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## The Scope and Standard of Legal Protection to Intellectual Property Rights in the Chinese Legal System

SUN Nan-shen

**Abstract:** In the legal system of intellectual property rights in China, the subject matter includes patent, trademarks, copyright, computer program, circuit lay-out design, trade secret and so on. The legal protection by law is negative in the sense that the law can be used to stop others from exploiting the intellectual property without permission from its owner. It is necessary for this purpose to make it clear what are the rights that the owner enjoys. On the other hand, it is also important to make it clear what acts constitute infringement of the owner's rights, which is beneficial not only to protecting the owner from infringement but also to stopping the abuse of intellectual property rights. The solution to these matters is determined by the scope and standard of legal protection to intellectual property rights, which is dealt with in this paper through the deep analysis of relevant principles and rules from intellectual property right laws in China.

**Key words:** intellectual property rights; patent; trademark; copyright

I N RECENT YEARS, the rapid development of international technological trade has made its percentage in international trade progress with steady steps. Technical trade has become an essential part of international trade, together with trade in goods and trade in services. Trade in goods, technologies and services are paratactically listed in *The Law on Foreign Trade of the PRC* published in 1994. Meanwhile, protection on intellectual property and trade in goods cannot be separated. Tangible goods are always the carrier of intangible intellectual property. With quick steps of the world's economic globalization, technology-intensive products have been increasingly popular in the international trade in goods. States must consolidate their protection on intellectual the property at home and abroad so as to maintain their competitive advantage in the traditional product field and form new comparative trade advantages. In contrast to it, the fraudulent copy and piracy of domestic technical products negatively affect the trade in goods. Low manufacturing cost and high value-added rate are common to all technical products, which enables imitators to obtain high profits and a huge market with a much lower selling price of imitated goods.

After entering the WTO, China completed within a short period of time the amendments and perfection of the legislation for intellectual property rights so

as to enforce the protection requirements of the WTO's agreement on intellectual property rights (TRIPS). In contemporary China, different institutions are established to be in charge of the legislation and enforcement of intellectual property rights (here in after referred to as IPR) laws and policies. For example, the State Intellectual Property Office of the PRC is in charge of the approval of patents; the Trademark Office under the State Administration for Industry & Commerce is in charge of trademark registration; the Copyright Administration in charge of policy-making of copyrights; the State Administration for Industry & Commerce in charge of the unfair competition in the market; the General Administration of Customs in charge of the border measures for IPR; the Ministry of Agriculture in charge of the protection of new plant breeds; the Ministry of Information Industry in charge of the protection of layout designs of integrated circuits; and the State Bureau of Quality and Technological Supervision and Quarantine in charge of combating counterfeiting acts. Other institutions, including the State Administration of Press and Publication and the Ministry of Public Security, are also involved in the protection of IPR.

The Copyright Administration Department of the State Council will take charge of the work of copyright administration throughout the country. Copyright administration departments of the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government will take charge of the work of copyright administration within their respective administrative areas. In terms of patent administration, since the establishment of the State Intellectual Property Office on Nov. 30, 1998, various measures have been taken to solve inner-department issues and influential cases and to enforce coordination between relevant authorities. In terms of trademark administration, as has been mentioned above, the Trademark Office under the State Administration for Industry & Commerce is in charge of trademark registration and administration. The Trademark Review Committee is the competent administrative organ in charge of the confirmation of the ownership of trademarks and the local all-level administrations of industry & commerce handle the investigation and prosecution of the violation of trademark law.

