copyright infringement, and will receive a fine or an imprisonment of no more than 2 years.

2. If the perpetrator obtains profit by importing the goods specified in Article 49.1.1 for the purpose of distributing samples, copies, photos, recordings, films or other devices, records, tables, procedures, other similar works with massive information, or database intended for editing, verification or demonstration, though he knows that the production or copying of such goods is punishable according to Article 1 of Copying Law (1998/No.25) or Article 56a of Copyright Law.

III. Comparison of Criminal Legislation against Copyright Infringement in China and European Union

According to the above description concerning criminal legislation against copyright infringement in China and member countries of European Union, there is a big difference between legislation of China and that of the European Union countries, and even among the member countries of European Union there is difference between them in this concern. The author will make
comparison on criminal legislation against copyright infringement in China and European Union as follows:

1. Difference of legislation concept

From the prospect of concept on criminal law protection, both European Union and China have attached great importance on protection of copyright, and have implemented criminal law protection measures. For the countries of European Union, they have a long history of copyright protection. “Criminal law protection of intellectual property right almost coincides with protection of intellectual property right with legal measures”. The European Union attaches great importance to protection of intellectual property right. Nearly ten documents in the form of legally binding “directives” have been issued to demand the member countries to protect intellectual property rights which involve computer software, lease and transfer right, copyright and relevant rights, transfer right of the original artist, etc. The Chinese government and its public also attach great importance to criminal law protection of copyright. Needless to say, since China is still a developing country and its protection of copyright started quite late, it is necessary to raise the awareness of copyright and reinforce copyright protection.

For concrete regulations of criminal law protection of copyright, China’s crime concept is “qualitative + quantitative” model, namely the crime should not only pose damage to the society, but also that the damage should reach a certain degree. Therefore, the constitutive requirements of copyright infringement crime include “big amount of illegal income or other serious circumstances”, “especially big amount of illegal income”, etc. In Criminal Law of European Union Countries, the crime concept is mostly “qualitative”, namely, the crime poses damage to the society, and there are no quantitative requirements. Such difference of concepts often makes it difficult for other countries to understand China’s criminal protection of copyright. Some of them even criticize China for this concern, for example, some thinks that China shall not set a threshold for crime of copyright infringement, and that the criteria of this crime is too high. China’s Supreme People’s Court has issued two explanations concerning criminal enforcement of intellectual property right to lower the criteria of copyright infringement. The criticisms of European Union countries have certain reasonableness, but there are also some misunderstandings. China never thinks copyright infringement below a certain threshold or circumstance is legal and immune to punishments. Actually, such petty copyright infringement behaviors have been punished by administrative measures, which are like misdemeanor punishment or contravention punishment in member countries of European Union.

For legal interests protected against infringement, the European Union countries protect the personal copyright of the copyright owner, and regard such right as a private right. Chinese Criminal Law specifies crime of copyright infringement in Chapter 3 “Crime of Damaging Socialist Economic Order”, which signifies that the crime of copyright infringement is primarily a crime that damages socialist market order, and secondarily it is the infringement of personal interest of the copyright owner.

2. Comparison of legal interests and object of protection

The scope of copyright criminal law protection is expanding, and this is the common trend of criminal law protection of copyright in both China and European Union. Protection range of copyright works include: literary works, artistic works (musical works, paintings, sculptures),
sound recordings, video recordings (CD, tape, video tape, etc.), films, architecture works, performance works, TV program, folk arts, scientific works (including computer software) and other articles related with copyright products (such as the printing plate protected by Criminal Law of Taiwan). The objects of criminal law protection of copyright in China are much the same with those of other countries. Compared with European Union countries, China’s legislation is a little backward. For example, the protection of technical measures and copyright management information is more and more important with the appearance and fast development of digitalization technology. The two international conventions (WCT and WPPT) of World Intellectual Property Right Organisation clearly demand the member countries to provide legal protection for copyright. Many countries of European Union have incorporated technical measures and copyright management information into the scope of criminal law protection. But Chinese Criminal Law has not yet made relevant move to keep in pace with such trend.

As for legal interests under protection, most countries protect copyright and neighboring rights. But for the concrete contents of copyright, there is big difference between China and the member countries of European Union. The countries of Continental Law System in European Union attach importance to protection of right of personality and proprietary right of works, for example, both France and Germany stipulate the crime of infringing right of personality. While the countries of Anglo-American Legal System, for example Britain, only stipulates the criminal law protection of proprietary right of works. For China, the criminal law protection is intended for protection of proprietary right of works. Only one crime behavior involves signature right of the artistic author, for example, the behaviors of infringing original author’s right of publishing, right of modification, right of maintaining the integrity of the work. They are not deemed as crimes, but only handled as civil infringements.

3. Comparison of constitutive requirements

There is something in common between China and European Union in the concern of constitutive requirements of copyright infringement crimes, for example, the crime must be intentionally committed. Still there are big differences as below:

First, requirement of profit-oriented behavior: in China, the behavior of copyright infringement must be intentionally committed, and must be profit-oriented. Such requirement brings much trouble for evidence gathering of prosecuting authority. On the other hand, many copyright infringements in this era of internet are not profit-oriented, but they also damage the copyright of original author. For countries of European Union, only requirement is that the perpetrator must be intentional in the crime, while the nature of profit-orientation is unnecessary. For example, in Germany, profit-orientation is only used as the requirement of severe punishment. In France, if the infringement behavior is committed “without prior approval”, it will be deemed as crime, no matter a compensation is provided or not; in Britain, if the perpetrator distributes reproduces of original copy in business operation, to the extent of damaging the interests of copyright owner, and such behavior is committed “without approval of copyright owner” and against the will of copyright owner, it will be deemed as crime even it is not intended for profit.

Second, for behaviors of copyright infringement, China’s regulations are quite simple, including reproducing and distribution, publishing, and producing for sale. For indirect infringement of copyright, only sale of infringement reproduces constitutes crime. For countries of European
Union, the behaviors of copyright infringement are listed in great detail. For example, Britain stipulates that producing, importing, possessing, selling, leasing, publicly displaying and distributing of infringement reproduces and other indirect infringements will constitute crimes, and production of infringement goods, possession of infringement goods, unauthorised performance of works, unauthorised presentation of recordings and films and other direct infringements will constitute crimes. In Germany, crimes of copyright infringement include unauthorised use of copyright (including copying, circulation and public reciting of copyright works; selling, distribution), importing/exporting pirated copyright works; making and producing of books for piracy (original copy, original disk, original tape, etc.), unauthorised use of the copyright owner’s name, infringement of neighboring rights and other rights related with copyright (including illegal copying, circulation or public reciting of works not yet protected by Copyright Law, illegal use and adaption of posthumous works, illegal copying, circulation and demonstration of photos, etc.).

4. Comparison of punishments

For punishments on crimes of copyright infringements, most countries use the model of combining imprisonment with a fine. Compared with countries of European Union, China has the following differences in this concern:

First, the maximum imprisonment of copyright infringement in China is 7 years. This is higher than maximum value of the European Union countries. Most of them stipulate an imprisonment of 2 or 3 years for this crime, and few of them stipulate an imprisonment of more than 3 years. Second, China has not limit for a fine, and this is difficult to practice in real situation, while the countries of European Union set limits to fines. Third, China does not stipulate qualification suspension in punishments on copyright infringement. For countries of European Union, such as France and Spain, they impose permanent or provisional suspension of business on enterprise of copyright infringement.

IV. Summary

Criminal law protection of copyright is the fastest changing and growing part in the Criminal Law of many countries. Currently, China’s legislation of copyright protection is confronting with challenges of digital technology and internet technology: is it possible to include technical measures and copyright management information into the range of copyright criminal protection? Is it necessary to treat infringement of right of personality of the copyright owner as a crime? How to calculate the number of infringement reproduce copies? Is it necessary to continue to use “profit-orientation” as requirement of crime? All these are imminent problems to be solved in China’s criminal protection of copyright.

Section 4 Comparative Studies on Crime of Business Secret Infringement

I. History and Current Legislation of Criminal Law Protection of Business Secret in China

1. History of criminal law protection of business secret in China

China’s criminal law protection of business secrets can be divided into two stages: before and after issuing of Law of the People’s Republic of China against Competition by Inappropriate Means in 1993.
Before the issuing of Law of the People’s Republic of China against Competition by Inappropriate Means in 1993, China’s criminal law protection of business secret is realised through enforcement on crime of theft and crime of leaking national secrets. Article 186 of 1979 Criminal Law stipulates that: if any government worker breaches regulations concerning national secrets by leaking important national secrets, and the circumstance is serious, the perpetrator will receive an imprisonment of no more than 7 years, detention or be deprived of political rights. Supplemental Regulations on Enforcement Against Leakage of National Secrets issued in 1988 stipulates that: those who steal, buy or provide national secrets for overseas institutes, organisations or persons will be punished by 5 to 10 years of fixed-term imprisonment; if the circumstance is trivial, an imprisonment of no more than 5 years, detention or depriving political rights; if the circumstance is especially serious, more than 10 years of fixed-term imprisonment, life-time imprisonment or death penalty, and depriving of political rights. If the business secrets involve national economic or military interests, disposal will be based on crime of leaking national secrets. For business secrets not involving national secrets, Article 1.4 of Explanations on Applicable Laws for Enforcement on Crimes of Theft” issued by the Supreme People’s Court and the Supreme People’s Procuratorate stipulates that: theft of private properties involves tangible properties and also electric power, gas, natural gas, important technologies and other intangible properties. Business secrets are treated as important technologies. Article 5 of “Opinions on Enforcement against Economic Crimes in Scientific Activities” stipulates that: for theft of technical secrets, if the circumstance is serious, it will be treated as crime of theft. The “Opinions” also stipulates that: technical secrets herein mean the technical information, computer software and other non-patent technical results that are unknown to the public, practical, capable of bringing economic interest or competitiveness to the owner, and protected by confidential measures by the owner. “Notice on Reinforced Protection of Intellectual Property Rights” issued by the Supreme People’s Court in September, 1994 stipulates that: for theft of important technical results, it will be held accountable for criminal liabilities of theft crime.

This indicates that China’s criminal protection of business secrets is quite inadequate. The protection scope only covers secrets concerning national economic or social development interests and technical secrets. Theft of technical results is treated as crime of theft, while the operation information in business secrets is not within the scope of criminal protection. What’s more, the approach of treating theft of business secrets as crime of theft or crime of leaking national secrets doesn't reflect the features and importance of business secrets.

After the issuing of Law of the People’s Republic of China against Competition by Inappropriate Means in 1993, China’s criminal law protection of business secrets entered an all-round development period. This law clearly defines business secrets, namely the technical information and operation information which are unknown to the public, capable of bringing economic interests to the owner, practical, and handled with confidential measures by the owner. Article 219 of Criminal Law revised in 1997 formally added crime of business secret infringement and systematically specified several behaviors of business secret infringement. Explanations on Several Issues Concerning Applicable Laws for Enforcement of Intellectual Property Rights jointly issued by the Supreme People’s Court and the Supreme People’s Procuratorate in 2004 further clarified the applicable laws for enforcement against business secret infringement, and this can help standardize enforcement against business secret infringement.
2. Current regulations concerning business secret infringement

Article 219 of Chinese Criminal Law stipulates that: for any of the following behaviors, if it brings serious damage to the owner of business secrets, it will be punished by an imprisonment of no more than 3 years, or detention, and/or a fine; if it causes other especially serious results, it will be punished by 3 to 7 years of fixed-term imprisonment and a fine: (1) obtaining business secrets by stealing, luring, coercing or other inappropriate methods; (2) disclosing, using or allowing other person to use the above mentioned business secrets; (3) breaching the agreement or the owner’s requirements concerning confidentiality of the business secrets by disclosing, using or allowing other person to use the business secrets in his disposal. If the perpetrator knows or reasonably knows the above mentioned behaviors, but still obtains, uses or discloses other person’s business secrets, he will be punished for the crime of business secret infringement.

Therefore, the constitutive requirements of business secret infringement include:

1. The object of this crime is national regulations concerning protection of business secrets and legal interests of the business secret owner.

2. Objective behaviors of this crime involve infringement of other person’s business secret and serious damage brought to the owner. Specific contents include: (1) behavior object is business secrets. According to Article 219 of Criminal Law, business secrets mean the technical information and operation information which are unknown to the public, capable of bringing economic interests to the owner, practical, and handled with confidential measures by the owner. Therefore, business secrets have the following features: first, business secrets are technical information or operation information. Second, business secrets are something unknown to the public. Third, business secrets can bring economic interests to the owner. Fourth, business secrets are practical, namely, the owner can directly use the business secrets into production and operation. Fifth, business secrets are handled with confidential measures by the owner. (2) Behaviors of business secret infringement have been committed. Objective behaviors of business secret infringement include: first, obtain other person’s business secrets by stealing, luring, coercing or other inappropriate methods. Second, disclose, use or allow other person to use the inappropriately obtained business secrets. Third, breach the agreement or the owner’s requirements concerning confidentiality of the business secrets by disclosing, using or allowing other person to use the business secrets in his disposal, namely, those who appropriately know the contents of business secrets disclose, use or allow other person to use business secrets. Fourth, the perpetrator knows or reasonably knows the above mentioned behaviors, but still obtains, uses or discloses other person’s business secrets. This is indirect infringement of business secrets, namely a third party knows or reasonably knows that the business secrets disclosed to him are inappropriately obtained by the discloser, but he still obtains, uses or discloses other person’s business secrets. If the perpetrator commits two or more of the above mentioned behaviors, he will be held for only one crime. Besides, according to enforcement explanations, serious damage means loss of more than 500,000 Yuan brought to the owner of business secrets.

3. The subject of this crime can be natural person or corporate body.

4. The perpetrator must be intentional in his behaviors. The first, second and third behaviors mentioned above are surely intentionally committed, namely the perpetrator knows that his
behavior will infringe other person’s business secrets and bring serious damage to the owner, but
still he wishes or lets such result to happen. For the fourth behavior mentioned above, if the
perpetrator “reasonably knows” his behavior, his behavior will be deemed as negligent crime.

II. Criminal Legislation against Business Secret Infringement in Major Countries of
European Union

1. France

French Criminal Law revised in 1994 stipulates infringement of business secrets in Article 418 as
follows:

(1) If managers, employees or workers of the factory disclose or attempt to disclose the factory’s
secrets to foreigners or French people living in foreign countries, a fixed-term imprisonment of 2
to 5 years, and a fine of 1,800 to 120,000 franc will be imposed.

(2) Perpetrator of the above crime will be deprived of the rights in Article 42 of this law for 5 to 10
years. This period starts from the accomplishment of above punishments.

