



On the necessity of incorporating IP Laws into the Civil Law of China and How

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Abstract

To codify IP laws into the Civil Law is the way to go for the modernization of the Civil Law in China. China, a mega economy rising swiftly in the last couple of decades and a latecomer to the rule of law, should grasp the moment, ride on the tide of history, surpass its forefathers, break away from the mould and pave the way to modernizing the Civil Law. Furthermore, by codifying IP laws into the Civil Law, China will be laying a solid legal foundation for the long-term strategy of innovation-driven development and for the rule of law in China.

Keywords

Civil Law · General Provisions of the Civil Law · General Principles of the Civil Law · Intellectual Property (IP) · Codification

1 Introduction

In March 2017, China promulgated the “General Provisions of the Civil Law”. Thereafter, China has been pushing actively to table the various Special Provisions of the Civil Law in 2020, which will be incorporated into the Civil Law Code as one complete piece of legislation. With regard to the issues of whether intellectual

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property (IP) laws should be added into the Civil Law Code and if so, how, controversies exist. While some Civil Law academics are naysayers due to misunderstanding of IP laws, some IP scholars remain passive because of the conceived specialty of IP rights. Although the legislation program of the National People's Congress seems to have dropped the idea of incorporating IP laws into the Civil Law Code, this chapter advocates that IP rights, which are objectively of private right nature, are a new form of real right¹ that has gone through the Industrial Revolution, been ushered into the knowledge economy and fundamentally changed the property structure of human society. IP rights have become a new member of the property system. Following the objective needs of technological, economic and societal development, and judging the development trend of legislation of the Civil Law from a global perspective, codification of IP laws into the Civil Law is the grand trend for modernizing the Civil Law of China. As a mega economy that has risen swiftly in the last couple of decades and a latecomer to the rule of law, China should grasp the moment, ride on the tide of history, surpass its forefathers, break away from the mould and pave the way to the modernization of the Civil Law. Furthermore, China should codify IP laws into the Civil Law and lay a well-established legal foundation for the long-term strategy of innovation-driven development in China.

In the following six sections, this chapter will discuss how the establishment of IP rights has revolutionized property (1), the doctrinal and practical values of codifying IP laws into the Civil Law (2), choice of models for the fusion between IP laws and the Civil Law (3), the relationship between IP laws, the General Provisions of the Civil Law and its respective chapters (4), technical issues for fusing IP laws into the Civil Law (5), and finally why the issue of reuniting IP laws with the Civil Law is closely related to the securing of the rule of law in China (6).

2 The Establishment of IP Rights Has Revolutionized Property

That the results of knowledge and technology have become the objects of property rights manifests a revolution in the history of property.² According to traditional jurisprudence or economic theory, possession or labour is the foundation of property. The production pattern in an agricultural society means that the various useful material objects and the interests brought by labour are the most natural property. Gold is property in an ancient agricultural society, but not the “golden touch”

¹Article 2 of the Property Law of the People's Republic of China (PRC) provides the definitions for “property” and “real right”: “(1) This Law shall apply to the civil relationships generated from the ownership and utilization of properties. (2) The term “property” as mentioned in this Law includes real estates (immovable property) and movable property. In case other laws also stipulate certain rights to be the objects of real right, those provisions shall be followed. (3) The term “real right” as mentioned in this Law refers to the exclusive right of direct control enjoyed by the holder according to law over a specific property, including ownership, usufructuary right and real rights for security.

²Liu Chuntian, Analysis of IP Rights (in Chinese), Social Sciences in China, 2003, No. 4.

that transforms minerals into gold. In other words, knowledge and technology hidden behind the material property and labour lack the conditions to become property. This is consistent with the property system and property theory of agricultural society that have been developed and perfected over thousands of years.

