

Discussion on Intellectual Property's Private Right Nature

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Abstract: Intellectual property is a kind of private right. It is neither equal to right of public nor to civil right, but it has the factors of both right of public and civil right. It is very necessary to take intellectual property as a kind of private right legal protection. Under the situation of conflict of powers, it needs to fully consider the coincidence of intellectual property and the other two rights. [Nature and Science. 2004;2(4):84-86].

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1. Concept of intellectual property

Intellectual property is also called intangible property. From the point of the source of the proprietary right of intellectual property, it is a kind of private right that regulates the property ownership of intellectual products. Most countries' juristical works, laws and even international treaty all define the concept of intellectual property from the point of extension. At present, there are the following three kinds of influential definitions in the world:

1.1 The Establishing World Intellectual Property Organization (WIPO) Convention issued on July of 1967 stipulate, the intellectual property includes: (1) literary, artistic and scientific works; (2) performances of performing artists, phonograms, and broadcasts; (3) inventions in all fields of human endeavor; (4) scientific discoveries; (5) industrial designs; (6) trademarks, service marks, and commercial names and designations; (7) protection against unfair competition; (8) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Up to March 10, 2004, the state members of WIPO Convention have been 180 countries (China took part in the organization in 1980). Because the convention has the regulation in Clause 16 that for this convention there should not be any retention, we can think that, most of the countries in the world have accepted the above definitions about intellectual property.

1.2 In the Trade Related Intellectual Property Statement (TRIPS) of World Trade Organization (WTO), the first clause of the first part define the

scope of the intellectual property included in the statement: (1) copyright and related rights; (2) trademarks; (3) geographical indications; (4) industrial designs; (5) patents; (6) layout-designs (topographies) of integrated circuits; (7) protection of undisclosed information.

1.3 1992 Tokyo meeting of Association of Industrial Property Protection (AIPPI) thought that intellectual property can be divided into creative results rights and identifying marks right two classes. In which, the first class includes 7 items, those are patent for invention right, integrated circuits, plant varieties, know-how right (also called technical know-how right), industrial designs, copyright and software right. The later class includes 3 items, those are trademarks, commercial name right (also called trade name right) and other identifying mark right relating with prohibiting unfair competition.

2. Legal character analysis of intellectual property

The preamble principle of the TRIPS points out explicitly that the intellectual property is private right and this makes a basic orientation of the legal character of the intellectual property. Both the intellectual property and the civil right are private right and the two have very close connection. However, because the counter-performance thing of civil right is corporeal thing, the counter-performance of intellectual property is intangible thing and the continuous development of the intellectual property legal institution, the difference between the two becomes more obvious day by day, can not take intellectual property as

equal to civil right simply and should treat them separately. To be specific, intellectual property and civil right have the following differences:

(1) From the point of the social relationship that the two adjust, the social relationship that the intellectual property adjusts is not the social relationship among subjects with equal status, for example the relation between the organization for examination and approval of patent and the patent applicant, the relation between patent administrative authority and patentee and the relation between applicant of trademark registration and trademark examination organization. Besides, the administrative management relationship existing a lot in the intellectual property field makes the intellectual property can not be classified into the category of civil right.

(2) From the point of the contents of the two rights, the intellectual products as useful information combination, have a very special attribute, that once they are published, they will become public products called by economics, everyone can get it and use; while the users usually will not pay consciously for their use action. This makes the creator of the intellectual products and related input cannot get counter repayment. Because the intellectual property is intangible, the occupancy of the owner of the intellectual products to the chose is a kind of virtual occupancy, the producer of the intellectual products cannot invoke the traditional property institution in civil right to claim exclusive right of use to his chose.

Compare with other rights of real right in civil law, the difference between the two is obvious. First, intellectual property is the right of control to intangible thing. Second, intellectual property can have many real rights on one thing, for example the patentee enjoys the rights of prohibiting production, use, promise selling and importing, etc. to his invention creation. Although intellectual property and civil right are both rights against the entire world, the civil right's right against the entire world is absolute. Within the scope of legal prescription, it can exclude all people's disturbance, while the intellectual property's right against the entire world is relative. It is often restricted by other obliges including real right obliges.

