Front. Law China 2009, 4(2): 163–177
DOI 10.1007/s11463-009-0010-7

RESEARCH ARTICLE

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Sino-US disputes over "criminal threshold" of intellectual property rights

Abstract In April 2007, the United States filed an application with the DSB of WTO with respect to the issue of criminal law protection mechanism of intellectual property rights in China, which was the first dispute accepted by the DSB arising out of the issue of criminal law protection mechanism of intellectual property rights. The core of the dispute of the case is how to interpret the "commercial scale" under Article 61 of the TRIPS Agreement as the "criminal threshold". It can be seen from the practice of the interpretation of the DSB that while each WTO member is entitled to interpret the term "commercial scale", the boundary of interpretation is subject to Article 61 of the TRIPS Agreement. It is unnecessary for China to lower her "criminal threshold", since China's criminal law protection in intellectual property policy is in compliance with the TRIPS Agreement. In fact, the United States should change from lowering the criminal threshold to how to strengthen the criminal crackdown on piracy under the circumstance of lowering the price of genuine works when imposing pressure on China in the protection of intellectual property rights.

Keywords intellectual property, commercial scale, criminal threshold, TRIPS Agreement

摘要 2007 年 4 月美国就中国知识产权刑事保护机制问题提请 WTO 争端解决机构（DSB）以寻求解决，这是 DSB 受理的第一起就知识产权刑事保护机制问题所引发的争端。本案的争议核心是如何解释作为"刑事门槛"的《TRIPS 协定》第 61 条所规定的"商业规模"。通过 DSB 解释实践，可以看出，"商业规模"的解释主权应属各成员所有，但解释边界受《TRIPS 协定》第 61 条相关条件的限制，中国知识产

Translated from *Xiandai Faxue* 现代法学 (Modern Law Science), 2008, 30(2): 126–132

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关键词 知识产权，商业规模，刑事门槛，TRIPS 协定

Though Sino-US disputes over intellectual property rights have been of a long standing, they are subject to negotiation and consultation under the Sino-US bilateral framework. In April 2007, the United Stated filed an application with the DSB of WTO on China's criminal law protection mechanism of intellectual property rights, which marked US attempts to initiate multilateral mechanisms to solve Sino-US disputes over intellectual property rights, which was also the first case the DSB received with respect to the dispute over the criminal law protection mechanism of intellectual property rights. No matter what is the final settlement of the case, it would be of important influence on how to reasonably interpret the "criminal threshold" under Article 61 of the TRIPS Agreement and how to coordinate the relationships between criminal legislative sovereignties of nations and WTO. Taking criminal law protection of copyright as example, this paper has made a preliminary analysis on such aspects as the practice of interpretation of the texts of WTO, the sovereignty of the interpretation of "commercial scale" and the restrictions on the interpretation sovereignty of the "commercial scale" by the TRIPS Agreement.

1 Legal focus of Sino-US disputes over intellectual property rights

The TRIPS Agreement provides for not only the "minimum standard of protection"[1] of the substantial rights of intellectual property protection of WTO members but also the integrated procedures including the civil procedure, the administrative procedure, the Customs procedure and the criminal procedure for intellectual property protection, among which Article 61 of the TRIPS Agreement requests that WTO members shall establish the criminal procedures to crack down on piracy. China, one of WTO members, has imposed criminal penalties for cracking down on piracy as intellectual property infringement as

[1] "Minimum standards of protection" refers to that the protection of WTO members of substantial rights and procedure rights of intellectual property shall not be lower than the standards of the TRIPS Agreement but may be higher. The minimum standards herein are actually the "current standards" of the developed countries on protection of intellectual property rights, and for most of the developing countries, those are not the "minimum standards of protection" but shall be the "higher standards".

early as its accession to the WTO.

