

# Research on the Connection Mechanism between Copyright Administrative Enforcement and Criminal Justice

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## Abstract

In recent years, with the increasing awareness of copyright protection in Our country, the implementation of the National Copyright Administration "Sword Net" and other special "anti-pornography and anti-illegal" actions, as well as the lowering of the threshold of the crime of copyright infringement, piracy and infringement has been effectively curbed. However, there are still substantial and procedural difficulties in how copyright law enforcement agencies transfer cases suspected of constituting intellectual property crimes to public security and judicial organs. In substantive law, subjective purpose can not be connected; It is difficult to continue copyright administrative illegal and criminal acts. In procedural law, supervision of procuratorial organs can not play an effective role; It is difficult to collect and transform evidence. It is suggested to cancel the constitutive elements of "profit-oriented" subjective crime and the scope of the objective action elements of the crime of infringing copyright. In terms of procedural law, it is suggested to perfect the supervision of procuratorial organs mechanism and explore the self-investigation power of Procuratorial organ in intellectual property crime cases, so as to perfect the connection mechanism between copyright administrative law enforcement and criminal justice in China.

## Keywords

Connection between Two Methods; Copyright; Crime of Infringing Copyright.

## 1. Introduction

The intellectual property protection in China adopts the "dual track system" of administration and judicature. Different from the foreign intellectual property administrative protection mode, the intellectual property administrative organs in China have the functions of both management and law enforcement. With regard to the infringement of intellectual property rights, administrative law enforcement organs shall deal with the lesser illegal acts and public security and judicial organs shall deal with the more serious illegal acts according to the seriousness of the harmful acts. The intellectual property administrative authority shall, in the course of enforcing the law, transfer suspected intellectual property crimes to the public security and judicial organs for handling. But in practice, there are still cases of "substituting punishment for punishment" by intellectual property administrative law enforcement organs. At present, to solve the problem of poor connection between intellectual property administrative law enforcement and judicature is not only a hotly discussed issue in academic circles, but also a difficult problem that the country needs to overcome at present and in the next 15 years. The academic and practical circles have made suggestions on improving the mechanism of "linkage between the two laws". This paper takes copyright (also known as "copyright") in the intellectual property system as the research object, and studies the problems in the connection between administrative law enforcement and criminal justice in the field of copyright (hereinafter referred to as "the connection between the two laws") and suggestions for improvement. So as to provide reference for the improvement of the

"connection between the two laws" in the field of intellectual property and food and environment.

## **2. The Connotation of the Connection Mechanism between Copyright Administrative Law Enforcement and Criminal Justice**

The connection between administrative law enforcement and justice is known as the "connection between two laws" in the academic circle. Zhang Daoxu defined the connection between two laws, which refers to the smooth and orderly transition between the administrative power system and the judicial system of a suspected criminal act. [1] Zhou Zhou, a scholar, defines it as "a case handling cooperation system in which relevant departments perform their respective duties, cooperate and restrict each other in the process of investigating and dealing with intellectual property crimes, and investigate the criminal responsibility of persons suspected of intellectual property crimes according to law". [2]

Administrative law enforcement involves the connection with civil law and criminal law, and the connection between administrative law enforcement and civil law is bounded by "public interest". Those who violate the public interest may be subject to administrative punishment. However, those who violate the copyright administrative regulations with serious circumstances and consequences will be punished by criminal law. This paper studies the connection between administrative law enforcement and criminal law. The "connection between two laws" in the field of copyright can be understood as the connection between the process in which copyright administrative law enforcement organs (National Copyright Administration and local copyright management organs) transfer suspected intellectual property crimes to public security judicial procedures in the process of administrative law enforcement, requiring administrative law enforcement organs not to substitute punishment for punishment. The effective connection of this process is not simply a matter of practical operation, but also needs to improve the relevant laws of the connection procedure in law.

## **3. The Present Situation of the Connection Mechanism between Copyright Administrative Enforcement and Criminal Justice**

There is no substantive law in China that specifically regulates the "connection between the two laws" of copyright, and the relevant substantive law provisions are scattered in the Copyright Law and related laws, criminal Law and relevant judicial interpretations. Administrative punishment shall be imposed if the violation falls within the provisions of the Copyright Law; Where an illegal act reaches the standard scope of the Criminal Law, criminal punishment shall be applied. For example, article 53 of the Copyright Law stipulates that "if a crime is constituted, criminal responsibility shall be investigated in accordance with the law". Article 53 of the Copyright Law is the legal basis for administrative organs to transfer cases suspected of constituting crimes. But the provisions are more general, not specific operability, resulting in the practice of administrative organs do not move the case, the case is difficult to move. In terms of the procedural law of the "connection of the two laws" of copyright, since the mechanism of "connection of the two laws" was first proposed in 2001, China has promulgated a number of legal norms in succession to ensure the perfect connection of copyright administrative law enforcement and judiciary in procedure. For example, the relevant laws and regulations concerning the "connection between the two laws" mechanism of copyright issued in the past three years, Opinions on Strengthening The Protection of Intellectual Property rights, Provisions on The Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs (Order No. 310 of The State Council), Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of

