

Study on the Judicial Application of Punitive Damages for Intellectual Property Rights in China

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Abstract. Since the first introduction of the punitive damages system in the Trademark Law in 2013, progressive improvements have been made in China's legislation relating to punitive damages for intellectual property rights (IPR). Nevertheless, there are many difficulties in the judicial application of punitive damages for IPR. For example, there are extensive discussions around the determination of punitive damages multipliers and the generalization of statutory damages in both theoretical and practical circles. Therefore, based on China's current status of judicial application of punitive damages for IPR, taking reference from typical cases, and borrowing from experiences of punitive damages for IPR in foreign countries, this study aims to improve China's punitive damages system for IPR by unifying application standards, defining application range, and defining the standard and method for damages calculation.

Keywords: IPR punitive damages; statutory damages; serious circumstances; punitive damages base; multiples of punitive damages.

1. Problem Proposal

To further improve China's IPR legal system, especially the IPR punitive damages system, the Civil Code implemented in 2021 has included a declarative provision of IPR punitive damages in Article 1185. Thereafter, other IPR-specific laws, such as the Patent Law and the Copyright Law, have also included provisions for punitive damages. At this point, China has completed the fundamental construction of a punitive damages system for IPR at the legislative level. On 09 October 2021, the State Council released the "National Plan for Protection and Application of the Intellectual Property Rights During the 14th Five-Year Plan Period" and explicitly requires to "fully establish and enforce a punitive damages system for intellectual property infringement, and to increase damage compensation." [1] Nevertheless, in recent years, many problems have been encountered by Chinese courts in the application of punitive damages in judicial practice. For example, when assessing the objective constituent elements of "serious circumstances" in punitive damages, there has been a tendency for direct comparison between the typical circumstances listed in the "Interpretation on the Application of Punitive Damages in Civil Cases of Intellectual Property Rights Infringement" (hereinafter referred to as the "Interpretation on the Application of Punitive Damages"), released by the Supreme People's Court in 2021, and the facts of the case in dispute. Such mechanical comparison for provision application excludes careful consideration and determination of the various elements of the case in dispute. Furthermore, for the determination of punitive damages amount, although existing legislation has specified three ways for punitive damage base calculation, difficulties exist in the actual application. Also, the determination of the multiplier of punitive damage basically depends on the discretion of the judge. As such, there are examples of "different rulings for similar cases" in judicial practice, which has aroused concerns and discussion from the public. In view of the application difficulties in the judicial practice of the IPR punitive damages system, this study will try to review China's IPR punitive damages system from a legislative standpoint and analyze current difficulties in the judicial application of IPR punitive damages. We will explore specific ways to improve the application of IPR punitive damages legislation and aim to provide recommendations for the reasonable application of China's IPR punitive damages system.

2. Legislative Evolution of China's Punitive Damages System for Intellectual Property Rights

Punitive damages, also known as exemplary damages, are additional compensation on top of the loss claimed. [2] Countries that apply a punitive damages system are mostly common law countries such as the United States, the United Kingdom, Australia, New Zealand, and Canada. Punitive damages have certain institutional superiority as, on the one hand, it could effectively reduce malicious torts, and on the other hand, it could safeguard social justice and fairness. Therefore, it has great influence over the civil compensation system of continental law countries. [3] For example, China's mainland and Taiwan have both introduced punitive damages systems into their civil legal system.

In 1993, the Law of the People's Republic of China on the Protection of Consumer Rights and Interests" has stipulated in Article 49 that "Business operators engaged in fraudulent activities in supplying commodities or services shall, on the demand of the consumers, increase the compensations for victims' losses; the increased amount of the compensations shall be one time the costs that the consumers paid for the commodities purchased or services received." This provision is considered China's first punitive damages system. In 1999, the Contract Law of the People's Republic of China invoked the punitive damages provision from the Law of the People's Republic of China on the Protection of Consumer Rights and Interests as the basis for regulations on contractual fraud. Later in 2009, the Food Safety Law stipulated that consumers could claim damages ten times the price from the tortfeasor on top of the damages claim. [4] In the same year, Tort Liability Law was introduced for the first time in general civil legislation, in Article 47, a punitive damages provision with regards to compensation for product liability. Then in 2019, when the E-Commerce Law was released, it stipulated in Article 42 that "Anyone who causes loss of operators on the platform due to its maliciously wrong notice shall assume double liability for compensation." It is thus clear that China has introduced a punitive damages system in many of its departmental laws for a long time.

