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On the Paths to Improve the Protection of Intellectual Property Rights in China

YANG Chunlei^{[a],*}; TU Qiang^[a]

^[a]School of Law, Yangtze University, Jingzhou, China.

*Corresponding author.

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Abstract

In knowledge economy era, in-depth study of the basic role of protection of the intellectual property to promote science and technology progress has outstanding academic and practical significance. In the legal system of rights on the basis of right balance concept, and on the consensus of the deep understanding of China's economic and social structure and legal culture, and on the basis of reasonable adoption of international standards, we must establish the basic national policy which adapts to China's situation to protect China's intellectual property, and formulate a unified intellectual property code, and further improve the legal system relating to science and technology. Finally, the academia need to adopt the superior concept "right of knowledge" to direct the theoretical research and legal practice in the future, and make right of knowledge as a prevalent right as social right.

Key words: Protection of the intellectual property; Right balance; Science and technology progress

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INTRODUCTION

The objective result of the market competition is that the scientific and technological enterprises with independent intellectual property rights are more able to resist the market risk than the pure processing trade enterprises, and also can earn more profits. However, intellectual property protection and the progress of science and technology are not a simple positive connection. Intellectual property protection not only have a positive impact on technological progress and the growth of economic, but also have a negative impact due to the maintenance of the monopoly position of intellectual property owners. Because, the protection will lead to conservative ideas. Under the protection of intellectual property rights, the obligee will take that seeking advantages and avoiding disadvantages into consideration, and always won't increase the investment of the subsequent scientific and technological innovation. Instead of this, they put the limited resources as much as possible to expand their market share and consolidate the advantage. This will slow down the innovation of innovator's own technological innovation and hinder the potential innovations of potential innovators. Thus, in knowledge economic era, in-depth study of the basic role of protection of the intellectual property to promote science and technology progress, especially in the processing in China's economic development change from the growth of traditional resource intensive and labor intensive to a growth of resource-saving and environment-friendly intensive, how to promote technological innovation and balance the rights and interests of the parties through the protection of intellectual property rights have outstanding academic and practical significance.

1. SCIENTIFIC ORIENTATION OF INTELLECTUAL PROPERTY RIGHT IN THE SYSTEM OF RIGHT

The comparison of Chinese and Western in the history of science and technology and economic development has proved that a perfect intellectual property protection system is the external environment for scientific and technological progress and economic prosperity. The country must pay attention to protect intellectual property rights, through the security of the innovators of innovation exclusive rights to obtain a sufficient return on investment, with diluted the cost of trial and error in the earlier stage and subsequent research, so that make scientific and technological innovation into the sustainable development of the industry track. In this way, the increase and collection of innovation can not only promote the transformation and utilization of scientific and technological achievements, but also promote the healthy transformation of economic growth mode, and ultimately improve the overall scientific and technological level and comprehensive national strength in our country.

However, the perfection of the intellectual property protection system does not mean that endless improvement in the degree of its protection. There is a fundamental contradiction in the gradual process of intellectual property—the tension between the exclusive right of the intellectual property and the benefit of the public. The interests' balance of the traditional intellectual property system is more biased in favor of the intellectual property owners. Because, in the early generation of industrial society, the main goal of the system was to maximize the stimulation of invention and creation, thereby promoting the development of productive forces and the prosperity of economic and social. Thus, by ensuring the monopoly interests of intellectual property owners to maintain the technology and cultural progress was considered for granted. And the sharing of the social public's achievements was the paid use as the main mechanism, with the exception of rational use and non voluntary licensing and so on as supplementary mechanisms. But after hundreds of years' accumulation of scientific and technological innovation and knowledge, knowledge products have been quite rich, including all areas of human life. The task of intellectual property system which is "how to make a bigger cake" has been largely achieved, and now the priority task should be focused on how to "distribute the cake". Because of the modern society, each person's survival and development has been closely related with the knowledge products, the sharing degree of knowledge product is directly related to people's levels of material life and spiritual life. If our system continues to set a high standard for sharing the knowledge of the public, it is bound to damage the normal promotion of

public life level, and even endanger the basic survival of vulnerable groups.

