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Intellectual Property System and Economy Development

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I. Intellectual Property

Intellectual property refers to those exclusive rights, such as patent, trademark, copyright, trade secret, enjoyed by people for their creative intellectual outputs. Intellectual property law is the one protecting these kinds of civil rights. The majority of those rights are property rights, among which patent and trademark are also called “industrial property”. They are the rights needed to be applied and created after examination and granting of competent administrative authorities. Copyright and trade secret are automatically created by the time of completion of related creating activities.

Like the normal civil rights, intellectual property also has its subject matter and object for protection. Inventor, patentee, owner of registered trademark, writer, artists, performance actor are the corresponding subject matters. New technology solutions, trademark signs, text writing, music, art works, computer softwares and etc. are the corresponding objects. In this regard, a certain proportion of the subject matters and objects of patent and trade secret are overlapping. After a new technology solution is developed by the inventor, he may either apply for patent before competent administrative offices, publish his invention and receive the patent right, or he may enjoy the practical exclusive right by keeping the secret. This means that the owner of the technology solution may choose patent or trade secret for its protection.

Like the tangible property right, intellectual property is also a kind of exclusive right, namely, others could not use or utilize it without authorization of the right holder.

Its difference with the tangible property rights include: first, the object of intellectual property is characterized by “hare to invent but easy to reproduce”. If a thief steels a car (tangible property) from a parking lot, he can at most sell this car and gain the illicit money. It is almost impossible for him to reproduce several cars and sell them. However, if a thief steals a software from one software company, he can immediately reproduce thousands of software for sale purpose which may lead to the bankruptcy of the software company. Second, although intellectual property and tangible property are both exclusive rights, the latter one can usually be protected by possessing the related objects; the objects of intellectual property is shown as certain information (e.g., invention is the new information for practical technology, trademark is the information of commodity resource, work is the text information, image information and audio video information expressed by the author). It is very difficult to receive protection through “possession”. Moreover, the object of tangible property is usually inseparable with its exclusive right that makes its protection comparatively simple. However, the case is in the contrary for intellectual property, thus makes it much more difficult to protect the objects.

II. Knowledge-based Economy and Intellectual Property

One or two centuries before the end of 20th century, developed countries attached their importance on property law (namely tangible property law) and contract law for product sales within the traditional civil law. This is because that the investment of tangible rights such as machine, land and infrastructure play the key role in industry economy. Since 1980s and 1990s, in accordance with the development of knowledge-based economy, developed countries and a batch of developing countries (such as Singapore, Philippines, India and etc.) gradually turn their focus onto intellectual property law and e-business in the field of civil legislation. However, this does not mean that the traditional property law and contract law are no longer necessary but rather the transfer of focus. The reason is that intangible property such as patent invention, trade secret and continuous updating computer program is now playing the key role. Certainly this does not lead to the conclusion that tangible property accumulation is not important. This implies that the legislation stress in superstructure will be changed accordingly to adapt with the developed operational means. Some developing countries in the process of industrial economy have realized that their economy strength will never be comparable with developed countries if they, in the contemporary world, continue to rely on the traditional method of “labor working with heavy sweating” and still concentrate on tangible asset accumulation. The only way to ease the gap with developed countries is to use intangible asset accumulation (mainly refers to the development of “independent intellectual property”) to promote tangible asset accumulation.

Some domestic corporations, such as Haier for home appliance and Lenovo for computer industry, who opened the international market and maintained their market share, follow the exact rule. In their words, this rule is called “promoting industrialization through informationization”. At the early part of the year 2000, a new although not advanced product introduced by Lenovo, namely network computer, contained over 40 patents.

III. Intellectual Property Legislation System
In 1982, China issued Trademark Law (revised in February 1993 and 2001 respectively); in 1984, China issued Patent Law (revised in September 1992 and August 2000 respectively); in 1986, China published General Principles of the Civil Law of the People’s Republic of China which prescribed the protection on intellectual property; in 1990, China published Copyright Law for the protection of copyright (first revision took place in 2001); in June 1991, the State Council also published Regulations for the Protection of Computer Software; in September 1993, China issued Law Against Unfair Competition which triggered the protection of trade secret; in March 1997, the State Council issued Regulation on the Protection for New Varieties of Plants. In order to meet with the requirements of acceding to WTO, China published Regulations on the Protection for Integrated Circuits by the State Council. Hence, China has been equipped with basic laws and regulations composing of legislation system on intellectual property protection.

