

# Investigation on the Relationship between the Implementation of Chinese Civil Code and the Application of Intellectual Property Law

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## Introduction

As the product of the systematic development of statutory law, the code is of symbolic significance to the development of the legal system of the continental law system countries, which reflects the systematic development of the legal system. On January 1, 2020, China's Civil Code came into effect. China's civil code is based on the successful experience and practice of other civil codes and combined with the development of China's actual conditions. The history of the compilation of Chinese civil code has been accumulated for several decades, which is accompanied by various academic arguments in the process of formulation<sup>1)</sup>. In the early days of the civil code, there were many disputes about whether intellectual property law should be included in civil law<sup>2)</sup>. With the development of intellectual property system in China, intellectual property law has long been regarded

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1) In 1954, 1962 and 1979, China started the work of formulating a civil code, but all of them were stalled due to various reasons. In December 2012, the Standing Committee of the National People's Congress (NPC) reviewed the draft of the Civil Code for the first time. However, after discussion and study, it decided to continue to adopt the method of formulating separate laws to promote the construction of China's civil law system. In 2014, the compilation of the Civil Code was put forward again. This time, the compilation was divided into "two steps". The second step is to compile the parts of the civil code. The compilation of the civil Code was officially launched in 2016, which will be published on May 28, 2020 and implemented on January 1, 2021. See the preface of *Key Amendments and Interpretation of New Provisions of the Civil Code* (Vol. 1 and Vol. 2) by Jiang Bixin.

2) Professor Wang Liming mentioned in his article "On the Formulation of China's Civil Code" published in 1998 that whether the intellectual property system should be included in the civil law is very controversial. Some scholars believe that intellectual property has its particularity and does not fully apply the basic principles of civil law, so it should become an independent legal department. See Wang Liming, "On the Formulation of China's Civil Code", *Tribune of Political Science and Law*, No.5, 1998, pp. 44-52+83.

as an important part of civil law<sup>3)</sup>. Later, the academic disputes about intellectual property related issues in the compilation of the civil code turned into whether intellectual property law should be included in the civil code,<sup>4)</sup> and whether intellectual property rights should be independently organized<sup>5)</sup>, some scholars also analyzed and demonstrated the different

3) China's relevant intellectual property legislation mainly provides for civil rights and other contents. Although administrative management is included, the main provisions are still civil rights and other contents. The prevailing view is that intellectual property law is part of civil law. For example, Professor Xie Huaishi classifies intellectual property as one civil right along with the right of personality, the right of kinship and the right of property and membership. Professor Wang Liming also believes that we do not deny the particularity of the intellectual property system, but in the final analysis, intellectual property is still a civil right, its essential attribute is the combination of property rights and personal rights. In the field of intellectual property law, it is also a general theory that intellectual property belongs to civil rights. In the textbooks edited by Professor Wu Handong, the private nature of the right ontology is the basic basis for classifying intellectual property into the category of civil rights.

See: Xie Huaishi, "On the Civil Rights System", *Chinese Journal of Law*, No. 2, 1996, p. 9.

See Wang Liming, "On the formulation of China's Civil Code", *Tribune of Political Science and Law*, No. 5, 1998, p. 52.

See Wu Handong (ed.), *Intellectual Property Law*, Law Press China, 2014, p. 7.

4) In the opinion of whether to include intellectual property law in China's civil code, the mainstream view is agreed to include intellectual property law in China's civil code.

See Wang Liming, "On the Formulation of China's Civil Code", *Tribune of Political Science and Law*, No. 5, 1998, pp. 44-52+83.

See Wang Qian, "Thoughts on incorporating Intellectual Property law into the Civil Code," *Intellectual Property*, No. 10, 2015, pp. 16-19.

5) Professor Wu Handong points out that the independent compilation of intellectual property rights is to respond to the economic development of intellectual property rights, improve the civil rights system and inherit the legislative tradition of the General Principles of Civil Law in his article "Intellectual Property Rights Should be Independent in the Future Civil Code". See Wu Handong, "Intellectual Property Rights Should be Independently Compiled in the Future Civil Code", *Intellectual Property*, No. 12, 2016, pp. 3-7.

Professor' intellectual property rights in the theory of the civil code compiling is independent to make a paper from opening new of intellectual property rights, the relative stability of the civil code of volatility and profound contradictions exist, intellectual property law, procedural and the civil code of the private law attribute does not match such problems as intellectual property law in China's civil code should not be kept independent set. See Li Yang, "On 'Intellectual Property Rights should not be Independently compiled in the Compilation of Civil Code'", *Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition)*, No. 2, 2017, pp. 32-41.

models<sup>6)</sup>. In August 2018, after the Civil Law Office of the Commission for Legislative Affairs of the Standing Committee of the National People's Congress (NPC) of China responded to concerns about failing to independently 'codify' intellectual property laws,<sup>7)</sup> the academic debate about whether the intellectual property law should be independently compiled in the formulation of China's civil code is also quiet. With the implementation of China's Civil Code on January 1<sup>st</sup>, 2021, the relationship between the implementation of China's Civil Code and the application of intellectual property law has also become a topic of academic discussion. Therefore, by combing the historical process of the enactment of China's civil code and the development history of intellectual property law in China, this paper aims to expatiate the connotation and logic of intellectual property provisions in China's civil code, and further analyze the application relationship between China's civil code and intellectual property law.

6) See Yang Xudong, "Review and Reflection on the Non-Independent Edition of Intellectual Property In The Civil Code: On the Connection between the Systemization of Intellectual Property Law and the Civil Code", *Journal of Chongqing Technology and Business University (Social Science Edition)*, No.6, 2020, pp. 139-148.

See Cao Xinming, "The choice of the connection mode between intellectual Property and civil Code: from the perspective of the compilation of intellectual Property Code", *studies in Law and Business*, no. 1, 2005, pp. 26-34. In this paper, the coordination mode between intellectual property and civil code is discussed and analyzed from the aspects of separation mode, inclusion mode, mashup mode and link mode. Professor Wu Handong, in his article "Intellectual Property Law in the Movement of Codification of civil Law", analyzes two modes of linking Intellectual property law and civil code in China. One is to form a special intellectual property code. See Wu Handong, "Intellectual Property Law in the Movement of Codification of Civil Law", *China Legal Study*, No.4, 2016, 24-39.

7) China's intellectual property legislation has always adopted special civil laws, such as the Patent Law, the Trademark Law and the Copyright (Copyright) Law. It also involves laws such as the Anti-unfair Competition Law and administrative regulations such as the Regulations on the Protection of Integrated Circuit layout-designs and the Regulations on the Protection of New plant varieties. China's intellectual property legislation provides for both civil rights and administrative management, and is generally consistent with relevant international treaties. The civil code is a law to adjust the civil legal relations between equal civil subjects. It is difficult to include the contents of administrative management, and it is difficult to abstract the general rules of different types of intellectual property rights. The intellectual property system is still in rapid development and change, and domestic legislation, law enforcement and judicature need to constantly adjust to it. If intellectual property laws and regulations are incorporated into the civil code now, it will be difficult to maintain its continuity and stability. Due to the above reasons, the legislation method of civil special law is still adopted for intellectual property related. According to different needs, single legislation is implemented and the system of intellectual property related is improved by means of separate laws on intellectual property. Meanwhile, the existing separate laws on intellectual property will continue to be retained, which is more conducive to strengthening and improving the protection of intellectual property. It is not appropriate to set up an intellectual property section in the civil code for the time being.

## Chapter 1 The Debate on Whether Intellectual Property Law Should Be Incorporated Into the Civil Code

### Section 1 Enactment of the Civil Code

#### 1. First Draft of the Civil Code

The compilation of the Civil Code of New China began in 1954,<sup>8)</sup> The Standing Committee of the National People's Congress established the Leading Group for the Drafting of the Civil Law, and completed the first draft of the General Provisions in October 1955. In 1956, the entire framework of the Civil Code was initially formed, and relevant revision work continued until 1957.<sup>9)</sup> The effort of New China's first drafting of the Civil Code showed a strong enthusiasm. The characteristics of the drafting of the first Civil Code of New China reflect the characteristics of the times at that time. The first draft of the Civil Code has four parts: *General Provisions, Ownership, Creditor's Rights and Succession*. However, due to political reasons, the drafting of the first civil code did not succeed.<sup>10)</sup>

8) The subject of this paper is the history of civil code enactment after the founding of new China. In order to distinguish it from the civil code enacted in Chinese history, this paper uses new China as the expression. In modern Chinese history, there were three drafts of the Civil code: the Draft of the Qing People's Law in the late Qing Dynasty, which was drafted in 1908 and completed by the end of 1910. It entered the deliberation process in 1911, but was never formally promulgated. The second draft of the Law of the People and the People compiled by the Beijing government of the Republic of China was completed in 1925-1926, and the draft was not deliberated by the National Assembly and passed into a formal code. For the third time, he drafted the civil code organized by the Nanjing government of the Republic of China. In December 1928, the Legislative Yuan was established, responsible for the compilation of the code, which was promulgated and implemented after the compilation was completed in December 1930. See xie Zhenmin, *Legislative History of the Republic of China*, Vol. 2, China University of Political Science and Law Press, 2000.

9) In 1956, the drafting of the first civil code in New China had 45 drafts, accounting for about 73% of the total manuscripts, and the interval between revisions was relatively short. In 1956, more than 500 articles were drawn up, and the framework of the entire civil code was initially established. See he Qinhua et al., *An Overview of the Draft civil Code of New China* (Vol. 1), Law Press, 2003. In June 1956, Peng Zhen reported in his report on the work of the Standing Committee of the National People's Congress: "Part of the draft civil Law has been drafted. These are still some hate the immature draft, very preliminary preparatory work, are seeking opinions from the relevant parties, continue to revise". He said the same thing in his work report in 1957. See the Research Office of the General Office of the Standing Committee of the NPC, *Compilation of the Documents of the People's Congress of the People's Republic of China (1949-1990)*, China Democracy and legal System Publishing House, 1990.

10) Professor Jin Ping's speech at the theoretical seminar "Review and Prospect of the 50th Anniversary of the drafting of the New China Civil Code": "At a time of high interest (in the drafting of the civil Code), great changes have taken place in the political situation. It was the change in the political situation at that time that led to the cessation of the drafting of the civil law, and in the following years, the report on the work of the Standing Committee of the National People's Congress no longer contained the contents of the enactment of the civil law.

## 2. Second Draft of the Civil Code

After the first drafting of the Civil Code was forced to stop in New China, the drafting of the Civil Code was put on the agenda again in 1962,<sup>11)</sup> Although in 1962 and 1963, the National People's Congress seek opinions, but the substantive effect is not significant.<sup>12)</sup> The final draft of the Second Civil Code was completed and published on November 1, 1964. The Draft of the Civil Law of the People's Republic of China (Trial Implementation) consisted of 262 articles in 24 chapters in three parts, and the system adopted was the General Provisions, the ownership of property and the circulation of property in three parts,<sup>13)</sup> Later, the second drafting of the Civil Code was clearly recorded in its last draft that the drafting work was stopped because of the participation in the social and educational movement.<sup>14)</sup> The drafting of the second civil code also failed because of the special historical period.

## 3. Third Draft of the Civil Code

Since 1978, China has entered a new historical period. Under the specific historical background of the transformation of national focus, reflection on history and the need of social development, the drafting of the Third Civil Code has once again been included in the agenda. In November 1979, the Legislative Affairs Committee of the NPC set up a drafting group for the

11) In September 1962, the Law Office of the General Office of the NPC Standing Committee organized a civil Law Research Group to start the drafting of the second civil Law. Involved in the second draft civil code of the main, the law committee of the NPC Standing Committee, Beijing university, Beijing institute of political science and law (now the China university of political science and law), renmin university of China, east China institute of political science and law (now east China university of political science and law), jilin university, hubei university, southwest college of political science and law (now southwest university of political science and law) and other institutions.

12) According to professor Li Jingtang in retrospect and prospect "new China civil code draft fifty years" symposium on theory of speech: "when the economy is a planned economy, the public sector of the economy first, economy is self-sufficient (especially in rural areas), Commodity Exchange is few, such as transportation, can only carry portable pedal, or illegal. Without Commodity Exchange, how to formulate the civil code that mainly regulates commodity economy? No matter how serious you are, there is no way. In the end, there is no debate on the draft. Lee said, The last draft of the Civil Law was finalized on November 1, 1964, but I am not satisfied now. It is not a law, but it reflects the history of the time.

13) See He Qinhua et al., *An Overview of the Draft civil Code of New China (vol. 2)*, Law Press China, 2003, p. 160.

14) Social education movement refers to the socialist education movement in the form of "siqing" in 1962, especially after the Tenth Plenary Session of the CPC Central Committee. See Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 59.