The design of our system should not only encourage the innovation consciousness and the spirit of the work, but also ensure the freedom of the public to share knowledge and the enthusiasm to continue creating. Therefore, we need to balance the right between the equal subjects. Specifically, the status of intellectual property should be defined accurately in the updating process of our country's rights system, and arranged for the appropriate level of validity in the entire rights system. When the different levels of rights conflict with each other, the priority of the basic rights of the higher level should be protected. For example, the right of life and health, survival and development rights, freedom of expression and other rights should be put before the protection of intellectual property right. It can achieve these rights through sharing the knowledge achievement and reducing the exclusive rights of the intellectual property owner. Besides, it is necessary to determine the way and mechanism of dealing with the conflicts of rights, hence the social security system can be configured reasonably to enhance the legitimacy and authority of the legal order. Accordingly, it can balance the relationship between intellectual property rights and other rights, coordinating the interests of individuals, the state and the human community can help to achieve the protection of intellectual property, prevent the excessive commercialization of intellectual property, regulate the social responsibility of intellectual property, and eliminate public concerns about the abuse of intellectual property rights through the law.

2. CHINA NEEDS THE INTELLECTUAL PROPERTY POLICY ACCORDING WITH THE NATIONAL CONDITIONS

The constitution of the People's Republic of China in the part of general program of the provisions of 20th of the "nation develops natural science and social science, popularize knowledge of science and technology, rewards achievements in scientific research and technological invention creation" is not the formal national intellectual property strategy. It is extremely unfavorable to the harmonization of intellectual property legislation, the coordination of intellectual property protection and the constancy of national scientific and technological innovation. Intellectual property rights and related rights, especially the rights to share knowledge and the results lack the clear constitutional guide which results in the difficulties of the state to adjust the field of intellectual property. Different social subjects have various levels of intellectual property rights, and lack of smooth relief channels. As a result, we can set up the core content of "Outline of the national intellectual property strategy"

as the basic national policy to establish the intellectual property protection strategy which in line with the social development level and to make it become a constitutional principle, and then authorize and direct the formulation of the intellectual property code. This is the inevitable choice for our country to improve the legal system of intellectual property rights, to realize the intellectual property rights of citizens, and to achieve the goal of innovation oriented country.

Based on the development experience of all countries in the world, intellectual property protection strategy is a global and forward-looking public policy choice which is a combination of short-term, medium and long-term economic and social development goals. In developing countries, the over protection of intellectual property rights will only be a barrier to their development. In the early stages of industrialization, developing countries have no power to take the high standards of the large scale of original intellectual products of their own science and technology and foreign intellectual products into account. Therefore, the primary power of developing countries completing the industrialization process is technology imitation rather than independent innovation.

On the contrary, since the reform and opening up, the protection of intellectual property rights in our country has not experienced the full preparation and buffer of the industry and technology before we participated in the high standards of international protection and market competition. The protection of intellectual property rights in our country has been higher than the economic developing level of our country. The developed economies, due to the loss of the advantages in the traditional manufacturing field, turn to the intellectual property as their main method to control the market and profits. The multi-national corporations which are controlled by monopoly capital take advantages of the strong protection of intellectual property law in China. They use forms such as patent licensing joint, private patent standards, price discrimination, predatory pricing and so on to prevent our enterprises from carrying out the follow-up innovation, to manipulate unreasonable allocation of the industry profits and damage the interests of consumers in our country. This leads to China's lack of the world's leading technology and business in high-tech manufacturing, energy industry, pharmaceutical industry, software industry, agriculture and many other areas.

Therefore, China needs to actively seek policy leadership in the field of protection of intellectual property rights. On the fundamental law side, the basic national policy must suggest the country's long-term goal unremittingly. Our intellectual property policy can expressed briefly in general program as: "In order to enhance the capability of independent innovation of China's intellectual property, optimize the system of intellectual property, promote the creation and application

of intellectual property rights, strengthen the protection of intellectual property rights, prevent the abuse of intellectual property rights, and cultivate intellectual property culture." Based on the core task of enhancing the ability of independent innovation, when we embody the policy of intellectual property in the lower normative legal documents, we should considerate to meet the minimum international intellectual property convention obligations, take advantage of the elastic clauses and make full use of international treaty in the principles, framework and rules to develop the intellectual property protection scheme to develop the intellectual property protection scheme in line with our country social development level and historical and cultural traditions for independent scientific and technological innovation. By determining the localization standard which is suitable for the level of intellectual property in our country to ensure that the weak industry and immature technology can get support, and lay a solid foundation and legal basis for it turning into a strong industry and mature technology in the future.