## **1. Scope and Standard of the Legal Protection to Patent**

### **1.1 Definition**

The Patent Law of the PRC (hereinafter referred to as Patent Law) protects inventions, utility models and exterior designs.<sup>[1]</sup> It sets different technical

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[1] See Patent Law, Art. 2.



requirements for the three types of patent. "Invention" as mentioned in Patent Law means any new technical solution related to a product, a process or an improvement thereof. "Utility model" means any new technical solution related to product's shape, structure, or a combination thereof, which is fit for practical use. "Exterior design" is any new design of a product's shape, pattern or a combination thereof, as well as its combination with the color and the shape or the pattern of a product, which creates an aesthetic feeling and is fit for industrial application.<sup>[2]</sup>

An essential limitation to the grant of patent right is reflected in Article 5 of Patent Law, which holds that "no patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interests." Meanwhile, China applies different standards for different types of patent. An invention or utility model must exhibit novelty, inventiveness, and practical applicability in order to qualify for patent protection and an exterior design must not be identical with or similar to any design that has been already publicly disclosed.<sup>[3]</sup> Certain discoveries and methods are excluded from patent, including scientific discoveries, rules and methods for mental activities, methods for the diagnosis or treatment of diseases, animal and plant breeds, and substances obtained by means of nuclear fission.

Owners of patent can be individuals or organizations. Foreign individuals and corporations will be granted patent rights in China in accordance with any bilateral or multilateral treaties that have been concluded by China and the foreign nation or on the basis of reciprocity.<sup>[4]</sup> Foreigners, foreign enterprises, and foreign organizations that seek to apply for a patent or need to handle other patent matters in China must be represented by one of the foreign patent agents designated by the State Council.<sup>[5]</sup> The revisions permit greater opportunity for inventors who make an invention in the course of employment for a work unit to obtain patent rights. After the grant of the patent right, no entity or individual may, without the authorization of the patentee, exploit the patent. Here "no exploiting the patent" has two shades of meanings:

a. no entity or individual may make, use, promise to sell, sell or import the patented product for production or business purposes, which specifically refers to product patent;

b. no entity or individual may use the patented process, or use, promise to sell, sell or import the product directly obtained by the patented process for production or business purposes, which specifically refers to process patent.

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[2] See "Implementation Regulation of Patent Law," Art. 2.

[3] See Patent Law, Art. 22 & 23.

[4] See Patent Law, Art. 18.

[5] See Patent Law, Art. 19.

## 1.2 Patent Infringement

Patent infringement consists of any act of exploiting the patent, including manufacture, sale, or use of the patent without the authorization of the patent owner. Among various patent infringements, the act of passing off the patent of another person is the most serious phenomenon in China. Four types of passing off have been regulated in Article 84 of "Implementation Regulation of Patent Law" (here in after referred to as IRPA):

- a. without permission, marking the patent number of another person on the product produced or sold by him/itself or on the package of that product;
- b. without permission, using the patent number of another person in the advertisement or other advertising materials, thus causing people to mistake the technology for the other person's patented technology;
- c. without permission, using the patent number of another person in the contract, thus causing people to mistake the technology involved in the contract for the other person's patented technology;
- d. forging or altering the patent certificate, patent documents or patent application documents of another person.

Article 85 of IRPA also lists five types of acts passing an unpatented product off as a patented product or passing an unpatented process off as a patented process, all of which are prohibited by Patent Law:

- a. producing or selling an unpatented product marked with a patent mark;
- b. after a patent right has been declared in valid continuing to mark a patent mark on the product produced or sold by himself;
- c. declaring an unpatented technology in the advertisement or other advertising materials to be a patented technology;
- d. forging or altering the patent certificate, patent document or patent application documents.

However, to prevent the abuse of patent right and secure the smooth operation of trade activities, Article 63 of Patent Law lists several circumstances which shall not be deemed an infringement of patent right:

- a. Where, after the sale of a patented product that was made or imported by the patentee or with the authorization of the patentee, or that was directly obtained by using the patented process, any other person uses, offers to sell or sells that product;
- b. Where, before the date of filing of the application for patent, any person who has already made the identical product, used the identical process, or made necessary preparations for its making or using, continues to make or use it within the original scope only;
- c. Where any foreign means of transport that temporarily passes through the territorial lands, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the

country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are parties, or on the basis of the principle of reciprocity, for its own needs, in its devices and installations;

d. Where any person uses the patent concerned solely for the purposes of scientific research and experimentation;

e. Any person who, for production and business purposes, uses or sells a patented product without knowing that it was made and sold without the authorization of the patentee, shall not be responsible for the damages caused so long as he can prove that he has obtained the product from legitimate channels of distribution.