Civil Law, with over 40 members participating in the drafting.<sup>15)</sup> In May 1980, the third draft of the Civil Code was drafted, and in August of the same year, the draft of the Civil Law of the People's Republic of China (Draft for Public Comments) was issued to solicit public opinions from the whole country. In April 1981, the Second Draft of the Civil Law of the People's Republic of China (for Comments) was issued to solicit opinions from the whole country. In July 1981, the Third Draft of the Civil Law of the People's Republic of China was issued. In May 1982, the Fourth Draft of the Civil Law of the People's Republic of China was issued.<sup>16)</sup> Some achievements were made in the drafting of the third civil code, but due to the rapid development and change of the society at that time, the stability of the civil code and the unstable factors of the social development at that time, the state changed the guiding ideology of the drafting of the civil code: The enactment of the civil code is still the main task and goal, but the civil code is not issued at the beginning, but to issue separate laws, mature to enact one by one.<sup>17)</sup> Under such a background, the draft of the Civil Law of the People's Republic of China (the fourth draft) was not submitted for discussion, and the drafting of the third civil code was stopped again.

15) Leading members of the civil law drafting group set up by the Legislative affairs Committee of the National People's Congress are Tao Xijin, Yang Xiufeng, Sun Yamin, Lin Hengyuan, Zhao Guoping, Wu Kejian, Zhen Rou and Shi Yue. The drafting group also includes Wang Jiafu, Su Qing, Chen Hanzhang and Yu Nengbin from the Institute of Law of the Chinese Academy of Social Sciences. Zhenying Wei and Zuotang Wang of Peking University; Zhao Zhongfu of Renmin University of China; Jin Ping, Southwest Institute of Political Science and Law; Yang Zhenshan of the Beijing Institute of Political Science and Law; Ma Yuan, Long Shirong, Ai Wei and Fei Zongyi of the Supreme People's Court; Lu Jialin of Beijing Higher People's Court; Shi Xiuzhen and Li Shirong from Tianjin High People's Court, and Professor Xu Kaishu participated in the drafting in the later stage. See Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 74.

16) The Draft Of the Civil Law of the People's Republic of China (Draft for Public Comment), released during the drafting of the third Civil Code, consists of six parts, namely, general Provisions, property ownership, contracts, remuneration and rewards for labor, liability for damage, and property inheritance, with 501 articles in total. The Draft Of the Civil Law of the People's Republic of China (Second Draft for Public Comment) consists of six parts, including general provisions, property ownership, contract, liability for tort damages, right of intellectual achievements, and property inheritance, with a total of 426 articles. The Draft of the Civil Law of the People's Republic of China (Third Draft) consists of eight parts and 510 articles, including tasks and basic principles, civil subjects, property ownership, contracts, intellectual achievements, kinship succession, civil liability and other provisions. The fourth Draft of the Civil Law of the People's Republic of China consists of 465 articles in eight parts: the tasks and basic principles of the civil law, civil subjects, property ownership, contracts, intellectual property rights, property inheritance, civil liability and other provisions. See the general Review of the Draft Of the New China Civil Code by He Qinhua et al. See Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 75,81.

17) See Gu Angran, *Introduction to New China's Civil Law*, Law Press China, 2000, pp. 7-11.

Thereafter, China's civil legislation entered the stage of making separate laws and regulations. On April 12, 1986, the Fourth Session of the Sixth National People's Congress adopted the General Principles of the Civil Law of the People's Republic of China, which came into effect formally on January 1, 1987, signifying the end of the drafting of the Third Civil Code.<sup>18)</sup>

#### **4. Fourth Draft of the Civil Code**

In December 2002, the 31st session of the Standing Committee of the Ninth National People's Congress deliberated on the draft of the Civil Law. After the property law has not yet set,<sup>19)</sup> together with the wide divergence of the understanding of the draft civil law,<sup>20)</sup> Leadership of the legal work of the civil code compiling committee work in abandoned some experts to compile the draft, will then intact the introduction of the current law, the civil code of arbitrary behavior actually is "assembly" rather than "compiled", caused strong dissatisfaction with the civil law educational world, under the civil code, and then work has finally been shelved, It is still de-

18) Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 94.

19) The Real Right Law of the People's Republic of China was adopted at the fifth session of the tenth National People's Congress on March 16, 2007. Promulgated by Order No. 62 of the President of the People's Republic of China on March 16, 2007 and effective as of October 1, 2007.

20) The Commission for Legislative Affairs of the NPC Standing Committee held a meeting on January 11, 2020, and officially launched the compilation of the Civil Code. Hu Kangsheng, deputy Director of the Commission for Legislative Affairs of the NPC Standing Committee, commissioned six experts and scholars to draft the articles of each part of the Civil Code. Professor Wang Liming was responsible for the drafting of personality rights and tort; Zheng Chengsi, a researcher of the Institute of Law, Chinese Academy of Social Sciences, was responsible for drafting the intellectual Property compilation. Tang Dehua, vice president of the Supreme People's Court, was responsible for drafting the civil liability edition. Professor Wu Changzhen from China University of Political Science and Law was in charge of drafting the kinship and succession compilation; Fei Zongwei, a retired judge of the Supreme People's Court, was in charge of drafting the application of laws on foreign-related civil relations. The Commission for Legislative Affairs of the NPC Standing Committee formed and discussed the Draft Civil Code (September Draft) in five months based on the work of six experts. However, after this discussion, the contract part, the kinship part, the inheritance part and the intellectual property part were scrapped, and the relevant laws in force at that time were incorporated directly, which caused the anger and dissatisfaction of civil law scholars. Liang Huixing, a civil jurist, fully expressed his dissatisfaction with the "compilation of civil codes" by submitting the "Suggestions on correcting the Arbitrariness of the Civil Code Legislation" during the National Committee of the Chinese People's Political Consultative Conference (CPPCC) in 2003. Then, in 2003, the legislative plan did not mention the issue of the enactment of a civil code, and work on the enactment of a civil code was again suspended.

terminated to continue the approach of separate legislation.<sup>21)</sup>

### **5. Drafting of the Fifth Civil Code**

In 2014, the compilation of China's civil Code was put forward again, and in June 2016, the compilation of China's civil Code formally entered the legislative process.<sup>22)</sup> On March 15, 2017, the General Provisions of the Civil Law of the People's Republic of China (Draft) was approved for review. On this basis, the Commission for Legislative Affairs of the NPC Standing Committee and the participating units of the compilation of the Civil Code fully promoted the compilation of the sub-chapters, which will be reviewed in August 2018.<sup>23)</sup> The draft civil Code of the People's Republic of China (Draft) was revised and merged with the General Provisions of the Civil Law in 2018-2019 after multiple deliberations. In 2019-2020, the draft was further revised and improved by extensively listening to the opinions of all parties, reading and discussing, and finally passed to a vote on May 22, 2020. Effective as of 1 January 2021. At this point, the Chinese civil code was born, which is the first law named after the code in New China, and has great historical significance. The Civil Code of the People's Republic of China consists of seven parts with a total of 1,260 articles. Each part is divided into general provisions, Real Right, Contract, right of personality, marriage and family, inheritance, tort liability and supplementary provisions.

21) The Real Right Law of the People's Republic of China was adopted at the fifth Session of the tenth National People's Congress on March 16, 2007. Promulgated by Order No. 62 of the President of the People's Republic of China on March 16, 2007 and effective as of October 1, 2007; The Tort Liability Law of the People's Republic of China was adopted at the 12th session of the Standing Committee of the 11th National People's Congress on December 26, 2009 and implemented on July 1, 2010.

22) In November 2014, the Fourth Plenary Session of the 18th CPC Central Committee explicitly proposed the compilation of a civil code. In June 2016, the 21st session of the Standing Committee of the 12th National People's Congress (NPC) reviewed the draft general Provisions of civil Law for the first time, indicating that the compilation of the civil code has entered the legislative process. See People's Daily, History of the Compilation of new China's Civil Code, October 26, 2016.

23) The Commission for Legislative Affairs of the NPC Standing Committee and the participating units in the compilation of the Civil Code have made every effort to promote the compilation of the civil Code in different parts. Taking the existing property law, contract law, guarantee law, marriage law, adoption Law, inheritance Law and tort Liability law as the basis, and taking into account the new demands of China's economic and social development for civil law, The draft of the civil Code was submitted to the Fifth session of the Standing Committee of the 13th National People's Congress (NPC) in August 2018 for deliberation, including six sub-chapters, including real right, contract, right of personality, marriage and family, inheritance, and tort liability.



## Section 2: The Causes of the Enactment of the Civil Code

### 1. Historical Analysis of the Reasons for Formulating the Civil Code

In the decades between the drafting of the first civil code in New China and the birth of the Chinese civil code, a total of five civil codes have been drafted. In different historical backgrounds, the reasons for the compilation of civil code also have different historical backgrounds. The drafting of new China's first civil code was a requirement for the Central People's Government to establish a complete democratic legal system,<sup>24)</sup> in 1956, the Eighth National Congress of the Communist Party of China held, proposed to further strengthen the construction of democracy and legal system.<sup>25)</sup> It paved the way for the drafting of the first civil code under such a background. The background of drafting the second civil Code is also put forward again under the background of economic adjustment.<sup>26)</sup> The drafting of the third civil code was put forward because of the change of national focus, which can be summarized in four aspects: the development of civil code is the need of economic development, the need of rights protection, the need of justice, and the need of maintaining social morality.<sup>27)</sup> The drafting of the fourth civil Code was put forward against the background of the development of the socialist market economy. The successful enactment of a large number of separate civil laws, the development of civil trials, the in-depth research on civil law and the enactment of civil codes in various countries around the world all contributed to the drafting of the fourth Civil Code in China.<sup>28)</sup> There are five main reasons why the drafting of the fifth civil Code is put forward: first, the need of the development of China's so-

24) In 1953, China began a large-scale economic construction, and the judicial work became increasingly heavy. In order to ensure the economic construction, the country needs to improve the judicial level. See People's Daily, May 14, 1953, edition 1, "The second National Judicial Conference adopted a resolution to Strengthen people's judicial construction, ensure the smooth progress of economic construction and elections". On September 16, 1953, In his Report on Political and Legal Work, Peng Zhen stressed that political and legal work would be a major task in the future. See selected Works of Peng Zhen (1941-1990), People's Publishing House, 1991, p. 242. On the legislative side, the necessary laws and regulations should be further developed. See editorial "Further Strengthening Political and legal Work in the Period of Economic Construction", People's Daily, March 30, 1954, page 1.

25) See *Selected Works of Liu Shaoqi*, Shaanxi People's Publishing House, 1985.

26) Due to the people's commune movement after 1957 and three years of natural disasters, the national economy encountered serious difficulties. In 1961, the ninth Plenary session of the eighth CPC Central Committee put forward the eight-character policy of "adjustment, consolidation, enrichment and improvement", and the national economy entered a period of adjustment.

27) Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 69,72.

28) Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 137,139.

cial system; second, the need of building a country under the rule of law; third, the need of economic development; fourth, to safeguard the rights of the people; fifth, the socialist legal system with Chinese characteristics has been formed, laying the foundation for the formulation of the civil code.<sup>29)</sup> Through sorting out the reasons and background for the drafting of the new Chinese civil code, social development and economic development are the main reasons. As a country of civil law system (civil law system), China's tradition of formulating written law is also the inevitable result of the birth of Chinese civil code.

## **2. The Only Way to Systematize Civil Legislation**

In addition to historical and political reasons, the drafting of the New China civil Code has been suspended for several times because of the lack of enactment and implementation of relevant laws and the lack of a complete legal system. Since the formation of the socialist legal system with Chinese characteristics, the complete development of the civil legal system has promoted the smooth progress of the compilation of China's civil code. As a country of civil law system, China's code is an important embodiment of the rationality of written law, which is mainly manifested as formal rationality.<sup>30)</sup> The formal rationality can realize scientific legislation,<sup>31)</sup> scientific legislation is one of the value judgment standards to evaluate whether the legal system is perfect, and the pursuit of The formal rationality in the code is more about stability, reducing the conflict between values, avoiding the conflict of civil legal system, and realizing scientific legislation.<sup>32)</sup> Therefore, the enactment of civil code is the best way to realize the systematization of civil law, which can not only guarantee the scientific, reasonable and logical norms of civil law, but also realize the fairness and unity of the application of civil trial law.

29) See Liu Junchen, Deputy Director of the Commission for Legislative Affairs of the NPC Standing Committee, "The Great Significance and General Consideration of the Compilation of the Civil Code", *Social Governance*, No. 9, 2020, pp. 5-9.

30) In professor Xu Zhongyuan's philosophy of Civil Code Systematization -- Comment on Professor Wang Liming's Thought of "Civil Law Systematization", we borrow Max Weber's concept of formal rationality: Weber believes that the formalism of the code "provides the largest relative space for the interests of the law to move freely. It sees the legal process as a special form of peaceful resolution of conflicts of interest, bound by fixed and abiding "rules of the game." Xu Zhongyuan, Xiong Bingwan, "The Philosophy of Systematization of Civil Code: A Review of Professor Wang Liming's thought of systematization of Civil Law", *Law and Social Development*, No.3, 2009, pp. 63-72.

31) Wang Liming, *Study on the Major and Difficult Problems of China's Civil Code*, Law Press China, 2006, 28-32.

