



中南财经政法大学  
青年学术文库

# 中国知识产权 刑法保护理论研究

黄洪波 著

中国社会科学出版社



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## 总 序

一个没有思想活动和缺乏学术氛围的大学校园，哪怕它在物质上再美丽、再现代，在精神上也是荒凉和贫瘠的。欧洲历史上最早的大学就是源于学术。大学与学术的关联不仅体现在字面上，更重要的是，思想与学术，可谓大学的生命力与活力之源。

中南财经政法大学是一所学术气氛浓郁的财经政法高等学府。范文澜、嵇文甫、潘梓年、马哲民等一代学术宗师播撒的学术火种，五十多年来一代代薪火相传。世纪之交，在合并组建新校而揭开学校发展新的历史篇章的时候，学校确立了“学术兴校，科研强校”的发展战略。这不仅是对学校五十多年学术文化与学术传统的历史性传承，而且是谱写 21 世纪学校发展新篇章的战略性的手笔。

“学术兴校，科研强校”的“兴”与“强”，是奋斗目标，更是奋斗过程。我们是目的论与过程论的统一论者。我们将对宏伟目标的追求过程寓于脚踏实地的奋斗过程之中。由学校斥资资助出版《中南财经政法大学青年学术文库》，就是学校采取的具体举措之一。

本文库的指导思想或学术旨趣，首先，推出学术精品。通过资助出版学术精品，形成精品学术成果的园地，培育精品意识和精品氛围，提高学术成果的质量和水平，为繁荣国家财经、政法、管理以及人文科学研究，解决党和国家面临的重大经济、社会问题，作出我校应有的贡献。其次，培养学术队伍。特别是通过对一批处在“成长期”的中青年学术骨干的成果予以资助推出，促进学术梯队的建设，提高学术队伍的實力与水平。再次，培育学术特色。通过资助在学术思想、学术方法以及学术见解等方面有独到和创新之处的成果，培育科研特色，力争通过努力，形成有我校特色的学术流派与学术思想体系。因此，本文库重点面向中青年，重点面向

精品，重点面向原创性学术专著。

春华秋实。让我们共同来精心耕种文库这块学术园地，让学术果实挂满枝头，让思想之花满园飘香。



2009 年 10 月

## Preface

A university campus, if it holds no intellectual activities or possesses no academic atmosphere, no matter how physically beautiful or modern it is, it would be spiritually desolate and barren. In fact, the earliest historical European universities started from academic learning. The relationship between a university and the academic learning cannot just be interpreted literally, but more importantly, it should be set on the ideas and academic learning which are the so-called sources of the energy and vitality of all universities.

Zhongnan University of Economics and Law is a high education institution which enjoys rich academic atmosphere. Having the academic germs seeded by such great masters as Fanwenlan, Jiwenfu, Panzinian and Mazhemmin, generations of scholars and students in this university have been sharing the favorable academic atmosphere and making their own contributions to it, especially during the past fifty – five years. As a result, at the beginning of the new century when a new historical new page is turned over with the combination of Zhongnan University of Finance and Economics and Zhongnan University of Politics and Law, the newly established university has set its developing strategy as “Making the University Prosperous with academic learning; Strengthening the University with scientific research”, which is not only a historical inheritance of more than fifty years of academic culture and tradition, but also a strategic decision which is to lift our university onto a higher developing stage in the 21st century.

Our ultimate goal is to make the university prosperous and strong, even through our struggling process, in a greater sense. We tend to unify the destination and the process as to combine the pursuing process of our magnificent goal with the practical struggling process. The youth's Academic Library of Zhongnan University of Economics and Law, funded by the university, is one of our specific

measures.