The first introduction of the punitive damages system in IPR legislation was in the Trademark Law as amended in 2013. In Article 63 (1), it stated that "Where an infringer maliciously infringes upon another party's exclusive right to use a trademark and falls under serious circumstances, the amount of damages may be determined as not less than one time but not more than three times the amount that is determined according to the aforesaid methods." The General Principles of the Civil Law, implemented in 2017, has introduced a punitive damages system in Article 179 (2). The Civil Code adopted in 2020 specifies the general content of punitive damages under the civil liability provision in Article 179 of the General Provisions and stipulates punitive damages liability in Article 1207, Article 1185, and Article 1232, respectively. In particular, Article 1185 explicitly provides declaratory provisions on punitive damages for Intellectual Property Rights. Up till this point, China's special law on IPR has provided an institutional premise for the improvement of the punitive damages system. In 2015, the Draft Amendment to China's Patent Law (the "Draft") had included a punitive damages provision of "not less than one time but not more than three times." In the Amendment to the Chinese Patent Law (draft) implemented in 2019, the maximum punitive damages have been increased from three times to five times. Furthermore, in the Trademark Law amended in Apr 2019, the punitive damages multiplier standard has also been raised to five times. The Anti-Unfair Competition Law implemented in 2019 adds a new provision in Article 17 (3) regarding punitive damages on infringement upon trade secrets, stating that "If a business infringes upon a trade secret in bad faith with serious circumstances, the amount of compensation may be determined to be more than one time but not more than five times the amount determined by the aforesaid method." Article 71 of the Patent Law and Article 54 of the Copyright Law, which were amended and published in 2020, formally established the punitive damages system, respectively. Meanwhile, the Interpretation on the Application of Punitive Damages issued in 2021 provides detailed guidelines for the application of punitive damages for IPR in judicial practice. It can be thus concluded that China has fully introduced and established a systematic punitive damages system in the field of IPR infringement.

3. The Dilemma of Judicial Application of China's Punitive Damages System for Intellectual Property Rights

3.1 Determination of Applicable Elements in Punitive Damages for IPR

3.1.1 Judicial determination of "intentional"

Firstly, there is the issue of the meaning of "malicious intent" under the Trademark Law and the Anti-Unfair Competition Law, and "intentional intent" under the Civil Code, the Copyright Law, and the Patent Law. In an interview with the media, the head of the Supreme People's Court made it clear that the interpretation of "malicious" and "intentional" should be consistent. The reason for this is that, on the one hand, from a legal hierarchy perspective, the Civil Code is superior law, while the Trademark Law and Anti-Unfair Competition Law are inferior laws, and both the Patent Law and the Copyright Law stipulate intent as the subjective element of punitive damages. On the other hand, in the judicial practice of IPR, it's difficult to precisely differentiate intent and malicious intent. Therefore, consistent interpretation not only helps to improve practical operation, but also avoids confusion in its application in different department laws. [5]

Secondly, for intellectual property, due to its immaterial nature and diversity in ways of usage, the standards used to determine the "knowingly" element of the infringement behavior and the "hoping" element of the harmful result would not be as precise as standards used in other civil infringement activities. Also, "intentional" is a subjective state of mind; its evaluation should be based on objective evidence. However, Chinese legislation and judicial interpretations have never given specific and clear instructions on the criteria for determining "intentional." Therefore, in judicial practice, different courts always have varying standards in determining "intentional." For example, in the trademark infringement case between Zhongshan Povos Appliances Co., Ltd and Xiaomi Corporation in 2019[6], the court held that the defendant should have taken more duty of care since Xiaomi, the trademark in question, constituted a well-known trademark. However, the defendant's deliberate imitation by various means met the "intentional" constituent requirement of "intentional" infringement. In the trademark infringement case between Beijing Bytedance Technology Co., Ltd and Hangzhou Dou Shang Technology Co., Ltd in 2019[7], since the defendant had knowingly committed the alleged trademark infringement for an extended period without a trademark license, the court found that Hangzhou Dou Shang had greater subjective malice. In the above cases, the determination of "intentional" by one court is based on the defendant's degree of care, and the other is based on whether there was "prior knowledge." Apart from this, the theoretical community also has different views regarding the determination of the "intentional" element in punitive damages for IPR. Some scholars believe that the determination can be made by objective evidence from both a knowledge perspective and a willfulness perspective[8]. Some other scholars believe that the judgment standard should be whether the party has exerted the degree of care that they should have [9]. In short, there is an urgent need for a determination standard for the "intentional" element in the punitive damages system in both the practical and theoretical communities.