32) Wang Liming, "The enactment of civil Code after the Formation of legal System", *Guangdong Social Sciences*, No.1, 2012, 5-17.;

### **Section 3 Disputes over Whether Intellectual Property Law Should Be Included in the Civil Code**

#### **1. Opinions on Codification in the Civil Code**

The specific reasons are as follows:

##### **1.1 It is the requirement of internal logic and integrity of the civil code.**

According to the current definition of intellectual property rights in China's legal circle, intellectual property rights are the exclusive rights that people enjoy in accordance with the law for their creative intellectual achievements and marks and reputations produced in industrial and commercial management activities. The preamble of the TRIPs Agreement confirms the property of the private right of intellectual property, which shows that the property of the private right of intellectual property is basically recognized all over the world and is also an important content in the field of civil rights. The property right system without intellectual property is not a complete property right system. Therefore, some people believe that the civil code, as the core of the civil legislation system, is not a complete civil code without the content of intellectual property<sup>33)</sup>.

Scholar Wu Handong pointed out in his thesis "Intellectual Property Law in the Movement of Codification of Civil Law" that the acceptance of intellectual property rights in the civil code satisfies the requirements of comprehensiveness and consistency of the private rights system. Although intellectual property is an intangible property right form of knowledge, its basic attribute is no different from property ownership. Civil code should construct a complete property rights system including tangible property rights and intangible property rights. In essence, intellectual property law should not be absent in civil code.<sup>34)</sup>

Su Yeong-chin professor pointed out that in the search for a new civil law, even be classified as special law of intellectual property rights, the rights with configuration (that is, the same category) were significantly higher than those of commercial law, given the traditional civil code in the personal right, creditor's rights, property rights and other rights type, there is no such have the absolute effect of intellectual property rights, the common rules in civil code should be systematic more appropriate choice.<sup>35)</sup>

33) Wang Yingxian, "A Study on the Legislative Model of Intellectual Property System in civil Code Enactment", *Journal of Shaoyang University (Social Science Edition)*, No.2, 2017, pp. 30-35.

34) Wu Handong, "Intellectual Property Law in the Movement of Codification of civil Law", *Chinese Legal Science*, No.4, 2016, 24-39.

35) Su Yongqin, "The Significance of the Civil Code in the Times", in *Search of A New Civil law*, Peking University Press, 2012, p. 82.

## **1.2 The theory and system of intellectual property have a feedback effect on the theory and system of civil law**

Some scholars believe that the landmark of the civil Code incorporated into the Intellectual Property Code does not mean simply adding a new property law member to an inherent Civil Code, but that the integration of this new sub-system, rather than “joining”, It is a historic transcendence of a series of representative Civil codes since the beginning of the 19th century. The essence, institutional function, business model, unique property right ability, theory and logic of property origin revealed by intellectual property right, its method and explanatory power are not only an extension of the inherent civil law, but also a re-creation of system and theory, which can feedback the civil law. Bring the traditional civil law into the new era of knowledge economy. The intellectual property law ADAPTS to the new technology, new economy and new way of life, and can inject new vitality into the traditional Civil Code.<sup>36)</sup>

## **1.3 It is the need of the systematic construction of the intellectual property system**

The code is at the highest level among the various forms of legislation, and has higher requirements for the logic and systematization of the provisions of the law. As the core of the legal system of this sector, the code needs to lead the basic values and reflect the legal principles. Codification is an important opportunity to improve the system structure between intellectual property legislation and civil code, eliminate contradictions, identify loopholes and fill gaps. In addition, it is beneficial to strengthen the understanding of the state and the public on the private property of intellectual property.<sup>37)</sup>

Some scholars also point out that the codification can promote the system coordination among the intellectual property law departments. If the contents of the three major copyright laws are included in the Civil Code, some principles and commonalities of intellectual property law can be stipulated in the Civil Code, and the basic principles and systems of civil law can be used to influence intellectual property law, instead of the current practice of repeating provisions in separate legislation. At present, the problem of incoordination among the intellectual property laws is expected to be

36) See Liu Chuntian, “Rationality of the Establishment of Intellectual Property In China’s Civil Code”, *Intellectual Property*, no.9, 2018, pp. 81-92.

37) See Wang Yingxian, “A Study on the Legislative Model of Intellectual Property System in the Enactment of Civil Code”, *Journal of Shaoyang University (Social Science Edition)*, No.2, 2017, pp. 30-35.

solved.<sup>38)</sup>

#### **1.4 Promoting the protection of intellectual property rights**

The incorporation of intellectual property law into the civil code provides a broader legal application for intellectual property cases and makes the rights of intellectual property more specific. When intellectual property becomes a universal civil right, the more specific the right is, the more it can be sued, and the more it can be protected.<sup>39)</sup> At the same time, entry into the code can provide judges with an accurate basis for judicial decisions and stable expectations for judicial subjects to evaluate their legal acts,<sup>40)</sup> provides a broader legal application for intellectual property cases. For example, when there is a loophole in the separate laws of intellectual property, if intellectual property is “codified”, the provisions of the upper law can be applied when there is no provision in the lower law, which also provides legal support for the judges to apply the legal principles in the civil law as the judgment basis in the judicial work. It is helpful to reconstruct the source system of Chinese civil law, to define the boundary between legislation and justice, to establish a legal development model with reasonable division of labor and orderly regulation, to abandon the existing phenomenon of the mismatch between legislators and judges, and to let the Supreme Court return to its role as a judge<sup>41)</sup>.

#### **1.5 Inherit the legislative tradition of the General Principles of Civil Law**

The general Principles of Civil Law combines intellectual property with real right, creditor’s right and personal right. The institutional innovation and legislative tradition of the chapter of civil rights lay the institutional foundation for the independent compilation of intellectual property rights in the civil code. China is the first country to write intellectual property rights into its civil code as a legal system. No other country has formally stipulated intellectual property rights in its civil code. The General Principles of the Civil Law of China for the first time stipulated intellectual

38) Liu Mingliu, “Research on the Incorporation of Intellectual Property Law into the Law”, In *Economic Outlook around Bohai Sea*, No. 3, 2019, pp. 171-172.

39) See Zhu Ningning, “Whether Intellectual Property Rights Should Be Included separately in the National Law Code Raises Heated Debate among Standing Committee Members”, *Legal Daily* reported on The position of Xu Xianming, a member of the Standing Committee of the National People’s Congress, accessed on September 4, 2018, <http://www.npc.gov.cn/npc/c22342/201809/ba49d927e3d64a5cbbc587343f71e351.shtml>.

40) See Yi Jiming, “The Choice of Intellectual Property Legislation under the Background of China’s Civil Code”, *Journal of Shaanxi Normal University (Philosophy and Social Science Edition)*, no.2, 2017, pp. 5-19.

41) See Xue Jun, “The Compilation of China’s Civil Code: Ideas, Visions and Ideas”, *Chinese Legal Science*, No.4, 2015, pp. 41-65.



property rights in the basic law of the Civil Law, which is the embodiment of the Chinese characteristics of the General Principles of the Civil Law. Compiled today's civil code to do, of course, the general principles of the civil law tradition of legislation, the independent intellectual property rights into woven into, in the civil law breaks through the civil law real right and creditor's rights and dual structure, make the intellectual property rights and real right and creditor's rights, as property rights, inheritance characteristic of civil legislation in our country, comply with the property dematerialize when knowledge economy era, For the civil law system to create a new legislative model.<sup>42)</sup>

### **1.6 The civil code in line with the characteristics of the socialist system with Chinese characteristics**

Some scholars also suggest that the socialist legal system with Chinese characteristics should be combined with the civil code and intellectual property. The characteristics of The Chinese civil code weaken the unique legal character of intellectual property, rationalize the unique normative composition of intellectual property, and legitimize the unique system connotation of intellectual property. The autonomy of the private law of the Chinese civil code is developing in both ways of moderation and expansion, which accords with the development law of the modern private law order and the basic requirements of the socialist rule of law with Chinese characteristics. The dual development trend of civil code's restraint and expansion weakens the emphasis on the uniqueness of intellectual property and interprets the unique intellectual property from the perspective of traditional civil code.<sup>43)</sup>

### **1.7 The independent compilation of intellectual property rights is the trend of the world civil code compilation**

Some scholars believe that the independent compilation of intellectual property rights has become the trend of the world civil code compilation.<sup>44)</sup> Since the 21st century, the world civil codification movement in intellectual property law in civil codes as a independent part of a compiled and some countries in formulating and modify its civil code, not only in the general provisions of the intellectual property rights, intellectual property rights in the catalog as a separate part of civil code or independent, some countries have abolished the special law of intellectual property, Fully integrate

42) Deng Shemin, "Legislative Conception of Intellectual Property Rights in the Compilation of Special Provisions of China's Civil Code", *Law Review*, No. 5, 2017, pp. 107-115.

43) See Wang Linlin, "Legislative Proposals on the Incorporation of Intellectual Property Rights from the Perspective of The Era characteristics of Chinese Civil Code", *Contemporary Law*, no.2, 2018, pp. 97,111.

44) Deng Shemin, "Legislative Conception of Intellectual Property Rights in the Compilation of Special Provisions of China's Civil Code", *Law Review*, No. 5, 2017, pp. 107-115.

intellectual property rights into the civil code.<sup>45)</sup> It can be seen that, with the increasing importance of intellectual property in property, in the world civil code compilation movement, the return of intellectual property to the civil code, and become an independent part of the civil code has become the trend of contemporary civil code compilation, which provides useful experience for the compilation of intellectual property in China.

## **2. That It Should Not Be Codified in the Civil Code**

### **2.1 Intellectual property rights have different origins from civil law**

Scholar Xiong Qi pointed out in his paper “The Systematic Orientation of Intellectual Property Law and Civil Law” that the historical development path of intellectual property was in fact basically close to the commercial law rather than the civil law, which was the result of the joint action of mer-

45) As adopted by the Bureau on October 1, 1998 and amended on January 5, 2016, the Civil Code of Belarus consists of 1,153 articles and consists of eight parts: Part I General Provisions; Part II Ownership and other Property rights; Part III General Provisions for Creditor's Rights; The fourth part of the types of debt; Part V Intellectual Property rights; Sixth part right of inheritance; Part VII private international law; Part VIII Final provisions. The Civil Code of Kazakhstan was promulgated on December 27, 1994 and amended several times from 2011 to April 21, 2016, with a total of 1,124 articles. Part II Ownership and other Property rights; Creditor's rights of Part III) and the specific rules (types of debt of Part IV; Part V Intellectual Property rights; Sixth part right of inheritance; Part VII Private International Law). The Civil Code of Tajikistan is divided into three parts and seven parts, with a total of 1,234 articles. Part I promulgated on June 30, 1999 and amended on July 23, 2016, Part I General Provisions, Part II Ownership and Other Property Rights, Part III Creditor's rights; The second part was promulgated on December 11, 1999 and amended on July 3, 2012. Part III was promulgated on March 1, 2005 and amended on July 3, 2012. Part V Intellectual Property rights, Part VI Inheritance Rights, Part VII Private International Law. The Civil Code of Turkmenistan was promulgated on July 17, 1998 and amended on December 22, 2012. It consists of five parts: Part I general provisions, Part II property (property) rights, Part III creditor's rights, Part IV intellectual property rights, and Part V right of inheritance. The Civil Code of Ukraine was promulgated on January 16, 2003 and amended on June 14, 2016, with a total of 1308 articles, consisting of six parts: Part I General Provisions, Part II personal rights of natural persons, Part III ownership and other real Rights, Part IV intellectual property rights, Part V Creditor's rights, and Part VI right of inheritance. The Civil Code of Uzbekistan was promulgated on December 21, 1995 and amended on August 2, 2015, with a total of 1,199 articles, consisting of two parts and seven parts. Part I: Part I General Provisions, Part II Ownership and other Real Rights, Part III Creditor's rights; Part II: The types of part IV debt, Part V intellectual property rights, Part VI inheritance rights; Part VII private International Law. The Civil Code of Gilsutan was promulgated on March 8, 1996 and amended on July 23, 2016, with a total of 1,208 articles, consisting of two parts and seven parts. Part I: General Provisions of Part I, General Provisions of Title and Other Property Rights of Part II, General Provisions of Law of Debts of Part III; Part II: Part IV types of debt, Part V Intellectual property, Part VI Right of inheritance, Part VII Private international law. The Civil Code of Armenia was promulgated on July 28, 1998 and amended on December 3, 2015, with a total of 1,183 articles and consisting of 12 parts. Part I General Provisions; Part II (subject of civil rights); Part III Object of civil rights; Part IV Ownership and other Real Rights; Part V Legal act, agency, time limit and limitation of action; Part VI General Provisions for Creditor's Rights; Part VII Contractual debts; Part VIII Debts for unilateral acts; Part IX debts for damage; Part X Intellectual Property rights; Part XI Right of inheritance; Part XII Private International Law.

chants' autonomy and the state's "mercantilist" thinking. Its legislative impetus has always been to seek competitive advantage for the private or the state. The rise and development of intellectual property rights is due to the importance of innovation as a means of economic competition between nation states. In order to protect and stimulate innovation and make the country gain advantages in national competition, after a long period of system trial and error, intellectual property rights have been used up to now after being proved to be the best tool to protect innovation in comparison with other systems. It is because of the means of market competition emerge in endlessly, lead to fluctuations in the category of intellectual property rights, and finally caused the intellectual property rights become a the most unstable part of the system of private rights, in the history of all the efforts to be included in the civil code of all failed, because the object of intellectual property and rights category, needs to constantly changing along with the development of The Times and technology, It is opposite to the stability and abstractness that codification pursues, and it is different from the system reform path that civil law provides the basic rules of civil society as general private law. Therefore, intellectual property law, as a special private law, is more similar to commercial law. It is discovered and created by businessmen in the practice of commercial transactions, rather than the result of logical deduction of the system. Therefore, it should refer to the legislative style of commercial law and exist in the system of private law.