China’s copyright law protects written works but its contents are far beyond that. All the matters such as musical works, choreographic works, cinematographic works, television works, drawings of engineering designs, maps, computer software, live performances and etc, which have the possibility to be reproduced, namely intellectual works may be “repeated”, “copied” or “pirated” are under its protection. Work reproduction in the form of paper, cassette, filmstrip is classified as media reproduction; work reproduction in the form of performance belongs to non-media reproduction. Due to this reason, international treaties and laws in many countries protecting this kind of works are called “copyright law”. In China’s legislation, “work right” and “copyright” are synonyms. Those works whose publication and dissemination are forbidden by law are not protected in China.

The precondition for enjoying copyright protection by the creative works is “creativity”. This means that it could not be produced by infringing others’ copyright such as copying, reproducing or other ways. It must be created by its author. “Creativity” differs from the requirement of “originality”. “Creativity” does not exclude “coincidence” in creation.

However, an invention for patent must own the “originality”. Patent system expels the “coincidence” in the developing process. If A applied the patent first while B who made the same invention applied later, B could never receive the patent, even if B did not know the developing progress of A and made the invention independently. These are the “novelty” requirement and “first-to-file” rule in Chinese patent law. This is because that a lot of people is making inventions in the same technology field, so it is not very probable for patent examination and granting authority to decide the first inventor if different people apply patent for the same invention. Therefore, the law prescribes that the first one who submits the application will be received and thus expels all the others. For this reason, if our enterprise or research institute has a new invention, they should first consider whether others could develop the same technology solution in a short period of time without their help. If it does exist the possibility, then they should apply for a patent at their earliest convenience. Otherwise, others will file first and expel the enterprise or institute out of the market. If research achievements belong to new scientific discovery, then they should publish it to the media as early as possible for the purpose of gaining recognition of “first discovery right” from their counterparts and even the world. However, if research achievements are practical inventions (namely new technology solutions), then they should first consider to apply patent and occupy the market. Under this circumstance, they should not publish it in a hurry or it will be filed first by others and also destroy the novelty.

We had lost quite a lot of patent achievements, which should belong to us, due to lack of capacity in clarifying the different legal status between scientific discovery and practical invention and always seek to make publications at the earliest time. Certainly, if you believe that others could not make the same invention without your help, then you may choose trade secret to protect your achievements instead of applying patent.

Those signs, which can be registered as trademark, must own “distinctiveness”. If “milk” is allowed to be used as trademark for packaged milk, consumers can not distinguish this kind of packaged milk with others produced by other companies. This is called lack of distinctiveness. Only distinctive marks, such as “Yi Li”, “Meng Niu”, “Pamalart”, can distinguish the same products produced by different companies and this is the major function of trademark.

In a rather long time period after China’s publication of several intellectual property laws, trademarks attracted far less attention by many people comparing with other intellectual property rights. In theory, some people hold the view that trademark only plays the marking function and seems not belonging to intellectual property. In practice, people think that creating a well-known brand is the business of high-tech industry and the operation of primary products (such as mineral sand, grains and etc.) do not need trademark. Actually, a trademark since it is firstly chosen by the right holder continues to absorb creative intellectual investment. The improvement of trademark reputation mainly depends on marketing method of its operator and the technology proportion
invested for the purpose of enhancing quality and product updating. All of these are creative outputs. The primary products in developed countries are marked with trademark when they appear at the market with seldom exception. They all understand that while operating its tangible products, its intangible property—trademark will also be value-added. Even if he lost all his physical products (force majeure, such as sea accident or natural disaster, investment venture, such as financial crisis), he owns at least the value of his trademark. The manager of “Cocacola” once said that if all the factories and commodities of his company were lost by fire accident, he still could use the trademark of “Cocacola” as a mortgage to recover the production on the next day. Every year, the “financial sector” evaluates that the worth of “Cocacola” equals dozens of billion U.S. dollar. Some theorist had once told us that if a company was bankrupt, its trademark would also be nothing. In fact, we can find a lot of examples of valuable trademarks after the companies go bankruptcy. For example, in March 1998, Guangzhou Camera Plant closed down and the evaluation company estimated that the trademark “Zhujiang” which was owned by the company should be 4000 RMB. Many people thought that it was highly evaluated. However, at the bidding block in the same month, this trademark was sold at the price of 395,000 RMB. Obviously, the reputation invested by the company to the trademark for years of intellectual investments will not completely lost with the bankruptcy of the company itself due to wrongful operations (or other unexpected accident). Therefore, increase the trademark awareness of Chinese operators (especially the operator of primary products) is very important to the development of Chinese economy.

Besides some separate laws and administrative regulations, there is a special chapter in China’s Criminal Law (1997 revision) prescribing that people who infringe the trademark, offend copyright, violate trade secret and passing off patent severely will be subject to criminal sanction.