The guideline or academic theme of this Library lies first at promoting the publishing of selected academic works. By funding them, an academic garden with high – quality fruits can come into being. We should also make great efforts to form the awareness and atmosphere of selected works and improve the quality and standard of our academic productions, so as to make our own contributions in developing such fields as finance, economics, politics, law and literate humanity, as well as in working out solutions for major economic and social problems facing our country and the Communist Party. Secondly, our aim is to form some academic teams, especially through funding the publishing of works of the middle – aged and young academic cadreman, to boost the construction of academic teams and enhance the strength and standard of our academic groups. Thirdly, we aim at making a specific academic field of our university. By funding those academic fruits which have some original or innovative points in their ideas, methods and views, we expect to engender our own characteristic in scientific research. Our final goal is to form an academic school and establish an academic idea system of our university through our efforts. Thus, this Library makes great emphases particularly on the middle – aged and young people, selected works, and original academic monographs.

Sowing seeds in the spring will lead to a prospective harvest in the autumn. Thus, Let us get together to cultivate this academic garden and make it be opulent with academic fruits and intellectual flowers.

Wu Handong



## 中文摘要

中国对知识产权的法律保护，尤其是刑法保护起步较晚。目前国内刑法学界对侵犯知识产权犯罪的研究，多局限在刑法学领域内，从微观层面对具体罪名的构成要件与刑罚处罚作规范分析，而对中国知识产权刑法保护的基本依据、基本立场、基本原则等全局性、基础性理论问题少有研究。这种封闭式、自给自足的研究方法和自说自话虽然也能解决部分问题，但仅将眼光局限在刑法领域，会因为“身在此山中”而“不识庐山真面目”，以致不能从根本上找到问题的症结。据此，本书写作的设定目标是：第一，开展惩治侵犯知识产权犯罪的基础理论研究，改变我国目前知识产权刑法保护基础理论研究薄弱的现状；第二，研究视角和方法多样化，力争学术论说方法论的规范化。从研究视角上，与目前仅从刑法角度研究如何惩治侵犯知识产权犯罪的现状不同，本书力争不仅在刑法之中研究知识产权的刑法保护，更在刑法之上、刑法之外研究知识产权的刑法保护；从方法论上，不再简单罗列历史资料和他国立法规定并径直借鉴到我国立法中，而是将国内外的相关立法规定或建议置于其社会文化背景中，解读其产生的原因和合理性，力争对相应缺陷和完善措施有充分的论证和推进过程。

本文内容的总体框架分为五个部分。

第一章：知识产权的基本理论。“知识产权”的“刑法”保护研究，意味着我们要不断往返于知识产权法学和刑法学之间，在学科之间不断进行沟通 and 对话，因为刑法只有首先了解其保护的对象——知识产权——不同于传统财产权的根本属性，才能从根本上实现刑法保护知识产权的正当性和适当性。因此，本章介绍了知识产权的基本理论，作为全文研究的理论背景和支撑。具体内容包括知识产权的概念和特征、哲学根基以及其保护体系。

第二章：知识产权刑法保护的基本依据。本章主要论述中国加强知识

产权刑法保护的重要原因和意义。刑法自身内敛和收缩的性质,决定了其不宜过度介入社会生活,因此,刑法意图保护知识产权时首先面临的就是正当性论证。在刑法已经明文规定了侵犯知识产权犯罪的情况下,中国知识产权刑法保护的正当性之所以具有问题价值是因为:首先,知识产权从其产生至今始终是备受争议、蹒跚前行,不仅在历史演进中充满争议,在当前国际社会三股反知识产权的潮流中处境也极为尴尬。其次,与知识产权学界对自身的正当性问题热火朝天的争辩氛围不同,刑法学界对此却是相对冷淡的态度,少有兴趣对之长篇大论,刑法保护的正当性总是被视为理所当然。本章从全球化、国际法、财产法、经济学和刑事政策等不同视野论证了刑法保护知识产权的正当性和必要性。

