

**Core Parts of the Protest of
Shanghai Pudong New Area People's Procuratorate
lodged with
Shanghai No.1 Intermediate People's Court**

(unofficial translation dated Dec. 6, 2019, by Associate Prof. Yang Yu)

October 18, 2019

After reviewing it in accordance with the law, the prosecutor believes that the first instance decision was indeed wrong for the following reasons:

I. The available evidence is sufficient to prove that the accused LXW had the intention of illegal possession in the four sections of facts which were not identified and affirmed in the judgment.

- A. The accused LXW had no legal basis for obtaining property in the four sections of criminal facts, that is, it was criminally illegal. First, the crime of extortion is a natural crime. The establishment of this crime is not based on the premise of violating other departmental laws. Having a basis of rights in other departmental laws does not necessarily preclude the establishment of this crime. The judgment of criminal illegality should be based on the criminal law, and the judgment of illegality under the principle of uniform legal order cannot be separated from the judgment standard of criminal law. The judgment held that the criminality of property-based crimes must be based on the judgment standards enshrined in civil law, administrative law, and other departmental laws, which blurred the boundaries between criminal trials and other sorts of trials and was obviously inappropriate. Secondly, the so-called civil legitimacy found in the first instance judgment did not exist in this case. At present, there is no evidence to prove that the accused LXW achieved successful final outcome in the patent lawsuits. There is also no evidence to prove that the payments made by the victim companies to him were based on voluntary and true expression of intention. His obtaining the property of the victim companies lacked legal and consensual bases and thus lacked a basis of civil legality. Finally, testimony of witnesses and patent lists provided by the intellectual property agency involved in the case confirmed that most of the patents in the name of the accused LXW and his companies were modifications to the patented prior arts or permutations and combinations of existing technologies, and the R&D costs were extremely low, lacking basic conditions for initiating patent infringement lawsuits. Instead, he conducted patent ambush in various fields and specifically prepared for extortion in the form of patent litigation. The judgment of the first instance held that some of the patents involved in the patent infringement lawsuits filed by the accused LXW were valid or uncertain, but such facts could not prove that he had bases of rights in the lawsuits involved.
- B. Intentional judgment of illegal possession should adhere to substantive standards, instead of pro forma standards. First, the first instance judgment wrongly equated procedural rights to bring a patent infringement lawsuit with substantive rights to win a lawsuit. The evidence in the case proves that the accused LXW withdrew the charges before the trial after receiving the non-infringement replies from the victim companies, or abused the litigation resources by filing lawsuits but not paying the litigation fees. He subjectively

knew that the victim companies had not infringed his patent rights, so it adopted the way of withdrawing the lawsuits and filing lawsuits again to avoid his lawsuits being rejected by the court. Secondly, the involved civil litigation documents for patent disputes and testimony of witnesses further confirmed that the accused LXW had never won the patent lawsuits filed, and never made any substantial preparations for winning those litigations. The real purpose of instituting those patent infringement lawsuits was to entrap the targeted companies into litigation procedures and implement extortion rather than patent protection. The judgment of the first instance only noticed formally that the accused LXW enjoyed the right to sue in patent lawsuits, but ignored the true features of the malicious uses of the right to sue to initiate lawsuits to illegally possess others' property. Finally, the testimony of the employees of the victim companies, the implementation agreements of the patent licensing, and the settlement agreements, etc. confirmed that the bases on which the accused LXW obtained the money were essentially irrelevant to the existence of patent infringement or not. The amounts of money demanded from the victim companies were not contingent on the number, content and value of the patents, but on the victim companies' fear of litigation and ability to pay the price, thus his direct purpose was not to protect his patents. The court of first instance only made a nonessential judgment on whether the accused LXW had the purpose of illegal possession according to the superficial contents of the documentary evidence, ignoring that the quid pro quo of the proceeds was not patent license or infringement compensation, but the extortion price for removing the coercion exerted on the victim companies. He had an obvious purpose of illegal possession.

II. The accused LXW objectively conducted threatening acts, forcing the victim companies to deliver property involuntarily.

A. The severity of the threatening acts of the accused LXW justifies the conviction of extortion. The testimony of the employees of the victim companies, evidence of civil litigation documents related to involved patent disputes, tip-off materials and other evidence confirm that the defendant LXW deliberately selected companies that were in the stage of listing and financing, taking advantage of their fear of being sued which could hinder listing and financing on such sensitive time, or sued the companies in normal operations multiple times, taking advantage of the fear of the sued companies in the form of facing continuous charges which could severely disrupt business operations, in order to threaten the victim companies and force them to pay money in exchange for withdrawing the lawsuits or not being sued again. The judgment of first instance held that the existing evidence could only prove that the money obtained by defendant LXW from the four victim companies was the patent license fees or compensation, which misjudged the victim companies reluctant deliveries of property to get rid of blackmail as ostensibly legitimate license and compensation fees.

B. The deliveries of property by the victim companies are not based on willingness, but have criminal causation with the behavioral threats and blackmail acts committed by the defendant LXW. The judgment held that the defendant LXW filed lawsuits for infringement compensation through litigation or settlement negotiation, which could not prove that the relevant companies agreed to pay the corresponding amount solely because of coercion and free will's status of being controlled. It was impossible to rule out the possibility of private law autonomy in consideration of factors such as the intent to pour oil on troubled waters, litigation costs, etc. The prosecutor herein believes that, first of all, the objective aspect of the crime of extortion is the reluctant delivery of property after

being coerced, and does not necessitate the status of the victim's will under control. The four victim companies in this case all paid money, without considering that they had infringed the patents, or under the condition that they believed they could win the patent infringement cases, or even under the condition that the applications for declaring the accused LXW's patents invalid were successfully approved. Such payments were obviously involuntary. Secondly, the judgment of the first trial failed to accurately grasp the basis of the defendant's threats, that is, the object of the victim companies' fear was not to lose the patent infringement lawsuits, but the occurrences of those lawsuits on sensitive time point or repeatedly being entrapped into those lawsuits. Due to the lengthy duration and high costs of responding to lawsuits in the civil litigation of patent disputes, even if the victim companies can win the lawsuits, they are afraid of being involved in malicious litigation for a long time or repeatedly, which may affect the listing, financing or hinder the normal operations of the companies. Therefore, the forced payments of money to the defendant LXW in exchange for the settlement and withdrawal of the lawsuits were essentially the same as the facts that the victim companies reluctantly disposed of property because of the psychological status of fear and being scared, which was established and approved by the first-instance court. Moreover, the so-called autonomy of private law should also be based on a voluntary basis.

To sum up, the judgment of the first instance violates the rules of criminal judgment, substituting formal judgment for substantive judgment, making wrong evaluation of legal facts and applying the law wrongly, resulting in excessively light punishment.