3.1.2 Judicial determination of objective "serious circumstance"

Both the Civil Code and the single law on intellectual property have provisions on the "serious circumstance" in punitive damages application. It could be concluded from existing legislation that "serious circumstance" is the prerequisite for punitive damages application. Once the subjective intent of the infringer has been determined, evaluation of the severity of the infringement will be used as the basis for determination of punitive damages application and the damage multiplier. [10] In judicial practice, however, the determination of "serious circumstance" is as difficult as the determination of "intentional." Courts currently reply to the circumstances listed as examples of serious circumstances in Article 4 of the Interpretation on the Application of Punitive Damages for the application of serious circumstances. [11] Some scholars believe that the circumstances listed in the article are basically five reference categories, including the type of infringement, time of infringement, the scope of infringement, number of infringements, and social influence. [12] Nevertheless, in judicial practice,

as typical circumstances are enumerated in the provision, in case trial courts compare facts of the case in dispute to each of the circumstances to determine whether one of the circumstances has been met. Such mechanical application basically excludes careful consideration of different elements, lacking an overall view of the degree of infringement of the case. For example, in the trademark infringement case between Inner Mongolia Eerduosi Resources Co., Ltd and Beijing MQMY Co., Ltd in 2015[13], Beijing Intellectual Property Court found that the infringement was "serious" based on the long duration and large scale of infringement by the defendant. In the case of Liu Jun versus FILA Sports Co., Ltd in 2017[14], Beijing Intellectual Property Court found that the infringement was "serious" only based on the defendant's large sales amount. By comparing the determining factor of "serious circumstance" in the above judicial practices with the existing determining standard on "intentional," it's obvious that there is confusion in the judicial determination on "intentional" and "serious circumstance," and sometimes the same standard has been used in both cases.

3.2 Calculation of Punitive Damages for IPR

3.2.1 Determining the Punitive Damages Base

There are three ways of calculating the punitive damages base on intellectual property rights in existing legislation: actual damage, profits gained from infringement, and royalty multiplier. The Interpretation on the Application of Punitive Damages clearly defines the order of priority of the three calculation methods. A royalty multiplier as a calculation base can only be used when the amount of actual damage or the profits from infringement cannot be obtained. Nevertheless, these three methods are rarely used in current judicial practice for several reasons.

Firstly, the intangible nature of the IP object and the uncertainty of the market make it difficult to ascertain the actual damage. For example, in trademark infringement cases, the plaintiff's goodwill depreciation caused by the infringement confusion is usually difficult to quantify. In the trademark infringement case between YongKang Elina Sports Equipment Co., Ltd and Balance Body Company in 2018[15], consumers mistakenly purchased the defendant's infringing products and found that there were quality issues, and mistook them for the plaintiff's product. This had a negative impact on the plaintiff's commercial goodwill; however, the actual damage caused to the plaintiff could not be quantified. The court could only rule on statutory damages for the plaintiff. In addition, different courts use different standards in evaluating the actual damage. For example, in the trademark infringement and unfair competition case between Baroque Timber Industries (Zhongshan) Limited and Zhejiang Baroque Company in 2017[16], when determining the plaintiff's actual damages, the court had taken comprehensive consideration of profit loss due to lost sales, profit loss due to price erosion, future profit loss due to infringement, and the reasonable cost incurred for stopping infringements. Yet, in the trademark infringement case between Adidas Ltd. and Ruan Guoqiang in 2020[17], the appeals court chose a calculation base that was most unfavorable to Adidas, that's the unit price of genuine Adidas shoes. The court also took into account the administrative penalties the defendant had paid three times to the administrative authorities for producing and selling infringed products. After appropriate deductions, the profit loss caused by the infringement for Adidas was determined.