America, and The Plan of The People's Courts for Judicial Protection of Intellectual Property Rights (2021-2025). It can be seen that China has formed a relatively perfect legal framework in terms of the connection procedure between copyright administrative enforcement and judiciary.

## **4. Problems in the Connection Mechanism between Copyright Administrative Enforcement and Criminal Justice**

### **4.1. Problems in Substantive Law**

#### **4.1.1. There is no Connection in Subjective Purpose**

Article 217 of Criminal Law stipulates that the crime of infringing copyright is "for profit". And article 53 of the Copyright Act of infringement of copyright administrative penalties need to be, does not require the offender has the subjective purpose, even if the infringer has caused serious consequences, to meet the plot of the criminal law criminalizing threshold, also by the administrative organ does not collect the infringer subjective profit objective evidence materials and can not be convicted and punished. In fact, it is unrealistic to ask administrative punishment to have subjective purpose.

#### **4.1.2. It is Difficult to Continue Copyright Illegal and Criminal Acts**

Article 53 of the "Copyright Law" specifically stipulates eight acts that violate the "Copyright Law" and need to be subject to administrative punishment, while the crime of infringing copyright only stipulates six corresponding illegal acts that constitute a crime. This means that even if the violation of copyright is serious, it cannot be a crime of copyright infringement. For example, the crime of copyright infringement requires that the object of the act is only a work of fine art, and the Copyright Law also protects all works including fine art. The acts regulated by administrative laws and regulations cannot be effectively reflected in the norms of criminal law, which leads to the difficulty of connecting illegal acts with criminal acts, and leads to the poor connection between copyright administrative law enforcement and judiciary.

### **4.2. Problems in Procedural Issues**

#### **4.2.1. It is Difficult to Collect and Transform Evidence**

Administrative organs law enforcement organs and public security organs have different procedures and standards for collecting evidence. When the copyright administrative law enforcement agency transfers the case suspected of constituting intellectual property crime, it will involve the question whether the administrative evidence can be directly applied in the judicial procedure. In fact, in the collection and transformation of evidence, copyright administrative law enforcement agencies can not achieve smooth connection with judicial organs. The collection and transformation of evidence of copyright administrative law enforcement agencies need to abide by the Criminal Procedure Law and Opinions on Several Issues concerning the Application of Law in Handling Criminal Cases of Intellectual Property Infringement (hereinafter referred to as "Opinions"), but there are certain contradictions between these two laws. First of all, the scope of evidence collection object is inconsistent. According to article 54 of the Criminal Procedure Law, administrative law enforcement agencies can collect material evidence, documentary evidence, audio-visual materials, electronic data and other evidentiary materials. Article 2 of the guideline stipulates that in addition to collecting the above materials, administrative organs may also collect inspection reports, appraisal conclusions, inspection and on-the-spot records in a closed listing form. Secondly, there are contradictions in the collection and transformation of evidence. Article 54 (2) of the Criminal Procedure Law stipulates that evidence collected by administrative organs can be used as evidence in criminal proceedings. The opinions stipulate that public security organs cannot directly apply verbal evidence and need to collect it again. Non-verbal evidence

can only be used as evidence after being examined by the public security procuratorial organ and confirmed by cross-examination by the people's court. As a concrete interpretation of law, judicial interpretation is of great significance to practical operation. The contradiction between law and judicial interpretation undoubtedly brings difficulties to practical operation.