Article 217 of Chinese Criminal Law 1997 provides for the "criminal threshold" of the crime of copyright infringement as follows: "Any person who has the purpose of making profits, when the amount of his illegal income is considerable, or when he has other serious circumstance, shall be sentenced to fixed-term imprisonment or criminal detention no more than three years, and/or fined. Because the provision thereof on the standard of "criminal threshold" is obscure, the Supreme Court and the Supreme Procuratorate jointly promulgated the Interpretation of Several Specific Issues on Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (hereinafter referred to as the Judicial Interpretation) in November 2004, which quantifies the standard of "criminal threshold": The so-called "amount of the illegal income [that] is considerable" refers to the illegal income more than RMB30,000; the so-called "other serious circumstance" refers to the illegal business income more than RMB50,000, or any for-profit duplication and/or distribution of the literal, musical, cinematic, television or video works, computer software or other works of copyright holders with the total of 1,000 copies at least without permission from the copyright holders. In April 2007, the Supreme Court and the Supreme Procuratorate jointly promulgated Interpretation II of Several Specific Issues on Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights to further lower the "criminal threshold" of punishing piracy: The "other serious circumstance" in Article 217 of the Criminal Law shall refer to any for-profit duplication and/or distribution, without permission from the copyright holder, of the literal, musical, cinematic, television or video works, computer software or other works of copyright holders with total of 500 copies at least.

The United States filed two charges against China's "criminal threshold" on crackdown of piracy: Firstly, China's "criminal threshold" on crackdown of piracy is too high. The US held that though China has lowered the "criminal threshold" on crackdown of piracy, such as the starting point of criminal penalties for piracy lowered from 1,000 copies of duplicates to 500 copies of duplicates in total, with the illegal business income amount from RMB100,000 before 2004 lowered to RMB50,000, such move can not remove China's serious piracy problems fundamentally because pirates will take such criminal threshold as "safe harbor", and as long as the limit is not crossed, they can copy and sell piracy works at will. The US emphasizes the piracy acts lower than the "criminal threshold" still constitute the ones of "commercial scale" that shall be given criminal penalties in Article 61 of the TRIPS Agreement. Secondly, the direction of China's "criminal threshold" has defects. Article 12 of the Judicial Interpretation of December 2004 specifies how to calculate the "illegal business income amount", that is, the value of sold infringing products is calculated at "the actual sales price" or "quoted price or the actual average sales price of

infringing products clearly discovered". The US believed that if "illegal business income amount" is determined at the price of infringing products rather than the retail price of the corresponding legal infringed products, it may happen that the lower the actual sales price or the quoted price is, the more piracy products the pirates will sell or provide. Thus, even if an act meets the requirements for piracy of "commercial scale" in the TRIPS Agreement, the pirates will be exempted from criminal penalties because the said act does not reach the "criminal threshold" defined in accordance with the "illegal business income amount" in the Criminal Law. Accordingly, the United States filed the charge alleging that China had not fulfilled her obligations under Article 41.4 and Article 61 of the TRIPS Agreement. [2]

Article 61 of the TRIPS Agreement specifically provides that "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity." In other words, only when the piracy act reaches the "commercial scale" can a crime be constituted for giving criminal penalties, where the "commercial scale" refers to "criminal threshold" for punishing piracy acts. The issue of Sino-US disputes is what degree of piracy reaches constitutes the "commercial scale". China held that 500 copies of duplicates or illegal business income amount of RMB50,000 constituted the "commercial scale", while the United States thought that threshold was too high; with respect to the specific standard of "criminal threshold", the United States did not provide for a corresponding quantitative standard, and in view of the filing by the United States of the dispute to the DSB, the United States seemed to set a lower "criminal threshold" through the DSB to achieve the purpose of unifying the standard of "criminal threshold" on punishing piracy infringement of WTO members. Hence, the dispute herein involves the critical legal issue how the DSB of WTO will interpret the meaning of "commercial scale" in Article 61 of the TRIPS Agreement.

2 Sovereignty over interpretation of "commercial scale"

2.1 Influence of WTO members on the interpretation rights of DSB

When discussing how the DSB interprets the "commercial scale" at present, most

[2] China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, Request for Consultation by the United States, WT/DS362/1, 2007-4-16.

of the scholars deem that it is of great unpredictability as per Article 3.2 of Understanding on Rules and Procedures Governing the Settlement of Disputes providing that "the DSB clarifies the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The customary rules of interpretation of public international law" therein actually refer to the rules of interpretation in Article 31 and Article 32 of Vienna Convention on the Law of Treaties. Therefore, the level of piracy that constitutes "commercial scale" depends on the practices of interpretation of the DSB. Thus, some scholars propose that precedents of interpretation of "commercial scale" by the DSB should be found for consequential citation. The idea is good indeed, but the problem is that this case of disputes is the first on how to interpret "commercial scale" without precedent of interpretation.