Secondly, although there is legislation stipulating obstruction of evidence and presumption of evidence, the infringer still holds the upper hand. Under the circumstance where the infringer refuses to provide, without a valid reason, profits-related data such as sales volume and profit margin, the court can calculate the damages based on evidence provided by the plaintiff. However, such calculation is not among the above three calculation methods, but rather is at the discretion of the judge. For example, in the trademark infringement case between Actionsoft Co., Ltd and Amazon[18], the plaintiff required the defendant to provide its account book to determine the profit gained from the infringement. However, the defendant failed to submit such evidence. As a result, the court could only determine the infringement profit of the defendant by taking into consideration evidence provided by the plaintiff.

Lastly, the use of the multiples of royalty as the calculation base is still highly controversial in China. In contrast, in countries like the United Kingdom and the United States, it's a common judicial practice to use multiples of royalty as the calculation base. For example, in the case of *Georgia Pacific Corp. v. United State Plywood Corp.*[19], the US court used hypothetical negotiation and took into consideration of the 15th Georgia factors to determine the reasonable royalty. Nevertheless, as China's current IPR trading and licensing system is yet to be improved, using royalty as a calculation base is feasible, but it will be difficult to fit into current social circumstances.

3.2.2 Determination of the Multiplier for Punitive Damages

The multiple of punitive damages for intellectual property rights is one to five times the compensatory amount and can be determined by taking into consideration the degree of subjective fault of the defendant, the severity of the infringement, and other factors. However, there is no clear standard for determining the multiple. As a result, in judicial practice, there is no stable corresponding relation between the degree of subjective fault, the severity of the infringement, and the multiple of compensation. This weakens the incentive for the public to abstain from infringing and restraining negative externalities of behavior in order to avoid heavier liability. [20] Since it's difficult to align judges' assessment of the severity of infringement in each case, "different rulings for similar cases" and commutations on multiple happen from time to time. For example, in the trademark infringement case between *Zhongshan Povos Appliances Co., Ltd and Xiaomi Corporation* in 2019[21], the court of the first instance imposed a multiple of two times for punitive damages. However, the court of the second instance increased the multiple to three times as it considered heavier punishment necessary after comprehensive consideration of the defendant's obvious malicious intention and the huge scale of infringement, as well as the damage to the extent of the plaintiff's business reputation had suffered. In the technical secret infringement case appealed by *Guangzhou Tinci Materials Technology Co., Ltd. and Jiujiang Tinci Materials Co., Ltd.* in 2019[22], the court of first instance ruled for 2.5 times compensation. But in the second trial, the court held that the defendant, *Anhui Newman Fine Chemicals Co., Ltd.*, had been engaging primarily in continuous infringements on a large scale and for an extensive period. Based on the above, five times punitive damages would be reasonable.

3.3 Punitive Damages Being Substituted by Statutory damages

Statutory damages refer to the compensation determined by the court based on the specific infringing details, and not higher than the statutory amount, in circumstances where the actual loss, profits gained from the infringement, or the royalty cannot be calculated, and no more applicable punitive damages are available. [23] From a legislation intention perspective, the application of statutory damages should follow the rule of "not to use if it shouldn't be used." But in China's judicial practice, the application of statutory damages happens whenever possible. [24] Statistics show that from 01 May 2014 till 01 May 2019, out of 16 trademark infringement cases where punitive damages were applicable, statutory damages were used in 14 cases. [25] It's obvious that in judicial practice, punitive damages are often substituted by statutory damages, and the application of statutory damages is usually dominated by the judge's discretion. Reasons for such status quo in judicial practice are twofold. On the one hand, due to the intangible nature of IPRs and the ambiguity of their boundaries, it's difficult for the parties to fulfill the burden of proof for actual loss, illegal gains, or royalties, or they are too lazy to participate in the tedious and complicated process for the burden of proof, thus turning to statutory damages. For example, in the trademark infringement case between *Puma AG Rudolph Dassler Sport and Zhangjiakou Xuanhua Jilong Shopping Plaza Co., Ltd.* in 2012[26], the court did not obtain evidence of the defendant's benefit from the infringement and the plaintiff's loss from the infringement. Therefore, statutory damages were applied to the defendant, and serious circumstances were considered in determining the number of damages. On the other hand, judges tend to take a more conservative approach to the application of punitive damages, and hardly find the parties' burden of proof on the compensation amount admissible. Direct application of statutory damages is not only simple to operate, but also efficient in reducing the backlog of court cases. For example, in the trademark infringement case between *Calvin Klein Trademark Trust and Quanzhou*

