

# The Perfection of Chinese Criminal Legislation on Network Infringement of Copyright

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**Abstract:** This paper introduces the current situation of criminal legislation on network infringement of copyright in China, including the *Criminal Law*, judicial interpretations, normative legal documents and the *Copyright Law* and relevant laws and regulations. The current criminal legislation on network infringement of copyright in China has four main problems: the new type of intellectual property cannot be fully included in the scope of criminal law protection; the current provisions in the *Criminal Law* cannot include the new type of network infringement of copyright crimes; the result standard of network infringement of copyright crimes still needs to be improved; the purpose elements limit the scope of the punishment. The countermeasures for the perfection are: appropriate adjustment of the protective scope of copyright by the criminal law; add independent crimes of network infringements of copyright; refine the result standard of criminal acts of network infringements of copyright; offenses with purpose of “for profit” should be adjusted to be more serious punishment types.

## 1. Introduction

According to the report named *State of Intellectual Property Protection in China in 2018* issued by the State Intellectual Property Office of China, the local people's courts nationwide newly approved 4,419 first-instance cases involving IPR infringement, and concluded 4,064 cases, up 19.28% and 11.59 % respectively, and 136 cases of copyright infringement crimes, down 20% year-on-year, 6 cases of sales of infringing copies, up 50% year-on-year. Meanwhile, there were 195,408 copyright civil cases, up 42.36% year-on-year, and 17 copyright administrative cases, which was the same year-on-year. This shows that many cases had not entered criminal proceedings, and the intensity of criminal protection still needs to be increased. The number of crimes of network infringement of copyright is also increasing, so it is necessary to improve relevant criminal legislation.

## 2. The status quo of criminal legislation on network infringement of copyright in China

Since the crime of copyright infringement was created in *Decision on Punishment of Crimes of Infringing Copyright* promulgated by Committee of the National People's Congress in 1994, the provisions of the crime of copyright infringement have not always changed. Subsequently, the Supreme People's Court and the Supreme People's Procuratorate promulgated the *Interpretation on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights* (hereinafter referred to as the *Interpretation*) in 2004 and the *Interpretation on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights (II)* (hereinafter referred to as the *Interpretation (II)*) in 2007, especially in 2011 the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security promulgated *Several Issues Concerning the Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights* (hereinafter referred to as the *Opinions*), the provisions of the network infringement of copyright crimes began to attract attention. In addition, the Second Chamber of Criminal Justice of the Supreme People's Court published *Reply to the letter “Consultation on the calculation of the number of copies of online film and television”* in 2010, the Supreme People's Court and the Supreme People's Procuratorate issued

*Reply on the Relevant Issues Concerning the Recording of Video Products in Criminal Cases of Copyright Infringement* in 2005. In 2008, the Supreme People's Procuratorate and the Ministry of Public Security issued *Criteria for Prosecution of Criminal Cases under the Jurisdiction of Public Security Organs(I)*, there are also many provisions related to network infringement of copyright.

China's current copyright laws and regulations mainly include: *Copyright Law, People's Republic of China Copyright Law Implementation Regulations, Information Network Communication Rights Protection Regulations, Copyright Collective Management Regulations, Computer Software Protection Regulations, Implementation International Provisions on Copyright Treaty and Interim Measures for the Payment of Remuneration for Broadcasting of Radio Products by Radio and Television Stations*. It is worth noting that the *2014 Copyright Law of the People's Republic of China (Revised Draft for Review)* (hereinafter referred to as the *Copyright law Draft for Review*) issued by the Legislative Affairs Office of the State Council. According to the *Copyright law Draft for Review*, personal right of copyright was reduced to the right to publish, to sign and to protect the integrity of the work; the property rights involving copyright include expanding the scope of copying rights, and incorporating any means such as digitization into the "copying" scope of the *Copyright Law*; expanding the scope of the object of renting rights, adding the right to rent the "recorded products containing works"; the content of the cable broadcast is increased, and the broadcast right is modified into the right to play; the right to spread the information network is expanded from interactive communication to live broadcast and broadcast; the criminal liability clauses for the investigation of copyright infringement have been amended to increase the criminal liability clauses for "unauthorized use of other people's works" and "intentional avoidance or destruction of copyright holders' copyright or technical measures".