In reality, the above-mentioned rules of interpretation are those in ordinary circumstances, where the judicial interpretation right of the agreements is entirely vested with the DSB, but not absolutely. Under some special circumstances, for the specific meanings of some specific clauses, the DSB should appropriately respect the interpretations made by WTO members. For example, Article 17.6 (ii) of the Anti-Dumping Agreement confines the right of interpretation of the DSB as follows, "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities" measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". As for the Anti-Dumping Agreement, the reason why the DSB shall appropriately respect the interpretations made by WTO members mainly originates from the specific provisions in the Anti-Dumping Agreement. In addition, though the relevant agreements did not specifically provide that the DSB shall appropriately respect the interpretations of the relevant clauses by WTO members, it may be deduced from the principle of state sovereignty that the DSB shall respect the interpretations by WTO members. For example, Article 14 (a) of GATS prescribes that WTO members' "measures necessary to protect public morals or to maintain public order" can be taken as defense of exceptional measures for disobeying the provisions of the GATS. In the case "United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services",[3] the

[3] The United States banned the gambling services through network, but did not ban its domestic "face-to-face" provision of gambling services. The reason is the United States believes that network gambling brings forth many threats to public morals and public order, such as organized money laundering, damage to minors and physical health. Antigua as the applicant of the case, however, did not agree on the interpretation of the United States of public morals and public order.

interpretations of "public morals" and "public order" are involved. In the Panel's view, "the content of these concepts (the terms "public morals" and "public order") for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.… Particularly, Members should be given some scope of policy to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values."[4] Thus, it can be seen that in interpretation of WTO multilateral agreements, WTO members have larger space of sovereignty in two circumstances: Firstly, the interpretation of WTO members specifically provided in the specific agreements that should be respected, for example, Article 17.6 (ii) of the Anti-Dumping Agreement; secondly, the situation where there is no common value standard accepted by WTO members, such as, the interpretations of "public morals" or "public order".

2.2 Sovereignty of WTO members over the interpretation of "commercial scale"

If the interpretation of the meaning of the "commercial scale" with respect to the criminal threshold for punishing piracy falls in one of the above-mentioned two circumstances, the interpretations of WTO members will be better respected by the DSB. Article 41 of the TRIPS Agreement provides that "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements." According to such provision, the precondition of the obligation of WTO members to "ensure that enforcement procedures (including criminal procedures) as specified in this Part are available" is being "under their law". In other words, different WTO members may fulfill the obligation of protecting intellectual property by criminal penalties under different laws. Thus, the TRIPS Agreement specifically pointed out in its preamble "the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights" shall be enforced by "taking into account differences in national legal systems". For example, the US criminal threshold of piracy is as follows: "If the infringement was committed by illegal reproduction or sale of one copy or phonorecord of one copyrighted work, which has a total retail value of more than

[4] Panel Report, United States — Measures affecting the cross-border supply of gambling and betting services. DS285/R, 2004-11-10, Para. 6.461.

USD1,000, a one-year felony is constituted.[5] If the infringement was committed by the reproduction or distribution, including by electronic means, during any 180-day period, of at least ten copies or phonorecords, of one or more copyrighted works, which have a total retail value of more than USD2,500, maximum fine of USD250,000 or five-year imprisonment may be imposed."[6] In Japan, any copyright infringement shall be treated as "criminal act" (Liao, 2005) In April 2007, one of the agenda of European Parliament held in Strasbourg, of France was to debate on the constitution of "commercial scale" in the crime of intellectual property. China provides that the crime constituted by intentional piracy shall meet the requirements for 500 copies of infringing duplication or illegal business amount of RMB50,000. Article 41 and Preamble of the TRIPS Agreement clearly require that different "criminal thresholds" of WTO members shall be respected. In other words, the so-called unification of the criminal procedures for protecting intellectual property of WTO members by the TRIPS Agreement are limited to unifying that intentional piracy of "commercial scale" shall be given criminal penalties. To what degree piracy constitutes "commercial scale" and how much fine of criminal penalties or what imprisonment term shall be imposed are mainly "under their law" of WTO members.

The deep reason why the TRIPS Agreement permits WTO members to provide for or interpret "commercial scale" under their law is just like the interpretation of "public order", where the philosophies of criminal offences and theories of applications of criminal law to the protection of intellectual property of nations vary to a large extent.