The progress of technology gave birth to the industrial civilization. Commercially, knowledge and technology hidden behind materials and labour have come to the fore, and the golden touch has become property and the object of market exchange. Legally, this phenomenon has unleashed a brand new form of property—IP rights. With the maturing of knowledge and technology transaction and the perfection of the IP system as a property system, people realize that it was neither the “things”, which are the objects of traditional property, nor the act of “labour” that led to the emergence of the new forms of property such as IP rights; rather, it was the other human behaviour of creation, which has been hidden behind labour and yet decided the rise and fall and the specific form of labour. Creation is the source of all knowledge and technology. Without creation, there will be no knowledge and technology, and no labour. In the era when there was only labour, knowledge and technology were nothing but specific forms of labour. The emergence of IP rights, which take creative results as their hallmark and value those results by market standards, has triggered civilized societies to readjust the property system that has been formed over a long history.

That IP rights have become the *de facto* “first property right” is an indicator of a major revolution in the history of property.³

The birth of IP rights also ushers in new inquiries about property, its essence and source. According to economic theory, any property must possess “quality” and “quantity”, with the former being its essence and the latter being the yardstick for measurement. Judging from the “quality” perspective of property, “things” as objects of property are derived from their usefulness, which, after deducting the natural attributes of material, depends entirely on the knowledge and technology that exploit the “things”. Labour in abstract as a carrier of values, i.e. one of the sources of property, has its true essence in how much energy (power) it can generate. Concrete labour derives its usefulness entirely from its dominance over the knowledge and technology of labour, which decides the actual form of labour. If there is no knowledge and technology to control human mental and physical activities, such activities cannot be labour, and are instead wasteful consumption of natural energy with no value, usage value or social meaning. Therefore, what really makes up the core and soul of property is the dominance of human mental and physical capability by knowledge and technology, in addition to natural factors and regardless of its exterior appearance.

Looking at the “quantity” perspective of property, excluding natural factors, what decides the value of a material property in the knowledge economy era is not the amount of labour, but rather IP rights. Knowledge, technology and commercial indicators play a decisive role in the value composition of modern society. Trade in goods, trade in services and trade in IP rights under the governance of the World

³Liu Chuntian, *That IP Rights are the First Property Right is the Discovery of the Civil Law Jurisprudence* (in Chinese), *Intellectual Property Rights*, 2015, No. 10.

Trade Organization (WTO) include almost all the property forms of the modern world. While the object of trade in IP rights is exclusively knowledge and technology, trade in services such as financial, technological and commercial service derives most of its value also from knowledge and technology. Trade in goods under the dominance of the real right is no exception, as goods become the objects of trade mainly due to knowledge, technology and commercial indicators, after deducting the natural factors. Contemporary material products can hardly be marketed without the help of IP rights. The knowledge economy is now revolutionizing the traditional understanding of “major” and “subsidiary” values. Traditional wealth treats physical materials and the amount of human labour as the source or subject of product value and treats knowledge and technology only as “technically added value”. Nowadays, the more expensive man-made products are, the higher the percentage that IP rights take up in the value composition and the lower the contribution labour can make. From aircraft to limousines, TVs, computers, smart phones, French perfumes, luxury bags and wine, Italian fashion clothing, Chinese Maotai and the like, the product value all comes from IP rights. Study shows that although China produces 90% of the mobile phones in the world, its contribution is mainly manufacturing labour, which is low in the global value chain, and can earn a profit margin of less than 5%. In contrast, Qualcomm, Apple, Samsung, etc., which provide the core knowledge and technology, walk away with 90% of the profit. On the state level, those countries which have the strongest capability in terms of knowledge and technology and the most well-known trademarks must also be the richest and most competitive.

In the knowledge economy, knowledge and technology are the real source of value for material products, whereas objects and labour are the by-product of knowledge and technology. Along with the swift and powerful advancement of digital technology, the trend of the property system is that IP rights have jumped to become ahead of, superior to and more important than material property and are the most important and crucial property form. Decades ago, it was the tycoons of cars, steel and railroads whose wealth could match that of a nation. Nowadays, companies with knowledge and technology as their core property, such as Apple, Microsoft, Google, Samsung, etc., are the new leaders in wealth. IP rights are fast swirling up, replacing the traditional rights over things and becoming the basic, core, decisive and dominant power of the property system and the de facto “first property rights”. This is a logical development and a practical one too.

3 Doctrinal and Practical Value of Codifying IP Laws into the Civil Law

The codification of IP laws into the Civil Law has both doctrinal and practical value.