When an infringement of a patent occurs, Patent Law provides for a mediation procedure under Article 57. Where mediation is unsuccessful or the patent owner does not seek mediation, the patent owner can file a suit directly in a people's court or request the local administrative authority on patent to handle the matter. The local patent authority is empowered to order the infringer to cease the infringing activity if a violation of the patent is found.<sup>[6]</sup> Article 60 of Patent Law provides that the patent owner can recover compensation based upon the economic losses caused by the infringement, the gains to the infringer, or, where the losses or gains are difficult to determine, based upon some reasonable multiple of the licensing fee for the patent. Article 61 provides for pre-trial injunctions or property preservation before filing suit. Article 58 provides for both civil and criminal liability for the counterfeiting of patents.

## **2. Scope and Standard of the Legal Protection to Trademarks**

### *2.1 Trademark Rights*

The first intellectual property legislation enacted by China was in the area of trademarks. In 1982, China adopted its Trademark Law, which replaced the 1963 Regulations Governing Trademarks. Trademark Law was revised in 1993 and in 2001 to bring the law into closer compliance with TRIPS. In addition to trademark law, there is an implementing regulation for trademark law, which provides some specific rules, explanations, and additional provisions. The Implementing Regulation was enacted in March 1983, accompanying the trademark law, and thereof amended in January 1988, in July 1993, and in September 2002.

The 2001 Trademark Law has brought its definition of a trademark into conformity with Article 15 of TRIPS. Article 8 of Trademark Law provides:

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[6] See Patent Law, Art. 57.



“Any visible symbols that may differentiate commodities of natural persons, legal persons, or other organizations from those of others, including words, figures, characters, graphics, three-dimensional symbols, and combinations of colors, and combinations of the aforesaid factors shall be eligible for registrations as trademarks.” This article is the legal definition of trademark as well as qualified condition for the registration of a trademark.

As stipulated in Article 9 of Trademark Law, the trademark for which an application for registration is filed shall have distinctive characteristics easy to identify, and may not conflict with the legal rights acquired by others in priority. It manifests the basic characteristic of trademark-distinctiveness. Therefore, some marks may not be registered as trademarks, including:

- a. those only having the generic names, designs and models of the commodities concerned;
- b. those simply and directly indicating the quality, main raw materials, functions, use, weight, quantity or other characteristics of the commodities concerned; and
- c. those lacking distinctive characteristics.

The owner of a registered trademark enjoys protection against infringement of the mark. Infringement is defined in Trademark Law as using an identical or a similar mark on identical or a similar goods; selling commodities with an infringing trademark; copying or selling representations of a registered trademark without authorization; removing or changing a registered trademark from a product and replacing it with the infringer's own trademark and selling the product as the infringer's own (so-called “reverse counterfeiting”); or causing other harm to the exclusive rights of the trademark owner.<sup>[7]</sup>

The administrations of industry and commerce (AICs) have the power to investigate and handle infringement cases although the parties concerned also have the option of proceeding directly in a people's court. Most trademark owners prefer to appeal to administrative authorities because of the simplicity and their speedy response. Remedies available to the trademark owner are an order requiring the cessation of infringing activities, fines, and compensations. The 2001 revision also explicitly provides that AICs have the power to confiscate and destroy products and equipment.<sup>[8]</sup> Article 56 of Trademark Law of the PRC provides that trademark owners may seek a pretrial injunction and statutory damages of RMB 500,000 where the plaintiff's damages or the infringer's profits cannot be determined.

A significant change of the 2001 revision of Trademark Law is that it provides that administrative authorities can transfer cases to judicial authorities for criminal prosecution where there is suspicion that a crime has occurred,

[7] See Trademark Law, Art. 52.

[8] See Trademark Law, Art. 55.

while the prior standard required proof, not merely suspicion, that a crime had been committed. Trademark owners are able to obtain enforcement actions in the form of raids of suspected premises and seizures of suspected infringing goods at the same date that an application is made. An application usually consists of a complaint, the trademark registration certificate, and proof of suspected illegal activity, such as sample infringing products, photographs, and written and oral statements.