Firstly, the theoretic understanding of criminal offences by WTO members differs. For example, the concept of crime in the US criminal law is biased toward qualitative provision, where an offence is defined as an unlawful act which may trigger criminal proceedings and application of criminal law, the degree of social hazard is not emphasized, the standard of quantitative provision is very low in legislation, and regardless of quantity or amount involved, any unlawful act occurred may be regarded as offence. However, the concept of crime in Chinese criminal law deems that it is essential to unify social hazard and criminal illegality as well as qualitative and quantitative. As for the crime of intellectual property rights, a large amount or serious circumstances are necessary. Considering the difference in theory, under the legal framework of China's intellectual property protection, there are civil sanction, administrative penalty and criminal penalty with criminal penalty to apply only to serious unlawful acts and with the punishment space of ordinary unlawful acts left to administrative enforcement the means of which include pecuniary penalties and suspension of

[5] 17 U.S.C.S. §506 (2005).
[6] 18 U.S.C.S. §2319 (2005).

business license. The United States has only two corresponding methods, namely, compensation of civil torts and criminal prosecution, and the level of China's administrative penalties is basically equivalent to the penalty of misdemeanors in the US criminal law, both of which tend to the application of the measures for property punishment. (Li Xiao, 2006) Secondly, the value orientations of criminal laws in protecting intellectual property rights are different. The application of criminal law to protecting intellectual property rights is generally based on the following two theories: To protect private property rights and to maintain competitive order, and the difference of nations lies in what interest is focused by protection. The US criminal theory tends to favor the former, holding that the hazard of piracy acts mainly lies in the infringement of private property rights of copyright holders, and thus the level of loss to the copyright holders caused by an infringement act is the major element in deciding whether an infringement constitutes an offence. The quantitative standard of "criminal threshold" only refers to the quantities of the infringing works duplicated and sold and the retail value of the infringed legal works. China tends to protect the latter, believing that the infringement of intellectual property rights not only harms the interest of intellectual property holders but more seriously impairs the normal market competitive order and thus one of the standards on sentencing of piracy in China is to calculate the price of the infringing work itself. Just because of the difference of value orientations, the United States held that it was wrong for China to calculate the "unlawful business amount" in the "criminal threshold" at the price of the infringing work itself rather than the retail price of the corresponding legal work. As a matter of fact, just as two sides of a coin, both the protection of property rights and the maintenance of competitive order are the important and indispensable functions of the modern intellectual property regime, and thus different emphases on the criminal law protection of intellectual property rights between China and the US should give little cause for criticism. (Tian, 2003) However, now that the United States has filed the disputes with the DSB, China shall investigate the specific provisions in the TRIPS Agreement. Article 61 of the TRIPS Agreement provides that "criminal procedures and penalties shall be applied in cases of copyright piracy on a commercial scale". The "commercial scale" here is the attributive of "piracy", which means that only when a piracy act reaches the "commercial scale" can a crime be constituted, and thus judging whether piracy constitutes "commercial scale" shall be based on the price of piracy itself rather than the retail price of the legal work involved. Of course, it is permissible if WTO members are willing to provide a higher standard of protection, such as, using the retail price of the legal works involved by piracy infringement to judge whether piracy is of "commercial scale", since the TRIPS Agreement provides that the protection standards provided by members shall not be lower than the provisions of the TRIPS Agreement, without

restricting the protection standards provided by members that are higher than those provided for in the TRIPS Agreement.

Finally, countries have different provisions on how to use criminal law in cracking down on piracy, and even the same country has different provisions at different stages. Take the United States for example. The Copyright Act of 1790, the first one in the US, did not provide for the criminal liability of copyright infringement. While, nearly a century later, when revising the Copyright Act in 1897, the US Congress firstly added the criminal liability of copyright infringement, which provided that any defendant who commits infringement with the two elements of "on purpose" and "for profit" shall be punished as misdemeanor. In 1976, the US Congress completed the full revision of the copyright act, which kept on imposing misdemeanor on the infringement of copyright, but revised the elements of a crime. The United States Congress adopted the Piracy and Counterfeiting Amendments Act under the pressure of the strong lobby community in 1982, and passed the Copyright Felony Act in 1992 to determine piracy of certain commercial scale[7] as "felony". One of the reasons why the United States imposed felony on piracy of certain scale is that the procurators and judges at that time were unwilling to take piracy as a serious crime with penalties imposed. For the investigated and prosecuted infringement cases, procurators were unwilling to institute a public prosecution while judges were inclined to make too lenient judgments. The Congress thought that such results should partially attributed to copyright infringement regarded as misdemeanor, and US Department of Justice would rather devoted limited judicial resources to coping with felony. (Wu, 2000) In 1997, the United States Congress adopted No Electronic Act, and in 1998, the US president signed Digital Millennium Copyright Act. The promulgation of such two acts indicated the United States had extended the criminal law protection of copyright to the area of electronic information and strengthened the strength of criminal penalties. It can be seen from development of the history of US criminal law of copyright that her adoption of criminal law to crack down on piracy has started from scratch and gone through different stages of development from relax to strict.