Feng Shang E-Commerce Co., Ltd. [27], the court found that the defendant had subjective malice and the plaintiff had provided evidence of the severity of the infringement. However, the court did not apply punitive damages while simply awarded damages in accordance with the statutory cap.

As mentioned above, punitive damages are often substituted by statutory damages due to the difficulties in the burden of proof and the conservativeness of the court. In judicial practice, statutory damages are highly dependent on the discretion of the judge, and the reasoning of the court's decision is rather sketchy. Not only is it difficult for the parties to understand the determination of the damages, but it also makes it difficult for the public to grasp the tendency of judicial decisions. Therefore, extensive use of statutory damages in judicial practice will inevitably undermine judicial credibility.

4. The Path to Improve the Judicial Application of Punitive Damages for Intellectual Property Rights in China

4.1 Clarification of the meaning of "intentional" and the judging criteria

According to the provisions of the Tort Liability section of the Civil Code, intent in civil tort generally refers to the state of mind in which the perpetrator, knowing that his or her actions will cause adverse consequences, still wishes or allows such results to occur. Intent can be categorized into direct intent and indirect intent. [28] In the case of punitive damages for IPR, the subjective constituent element of "intent" should be defined as direct intent and exclude indirect intent. In the case of trademarks, for example, the reason for defining "intent" as direct intent is that only the direct intent of actively pursuing illegal benefits and trying to gain from other's goodwill reflects the malicious motive of the party. The distinction between punitive damages and general damages can only be made by distinguishing direct intent from indirect intent and negligence. [29]

Current legal interpretations and relevant guidelines have enumerated different circumstances of intentional infringements of IPR for the courts' reference in judicial practice. However, there is still a great deal of ambiguity as to the criteria for determining "intentional." We argue that China's judicial practice should aim to explore reasonable criteria to determine the "intentional" element of most of the cases, based on the fact that whether the party has "prior knowledge" and whether there is "subsequent continuation" also taking into account facts of individual case and evidence provided by the party, the type of infringed object, the state of the rights, and the popularity of the infringed product. This will limit the application of punitive damages and balance the interests of the parties, avoiding a negative impact on incentives for social innovation.

4.2 Improving Regulations on Using Multiple of License fees as Basis of Calculation

According to existing judicial interpretation, in the circumstances that the obligee's actual loss, or benefits gained from the infringement are not applicable as the basis for calculation, the judiciary can use a multiple of the license fee to define a reasonable punitive damages base. Using the multiple of the license fee as one of the computation options for punitive damages base is a rational choice. The reason is that, for the infringer, the cost of infringement is multiple of the license fee, which far exceeds the license fee that would be required in normal commercial cooperation. Using the multiple of the license fee as the basis for calculation for punitive damages serves the purpose of punishing and deterring infringers from committing malicious infringement again. As for the obligee, the licensee fee is the fee charged by the licensor allowing the licensee to use to a certain extent. Multiplying it by a reasonable number can produce an amount close to the actual loss of the obligee, and could determine the basis for punitive damages.

As to the inconsistency in the determination of multiple of the license fees in current judicial practice, the Chinese judiciary can construct the computation rules applicable to current Chinese social circumstances by summarizing their experience from the cases, as well as referring to relevant regulations by other countries, such as the United Kingdom and the United States, on the determination of license fees. For example, the United States has established four methods of

determining license fees: established license fee, industrial practice, hypothesis negotiation, and analytics. In addition, China should promote the trading and licensing of intellectual property by the obligee, and help to improve the trading and licensing system. This would form the basis for using the multiple of the license fees as the calculation method, and could improve the utilization of Chinese intellectual properties.