## 2.2 *Geographic Marks*

The geographic mark in practice is a typical certification mark.<sup>[9]</sup> In China, the scope of legal protection to the geographic mark is broader than the requirement in TRIPS. In accordance with the definition of the geographic mark in TRIPs, a geographic mark in Trademark Law refers to the mark that indicates the region that the commodities come from. And the specific quality, reputation or other characteristics of the said commodities are determined mainly by the natural factors or human cultural factors of that region.<sup>[10]</sup> In the practice of international trade, some product would indicate a region which actually has no connection at all with the region where the product originally comes from. It may mislead the public or constitute unfair competition. To prevent abuse of the geographic mark, Article 16 of Trademark Law stipulates that if a trademark contains the geographic mark of the commodities while the commodities do not come from the region indicated by that mark, and thus misleads the public, the trademark shall not be registered and shall be prohibited from use; however, those that have been registered in good faith shall continue to be valid.

## 2.3 *Well-known Trademarks*

In consideration of the special status of well-known trademarks, Chinese Trademark Law provides specific protection to them. First of all, it provides legal protection to the well-known trademark that has not been registered in China, yet this is just limited to the same or similar commodity. Moreover, Trademark Law provides legal protection to the registered well-known trademarks, even if they are different or dissimilar commodities.<sup>[11]</sup>

Whether a trademark is a well-known trademark is a *de facto* question and it shall be determined by competent organizations based on certain criteria. The following factors shall be taken into consideration in the determination of well-known trademarks:

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[9] Certification marks used in Trademark Law refers to the marks that are controlled by the organizations with supervising power over some kind of commodities or services yet are used by the units or individuals apart from the said organizations on their commodities or services, thus to certificate the origins, raw materials, manufacturing methods, quality or other specific characteristics of the said commodities or services.

[10] See Trademark Law, Art. 16.

[11] See Trademark Law, Art. 13.

- a. how well is that trademark known by the relevant public;
- b. the period during which that trademark has been in use;
- c. the period, extent and geographic scope of any publicity of that trademark;
- d. the record of protection of that trademark as a well-known trademark; and
- e. other factors for which that trademark is well-known.

### 3. Scope and Standard of the Legal Protection to Copyright

The 2001 revision brings Copyright Law into compliance with the Berne Convention, which is also incorporated into TRIPS, by providing full copyright protection to works of literature, art, natural sciences, social sciences, engineering, and technology, among other fields, created in any of the following forms: written works, oral works, musical works, dramatic works, choreographic works, and acrobatic works; works of the fine arts and architectural works; photographic works; cinematographic works; engineering design drawings, product design drawings, maps, sketches, and other pictorial and graphic works; computer software; and other works as provided by relevant laws and administrative regulations.<sup>[12]</sup>

As stipulated in Copyright Law, works of citizens, legal persons or other organizations of China shall enjoy copyright, whether they are published or unpublished. For foreigners and stateless persons, copyright exists at the date that the work is first published in China. Copyright enjoyed by works of foreigners and stateless persons according to the agreements signed by China and the states of which the authors are nationals or in which the authors domicile habitually or the international conventions to which both China and the States are members is also protected by Copyright Law. In accordance with the national treatment principle of the Berne Convention, where the foreign work is first published in a third country that has entered into an international copyright agreement with China, the work will enjoy copyright protection in China even though the nation where the foreigner or stateless person resides has not entered into an international copyright agreement with China. No copyright is available for laws, regulations, resolutions, decisions and decrees of state authorities and other documents of legislative, administrative or judicial nature, as well as their official translations; news on current affairs; calendars; general numerical tables; and forms and formulas in general use.<sup>[13]</sup>

Copyright owners include authors and citizens, legal persons and other organizations enjoying copyright. The 2001 revision adds twelve additional rights while prior law consolidated all rights into the single right of

[12] See Copyright Law, Art. 3.