3. CHINA NEEDS TO DEVELOP A UNIFIED INTELLECTUAL PROPERTY CODE

Multi-National Corporation can occupy a strong position in the Chinese market due to their leading technology and mature right protection mechanism. What more important is that they have orderly competition environment created by their strict legal system of intellectual property rights, the advantages on intellectual property and the accessing market opportunities protected by their sovereignty in other countries. In contrast, China's intellectual property obligee can't fully achieve the protection on establishing their competitive advantages in the existing legal system of intellectual property rights. Of course, we are at a weak position in the competition with the strong multi-national corporations. Therefore, in order to ensure that all the rights of the basic national policy of intellectual property and related subjects have been implemented, we must develop a unified intellectual property code so as to make the relevant principles and spirits of fundamental law permeated. And thus, so as to create a stable law environment for the realization of intellectual property rights and the use of knowledge, then provide guarantee of law for our country's independent intellectual property rights entering the overseas markets.

As the intellectual property division of our country takes a single legislative model which lacks of basic regulations of the specific intellectual property system, at the same time the lack of some general provisions of intellectual property issues, some separate laws duplicates and crosses, but not identical. It has created a conflict problem that how to coordinate the same items in different laws and the scope of application. Besides, as a result of the messy intellectual property law, the protection of

certain rights are often scattered in related intellectual property laws, regulations, rules and other branches of law. These unknown divisions and unclear authority must cause the omission of legislation. And the deviation of legislation directly results in the disadvantages of divided policies from various sources, law enforcement beyond their authorities, and repeating the law enforcement which also hinders the progress of the judicial application. At length, those will go against the perfection of the legal system of intellectual property and cannot meet people's increasing demands for the protection of intellectual property and technological and cultural prosperity.

Only through the establishment of a unified intellectual property code, compiling the existing intellectual property rights which have good effect under the unified legislative guiding ideology and principles, forming a harmonious, orderly and reasonable internal regulation system; can we maximize dispel the limitations and self-interest that department legislation and local legislation may have, and can the judge obtain accurate basis to decide cases easily instead of facing many different levels of regulation in a dilemma.

Specifically, the intellectual property code of our country should be composed of three parts: general provisions, specific provisions and supplementary provisions. The general provisions mainly stipulate the basic principle of intellectual property, including the legislative purpose and the basic principle of intellectual property law, the concept, scope and nature of intellectual property, the subject and object of intellectual property rights, the production of intellectual property rights, the principle of acquisition and application in intellectual property, the definition of intellectual property rights' validity and the scope of its validity, in particular, the way to the foreign protection of intellectual property rights, identification of tort, tort liability, the procedures and ways of relief and the abuse of intellectual property and restrictions and other basic provisions. Specific provisions are the main body of the intellectual property code, it should include copyright, adjacency right, patent right, trademark right, trade secret right, plant variety right, integrated circuit layout design right and other specific forms of rights. With the spirit of unity and coordination, it is on the basis of amendments to the existing separate laws and regulations arranging the specific branches of intellectual property rights to integrate them into a comprehensive intellectual property protection system. At length, supplementary provisions mainly stipulate the relationship between intellectual property code and other relevant laws and regulations such like civil law, property law, tort liability law, law of scientific and technological progress, law of scientific and technological achievements transformation, anti unfair competition law, anti monopoly law, the criminal law and so on, and some supplementary description needed to add such like when the laws taking effect and some special events.

4. CHINA NEEDS TO FURTHER IMPROVE THE LAW OF SCIENCE AND TECHNOLOGY

Different from the high standard equal as the intellectual property legislation in the world, the technology improvement legislation of our country still has a great gap with the reference scientific research management and the policy of technology innovation in developed country, it remains to be improved.