3.1 The Civil Law Principally Guides IP Laws

The codification of IP laws into the Civil Law allows not only the spirits, principles and system of the latter to be systematically projected into the individual IP laws but

also the latter's strength to permeate into the implementation of IP laws. Such codification has both declaratory meaning and substantive value. Human history has been one of constant liberation and gaining of more freedom. Real rights provide basic protection for human rights. The history of property has evolved through stages of monopoly by public power, regulation and private autonomy as society progresses. The precursor of IP rights, be it technological franchises or publishing privileges, all derived from regulatory property rights. The private right nature of IP rights does not depend on any one person's subjective view, but is rather the inevitable result of technological, economic, societal and legal developments, as well as the objective demand of market economy. The practice of history has proven that the establishment of private rights that accompany the market economy can stimulate human creativity; effectively push forward technological, economic and social advancement; and thereby create and accumulate more wealth for the elevation of the living standards of mankind.

That IP rights are private rights has developed into the consensus of the international community in the last decades. Codifying IP laws into the Civil Law is certainly one development trend of the codification movement of the civil law jurisdictions. The so-called codification is the systemization of laws. Systemization is at the same time a thinking tool, a path for legal actions and the goal of laws. Systemization of laws is the product of alliance between the Civil Law traditions of civil law countries, science and rational thinking. The underlying cause for the systemization of laws is the objective demand for legal reform which stems from technological, economic and social progress and the public. Codifying IP laws into the Civil Law can avoid needless repetition and the parallel existence of the so-called IP Code that might even conflict with the Civil Law.

For historical reasons, the establishment of IP laws in the PRC has developed outside the system of the Civil Law legislation, with no framework to abide by, no system to inherit from, no theories to follow and no practice to reference, and has grown single-handedly, separately and individually on the barren land of unitary public ownership, a planned regime and a backward agricultural economy. At the beginning, crossing the river by touching stones on the riverbed, people paid more attention to the superficial difference between the IP system and the traditional property system; and there was no understanding of the commonality between the two systems and their respective essence on the logical abstract level and no understanding of IP laws on the theoretical abstract level either.

The IP legislation was based on the procedural need of having to ascertain rights, followed the traditional thinking and models of the relevant government agencies and was completed based on drafts by different government agencies. The drafters were mostly government officials and technocrats long trained in the planned economy, and few were legal experts. Those drafters lacked the awareness of private rights and legislative experience for localization. Among individual IP laws, there was insufficient mutual echoing and connection, not to mention the guidance over and integration of IP laws by the spirits, goals and principles of the Civil Law. This negatively affected the coordination between individual IP laws and the systems of the Civil Law that were developed in parallel, which led to inherent difficulties for legal practices. For example, the Trademark Law, the Patent Law and the Copyright Law all had disregarded the provisions of the Civil Law and set up their own systems of civil

subjects, which were not abolished until 2001. There were also various provisions contradicting the principles of the Civil Law. Comforting, though, was the fact that the 1986 General Principles of the Civil Law include IP as one of the civil rights⁴ and provide the abstract reasoning framework and systematic demarcation, which helped to clarify the private right nature of IP rights from a macro perspective, and set the direction for the later smooth operation and perfection of individual IP laws.

Therefore, some opine that under the governance of the General Principles of the Civil Law, the individual laws of things, copyright, trademark, patent, contracts, family and inheritance constitute a Civil Law system which is a *de facto* Civil Law Code of Chinese style. According to them, the General Principles of the Civil Law are the framework, and all other laws just mentioned are the details; they appear to be loose, yet clearly structured, with a focused spirit despite a loose appearance. However, during the course of establishing IP laws, the tendency of “de-privatizing rights” and “de-Civil Law-ization” manifested itself due to the influence of power and interests, which hindered the integration of IP laws with the Civil Law and the systemization of IP laws, causing difficulties for social life and the judiciary. The judiciary has to constantly issue large amounts of “interpretations” in writing to connect, coordinate and integrate these contradictions, conflicts and problems,⁵ which is in essence connecting IP systems with the basic principles and systems of the Civil Law, towards their incorporation with the Civil Law and systemization. Such interpretations are filling the vacuum left behind by the legislation. However, it is inappropriate for the adjudicating judges to undertake this legislation-like task, which runs the risk of being biased and over-generalized. Such a patchwork of constant piecemeal fixings in the absence of legislation and systemic thinking is not legislation after all and eventually can hardly establish a stable, systematic and statutory relationship between IP system, the General Principles of the Civil Law and other Special Provisions of the Civil Law. As a result, new problems and conflicts will arise in the long run.