## **2.2 There is a profound contradiction between the openness and variation of intellectual property rights and the relative stability of the civil code**

The intellectual property code should not undermine the stability of the code. Wang liming scholars in the paper 'on the several problems of China's civil code system', points out that in the civil code is a significant strategy of governing the country according to law is important one annulus, is that "systematic help by ensuring the stability of the civil law, so as to achieve the stability of the social life and people in social life predictability"<sup>46)</sup>. Scholars Li Yang in the paper 'the theory of intellectual property rights in the civil code compiling is unfavorable in separate compiled' pointed out that the intellectual property right is different from the traditional real right, the type, content, exercise, limit and protection core content have openness, influenced by science and technology, economy and international trade, which determine the intellectual property law in legislative technology also

46) Wang Liming, "Some Problems on the Construction of China's Civil Code System", Law Science, No.1, 2003, pp. 30-39.

needs to maintain moderate openness and volatility, There is a profound contradiction between this openness and variation and the relative stability of the civil code<sup>47)</sup>.

### **2.3 The public law norm and procedural norm of intellectual property law do not match the private law attribute of Civil Code**

Scholar Li Yang in the paper ‘the theory of intellectual property rights in the civil code compiling is unfavorable in separate compiled’ pointed out that in the non-material characteristics of as the object of intellectual property, knowledge itself does not have the physical characteristics of exclusive possession, at the same time, in order to achieve the efficiency as the center of science and technology innovation, cultural progress, industry development, fairness and justice, give attention to two or more things The state has to examine through certain procedures and methods the characteristics of the advanced nature, creation and recognition of the knowledge that enforces the exclusive right, and enforces the publicity effect of such exclusivity. Therefore, patent, trademark, new plant varieties, integrated circuit layout-design and other intellectual property laws will inevitably contain a large number of procedural norms and public law provisions related to application, review, objection, authorization, revocation, invalidation, administrative management and other procedural norms, and all intellectual property laws and regulations will be relocated to the civil code as a whole. Obviously, it will not match with the civil code, which is the basic protection of private rights, and greatly impact the private law attribute of the civil code, and violate the fundamental idea of private law autonomy, which can only be said to be an extremely romantic idea.<sup>48)</sup>

### **2.4 The three kinds of rights inside intellectual property are complicated, and the system is difficult to refine**

Scholar Xiong Qi pointed out in his paper “The System Orientation of Intellectual Property Law and Civil Law” that there are great differences in the object and scope of rights between intellectual property and civil rights, or the three rights within intellectual property. From the point of view of object identification, intellectual property is regarded as different from the property rights on the object of land, air or animals, and the identification of its object needs to be based on the recognition of additional creative

47) Li Yang, “Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code”, Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

48) Li Yang, “Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code”, Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

labor, which results in a great difference in the definition of copyright, patent and trademark right creation in the protection requirements.<sup>49)</sup> From the perspective of rights category, copyright law, trademark law and patent law have different types of rights. The protection of intellectual property is faced with high cost of bounding rights. At the same time, it is difficult to have complete and comprehensive exclusive attributes like property right. In the scholars' Proposal for The Intellectual Property Edition of the Civil Code of the People's Republic of China, drafted under the guidance of the China Intellectual Property Law Institute, a large number of articles are divided into three paragraphs to correspond to the special arrangements of copyright, patent and trademark rights. This clearly shows that the legislative differences among the three types of laws make it difficult to extract the common ground prevailing in all types of intellectual property laws through legislative techniques.<sup>50)</sup>

### **2.5 The independent compilation of intellectual property rights is difficult to increase the normative function of intellectual property law**

Scholar Li Yang pointed out in his paper "On the Inadvisable Independent Compilation of Intellectual Property Rights in the Compilation of Civil Code" that the structure design and content arrangement of civil code should consider not only the dual attributes of civil law which professor Liang Hui-xing said had both rules of conduct and rules of judgment, but also the creation of new normative energy. Will all existing intellectual property laws regulate the overall relocation to the unique one in the civil law, or to all existing substantive intellectual property law, civil law standard one-on-one hit out alone in the civil code set one, can't increase the intellectual property law not to speak of the specification of the energy, even by some scholars point of view, all or part of the abstract out the general rule applies to all intellectual property rights, Nor does it increase the regulatory energy already stored up by existing intellectual property laws.<sup>51)</sup>

### **2.6 There is no example in the world of a successful relationship between intellectual property law and civil code**

From the perspective of the history of intellectual property legislation, since the establishment of modern intellectual property law system, both

49) Xiong Qi, "Intellectual Property Law and Civil Law", *Journal of Wuhan University (Philosophy and Social Sciences)*, No. 2, 2019, pp. 128-138.

50) Xiong Qi, "Intellectual Property Law and Civil Law", *Journal of Wuhan University (Philosophy and Social Sciences)*, No. 2, 2019, pp. 128-138.

51) Li Yang, "Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code", *Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition)*, No. 2, 2017, pp. 32-41.



the Common law system and the civil law system countries have always adopted the legislative model of civil special law or separate law, which has nothing to do with the compilation of civil code. Due to their own legal tradition, legal concept, legislative technology and other reasons, the common law countries have no civil code in form. Since the birth of intellectual property law, it has taken the form of independent enactment law, which has become a unique legal system independent of tangible property rights. Examples include the Monopoly Act of 1623 in England and the Anna Act of 1709. The civil law countries are different from the Common law countries, inheriting the tradition of ancient Rome codification. France at the beginning of the 19th century, Germany and Japan at the end of the 19th century respectively formulated and promulgated the civil code of paradigm significance. Before this, the most important intellectual property legislation in France, Germany and Japan has been completed, but the civil codes of France, Germany and Japan have not incorporated the intellectual property system into their civil codes.

In the 20th century, in response to the object of intellectual property development and intellectual property status in the whole property right constantly strengthened, Italy, Russia, the Netherlands, Mongolia, Vietnam and other civil law countries began to try to include intellectual property rights in the civil code system, and in the 1990 s reached climax, the codification movement, but there are no successful examples. The Russian civil code has moved the intellectual property law into the civil code, but there are some problems in this practice. There are at least the following defects: first, the object of intellectual property rights to adopt a closed exhaustive enumeration. Second, Article 1232 of the Russian Civil Code stipulates the national registration procedure of intellectual activity achievements or individual means, which is inconsistent with the private law attribute of the civil code. Third, the definition and uniform use of core concepts do not meet the requirements of codification. Fourth, the civil codification of intellectual property has seriously impacted the stability of the civil code. Fifth, both the Russian Civil Code and the Intellectual Property Code adopt the structure of “general provisions -- specific provisions”, but the relationship between general provisions and specific provisions is not well handled. There are many problems in the “general provisions” of the Intellectual property law in Chapter 69. For example, the norms related to the authors of intellectual activities (article 1228), the norms related to the collective management of copyright (Article 1242-1244), and the norms related to patent agents and patent fees are all stipulated in the “general provisions”, which obviously does not conform to the logical requirements of the “general pro-

visions - specific provisions” of the civil Code.<sup>52)</sup>

In 1995, Part 6 of Vietnam’s Civil Code was set up to systematically regulate intellectual property rights, and the Industrial Ownership Protection Act of 1989, Copyright Protection Act of 1994 and Foreign Technology Introduction Act of 1988 were abolished when it came into force in 1996. Title 6 of Vietnam’s Civil Code is entitled “Intellectual Property rights and technology transfer rights”, including “copyright”, “industrial ownership” and “technology transfer” three chapters. However, there are also some drawbacks in the civil code concerning intellectual property in Vietnam. First, the contents of the civil code are too repetitive with the intellectual property code. Second, it only defines the traditional main types of intellectual property rights, and does not respond to the new intellectual property rights that arise with the development of science and technology. Like the Italian civil code, it lacks inclusiveness and expansion. Three is the common fault of the other civil code, the artificial segmentation substantive law, civil law and procedural law, public law, the procedural norms of intellectual property rights, administrative law and criminal law norms can only be kept in separate regulations or other legal departments to complete, causing the applicable law is not very convenient, and the difficulty of learning, research.<sup>53)</sup>

### **3. The Third Way: Incomplete Codification, Setting General Provisions of Intellectual Property Rights**

Professor Wu Han-dong is put forward in the paper, set in the “general” property rights of civil code “general provisions of intellectual property”, the right nature, right object, right of ontology, rights to produce, effectiveness, rights to use, and the relationship between the prior right, prohibit abuse of rights, and the relationship between civil special law, and the relationship between civil code of the ten items. This is neither a parallel implantation of the intellectual property system into the civil code, nor a simple declaration of the property of intellectual property in the civil code. Its legislative method is the combination of the general provisions of the civil Basic law and the special provisions of the civil law.<sup>54)</sup>

Some scholars also put forward the path of incomplete codification, suggesting that the general norms of intellectual property should be abstracted

52) See Wang Zhihua, “On the Civil Codification of Intellectual Property Law in Russia”, *global Law Review*, No.6, 2009.

53) Li Yang, “Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code”, *Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition)*, No. 2, 2017, pp. 32-41.

54) Wu Handong, “The Introduction of Intellectual Property Rights and the General Provisions of Property Rights in the Civil Code”, *Legal and Social Development*, No.4, 2015, pp. 58-66.

as the intellectual property book, and the separate laws of intellectual property should be retained outside the civil code. Scholars who hold this view believe that the generalized dual legislative model has more advantages: It highlights the importance of intellectual property rights and to better coordinate the relationship between the civil code of intellectual property rights and superior to the link type, while maintaining the purity and stability of the civil code is better than into the type, the openness and low cost rather than intellectual property legislation of administrative procedure, in both the integrity of the special law of intellectual property itself and facilitate the applicable law in the total fraction of the intellectual property rights. Therefore, this model is the best choice for China to construct the relationship between civil code and intellectual property rights. In view of this path, some scholars have pointed out its drawbacks. Professor Yijiming pointed out that the practice of setting up a separate intellectual property section in the civil code and retaining a separate law on intellectual property rights may lead to a certain degree of legislative duplication. Professor Li Yang pointed out that this approach makes it more difficult to refine the intellectual property rights provisions. The existing legal system of intellectual property is mainly composed of individual laws of intellectual property, and the differences between the individual laws may be more prominent than the similarities, so it is difficult to refine the general rules of intellectual property.<sup>55)</sup>

55) Scholar Li Yang pointed out that “it is difficult to refine the provisions of the intellectual property section because the civil code sets up an independent intellectual property section and retains a separate intellectual property law”. Li Yang, “Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code”, *Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition)*, No. 2, 2017, pp. 32-41.

## Chapter 2 Provisions on Intellectual Property Rights in the Civil Code

### Section 1 Provisions Relating to Intellectual Property Rights in the Current Civil Code

	Article	Book	Chapter	Main Content
1	123	Book I: General Provisions	Chapter V Civil Rights	Civil subjects shall enjoy intellectual property rights according to law. Intellectual property rights are exclusive rights enjoyed by the right holder in accordance with the law with respect to the following objects : (1) works; (2) inventions, utility models and designs; (3) Trademarks; (4) Geographical indications; (5) Business secrets; Layout-design of integrated circuits; New varieties of plants; (8) other objects provided for by law.
2	440, Paragraph 5	Book II Real Rights	Chapter XVIII Pledge	The following rights which the debtor or a third party is entitled to dispose of may be pledged:..... (5) the property rights among intellectual property rights such as the exclusive right to use a registered trademark, patent right and copyright that can be transferred; ...
3	444	Book II Real Rights	Chapter XVIII Pledge	If the property right in the intellectual property right such as the exclusive right of registered trademark, patent right and copyright is pledged, the right of pledge shall be established upon the registration of pledge. After the property rights in the intellectual property rights are pledged, the pledgor shall not transfer or permit others to use them, except as agreed by the pledgor and the Pledgee through consultation. The proceeds obtained by the pledgor from transferring or licensing another person to use the property rights in the pledged intellectual property rights shall pay off debts or be deposited with the pledgee in advance.
4	501	Book III Contracts	Chapter IX Sales Contracts	The parties may not divulge or improperly use trade secrets or other confidential information that they have come to know in the course of concluding a contract, no matter whether the contract is formed or not. If the party divulges or improperly uses such trade secrets or information and causes losses to the other party, it shall be liable for compensation.
5	600	Book III Contracts	Chapter IX Sales Contracts	Where a subject matter with intellectual property rights is sold, the intellectual property rights in the subject matter do not belong to the buyer, unless otherwise provided by law or agreed by the parties.