[13] See Copyright Law, Art. 5.



remuneration and exploitation. Copyright includes the following personal rights and property rights: right of publication; right of authorship; right of alternation; right to integrity of the work; right of reproduction; right of distribution; right of lease; right of exhibition; right of performance; right of show; right of broadcast; right of information network dissemination; right of production; right of adaptation; right of translation; right of compilation; and other rights that can be enjoyed by copyright owners. The term of copyright protection is the life of the author plus fifty years in the case of a natural person or fifty years in the case of a legal person, such as a business enterprise.<sup>[14]</sup>

Among the above-mentioned rights, the first four rights are classified as personal rights and the remaining are property rights. Theoretically copyright-related rights are called neighboring rights, and Copyright Law stipulated four types of neighboring rights respectively enjoyed by publisher, performers, producers of sound or visual recordings, and radio or television stations.

Copyright Law divides infringement of copyright into two categories and stipulates them respectively in Article 46 and Article 47 of Copyright Law. Comparatively speaking, Article 46 lists various infringements with civil responsibility while Article 47 lists more serious infringements with administrative punishment and even criminal prosecution. As stipulated in Article 46, any of the following acts of infringement shall be demanded for civil responsibility such as the cessation of the infringement, elimination of the effects, public apology and compensation for the loss:

- a. without the license of the copyright owner, to publish his work;
- b. without the license of other joint authors, to publish their collective work as a work created solely by oneself;
- c. when a person has not participate in the creation, to indicate his name on a work of an other for seeking personal fame and interests;
- d. to distort or mutilate a work of another;
- e. to plagiarize a work of another;
- f. without the license of the copyright owner, to use his work by exhibition, film production or analogous method of film production or by adaptation, translation or annotation;
- g. without due compensation, to use the work of another;
- h. without the license of the copyright owner of a cinematographic work, a work created by virtue of the analogous method of film production, computer software, sound or visual recording product or the copyright-related owner, to lend a work or sound or visual recording product;
- i. without the license of the publisher, to use the typographical arrangement of a book or magazine he published;

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[14] See Copyright Law, Art. 21.

j. without the license of the performer, to broadcast on the site, to transmit in public, or to record, his performance; or

k. other acts of infringement of copyright and copyright-related rights.

According to Article 47, any of the following acts of infringement shall be demanded for civil responsibility such as the cessation of the infringement, elimination of the effects, public apology or compensation for the loss; if the act causes a damage to the public interests simultaneously, the copyright administration department may order the person committing the act to stop the act of infringement, confiscate his illegal gains, confiscate and destroy the infringing copies and impose a fine thereon; if the circumstances are serious, the copyright administration department may also confiscate the key materials, tools and equipment mainly used for making infringing copies; and if the act constitutes a crime, criminal responsibility shall be demanded according to law:

a. without the license of the copyright owner, to reproduce, distribute, perform, show, broadcast, compile or disseminate to the public through information networks his work;

b. to publish a book in which the exclusive right of publication shall vest in another;

c. without the license of the performer, to reproduce or distribute a sound or visual recording product on which his performance was fixed or to disseminate his performance to the public through information networks;

d. without the license of the producer, to reproduce, distribute or disseminate a sound or visual recording product to the public through information networks;

e. without the license, to broadcast or reproduce a radio or television program;

f. without the license of the copyright owner or copyright-related owner, intentionally to escape or infringe the technical measures adopted by the right owner for protecting the copyright or copyright-related rights in his work or sound or visual recording product;

g. without the license of the copyright owner or copyright-related right owner, intentionally to cancel or alter electric data for management of his work or sound or visual recording product;

h. to produce or sell a work on which the author's name is forged.

As in other areas of intellectual property, the people's courts have concurrent jurisdiction with the administrative authorities and a copyright owner can choose to proceed directly in court with a lawsuit. Compensation can be based upon the actual economic losses of the copyright owner or on the illegal gains of the infringer. Where these amounts cannot be determined, a people's court is authorized to award statutory damages of up to RMB 500,000.<sup>[15]</sup>

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[15] See Copyright Law, Art. 48.