(3) If the above mentioned secrets are disclosed to French living in France, a fixed-term
imprisonment of 3 to 24 months and a fine of 500 to 1,800 franc will be imposed.

(4) If the above mentioned crimes involve secrets of national arsenal or weaponry, maximum
punishments will be imposed.

2. Germany

Articles 17 to 20 of Law of the Federal Republic of Germany against Inappropriate Competition\textsuperscript{131} stipulate the crimes of business secret infringements as follows:

Article 17: Leakage of business secrets or operation secrets

(1) If employee, worker or apprentice of a commercial enterprise discloses business secrets or
operation secrets in his disposal or obtained by himself to the other person for purpose of
competition, private interests, or interests of a third party, or bringing damage to the owner of the
enterprise during the term of employment, an imprisonment of no more than 3 years or a fine will
be imposed.

(2) Any one of the following behaviors for the purpose of competition, private interests, or
interests of a third party, or bringing damage to the owner of the enterprise, same punishments
will be imposed:

1. Obtaining or keeping business secrets or operation secrets by the following methods: by
technical measures, making copies of secret media, or stealing the goods bearing secrets, or

2. Use or disclose the business secrets or operation secrets obtained or kept in the way
mentioned above by himself or by other person, or in other ways.

(3) Attempted behavior also constitutes crime.

\textsuperscript{131} Shao Jiandong: \textit{Studies on German Law against Competition by Inappropriate Means}, Press of
(4) For serious circumstances, an imprisonment of no more than 5 years and a fine will be imposed. For especially serious circumstances, namely, the perpetrator knows that the secrets will be used in foreign country, or the perpetrator discloses such secrets in foreign countries.

Article 18: theft of samples

The perpetrator uses or discloses samples or technical procedures, such as drawings, models, molds, section plan and formula obtained in business operation for the purpose of competition and private interests.

Article 20: Lured or voluntary leakage of secrets

(1) Lures other person to commit the crimes in Article 17 and Article 18, or accept other person who commits the above crimes, for the purpose of competition or private interests, an imprisonment of no more than 2 years or a fine will be imposed.

(2) Voluntarily commits the crimes in Article 17 and Article 18, or agrees to commit such crimes required by the other person, for the purpose of competition or private interests, same criminal liabilities will be imposed.

(3) Article 31 of Criminal Law (attempted crime of accomplice) also applies.

3. Austria

Articles 122-124 of Criminal Law of the Republic of Austria revised in 2002 stipulate crime of business secret infringement as follows:

Article 122: Infringement of business secrets or enterprise secrets

(1) For disclosure or use of the business secrets or enterprise secrets (Article 122.3) informed or obtained in supervision, auditing or collection allowed by law or entrusted by administrative authority, a fixed-term imprisonment of no more than 6 months, or a fine for 360 days will be imposed.

(2) Obtaining proprietary interests for himself or other person, or causing damage to the right owner, a fixed-term imprisonment of no more than 1 year, or a fine of no more than 360 days will be imposed.

(3) The business secrets or enterprise secrets mentioned in Article 122.1 mean the secrets whose confidentiality must be protected by the perpetrator according to law. Disclosure or use of such secrets will infringe rights of the party whose enterprise is under supervision, auditing or collection.

(4) If disclosure or use of some contents or forms of such secrets is beneficial for public interests or legal private interests, no punishments will be imposed.

(5) For claim of infringement of information not classified as confidential, the perpetrator won’t be prosecuted.

Article 123: Espionage of business secrets or enterprise secrets

---

(1) For deliberate spy and use of business secrets or enterprise secrets, offer such secrets to others, or sell them to the public, a fixed-term imprisonment of no more than 2 years will be imposed, and/or a fine of more than 360 days will be imposed.

(2) If there is no claim of the victim, no prosecution will be filed against the perpetrator.

Article 124: Espionage of business secrets or enterprise secrets for the interests of foreign countries

(1) For deliberate espionage of business secrets or enterprise secrets for the purpose of exploiting, using or otherwise applying in foreign countries, a fixed-term imprisonment of no more than 3 years will be imposed. A fine of no more than 360 days can also be imposed.

(2) If those who have obligation of keeping the confidentiality of business or enterprise secrets sell business or enterprise secrets to let them be exploited, used or otherwise applied in foreign countries, same punishments as mentioned above will be imposed.

4. Switzerland

Article 162 of Swiss Criminal Law revised in 2003 stipulates the crime of infringing production or business secrets as follows: "If the perpetrator discloses production or business secrets whose confidentiality is supposed to be protected according to law or contract obligation, with the purpose of make himself or other person to exploit such secrets, an imprisonment or a fine will be imposed. This crime will be prosecuted only after claim of the victim.

5. Spain

Articles 278 to 280 of Spanish Criminal Law stipulate the crime of business secret infringement.

Article 278: Cause 1: if obtaining enterprise secrets by data media, words, electronic files, information media or other methods specified in Article 197.1, an imprisonment of 2 to 4 years and a fine of 12 to 24 months will be imposed.

Clause 2: if distributing, demonstrating or transferring the inappropriately obtained secrets, an imprisonment of 3 to 5 years and a fine of 12 to 24 months will be imposed.

Clause 3: if possessing and damaging information, and breaching this regulation, combined punishment for several offenses will be imposed.

Article 279: those who have the obligation of protecting the confidentiality of secrets according to law or contract but still distribute, use or transfer enterprise secrets to other person, imprisonment of 2 to 4 years and a fine of 12 to 24 months will be imposed.

For infringement of enterprise secrets for the purpose of personal use, only half of the above penalty will be imposed.

Article 280: though aware that the origin of secrets is illegal, but still committing the above mentioned infringement, but not disclosing the secrets to the public, an imprisonment of 1 to 3 years and a fine of 12 to 24 months will be imposed.

133Swiss Penal Code, translated by Xu Congsheng and Zhuang Jinghua, China Fangzheng Press, 2004, P.54
6. Finland

Chapter 49 “crime of infringing intangible assets” and Clauses 4 and 5 of Chapter 30 “Business Crime” of Finnish Criminal Law revised in 2003 stipulate crime of business secret infringement as follows:

Clause 4 business espionage (1990/No.769)

1. Obtain other person’s business secrets by inappropriate means
   (1) Enter the area or information system available for authorised personnel only.
   (2) Possess or copy files or other records, or by other similar methods.
   (3) Use special technical device to obtain the business secrets for the purpose of disclosing or using them in an inappropriate manner

Such behaviors will be treated as business espionage, a fine or an imprisonment of no more than 2 years will be imposed, unless more severely otherwise specified by other laws.

2. Attempted behaviors are also punishable.

Clause 5: Infringement of business secrets (1990/No.769)

1. Obtain secrets and disclose them or use them inappropriately for the purpose of personal or other person’s economic interests.
   (1) When working for other person
   (2) When acting as member of the executive committee, member of the board of directors, executive director, auditor of the company or funds, or bankruptcy assets manager, or other similar functions,
   (3) When performing certain function on behalf of other person, or other entrusted functions,
   (4) In company restructure procedure,

The above behaviors will be treated as infringement of business secrets, and a fine or an imprisonment of no more than 2 years will be imposed, unless more severely otherwise specified by other laws (1993/No.54)

2. This clause doesn’t apply to the behaviors committed two years after expiration of employment term of the perpetrator mentioned above (2003/No.61).

3. Attempted behaviors are also punishable. (2003/No.61)

Clause 6 Abuse of business secrets (1990/No.769)

For inappropriate behaviors of

1. Obtaining or leaking business secrets by punishable means mentioned above in business activities, or

2. Leaking such secrets for the purpose of personal or other person’s economic interests,

Such behaviors will be treated as crime of business secret abuse, a fine or an imprisonment of no more than 2 years will be imposed.
III. Comparison of Criminal Legislation against Crime of Business Secret Infringement in China and European Union

1. Comparison of crime terminology

Most countries of European Union treat crimes of business secret infringement as a group of crime terms, and the group is subdivided into detailed terms. For example, Germany stipulates leakage of business secret, luring of business secret leakage, and voluntary leakage of business secret; the Criminal Law of Austria stipulates infringement of business secret, espionage of business secret, and espionage of business secret for the benefits of foreign countries; Spain stipulates crime of obtaining enterprise secrets, crime of distributing, demonstrating or transferring inappropriately obtained secrets, as well as crime of distributing, demonstrating or transferring enterprise secrets by breaching an agreement; the Criminal Law of Finland stipulates crime of business espionage, crime of abusing business secret and crime of infringing business secret. These crime terms treat behaviors of obtaining business secret by inappropriate means, or breaching an agreement, or other means as different crimes. This indicates the nature and degree of damage of different means of business secret infringement, and corresponding punishments will also be stipulated.

The behaviors of business secret infringement specified in Chinese Criminal Law and those specified in European Union countries are quite similar, but China only stipulates the crime of business secret infringement and its punishments. Whereas the regulations of European Union countries are more meticulous and scientific, since the directness and damage degree of inappropriate acquisition of business secret, leakage of business secret and abusing of business secret are different.

2. Constitutive requirements

Most European Union countries require that the infringement of business secrets is intentionally committed and negligent behaviors should not be counted as crimes. While the behaviors of business secret infringements in Chinese Criminal Law include intentional behaviors and negligent behaviors. Article 219.2 of Criminal Law stipulates crime of “obtaining, using or leaking other person’s business secret with the perpetrator knowing or reasonably knowing that the above behaviors are punishable”. The “reasonably knowing” situation is counted as negligent behavior.

In my opinion, the concept of negligent behaviors concerning business secret infringement is not reasonable. Reasons include that: it is not reasonable to punish a third party for indirect and negligent infringement behaviors. Article 219.4 of Criminal Law stipulates that: “obtains, uses or leaks other person’s business secret, though the perpetrator reasonably knows that the above behaviors are punishable”. Obviously, such condition involves the third party who obtains, uses or leaks other person’s business secrets. The business secrets are obtained from the above mentioned behaviors. Without such behaviors, the third party cannot obtain, use or leak other person’s business secrets. In one word, the above mentioned behaviors are direct infringement of business secrets, while the behaviors of the third party are only indirect infringement. In above mentioned behaviors, the behaviors of leaking, exploiting or allowing other person to exploit the business secrets obtained by theft or other inappropriate means are obviously intentionally committed. But the so-called “reasonably knows” situation can be intentional and also negligent.
Article 219.3 only stipulates the intentional behaviors of the person who “reasonably knows”, because of the consideration that his negligent leakage of business secrets shall not be counted as crime. But, the intentional or negligent behaviors of person who “reasonably knows” are direct infringement, while the behaviors of the third party are only indirect infringement. For the direct infringement, only the intentional behaviors will be punished; while for the indirect infringement of the third party, both the intentional (knows) and negligent (has reason to know) behaviors are punishable. This is unfair for the negligent perpetrator. Second, punishment of the indirect infringement of negligent third party is against the prudence principle of criminal law. The Criminal Law stipulates that for behaviors of obtaining business secrets by inappropriate means, intentional leaking, exploiting and allowing other person to exploit other person’s business secrets, only after the behaviors have brought much loss can they be counted as crimes. This clearly separately the illicit behaviors and criminal behaviors and clarifies the criminal law protection scope of business secrets. But the punishment of “reasonably knows” behaviors which are neither intentional nor direct expands the scope of criminal law protection, since criminal enforcement is the last resort and it is used only when the economic and administrative measures are not enough to protect the rights of business secrets. The damage of “reasonably knows” infringement should be compensated by the negligent perpetrator, who shall draw lessons from such experience and avoid reoccurrence. Criminal measures are not enough to prevent such behaviors. After all, the cost of such measures is too expensive. In another word, the “reasonably knows” behaviors can be punished by economic and administrative measures, while criminal measures are unnecessary.

For protection objects, Chinese Criminal Law defines business secrets as technical information and operation information, while TRIPS protocol also regards “unannounced information” as business secrets. In my opinion, the definition of business secrets should be reasonable. If the definition is too wide, it expands the scope of criminal law protection of business secret, and it will impact the protection of other interests. If the definition is narrow, the legal rights of the business secret owner cannot be well protected. The scope of business secrets is influenced by a nation’s cultural traditions, business secret awareness and its economic and social development level. American researcher James A. Forstner holds the opinion that, when evaluating a nation’s scope of criminal law protection of business secret, “it is necessary to take into account of the cultural context of criminal enforcement, namely, whether the country has the tradition of protecting business secrets, and which types of business secrets can be protected. Business secrets involve many ethic concerns in America, while in other countries, the situation is not necessarily the same.” 134 For China, “it is impossible to fulfill all commitments of international intellectual property rights conventions, since the real condition of our country should also be taken into account.” 135 In this concern, taking into account of current condition of China, our cultural traditions, and the economic and social development level, it is impossible to include unannounced information into scope of business secrets. Technical information is restricted to industrial technical information. For operation information, not all the operation information should

135 Zhao Zhenjiang: Functions of Law in Science and Economic Integration, Chinese Jurisprudence, Vol.1, 1996, P.40
be counted as business secrets. Instead, business secrets should be restricted to important operation information, namely the information vital for production or transaction. Specifically, such information includes information of the operation state of the business owner, information of business flow, and the business owner’s evaluation on the market and competitors.\textsuperscript{136}

3. Comparison of punishments

The punishments of business secret infringement in European Union countries include fixed-term imprisonment and a fine, etc. Degree of punishments is based on degree of damages brought by infringement.

For infringement of business secrets, Chinese \textit{Criminal Law} stipulates two grades of punishments: for infringement that causes massive loss to the business secrets owner, a fixed-term imprisonment of no more than 3 years or detention, and/or a fine will be imposed; for infringement that causes especially serious results, a fixed-term imprisonment of 3 to 7 years and a fine will be imposed.

Compared with counterparts of European Union, China’s punishments for business secret infringement have two flaws: first, punishments are a little severe. China’s punishment for business secret infringement is 7 years of fixed-term imprisonment, while the countries of European Union treat infringement of business secrets as minor offences and the maximum punishment is no more than 3 years of fixed-term imprisonment. Second, the punishment is only based on damage degree, while the difference of behaviors is not taken into account. Different means of business secret infringement will cause different damages to the society, for example, direct infringement and indirect infringement have different damage degrees. And the damages of obtaining secrets by inappropriate means and leaking of secrets by breaching the agreement are also different. The indiscriminative punishments are not corresponding to damages of different infringement methods.

4. Prosecution methods

Most countries of European Union apply the principle of “prosecution after claim of the victim”, for example, Germany, Austria, and Switzerland stipulate that infringement of business secrets is a private prosecution crime, since this crime concerns the rights of business secret owner and the confidentiality of these secrets, and it is more suitable for the victim to decide whether to claim his rights or not.

