

The Perfection of Chinese Criminal Legislation of Intellectual Property Rights

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Abstract. China's intellectual property rights are developing rapidly, intellectual property laws are constantly improving, and intellectual property crimes are showing a growing trend. Faced with these realities, there are three key problems in China's intellectual property criminal legislation, such as a small scope of protection, an unscientific penal system, and prosecution criteria are too high. The solution to these problems is: China does not need to blindly pursue the expansion scope of protection, incorporate all objects and possible violations of intellectual property rights into the criminal law, but need to establish a relatively reasonable scope of protection by comprehensively considering various interests according to national conditions and protection needs; the penalty system of intellectual property crimes in China should adhere to the principle of "reducing punishment for minor crimes and increasing punishment for serious crimes", that is, the penalty cannot be completely relaxed, and it cannot be blindly; it is necessary to distinguish between intellectual property crimes biased towards private rights without harming the public interest, intellectual property crimes involve national interests, public security and other national interests and intellectual property crimes that simply disrupt administrative order, in order to set different standards of prosecution.

1. Introduction

In 2008, the State Council of the People's Republic of China began to promulgate and implement the Outline of the National Intellectual Property Strategy which proposed to build China into a country with a high level of intellectual property creation, utilization, protection and management by 2020, CPC Central Committee General Secretary Xi Jinping in the report of the 19th National Congress of the Communist Party of China emphasized that "advocate innovative culture and strengthen the creation, protection and application of intellectual property rights." By the end of 2018, the domestic (excluding Hong Kong, Macao and Taiwan) invention patents totaled 1.602 million, the number of invention patents per 10,000 population reached 11.5, the effective registration number of trademarks was 19.546 million, and an average of 5.8 market entities had one valid trademark. In 2017, the national procuratorate approved a total of 2510 pieces of 4,272 persons involved in intellectual property crimes and 3,674 pieces of 6,809 persons involved in public prosecution. As the criminal protection of intellectual property rights in China continues to increase, the criminal legislation of intellectual property rights in China should also be improved accordingly.

2. The development of criminal legislation of intellectual property rights in China

The provisions of the *1979 Criminal Code* on intellectual property crimes have only one crime, namely the crime of counterfeiting registered trademarks as stipulated in article 127. Article 63 of the *Patent Law* of 1984 stipulated the punishment for the crime of counterfeiting registered trademarks. According to "several issues concerning the implementation of patent trial work" stipulated in the second part of article 1 of the judicial interpretation *Trial Work on Criminal Cases Related to Patent* promulgated by the Supreme People's Court in 1985, if the plot is serious, the person directly responsible shall be punished for the crime of impersonating another person's patent in accordance with the provisions of article 127 of the criminal law. In February 1993, the single criminal law named the *Supplementary Provisions on Punishing the Crime of Counterfeiting Registered Trademarks* was

passed, and the crimes of counterfeiting registered trademarks, the sale of goods for the sale of counterfeit registered trademarks, the illegal manufacture and sale of illegally manufactured registered trademarks were stipulated and amended. In July 1994, the single criminal law named the *Decision on Punishing Crimes Infringing Copyright* was passed, which increased the crimes of copyright infringement, the sale of infringing copies, and strengthened punishment for the crime of copyright infringement. The *1997 Criminal Code* retained the crimes of registered trademark identification, the crime of copyright infringement, the crime of selling infringing copies, and the crime of counterfeiting patents, and increased the crime of infringement of trade secrets, finally formed seven crimes as the third chapter of specific provisions of the criminal law. At the same time, in the *Trademark Law, Patent Law, Copyright Law* and other laws stipulated the intellectual property rights violations and relevant criminal liability provisions. The judiciaries also issued corresponding judicial interpretations, including *Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights* in 2004 promulgated by Supreme People's Court and the Supreme People's Procuratorate, and *Several Issues Concerning the Specific Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights (II)* in 2007 promulgated by Supreme People's Court and the Supreme People's Procuratorate, *Several Issues Concerning the Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights* in 2011 promulgated by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security.