(3) From the point of the acquisition and limitation of the right, there are two ways to achieve

proprietary right in civil right: original acquisition and limitation acquisition. The acquisition of the intellectual property needs to go pass certain procedure for appeal, confer exclusive right after the state agency checking it as qualification; while the acquisition of copyright that gets legal protection automatically has no much difference to the original acquisition in civil right; besides, from the point of limitation, the real right in civil law is sine die effective, the effectiveness of real right is correspondent to thing's effectiveness, the effectiveness of intellectual has expiry limitation.

(4) From the point of the territorial scope of the rights that are protected by the laws, territorial protection is an important feature of intellectual property protection, the protective efficiency of the intellectual property cannot exceed the country's territorial scope, while the real right is protected by the *lex loci site* of international private law. No matter where the thing goes, the obligation can claim to the ownership right of the thing.

3. Intellectual property as the juristical basis of the private right protection

The right basis of the intellectual property can be traced back to the *lex natural* of Roman Law. It has both the characteristics of property right and right of personality, and its philosophical basis is equality. This is giving out labor that should get correspondent repayment. As the development of laws, the intellectual property theory also goes through a developing stage from natural right to social contract theory. At the end of 20th century, the right standard in civil right transfers to obligation standard. Influenced by this, from one side, the intellectual property law protects private property right. From another side, it also takes promoting advance of science and technology and the country's economic development, and the highest object. The first clause of Chinese current patent law prescribes explicitly that, to protect invention-creation patent right, encourage invention and creation, be benefit for application and dissemination of invention and creation, promote advance and creation of science and technology and adapt for demand of social modernization drive to draft this law.

Establish efficient private property law

institution can encourage people to create and develop economy. One of Noble prize winners Douglas Nose thought that one efficient property institution that includes encouraging creation and providing adequate personal stimuli is a decisive factor for promoting economic growth. He pointed out that industrial revolution is not the reason for the economic growth of the world and the key of economic growth is institution factor, especially the institution of establishing property ownership. So, it is demanded to establish efficient property rights institution, make individual's rate of return nearly equal to the society's rate of return, stimulate and promote people to be engaged in the activities that fit for the social demand. From the point of protecting private rights, many countries, including China, have established private right protection law institution - intellectual property law institution.

4. Coincidence of intellectual property and public right and civil right

4.1 Coincidence of intellectual property and public right

Public right is the right established for protecting the State and public interests, while private right is the right established for protecting private interests. The division between public law and private law functions a lot for preventing public right interferes excessively in the private right, maintaining the sacredness of private right. However, as the law's socialization goes deep further, State's interests and individual's interests, public right and private right have many coincidence, so there are the tendencies that public law becomes as private law and public law becomes as public law. Intellectual property law is a kind of law that the tendency that private law becomes public law is relatively obvious. Intellectual property is private right and intellectual property law is thought as private law traditionally. The protecting objects of intellectual property, such as invention, works, etc., not only concerns the obligee's private interests, but also connects close with public interests, some inventions even concerns the historic progress of the whole human being's civilization. Besides, from the contents of the social relations that the intellectual property law adjust, intellectual property laws not only regulate the intellectual property obligee's private law relation because of the intellectual creation activity, but also regulate the executive command relation between

State agency and intellectual property oblige. Besides the clauses that limit to the rights of the intellectual property owner which exists a lot in the intellectual property law reflect the interfere of State's public right to the private right, this reflects coincidence of these public right and private right.

4.2 Coincidence of intellectual property and civil right

Relative to intellectual property, civil right has relatively strong absoluteness. However, the absoluteness of civil real right, under the influence of the big environment of socialization of the law, also increases the content of socialization gradually. The principle of the absoluteness of real right started from Roman Law times. Individual's freedom is the highest ideal at that time, ownership right is indispensable tool by which individuals realize free personality, and the laws made absolute protection to it. However, as the development of capitalistic economy day by day, principle of real right absoluteness disposed its disadvantages gradually. At the end of 19th century and the beginning of 20th century, a new law thought appeared, that is the socialization of ownership thought. This thought thought that, on the basis of human nature, ownership should be mastered and owned by individual. But when the individuals exercise ownership, it must conform to the State and the society's public interests. On this point, the socialization of the corporeal property right and the intangible property right becomes public right have some coincidence in some aspects.

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