China’s Criminal Law doesn’t specifically stipulate that infringement of business secret is a private prosecution crime. But relevant enforcement explanations stipulate that this crime is a private prosecution crime, except when it involves national interests or social interests.

IV. Summary

China’s criminal law protection of business secrets has gone through a process of starting from scratch, which is quite the same with the international trend of criminal law protection of business secret. But, in the enforcement of business secrets, other legal interests should also be taken into account, “legal protection, especially criminal law protection, of a certain interest should also take

into account of relevant interests. If other legal interests are ignored and punishments of a certain infringement are excessive, it will be unsuitable for economic and social development.”

China shall also attach importance on the reasonableness of criminal law protection of business secrets, such as clarifying the scope of business secrets, and the range of business secret infringement behaviors.

---

Chapter 5 – Problems in Criminal Law Protection of Intellectual Property Right and its Legislative Perfection in China

Section 1 Problems in Criminal Law Protection of Intellectual Property Right in China

China’s criminal law protection system of intellectual property right, precisely, is gradually established with China’s reform and opening up, and has gone through a process of developing from nothing and improving from a scattered and rudimentary body of rules to a systematic and integrated body of rules. In particular, since 1990s, in order to join WTO, China’s quantity of legislation on intellectual property right has grown so much at an unprecedented speed and scale that it fulfills the legislation course within the short double decades while developed countries took hundreds of years, achieving fast improvement of intellectual property right protection from low level to a high level. “In the history of intellectual property right, China’s speed of finishing all these things is unique.”

Nevertheless, after China entered into WTO, the biggest trade barrier and dispute between China and the USA and other developed countries still lie in intellectual property right. For example, the US government has repeatedly blamed China for its inadequate efforts in protection of intellectual property right, and intended to impose sanctions on China by employing Special 301 for several times, even duly suing China in Apr. 2007 with WTO for its over high thresholds for criminal liability of intellectual property right and thus providing safe harbor to pirates and counterfeiters. In summary, the developed countries blame China in protection of intellectual property right mainly for: first, there are numerous insufficiencies in China’s criminal legislation for intellectual property right, such as provision of threshold for conviction that may connive at crimes; second, there are problems in judicial protection of intellectual property right in China such as ineffective crackdown on intellectual property infringement crimes. Concretely as follows:

I. Problems in Criminal Legislation Protection of Intellectual Property Right in China

Compared with the minimum protection standard specified in International Conventions in terms of the legislative level of criminal law protection of intellectual property right, China’s criminal law protection level of intellectual property right seems not quite low; however, in comparison of the range and extent of developed countries’ criminal law protection of intellectual property right, it is generally believed that the following problems are existent in Chinese criminal law protection of intellectual property rights.

(i) Relatively less types of rights criminally protected

China has relatively less types of intellectual property rights criminally protected than the developed countries. As provided by Chinese existing laws, the protected objects against

---

intellectual property right infringement crimes include trademark right, patent right, copyright and business secrets, but for new varieties of plants, layout design of integrated circuits, geographical indications, trade name and other types of rights, China has not provided any criminal protection yet. For instance, although Article 16 of the newly amended Trademark Law of PRC provides that “If a trademark contains the geographic mark of the commodities while the commodities don’t come from the region indicated by that mark, and thus misleads the public, the trademark shall not be registered and shall be prohibited from use”, but articles on criminal liabilities related thereto are not provided. Another example is that Regulations for the Protection of Layout-design of Integrated Circuits issued in 2001 defined the protection extent for layout design of integrated circuits and the legal liabilities but still did not include into the range of criminal law protection. However, most EU countries have provided the methods of criminal law protection for these types of rights. For example, in respect of geographical indications, there are 21 EU members (Austria, Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Ireland, Italy, Latvia, Malta, Poland, Portugal, Romania, Slovenia, Slovakia and Sweden) providing the criminal liabilities, 20 EU members (Hungary, Belgium, Bulgaria, Cyprus, Germany, Denmark, Estonia, Spain, Finland, France, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Sweden) doing so regarding new varieties of plants, and 19 EU countries (Austria, Belgium, Cyprus, Czech Republic, Germany, Denmark, Spain, Finland, Greece, Hungary, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, Sweden) providing penal sanctions in terms of trade name right.

(ii) Relatively incomplete object of criminal law protection

The ways of acts for some intellectual property infringement crimes as provided in China’s Criminal Law are relatively less. Taking trademark-related crime for example, Chinese Criminal Law provides such three specific charges as crime of counterfeiting registered trademark, crime of selling products with counterfeit registered trademarks and crime of illegally manufacturing or selling illegally-manufactured signs of registered trademarks. In terms of the object of crime, although paragraph 2 in Article 4 of the amended Trademark Law of PRC provides that “any enterprise, institution, or individual producer or trader, intending to acquire the exclusive right to use a service mark for the services provided by him, shall file an application for the registration of the service mark with the Trademark Office” and paragraph 3 thereof provides that “the provisions made in this Law concerning goods trademarks shall apply to service marks”, so the registered trademarks include registered goods trademark and registered service trademark. Since Article 213 of China’s existing penal code explicitly provides that “the use of a trademark identical to a registered trademark on the same type of goods without the permission from the owner of the registered trademark…”, it is thus clear that the protected object against trademark-related crimes by the Criminal Law is only limited to the victims of crimes of counterfeiting registered goods trademarks, but there is no definite protections given to the registered service trademarks, hence resulting in a legislative loophole. For another instance, the regulations on crimes of infringing copyright in Article 217 of Criminal Law of PRC only offer protections for two

140 Study on a possible modified proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights – FINAL REPORT JLS/2009/A1/FWC/023
neighboring rights, namely the right of reproduction and distribution of producers of sound recordings and video recordings and the exclusive publishing right of book publishing entities, but offer no protection for the right of performers and the right of broadcasting of broadcasting stations and TV stations. However, Article 37 of Copyright Law of PRC provides that performers shall enjoy the following rights in relation to their performance: (1) to indicate their identity; (2) to safeguard the image inherent in their performance from distortion; (3) to license others to broadcast on the site and transmit in public their performance and to get compensation; (4) to license others to make sound or visual recordings and to get compensation; (5) to license others to reproduce or distribute sound or visual recording products on which their performance is fixed and to get compensation; (6) to license others to make information network dissemination of their performance to the public and to get compensation. Though the right to indicate their identity and to safeguard the image inherent in their performance from distortion can be protected by "crime of insult" and "crime of defamation" as provided in Criminal Law of PRC, the seriously infringed property right of performers is totally out of the protection thereof, consequently less favorable for performers' right remedy. Also, the right of broadcasting of radio stations and TV stations (i.e. the right to prohibit the acts of replaying their radio or television programs, fixing their radio or television programs on any sound or visual medium and reproducing any sound or visual medium) as provided in Copyright Law of PRC are not protected by the Criminal Law. In contrast, Germany’s criminal law includes the victims of crimes of “illegally using the performance of art performer” and “illegally using TV or broadcasting programs” in its range of protection; British also protects the rights of performers by separate criminal legislation, providing that if anyone intentionally makes sound or visual recordings of a performer’s live performance without his licensing, and reproduces and rents out these sound or visual recordings for commercial purpose, or intentionally broadcasts such live performance to the public, these sound or visual recordings and their copies shall be confiscated, and he could be fined. 141

(iii) Relatively imperfect punishment structure system

Types of punishment in Criminal Law of PRC include fixed-term imprisonment, criminal detention, public surveillance and fine. In general, this punishment structure system is reasonable, but compared with developed countries China’s punishments against intellectual property infringement crimes has following problems:

Firstly, Over-harsh punishment: taking the maximum statutory penalty for example, except for infringement on patent right for which the maximum statutory sentence is 3-year imprisonment, the maximum statutory penalty for the crimes of infringing copyright and trademark right as provided in the Criminal Law of PRC can be even up to 7 years of imprisonment (see Table 5.1). Although there is a tendency that the punishment against infringement on copyright grows aggravated globally142, EU members set the criminal penalties against the crime of infringing

142 For instance, the punishment of “3 months to 2 years of imprisonment and FRF 6,000 to 12,000 fines or either of the two” against the crime of infringing copyright is amended as “a fixed term imprisonment of less than five years and below EUR 500,000 fines (if done by a criminal gang)” in French Copyright Law 2004. If a recidivist or
Comparative Study on Criminal Protection of IPR in the EU and China
Chapter 5 - Problems in Criminal Law Protection of IPR and its Legislative Perfection in China

trademark right less severe (Table 5.2). Comparatively, China sets 7 years of imprisonment for the crime of infringement on trademark right that seems over-harsh.

Table 5.1 The maximum statutory punishment against crimes of infringing intellectual property rights in Criminal Law of PRC

<table>
<thead>
<tr>
<th>Articles</th>
<th>Specific accusation</th>
<th>Maximum statutory punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 213</td>
<td>Crime of infringing registered trademarks</td>
<td>7-year fixed-term imprisonment</td>
</tr>
<tr>
<td>Article 214</td>
<td>Crime of selling products with counterfeit registered trademarks</td>
<td>7-year fixed-term imprisonment</td>
</tr>
<tr>
<td>Article 215</td>
<td>Crime of illegally manufacturing and selling illegally manufactured registered trademarks</td>
<td>7-year fixed-term imprisonment</td>
</tr>
<tr>
<td>Article 216</td>
<td>Crime of counterfeiting the patent of another person</td>
<td>3-year fixed-term imprisonment</td>
</tr>
<tr>
<td>Article 217</td>
<td>Crime of infringing copyright</td>
<td>7-year fixed-term imprisonment</td>
</tr>
<tr>
<td>Article 218</td>
<td>Crime of selling pirated products</td>
<td>3-year fixed-term imprisonment</td>
</tr>
<tr>
<td>Article 219</td>
<td>Crime of Infringing Business Secrets</td>
<td>7-year fixed-term imprisonment</td>
</tr>
</tbody>
</table>

Table 5.2 Setting of punishment against freedom for crimes of infringement on trademark rights in EU member states

<table>
<thead>
<tr>
<th>Country</th>
<th>Minimum statutory punishment</th>
<th>Maximum statutory punishment</th>
<th>Country</th>
<th>Minimum statutory punishment</th>
<th>Maximum statutory punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Nil</td>
<td>Nil</td>
<td>Ireland</td>
<td>5-year imprisonment</td>
<td></td>
</tr>
<tr>
<td>Belgium</td>
<td>3-month imprisonment</td>
<td>3-year imprisonment</td>
<td>Italy</td>
<td>5-year imprisonment</td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td>5-year imprisonment</td>
<td></td>
<td>Lithuania</td>
<td>3-year imprisonment</td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>3-year imprisonment</td>
<td></td>
<td>Luxembourg</td>
<td>Nil</td>
<td>Nil</td>
</tr>
<tr>
<td>Czech</td>
<td>2-year imprisonment</td>
<td></td>
<td>Latvia</td>
<td>5-year imprisonment</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>3-year imprisonment</td>
<td></td>
<td>Malta</td>
<td>3-year imprisonment</td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>1-year</td>
<td></td>
<td>Holland</td>
<td>1-year</td>
<td></td>
</tr>
</tbody>
</table>

anyone under contract with victims infringes the copyright, he shall be sentenced up to 10 years in prison or be fined EUR 1.5 million.
Comparative Study on Criminal Protection of IPR in the EU and China
Chapter 5 - Problems in Criminal Law Protection of IPR and its Legislative Perfection in China

<table>
<thead>
<tr>
<th>Country</th>
<th>Imprisonment</th>
<th>Country</th>
<th>Imprisonment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estonia</td>
<td>3-year imprisonment</td>
<td>Poland</td>
<td>2-year imprisonment</td>
</tr>
<tr>
<td>Spain</td>
<td>6-month imprisonment</td>
<td>Portugal</td>
<td>2-year imprisonment</td>
</tr>
<tr>
<td>Finland</td>
<td>2-year imprisonment</td>
<td>Romania</td>
<td>1-month imprisonment</td>
</tr>
<tr>
<td>France</td>
<td>4-year imprisonment</td>
<td>Slovenia</td>
<td>8-year imprisonment</td>
</tr>
<tr>
<td>Greece</td>
<td>5-year imprisonment</td>
<td>Slovakia</td>
<td>3-year imprisonment</td>
</tr>
<tr>
<td>Hungary</td>
<td>2-year</td>
<td>Sweden</td>
<td>2-year</td>
</tr>
</tbody>
</table>

Secondly, inappropriate public surveillance: only one crime (crime of illegally manufacturing and selling illegally manufactured registered trademarks) out of the seven crimes of infringement on intellectual property rights as provided in the Criminal Law of PRC is punishable with public surveillance. Article 215 of Criminal Law of PRC provides that “whoever counterfeits, or makes, without authorisation, the representations of a registered trademark of another person, or sells such representations of a registered trademark as were counterfeited, or made without authorisation, if the amount involved is relatively large, shall be sentenced to a fixed-term imprisonment of no more than three years, criminal detention or public surveillance and shall also, or shall only, be fined; if the amount involved is huge, the perpetrator shall be sentenced to a fixed-term imprisonment of no less than three years but no more than seven years and shall also be fined.” In the punishment system of China, public surveillance means restricting a criminal’s personal liberty rather than putting him in prison, applying to “the offenders whose crimes are relatively minor and in no need of imprisonment or detention”\(^{143}\), hence being deemed as one most lenient principal penalty. Nevertheless, only 3-year imprisonment as the maximum statutory punishment is set for the other two crimes (crime of counterfeiting patent of another person as provided in Article 215 and crime of selling pirated products as provided in Article 218 of the Criminal Law), which are definitely lighter than the crime of illegally manufacturing and selling illegally manufactured registered trademarks for which 7-year imprisonment of maximum statutory punishment is set, but without the penalty of public surveillance provided in the Criminal Law of PRC.

Thirdly, unreasonable rule of unlimited fines: in terms of the legislative pattern of fine punishment, though China, like many other countries in the world, sets fine punishment against the crimes of infringing intellectual property rights, most EU member states adopt the pattern of limited fine or day fine in respect of the amount for fine punishment, while China adopts the rule of unlimited fine in its Criminal Law, that is specific amount of a fine is not defined therein. Therefore, as provided in Article 52 of Criminal Law of PRC: “the amount of any fine imposed shall be

II. Problems Existing in Protection of Criminal Justice of Intellectual Property Rights in China

“Only law alone cannot take effect”. The strength and effect of criminal justice protection of intellectual property rights will directly affect the level and situation of criminal protection of intellectual property rights. With the continuous improvement of the criminal legislation system of intellectual property rights in China, China has established a complete set of criminal justice system protecting intellectual property rights. In recent years, criminal justice protection of intellectual property rights in China is constantly reinforced and the fighting against crime of intellectual property rights is also heightened. However, the situation of judicial protection of intellectual property rights in China is still blamed by developed countries headed by the United States, mainly focusing on the following two aspects.