#### **4.2.2. Lack of Effective Procuratorial Supervision**

In intellectual property protection, procuratorial organs shoulder the irreplaceable important functions of prosecuting crimes and ensuring the correct implementation of laws by legal supervision. [3] The procuratorial organ should not only supervise the transfer of cases by administrative organs, but also supervise the timely acceptance and filing of cases transferred by administrative organs by public security organs, which is a kind of "double-headed supervision". Therefore, the supervision of procuratorial organs in criminal cases of infringing intellectual property rights can be divided into administrative supervision and judicial supervision. First of all, in practice, there is the problem of insufficient rigidity of administrative procuratorial supervision. Article 12 of the Provisions of the People's Procuratorates on Handling The Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs stipulates that "if the procuratorial organ finds that the suspected criminal cases should be transferred by administrative law enforcement organs but fails to transfer them, it may put forward procuratorial opinions". However, this kind of supervision is flexible and does not have coercive effect. The lack of effective supervision of administrative supervision leads to judicial supervision becoming "law on paper", which cannot be really implemented. The effect of judicial supervision is related to administrative supervision. If the administrative organ does not transfer the case, the public security organ has no "case source", and the procuratorial organ has no way to supervise its case acceptance. Secondly, information asymmetry can not lead to effective supervision. Administrative organs, public security organs and procuratorial organs belong to different systems. It is very difficult for procuratorial organs to check the law enforcement information of administrative organs. Without case information, procuratorial supervision is even more impossible to talk about. Although information sharing system, established the case but in terms of information sharing mechanism, and some departments only content to sign relevant documents, issuing information platform construction, there is no real carry out, the spirit of the implementation file, make full use of the role of information sharing platform, network platform became the "paper platform", specious and lost its essence. [4] The above two aspects lead to procuratorial supervision can not play a role in practice.

### **5. Suggestions on Perfecting the Connection Mechanism between Copyright Administrative Law Enforcement and Criminal Justice**

#### **5.1. Suggestions on Improvement of Substantive Law**

##### **5.1.1. Abolish the Constitutive Requirement of "Profit-Seeking" Crime**

In order to realize the effective connection between copyright administrative law enforcement and criminal justice at the subjective objective level, either require copyright administrative law enforcement organs to collect the evidence of subjective profit objective in administrative punishment, or cancel the subjective profit objective stipulated in article 217 of criminal law. For administrative law enforcement agencies, it is difficult not only to prove the profit-oriented requirement of copyright infringement, but also to collect and fix the evidence in practice. [5] I agree with the latter. On the one hand, according to foreign experience, most countries, such as the United States, Japan, Italy and so on, have not defined "profit-seeking purpose" as the subjective element of the crime of infringing copyright, as long as the actor has intent in his subjective aspect. [6] On the other hand, China's Copyright Law does not take profit-making purpose as an administrative penalty element, but requires profit-making purpose in the conviction of the infringer, which is not conducive to the connection of the two laws. Zhang

Mingkai, a scholar, thinks that the criminal law stipulates profit-seeking as the constitutive element of a crime, on the one hand, because only profit-seeking can be carried out; On the other hand, the social harmfulness reflected by other factors does not reach the degree of crime. Only by adding the element of profit purpose can the social harmfulness of behavior reach the degree of crime. [7] In fact, some acts of copyright infringement are not for profit, but for communication and sharing. From this point of view, it is also desirable to abolish the "profit-oriented purpose" of the crime of infringing copyright.

### **5.1.2. Reasonably Expand the Act Requirements of the Crime of Infringing Copyright**

Some scholars are opposed to expanding the objective elements of the crime of infringing copyright, because it will violate the principle of legality and does not accord with the characteristics of modesty of criminal law. However, serious administrative violations of copyright can not be reflected in criminal law, which will lead to the copyright administrative law enforcement organs to objectively "not move" and "substitute punishment for punishment". As for the opinion that it will violate the legality of crime and punishment, we can make legislation first and expand the objective elements of the crime of infringing copyright by revising the criminal law, so that there will be no violation of the legality of crime and punishment. Views that do not conform to the modesty of criminal law. The modesty of criminal law means that criminal law should control the scope and degree of punishment. Criminal law means should not be used when other means can be used to crack down on illegal laws and protect legal ones, and heavier punishment should not be used when lighter punishment means can be used to protect interests. [8] Criminal law, as the most severe legal means, cannot be easily initiated. However, if the act of copyright infringement is very serious, the perpetrator cannot be punished more severely because there is no corresponding objective act stipulated in the criminal law. Not only the interests of the right holder can not be guaranteed, but also encourage the wind of infringement by the actor. Therefore, the author suggests to expand the objective elements of the crime of infringing copyright, so that the administrative illegal acts violating copyright in the Copyright Law can be regulated by criminal law when the circumstances are serious.