### **3. Major problems in criminal legislation of network infringement of copyright in China**

#### **3.1 New types of intellectual property cannot be fully incorporated into the scope of criminal law protection**

With the rapid development of China's internet, the new types of intellectual property related to the internet continue to emerge, whether it is within the scope of the "work" of the copyright protection of the *Copyright Law*, whether it is within the scope of works, books, audio and video, and fine works of the crime of copyright infringement in the *Criminal Law*, both are questions that need to be answered. According to the provisions of the *Copyright law Draft for Review*, the "computer software" of one of the "works" types within the current *Copyright Law* will be revised to "computer program". Obviously, the legislature has seen that "computer software" is insufficient to cover the emerging type of copyright. In this sense, the objects of protection of network infringement of copyright in the *Criminal Law* may also be expanded.

#### **3.2 Current criminal law provisions are difficult to cover new types of network infringement copyright crimes**

First, although the relevant copyright laws and regulations based on the *Copyright Law* have been revised several times, and new draft laws are being submitted for discussion and deliberation, the provisions of the *Criminal Law* for copyright infringement have not been correspondingly modified. For example, in 2001, the *Copyright Law* has added the right of information network communication as one of the types of copyright rights along with the right of reproduction and distribution. The main type of copyright infringement is still copy and publication. Under the circumstance that network copyright infringement has been increasing, the clauses of copyright infringement in the *Criminal Law* are obviously a little outdated. In order to effectively regulate network crimes of copyright infringement, article 12 of the *Opinions* stipulates that "publish" behavior includes "behaviors through the information network". In other words, the network communication behavior is an act belong to "publish" behavior rather than an independent one. The question is that is it an analogy explanation to expand the publish behavior to include network communication behavior? If it is an analogy explanation, it violates the principle of a legally prescribed punishments for a specified crime,

which leads to the infringement behaviors of copyright through the information network cannot be convicted of the crime of copyright infringement. Some network communication behaviors can be identified as copying and publishing behavior within a certain scope, but it is indeed irrational that all network communication behaviors are classified into copying and publishing behaviors. However, without penalizing other network communication behaviors, it will cause legal loopholes. Secondly, according to the “joint crime” clause in the general rules of the *Criminal Law*, the act of network infringement of copyright crimes is easily indulged. The main reason is that the subjective and objective conditions for the establishment of joint crimes are difficult to identify cybercrimes because the requirements are stricter and the evidence is more difficult to obtain. Although it is easy for the perpetrators to provide criminal means and tools for network infringement of copyright of others, but it has become difficult to be sanctioned by the *Criminal Law*.

### **3.3 The standards of dangerous result of network infringement of copyright crimes still need to be improved**

Article 13 of the *Opinions* stipulates that the prosecution standard of the act of “transmitting the works of others through the information network to the public”, and the standards of “clicks” and “registered members” have been added. Specifically, it refers to with the purpose of “making profits” and without the permission of the copyright owner, to spread the works of others to the public through the information network, the actual number of hits reached 50,000 times or more, or spread by membership, and the registered members reached more than 1,000. On the one hand, the standards of “clicks” and “registered members” do reflect the characteristics of cybercrime and provide more appropriate hazard standards. However, on the other hand, there are some problems with the aforementioned standards, for example, what is the specific standard of “clicks”? how to deal with the problem of repeated clicks? whether it is proper that make the number of hits up to 50,000 times equal to the amount of illegal business of 50,000 yuan? All problems need be further researched.

### **3.4 The purpose element limits the scope of punishment**

According to article 217 of the *Criminal Law*, the crime of infringement of copyright must be identified with the purpose of “for profit”. On the one hand, there has been controversy over whether to abolish this subjective element, and the problem is the perpetrator may cause great damage to the copyright owner even if not make a profit. On the other hand, the harm of network copyright infringement is significantly greater than the traditional copyright infringement, and the subjective purpose of network copyright infringement is more difficult to prove and identify, and the rationality of retaining the subjective purpose element is worth considering.