In the beginning of the twenty-first century, during the Civil Law codification movement in the PRC under the influence of the General Principles of the Civil Law, the legislature had in mind to set up an “IP chapter” in the Civil Law. Unfortunately, constrained by insufficient knowledge, and lack of doctrinal guidance, a vision and an ideal, the forest was missed because of the trees, and the

⁴Section 3 (Intellectual Property Rights) of Chap. 5 (Civil Rights) of the General Principles only mentions the overarching term of IP rights in its title and enumerates three specific kinds of IP rights, namely, copyright, patent and trademark. Article 94 provides: “Citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works and obtain remuneration in accordance with the law”. Article 95 stipulates: “The patent rights lawfully obtained by citizens and legal persons shall be protected by law”. Article 96 foresees: “The rights to exclusive use of trademarks obtained by legal persons, individual businesses and individual partnerships shall be protected by law”. Article 97 provides: “Citizens who make discoveries shall be entitled to the rights of discovery. A discoverer shall have the right to apply for and receive certificates of discovery, bonuses or other awards. Citizens who make inventions or other achievements in scientific and technological researches shall have the right to apply for and receive certificates of honour, bonuses or other awards”.

⁵Li Chen, From the Need of the Judiciary for IP to the Codification of the Chinese Civil Law (in Chinese), National Judges College Law Journal 2016, No. 12.

proposed “IP chapter” was not satisfactory, as it only had few articles, paid much attention to technicalities, fixated on the seeming difference between the objects of IP rights and those of the traditional property rights and lacked the awareness of the essence of IP rights and their deep and internal linkage with the Civil Law. This led to a twofold misunderstanding by the Civil Law community and the society at large: On the one hand, IP rights were ill-suited for incorporating into the Civil Law. On the other, the IP community disagreed with the incorporation of IP rights into the Civil Law. Fifteen years have since elapsed, and the above-mentioned problems of knowledge, vision and ideal have been clarified. Therefore, when the enactment of the Civil Law was again initiated, IP scholars have now more of a unified view that IP laws should be incorporated into the Civil Law.⁶

The General Provisions of the Civil Law of the PRC have combined the historical practices, referenced the basic spirits and paradigms of foreign laws and international treaties and again, as some kind of the Basic Law, confirm again the essential nature of IP rights, which has a profound meaning. However, it is by far not enough, as what is needed is the genuine integration of IP rights into the Civil Law. If the Civil Law can set up general rules for IP rights, the appearance and spirits will be unified. Under the guidance of the General Provisions of the Civil Law, individual IP laws can be better interconnected,⁷ and current fundamental conflicts can be solved more pragmatically, which will have great benefits for the service economy, social practices, legal research, civil education of citizens’ legal awareness, the connection with the international community and the economic and social effects of systemization.

3.2 Feedback from IP Theories and Systems to the Civil Law

The more diverse all matters on earth are, be they technology or society, city or state, the more elements need to be added and consolidated into the current foundation, and the more functions desire to be achieved. The lower the costs and the better the effects, the more order and systemization will be needed. The perfection of any and every system is conditional and relative. Any perfect system will be disrupted when its supporting conditions have changed. In a near perfect system, any addition of new elements and functions will pose a challenge. The system designer must deconstruct, even overhaul the incumbent system, adopt revolutionary reform and rebuild new systems according to the demand of changed conditions. Any substantive progress is not just an isolated, incidental and simple physical adding-up of the changes to the existent matters and life systems. All new knowledge, technology and ways of life are not extraterritorial visitors, but are derived from the existing

⁶The Chinese IP Law Society under the presidency of the first author of the present chapter has proposed “IP Chapters for the Civil Law Code” in 2017, which has 7 chapters and 96 articles.