4.3 Clarification of Rules of Punitive Damages Multiples

To protect social innovation, it's necessary to build a stable corresponding relationship between punitive damages multiple and the severity of the infringement, and such a relationship should be well known to the public. This requires a precise reference criterion for the judge when determining the multiple of punitive damages. At the same time, the judge will need to provide logical, well-argued, and convincing reasoning on the determination of the multiple. We propose to summarize the multiple applied in punitive damages cases with their relevant circumstances. And to construct a relatively accurate multiplier application table detailing specific application range by assigning the multiplier's value range to the subjective and objective infringing aspects of the infringer. When assessing cases, judges can compare the case with the table to determine the multiplier's range for each specific circumstance. The Judge can then exercise moderate discretion on the specific circumstance of the case, determine the multiplier for each circumstance, and sum them up to the final multiplier of punitive damages for the case. This avoids the mechanical determination of multipliers by judges, and limits their discretion to the greatest extent possible. The multiplier range table can provide the public with a clear and identifiable relationship between the punitive damages multiplier and the circumstances of the infringement, which in effect deter potential infringement. A unified multiplier criterion will also help to visualize the process of judges' free-proof.

4.4 Limiting the Application of Statutory Compensation

Statutory compensation as a bottom-line solution in judicial practice can significantly reduce the workload and difficulties in case handling of the courts. However, its application should not be a general practice. This study argues that to void punitive damages being substituted by statutory compensation, the possible solutions are reducing the difficulty of providing evidence for punitive damages base, and limiting the application of statutory compensation. On the one hand, in current judicial practice, the courts are overly strict in requiring a precise calculation base, resulting in the plaintiff often having to bear an excessively heavy burden of proof. For this, the courts can relax the evidentiary requirements for determining the calculation base, provided that supporting evidence exists. This will significantly reduce the difficulty of proof for the plaintiff and ensure that the punitive damages calculation base can be determined from the evidence provided by the plaintiff. On the other hand, there should be regulations on the conditions for the application of statutory compensation. Judges should only apply for statutory compensation when they fail to calculate the damages amount after exhausting all methods and should fully justify the application of statutory compensation in the court verdict. Placing a heavier burden of reasoning on the courts will urge the courts to be more cautious about the use of statutory compensation.

5. Conclusion

China not only provides declarative provisions on punitive damages for intellectual property rights in Article 1185 of the Civil Code, but also successively introduces punitive damages systems in separate laws on intellectual property rights. Therefore, at the legislative level, China's intellectual property punitive damages system has basically been established. However, in judicial practice, punitive damages have problems such as unclear identification of applicable elements, difficulty in calculating the volume of punitive damages, and replacement by statutory damages. Based on this, this paper believes that, first of all, the court should clarify the connotation and judgment standard of "intentionality." Comprehensive consideration should be given to the reference factors of "serious

circumstances" to achieve the purpose of accurate application of punitive damages. Secondly, in order to solve the problem that it is difficult to calculate the compensation base, the court should actively learn from extraterritorial experience and rationally use the multiple of the right license fee as the base for calculation. At the same time, the method for determining the multiples of punitive damages was further refined, and a relatively accurate multiple range correspondence table was established. Finally, courts need to reasonably apply statutory damages, appropriately reduce the difficulty of proving the base of punitive damages, and increase the rationale for applying statutory damages. Only when the judicial application achieves uniform standards, accurate application situations, and appropriate punishment, can the punitive compensation system of intellectual property rights play its role in punishing and preventing infringements. It is undeniable that China's intellectual property system will be further developed and improved in the future, especially with the establishment and improvement of the market transaction system centered on the transfer of intellectual property rights. It may provide new solutions for further solving the judicial application of punitive damages for intellectual property rights in China.

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infringement of intellectual property rights as a business; (c) forgery, destruction or concealment of evidence of infringement; (d) refusal to comply with the preservation ruling; (e) infringement of profits or huge damage to the right holder; (f) infringement may endanger (g) infringement may endanger national security, public interests or personal health; (h) other circumstances that can be considered serious.

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