A conclusion can be drawn from the above-mentioned analysis that though the TRIPS Agreement requested members to unify application of criminal penalties to punishing piracy of a "commercial scale", it did not make integrated provisions on what degree of piracy constitutes a "commercial scale" and what imprisonment term or how much amount of fine should be imposed. Just as some

[7] Refer to any person who commits an offence shall be imprisoned not more than 5 years, or fined in the amount of USD250,000, or both, if the offense consists of the infringing reproduction or distribution, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, with a retail value of more than USD2,500.

scholars pointed out, though countries indicated a convergent trend to protect intellectual property rights by means of criminal liabilities, in China or other countries, there existed great difference in theoretic cognition of such issues as criminalization and decriminalization, legislative mode and category of criminal law, and static legal regulation and dynamic criminal justice of tort acts and such difference in theoretical concepts accompanies that of economic development stages, indicating that the integration of intellectual property rights represented by the TRIPS Agreement can not go too much in advance in criminal procedures. (Sun, 1999)

3 Restrictions of the TRIPS Agreement on WTO members' sovereignty over interpretation of "commercial scale"

Now that WTO members can interpret what "commercial scale" is under their own law, whether can they formulate the "criminal threshold" at will? For example, whether can they provide that only infringement duplication or distribution of 100,000 copies may constitute piracy of a "commercial scale"? Whether is the sovereignty of members in interpretation of the "commercial scale" of members limited to some extent? In this regard, we shall study the specific provisions of Article 61 of the TRIPS Agreement. The provisions thereof on criminal penalties are of the following levels of meanings: Firstly, criminal penalties shall be imposed on intentional piracy of a "commercial scale"; secondly, the means of criminal penalties to be adopted include imprisonment and/or fine; thirdly, the criminal penalties of piracy shall be consistent with those of the equally serious crimes; and fourthly, the criminal penalties shall be sufficiently deterrent. It is not hard to see that the third and fourth levels of meanings constitute restrictions on the interpretation by members of the "commercial scale", which means that the interpretation shall match the penalties of equally serious crimes and sufficiently deterrent to piracy. Thus, we shall further analyze whether China's "criminal threshold" meets those requirements.

An equally serious crime of piracy should be the crime of theft in China. According to the Provisions on the Standards on Determining the Amount of Crime of Theft jointly promulgated by the Supreme Court, the Supreme Procuratorate and the Ministry of Public Security, the "criminal threshold" of the crime of theft is "RMB500 to RMB2,000", and provinces and municipalities may formulate their own provisions within such range according to specific circumstances. Take Shanghai for example. The standard on estab- lishing a case of the crime of theft is RMB2,000. One of the "criminal thresholds" of the crime of copyright infringement is the piracy or distribution of 500 copies, and for ordinary piracy of DVD discs at the unit price about RMB5, the total unlawful

income of a criminal suspect is about RMB2,500 with net profits about 1500 after reduction of cost, which is basically consistent with the constitution of the corresponding crime of theft. It shall be further pointed out that as alleged by the US, China adopted the criminal threshold standard of "illegal business amount" in cracking down on piracy, and the relevant amount is calculated at the price of piracy works, which would lead to the situation where the lower the price of the pirate infringing work, the larger the piracy scale. Such charge does not hold water in fact. The reason is that the "illegal business amount" is just one of the standards constituting the "criminal threshold" but not the sole standard. Even if the price of the infringing work is rather low, a crime will be constituted once the infringement quantity (500 copies) is reached.