## **4. Regulations of the Computer Program and Circuit Lay-out Design**

### *4.1 Protection on Computer Software*

Copyright Law expressly includes copyright software as a protected work in line with TRIPS, but the detailed rules for the protection of the computer program are contained in separated legislation. By the Regulations on the Protection of Computer Software (RPCS) issued by the State Council in 2002, authors enjoy copyright in software developed by them whether the software is published or not. The software of foreign or stateless persons enjoys copyright if it is first distributed in the territory of China. The copyright in the software of foreign or stateless persons under the agreements concluded with China by the countries to which the creators belong or in which the creators reside habitually or under the international conventions to which China is a member state is also protected by the Regulation.

Computer software means computer programs and their documentation. The computer program means a sequence of code-based instructions that can be executed by such devices having information processing capacity as a computer for achieving a certain result. Documentation means the written materials and diagrams, such as the program design specifications, flow charts and operation manuals, which are used to describe the contents, elements, design, functions and specifications, development, testing results and operating method of the program.<sup>[16]</sup>

The software protected by the Regulation must be independently created by the creator and has been already fixed on a form of tangible medium. Authors are encouraged, but not required, to register their software under the Measures for the Registration of Computer Software Copyrights (2002). Registration is not a condition for obtaining copyright protection as copyright attaches itself upon the creation of the software. The benefit of the registration is that it provides evidence of ownership and of the content of the software so that it will facilitate the resolution of competing claims of authorship and enforcement.

### *4.2 Infringement of Computer Software*

Both personal and economic rights are recognized in computer software, including right of publication, right of authorship, right of alteration, right of reproduction, right of distribution, right of rental, right of dissemination through information networks, right of translation, and other rights that shall be enjoyed by software copyright owners. Using standards consistent with the Copyright Law, the Regulation provides civil, administrative and criminal liability in software infringement cases as well as for pre-trial injunctions and

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[16] See Regulations on the Protection of Computer Software, Art. 2, 3.



property preservation orders. As stipulated in Article 23 of the Regulation, any one who commits any of the following infringing acts shall, in the situation, stop the infringement, eliminate the effect, make a public apology, compensate for the loss and bear other civil responsibilities:

- a. without the licensing by the software copyright owner, to publish or register his software;
- b. to publish or register another person's software as his own;
- c. without the licensing by the co-creator, to publish or register the software created jointly as one created by his own;
- d. to sign his name in another person's software or to alter the name indicated therein;
- e. without the licensing by the software copyright owner, to alter or translate his software;
- f. other acts of infringing the software copy right.

As stipulated in Article 24 of the Regulation, besides the above-mentioned civil responsibilities, if his act prejudices the social and public interests, the copyright administrative department shall order him to stop the infringing act, confiscate of his illegal gains, confiscate and destroy the infringing copies and may concurrently impose a fine; if the circumstances are serious, the copyright administrative department may concurrently confiscate of the key materials, tools and equipment for making the infringing copies; if his act prejudices Criminal Law, he shall be demanded for criminal responsibility under the provisions of Criminal Law on crimes of infringing on the copyright and crimes of selling the infringing copies:

- a. to reproduce, wholly or partly, the software of the copyright owner;
- b. to distribute, rent or disseminate through information networks the software of the copyright owner to the public;
- c. intentionally to escape from or disrupt the technical measures adopted by the copyright owner for protecting his software copyright;
- d. intentionally to delete or alter electric data for the right management of the software;
- e. to transfer or license another person to exercise the software copyright of the copyright owner.

#### 4.3 *Protection on the Circuit Lay-out Design*

To protect the exclusive right of the circuit lay-out design and abide by obligation as a member state of TRIPS, the Chinese government promulgated Regulations on the Protection of the Lay-out Design of Integrated Circuits in March, 2001, which came into force on October 1, 2001.

The Regulations makes clear definitions respectively of the key terms such as "integrated circuit" and "lay-out design of integrated circuit." "Integrated