⁷Li Shishi, *The General Provisions of the Civil Law is the Basic Law for Establishing and Perfecting Civil Legal System* (in Chinese), *The People’s Congress of China* (half-monthly), 2017, No. 7.

knowledge, technology and ways of life. Any new system is an inheritance from, a breakthrough to and a qualitative jump over the old system.

The fusion of IP laws into the Civil Law Code has its milestone significance not in the simple addition of a new property law member into the existent Civil Law Code, but in the fusion of such a brand new subsystem, which is a historical transcendence over a series of Civil Codes typified by the French Civil Code since the nineteenth century. The substance, system functions, business models, unique property functions and the declared theory and logic about the origin of property, methodology and explanation capacity of IP rights can provide feedback to the Civil Law,⁸ bringing it to the new era of the knowledge economy. One simple example is the moral rights of an author, which do not perish with his death immediately, but remain in force for a certain period post mortem,⁹ even indefinitely in some jurisdictions.¹⁰ This can have some feedback for the Civil Law, which categorically provides for the immediate cessation of moral rights (or personality rights) the moment the author deceases.

How IP laws have adapted to new technologies, economies and new ways of life can infuse new life blood into the traditional Civil Law. The systems and spiritual core of IP rights developed through the last couple of hundred years, and their theoretical leadership through the history of property can enhance the system and theory of the Civil Law.

4 Choice of Models for the Fusion Between IP Laws and the Civil Law

The 1986 General Principles of the Civil Law already list IP rights on the same level as real rights and creditors' rights. Systemization is the fundamental quest for Civil Law legislation in contemporary countries with codified laws. The movement of codifying Civil Law typified by the French Civil Code and the German Civil Code has real rights and creditor's rights as its two pillars.¹¹ In the early IP law system, national states enacted patent law, trademark law and copyright law separately. There are at least three models in which national states have dealt with the issue of systemization of IP laws and put IP laws into the property law system under the Civil Law.¹²

⁸Li Chen, On the Necessity for the Chinese Civil Law to Set Up IP Chapter (in Chinese), *Journal of Soochow University (Law edition)*, 2015, No. 4.

⁹For example, 70 years post mortem in Germany.

¹⁰For example, the French, Chinese, Japanese and Taiwanese copyright law.

¹¹Ma Junju/Zhang Xiang, The Ethics and Technique in the Construction of Personality in the Civil Law (in Chinese), *Science of Law (Journal of Northwest University of Political Science and Law)*, 2005, No. 2.

¹²Cao Xinming, Choice of Connection Models between IP rights and the Civil Law From the Perspective of Codifying the IP Code (in Chinese), *Studies in Law and Business*, 2005, No. 1.

The first model is to compile an “IP Code” which collects all the IP laws,¹³ such as the French IP Code of 1992,¹⁴ the IP Code of the Philippines of 1997¹⁵ and Vietnamese Law on IP.¹⁶ The second model is to incorporate all IP laws into the Civil Code, such as the 2003 Model Civil Code for the Commonwealth of Independent States (CIS)¹⁷ and the 2006 Russian Civil Code.¹⁸

The third model is to extract the common features of IP rights to form an IP Chapter in the Civil Law Code, in parallel to other chapters for real rights, creditors’ rights law, torts, etc., which uplinks with the General Provisions of the Civil Law and downlinks with all individual IP laws. The Civil Codes of Armenia,¹⁹ Belarus,²⁰ Kazakhstan,²¹ Kyrgyzstan,²² Uzbekistan²³ and Mongolia have adopted this model.²⁴

The shortcoming of the first model is that with the appearance of an independent system, these IP Codes are simple compilation of individual IP laws and can only function under the guidance of its respective Civil Law Code; without their respective Civil Law Code, these IP Codes cannot be enforced by themselves. The problem with

¹³ Wu Handong, IP Laws in the Codification Movement of the Civil Law (in Chinese), China Legal Science, 2016, No. 4.

¹⁴ According to Wikipedia (https://en.wikipedia.org/wiki/French_Intellectual_Property_Code), the French Intellectual Property Code is a corpus of law relating to intellectual and industrial property. It was formalised by Law No 92-597 of 1 July 1992, replacing earlier laws relating to industrial property and artistic and literary property. The code is frequently modified: two major modifications are known as the DADVSI law and the HADOPI law.