The blame of the United States on China's "criminal threshold" that may strike a chord is that China's criminal threshold is "not a sufficient deterrent" to piracy acts. Though China has proved to the United States China's determination to protect intellectual property rights as well as her achievements made in recent years, audio video piracy infringement and computer software infringement obvious on the streets in China is seemingly on the rise. (Haber, 2006) Is the reason why there are comparatively severe piracy infringements currently in China that China's "criminal threshold" is too high? Will China's piracy situation not be severe if infringement on one piece of work is to be imposed with criminal penalties? The issue is not so simple, and quantitative analysis is needed. The actual level of the "criminal threshold" of the piracy crime currently can not be exactly analyzed due to the limitation of the public information in China.[8] If the actual "criminal threshold" of the piracy crime is basically close to that in legislation and there are still plenty of piracy acts in China, it will be indicated that the present "criminal threshold" in legislation is actually too high, where the infringer may conduct piracy acts under the legislative "criminal threshold" and avoid penal sanction. Hence, it can be deduced that China's legislative "criminal threshold" is not a sufficient deterrent. In this regard, the United States may file the "violation complaints" with the DSB, alleging that China's relevant laws on criminal penalties of piracy are inconsistent to the obligations in Article 61 of the TRIPS Agreement. Of course, the United States shall have quantitative evidences of the basic closeness of the actual "criminal threshold" and the legislative "criminal threshold". Otherwise, if China's actual "criminal threshold" is higher than her legislative "criminal threshold", such as in the judicial practice where the average quantity of piracy imposed with criminal penalties far surpasses 500

[8] For example, according to the report from the People's Court Daily in April 2007, China's courts at all levels heard total of 2,277 cases of intellectual property infringement and gave sentencing to 3,570 persons in 2006. However, it was unknown how many piracy crimes there were, and what were the specific amounts or what was the average infringement quantity of the piracy crimes.

copies, in other words, a large number of piracies with about 500 copies each have not been imposed with criminal sanction, which is not a legislative issue but a issue of corresponding enforcement mechanism. If the United States files a lawsuit with the DSB concerning the issue in China's domestic enforcement mechanism, it can not file "violation complaints", because Chinese laws conform to the provision of Article 61 of the TRIPS Agreement "for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale", but can only file the "non-violation complaints".[9] Filing of a "non-violation complaint" apparently goes against the will of the US because the recommendation on ruling of "non-violation complaints" is not enforceable. The author believes that the criminal law protection of intellectual property rights in China is mainly an enforcement issue rather than a legislative issue.[10]

The author believes that the main reason for the issues in law enforcement lies in that the present criminal legislation on intellectual property rights may have neglected the by-stage features of intellectual property protection. The by-stage features are presented in two aspects: Firstly, the by-stage feature of the awareness in criminal law protection of intellectual property rights, that is, the awareness of Chinese citizens on protecting intellectual property rights has been gradually established, but it may still be hard to accept that 500 copies of duplicates constitutes a crime, for which a period of understanding and assimilation is required. That is just like the United States before 1982, when procureators and judges were unwilling to treat piracy as serious offences, and Justice Department of the US was also unwilling to devote her limited judicial resources to criminal law protection of intellectual property rights. Secondly, the by-stage feature of economic development. Though intellectual property protection is inherently "to add fuel of interest to the fire of wisdom", intellectual property protection of a nation shall adapt to the stages of her economic development. For example, an authentic DVD disc is sold at USD14 per copy in the US, and nearly no consideration will be taken in buying a copy of DVD in the US as compared with the salary level of the American people. However, a copy of authentic DVD in China is generally sold at RMB30 approximately, and compared with China's

[9] The so-called "non-violation complaints" refers to that though the measures adopted by a member have not violated the agreements of WTO, if the measures cause losses to the interest of a member under the agreements of WTO or hamper the realization of such interest or the goal of WTO, other members may also file lawsuits with the DSB against the member that implements such measures.