(i) Crimes of intellectual property rights in China are serious

It is mainly manifested in the following aspects

1. The number of cases and convicts in - intellectual property rights infringement crimes resolved by the courts in China show a gradual increasing trend year by year (Figure 5.1). In 2004, the courts in China resolved 385 cases about crimes of infringing intellectual property rights, with 528 convicts under effective judgment; in 2005, the courts resolved 505 such cases, growing by 31.17% over the same period of the previous year, with 741 convicts under effective judgment, increasing by 40.34% over the same period of the previous year; in 2006, 769 such cases were resolved with 1212 convicts under effective judgment, increasing by 52.25% and 63.56% respectively, over the same period of the previous year; in 2007 the number of such cases was 904 with 1371 convicts under effective judgment, going up by 17.56% and 13.12% respectively, over the same period of the previous year.  


145 Data source: Situation of Intellectual Property Rights in China, 2004, 2005, 2006 and 2007. The number of cases of infringing intellectual property rights resolved does not involve the crimes of intellectual property rights that were punished in the form of other crimes (such as crime of illegal business operation).
2. The amount of money involved in the cases becomes bigger and bigger. 146 On one hand, the total amount of money involved in the cases is increasing. Since special campaigns were carried out nationwide to crack down crimes of infringing intellectual property rights in 2004, the amount of money involved in the cases has also become bigger and bigger. Take law enforcement by customhouses for example, from 2005 to 2007, the customs throughout the country hunted down and seized 99.78 million Yuan, over 200 million Yuan and 438 million Yuan, respectively, involved in infringement cases. Take public security organ’s filing of cases as another example, in 2007, the public security organs throughout the country cracked down cases of infringing intellectual property rights with 1.49 billion Yuan involved; and in 2008, the amount was 1.65 billion. On the other hand, the amount of money involved in single case is increasing. For instance, in June 2009, the public security organ of Zhejiang Province unearthed the case of illegal manufacturing and counterfeiting of trademarks by Liao; 7 criminal suspects were under arrest and 15 hideouts were destroyed; 58 counterfeit making machines were checked and detained; 11.51 million counterfeited printer cartridges and packages of brands such as “HP”, “Cannon” and “Epson” were captured, with more than 30 million Yuan involved, which is a case of infringing intellectual property rights that is the largest in scale and which captured the most counterfeited trademarks ever since in this province.

(ii) Efficiency in law enforcement is China is relatively low

Low efficiency in law enforcement in China is mainly showed in the following two aspects:

1. The rate of cases of intellectual property rights referred for criminal prosecution is low, which, to some extent, indicates little applicability of China’s criminal law legislation provisions on intellectual property rights. China has built a complete system of intellectual property rights protection by criminal law at an amazing speed, but in judicial practice, the actual prosecution

---

146 Data source: 2004-2008 Situation of Intellectual Property Rights in China; please refer to speeches by Che Yaohua on November 18th 2009 at the national symposium of intellectual property rights protection for foreign-invested business organisations held in Chongqing.
rate of the articles of laws with regard to crime of intellectual property rights is extremely low. As shown in Table 5.3 and 5.4, for both trademark crime and copyright crime, the case referred for criminal prosecution shows an increasing trend, but the ratio in the total illegal behaviors is still quite minor. Referral rate of copyright crimes is lower than 5% and that of trademark crimes is less than 0.5%.

**Table 5.3 Comparison of trademark infringement between administrative punishment and referral for public prosecution in 2003-2007**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of infringement cases punished by administrative organs</th>
<th>Number of cases referred to judicial organs</th>
<th>Cases referred to judicial organs/infringement cases punished</th>
<th>Referral rate compared to the previous year (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>37,489</td>
<td>45</td>
<td>0.001200</td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>51,851</td>
<td>96</td>
<td>0.001851</td>
<td>54.25</td>
</tr>
<tr>
<td>2005</td>
<td>49,412</td>
<td>236</td>
<td>0.004776</td>
<td>158.02</td>
</tr>
<tr>
<td>2006</td>
<td>50,534</td>
<td>252</td>
<td>0.004987</td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>50,318</td>
<td>229</td>
<td>0.004551</td>
<td></td>
</tr>
</tbody>
</table>

**Table 5.4 Comparison of copyright infringement between administrative punishment and referral for public prosecution in 2003-2007**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of infringement cases punished by administrative organs</th>
<th>Number of cases referred to judicial organs</th>
<th>Cases referred to judicial organs/infringement cases punished</th>
<th>Referral rate compared to the previous year (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>23,013</td>
<td>21,032</td>
<td>224</td>
<td>0.01065</td>
</tr>
<tr>
<td>2004</td>
<td>9,691</td>
<td>7,986</td>
<td>101</td>
<td>0.01265</td>
</tr>
<tr>
<td>2005</td>
<td>9,644</td>
<td>7,840</td>
<td>366</td>
<td>0.04668</td>
</tr>
<tr>
<td>2006</td>
<td>10,559</td>
<td>8,524</td>
<td>235</td>
<td>0.02757</td>
</tr>
<tr>
<td>2007</td>
<td></td>
<td>9,816</td>
<td>268</td>
<td>0.02730</td>
</tr>
</tbody>
</table>

2. Index of strength in law enforcement of intellectual property rights in China is low

If only seen from law regulations of intellectual property rights including criminal legislation, the intellectual property rights protection level in China completely complies with international standards and is even over-compliant. According to the index system and calculation method about intellectual property rights protection level by scholars, by 2002, the static index of intellectual property rights protection in China has exceeded the level of most developed countries in 1999, which indicates that the law articles of intellectual property rights protection in
China has been fairly complete. However, the strength in law enforcement is relatively low, being 0.678 in 2002, which indicates that nearly 1/3 of the enacted laws were not effectively executed in practice.147

Section 2 Legislation Improvement of Intellectual Property Rights Protection by Criminal Law in China

I. Basic Principles for Improving Legislation of Intellectual Property Rights Protection by Criminal Law in China

As mentioned above, in terms of criminal law protection of intellectual property rights, there are differences between China and developed countries in interest standpoint, value orientation, legislation direction, legislation mode and punishment allocation etc. Such differences in legislation should not be completely regarded as problems and defects of the criminal legislation of intellectual property rights in China. When developing legislation on criminal law protection of intellectual property rights, China must combine the legal and cultural characteristics and criminal policies of its own on the basis of the minimum requirement of international obligation to determine the scope and intensity of criminal law protection legislation of intellectual property rights. To be specific, when working on improving legislation of criminal law protection of intellectual property rights, the following basic principles must be abided by:

(i) Principle of timeliness

1. Meaning of the principle of timeliness

The principle of timeliness means that the criminal legislation should comply with and be adapted to the realistic needs of the society, because “the legislator, however, should regard himself as a naturalist. He does not make the laws, he does not invent them, but he only formulates them, expressing in conscious, positive laws the inner laws of spiritual relations. Just as one should reproach the legislator for the most unbridled arbitrary behavior if he replaced the essence of the matter by his own notions.”148 The legislator should carry out legislation and determine the boundary of legal protection starting from the actual situation of existing economy, politics and culture.

Criminal law establishes social harmfulness of behavior at the standard of crime and punishment regulation. But social harmfulness is the integrity of stability and changeability. Therefore, as social life changes, the existence and degree of social harmfulness will be changing. In order to be adapted to the social reality and protect legal interests and rights, with the change of social harmfulness, the legislator should follow the need of the social reality, reevaluate the nature of behavior and timely respond by “legislation, amendment and abolishment”. Especially, the development of new technologies makes the legal system of intellectual property rights open and expands the scope of intellectual property rights. So to speak, intellectual property right is very vulnerable to the impact of social and economic development and new technology updates; therefore, law system of intellectual property rights is constantly modified and changed, under a


148 Karl Marx and Frederick Engels, Vol.1, P183.
Comparative Study on Criminal Protection of IPR in the EU and China  
Chapter 5 - Problems in Criminal Law Protection of IPR and its Legislative Perfection in China

state of extreme instability and “shattering”. Correspondingly, the scope of criminal behavior of intellectual property rights is also under a dynamic process in a short period of time; therefore, criminal law specifying crime of intellectual property rights should be adjusted in time.

2. Implementation of the principle of timeliness

About the relationship between legislation and social reality, there are three different opinions theoretically: firstly, "lagging theory” holds that law should be made after it becomes mature; especially in criminal legislation, an article should be made after it becomes mature. The reason is that China now is in an era of reform, conducting a totally new cause of human society, groping forward without the reference of others’ similar experience or accumulation of its own experience, so after some exploration of social practice with some experience gained and tentative things become mature, the confirmed experience after the check of practice can be fixed in the form of law. Secondly, "advancing theory” holds that legislation should not only be based on the objective conditions when making laws, but should anticipate the society and take the future social condition obtained through anticipation as foundation to fully reflect the social condition when law is implemented in future, so provisions advanced to some extent are made. Because the society is developed by following certain rules and such rules can be known, it is possible for advanced legislation; at the same time, laws are not carried out in the society when they are made but in the future society after they are made, so laws should be based on future social condition. Thirdly, “synchronizing theory” holds that legislation can neither be advanced nor lagged, but should be synchronized with the society because lagged legislation cannot bring the supposed effects of laws and is unfavorable to legal system construction and advanced legislation is not consistent to the objective reality and the laws are hard to be carried out. Undoubtedly, “synchronizing” is the highest wish of people on the relationship between legislation and social reality; in practice, however, there are more situations that the two are not compatible, and so advancing or lagging just become a normal relationship state between legislation and social reality.

Overall, criminal law protection of intellectual property rights in China belongs to advanced legislation. We should say that the entire intellectual property rights system of China is a castle in the air established without corresponding social foundation because China didn't fundamentally generate the social need of protecting intellectual property rights; even if there are some social needs, the protection provided for the intellectual property rights by the criminal law of China has left the social needs far behind. The reason is that the birth and improvement of intellectual property rights in China are fundamentally taken by the government as a tool instead of a result by conducting compulsory system transition. By the end of the 20th century, the birth of intellectual property rights of China was a complete input of form from the legal systems of the West due to the invasion of the imperial super powers. From the establishment of the new China to reform and opening up to the outside world, the highly controlled planned economic policies and “anti-elitist” ideology completely negated the private ownership system of intellectual products. After reform and opening up to the outside world, the establishment and improvement of intellectual property rights have always had a direct causal relationship with the pressure from the United States. In order to win more extensive international space for reform and opening up, to establish intellectual property rights system in conformance with American standard becomes

---

the only counter that China has in negotiation. So to speak, to establish intellectual property rights system and conduct large scale legislation design contemporarily is not to adapt to domestic social need and is always outside of the social need.

Advanced legislation deviated from the domestic social reality is chosen for criminal law protection of intellectual property rights in China, leading to invalidity of law and loss of legal authority. In the history of China, during system construction and reform, the highlighted problems were usually arguments with underprepared ideas or even without ideas, which causes lack of idea support in the entire legal system construction and severe instrumentalism of law. As a matter of fact, any law covers two levels, idea and system, and a law only on system level without spiritual idea level is definitely incomplete.¹⁵⁰ “Knowing the unrealistic nature of the idealism of expecting 100% execution of law means that attention should be paid to avoiding making laws that can be hardly executed and abolishing those that can only be occasionally executed. A law that has been neglected for a long time and is only occasionally executed indicates that: such prohibited conduct does not cause severe damage to the sense of safe social order. Actual punishment rate is an important index for identifying anti-social conduct. Making and retaining those criminal articles that are only occasionally executed is not only ineffective but also brings actual danger. Such ineffectiveness is originated from this knowledge that a decree that is executed in very few situations will definitely affect the deterring effect of this kind of articles.”¹⁵¹ Therefore, the advancing quality of law does not completely lie in how much modern and advanced index it specifies; its adaptability and feasibility in the realistic life should also be taken as criteria. If the legislator adheres to such instrumentalism of law without caring the social reality and indulges in the self-entertainment of legislation design, the result is that the legal articles of rational design is laid on a high shelf without gaining citizen’s respect and obedience. Therefore, “while we blame the people not having sufficient awareness of law, we should self-criticize about whether the laws that we made reflect the values and code of conduct universally recognized by the public, whether they are in compliance with people’s will, worth of public’s respect and recognition and arouse the public’s law affection and faith.”¹⁵²

(ii) Principle of self-restraint

1. Meaning of the principle of self-restraint

The principle of self-restraint of criminal law means that criminal law should control its width and depth and reasonably define the criminal punishment scope and degree when intervening in social life.

Scholars in different countries proposed different ways to confirm the intervention degree of criminal law and reasonably define the circle of crime on how to understand the specific content of the self-restraint of criminal law. In 1968, Packer, a famous American penologist, systematically proposed six specific criteria for defining crime circle and setting punishment amount: (1) To most people, the harmfulness of such conduct to the society is obvious and such

conduct is intolerable from every aspect of the society; (2) punishment for such conduct is compliance with the purpose of punishment; (3) restriction of such conduct does not restrict the conducts that the society desires; (4) treatment can be done through just and undifferentiated execution; (5) Such conduct is banned through criminal procedure, not adding burden to legal proceeding in terms of both quality and quantity; (6) there is no other appropriate methods to replace punishment for treating such conduct. \(^{153}\)

A Japanese scholar Hirano limited the content of self-restraint of criminal law from three aspects: “firstly, supplementary nature of criminal law, even if it is about citizen’s safety, only when other approaches such as habitual and moral sanction, namely, geological social informal or civil regulations are insufficient can criminal law be launched……Secondly, incompleteness of criminal law……Thirdly, tolerance of criminal law, or the nature of respecting freedom. Even if citizen’s safety is infringed and other control measures are not brought into full play, it is not necessary for criminal sanction without missing. In modern society, people cannot survive without infringing others more or less; therefore, each person must tolerate others’ invasion to some degree. If all the invasion conducts are prohibited, it is easy to hinder individual’s activities conversely. \(^{154}\)

The author holds that the self-restraint principle of criminal law can be expressed as different content from different perspective; however, the common purpose for elaborating the content of the self-restraint principle of criminal law is to limit the punishment scope of criminal law and the degree of punishment. Therefore, the self-restraint of criminal law should be understood from two aspects, punishment scope and punishment degree: firstly, what specific rules are based on to limit the punishment scope of criminal law and under what conditions can criminal law be used? Secondly, for conduct that has been determined as crime, if relatively light criminal responsibility is enough to restrict certain criminal conduct and protect legal interests and rights, relatively heavy criminal responsibility method should not be used. Therefore, for investigation of the self-restraint principle of criminal law protection of intellectual property rights in China, it should be developed from horizontal and longitudinal aspects: firstly, determine criminal protection scope horizontally; secondly, select criminal penalties degree longitudinally.