第三章:知识产权刑法保护的基本立场。知识产权刑法保护始终存在着多方面分歧,包括:利益平衡问题(个人利益或公共利益);价值取向问题(个人自由或社会秩序);政策倾向问题(高水平保护或低水平保护);立法方向问题(本土化或国际化);立法体例问题(分散型或集中型)。对于前述争论的不同选择,是导致具体制度设计存在差异的根本原因。中国刑法学界在强化刑法对知识产权保护这一点上表现出惊人的一致,多数刑法学者认为应当扩大刑法犯罪圈。要理性认识和评价这种强烈欲望和非理性扩展态度,就必须深入挖掘隐藏于各种完善建议背后的基本立场。本章从历史溯源、现实考察和未来走向三个层次,分别界定了我国知识产权刑法保护的基本立场:利益平衡应当是公共利益优先;价值取向应当是社会秩序优先;政策倾向只能是高水平保护,但是要坚持知识产权保护的阶段论和范围论;立法方向只能走国际化道路,但是本土化应当并且必须是我国未来的走向;立法体例应当考虑分散型立法模式。

第四章:知识产权刑法保护的基本原则。知识产权刑法保护具有必要性,但同时必须具有适度性,不能将侵犯知识产权的行为一概犯罪化,防止刑罚触角过分扩张带来不利后果。那么,按照什么标准或原则确定我国知识产权刑法保护的合理范围呢?这是本章需要解决的问题。我国知识产权刑法保护的基本原则直接关系到刑法介入知识产权的范围和深度,是考察和反思我国知识产权刑法保护程度的理论基础。笔者认为,我国知识产权刑法保护基本原则的内容是确定刑法介入的纵深范围,因此其不同于刑法基本原则,而具有自身的属性。具体而言,包括:现实维度的适时性原则;立法维度的谦抑性原则;司法维度的实效性原则。

第五章：中国知识产权刑法保护的完善。本章的论证目标是，和国外相关立法相比，我国的立法规定是否有真正意义上的缺陷？这种缺陷是否只能借助立法完成？简单践行“拿来主义”，是否会造成“水土不服”？关于我国知识产权刑法保护的完善，一直是我国刑法学界数年来孜孜不倦的研究内容，因此，虽然现有研究成果的数量相当丰富，但内在观点却有着惊人的相似性：几乎都是认为刑法对知识产权的保护力度不够，还应该大举立法扩大刑法保护的範圍。本章从研究结论和论证思路两方面对现有研究成果进行了梳理和总结，笔者发现，现有研究结论的论证过程值得怀疑，多数学者都是在“比较研究”中，粗略浏览外国（地区）的相关法律内容，并与我国的法律规定作简单对照，进而确信之间的差异是我国的立法缺陷，据此不加分析地按照国外的法律规定模式提出我国的立法建言。这种既不“拉开距离”，也不“辨析差异”，径直“走向本土化”的比较研究方法，其研究结论也许“只能是那些死的事实和活的错误”。因此，笔者认为，更为谨慎的做法应当是，一方面限制扩张冲动，立足具体需要；另一方面调整刑罚配置，注重实际效益。

**关键词：**知识产权；刑法保护；依据；立场；原则；立法完善

## **Abstract**

Our legislative research in protecting intellectual property starts so late that it is restricted in analyzing constructive conditions in the establishment of specific crimes and criminal punishment in microcosmic aspects. But rarely criminal research follows the overall or basic theory of protecting intellectual property such as basic grounds, basic principles or basic position. Although this closed self-contentment of research methods or murmurous technology can solve parts of it, we can't get at the root of the problem radically because the scope of research limited in the area of criminal law results in the situation as one can never discern the true face of the mountain if one can only look out from within these hills. Thus, in this paper, the author will discuss: firstly, the study of the basic theory of intellectual property infringement so as to change present weak situation of the basic theoretic study on criminal protection of intellectual property; secondly, several angles or methods for studying aim at normalization methodology of scholarly treatise. The article explores criminal protection not only in the area of criminal law, even more outside the law. Methodologically, we no longer list simply historical materials or other legislative rules and flatly use in our legislation, but interpret causes and rationality of legislative rules or suggestions at home and abroad in the setting of social culture for explaining adequately corresponding defects and promoting improvements. The five parts will respectively discuss basic theories of intellectual property, basic grounds or principles of criminal protection of intellectual property, and compare our related legislations with others. Finally, the author will offer a few ideas to improve it.