6	843	Book III Contracts	Chapter XX Technology Contracts	A technology contract is a contract through which the parties establish the rights and obligations of each other in respect of technology development, transfer, licensing, consultation or services.
7	844	Book III Contracts	Chapter XX Technology Contracts	The conclusion of a technology contract shall be conducive to the protection of intellectual property rights and the progress of science and technology, and promote the research, development, transformation, application and dissemination of scientific and technological achievements.
8	845	Book III Contracts	Chapter XX Technology Contracts	<p>The contents of a technology contract generally include the name, content, scope and requirements of the project, the plan, place and method of performance, the confidentiality of technical information and data, the ownership of the technical achievements and the method of distributing the benefits, the acceptance criteria and methods, and the interpretation of terms and terms, etc.</p> <p>The technical background information, feasibility demonstration and technical evaluation report, project assignment and plan, technical standard, technical specification, original design and process documents and other technical documents related to the performance of the contract may be an integral part of the contract as agreed by the parties.</p> <p>Where a technology contract involves a patent, it shall indicate the name of the invention-creation, the patent applicant and the patentee, the date of application, the application number, the patent number and the validity period of the patent right.</p>
9	846	Book III Contracts	Chapter XX Technology Contracts	<p>The method of payment for the price, remuneration or royalties under a technology contract shall be agreed upon by the parties, and may be in the form of one-time payment on a one-off basis or installment payment on a one-off basis, or in the form of royalty payment or royalty payment plus an advance payment for the initial fee.</p> <p>Where a royalty payment is agreed upon, the royalty may be calculated as a percentage of the product price, the additional output value resulting from exploitation of the patent and use of the technical secret, the profits or the sales of the product, or by any other method agreed upon. The proportion of royalty payment may be fixed, increasing or decreasing year by year.</p> <p>Where royalty payment is agreed upon, the parties may agree on a method for inspection of the relevant accounting accounts.</p>



10	847	Book III Contracts	Chapter XX Technology Contracts	Where the right to use and the right to transfer the employee-owned technology belongs to a legal person or an organization without legal personality, the legal person or organization may conclude a technology contract with respect to the employee-owned technology. Where a legal person or an organization without legal personality enters into a technology contract for the transfer of job-related technology, the person who made the job-related technology shall have the right of first refusal under the same conditions. A job-related technology is a technology developed in the performance of a task assigned to a legal person or an organization without legal personality, or by utilizing primarily the material and technical resources of a legal person or an organization without legal personality.
11	848	Book III Contracts	Chapter XX Technology Contracts	The right to use and transfer the non-job-related technology belongs to the individual who made the technology, and the individual who made the technology may enter into a technology contract in respect of the non-job-related technology.
12	849	Book III Contracts	Chapter XX Technology Contracts	The individual who has made the technological achievement shall have the right to identify himself or herself as such in the relevant technological achievement documents and the right to obtain certificates of honor and awards.
13	850	Book III Contracts	Chapter XX Technology Contracts	A technology contract that illegally monopolizes technology, impedes technological progress, or infringes upon the technological achievement of another person shall be null and void.
14	851	Book III Contracts	Chapter XX Technology Contracts	A technology development contract is a contract concluded between the parties concerning research and development of new technology, new product, new technology, new varieties or new materials and their systems. Technology development contracts include commission development contracts and cooperative development contracts. A technology development contract shall be in writing. Where a contract is concluded between the parties concerning the transformation of a scientific or technological achievement of practical value, reference shall be made to the relevant provisions governing technology development contracts.
15	852	Book III Contracts	Chapter XX Technology Contracts	The commissioning party under a commissioned development contract shall pay research and development funds and remuneration in accordance with the contract; Provide technical data and original data; Put forward research and development requirements; To complete collaborative tasks; Acceptance of research and development results.

16	853	Book III Contracts	Chapter XX Technology Contracts	The developer under a commissioned development contract shall formulate and implement the development plan in accordance with the contract; Rational use of research and development funds; Complete the research and development work on schedule, deliver the research and development results, provide relevant technical data and necessary technical guidance, and help the client master the research and development results.
17	854	Book III Contracts	Chapter XX Technology Contracts	Where a party to a commissioned development contract violates the contract and causes stagnation, delay or failure of the development work, it shall be liable for breach of contract.
18	855	Book III Contracts	Chapter XX Technology Contracts	The parties to a cooperative development contract shall, in accordance with the contract, make investment, including investment in technology; To participate in research and development work according to the division of labor; Cooperate in research and development.
19	856	Book III Contracts	Chapter XX Technology Contracts	Where a party to a cooperative development contract breaches the contract, thereby causing stagnation, delay or failure of the development work, it shall be liable for breach of contract.
20	857	Book III Contracts	Chapter XX Technology Contracts	Where the technology which is the subject matter of a technology development contract has been disclosed by another person, rendering the performance of the technology development contract meaningless, the party may terminate the contract.
21	858	Book III Contracts	Chapter XX Technology Contracts	In the course of performance of a technology development contract, if the research and development fails or partially fails due to insurmountable technical difficulties, such risk shall be agreed upon by the parties; Where it is not prescribed or clearly prescribed, and cannot be determined in accordance with the provisions of Article 510 of this Law, the risk shall be reasonably shared by the parties. If a party discovers any of the circumstances prescribed in the preceding paragraph which may cause the failure of the research and development in part or in part, it shall promptly notify the other party and take appropriate measures to reduce the losses. If the party fails to timely notify and take appropriate measures, thus causing further losses, it shall be liable for such further losses.

22	859	Book III Contracts	Chapter XX Technology Contracts	For an invention-creation resulting from a commissioned development, the right to apply for a patent shall belong to the developer, unless otherwise provided by law or agreed upon by the parties concerned. Where the developer has obtained a patent right, the entrusting party may exploit the patent according to law. Where the developer assigns the patent application right, the client shall have the right of first refusal under the same conditions.
23	860	Book III Contracts	Chapter XX Technology Contracts	<p>Unless otherwise agreed by the parties, the right to apply for a patent for an invention-creation resulting from a cooperative development shall be jointly owned by the parties. Where a party assigns its jointly owned patent application right, the other parties shall have the right of first refusal under the same conditions.</p> <p>Where one party to the cooperative development declares to waive its joint right to apply for a patent, the other party may file an application separately or the other parties may file an application jointly. Where the applicant has obtained the patent right, the party waiving the right to apply for the patent may exploit the patent free of charge. Where one party of the cooperative development does not agree to apply for a patent, the other party or any other party may not apply for a patent.</p>
24	861	Book III Contracts	Chapter XX Technology Contracts	The right to use and transfer the technical secret resulting from the commissioned or cooperative development, as well as the method for distributing the benefits thereof, shall be agreed upon by the parties; Where there is no agreement or the agreement is not clear, and it cannot be determined in accordance with the provisions of Article 510 of this Law, the parties shall have the right to use and transfer the technology before the same technical solution is granted a patent. However, the developer of the commissioned development may not transfer the research and development results to a third party before delivering them to the commissioning party.

25	862	Book III Contracts	Chapter XX Technology Contracts	A technology transfer contract is a contract concluded by the right holder who legally owns the technology to assign the rights related to the existing specific patent, patent application and technical secret to another person. A technology licensing contract is a contract concluded by the right holder of the technology who legally owns the technology to license the relevant rights of the existing specific patent or technical secret to another person for exploitation or use. The provisions in a technology transfer contract or a technology licensing contract concerning the provision of special equipment or raw materials for the implementation of the technology or the provision of relevant technical advice and services shall be an integral part of the contract.
26	863	Book III Contracts	Chapter XX Technology Contracts	Technology transfer contracts include contracts for the assignment of patent rights, patent application rights and technical secrets. Technology licensing contracts include contracts for licensing patents, licensing technical secrets, etc. Technology transfer contracts and technology licensing contracts shall be in writing.
27	864	Book III Contracts	Chapter XX Technology Contracts	A technology transfer contract or a technology licensing contract may specify the scope of exploitation of the patent or use of the technical secret, but shall not restrict technological competition and technological development.
28	865	Book III Contracts	Chapter XX Technology Contracts	The patent licensing contract shall be valid only during the duration of the patent right. Where the validity period of the patent right expires or the patent right is declared invalid, the patentee may not enter into a patent licensing contract with any other person for the patent.
29	866	Book III Contracts	Chapter XX Technology Contracts	The licensor under a patent licensing contract shall, in accordance with the contract, license the licensee to exploit the patent, deliver technical materials related to exploitation of the patent, and provide necessary technical guidance.
30	867	Book III Contracts	Chapter XX Technology Contracts	The licensee under a patent licensing contract shall exploit the patent in accordance with the contract, may not license the patent to any third party other than the one agreed upon, and shall pay a royalty in accordance with the contract.

31	868	Book III Contracts	Chapter XX Technology Contracts	The transferor under the contract for the transfer of the technical secret and the licensor under the contract for the license for the use of the technical secret shall, in accordance with the contract, provide technical materials, provide technical guidance, ensure the practicality and reliability of the technology, and bear the obligation of confidentiality. The obligation of confidentiality provided for in the preceding paragraph shall not restrict the assignor or licensor from applying for a patent, except as otherwise agreed by the parties.
32	869	Book III Contracts	Chapter XX Technology Contracts	The transferee under a contract for the transfer of technical secret and the licensee under a contract for the licensing of the use of technical secret shall, in accordance with the contract, use the technology, pay a royalty and bear the obligation of confidentiality.
33	870	Book III Contracts	Chapter XX Technology Contracts	The transferor under a technology transfer contract shall warrant that it is the legal owner of the technology provided and that the technology provided is complete, correct, effective and capable of achieving the agreed objectives.
34	871	Book III Contracts	Chapter XX Technology Contracts	The transferee under a technology transfer contract shall, within the agreed scope and time limit, bear the obligation to keep confidential the undisclosed part of the technology supplied by the transferor.
35	872	Book III Contracts	Chapter XX Technology Contracts	Where the transferor fails to transfer the technology in accordance with the contract, it shall refund part or all of the royalties and shall be liable for breach of contract; Where any party exploits the patent or uses the technical secret beyond the agreed scope, or, in violation of the agreement, permits a third party to exploit the patent or use the technical secret, it shall cease its breach of contract and be liable for breach of contract; Where a party breaches the agreed confidentiality obligation, it shall be liable for breach of contract. Where licensor is liable for breach of contract, the provisions of the preceding paragraph shall apply with reference to.



36	873	Book III Contracts	Chapter XX Technology Contracts	Where the transferee fails to pay the royalties as agreed, it shall make up the royalties and pay liquidated damages as agreed; Where it fails to make up the royalties or pay liquidated damages, it shall stop exploitation of the patent or use of the technical secret, return the technical materials and be liable for breach of contract; Where the transferor exploits the patent or uses the technical secret beyond the agreed scope, or licenses the patent or the technical secret to a third party without the consent of the transferor, it shall cease the breach and be liable for breach of contract; Where a party breaches the agreed confidentiality obligation, it shall be liable for breach of contract. Where the licensee is liable for breach of contract, the provisions of the preceding paragraph shall apply with reference to.
37	874	Book III Contracts	Chapter XX Technology Contracts	Where the assignee or licensee exploits the patent or uses the technical secret in accordance with the contract to infringe upon the lawful rights and interests of another person, the assignor or licensor shall be liable, except as otherwise agreed by the parties.
38	875	Book III Contracts	Chapter XX Technology Contracts	The parties may, in accordance with the principle of mutual benefit, stipulate in the contract a method for sharing any subsequent improvement resulting from the exploitation of the patent or the use of the technical secret. Where it was not prescribed or clearly prescribed, and cannot be determined in accordance with the provisions of Article 510 of this Law, the other parties shall not be entitled to share any subsequent technological improvement made by one party.
39	876	Book III Contracts	Chapter XX Technology Contracts	The transfer and licensing of other intellectual property rights, such as the exclusive right of layout-design of integrated circuits, the right of new plant varieties, and the copyright of computer software, shall be governed by reference to the relevant provisions of this Section.
40	877	Book III Contracts	Chapter XX Technology Contracts	Where laws or administrative regulations provide otherwise in respect of technology import and export contracts or patents or patent application contracts, such provisions shall prevail.
41	878	Book III Contracts	Chapter XX Technology Contracts	A technical consulting contract is a contract concluded by one party to provide the other party with the technical knowledge to provide feasibility demonstration, technical forecast, special technical investigation, analysis and evaluation report for a specific technical project. A technical service contract is a contract concluded by one party to solve a specific technical problem for the other party with its technical knowledge, excluding contracts for work and contracts for construction projects.