2. Implementation of self-restraint principle

(1) To determine the horizontal protection scope of criminal law of China’s intellectual property rights, it must be conducts that substantially deserve punishment of criminal law in terms of positive aspect, and that have to be punished by criminal law in terms of passive aspect.

From the positive perspective, the conduct of infringing intellectual property rights must deserve punishment of criminal law in essence. To be specific, it should include objective standard, subjective standard and quantitative standard. Firstly, the objective standard is that the conduct of infringing intellectual property rights must infringe upon the overall interest of the nation and the society. Starting from the appearance of human society, there have existed all kinds of conducts violating social rules but it is not that any rule-violating conduct is punished as crime of criminal law. The nation always chooses to specify some of these conducts as crime and give criminal penalty based on certain conditions and principles. The reason of specifying a conduct as crime and giving criminal penalty firstly lies in that such conduct infringed upon the overall


interest of the nation and the society and will finally endanger the basic surviving condition of the nation and society; and only based on the ground of maintaining its own surviving condition will the nation use criminal penalty, the last and harshest punishment, to punish and stop such conduct. As a type of crime, infringement of intellectual property rights should be determined and punished by following this basic principle. Secondly, objective standard is that the offender of intellectual property rights has the intention against social rules; the conduct infringing overall social interest is only the prerequisite for criminal sanction but not the sufficient condition of punishing such conduct with criminal law. Only when some harmful conducts are chosen and conducted by the offender by free will can the punishment of criminal penalty on him is justifiable. In market economy activities, for the conducts of infringing intellectual property rights endangering the overall interest of market economy carried out with intentional subjective attitude, punishment of criminal sanction is justifiable. The reason is that modern market economy is an economic pattern featuring reasonable calculation and rational judgment; the subject of market pays special attention to the thorough and systematic calculation of long-term profit, instead of profiteering through simple speculation and short-term conduct. Similar to normal economic activities, the subject of the market also has rational judgment of maximizing what's good and minimizing what's bad when carrying out the conduct of infringing intellectual property rights, usually taking initiative to violate social rule for the purpose of gaining great profit, instead of being on an impulse. If the conductor, knowing these social rules, takes initiative to violate social rules driven by pursuit of interest, even very often takes various measures to hide his conduct in normal activities with the intention of avoiding sanction of law, especially criminal law, which clearly indicates his disdainful and hostile attitude toward the rules and national laws. If we read through the criminal law regulations in the countries around the world, we find no difficulty in discovering that almost all the crimes of infringing intellectual property rights specified by them are conducted with intentional subjective attitude. For involuntary conducts of infringing intellectual property rights violating social rules, the criminal law should exclude them from the punishment scope. The conductor of negligent conduct does not have the subject mentality of pursuing or indulging the result of the harm, therefore, the anti-social nature and culpability of subjective attitude is obviously weaker than intentional criminal behavior. Therefore, almost all the criminal laws around the world take punishing intentional crime as the principle and negligent crime as exception. From the data collected from around the world about legal regulations of crime of intellectual property rights, there are very few cases in which negligence constitutes crime of intellectual property rights. It is thus clear that the legislation status quo in countries around the world reflects that it is extremely cautious for each country to use criminal law in punishing negligent infringement of intellectual property rights. Finally, quantitative standard is that crime of intellectual property rights must be worth punishing both qualitatively and quantitatively. In China, infringement of intellectual property rights that can be put in the criminal law control must be the conduct of intentionally infringing legal rights and interests by the offender in terms of quality. However, the protection of legal interests and rights by the nation is not carried out only through criminal law. On the contrary, due to the private ownership attribute of intellectual property rights, indicated by legislation experience and history of each country, infringement of intellectual property rights is usually regulated and controlled by civil laws and regulations that are non-criminal in the first place. This feature decides that criminal law can only follow certain standards to criminalize some conducts of infringing intellectual property rights for
providing and punishing the crime of infringing intellectual property rights. Such standard of
criminalizing selection, in addition to the abovementioned qualitative stipulation, indifference to
light conduct of infringing intellectual property rights should also be shown in terms of quantitative
stipulation; only conduct of severe infringement of intellectual property rights management order
is punished. Therefore, when constitutes of crime of infringing intellectual property rights are
established by articles, the criminal law uses a lot of quantitative factors such as plots and
amount to limit the establishment of a crime; in judicial practice, detailed judicial interpretations
including specific quantitative contents are continuously modified and promulgated.

Seen from negative condition, the conduct of infringing intellectual property rights must be that
the criminal law has to punish. Such “has to” limitation is decided by the nature of criminal law.
Firstly, the adjustment scope of criminal law is extensive, almost involving all the domains of
social life. But its punishment scope is not complete or fragmentary, namely, the adjusted target
of criminal law is a legal relationship formed after adjustment of other laws. Criminal law only
adjusts the social relationship involving in the overall interest of the nation and the society, for
which the existence of corresponding legal system will be fundamentally threatened if not
sanctioned by criminal penalty, thus severely harming the national legal order as a whole. Such
incompleteness decides that criminal law must strictly follow the orientation as supplement of
other laws and the national legal system of the final control measure of society when conducting
legislation establishment and justice confirmation on crime, and can only punish conduct that
deserves punishment and that sanction measures of other legal system cannot effectively stop.
Secondly, criminal law adjustment measures are strict, mainly manifested in depriving citizen’s
basic human rights (life, freedom, property, basic political rights) by its sanction measures, yet
those rights of citizens are the core of basic rights that are sacred and inviolable in modern rule of
law. Therefore, criminal law has such harshness that any other laws cannot compare with so that
people have to strictly limit the applicable scope of such sanction measures with special
standards. Thus, adhering to the principle of “necessity” and “has to” of criminal law (criminal
penalty) is an inevitable choice of modern criminal law. The criminal sanction can only take the
most important social interest as protective target, and the society can specify and use criminal
law (penalty) only when there is no alternative.155

(2) For determining the horizontal scope of intellectual property right protection by criminal law,
whether the punishment degree on the crime of intellectual property rights by criminal law is
reasonable is investigated, also whether the statutory sentence allocated to the crime of
intellectual property rights by criminal law is reasonable. “Allocation of statutory sentence is
definitely not the affairs that the legislator can willfully do; it must be controlled by some kind of
proporionality. To pursue the proportionality of statutory sentence allocation is actually for the
purpose of establishing and confirming a kind of justice idea of crime-punishment relationship.”156
As crime-punishment proportionality is only an ideal state that mankind subjectively sets, people
can only indefinitely approach such state in reality. A complete proportionate state does not exist;
even if it did, such kind of proportionality or balance could never be sustained. Therefore, such
proporionality is relative and the imbalance of crime-punishment relationship is the normal state

156 Zhou Guangquan: Rationality Discussion on Allocation of Statutory Sentence – Unrealistic Comparison of
of the relationship between the two. Investigated from the crime-punishment degree, the imbalance is simply over-heavy or over-light punishment. China is too harsh in criminal penalty in crime of intellectual property rights, so over-heavy punishment theory must be opposed if crime-punishment proportionality is followed to determine the degree of intellectual property rights protection by criminal law. Otherwise, giving punishment that is heavier than the crime would not enable the offender to have painful and regretful mentality; instead, the offender may develop the emotion of hatred and confrontation and his anti-social mentality may be reinforced due to excessive punishment; in order to make up for the psychological imbalance caused by over heavy punishment, he would be very likely to recommit a crime.

3. Improvement on self-restraint principle and crime of infringing on business secrets in China

In accordance with Article 219 in the Criminal Law of China, the crime of infringing on business secrets is mainly manifested in the following aspects: (1) obtaining an obligee's business secrets by stealing, luring, coercion or any other illegitimate means; (2) disclosing, using or allowing another to use the business secrets obtained from the obligee by the means mentioned in the preceding paragraph; (3) in violation of the agreement or the obligee's demand for keeping business secrets, disclosing, using or allowing another person to use the business secrets he has; and (4) Whoever obtains, uses or discloses another's business secrets, which he clearly knows or ought to know falls under the categories of the acts listed in the preceding paragraphs, shall be deemed as an offender who infringes on business secrets. Generally speaking, the former two categories can be classified as one, known as business spy conduct. As the business secret acquired by the conductor is unjustifiable in source with dangerous measures, it is one of the most severe infringing conducts and it is a universal practice that it is controlled and cracked down by criminal law in many countries in the world, including the United States, Germany, Austria and Russia. Before amending the criminal law, such crime has been taken as the crime of theft in judicial activity, so there is no doubt about the justifiability of criminal penalty. However, for the provisions of the latter two categories, according to the self-restraint principle of intellectual property rights protection by criminal law, there is doubt about the justifiability of the punishment on it by criminal law.

Firstly, it violates the self-restraint principle of criminal law to specify infringing on business secret as crime.

According to Sub-clause 3 of Clause 1 of Article 219 in the Criminal Law of China, the crime of infringing business secret is constituted if in violation of the agreement or the obligee’s demand for keeping business secrets, disclosing, using or allowing another person to use the business secrets he has and great loss is caused to the obligee. Since this business secret in question is known by the conductor in a legal way, what the law emphasizes is violation of the obligation of keeping secret agreed upon in contract. Disclosing business secret is essentially a conduct of breaching contract. In market activity, breach of contract may cause loss to the interest of one contractual party, but since there is agreement on keeping secret between the conductor and the obligee and contract transaction is predictable, the conduct and result of breaching of contract can be predicted by both parties. Therefore, the existence of such loss from breaching contract cannot fully justify a criminal penalty punishment. As pointed out by German penologist Jescheck, “Even if loss of millions of dollars caused to the opposite party due to failure to perform contract, criminal penalty punishment should not be given; but even the smallest fraud will be deterred by
criminal penalty punishment as the interest of not abiding by contract can be effectively protected by means of non-criminal penalty (such as obligation of compensation for loss, fine for breach of contract, etc.).

Therefore, for breach of contract in market activity, it can surely be handled through self-control mechanism of market or civil responsibility mechanism to restore or compensate for the lost interests and rights to the party opposite to breach of contract. For punishing the breaching party, criminalization of common civil breaching conduct by criminal law is not only in violation of the basic value orientation of market economy, but also violating the self-restraint principle of modern criminal law, so there is doubt about its reasonableness and justifiability.

Secondly, specifying negligent infringement of business secret as a crime violates the self-restraint principle of criminal law.

Clause 2 of Article 219 of the *Criminal Law* provides, “Whoever obtains, uses or discloses another’s business secrets, which he clearly knows or ought to know falls under the categories of the acts listed in the preceding paragraph, shall be deemed as an offender who infringes on business secrets”. Here the “ought to know” refers to that the conductor has the obligation of “ought to know”; as for those that the conductor “ought to know” but does not know, except understood from the perspective of negligence, no other faults can apply.

The criminal law specifies such conduct of negligent infringement of intellectual property rights as crime; on the one hand, it violates the self-restraint principle of criminal law. As mentioned above, one of the positive conditions for determining the scope of intellectual property rights protection by criminal law in China is that the offender of the intellectual property rights must be subjectively intentional. The negligent conducts of infringing intellectual property rights should be excluded from punishment scope by criminal law. In terms of control method, non-criminal-sanctions such as civil compensation and administrative punishment can be used for prevention as there is no justifiability and “have to” nature of sanctioning and controlling such conducts with criminal penalty punishment. Even if seen from legislation about business secret crime in other countries, the crime of infringing business secret in negligent form is also strictly restricted. For instance, Japan expressly specifies the criminal responsibility of negligent infringement of business secret in *Unfair Competition Prevention Law*, but it is only limited to “significant negligence”, no light negligence within the scope. The reason for requiring such subjective state is that business secret is of no publicity and over-confidentiality may endanger the safety of information transaction.

On the other hand, such provision of criminal law is unfair. Seen from the four kinds of behaviors of infringing business secret provided by the criminal law, crime of indirectly infringing others’ business secret by a third party covers both intention and negligence in terms of subjective aspect; while the crime of acquiring business secret, or disclosing and using obligee’s business secret by a second party in an illegal way can only be constituted by intention, which

---


causes the situation that the criminal law is stricter on a third party instead of a second party. Such legal provision is actually proposing higher obligation of attentions to the third party. Because the third party needs to carefully notice whether others are the legal owner of the business secret in normal market circulation as he is not the direct gainer of business secret, so his burden is apparently heavier than the second party in terms of not disclosing, using or allowing others to use the business secret known that does not belong to him. For direct infringement, the law gives punishment for intention; while for indirect infringement, the law gives punishment for both intention (knowing) and negligence (ought to know), which is suspected to have ignored heavy crime and punish light crime, which is apparently unfair.

II. Specific Content of Legislation Improvement of Intellectual Property Rights Protection by Criminal Law in China

(i) Improvement of protective scope: based on realistic need, limit impulse of expansion

Adhering to the principles of timeliness and self-restraint for legislation of criminal law of intellectual property rights means that China should determine whether law network should be further expanded and protection be reinforced on the basis of the specific need of the social reality under the prerequisite of the lowest standard required by TRIPS for legislation of criminal law of intellectual property rights. It cannot propose various suggestions for legislation improvement only based on the difference itself after making a simple comparison between domestic criminal legislation about intellectual property rights with relevant regulations in the developed countries in the West. As a matter of fact, the difference in terms of legislation may show the characteristic of the criminal law legislation of a country. Therefore, we cannot go like this: because “Nation A is this, so is Nation B, also the same in Nation C, so China should……”. If such thought of comparative research is adhered to, the legislative difference of each country is naturally taken as its own legislative defect, blindly and mechanically emphasizing catching up with the developed countries and pursuing satisfaction in form, it can only aggravate the tension and separation between the reality and the legislation. As pointed out in Integrating Intellectual Property Rights and Development Policy by the UK Commission on Intellectual Property Rights, hopefully both rich countries and poor countries will take intellectual property rights as a tool for development and re-correct the idea of “the stricter protection of intellectual property rights, the better”. Whether a nation needs to strictly protect intellectual property rights, especially protection at a large range by using criminal penalty power, essentially lies in whether such protection is favorable to the development of this nation’s economy; the original intention of establishing intellectual property rights system was this, after all, instead of the so-called internationally prevailing trend and standard.