## **5.2. Suggestions on Improvement of Procedural Law**

### **5.2.1. Explore the Self-Investigation Power of Procuratorial Organs in the Field of Copyright**

In China, criminal cases are generally investigated by public security organs, prosecuted by procuratorial organs, and finally judged by people's courts. The self-investigation power of the procuratorial organ refers to the power of the procuratorial organ to directly file a case and investigate, that is, the procuratorial organ can directly contact the case and investigate the factual evidence of the case. Article 19 (2) of China's Criminal Procedure Law stipulates that the procuratorial organ can investigate the criminal acts of abusing power of judicial staff when conducting judicial supervision over litigation activities. It can be seen that the scope of self-investigation power of procuratorial organs has been limited to the duty crimes of judicial staff after the promulgation of supervision laws and regulations. The author thinks that, with the development of Internet, the copyright crime concealment, wide spread, severe injury consequence, the holder of rights protection cost is high, if the administrative authority to suspected criminal cases, and investigation by the public security organs, the examination and prosecution by the procuratorial authority, the process is too long, adverse to the right holder, Moreover, administrative evidence may not be used in judicial proceedings due to problems in collection procedures, and then the public security organs collect evidence again, and the original evidence may have been lost. Therefore, the author thinks that we can explore the self-investigation power of procuratorial organs on intellectual property crimes, and on the basis of the existing self-investigation power of procuratorial organs, expand the scope of application

of the self-investigation power of procuratorial organs by amending laws, so as to solve the problem of inconsistent standards of evidence collection and transformation in the connection between administrative law enforcement and judicature.

### 5.2.2. Improve the Procuratorial and Supervisory Mechanism

There are two aspects to perfect the supervision of procuratorial organs over the transfer of suspected criminal cases by administrative organs. First, entrusting procuratorial supervision with compulsory effect. If the procuratorial organ considers that the administrative organ has not moved the case, it shall issue a Notice of Transfer of Suspected Criminal Cases to the administrative organ and attach the prescribed transfer time and objection period. Upon receipt of the notice, the administrative organ shall transfer it within the prescribed time or raise an objection to the procuratorial organ within the prescribed time. If the procuratorial organ considers the objection untenable, the administrative organ shall transfer the objection. Secondly, improve the information sharing platform. The information sharing platform is the bridge to break the "isolated island of information" between administrative, public security and procuratorial organs. This platform does not belong to the administrative department, nor does it belong to the public security department or the procuratorial department. It is led by a third party, so it can avoid the influence of other departments on the work of the department. The administrative organ shall timely input the information involved in the case, even if the administrative organ considers that the case is not a crime of intellectual property infringement, it shall also input the information of the case into the platform. In addition, at present, information sharing platforms are generally established around the country, but the information systems are independent of each other. However, the scope of intellectual property infringement is large and the area involved is wide. Therefore, we should start from the overall situation and gradually establish a national case information sharing platform, at least a provincial case information sharing platform, so as to realize the effective supervision of the procuratorial organ over the case transfer. Only when the law enforcement information of suspected intellectual property crime cases is transparent can the procuratorial organs supervise the copyright law enforcement of administrative organs and the acceptance and filing of cases transferred by public security organs. So as to realize the effective operation of the linkage mechanism between copyright administrative law enforcement and judicature.

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## References

- [1] Zhang Daoxu: Study on the Mechanism of "Connection between Two Laws" in Intellectual Property Protection, *Administrative Law Research*, Vol.20(2012)No.2, p.103-108.
- [2] Zhou Zhou: Research on the connection mechanism between Intellectual Property Administrative Law Enforcement and criminal justice, *Journal of Beijing Vocational College of Political Science and Law*, Vol.25(2011)No.1, p26-32.
- [3] Ma Yide: Outline of the Procuratorial Protection System of Intellectual Property Rights, *Intellectual Property Rights*, Vol.35(2021)No.8, p21-31.
- [4] Yi ling: Discussion on transfer mechanism of suspected intellectual property crime cases, *Journal of Hunan University (Social Science Edition)*, Vol.57(2012)No.3, p152-156.

- [5] Zhang Bufeng and Zhang Tianxiang: Copyright law enforcement illegal execution cohesion system research - by the execution point cut, Journal of Liaocheng University (Social Science Edition), Vol.34(2021)No.4,p108-114.
- [6] Gu Yongchao: On the Construction of Substantive Execution Cohesion System of Copyright Crime in China, China Publishing, Vol.41(2018)No.19,p39-42.
- [7] Zhang Mingkai: On "profit-seeking" in Criminal Law, Theoretical Research of Procuratorial Work, Vol.5 (1995)No.4,p40-44.
- [8] Zhang Mingkai: The tolerance of sex in the theory of criminal law, Journal of Local Research (Central South University Journal of Political Science and Law), Vol.39(1995)No.4,p55-62.