¹⁵ Republic Act No. 8293 June 6, 1997. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for Its Powers and Functions, and for Other Purposes.

¹⁶ Order No. 28/2005/L-CTN of December 12, 2005, on the promulgation of Law on Intellectual Property. See Wu Handong, IP System in the International Reform Trend and the Bigger Picture of Chinese Development (in Chinese), Chinese Journal of Law, 2009, No. 2.

¹⁷ CIS is a regional intergovernmental organization of post-Soviet republics in Eurasia formed following the dissolution of the Soviet Union. It now has nine members, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Armenia, Moldova, Russia, Tajikistan and Uzbekistan.

¹⁸ Part IV, Civil Code of the Russian Federation.

¹⁹ Division 10, Civil Code of the Republic of Armenia.

²⁰ Section 5, Civil Code of the Republic of Belarus.

²¹ Section 5 of Civil Code of the Republic of Kazakhstan. Article 3 of the Copyright Law explains its relationship with the Civil Code: “Legislation of the Republic of Kazakhstan on copyright and allied rights consists of the Civil Code, of this Law and other legal acts issued in accordance with this Law”.

²² Section 5, Civil Code of the Republic of Kyrgyzstan.

²³ Section 4, Civil Code of the Republic of Uzbekistan. See Khaydarali Yunusov, The Development of Legal Systems of Central Asian States, available as [ssoar-studeuropene-2014-2-yunusov_khaydarali-The_Development_of_Legal_Systems.pdf](#).

²⁴ Mongolia merges IP rights with other property rights to form a unified property right concept. Article 83.1 of the Mongolian Civil Code provides: “Anybody may acquire assets that are material wealth, and intellectual values, that are non-material wealth, as well as rights, earned by means not prohibited by law or conflicting with commonly accepted behavioural moral norms. In this case the abovementioned wealth is considered an asset”. See also Wu Handong, IP Rights into the Civil Law Code and IP Chapter (in Chinese), Law and Social Development, 2015 No. 4.

the second model is that the fast developing IP laws cannot be squeezed into the Civil Law, resulting in the rise of the third model. Taking stock of the current situations in China, the third model is more feasible for the development of the Chinese Civil Law. With the rise in importance of IP rights and the fall of the traditional property rights, IP rights will eventually take over a dominant role in the civil property rights system.

When a new member with the same genes enters a mature or even ancient system, incumbent members will probably feel some anxiety or interim maladjustment, which will later be overcome by long-lasting harmony. The famous German jurist Thibaut has said in his work “On the Necessity of a General Civil Law for Germany”: “Only the Civil Law, which as a whole is rooted solely in the human heart, sensibility and rationality, very seldom succumbs to the environment; even this unity (unified Civil Law—*added by the authors*) sometimes causes certain minor inconveniences here and there, [and] the numerous benefits brought by this unity will hugely offset these inconveniences. We need only to consider individual parts of the Civil Law! Many of their contents are only the so-called pure legal mathematics (*eine Art reiner juristischer Mathematik*), such as the theory of property rights, rights to inheritance, mortgage, and contracts, and what belongs to the general part of the jurisprudence, over which no local speciality can exert any significant influence”.²⁵ Thibaut’s ideas about a unified Civil Law should lend some inspiration to those who worry about special features of IP rights affecting the systemic viewpoints of the Civil Law Code.

5 Relationship Between IP Laws, the General Provisions of the Civil Law and Its Respective Chapters

Chinese IP laws have their direct source in the Civil Law. The Civil Law in general as the legal system governing the relationship between private rights has built a unitary private law blueprint for the economic and social life of a modern state. The Civil Law, both its exterior structure and internal essence, is all encompassing and yet fine. The General Provisions govern the Special Provisions as principal does subordinate in a hierarchical relationship. Looking from the structure of the Civil Law, the General Provisions of the Civil Law are the head and foundation of the Civil Law, whereas the special chapters of IP rights, real rights, creditors’ rights law, etc. are subordinate, on an inferior level, and are the body and limbs of the Civil Law. The legal spirits, guiding principles, legal principles, regulatory addressees, civil rights, right subjects, private autonomy, juridical acts, agency, extinctive prescription, torts, legal liability, litigation process, etc., all of which are basic systems established by the General Provisions of the Civil Law, are to be applied to special chapters of the Civil Law, without exception.