[10] For example, a city destroyed total 7.21 million copies of piracy discs in 2005, and 6.77 million copies of piracy discs in 2006; from January to April 2007, the investigated and punished dens of unlawful audiovisual products wholesale in the whole city reached 30 with piracy discs more than 10,000 copies respectively, but very few have entered the judicial procedure with criminal penalties imposed.

present salary level, people will hesitate before buying a copy of DVD. This is the feature in the economic development of China, where a pirated product will take the vacancy at a low price while people can not afford to buy an authentic one at a high price. The fundamental purpose of intellectual property protection is to promote the transmission of cultural knowledge, science and technologies. As a result of the protection of intellectual property rights, if people can not enjoy the cultivation of knowledge or can joy it only at huge economic cost, what is the value of such protection? Due to such primary reasons, we understand the deep meaning of "pure laws do not function well". This phenomenon does not exist only in China. In Japan, though Japanese legislation explicitly provides that any copyright infringement is a crime. While in fact, copyright infringements that are not very serious are generally handled in accordance with civil procedures. Obviously, the practice of pan-criminalization of copyright infringements is worth discussing. (Liao, 2005) As a matter of fact, in April 2007, the Supreme Court and the Supreme Procuratorate of China jointly promulgated Interpretation II of Several Specific Issues on Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights to further lower the "criminal threshold" from 1,000 copies of duplicates in 2004 to 500 copies. The author is worried whether the piracy act of illegal duplication of 500 copies can be actually imposed with criminal sanction in the judicial practice because there were reports indicating that based on such standard, more than one hundred persons may be sentenced annually in Hangzhou. Therefore, how many people should be sentenced accordingly across China? Furthermore, the United States will take that as an excuse, questioning why 500 copies of duplication may not be reduced to one copy when 1,000 copies of duplication can be lowered to 500 copies. The author has doubt on whether the judicial interpretations, especially those concerning criminal aspects, have gone through strict demonstration and full discussion, and whether there are supports from data models.

In fact, the US protection of copyright also emphasizes the adaptation to its economic development stage. Though the United States adopted the Copyright Act as early as 1790, it did not join the Berne Convention of 1883. In the following 200 years approximately, the United States did not protect the works of foreign nationals or just protected them in limited conditions until the year 1988 when it joined the Berne Convention. The US attitude towards international protection of copyright indicated that when the publication and printing industry or other means for transmission of cultural achievements is still not advanced in a nation, to protect the copyrights of foreigners usually causes losses to its economy. (Zheng, 1997)

4 Conclusion

Through the above-mentioned analysis, we can draw the following conclusions on the charge by the United States with the DSB by claiming that China's "criminal threshold" on intellectual property protection is too high: Firstly, WTO members shall, through criminal legislation, impose criminal penalties on piracy of a "commercial scale". Secondly, members are entitled to provide for the degree of piracy that constitutes a "commercial scale" "under their law". Thirdly, when providing for the "commercial scale" under their law, members shall be constrained by the following two factors: Firstly, the provision shall be consistent with the level of the punishment on equally serious crimes; and secondly, the provision on criminal penalties shall be sufficiently deterrent. Fourthly, China's present "criminal threshold" is very low, and the main reason why the anti-piracy situation is still severe in practice lies in law enforcement, which is in turn originated from the fact that the "criminal threshold" on intellectual property protection surpasses China's current development stage. The 21st century is an era of knowledge economy, when the knowledge based on property rights will, as the most important factor of production and wealth resources, be the centralized presentation of enterprise competitiveness and even national core competitiveness, hence to protect intellectual property rights is urgently necessary for China to improve her international competitiveness. The establishment of China's strategy of intellectual property protection is mainly based on the demand of China's economic development. Of course, what can not be neglected is the big pressure imposed by the United States constantly for China to enhance her intellectual property protection. The United States has constantly imposed pressure on China's intellectual property protection since the 1980s. In 1989, the US trade representatives listed China in the "Key Watch List" as per "Special 301", ending up with the promulgation of China's new Copyright Law in 1990; and consequently, the US had successively carried out "Special 301" investigations on China in 1991, 1994 and 1995, accordingly ending up with signing 1992 Sino-US Intellectual Property Protection Memorandum, 1995 Sino-US Intellectual Property Protection Agreement and 1996 Sino-US Intellectual Property Protection Agreement. In 2005, four years after China's accession to the WTO, the United States still listed China in the "Special 301" key watch list. (Johnson, 2006) However, we should see that if the United States neglects the efforts made by China in protecting intellectual property rights and proposes a level of intellectual property protection that surpasses China's development stage, the practical effect may not be good, and the matter may even become worse even if China accepts such requirement. Therefore, at present, the United States shall alter its policy from asking other countries to increase

criminal forces against piracy to lowering the price of its original products. The protection system based on the rational balance between intellectual property protection and the interest of intellectual property users will be the reasonable and practical strategy of intellectual property protection.

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