Chapter I. Basic Theories of Intellectual Property. Studying criminal protection of intellectual property means we have to run between science of intellectual property law and criminal law, and communicate or converse among sub-

jects. Criminal law must realize basic particular attributes of protected intellectual property to bring about legitimacy and appropriateness of criminal protection of intellectual property. Thus, the chapter will introduce basic theories of intellectual property as the theoretical background and supporting of research on full-text. The contents include concepts, characteristics or the philosophical foundation of intellectual property, and the system of protecting intellectual property.

Chapter II. the Basis of Criminal Protection of Intellectual Property. The chapter will describe reasons and important meanings of strengthening criminal protection of intellectual property. Secretive and contractile qualities of criminal law decide that it can not intervene freely in every corner of social activities. So criminal law is faced with proving its legitimacy when it has the intention of protecting intellectual property. Under the circumstances our criminal law has prescribed for infringing intellectual property that it's essential in proof of its legitimacy: firstly, intellectual property has been disputed all the time since it originated. The argument of literariness possession depicted an tottery image of intellectual property in controversy in the 18th century. Intellectual property is not only controversial on historical procession, but also embarrassed in three-ply international trends of objecting to intellectual property during the present time. Secondly, academic community of criminal law treats the dispute of legitimacy of intellectual property scornfully. The chapter will explain legitimacy and necessity of criminal protection of intellectual property by globalization, international law, property law, economic law and criminal policies.

Chapter III. Basic Position of Criminal Protection of Intellectual Property. There are serious valuable differences of criminal protection of intellectual property that the equitable problem of self-interest or social good, the value orientation of personal liberty or social order, the political tendency of strong protection or vulnerable protection, the legislative direction of localization or internationalization and the legislative style of the scattered type or the integrated type exist always. Different options about above disputes are the basis of differences in the specific system design of criminal protection of intellectual property. For example, academic community of criminal law in China unanimously demanded for expanding the criminal loop of penal law. Recognizing and evaluating rationally ir-

rational attitudes of most criminal scholars must dredge up basic position intensively behind perfect suggestions. The chapter will define separately basic position of criminal protection of intellectual property from the historical origin, actual exploration and future trend; public interest is preferential in balancing interest, social orders are preferential in value orientations, and strong protection in political tendency. Of course, we still have to persist in the phasic theory and scope theory, the international legislative direction, and the dispersed legislative body of the legislative style.

Chapter IV. Basic Principles of Criminal Protection of Intellectual Property. We need criminal protection of intellectual property, but it should be moderate. We can not suppose any behavior of infringing intellectual property is criminal for preventing adverse consequences of overextended the criminal antenna. So, how to confirm the reasonable criminal protecting scope of intellectual property? It's the necessary solved problem in the whole chapter. Basic principles of our criminal protection of intellectual property connect directly the scope and depth of intellectual property interfered by criminal law in China, which is the theoretical basis of inspecting and reflecting our criminal protection on intellectual property. The author considers its content is to fix the depth scope of criminal intervention. Specifically, it includes the suitable principle of actual dimension, the prohibitive principle of legislative dimension, and the practical principle of practical dimension.

Chapter V. Improving Criminal Protection of Intellectual Property in China. The aim of this chapter's evaluation is to get defects of our legislative rules clear by comparative study of outer legislative rules and discuss solutions. How to perfect our criminal protection of intellectual property? It has been the sum total of assiduous study for years in academic community of criminal law. Internal opinions of a large number of existing research results are identical or similar. That is, almost all believe that criminal protection of intellectual property is insufficient and should expand the scope of criminal protection by large-scale legislation. The chapter sums up existing research results of improving criminal protection of intellectual property from two aspects of research results and proving thoughts. The author recognizes the reasoning process of research results is susceptible because

most scholars conclude distinctive features of legal rules at home and abroad only after skimming through outer rules and contrasting simply with our rules. The research method and research results for becoming localization straightly without distancing or spotting differences. Thus, the author considers that confining impulse to dilate more and adjusting criminal distribution are more cautious methods.

**Key words:** Intellectual Property; Criminal Law; Basis; Position; Principles; Perfect

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