42	879	Book III Contracts	Chapter XX Technology Contracts	The client under a technical consulting contract shall, in accordance with the contract, clarify the problem concerned and provide technical background materials and relevant technical materials and data; Accept the work results of the trustee and pay remuneration.
43	880	Book III Contracts	Chapter XX Technology Contracts	The agent under a technical consulting contract shall complete the consulting report or answer the questions within the prescribed time limit; The consulting report submitted shall meet the agreed requirements.
44	881	Book III Contracts	Chapter XX Technology Contracts	Where the client under a technical consulting contract fails to provide the necessary materials and data in accordance with the contract, affecting the progress and quality of the work, or fails to accept or delays in accepting the work result, the remuneration paid shall not be recovered, and the unpaid remuneration shall be paid. Where the agent under a technical consulting contract fails to submit the consulting report within the prescribed time limit or the consulting report submitted is not in conformity with the contract, it shall be liable for breach of contract such as reduction or exemption of remuneration. The client under a technical consulting contract shall bear the losses caused by making decisions based on the consulting reports and opinions of the agent that meet the requirements of the contract, except otherwise agreed by the parties.
45	882	Book III Contracts	Chapter XX Technology Contracts	The client under a technical service contract shall provide working conditions and complete cooperation items in accordance with the contract; Accept work results and pay for them.
46	883	Book III Contracts	Chapter XX Technology Contracts	The agent under a technical service contract shall, in accordance with the contract, complete the service projects, solve technical problems, ensure the quality of work, and impart knowledge for solving technical problems.
47	884	Book III Contracts	Chapter XX Technology Contracts	Where the client under a technical service contract fails to perform its contractual obligations or fails to perform its contractual obligations in conformity with the terms of the contract, affecting the progress and quality of the work, or fails to accept or delays in accepting the work results, the remuneration paid shall not be recovered, and the unpaid remuneration shall be paid. Where the agent under a technical service contract fails to complete the service work in accordance with the contract, it shall be liable for breach of contract such as the exemption of remuneration.

48	885	Book III Contracts	Chapter XX Technology Contracts	In the course of performance of a technical consulting contract or a technical service contract, any new technology produced by the agent using the technical data and working conditions provided by the client belongs to the agent. Any new technology developed by the client using the work products of the agent belongs to the client. If the parties agree otherwise, such agreement shall prevail.
49	886	Book III Contracts	Chapter XX Technology Contracts	Where the technical consulting contract or the technical service contract does not specify or clearly specify the burden of the expenses required by the agent to carry out the normal work, the agent shall bear the burden.
50	887	Book III Contracts	Chapter XX Technology Contracts	Where laws or administrative regulations provide otherwise for technology intermediary contracts or technology training contracts, such provisions shall prevail.
51	1062	Book V Marriage and family	Chapter III Family relations	The following property acquired by husband and wife during the period of their marriage shall be their joint property and shall be in their joint possession: ... (3) earnings from intellectual property rights; ... Husband and wife shall have equal right to dispose of their joint property.
52	1185	Book VII Tort liability	Chapter II Damages	Where the intellectual property rights of others are intentionally infringed and the circumstances are serious, the infringed shall have the right to request corresponding punitive damages.

## **Section 2 Specific Contents Related to Intellectual Property Rights in the Civil Code**

The Civil Code does not include the intellectual property law as a separate part. A total of 52 articles related to intellectual property law are scattered in the general Provisions, the Real Rights book, the contract book and other relevant provisions, accounting for 4% of the total 1,260 articles. However, the civil code fully affirms the value of intellectual property in its legal attribute. In the aspect of civil legal behavior, the civil Code also fully considers and takes care of the special property attribute of intellectual property, and gives proper guidance on the exercise and protection of relevant rights.

### **1. Clarifying the Object of Intellectual Property Rights**

Article 123 of the Civil Code clearly stipulates that “civil subjects enjoy intellectual property rights in accordance with the law”, which is considered to be a centralized provision on intellectual property rights with a broad outline, indicating that the Civil Code is the main source of intellectual property laws and regulations. This method of defining intellectual property as civil power from the point of view of the subject of rights indirectly expresses the legislators’ recognition of the property of private right of intellectual property and the original intention of legislating the legal power. As a matter of fact, chapter 5 of the General Principles of The Civil Law promulgated in 1986 (implemented in 1987) stipulates that civil rights consist of “property ownership and rights related to property ownership”, “creditor’s rights”, “intellectual property rights” and “personal rights”. The third section explains that “intellectual property rights” consist of copyright, patent right, trademark right, discovery right, invention right, etc. However, due to the insufficient research and understanding of intellectual property legal sources, rights content, the relationship between intellectual property system and national policy and legal system, the right attribute and right structure of intellectual property were not mentioned, and the generalization of the scope of intellectual property rights was limited by The Times.<sup>56)</sup> In addition, Article 118 of the General Principles of the Civil Law provides for civil liability for infringement of the above rights.<sup>57)</sup> On

56) Yang Bin, Cui Fengming. “The Highlights of the Intellectual Property Provisions in the Civil Code and the Institutional Outlook”, published in Peking University, January 8, 2021.

57) Article 118 of the General Principles of the Civil Law of the People’s Republic of China “where a citizen or a legal person’s copyright (copyright), patent right, right to exclusive use of a trademark, right of discovery, right of invention or right of any other scientific or technological achievement is infringed upon by plagiarism, alteration or counterfeiting, he or she shall have the right to demand that the infringement be stopped, the effects be eliminated and damages be compensated”.

this basis, Article 123 of the General Provisions of the Civil Law was further formed in 2017, and this time it was changed to Article 123 of the General Provisions of the Civil Code.

This regulation directly confirms the legal status of “intellectual property” from the level of basic civil legal system, and fundamentally brings all civil legal acts related to intellectual property into the jurisdiction of the civil code. At the same time, the regulation lists the objects of intellectual property rights protection, including seven specific types of works, trademarks, trade secrets, as well as “other objects prescribed by law.” In this way, it not only fully sums up the connotation of the intellectual property in reality, but also leaves some space for the extension of the types of intellectual property rights in the future.

Article 444 of the Civil Code makes specific provisions on the issue of the pledge right of intellectual property. On the one hand, it emphasizes the economic attribute of intellectual property, the intangible intellectual property, and on the other hand, it clarizes the way of exercising the pledge right of intellectual property. This regulation helps the society to carry out intellectual property pledge activities in a more healthy and orderly way.

## **2. Strengthen the Protection of Business Secrets**

Trade secrets, as an essential factor in promoting social and economic development, are of great value. The civil code lists the protection principles and compensation schemes for trade secrets, and relevant provisions further strengthen the protection of trade secrets. “Trade secrets” in China, for the first time in the civil procedure law in 1991, but due to the time of the “general principles of the civil law” the lack of specific provisions of the commercial secret, until 1993, “the anti-unfair competition law” expressly determine business secret is a specific legal rights, many business secrets about the dispute case is the basis of the substantive law.

“Civil code” article one hundred and twenty-three the provisions of the commercial secrets belong to one of the object of intellectual property rights, for the business secret rights in civil law protection system provides the most basic and higher authority and status of the basic legal basis, which not only helps to set up the honest credit market order, will be more conducive to the fundamental principles of civil law and the organic combination of the internal requirement of market economy, We will consolidate good market order and competitive environment. Although the commercial secrets can be included in the category of the object of intellectual property rights, the nature of the business secret and intellectual property such as whether the object of expanding the range of appropriate controversial, but from the civil law general business secret should be brought into the protection of intellectual property rights, market operators to business secret



rights attribute, the form and right protection path, etc have a more clear understanding, But it is also an indisputable fact.

The inclusion of trade secrets in the protection of intellectual property rights in the Civil Code reflects China's attitude and determination to strengthen ipr protection. It is consistent with the policy of creating a law-based business environment and accords with the connotation of long-term and stable rights of trade secrets. At the same time, the civil code of business secret should be brought into the protection of intellectual property rights, also accord with outside countries and international organizations on commercial secret protection mode of the general consensus, but also in the process of a new round of economic transformation in China for foreign investment legal support, help international exchanges and economic cooperation between enterprises, boost business environment optimization and the intellectual property protection level of ascension.

Article 501 of the Civil Code provides for the situation of "trade secrets" learned in the course of contract signing. According to the provisions, "No matter whether the contract is formed or not, the parties shall not disclose or improperly use trade secrets or other confidential information that they have come to know during the conclusion of the contract; If any party divulges or improperly uses such trade secrets or information, thereby causing losses to the other party, it shall be liable for compensation."

### **3.The Regulation of Punitive Damages**

Punitive compensation for malicious intellectual property infringement is the focus of judicial and legislative practice of intellectual property in China in recent years. In 2013, the third amendment of the Trademark Law was first introduced into punitive damages. In 2019, the Anti-Unfair Competition Law was revised to include punitive damages. The revised patent law and copyright Law also contain punitive compensation provisions. Since the first introduction of China's Trademark Law in 2013, the punitive damages system has played a positive role in punishing and curbing intellectual property infringement and safeguarding the legitimate rights and interests of intellectual property rights holders. However, due to the trademark infringement cost is relatively low, the infringer profits is relatively high, the holder of the loss is difficult to determine, and the legal standard of compensation not high, the punitive compensation liability for the infringer of shock and awe, the compensation for the holder, for the infringement prevention enough strength, tension deficiencies and problems such as the effect not beautiful. Among cases involving trademark infringement heard by courts at all levels, the proportion of punitive damages awarded

to defendants was low, less than 0.2% between 2014 and 2018.<sup>58)</sup> by 2020 it will account for only 6.5 percent,<sup>59)</sup> to some extent, this reflects that the actual implementation effect of the punitive compensation system of intellectual property is not very ideal. Article 1,185 of the Civil Code states that “if a person intentionally infringes upon the intellectual property of another person and the circumstances are serious, the infringed person shall have the right to claim corresponding punitive damages”. The Civil Code clearly stipulates that in intellectual property infringement cases, based on the subjective intention of the actor, the serious consequences of the infringement and the judicial demands of the right holder, the people’s court can order the tortfeasor to bear the punitive compensation liability according to law. The judicial interpretation continues to clarify the application requirements of punitive damages, quantify the amount of basic damages, regulate the application of calculation methods, and clarify the restriction rules.<sup>60)</sup> These regulations echo China’s recent regulations on punitive damages in the intellectual property law, such as patent law and trademark law. All this highlights the importance China attaches to intellectual property rights as a civil legal right and its determination to protect them.

#### **4. Institutionalize Technology Contracts Related to Intellectual Property Rights**

Articles 843 to 887 of the Civil Code govern the use and transfer of technology-related intellectual property contracts. Compared with the Technol-

58) In 2019, The “Statistical Analysis Report on the Implementation of Trademark Punitive Damages System” released by “Chaochao Research Institute” and the “Research and Analysis Report on Intellectual Property Punitive Damages (May 1, 2014 -- December 31, 2018)” provided by “Zhichanbao”, among the trademark infringement cases heard by courts at all levels, The proportion of cases in which defendants were ordered to assume punitive damages was no more than 0.2%, see Zhang Guangliang, “Construction of The Punishment System for Intellectual Property Damages”, Law Science, No. 5, 2020.

59) According to the research of scholars Such as Wang Lianfeng and Xu Jun, the punitive damages system was introduced into the Trademark Law of China in 2013, and the effective date of the punitive damages clause for trademarks (May 1, 2014). One was applicable in 2015, one in 2016, two in 2017, three in 2018, three in 2019 and six in 2020. A research team of fujian District People’s Court in Shenzhen, Guangdong Province, found that punitive damages were used as the criterion in only 6.5 percent of trademark cases. See Wang Lianfeng, Jian Jialin, “The legal application of punitive Damages for Trademark Infringement: an empirical analysis based on 123 Judgments in China”, electronic Intellectual Property, no.5, 2020, pp. 73-90. See Wang Xinmei, “Construction of Punitive Compensation system for Trademark Infringement”, Intellectual Property, No. 5, 2020, pp. 40-54. See Xu Jun, Ye Mingxin, “A Study on the Classification of the Legal Application Requirements of Trademark Punitive Damages”, Intellectual Property, No.4, 2021, pp. 79-96.

60) Interpretation (2021) No. 4 of the Interpretation of the Supreme People’s Court on the Application of Punitive Damages in The Trial of Civil Cases of Intellectual Property Infringement (adopted at the 1831st meeting of the Judicial Committee of the Supreme People’s Court on February 7, 2021, effective from March 3, 2021)

ogy Contract Law of 1987, the Civil Code has revised the structure, concept, purpose, terminology and obligation setting of technology contract to varying degrees. This revision not only responds to the need of building an innovative country in China, but also reflects the call and requirement of comprehensively strengthening intellectual property protection. It also provides clear judgment guidance for the judicial practice of intellectual property, which has very distinct characteristics of The Times and practical significance.

Specific content, Civil Code will technology license contract as an independent type of technology contracts, and to expand its coverage to the patent and the technical secret, has been clear about the technology and general civil contracts in such aspects as content, lifting, implementation and invalid, highlights its in contract law system and the important position in the field of intellectual property rights and the rule of unique. At the same time, clarifying the purpose of the technology contract has important judicial significance for judging whether the legal termination conditions have been achieved, determining the liability for breach of contract and the performance of the subsequent technology contract. In addition, the non-essential clause of individual remuneration right should be deleted, and the correspondence between the technical contract clause in the Civil Code and the patent Law and other special laws should be maintained, and the simplicity of the Civil Code clause should be moderate. It can be said that the relevant provisions of the Civil Code on technology contract not only reflect the commonality between technology contract and general civil and commercial contract in terms of internal mechanism, applicable scenario and legal effect, but also maintain the exclusivity of technology contract in terms of coverage, quasi-application of clauses and legal effect.