3. Major current problems in criminal legislation of intellectual property rights in China

3.1 The protection range is too small

China's crimes of intellectual property rights are less, and the scope of protection is relatively small compared with foreign intellectual property criminal law. Mainly in the following aspects: (1) The intellectual property criminal law in China is limited to the traditional areas of intellectual property rights such as trademark rights, patents, copyrights and trade secrets. The new types of intellectual property rights are not included timely. For example, whether a service mark is controversial in the scope of protection of a trademark crime. (2) Selective criminal law protection for related intellectual property infringements. For example, infringement of intellectual property rights, such as counterfeiting, impersonating patents, illegally implementing patents of others and illegally renting infringing copies, are not included in the criminal law. (3) Subjective elements are unreasonably set, resulting in improper expansion or narrowing of penalties. Some provisions limit the scope of punishment. For example, the crime of copyright infringement requires a subjective purpose of "for profit". Some provisions improperly expand the scope of punishment. For example, the crime of infringement of trade secrets as stipulated in article 219 of the criminal law may be extended to include negligence.

3.2 The penalties are unscientific

The types of penalties of China's intellectual property crimes include two types of penalties: free penalties and property penalties, which include criminal detention, control, fixed-term imprisonment and fines. Unscientific aspects are mainly reflected in: (1) Lack of qualification penalty. According to articles 33 and 34 of the criminal law, the qualification penalty only includes the deprivation of political rights. The criminal law amendment IX has added a "professional prohibition" measure, which is stipulated in one of article 37 of the criminal law. According to the aforementioned term, the people's court may prohibit offenders from engaging in relevant occupations from the date of completion of the execution of the sentence or the date of parole, depending on the circumstances of the crime and the need to prevent recidivism. However, this kind of measure is not a penalty, of course it cannot be a qualification penalty. In short, for intellectual property crimes, the criminal law does not set a corresponding qualification penalty, which is not conducive to the protection of intellectual property rights. (2) The statutory penalty provisions are relatively serious, but the judiciaries in different provinces are very different in the trial of intellectual property criminal cases, and some

courts sentence lower penalties, and other courts sentence higher penalties. Compared with foreign intellectual property criminal law, the statutory penalty for various intellectual property rights in China is generally more serious. For example, the legal minimum penalty for copyright infringement in Japanese, German, and French criminal law is less than one year in prison or fine, and the maximum penalty is less than 5 years or fine, and the legal minimum penalty for infringement of copyright in Chinese criminal law is criminal detention or fine, the maximum penalty is 7 years imprisonment and fine. However, some courts with developed economies and more manufacturing provinces have less penalties for intellectual property crimes, and more probation has been applied. Courts with relatively backward economies and fewer manufacturing provinces have the opposite situation.

3.3 The standards of prosecution are too high

The conditions for the establishment of intellectual property crimes in China are “larger amount” or “serious plots”. According to the relevant judicial interpretation, the “amount” or “plot” standard is relatively high. For example, according to the judicial interpretation, the “large amount” of the crime of selling counterfeit registered trademarks is that the sales amount is more than 50,000 yuan, which is higher than the standard of crimes of infringement of property, because the “large amount” standard of the crime of theft is from 1,000 yuan to 3,000 yuan, and the amount of the crime of producing and selling fake and inferior products is the same. This higher level of prosecution may result in a lower level of protection of intellectual property.