Since 1980, China has joined major international treaties in the field of intellectual property, such as Convention Establishing the World Intellectual Property Organization, Paris Convention for the Protection of Industrial Property and Berne Convention for the Protection of Literary and Artistic Works and Universal Copyright Convention. No matter in regard to domestic legislation or participation of external cooperation relating to international protection on intellectual property, China as a developing country has made great progress. Both the former and present Director General of WIPO under UN think that China has finished the process for centuries taken by developed countries within a dozen of years.

Certainly, we still should not be too optimistic about the present IP protection status considering the short history of establishing modern IP legislation system. We are shouldering heavy responsibilities in the aspect of combating counterfeited trademarks and various forms of pirates.

IV. Intellectual Property Protection and Economy Development

Various kinds of WTO agreements mainly adjust commodity trade, service trade and intellectual property protection. In fact, the content of commodity trade and service trade are both closely connected with intellectual property protection.

With regard to commodity trade, all the products with legal resources has the problem of protecting its own trademark. Product package, its design and sales promotion advertisement (including advertisement image, wording and hitchhiker) all relates to copyright protection. Popular new products are often supported by patent or trade secret. Most of the products with illegal resource have counterfeited trademarks or pirated elements. As for service trade, the protection for service marks and the copyright of advertisement for providing services are the same with commodity trade. The differences lie in that: in the trans-border service, especially in network service, one enterprise who makes an advertisement within his country might infringe the trademark enjoyed by a foreign company in a foreign country. This is because the network is characterized by its boundless. However, trademark has the regional feature. This kind of special infringement disputes will not appear in the tangible commodity trade.

China has put in great efforts in revising and improving intellectual property laws and their enforcement. However, there is still a lot of work to do in the aspect of enhancing public awareness on IPR protection. For example, in a recent lecture of a law professor in a well-known university, he said that piracy was helpful in developing China’s economy and combating piracy was protecting foreign products. This is the reflection of a certain part of people’s view. I take exactly the opposite view that piracy has directly hindered our national economy development. First, the illegal revenue of pirates are never given to country for promoting economy; it is impossible to tax on illegal revenues. This has already comprised a great loss to the country. Second, the major victims of the pirated activities are domestic enterprises. We may take the example of software piracy. This has directly led to the lagging behind of our domestic software industry. Foreign enterprises, such as Microsoft, can still make profits with its English version, Korean version or Japanese version products in the
market of many countries or in America, even if it could not sell a single set of Windows in China. However, those software like “Chinese Star” or “Wu Bi Han Zi” developed by our own enterprises, will have a very limited market outside China if their domestic market is taken over by pirated products. This certainly will lead to the bankruptcy of those Chinese software enterprises. If we do not combat fiercely with pirated audio-video products or books, we will come up with the same results. The reason is that those culture products relating to Chinese characters or Chinese language mainly lie in China.

When Mr. Deng Xiaoping visited the audio-video company in Shenzhen in the early 1992, the first question he asked was that: “Did you solve the copyright issue properly?” This shows that the leaders of socialist market economy clearly understand the importance of IPR protection in promoting national economy. The legislation authorities, judicial and administrative enforcement authorities have always held firm stands on cracking down infringement and piracy.

After China’s accession to WTO, domestic industry, culture market and commodity market will be the first one to meet with the challenges of IPR protection. In the process of economy development, they should at least pay attention to the following aspects:

I. Do not infringe others’ rights. This refers to the period before the new products are promoted to the market. You need to solve the issue of intellectual property. If the products contain intellectual property of others, then you need to have the authorization.

II. After accession to WTO, we should learn our defense rights if other enterprises file infringe cases with us. Some of domestic companies are doing quite the opposite: before promoting the new products, they never care whether it involves other people’s patent or copyright; when others lodge infringement cases before the court, they do not know what to do except admit their mistake immediately without any analysis.

III. The intellectual property rights owned by Chinese enterprises and individuals might also be infringed by others both within and without. We should protect our intellectual property rights, increase law-abiding awareness and intellectual property awareness. This is not only targeting at the infringer but also useful for our IPR holders.

IV. The most important point is to encourage our people to develop independent intellectual property rights. Before China issued Patent Law, Mr. Yuan Longping had already applied patent in America and Australia for cross-bred paddy breeding. SINOPEC has also applied several patents in many countries for some chemical engineering technologies. This has helped them to establish their own “market protection circle”. If there is any foreign enterprise want to enter this circle and make or sell related chemical products, they must receive authorization from SINOPEC first. Some well-known trademarks like Haier or Lenovo also begin to receive international recognition. All these examples are typical “independent intellectual property rights”.

In order to develop our national economy, we can not refuse to import other’s creative achievements. What we can depend on is the creative ideas of the Chinese people. Provide intellectual property protection to creative achievements is the most effective incentive to encourage innovation.