Look from change amplitude, the civil code of technology contract shall be discussed with forty-five law, no change of only eight, although most changes does not belong to the substantial changes, but the whole, the technology contract section arrangement more reasonable some fine, content more, pay more attention to the parties to a contract the parties balance of interests and more respect the autonomy of the parties. In this way, the practical operation of technology contracts will be more reasonable, and it will help to promote the innovation potential and enthusiasm of intellectual property practitioners, so that the transformation of science and technology and intellectual property achievements will be more conducive to the implementation of innovation-driven development strategy. It can be said that the setting of the chapter of technology contract timely responds to the requirements of China's current development, and provides a new paradigm and a new pivot for the transformation of China's technological achieve-

ments and intellectual property rights.

### **Chapter 3 Application Relationship between Civil Code and Intellectual Property Law**

#### **Section 1: Intellectual Property law under the Civil Code**

##### **1. Basic Logic of Application of Civil Code and Intellectual Property Law**

As the basic law, superior law and general law in the civil field of China, the Chinese civil Code has the function of governing the legal norms in the civil field.<sup>61)</sup> According to Article 88 of the Legislation Law of the People's Republic of China on the application of laws, the upper law is superior to the lower law. The civil Code, as the upper law, is naturally more effective than the intellectual property law and has the priority of application.<sup>62)</sup> Article 92 provides that the special law is superior to the general law, provided that the prerequisite is a law enacted by the same agency. Based on the above analysis, the intellectual property law as the special legislation in the field of intellectual property rights, however, from the level to analyze its enactment organ, belongs to Xia Wei Fa, as a special law of its relevant content and included in the civil code, only if there are no relevant provisions in the civil code content priority applicable intellectual property laws, fully embodies the "civil code" as the "basic law" in the civil field.

From the perspective of the basic logic of the application of the Civil Code and intellectual property law, it can be specifically expressed as follows: 1. The Civil Code is the basic law in the civil field, and has the function of governing other laws in the civil field, so it includes the governing of intellectual property law. 2. The Civil Code is the basic law in the civil field, so the general norms made by the Civil Code are also applicable to intellectual property rights. 3. From the perspective of the enacting organs, the Civil Code belongs to the upper law and has the conditions of priority application. 4. From the perspective of specific legal norms, intellectual property law is a special norm in the field of intellectual property. In the absence of specific provisions in the Civil Code, it has the effect of priority application.

61) See Liu Tiegang, "Revision of the Separate Law on Intellectual Property Under the Jurisdiction of the Civil Code", *Contemporary Law Review*, No. 2, 2021, pp. 24-33.

62) Depending on the issuing department of the law, the law issued by the upper authority is more effective than that issued by the lower authority. In China, the Civil Code is issued by the National People's Congress, while the intellectual property law is issued by the Standing Committee of the National People's Congress, so the civil code is naturally more effective than the intellectual property law.

From such a basic logic, the future development of intellectual property law needs to return to the basic norms of the Civil Code. But in general, the Civil Code can provide theoretical support for the intellectual property law, and secondly supplement the applicable value, but also to prevent arbitrary application of civil law to destroy the balance of the intellectual property system.<sup>63)</sup>

## **2. Special Provisions of the Civil Code Governing Relations**

In order to prevent the application of the Civil Code and other laws from upsetting the balance between laws, special provisions are made in the Civil Code. For example, article 11 of the Civil Code stipulates that “if other laws have special provisions on civil relations, such provisions shall be followed”. According to this article, although the Civil Code is the superior law of the intellectual property law, this special norm makes the intellectual property law can be applied as a special law first. When there are special provisions in the intellectual property law for civil relations in the field of intellectual property, the intellectual property law shall be applied preferentially, and the Civil Code shall not have the effect of preferential application. Article 11 of the Civil Code can effectively prevent arbitrary application of the Civil Code from destroying the balance of the intellectual property system. For another example, article 188 of the Civil Code stipulates that “the limitation of action for the protection of civil rights shall be three years, if the law provides otherwise”.<sup>64)</sup> In the current intellectual property related legislation, only the Patent Law provides the prescription of action for the temporary protection of patent infringement and invention patent.<sup>65)</sup> And the civil Code protection of the same statute of limitations, three years. But in the patent law before its rules of litigation protection lasting for two years, after three years of patent law is amended as also for maintaining the basic principle of the equal protection of civil rights, such as for the provisions of the statute of limitations is different, also need to first apply when applicable law, the conflict with the basic principles of the civil code of special provisions can only through revising the law to adjust.

63) See Kong Xiangjun, “The relationship between the Civil Code and the application of intellectual Property Law”, *Intellectual Property*, No. 1, 2021, pp. 3-19.

64) Article 188 of Civil Code “the limitation of action for petitioning a people’s court for the protection of civil rights shall be three years. Where the law provides otherwise, such provisions shall prevail”.

65) Article 74 of Patent Law “the limitation of action for infringement of a patent right is three years, counting from the date on which the patentee or any interested party became or should have become aware of the infringing act and the infringer”.



In addition, there are articles 877 and 887 in the Civil Code<sup>66)</sup>, special provisions are also stipulated for technology contracts, and the special provisions of intellectual property law on technology contracts can be applied first.

### **3. Application of Basic Principles of Civil Code and Intellectual Property Law**

“From the perspective of comparative law, it is not the norm to enumerate the basic principles in the general provisions of the civil code”,<sup>67)</sup> there is some controversy in translating general legal thought into culture. In The Civil Code of China, the general legal thought of civil law is still clarified and the six basic principles are stipulated.<sup>68)</sup> As a general principle of law in the civil field, it has wide applicability and great discretion. Therefore, there are two situations in which the basic principles of civil law can be applied in practice: one is when the basic principles of civil law are not expressly stipulated in the civil law; Secondly, the basic principles should be applied when the results caused by the application of relevant specific norms will directly violate the basic principles of civil law.

From this analysis, the basic principles of the Civil Code are to coordinate civil legislation and reduce the conflicts between relevant civil legislation, which is of guiding significance. Therefore, the basic principles of the Civil Code have the same effect on the intellectual property law in practice, and the basic principles of the civil law can only be applied when the intellectual property law does not provide for problems arising in the field of in-

66) Article 877 of civil Code of the People's Republic of China “where laws or administrative regulations provide otherwise in respect of technology import and export contracts or patents or patent application contracts, such provisions shall prevail. Article 887 Where any law or administrative regulation provides otherwise in respect of technology intermediary contracts or technology training contracts, such provisions shall prevail”.

67) Scholar Fang Xinjun argues in his paper: “If observed from the level of comparative law, the legislative example of setting general principles in the civil code originated from Germany, but there is no provision on basic principles in the German Civil Code, which directly starts with the provision on” human “. The Civil Code of Japan (hereinafter referred to as “The Japanese People”), which followed Germany in terms of style, was completely consistent with the German Civil Code in the original version. The civil Code of Taiwan added a chapter of “Laws”, mainly about the sources and interpretations of laws, without listing the basic principles. See Fang Xinjun. “The Realization of The Integration of The Internal System and the Civil Code System -- Comments on the Basic Principles of The General Provisions of Civil Law”, Peking University Law Journal, No. 3, 2017, pp. 567-589.

68) Article 5 of Civil Code of the People's Republic of China “in engaging in civil activities, a civil subject shall abide by the principle of voluntariness and establish, alter or terminate civil legal relations according to its own will. Article 6 in engaging in civil activities, a civil subject shall abide by the principle of fairness and reasonably determine the rights and obligations of each party. Article 7 In engaging in civil activities, a civil subject shall abide by the principle of good faith, uphold honesty and abide by its commitments. Article 8 In engaging in civil activities, a civil subject shall not violate the law or public order or good customs. Article 9 Civil subjects shall engage in civil activities conducive to the conservation of resources and the protection of the ecological environment”.

tellectual property. When the application of specific provisions in an intellectual property law will directly contradict the general legal principles, the basic principles shall be applied, which is also the basic need to maintain the stability and stability of the Civil Code. Although there are different views on the establishment of basic principles in the Civil Code, this paper only analyzes the application relationship between the basic principles and intellectual property law after they are clarified.

## **Section 2 Intellectual Property Provisions of Civil Code and Intellectual Property Law**

### **1. Object of Intellectual Property Rights**

Article 123 of the Civil Code stipulates that “civil subjects enjoy intellectual property rights in accordance with the law”, which defines the object of intellectual property rights by enumerating.<sup>69)</sup> it expresses the legislators’ recognition of the property of intellectual property as private right, and ensures the stability of legal norms through the legislative model of “enumeration + cover”. The civil Code has a general stipulation on the object of intellectual property, while the intellectual property law has a more specific stipulation on the object of intellectual property. From the perspective of the relationship between the two, the provisions of the civil Code on the object of intellectual property reflect the guiding role of the Civil Code in intellectual property law, and absorb the achievements of the development of China’s intellectual property system in terms of ensuring the stability of legal norms. In the legal norms of the object of intellectual property, the provisions in the Civil Code and the intellectual property law maintain a complementary structure. Therefore, the Civil Code provides the basic law support for the intellectual property law in terms of application, making the development of intellectual property law more in line with the needs of the development of socialist rule of law with Chinese characteristics.

### **2. Punitive Damages**

According to the stipulations of article one thousand one hundred and eighty-five of the civil code of the infringement of intellectual property rights system of punitive damages, the clause formally established in the field of intellectual property rights general specification of punitive dam-

69) Article 123 of the Civil Code of the People’s Republic of China “civil subjects shall enjoy intellectual property rights according to law. Intellectual property rights are exclusive rights enjoyed by the right holder in accordance with the law with respect to the following objects : (1) works; (2) inventions, utility models and designs; (3) Trademarks; (4) Geographical indications; (5) Business secrets; Layout-design of integrated circuits; New varieties of plants; (8) other objects provided for by law”.

ages, for the law of the People's Republic of China copyright law "patent law of the People's Republic of China to introduce the punitive damages system provides guidance. The Trademark Law of the People's Republic of China introduced punitive damages in 2013 and revised and increased the amount of punitive damages in 2019.<sup>70)</sup> Punitive damages for infringement of intellectual property rights were introduced in the Civil Code, and then China's Copyright Law and Patent Law were revised to introduce punitive damages system, and the amount of compensation followed the provisions of the Civil Code. So far, the provisions of the Civil Code on punitive damages for intellectual property rights will lead to a series of implementation details of punitive damages for intellectual property infringement, which will further promote the protection of intellectual property rights. From this perspective, the provisions of the civil code of China are also leading the development of China's intellectual property law, in the legislative level, the field of intellectual property rights law revision is also in line with the "civil code" of the basic regulation, so in practice for the civil code of terms of intellectual property rights and intellectual property law will also presents the application of the complementary relationship.

### **3. Systematic Specification of Technical Contract**

According to articles 843 to 887 of Chapter 20 of the Civil Code, the legal norms governing contracts for intellectual property rights related to technology are provided. The provisions on technology contract in The Civil Code of China respond to the construction needs of an innovative country, and the technology contract clauses in the Civil Code correspond to the quasi-application of provisions in the Patent Law of the People's Republic of China and other separate laws. In the relationship between the two, it also presents a complementary pattern. In the Patent Law of the People's Republic of China, there are no specific details about technology contract, and in Article 10, Article 12 and Article 47, it is generally stipulated that patent license and transfer need to conclude a written contract, without specific details. Therefore, there is a complementary application relationship between the intellectual property provisions of civil Code and the patent law. In accordance with the basic norms of the Civil Code, the application will be combined with specific cases.

### **4. Business Secrets**

According to Article 123 of the Civil Code, trade secrets are clearly defined as the object of intellectual property, which provides the highest basic

70) In 2019, the revised Trademark Law of the People's Republic of China changed the amount of compensation from 1 to 3 times in 2013 to 1 to 5 times.

law basis for the right of trade secrets in the civil field. In the original legal norms, trade secrets are generally protected by the Anti-Unfair Competition Law. There has been disagreement over whether trade secrets belong to intellectual property rights.<sup>71)</sup> Now from the legislative level to end this dispute, trade secret right as the object of intellectual property rights, and then face the problem is how to use the field of intellectual property law to protect the trade secret right as the object of intellectual property rights. At present, there are no specific provisions in the specific laws related to intellectual property, so the next step of the revision of the specific laws in the field of intellectual property is to respond to the trade secret right as the object of intellectual property, and coordinate with the Civil Code and the Anti-Unfair Competition Law. The civil Code includes trade secrets in the scope of intellectual property protection, reflecting China's attitude towards strengthening intellectual property protection. At present, the protection of trade secrets still needs to be adjusted according to the Anti-Unfair Competition Law, and the provisions of the Civil Code also need to comply with the general legal principles in the intellectual property law.

## **Chapter 4 Some Controversies and Problems**

### **Section 1 The Connection and Coordination between the Civil Code and Various Intellectual Property Laws**

#### **1. Whether Codification of Intellectual Property Rights is a Necessary Choice**

There are two approaches to codification of intellectual property rights in China. One is that the intellectual property system is codified. The second is to formulate a code of intellectual property rights. The main reasons for the development of intellectual property codification include: first, the country's need for competitive advantage; secondly, the codification of intellectual property rights has successful precedents in comparative law and business.<sup>72)</sup> third, perfect the right system of civil code; fourth, the needs of modern social economy and social development;<sup>73)</sup> fifth, to solve the existing problems of intellectual property law,<sup>74)</sup> and so on.