4. The perfection of criminal legislation of intellectual property rights in China

4.1 Appropriate adjustments of the scope of protection of intellectual property criminal law

Foreign intellectual property criminal legislation generally shows the expansion of the scope of protection. For example, the protective scope of French intellectual property criminal law has covered new plant varieties, geographical indications, integrated circuit layout design, semiconductor mask products, genetic resources, distinctive marks, performers' rights, and moral rights in copyright and Russia incorporates relevant technical measures and rights management information into the copyright criminal law protective system. The United States and Germany are also expanding the scope of protection while continuously refining the types of crimes. China does not need to blindly pursue the expansion scope of protection, incorporate all objects and possible violations of intellectual property rights into the criminal law, but should establish a relatively reasonable scope of protection by comprehensively considering various interests according to national conditions and protection needs. In general, these aspects should be adjusted and categorized: (1) For the new type of intellectual property rights, priority should be given to incorporating intellectual property rights that are conducive to enhancing national competitiveness and representing innovation direction into the scope of criminal law protection and strengthening protection; (2) For existing intellectual property rights, criminalization of serious harmful infringements in intellectual property-related laws should be based on the principle of filling gaps and refining penalties. (3) The unreasonable subjective elements of the relevant crimes should be cancelled. For example, the “for-profit” purpose element in the crime of infringement of copyright and the crime of sale of infringing copies as well as the “should be aware” element in the crime of infringement of trade secrets should be cancelled.

4.2 Set up a scientific penal system of intellectual property crimes

The penal system of intellectual property crimes in China should adhere to the principle of “reducing punishment for minor crimes and increasing punishment for serious crimes”, that is, the penalty cannot be completely relaxed, and it cannot be blindly. Currently, the positions on the criminal law protection of China's intellectual property rights include “enhancement theory”, “weakening theory” and “non-criminalization theory”. The feasible position should be based on the reality of China's intellectual property rights that “the quantity and quality of its own intellectual property rights are still insufficient”, but also the international environment of “western intellectual property powers vigorously defending the right to speak of intellectual property rights”. Specifically includes several

aspects as follows: (1) To increase the level of statutory penalty. In view of the penalty for intellectual property crimes in China is generally more serious, it should be moderately implemented by increasing the level of the statutory penalty under the premise of not lowering the statutory minimum penalty and not increasing the statutory maximum penalty. For example, for a crime that can increase the level of the statutory penalty, such as adding a "lower plot" and "smaller amount", the original level of statutory penalty can be expanded to achieve a lighter felony penalty. (2) To expand the scope of application of fines and even increase the penalty for confiscation of property. For the less harmful intellectual property crimes, the case of a single penalty should be expanded, and for the more harmful intellectual property crimes, consideration should be given to increasing the confiscation of property penalties and increasing the deprivation of property infringement of intellectual property rights. (3) To add a qualification penalty. Foreign criminal law of intellectual property rights pays more attention to the use of qualification punishment. China should also promote the "prohibition of employment" as a qualification penalty timely, and adopt the penalty of depriving corresponding qualifications, stopping or prohibiting business for criminals who infringe intellectual property rights, which to a certain extent is more effective.

4.3 Improve the standards of prosecution of intellectual property crimes

The criminal prosecution standard is related to the threshold of penalizing intellectual property crimes, reducing or improving the standard of prosecution will affect the scope of criminal prosecution. The prosecution standard of intellectual property crime should be improved from several aspects: (1) For intellectual property rights that are biased towards private rights without harming the public interest, lower prosecution standards should be set. For example, the amount of copyright infringement can be appropriately reduced based on "illegal income of 30,000 yuan" or "illegal operation amount of 50,000 yuan", the standards should be appropriately lowered to ensure consistency with the criminal standards for protecting individual rights. (2) For intellectual property rights involving national security, public safety and other national interests, a lower standard of prosecution should be set. For example, counterfeit patent acts involving national interests such as national security and public safety, we should appropriately lower the standard based on the illegal operation amount of 200,000 yuan or the illegal income of 100,000 yuan. (3) For the intellectual property crimes that simply disrupt the administrative order, the original or set a higher standard of prosecution should be maintain.

5. Conclusion

China's intellectual property criminal legislation is closely related to the development of China's intellectual property rights and intellectual property laws. China's intellectual property criminal legislation has a small scope of protection, an unscientific penal system, and a high standard of criminal prosecution. We should appropriately adjust the scope of protection of intellectual property criminal law, set up a scientific intellectual property penal system and improve the standards for prosecution of intellectual property crimes, simultaneously explore the future of China's intellectual property criminal law under the guidance of the reality, concepts and policies of intellectual property protection, in the legal framework of intellectual property rights.

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