---

(ii) Improvement of protection degree: focus on actual profit, adjust criminal penalty allocation

“Criminal penalty is like a sword with two sharp edges; if not used properly, it will hurt both the nation and individuals”. Based on the profound historical and social reasons, the current criminal law system of China has an obvious trend of heavy punishment, which is also manifested in criminal penalty allocation on crime of intellectual property rights. As mentioned above, China’s criminal law is over-harsh on penalty allocation of crime of intellectual property rights. Therefore, priority should be given to fine punishment; punishment against freedom should be properly shortened and restricted qualification penalty should be applied.

1. Priority given to fine punishment

When creating system and applying criminal penalty, specific quality of certain category of crimes should be based on to consider the main reason why it is formed, with corresponding criminal penalty specifically established with the expectation to effectively realise the mission of criminal law and exert its function. “The interest principle of market economy drives market subject to conduct decision-making investment and to allocate available resources for realising maximisation of profit, which has great impact on the entire society; some people’s desire for interest expands, so they take chances to fake patent, steal others’ copyright and business secret in order to achieve economic success. With the temptation of great profit, the mental deformation of normal requirement of the subject in the crime of intellectual property rights caused occurrence of the crime.” Since pursuing profit is the largest also the deepest motivation for crime of intellectual property rights, control of such crime should also be designed with interest as the axial center, and should not be investigated only from the perspective of morality. For the crime of intellectual property rights with making profit as its purpose, fine punishment is apparently a punishment of the same quality, having vivid retribution effect of equal crime-punishment value. The direct result of applying fine penalty lies in: depriving offender of property to make him feel great material pain on the one hand, and making him lose the ability to recommit to spontaneously or conscientiously restrict the possibility of recommitment on the other hand. “Under the condition of establishing socialist market economy system, as a kind of property penalty, the fine for investigating criminal responsibility of the criminals of illegal economic interest and punishing property-seeking crime especially economic crime, can not only play a role of punishment and education, but also deprive criminals of conditions for recommitment with money.” It is an inevitable choice to apply much fine penalty on crime of intellectual property rights.

The criminal law of China has provided for penalty of “concurrent or separate fine” for various crimes of infringing intellectual property rights, but does not specify the scope of fine, completely

---

relying upon the judge’s arbitrary discretion. On April 4th 2007, the Supreme People’s Court and the Supreme People’s Procuratorate jointly issued Interpretation of Several Issues about Applicable Laws for Trialing Criminal Cases of Intellectual Property Rights, in which Article 4 provides, “the amount of fine is usually determined for above one time and below five times of the illegal income, or above 50% and below one time of the amount of money in illegal operation.”, which clarifies the punishment extent of fine penalty.

2. Properly shorten penalty against freedom

In the criminal penalty in China, freedom penalty has occupied the core position for a long time. For the crime of infringing intellectual property rights, the status quo that freedom penalty dominates is hard and not necessary to change. For economic crime, the existence and deterring force of freedom penalty is very necessary, “because most economic criminals seek nothing but profits and like adventurous speculation; if only fine punishment is given, subjectively for the conductor, it is just a failure of speculation, not punishment from the nation; therefore, the effect of penalty intimidation will be greatly weakened”. However, for the crime of infringing intellectual property rights, the maximum legal penalty provided by the criminal law of China is 7 year long fixed-term imprisonment; comparatively, the short-term freedom punishment degree applied in other countries around the world is relatively low. Many scholars hold that the freedom penalty for crime of intellectual property rights is too harsh, not suitable for the gentle trend of penalty development, and should not be the punishment degree selected for economic crime. Such penalty allocation is in violation of the development trend of the criminal law in the world. “Where light sanction method is applicable for certain crime and enough to protect legal rights and interests, heavy sanction method should not be provided”. Going through the development history of intellectual property rights, we can find that the system is originated from the utilitarian need of mankind society, irrelevant to moral appeal; therefore, protecting intellectual property rights does not belong to the so-called “first rationale” in ethnics (such as no killing, no stealing). As statutory crime, infringing intellectual property rights is generally thought to have less social harm than natural crime as the social moral blame and subjective malignance is not as strong as natural crime; and the personal danger of the crime conductor is also relatively smaller than other traditional crimes. Based on the principle of equal value between crime and punishment (adaptability), a relatively light penalty against freedom should be set up for the crime of infringing intellectual property rights. Besides, freedom penalty itself has some innate disadvantages. “Freedom penalty is undoubtedly the exile of mankind group, exiling a criminal to somewhere that is worse than any common society and from which he has to return to the society; it is therefore odd and futile exile; the criminal is not only incapable of have meaningful life but the connection with culture will also be cut off at the exiled place, ruining his psychology

---


and sociality, making his return to society more difficult.¹⁷² To properly shorten freedom penalty is a full respect to the self-restraint of criminal law and the humanitarian principle as well, help to avoid over-protection of intellectual property rights and reduce damage on social economic welfare. According to the degree of social harmfulness of the crime of infringing intellectual property rights, combined with establishment of statutory penalty of other crimes, it is more suitable to specify the statutory penalty for the crime of infringing intellectual property rights as fixed-term imprisonment or custody below 3 years.

3. Restricted qualification penalty is applied

“If separately investigated, no any penalty alone has the necessary attribute of all penalties. To realise the purpose of penalty, there must be different penalty methods for selection and difference is made among them so that several of them can be applied to the same crime.”¹⁷³ Qualification penalty deprives or restricts criminal’s qualification of engaging in certain activities, indirectly depriving criminal of recommitting ability, which has some effect in punishing and preventing crime. Based on such advantages as divisibility, restorability, specificity and strong operability, under the modern penalty philosophy of focusing on gentleness and openness, qualification penalty basically occupies certain position in the criminal penalty system in each country. Seen from the practice of the criminal justice in China, the crime of infringing intellectual property rights by organisations is very severe;¹⁷⁴ while in the crime of infringing intellectual property rights by natural person, many of them commit crime with their specific qualification or identity, such as senior manager and professional technician.¹⁷⁵ Through depriving or restricting the criminals’ business qualification of engaging in production and circulation relevant to intellectual products, not only the chances for criminals of recommitting crime of infringing intellectual property rights are eliminated to achieve special prevention purpose, but also warning is given to other engagers and legal persons (Organisation) to promote them to cherish their qualification of engaging in relevant business of intellectual products, thus achieving the purpose of general prevention. Therefore, depriving or restricting criminal’s some business qualification is a very effective measure in controlling crimes of intellectual property rights.¹⁷⁶

However, there are also some defects in qualification penalty, which have been criticised very often in modern times. It is regarded to “be over-punishing for corrected criminals, lack deterring

¹⁷⁴ Study on Impact of Producing and Selling Fake Products on National Economy and Countermeasures issued by the State Council Development and Research Center on June 30th 2000 indicates, “the natural person is the same as the legal person in producing and selling fake products:, fake products of high technological content in need of collective production and selling in large batches are mainly produced and sold by legal person while fake products of low technological content produced in small batches are produced by natural person.”
force and be void for criminals and instable offenders, and hinder criminals from re-socialising. To deprive criminals of particular qualification may affect the execution of other rights in such aspects as politics, society, economy, culture and education, and even endanger their basic human rights of survival and development. Therefore, application of qualification penalty should be strictly restricted. To help and improve qualification penalty, the system of restoring system should be added after qualification penalty is introduced; namely, for criminals sentenced to qualification penalty due to committing crime, when the conditions provided by the law are met, the deprived qualification should be restored to eliminate over-punishment and protect criminal’s legal rights and interests; also to motivate the criminal to sincerely regret, and actively reform himself. It is also helpful to improve criminal penalty application system and make criminal law more logical.

Section 3 Judicial Improvement of Intellectual Property Rights Protection by Criminal Law in China

I. Analysis of Reasons for the Existing Problems of Judicial Protection of Criminal Law

The reproaches of the abovementioned developed countries about the severity of crime and low enforcement efficiency in judicial protection of intellectual property rights by criminal law in China actually reflected the bad efficacy of intellectual property rights protection by criminal law in China. Efficacy of law refers to the actual effect of law in social order, and the situation of abiding by or executing the law in the actual realistic world. The severity of the crime of intellectual property rights indicates that the provisions of the criminal law about intellectual property rights in China are not very well abided by in judicial practice; low efficiency in enforcement of intellectual property rights indicates that there are few applicable provisions of criminal law on intellectual property rights in China. The reason for such a phenomenon is multi-level.

1. Reasons why severity of crimes leads to poor abidance of criminal law

People always habitually think that the reasons for severity of crimes are inadequate enforcement and low efficiency. As a matter of fact, enforcement and infringement is a pair of confliction, strict enforcement leading to less infringement and prevailing infringement causing difficulty in enforcement. Therefore, inadequate enforcement only facilitates infringement, not the real cause of infringement. And the real reason for severity of crime of intellectual property rights lies in:

(1) The public lack recognition on crime of intellectual property rights. To make legislation content of criminal law win support among the people and get extensive abidance, apart from some public and private resources invested by the nation to prevent crime and arrest criminal, the more fundamental condition is that the provisions of criminal law must be recognised by the people, because any law can be effectively implemented only by faith and recognition of the people, not only by its enforceability. Therefore, law needs to be based on morality to gain a kind of ethnic support, which is to present moral requirement of relatively low limit. In a society where the moral code is supported by the public and assimilated by the people as normal conduct code, based on which, the criminal law usually can exert relatively good effects in cracking down crime, because moral code not only plays a role of reducing crime and the function of moral binding enables the criminal justice system of the nation to have enough strength to actively focus on fighting against
crime instead of being trapped with trifles. And once criminal law loses moral foundation, the public’s sense of internal recognition on criminal code will be reduced and the number of crimes will increase; besides, weakening of moral binding function may also cause the criminal law to lose frontline barrier in controlling criminal conduct, directly facing various hazardous conducts which increases day by day. And the criminal justice system will therefore be located in a passive and busy situation, so the efficacy of criminal law will definitely decrease. Therefore, that the nation can make and carry out a law does not mean that the law of the nation is naturally reasonable. The reasonableness and vitality of a law depends on what kind of morality it determines and the method it carries out morality.

In traditional Chinese culture, however, it’s hard for the conduct of infringing intellectual property rights to form moral binding. Generally speaking, replicating other people’s works actually proves the quality of the replicated works and indicates understanding and respect to the original author. Therefore, “Great Chinese painters show general tolerance or actually pleasurable attitude for the conduct of imitating their works”. It is said that when replying on suggestions of requesting to stop faking his works, Shen Zhou (1427-1509) said, “if the picture I drew casually is helpful to the imitator, I have nothing to worry about.” Such practice is not happening only in painting; the condition is the same in literature, because such thought is promoted from Confucius’s belittling on commercial business (despite that it cannot always be fulfilled in reality). Confucius believes that a true scholar writes for education and moral renewal instead of for gaining profit. An investigation result also indicates that: the social public has weak awareness of respecting intellectual property rights; the people who do not buy pirated products accounts for 11% of all the respondent purchasers, and only 33% think that buying pirated products infringes others’ intellectual property rights; more concerns are about the quality and other issues. Therefore, the number of people refusing pirated product, in terms of both awareness and conduct, accounts for very little, only 4% of all the respondents.

(2) If investigated from the causes of crime, the conductor has the background of interest for infringing intellectual property rights. Such conduct itself features low cost and high profit, which decides that the conduct has the impulse of crime based on interest selection. As the capital described by Marx, 20 percent profit will produce eagerness; for 50 percent profit he will take risk; for 100 percent he will be ready to trample on all human laws; for 300 percent, there is not a crime which he will not scruple, nor a risk it will not run, even to the chance of himself being hanged.” According to David Finn, the chief in charge of digital integration business in Europe, the Middle East and Africa of Microsoft, the profit of pirated software is as high as 900 percent, 9 times higher than drug trafficking. Therefore, “intensive profit will drive people to violate legal code not giving consideration to the punishment that may be brought about by enforcement mechanism. When such condition becomes routine, the safeguarding enforceability will exist in

179 Wen Fong. The problem of forgeries in Chinese painting. 25 Artibus Asise95,100(1962).
name only. This is the so-called “degrading through habitual law” by jurists.\textsuperscript{181}

2. The reasons why low enforcement efficiency leads to little applicability of criminal law

(1) The nature of intellectual property rights decides that it is difficult to investigate such crime. For example, cases of intellectual property rights crimes show relatively high regional span and industrial span, while the current investigation forces on crime of intellectual property rights in China are allocated mainly on administrative regional division and important industries, easy to create the situation that investigations on crime of intellectual property rights are conducted in their own way, focusing on local part and neglecting the entirety. Infringing crime of intellectual property rights belongs to intelligent crime and the criminals have certain professional knowledge and skills. However, the people handling such cases generally do not have the professional knowledge and experience needed.

(2) The method of administrative enforcement of law is used to handle most illegal cases. Compared with intellectual property rights protection by criminal law, most of the illegal conducts of intellectual property rights are handled by the administrative enforcement organs.

(3) Some crimes are punished under other more severe provisions than the criminal provisions on IPR infringements (Figure 5.1). There are a lot of cases involved in crimes of infringing intellectual property rights resolved by the courts in China every year. However, the ratio of cases convicted for directly infringing intellectual property rights is not big, most of which were punished as more severe crime by the criminal law according to other provisions, such as crime of producing and selling fake products, and crime of illegal operation (Figure 2). For example, the number of cases involved in infringing intellectual property rights resolved by the courts in China was 3529 in 2005, among which the number of cases of infringing intellectual property rights was 505, accounting for 14.31%, that of producing and selling fake products was 437, accounting for 19.19%, and that of illegal operation cases was 1066, accounting for 46.82%. In 2007, the number of cases was 3326, among which, the number of cases of infringing intellectual property rights was 904, taking up 33.69%, that of producing and selling fake products was 477, accounting for 17.77%, and that of illegal operation cases was 1296, accounting for 48.29%.

Structure of crime cases involving IPR issues heard by Chinese courts in 2005-2007

II. Improvement of Intellectual Property Rights Protection by Criminal Law in China

Analysed from the abovementioned reasons for the existing problems in intellectual property rights protection by criminal law in China, it can be concluded that the measures for improving intellectual property rights protection by criminal law in China include but not limited to the following aspects: reinforcing transferring of cases, increasing investigation level, improving judicial interpretation and increasing awareness of protection. The key to reinforce transferring of cases may be the linking mechanism between law enforcement organs. Here we do not give unnecessary details about increasing investigation level as it will be discussed in the procedural law in detail.