## **4. The perfection of the criminal legislation of network infringement of copyright in China**

### **4.1 Appropriate adjustment of the scope of criminal law protection of copyright**

New copyright types such as “web” works, p2p software, databases, domain names, search engines, digital publications, copyrights on mobile networks, and copyrights on blockchains, if which can be classified as protected by the *Copyright Law*, are should become the object of protection of the *Criminal Law* in principle. However, just as people are arguing whether “digital virtual property” is “property” in the *Criminal Law*, whether “network and digital copyright” belongs to “copyright” is bound to cause controversy. Therefore, the scope of criminal protection of copyright should be appropriately adjusted, and the new network copyright that has reached consensus should be included in the scope of criminal law protection, while the disputed copyright should be treated with caution.

### **4.2 Adding network infringement of copyright as an independent crime**

Regarding how to regulate the emerging criminal acts of copyright infringement through the internet, some people suggest that it should be treated cautiously to add new crime and it is enough to increase the bottom clause such as “other acts of copyright infringement”, on the contrary ,some people think that the criminalization of new network infringement of copyright is more appropriate. And the latter view is more reasonable, the reason is that, on the one hand, the bottom clause is flexible but easily

lead to ambiguity in the legal provisions. On the other hand, it is more clearly that directly stipulates the crime of network infringement of copyright, whether it is a new type of crime of copyright infringement or a new crime. As for which an act of network infringement of copyright should be punished as a crime, it is another matter. Currently, there are higher voices for the inclusion of penalties for deep-seated behaviors, behaviors such as the production of game plug-ins, and the creation of illegal server of games. Simultaneously, in accordance with the provisions of article 15 of the *Opinions*, it should be punished as joint crime of infringement of intellectual property if knowing that others have committed IPR infringement crimes, by providing internet access, server hosting, network storage space, communication transmission channels, charge collection, fee settlement and other services to infringe intellectual property rights. However, its subjective and objective requirements need to be further improved. Otherwise, the behavior of network platform companies can easily fall into the scope of criminal law punishment.

#### **4.3 Refine the standards of dangerous result of the network infringement of copyright crimes**

First, for the “click volume” standard, some people think that the “number of infringing works” can be used instead of the “click volume” standard. The “click volume” standard is of course unreasonable, but there will be problems with the calculation standard when the “click volume” standard is replaced by the “number of infringing works”. Therefore, under the premise of continuing to retain “click volume” as the number of standards for network infringement of copyright crimes, it is more appropriate to stipulate some exceptions that should not be adopted according to judicial practice. For example, clicks on the same IP address should not be counted repeatedly, invalid clicks should not be counted, and so on. Secondly, for the “registered members” standard, it is necessary to pay attention to distinguish between registered and non-charged registered members, and non-charged registered members should not be counted. A more complicated situation is how to calculate the number of registered members that if a registered member of a platform or community does not charge itself, but must charge a fee for reading the specific infringing works or playing the specific infringing music works. Therefore, the “registered member” standard also needs to be refined.

#### **4.4 The offenses with purpose of “for profit” should be adjusted to be more serious punishment types.**

According to article 10 of the *Opinions*, the act of infringement of copyright through the internet, which can be identified as “for profit” include the sales behavior and the following four behaviors: (a) direct publication of paid advertisements, bundled third-party works, etc. or indirectly charge fees; (b) disseminate the work of others through the information network, or use the infringing works uploaded by others to provide paid advertising services on the website or webpage, directly or indirectly charge the fees; (c) disseminate the work of others through the information network in a membership-based manner, and receive membership registration fees or other fees; (d) other use of other people's works for profit. Due to the convenience and proliferation of the internet, the infringement of copyright by non-profit or non-material interests may cause greater losses to the copyright owner, and it is reasonable to include it in the scope of criminal law punishment. In this case, the “for-profit” network infringement of copyright rights should be adjusted accordingly to be more serious punishment types.

### **5. Conclusion**

China's development of internet is changing with each passing day. With the gradual popularization of 5G networks in the future, people use the network almost everywhere. It is conceivable that while network technology brings more convenience to people, criminals may also use new network technologies to implement more insidious, more convenient, and more harmful copyright infringements. The *Criminal Law* should be forward-looking. In order to strengthen the legal protection against network infringement of copyright, attention should be paid to the connection and cooperation between the *Copyright Law* and related laws and the *Criminal Law* based on adjusting the scope of protection, the type of behavior, and the standard of dangerous results.

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