In practice, once separated from the nutrition and the systemic support of the General Provisions of the Civil Law, real rights law and IP laws alike cannot be

²⁵ Anton Friedrich Justus Thibaut, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland* (On the Necessity of a General Civil Law for Germany), 1814, pp. 53–54, available at: http://dlib-pr.mpier.mpg.de/m/kleioc/0010/exec/bigpage/%22272169_00000057.gif%22. According to <https://www.britannica.com/biography/Anton-Friedrich-Justus-Thibaut>, Thibaut is remembered chiefly because of his call for the codification of German Civil Law, reflecting the rise of German nationalism after the Napoleonic wars.

enforced by themselves. IP rights and IP laws are on the same logical level as real rights law, and both are basic civil property rights and basic law of civil property.²⁶ Just like the real rights law, IP laws are fundamental civil property law, and their relationship with the Civil Law is part of a whole.²⁷

6 Technical Issues for Fusing IP Laws into the Civil Law

Whether and how to incorporate IP laws within the Chinese Civil Law Code have been quite controversial during the latter's construction. The General Provisions provide definition of IP rights,²⁸ and there is certain room to accommodate IP rights in the special chapters. However, currently, scholars from the Civil Law circle who are against the incorporation of IP laws into the Civil Law have the upper hand. They are of the opinion that IP laws are an open system in flux under the influence of technological developments and when incorporated into the relatively stable and systemic Civil Law might harm the stability of the Civil Law.

However, this line of thinking has mixed up three different layers of issues: one about the phenomenon of the fast progressing science and technology, another about the relative stability of the relationship between interests and the last one about the stability of rules that regulate the relationship between interests. As a matter of fact, the traditional real right is facing similar situations. Material products that were unheard of in the past are constantly popping up in our daily life, such as smart phones, gadgets, electric cars, etc. It is just that people are used to conducting logical abstraction of material products and can abstract "property" from any new products and then logically classify them as the object of real rights. In the same vein, under the drive of technology, technological products get innovated beyond imagination but are still within the ambit of "knowledge and technology" and remain the objects of IP rights. Under market conditions, the relationship of property interests triggered by the emergence of new products, new knowledge and new technologies does not undergo qualitative change and can be adjusted under a relatively stable legal regime. Therefore, the above-mentioned worries are nothing but a misunderstanding.

The Civil Law Code is a system of rules, a knowledge system with strict logic. It is at the same time an open system. Take automobiles for example. They are the perfect example of a system which evolves with the progress of time and remains constantly open. Automobiles had reached near perfection in terms of comfort in the

²⁶Liu Chuntian, That IP Rights is the First Property Right are the Discovery of the Civil Law Jurisprudence (in Chinese), *Intellectual Property Rights*, 2015, No. 10.

²⁷Ma Yide, Relationship Between IP Laws and the Civil Law—Using Public Order and Good Morals (in Chinese), *Intellectual Property Rights*, 2015, No. 10.

²⁸Article 123 of the General Provisions of the Civil Law has made progress as compared with the General Principles of the Civil Law, in its dealing with IP to the extent that it uses the overarching term of IP and that it recognizes a whole range of IP rights. It provides: "(1) Civil subjects enjoy intellectual property rights according to law. (2) Intellectual property rights are the exclusive rights of the persons on the following objects according to law: (1) works; (2) invention, utility model and design; (3) trademark; (4) geographical indications; (5) trade secrets; (6) integrated circuit layout design; (7) new plant varieties; (8) other objects prescribed by law".