71) See Lin Xiuqin, "Theoretical Basis of Intellectual Property Rights of Trade Secrets", *Social Sciences of Gansu*, No. 2, 2020, pp. 11-20.

72) See Wu Handong, "Intellectual Property Rights Should Be independently Compiled in the Future Civil Code", *Intellectual Property*, No. 12, 2016, pp. 3-7.

73) See Liu Chuntian, "Rationality of the Establishment of Intellectual Property In China's Civil Code", *Intellectual Property*, No.9, 2018, pp. 81-92.

74) See Wang Qian, "Thoughts on incorporating Intellectual Property law into the Civil Code," *Intellectual Property*, No. 10, 2015, pp. 16-19.

Undeniably, there is a connection between the reasons for the codification of intellectual property and the codification of intellectual property law, but it does not constitute a necessary connection. First, the increasing importance of intellectual property in the development of modern society leads to the conclusion that it is necessary to strengthen the protection of intellectual property. The way of protection can be to improve the legislation related to intellectual property, but not necessarily to codification. Second, although Professor Wu Handong pointed out: “The incorporation of intellectual property into codification is the historical coordinate of the movement of codification of civil law since the 1990s.” After reviewing the beneficial experience of codification of intellectual property in other countries, he argued that intellectual property should be independently compiled in China’s Civil Code. However, the successful experience of codification of intellectual property in comparative law, As the reason for the codification of intellectual property law in China is obviously not sufficient, there are also counterexamples of not codification of intellectual property law in the comparative law, the persuasibility of this reason is limited. Intellectual property plays an important role in the economy of the United States and Japan, but there is no development of intellectual property codification because of its importance. Third, it is reasonable to codify intellectual property rights to improve the rights system of the civil code. However, as Professor Liang Huixing pointed out: “Intellectual property law although have in common, but the lack of available for extracting common factor between (that is, as the intellectual property rights make up the first chapter of the common regulations under the “general rules”), if you want to into the civil code of intellectual property law, it is to extract the common factor, like civil code abstracts some general rules, but it is basically impossible”. Therefore, in order to improve the rights system of the civil code of the reason for the existence of a substantial conflict, is obviously not sufficient. Fourth, the deepest reason for advocating the codification of intellectual property is that the development of codification reflects the modernization and rationality, and can promote the development of modern social economy and society. But from the other side, can we not achieve its goal without the codification of intellectual property? Clearly there is no necessary connection. Fifth, the development of intellectual property codification can solve many problems in the current intellectual property law, not to mention whether it can solve the existing problems. Is it impossible to solve the problem by perfecting the existing specific method of intellectual property right? Obviously, the answer is not inevitable. Whether the development of intellectual property codification is an inevitable choice for the development of intellectual property law is still worth thinking about.



## 2. The Defects of Intellectual Property Law Research Methods

The reason for the controversy caused by the development of intellectual property codification in China is that the logic of intellectual property law and civil law is not clear. In view of the important difference in rule design between property rights of unembodied objects and property rights of embodied objects and the fact that common factors cannot be extracted from various types of rights in intellectual property law, copyright law, patent law and trademark law should be kept separate legislation. In terms of the current research method of intellectual property rights in China,<sup>75)</sup> from the perspective of intellectual property discipline construction and development, it is an immature and non-standard research method. There are several defects:

The first is the lack of a reasonable division and clear orientation of intellectual property law discipline. While focusing on the comprehensive description of the nature of the intellectual property rights but in intellectual property law as a independent discipline, while in other subject content, should not be dismembered by other disciplines, led to intellectual property law subject positioning chaos, so the intellectual property law research needs in a clear definition and classification on the basis of study, to avoid subject positioning chaos phenomenon.

The second is the lack of a unified, rigorous and scientific logical system. The study of intellectual property law relies too much on the legislative content and judicial hotspot of intellectual property law, which seems to be a lack of logical legal introduction, thus reducing the status of intellectual property theory system. The pluralistic and comprehensive characteristics of intellectual property law make intellectual property law have the nature of both private law and public law. However, the nature of private right determines that the core content of intellectual property law is still private law. Therefore, it is necessary to return to the core content of intellectual property law, and let the content of public law return to the theoretical system of public law research. The study of private law is the core of building the basic theoretical system of intellectual property law.

75) Scholar Li Jianhua pointed out in his thesis: "The research content of intellectual property law includes both private law and public law. There are both substantive law and procedural law. There are domestic laws, international conventions and international treaties. Both law content, also have administrative science and other content. To sum up, the current research methods of intellectual property law not only integrate the normative contents of different legal properties of intellectual property law, but also integrate the contents of many disciplines such as law and administration. In this paper, this kind of intellectual property law research method is called "the combination of various laws" comprehensive research method. See Li Jianhua, "Private Law Research Paradigm of Intellectual Property Law in the Post-civil Code Era", *Contemporary Law Review*, No. 5, 2020, pp. 47-59.

Thirdly, the research of the general theory of intellectual property law is insufficient, and there is no logical connection between the general theory and the sub-theory. In China, the intellectual property law circle has a relatively weak research on the basic theory of the general theory of intellectual property law, which is in sharp contrast to the enthusiasm of the research on the division of intellectual property, and has not formed a systematic research on intellectual property, so it has not reached the necessary state that the division is the specific development and support of the general theory.

From the above analysis, it can be concluded that the development of intellectual property codification needs to form its independent research paradigm, basic category and basic theoretical system to effectively avoid disputes and form a “common factor” in the field of intellectual property. Then it will be possible for intellectual property law to be “codified” or “codified”. How to change the research method of intellectual property law requires further exploration, analysis and demonstration by scholars.

### **3. Maintain the Status Quo to Maintain the Defects of the Legislative Pattern of the Separate Law on Intellectual Property Rights**

Intellectual property law “the fit” research methods from the side reflects the special law of intellectual property legislation pattern directly affect the research method of the intellectual property law, the relationship between the independence intellectual property special law is relatively high, lead to more difficult to form the understanding of the system is, the development of the intellectual property administrative procedure form the block.

In order to realize the connection between the Civil Code and the intellectual property law, Professor Zhang Yimin once proposed a plan: “To formulate the general principles of intellectual property law, summarize and coordinate the entire intellectual property legal system, and make up for the gaps in the separate intellectual property law”. Its purpose is not to deny the application of intellectual property rights to civil law, but only to the general sense of intellectual property laws, but also to help form the system of intellectual property law itself. “Civil code” in China are not independent intellectual property rights into compiled background, the scholars Yang Xudong said: “as a civil rights of intellectual property rights in the context of its systematic construction of the unfinished, return have a logic system of civil law conflicts, systematic need to complete intellectual property rights, intellectual property system systemized, after the completion of its” into “will also be potential open.” Scholar Wu Handong believes that “in China’s” civil Code era”, legislative preparation schedule should be mentioned in the formulation of the basic law of intellectual property, which is the legislative choice of the basic law after the “decodification” of intellectual property, and also an institutional arrangement to seek common

values and norms of various separate laws of intellectual property ”.<sup>76)</sup> It is not difficult to find from the viewpoints of the above scholars that they all affirm the systematic development of intellectual property rights. Although there are different purposes for the scholars to explore the development of intellectual property system law, they all aim to seek the common value of the specific method of intellectual property rights.

Through intellectual property “civil code” will not “into” the legislative choice, reflect the intellectual property law in the legislation pattern of defective, as the civil right of intellectual property rights are still lack of systematic, this also is in the “civil code” after the release of scholars put forward first need to realize the systematic development of intellectual property right system, to talk about the reasons for the development of the intellectual property administrative procedure idea. Therefore, the systematic development of Intellectual property system in China in the future still needs the joint efforts of legislators and scholars.

## **Section 2 Other Specific Existing Problems**

### **1. Intellectual Property Right Attribute Type Connection Problem**

Although Article 123 of the Civil Code stipulates that intellectual property is a kind of civil rights, the scholar Li Jianhua, on the basis of summarizing the academic research on the attribution of intellectual property, believes that “the view that intellectual property belongs to civil rights is not proper and lacks sufficient basis and argument. In addition, only thought that “civil code” overview of intellectual property regulation will be the viewpoints of intellectual property rights as civil rights legislation according to the defect of inadequate, “civil code” as the construction of law system of the basic law, the interview right type requires not only comprehensive regulation, but also provides other rights type, If article 125 provides for equity and other investment rights, they shall be commercial rights; Article 128 provides for the types of private rights such as consumer

76) See Wu Handong, “On The Basic Law of Intellectual Property in China in the Era of Civil Code”, *Intellectual Property*, No. 4, 2021, pp. 3-16.

rights”,<sup>77)</sup> it can be seen that only from the provisions of the Civil Code, there is a dispute on the view that it is a civil right, which needs further study and discussion.

Some scholars believe that “intellectual property law should be divided into the commercial law system rather than the civil law system.” However, although there is a certain connection between the intellectual property with the nature of private rights and the commercial rights, which are also private rights, there is a lack of sufficient and convincing arguments for dividing the intellectual property law into the commercial law system rather than the civil law system.

In addition, the dispute of intellectual property rights attribute will also involve the independent discipline status approved by the Chinese intellectual property law and intellectual property rights of independent private right type confirmation problems, and returned to the systematic development and intellectual property in the study of relationship between “civil code”, you also need to stay after the systematic development of China’s intellectual property system to determine the conclusions.

## **2. Other Specific Issues**

Firstly, the rights and interests of trade secrets, especially the technical secrets and their protection, are obviously different from other intellectual property rights and their protection, such as patent right, registered trademark right and copyright. Most countries protect trade secrets under the framework of competition law, and China is also mainly regulated under the Anti-Unfair Competition Law. Article 123 of the Civil Code directly puts trade secrets in the group of intellectual property objects. In the future, one of the tasks of the Civil Code is to strengthen and integrate the legal protection of trade secrets in the civil law and the Anti-Unfair Competition Law.

Secondly, China’s civil Code, Trademark Law, Anti-Unfair Competition Law, Patent Law and Copyright Law have stipulated the punitive compensation system for intellectual property rights, but the subjective constitutive

77) Although the Civil Code provides for intellectual property rights, the independence of intellectual property rights should not be denied by attributing intellectual property rights to civil rights. Commercial law is a special law of civil law, but commercial rights do not belong to civil rights. Although the status of commercial law as an independent legal department is controversial at present, the status of commercial law as an independent discipline has been widely recognized. Intellectual property law is a special law of civil law, but intellectual property should not be classified into the category of civil rights. The independent private right type of intellectual property should be confirmed, and the independent discipline status of intellectual property law should also be recognized. See Li Jianhua, “Private Law Research Paradigm of Intellectual Property Law in the Post-civil Code Era”, *Contemporary Law Review*, No. 5, 2020, pp. 47-59.

elements have two legislative expressions: intentional infringement and malicious infringement. And, generally speaking, malice is limited to subjective intent, which is not the same. Therefore, the trademark law, anti-unfair competition law and the provisions of China's civil code are inconsistent.

Thirdly, according to the understanding of Chinese legal circles, on the one hand, the special law is superior to the general law. Article 11 of the Civil Code provides that where other laws have special provisions on civil relations, such provisions shall prevail. Since trademark law, patent law, copyright law and other intellectual property laws are special laws of civil law, there is a logic of law application that "special laws are superior to general laws". On the other hand, the new law is superior to the old one. Compared with trademark law and anti-unfair competition law, the civil code is a new law, and there is a logic of law application that "the new law is superior to the old law". Then, how to solve the conflict between the two logic of law application? In accordance with paragraph 1 of Article 94 of the Legislation Law, if a new general provision on the same matter is inconsistent with an old special provision between laws, and the application cannot be determined, the Standing Committee of the National People's Congress shall make a ruling. Accordingly, the standing Committee of the National People's Congress will be required to further clarify the inconsistencies between the above-mentioned provisions of the Trademark Law and the Anti-Unfair Competition Law and the Civil Code.

### **Conclusion**

The history of compilation of China's Civil Code is of special historical significance, which reflects the development history of the society. The birth of the civil code also reflects the improvement of China's civil legal system and the level of social development. The relationship between the civil Code and the intellectual property law has always been controversial. In the era after the implementation of the Civil Code in China, the research on the application relationship between the intellectual property law and the civil code still needs constant reflection and discussion. First, the systematic development of Intellectual property law in China needs to be improved. After the systematic development of intellectual property law, there are still many ways to choose. Second, there is still a dispute about the property of intellectual property right, and its origin is still the lack of basic theoretical research on intellectual property law, and the lack of systematic research on intellectual property law.

The implementation of the civil code of China and the application of the intellectual property law relations as China's civil code of practice and the



development of China's intellectual property law changes, such changes may make the intellectual property rights in the civil code, may also make the form system of branch of independent intellectual property rights, obtain the independent discipline status recognition, independent private right type of confirmation. No matter how it develops, it will promote the further development of intellectual property in China and form a barrier for intellectual property protection.