(i) Improving judicial interpretation

1. Connotation and meaning of judicial interpretation

Judicial interpretation refers to the explanation made by the supreme judicial organ of the nation on the connotations of the legal provisions, namely, interpretation made by the Supreme People’s Court and the Supreme People’s Procuratorate about how to specifically apply the laws in trial and procuratorial work. In the intellectual property rights protection by criminal law in China, the judicial interpretation of criminal law has important significance in such aspects as further clarifying standard of conviction and sentencing, manifesting policy orientation of intellectual property rights protection by criminal law, and solving the underdevelopment of criminal law handling new rights.

Firstly, the judicial interpretation of criminal law clarifies the standard of conviction and sentencing. Because China adopts grave crime system for legislation of criminal law of intellectual property rights, the criminal law only punishes conducts that seriously or relatively seriously infringing intellectual property rights; therefore, the criminal law specifies crime threshold for crimes of infringing intellectual property rights. For example, the establishment of crime requires “serious circumstances” or “the amount of illegal gains is relatively large”. After the current criminal law as
promulgated in 1997, five judicial interpretations related to crime of intellectual property rights have been issued in China, which further clarifies the standard for conviction and sentencing of the crime of infringing intellectual property rights. For example, in December 1998, the Supreme People’s Court issued Interpretation for the Issues Concerning the Specific Application of Law Handling Criminal Cases of Illegal Publications, clarifying the standard for conviction and sentencing relevant to infringing copyright. In April 2001, the Supreme People’s Procuratorate and the Ministry of Public Security issued Regulations about Prosecuting Standard for Cases of Economic Crimes, providing for the prosecution standard of other infringements of intellectual property rights except infringement of copyright. In December 2004, the Supreme People’s court and the Supreme People’s Procuratorate issued Interpretation of the Issues Concerning the Specific Application of Law Handling Criminal Cases of Infringement of Intellectual Property Rights (hereinafter referred to as Interpretation) clarifying the standard for specific conviction and sentencing for such crimes as counterfeiting registered trademarks.

Secondly, the judicial interpretation of criminal law manifests the policy direction of intellectual property rights protection by criminal law. In terms of intellectual property rights protection by criminal law, the criminal law judicial interpretation of China constantly decreases the criminal responsibility threshold of intellectual property rights crime, showing the policy of harshly cracking down on such crimes. Take infringement of copyright as an example, the Interpretation promulgated by the Supreme People’s Court and the Supreme People’s Procuratorate in 2004 specifies that, “it belongs to “other serious circumstances” if reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner, with the reproduced number exceeding one thousand copies (pieces), and if the number is above five thousand copies (pieces) in total, it belongs to “other especially serious circumstances”. On April 4th 2007, the Supreme People’s Court and the Supreme People’s Procuratorate, through Interpretation of the Issues Concerning the Specific Application of Law Handling Criminal Cases of Infringement of Intellectual Property Rights (II) (hereinafter referred to as Interpretation II), further decreases the criminal responsibility threshold, stipulating that “it belongs to other serious circumstances if reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner for the purpose of making profit, with the reproduced number exceeding five hundred copies (pieces); and if the number exceeds two thousand and five hundred copies (pieces), it belongs to “other especially serious circumstances”.

Thirdly, the judicial interpretation of criminal law timely solved the underdevelopment of criminal law handling new rights. Article 10 in the Copyright Law modified in 2001 in China provides that the copyright owner enjoys the right of information network communication for his works, namely, the right of providing works to the public by means of online or offline method so that the public can get the works anytime anywhere decided by individuals. Comparatively, Article 217 in the Criminal Law of China defines the conduct of infringement of copyright in four types: firstly, reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner; secondly, publishing a book of which the exclusive right of publication is enjoyed by another person; thirdly, reproducing and distributing an audio or video recording produced by
another person without permission of the producer; and fourthly, producing or selling a work of fine art with forged signature of another painter. The conduct specified by the criminal law is “reproducing and distributing” without direct provision for the criminal responsibility of communicating others’ works through information network. In order to be adapted to the legislation in civil field, it is provided in Clause 3 of Article 11 in the Interpretation issued by the Supreme People’s Court and the Supreme People’s Procuratorate that communicating other people’s written work, musical work, motion picture, television programme or other visual works, computer software or other works shall be regarded as reproducing and distributing specified in Article 217 in the Criminal Law. In October 2005, the Supreme People’s Court and the Supreme People’s Procuratorate issued Reply to Relevant Issues about Handling Criminal Cases of Infringing Copyright Involved in Audio and Video Products, defining the conduct of communicating audio and video products through information network. This reply specifies, without the permission of the audio and video author, the conduct of communicating audio and video products through information network shall be regarded as reproducing and distributing specified in Clause 3 of Article 217 in the Criminal Law. Thus, the judicial interpretation of criminal law timely solved the underdevelopment of criminal law handling new rights.

2. Existing problems in judicial interpretation

Despite that the judicial interpretation of criminal law in China played an important role in intellectual property rights protection by criminal law, there are at least two problems existing in current judicial interpretation as follows.

Firstly, the circumstance of conviction and sentencing is monotonous, not taking into account the actual loss of the victim. Take the crime of infringing copyright as an example, according to the criminal law, the requirement for essential offense of constituting this crime is that “the amount of illegal gains is relatively large” or “there are other serious circumstances”. And that for the aggravated offense of constituting this crime is that “the amount of illegal gains is huge” or “there are other especially serious circumstances”. The Interpretation and Interpretation II issued in 2004 and 2007 respectively by the Supreme People’s Court and the Supreme People’s Procuratorate specify the connotations of “serious circumstance” and “especially serious circumstance”.

Table 5.6 Specific provisions of judicial interpretation on sentencing of infringement of copyright

<table>
<thead>
<tr>
<th>Crime type</th>
<th>Amount of illegal gain</th>
<th>Other serious circumstances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Essential offense of infringing</td>
<td>Above 30,000 Yuan</td>
<td>1. The amount of illegal gains is above 50,000 Yuan;</td>
</tr>
<tr>
<td>copyright</td>
<td></td>
<td>2. Without permission of copyright owner, reproducing and distributing his written work, musical work, motion picture, television programme or other visual works, computer software or other works, with the number of reproduced copies exceeding 500;</td>
</tr>
<tr>
<td>Aggravated offense of</td>
<td>Above 150,000 Yuan</td>
<td>3. Other serious circumstances</td>
</tr>
<tr>
<td>copyright</td>
<td></td>
<td>1. The amount of illegal gains is above 250,000 Yuan;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Without permission of copyright owner, reproducing</td>
</tr>
</tbody>
</table>
Comparative Study on Criminal Protection of IPR in the EU and China
Chapter 5 - Problems in Criminal Law Protection of IPR and its Legislative Perfection in China

| infringing copyright and distributing his written work, musical work, motion picture, television programme or other visual works, computer software or other works, with the number of reproduced copies exceeding 2,500; |
| 3. Other especially serious circumstances |

It can be seen from the above table that the judicial interpretation gives detailed explanation on “other serious circumstance”, but the actual loss of the victim is not taken into account. The nature of crime lies in its serious social harmfulness; such social harmfulness is not completely manifested in the amount of profit gained from crime or the scale or times of the crime carried out by the criminal; it should also be embodied in the losses to the nation, the society and the obligee caused by the crime. The judicial interpretation does not specify the amount of loss caused to the obligee by the infringement as one of the circumstances for conviction and sentencing, which is obviously unfavorable to protection of intellectual property rights.

Secondly, there is no clear calculation standard for great loss. According to Article 219 in Criminal Law, the crime of infringing business secret will not be established unless “great loss” is caused to the obligee. Therefore, the connotation and calculation standard about “great loss” are directly related to correct identification of such crime in judicial practice. Regulations of Prosecution Standard about Cases of Economic Crime issued by the Ministry of Public Security and the Supreme People’s Procuratorate (hereinafter referred to as Prosecution Standard) and the Interpretation issued by the Supreme People’s Court and the Supreme People’s Procuratorate specify the starting amount of “great loss” by infringing business secret as above 500 000 thousand Yuan. For the connotation of “great loss”, it is direct economic loss of above 500 000 Yuan to the business secret obligee specified in the Prosecution Standard, and amount of loss of above 500 000 Yuan caused to the business secret obligee in the 2004 Interpretation. The former defines great loss as “direct loss” while the latter expresses it as “amount of loss” including both direct loss and indirect loss. However, there is no provision about the calculation standard of great loss, which leads to dispute in handling cases of infringing business secret in judicial practice; almost all the debates in the cases of infringing secret surround the calculation standard of “great loss”.

3. Specific improvement of judicial interpretation

Against the existing problems of judicial interpretation in current intellectual property rights protection by criminal law, the author hold that specific improvement should be made in the following two aspects.

Firstly, add content of circumstances for conviction and sentencing. Through analysis with judicial trial experience and corresponding theories, the author holds that it can be considered to specify the following circumstances as “serious circumstances” on the basis of retaining the existing definition of serious circumstances. Firstly, the actual economic loss of the victim; under a lot of conditions it is hard to determine the amount of the illegal gains, but the loss of the victim is usually clear; besides, there is causal relationship between the infringement and the loss of the victim, therefore, the loss of the infringed can be taken as a circumstance for judging whether the crime of infringing intellectual property rights can be established. Secondly, for the conduct of infringing intellectual property rights by the offender for several times without being punished, the amounts should be accumulated in calculation. There are many articles in the criminal law
expressly providing that the amounts shall be accumulated for specific conduct for several times without being punished. For example, Article 153 of the *Criminal law* provides that, “Whoever smuggles goods or articles many times, and goes unpunished shall be punished on the basis of the cumulative amount of the payable duties he invades or dodges in smuggling goods or articles” and Article 383 stipulates that, “Whoever repeatedly commits the crime of embezzlement and goes unpunished shall be punished on the basis of the cumulative amount of money he has embezzled”. For infringing intellectual property rights for several times, the amount of money in transaction may not be large, but it can be very large if accumulated several times. For this the judicial interpretation can add stipulations.

Secondly, clarify calculation method of great loss. About the calculation standard of great loss, there are several opinions in the theoretical circle.\(^{182}\) The first opinion is “cost theory”, namely, costs such as development cost and confidentiality cost invested by the obligee in studying this business secret is based on to calculate loss; the second opinion is “value theory”, namely, the obligee’s loss is calculated according to the economic value of business secret; the third opinion is “loss theory”, namely, loss is calculated according to the lost profit of the obligee after business secret is infringed; the fourth opinion is “profit theory”, namely, the obligee’s loss is calculated according to the actual amount of illegal gains after business secret is infringed. The fifth opinion is “the loss theory assisted with profit theory”, namely, as specified in *Anti-unfair Competition Law*, where the losses are caused to the obligee due to infringement of business secret, the amount of compensation shall be calculated according to the obligee’s losses, where the losses are difficult to calculate, the amount of damages shall be the profit gained by the infringer during the period of infringement through the infringing act.\(^{183}\) Seen from the situation of great loss identified by judicial practice, under the condition that neither the criminal law nor the judicial interpretation expressly specifies the calculation standard of “great loss”, the judicial practice department has discovered several kinds of modes to identify “great loss” with its own trial wisdom. Firstly, identify “great loss” with the profit gained by the defendant due to infringement, which is the most common identification mode in judicial practice department; secondly, identify “great loss” with the value of the business secret; thirdly, identify “great loss” with the market value of the business secret or the value of the product.\(^{184}\) Such diversified identification mode in judicial practice has brought about bad consequences such as willfulness and chaos of law enforcement. Therefore, the author suggests that the judicial interpretation should combine the experience of judicial practice and specify the identification method of “great loss” in a uniform way. To be specific, the profit gained from infringement by the defendant should be taken as the mode for calculating “great loss”. Theoretically “losses suffered by the obligee due to infringement” can be taken as the optimum mode of calculating “great loss” in the crime of infringing business secret, but such identification mode is not practicable in reality while various calculation methods about interests created by the judge are feasible to some extent; besides, under the circumstance that disclosure


of business secret leads to loss of confidentiality or uncontrollable use of business secret by the obligee, the value of the business secret itself can be taken as the calculation standard for “great loss”.

(ii) Reinforcing transferring of cases

1. Analysis on reasons for the low number of transferring of cases

Mainly two conditions are covered for transferring cases of intellectual property rights: firstly, the administrative law enforcement organ transfers it to the judicial organ as criminal cases according to law; secondly, the civil trial court transfers the civil infringement case suspected of crime to the criminal trial court as criminal case. At present, the reasons for few cases to be filed and judgment on being guilty for criminal cases of infringing intellectual property rights are diversified; in addition to difficulty in getting evidence and verification, another important reason is small number of transferring of cases.

There are three major reasons for little transferring of cases from administrative law enforcement organ to criminal judicial organ: firstly, impact of department interests, for example, administrative organs such as industrial and commercial administrative bureau should stop the administrative investigation procedure and transfer the case including the illegal gains involved in the case if it found that the case of infringing intellectual property rights under handling has constituted a crime, according to the Regulations of Transferring Suspected Criminal Cases from Administrative Law Enforcement Organs promulgated and implemented by the State Council on July 9th, 2001. As it involves in turning in the illicit money and fine, out of the consideration of interest for the department, some local administrative organs are more prone to resolve the case through administrative punishment; secondly, the standard of conviction in the judicial interpretation is obscure, lacking identification standard for “great loss” in infringing business secret as mentioned above; thirdly, the linking mechanism of administrative law enforcement is not complete. For example, the administrative law enforcement organ usually does not consider the subjective fault but focus on investigating the illegal conduct; but the judicial organ needs to judge the subjective state of the suspect at judging on the nature of the crime, which may also cause blocked linkage. In terms of copyright infringement, the criminal law of China, in addition to the intention, also requires that the crime of infringing copyright and selling infringing replicated products must be “for the purpose of making profit”, which increases the difficulty in transferring criminal cases of intellectual property rights. Here is another example. The calculation standard for the value of the infringing things is not unified. According to the judicial interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate, “the value of the infringing products is calculated according to “the prices at which such products are actually sold. And the value of the unsold infringing products produced, stored and transported is calculated according to the labeled prices or the actual prices found to be sold at after investigation. And if the infringing products does not have labeled price or its actual prices to be sold at cannot be found out, it is calculated according to the middle market price of the infringed products.” The provision is clear but there are problems in practice. Generally speaking, the administrative law

enforcement organ is limited to its own law enforcement approaches and can hardly find out the
labeled price of the infringing product or the average actual price of the infringing products to be
sold at. Therefore, the administrative organ can only calculate the total value involved in the case
according to the middle market value of the infringed product, namely “to determine the price
according to the true product”. Under the same condition, when filing a case by the public
security organ, the total value involved in the case will be calculated according to the actual value
of the infringing product itself, namely “to determine the price according to the fake product.”187 If
it is a fake wrist watch of famous brand and the value is determined according to the fake product,
the value is very low; if calculated according to the middle market value, the value can be very
expensive. This leads to that the cases to be transferred from administrative law enforcement
organ cannot reach the criminal prosecution standard in many circumstances. Once the case is
rejected by the public security organ, it will influence judgment on the law enforcement capacity
of the administrative organ. Therefore, many administrative law enforcement organs always apply
administrative punishment measures under the situation of not being able to investigate and
verify, instead of transferring the cases wasting energy and coming to nothing.