1930s but continuously confronted new challenges and absorbed new technology and devices such as safety belts, power steering, air bags, infinitely variable speeds, antiskid tires, anti-lock braking systems, anti-theft devices, etc. into one unitary system.²⁹ The same goes with telephones, computers, etc. Meanwhile, whoever refuses to integrate with new and indispensable technology will voluntarily fall behind and withdraw from the market. Codification is a tool, which is neither inherently there, nor standing still. Codification must be practice-oriented, future-facing and evolving with time. Whether IP rights are civil rights and should be incorporated into the Civil Law Code must be decided by the objective demand of the technology and economic development, the nature of things and objective laws. Although IP rights are young as compared with other traditional real rights and creditors' rights, our understanding, thought, induction and refinement of IP rights are not yet mature, and technological progress poses constant new challenges; all these do not change the legal nature of IP rights, namely, as a typified basic property right, nor can these negate the objective fact that IP rights are on the same legal hierarchy as real rights and creditors' rights. Consequently, there must be a place in the Civil Law Code for IP laws.³⁰

With technology and institutional innovation increasingly determining the economic development and becoming the major means for wealth generation, IP rights are more and more the core of competitiveness, and not unknown or insignificant anymore. IP rights are the giants for wealth creation, the leading actor of human economic life. Therefore, Civil Law legislators should improve their understanding of property rights and list IP rights as the first property right.

Technology determines everything. The progress of technology will drive the development of society. Civil Law must reflect and serve the change of times. Civil Law originates from Roman law and has undergone a long formation process with numerous changes, and its core has advanced with the times. If the forefathers in Europe were trapped by history and adhered rigidly to Roman law, there would be no French Civil Code. Had they adhered rigidly to the French Civil Code, there would be no German Civil Code. The French Civil Code and the German Civil Code represent different technological and economic eras of their own. If we were obsessed with the German Civil Code and would not destroy its "perfection" by adding IP laws into it, that would be against the logic and progressive spirit that run through Roman law and the German Civil Code. The twenty-first century is distinctively different from the intersection of the nineteenth and twentieth centuries; the Internet has broken with history and disrupted the classic "perfection" of the German Civil Code. The calling of the day is to build a new perfection on top of the old establishment. Chinese people should move ahead with the times and contribute a Civil Law Code of the knowledge economy to mankind, with IP rights standing out as the shining feature of the Civil Law Code.

²⁹ For details, see Chap. 18 of the present volume.

³⁰ Liu Chuntian, *That IP Rights are the First Property Right is the Discovery of the Civil Law jurisprudence* (in Chinese), *Intellectual Property Rights*, 2015, No. 10.

7 IP Laws and the Rule of Law in China

To the surprise of many outside observers of China is the fact that the issue of reuniting IP laws with the Civil Law is closely related to the securing of the rule of law in China. Breaking away from the rigid ideology of collectivism is the precondition for establishing IP rights and laws in China, which is oftentimes not that self-evident. There have been many countercurrents to pull them back to the old control regimes.³¹ One feature of the Chinese IP regime is the ubiquitous administrative intervention into the creation, management, commercialization and even enforcement of all kinds of IP rights. The situation has deteriorated after the introduction and implementation of the National Intellectual Property Strategy between 2008 and 2020.³² The visible hands of the central, provincial and county governments are everywhere. Governments of all levels have become active players in IP industries, rather than the gatekeepers of the IP regime.

We believe that only by again affirming IP rights as private rights that governments cannot play with or take away just like that, and by returning IP laws into the Civil Law, can the driver of the knowledge economy and the foundation of the rule of law, namely, individual creativity and a private sphere free from state intervention, be protected and the role of the government be reasonably limited.³³

³¹ One example as mentioned earlier is that the Trademark Law, the Patent Law and the Copyright Law all had disregarded the provisions of the Civil Law and set up their own systems of civil subjects which lasted until 2001. Another is the above-mentioned tendency of “de-privatizing rights” and “de-Civil Lawization”.

³² For a detailed analysis of the National Intellectual Property Strategy and many of its downsides, see Kung-Chung Liu/Chuntian Liu/Ji Huang, IPRs in China—Market-Oriented Innovation or Policy-Induced Rent-Seeking? in Kung-Chung Liu/Uday S. Racherla (ed.), *Innovation and IPR in China and India—Myth, Realities and Opportunities*, Springer 2016, 161–179.

³³ For a similar opinion, see IP School, Renmin University of China, *Report on Development of Intellectual Property in China 2015*, Tsinghua University Press 2016, 71, 239.

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