First of all, the definition of "preferential principle of public interest" is not clear. Article 20(1) of "science and technology law" has exclude the situation of "national security interests of the state and major social and public interests" as project undertaker shall obtain the financial intellectual property rights. Basic on the same reason of Article 20(3), the country can implement free of charge, also can authorize others to the paid or free implementation of the project undertaker in implementing the financial intellectual property rights. These regulations show the "preferential principle of public interest" in the protection of intellectual property rights. However, regarding to the specific content and standard as well as standards agency decisions time decision procedure and way of relief "national security interests of the state and major social and public interests", "science and technology law" does not make specific provisions. The lack of operability is not conducive to effective implementation of the law, also hard to avoid differences and contradictions may cause the project undertaker in reality and decision institution. Therefore, the right of decision should be endowed to the project management institution, and defined by the research proposes and objective results. On the timing of decision making, we can choose flexible assignment, sign project agreements, project acceptance, and invention reported by project undertaker or advocating the intellectual property to identify it. On the way of decision procedure and relief, as long as it has not been identified as the state intellectual property should belong to all project stakeholders; if the project undertakers dissent the result of the decision, they could have the right to file a complaint review and administrative litigation.

Secondly, the exercise ways of government intervention are not clear. According to the regulation of "science and technology law" article 20(2), the project undertakers whom do not apply the right of financial property in reasonable duration, the country can apply in free of charge or allow the others to pay or free of charge. The provisions in paragraphs 1 and 3 determination of the public interests and the provisions of the compulsory license belong to the category of the right of government intervention. Therefore, "science and technology law" does not regular government intervention to the purpose of power subject, the launch measurement and condition,

program using the acid program. In order to balance the relationship in undertakers of program, program management authority and public interests, the above matters should be regulated. Program management authority should be estimated as the direct subject of government intervention, the upper technology administration department also has the right to intervene if necessary. Power subject should launch their intervention power according to legitimate authority or the application of the third party. Power subject has the information obligation in the exercise of intervention power, and shall inform in writing project undertakers the facts and reasons of starting intervention power and their rights. In the process of exercising intervention power, it should guarantee the project undertakers' rights of stating opinions, submitting evidences and defending. At the same time, "science and technology law" should stipulate that power subject should deal within a reasonable time to make a decision, avoid procrastination program. If project undertakers are not satisfied with the treatment results, they have the right to lodge a complaint to the project management institutions, but also bring administrative reconsideration to the superior administrative department of science and technology, and eventually to resort to the judicial relief

At last, "Principle of native industry as preferential" has not legislated completely. Article 21(1) of "science and technology law" regulates that the country encourages financial intellectual property rights to be domestically used first. But the legislation of encouragement can not show the meaning of "principle of native industry as preferential". It can not be estimated as the application of intellectual property for program undertakers and the obligatory evidence to restrict intellectual property transition from inner to outside. However the originality purpose of this legislation is to improve our national technology standard and economic competitiveness through intellectual property. Furthermore, Article 21(2) regulates that financial intellectual property rights' outside transfer and implementation shall be approved by the project management institution or other statutory bodies. Here is different from the flexible expression in paragraph 1, the rigid expression is the examination and approval system. Therefore, in order to avoid ambiguity and conflict between the laws, the provisions in the legislative expression should be modified to use the state fiscal funds set up by the science and technology fund projects or intellectual property rights which is formed by the science and technology plan projects shall be conducted in the first place in the real manufacturing.

CONCLUSION

State Council should systematically arrange the relevant administrative regulations, and formulate administrative

rules and regulations that are easier for operating than "science and technology law", based on the authority granted by "legislation law", so as to provide guidance to the administrative regulations of the lower level principal part of administration legislation.

At the same time, with the good opportunity of revising "the law of promoting transformation for scientific and technical achievements", we can increase the transformation of scientific, technological achievements integration services and financial support to match the methods of the implementation of "science and technology law". It helps to form a complete scientific and technological law department with coordinated effective degree, and be convenient for the unification and accuracy of the legal application. In addition, although decentralizing to project undertakers by "science and technology law" is a consideration of encouragement innovation. The focus of legislation of science and technology law department is emphasizing on the country to promote public intellectual property to correct the self-interest and blindness, which are different from the focus of legislation of intellectual property law department. Moreover, at present, the project undertakers' overall intellectual property awareness and ability are not high, technology industrialization degree is not adequate, the market demand information is not asymmetry, so their patent applications are of low quality and implementation benefits are not good enough. This shows that at this stage our country's legislation of science and technology should emphasize on the effective action of government intervention, need not to harsh on the procedure of its exercise of power, so as to strengthen the effect of science and technology laws and regulations. After all, the implementation of intellectual property policy and the actual effect of intellectual property protection cannot do without the cooperation and coordination of "science and technology law", which are the core of the science and technology law system.

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