The main reasons for little transferring of civil infringement cases suspected of crime to criminal
judicial organ include: firstly, according to relevant judicial interpretation, the cases of infringing
intellectual property rights, except those severely endangering social order and national interest,
are all criminal private prosecution ones. However, there is no interpretation of “severely
dangering social order and national interest” at present, which objectively leads to that the
court can hardly decide whether a case should be transferred. Secondly, the definition and
linkage between the criminal public prosecution and private prosecution of cases of intellectual
property rights are not clear. According to Clause 1 of Article 171 in the Criminal Procedure Law,
“In a case of private prosecution for which criminal evidence is lacking, if the private prosecutor
cannot present supplementary evidence, the court shall persuade him to withdraw his
prosecution or order its rejection.” Clause 2 of Article 4 in Regulations on a Number of Issues
Concerning the Implementation of the Criminal Procedure Law, Jointly issued by the Supreme
People’s Court, the Supreme People’s Procuratorate, Public Security Ministry, State Security
Ministry, Justice Ministry and National People’s Congress Standing Legal Work Committee
specifies that for criminal private prosecution such as cases of intellectual property rights, “if the
victim directly bring a lawsuit to the People’s Court, the People’s Court shall accept it according
to law; where the evidence is not sufficient and it can be accepted by the public security organ, it
shall be transferred to the public security organ to file the case for investigation. If the victim
directly accuses to the public security organ, the public security organ shall accept it.” It is thus
clear that further clarification needs to be made about whether the People’s Court shall directly
reject or needs to transfer the case to the public security bureau for investigation if evidence is
found insufficient.188

2. Countermeasures for reinforcing transferring cases

187 Ye Jiaping: Study of Several Issues in Linkage between Administrative Law Enforcement and Criminal Justice

188 Investigation Report of Issues Relevant to Intellectual Property Rights Protection by Criminal Law promulgated
in 2003 by the Supreme People’s Court.
A major countermeasure for reinforcing transferring cases from administrative law enforcement organ to criminal judicial organ is, in terms of short term, to unify the judgment standard for prosecuting crime of intellectual property rights. Take judgment on the price of the infringing product for example, a recognised standard should be unified. For example, we can directly determine the principle of “to determine the price according to the true product” for calculating price of infringing product according to the middle market price of the infringed product and abolish the prerequisite of “to determine the price according to the fake product”. In terms of long term, a unified Rules of Linking between Administrative and Judicial Protections of Intellectual Property Rights should be established to establish regular cooperative linking mechanism to integrate various scattered intellectual property rights law enforcement linking rules. Rules can specify provisions for linkage in the following aspects: reasonably define responsible power limit and juristic scope in work linkage of the administrative organ and the judicial organ so that each organ can do their own job and take their own responsibilities and handle the case according to law, and avoid the absence, dislocation and offside in the law enforcement process; clarify and complete the law enforcement mechanism of intellectual property rights including joint conference, liaison mechanism, case notification and case recording mechanism, information share mechanism, advanced intervention mechanism, joint case handling mechanism, responsibility investigation mechanism; unify intellectual property rights law enforcement evidence rules and transforming conditions, especially types of focused regulated evidence, principle of evidence collection and fixation, formula of evidence collection, transforming rules of evidence proofing force, etc.; relatively unify the prosecution standard for cases of intellectual property rights, including clarifying the crime names, crime facts and relevant essentials applicable for transferring; improve and innovate the transferring procedure of cases of intellectual property rights.189

For the major countermeasures in reinforcing transferring cases from administrative law enforcement organ to criminal judicial organ, firstly, interpretation needs to be made on the connotation of “severely endangering social order and national interest”; secondly, it can be considered to clarify, through corresponding judicial interpretation, the specific situations for the People’s Court to directly reject or transfer the criminal private prosecution cases of intellectual property rights to the public security organ.

(iii) Increasing investigation level

There are many countermeasures for increasing the level in investigating crime of intellectual property rights; for example, the professional quality of the police of economic investigation can be increased and the construction of basic profession of economic investigation can be strengthened. The cooperation between intellectual property rights management organ and relevant administrative law enforcement department should be reinforced. Extensive publication and education should be presented to the masses and the channel for the case source should be extended. The author holds that the most important measure may be establishing investigation

cooperation mechanism against the characteristics of the crime of intellectual property rights. 190

1. Characteristics of the crime of intellectual property rights decide the need for establishing investigation cooperation mechanism

Firstly, the cross-regional nature of the crime of intellectual property rights decides the need for establishing investigation cooperation mechanism. Firstly, such crime has relatively large industrial span, involving in many economic, cultural, scientific and technological fields and many industries and departments, and seeping into such emerging economic fields as technological market, talent market and electronic commerce. Secondly, such crime has relatively large regional span and has the trend of developing toward international space. The crime subject of intellectual property rights flow from one country to another, and such crimes are conducted trans-nationally, and the crime target of intellectual property rights flow internationally; besides, it is also manifested that the income of such crime is circulated through money-laundering internationally. Division of regional space is broke out by the offenders. However, the present allocation of forces in investigating crimes of intellectual property rights still focuses on administrative regional division and on important industries, which is easy to create the situation that investigations on crime of intellectual property rights are conducted in their own way, focusing on local part and neglecting the entirety. The department investigating such crimes must break through the routine, and change the traditional practice of “flat investigation” that follows the beaten track and the prescribed order, quickly launching investigation, adopting all-around investigation countermeasures, with the cooperation and combined combat of the investigation forces and multiple police in each region, carrying out “solid investigation”. 191

Secondly, the promptness of the crime of intellectual property rights decides the need for establishing investigation cooperation mechanism. Due to the high intelligence and Organisation of the criminal’s commitment of intellectual property rights, not only the entire process of infringing intellectual property rights is hidden and quick, but also the traces of such crime can be destroyed in a very short period of time. Although essentially “a crime committed will definitely leave traces” and “a crime can be definitely uncovered”; however, investigation of such crime is conducted in criminal prosecution procedure, which has procedural time limit, requiring timeliness. At the same time, during such investigation process, the time favorable for investigation is limited and there is even less decisive time about whether the case can be cracked. Investigation must be conducted in time to catch every favorable opportunity. Cooperation of investigation in the crimes of intellectual property rights can effectively integrate limited investigation resources, reduce time consumption for dispatching police force and decrease time delay caused by space movement of investigation forces under the current pattern of investigation forces allocation, thus catch the opportunity and launch the investigation rapidly.

Thirdly, the intellectualisation feature of the approaches of intellectual property rights crimes decides the need for establishing investigation cooperation mechanism. The intellectualisation of the crime of intellectual property rights is manifested in: firstly, the criminal subjects appear to be well educated, usually equipped with relatively high professional level and skill, decent disguise, 190 Ni Duanping, Ni Tie: Investigation Cooperation in Crimes of Intellectual Property Rights and Optimization of Its Mechanism, Criminal Research, 2004, Vol.3.
relatively rich scientific and technological knowledge. They usually have strong socialising ability and are well informed, with some expertise. Secondly, the approaches of such crime are professional and technological. The offenders usually rely on the network technology they mastered to track and wait for opportunity to acquire other people’s personal information at Internet chatting, sending email, browsing webpage or online shopping. The conduct of intellectual property rights crime is intellectualised and highly invisible, which requires high quality of the investigation subject: knowledgeable, with rich experience and good thinking ability; but this involves in the issue of restructuring the entire investigation system. Under the current investigation force structure and technological conditions, in order to occupy an advantageous position in the battle against the offender of intellectual property rights, investigation cooperation must be relied upon to pool everyone’s wisdom and efforts, realise mutual supplement of advantageous resources and safeguard the smooth progress of investigating intellectual property rights crime with the integrated group advantages of justice.

2. Difficult situation of investigation cooperation mechanism in crime of intellectual property rights

Under the current investigation cooperation mechanism, the difficult situation of investigation cooperation mechanism in crime of intellectual property rights is shown in the following aspects: firstly, there is low degree of rule of law for investigation cooperation in crime of intellectual property rights, with little procedure design at a relatively high level of law, and bad regulated coordination of investigation cooperation. Relevant laws such as Criminal Procedural Law and Procedural Regulations for Public Security Organ Handling Criminal Cases are based upon for cooperation, and there is no detailed procedural regulation for investigation cooperation. The regulations in different departments and investigation coordination rules in each place are not consistent, with extensive existence of conflict between investigation cooperation rules in each province; besides, consistence cannot be achieved in terms of investigation cooperation subject, procedural documentation, examination and approval procedure, and responsibility investigation.

Secondly, the system design for investigation cooperation subject in crime of intellectual property rights is not scientific. In the present investigation cooperation system, the main cooperation follows a top-down order, namely, the investigation department of intellectual property rights at upper level conducts unified dispatching and coordinates investigation activities. Such mechanism cultivates advanced longitudinal cooperation while the horizontal cooperation mechanism of investigation in such crime is relatively withered. This subject system leads to inefficient level-by-level report for approval between equal investigation subjects or reduced to mutually beneficiary work cooperation.

Thirdly, the investigation cooperation of crime of intellectual property rights is under a passive cooperation state. Under the current investigation cooperation mechanism, the organs in charge of such crime investigation usually request for investigation cooperation from other subjects as the difficulty is beyond their solution ability and juristic power limit, instead of going all-around cooperation communication among investigation organs in different places beforehand. Such passive cooperation state in investigating crime of intellectual property rights makes the cooperation lose opportunity and fail to grasp information initiative power from the outset of

investigation, and the cooperation can hardly be adapted to the changeable feature of the crime of intellectual property rights, nor can it be accustomed to the essential requirement of investigation cooperation.

Fourthly, the current content of cooperation in investigating crime of intellectual property rights is monotonous with relatively low level of cooperation. The cooperation way in investigating crime of intellectual property rights is simplified, mainly limited to low-level cooperation such as illegal gains investigation assistance, assistance in investigating materials remaining on site, and arresting criminal suspects, etc. The defect of such cooperation content makes the investigation cooperation in crime of intellectual property rights become the pronoun of cooperation. High-level investigation cooperation involves in replacement and allocation of investigation power; such replacement and allocation is temporary, but such cooperation is very difficult and becomes “unable to cooperate” due to the complexity of power allocation.

Besides, in the investigation in crime of intellectual property rights, the coordinating path of international investigation is not smooth and the cooperation forms are limited. There are a lot of foreign or trans-national cases in the field of intellectual property rights crime, which frequently involve in international investigation cooperation and extradition. But the narrow scope and non-institutionalisation in the criminal judicial assistance of China facilitate an international space for the flooding of international intellectual property rights crimes.

3. Improvement of cooperation mechanism in investigating crime of intellectual property rights

Firstly, the legislation level of cooperation in investigating crime of intellectual property rights should be increased with the procedural regulations of investigation cooperation in each area sorted out, including proposal of request for investigation cooperation, receiving and implementation of cooperation request, feedback of the result of investigation cooperation and the special requirements for investigation cooperation procedure. Besides, a system without the incentive of responsibility is inefficient. In order to guarantee highly efficient operation of the cooperation mechanism in investigating crime of intellectual property rights, the cooperation responsibility of the cooperative parties must be further clarified with the system of responsibility investigation established.

Secondly, the cooperation mechanism in investigating crime of intellectual property rights should be regulated. In the field of cooperation in investigating crime of intellectual property rights, the specific investigation cooperation covers all the enforceable measures and special investigation approaches adopted. Based on the current situation of investigation cooperation measures, detailed rules, specific goals and assessment standard of the investigation cooperation measures should be set up while promoting the diversity of the specific measures of investigation cooperation. This regulated measure system mainly covers: firstly, exchanging information about crime of intellectual property rights. For example, establish joint conference system in crime investigation departments of intellectual property rights or communicate information and exchange situations regularly or irregularly; each investigation subject digitises relevant information, establishes national and regional information cooperation network, and forms an overall network for information exchange of intellectual property rights crime. Secondly, reinforce investigation technology cooperation. On the one hand, the intellectual property crime investigation departments must reinforce connection with the scientific and technological
departments and relevant professionals in terms of technology so that support and help can be obtained when solving some technical problems; on the other hand, close technological cooperation should also be conducted among the intellectual property rights crime investigation departments; when there is a technical problem, a department equipped with technical strength, equipment and conditions or regional intellectual property rights crime investigation department can be requested for technical support. Thirdly, consolidated action and combined investigation should be carried out. Combined investigation in crime of intellectual property rights is against a series of trans-regional crimes of intellectual property rights, which are investigated by investigation organs in different areas in a combined and unified way.

(iv) Reinforce awareness of protection

The traditional culture of China worships a value of sharing knowledge, which is in conflict with the idea of the system of intellectual property rights; therefore, only legal enforceability alone cannot work for carrying out intellectual property rights protection. “Only law alone cannot take effect”. We must increase the awareness of the entire society in respecting intellectual property rights, promote the culture of intellectual property rights and make the system rules of intellectual property rights “assimilated” as internal awareness of social individuals, thus affecting their behavior, so that the public’s behaviors can be in compliance with the requirement of the order of intellectual property rights.

To be specific, the countermeasures for reinforcing the public’s awareness of intellectual property rights protection mainly cover the following aspects. 194

Firstly, the key to increase the overall social awareness and behavioral level of intellectual property rights lies in advocating clear common sense of honor and disgrace and popularising specific behavioral code. In the general awareness of the public, it is a shameful thing to illegally obtain tangible property and most people will choose to give up the opportunity of getting these rights under the judgment of clear sense of what is right, and will do things complying with social morality even if under the circumstance of no legal punishment. However, for intangible properties such as intellectual property, the public has not yet regard them as equal as tangible property. If the public has no clear recognition of common sense of honor and disgrace of intellectual property rights and is not familiar with the specific behavioral code of intellectual property rights, they are easy to misunderstand and be deviated in terms of ideas and conducts.

Secondly, encouraging the general public to participate in and care for innovation is an effective measure for increasing the overall intellectual property rights awareness of the society. Data from investigation about the public’s interest and ability in innovation 195 indicates that the public’s interest and ability in innovation need to be cultivated. Among all the respondents, 38% once conducted innovation or creation activities; only 17% hold that they have achieved some achievements; it is thus clear that 62% of the respondents have never carried out activities