

# *Research on China's Intellectual Property Punitive Compensation System*

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**Abstract:** Since the establishment of the intellectual property damage compensation system in China, statutory compensation has always been the method of compensation that the courts are keen to use in judicial practice. However, such compensation methods have not effectively protected the rights and interests of intellectual property rights, and intellectual property infringements are still in a high-risk situation. This paper intends to explore the necessity of the widespread application of the punitive damages system in the field of intellectual property protection in China, as well as the existing problems and solutions after the introduction of punitive damages system in the current Trademark Law.

## **1. Introduction**

The 27th meeting of the Central Comprehensive and Deepening Reform Leading Group held on November 27, 2016, reviewed and approved the Opinions of the CPC Central Committee and the State Council on Improving the Property Rights Protection System to Protect Property Rights According to Law, and the State Opinions to Promote Knowledge at the National Level. The determination of the comprehensive application of the punitive damages system in the field of property rights. Therefore, the application of the punitive damages system in the protection of intellectual property rights has aroused widespread concern in the academic and legislative branches. The most discussion is whether the introduction of a punitive damages system can effectively protect the rights and interests of intellectual property owners. The author believes that this is closely related to the fact that the overall judgment of intellectual property infringement compensation in the current judicial practice is not high, which leads to the intellectual property rights of intellectual property owners and the personal benefits are not effectively protected. The specific content of this article will be discussed later.

## **2. An Overview of China's Intellectual Property Punitive Compensation System**

Generally speaking, Article 49 of the Consumer Protection Law promulgated in 1994 is the first attempt of our country's legislation for the punitive damages system. Since then, Chinese scholars have begun to study the punitive damages system. The number of papers on the punitive damages system is even more numerous. The author found in the "China Knowledge Network" that the number of papers on "punitive damages" in "China Knowledge Network" began to increase year by year. The relevant research on the application of the punitive damages system in the after-effects of

intellectual property rights has only increased significantly in 2011. The benefits of technology research and development have led to more and more people taking notice of intellectual property, including a large number of infringers. Although there are also methods for damages in the original intellectual property rights, the current situation of protection of intellectual property rights in practice does not seem to be optimistic. The call for introducing a punitive damages system to protect the rights and interests of right holders is increasing, how to introduce them. How to introduce is an urgent problem to be solved. More and more scholars have participated in the research process in this area. The most representative one is the paper "Punishment Compensation and Intellectual Property Protection" published by Professor Wen Shiyang and Qiu Yongqing in 2004. The author believes that the punitive damages system should be introduced in the intellectual property infringement compensation, which can be used to punish the infringer to generate a deterrent effect. At the same time, it can also stimulate the rights and enthusiasm of rights holders and create more social wealth, which are far from being achieved by compensatory compensation. [1] In this regard, the author agrees. The setting of the law has never been based on simply punishing the behavior of those who violate the law, but more to warn and shock these illegal acts in order to maintain the peaceful development of the society and promote the steady development of the economy. Guarantee the rights and interests of property owners and ultimately achieve innovative social construction.

At present, among the existing intellectual property related legal systems in China, only the Trademark Law officially introduced the punitive damages system after the revision in 2013. According to the provisions of Article 63 of the current "Trademark Law" in China, there are four ways to compensate the amount of intellectual property rights in China: the actual loss of the right holder, the illegal income of the infringer, and the license fee (rights transaction fee). Multiples and statutory compensation. [2] The application of the above four compensation methods has a clear sequence. The actual loss of the right holder and the illegal income of the infringer are the basis and priority amount for determining and calculating the amount of the infringement damages. The court should first apply the two in the specific case. In the method, when the statistics of the above two algorithms and the difficulty of the party's evidence are unacceptable, the statutory compensation can be applied as the method for the right holder to be compensated, and the application of the statutory compensation should be strictly. However, even this seemingly comprehensive law does not seem to be ideal for the protection of rights holders in judicial practice.

### **3. Problems Existing in Current Intellectual Property Infringement Damage Compensation System and Their Causes of Formation**

#### **3.1. The Defects and Causes of China's Intellectual Property Infringement Damage Compensation System**

The current four methods of compensation for intellectual property rights mainly apply to the compensation compensation system based on the principle of filling in, and this compensation system has gradually shown a protection trend of "powerlessness". First of all, the calculation method of the actual loss of the right holder is very limited in practical practice. Adopting this method will not be beneficial to the successful rights protection of the right holder. The right holder should fulfill the requirements for proof according to the regulations, but the complexity of the technology determines that some rights holders cannot provide evidence of the violation of rights. Secondly, for special infringements, the amount of compensation for compensation purposes is not obvious in combating the legal effect of infringement, not only in the inability to fill the loss of the right holder, but also in the difficulty of curbing the occurrence of infringement. Although many existing provisions have clearly stipulated the actual loss of the right holder that should be referred

to in the judgment of the amount of compensation or the gains obtained by the infringer due to the infringement, it is very difficult to prove the above two in actual operation. The high cost of litigation caused by the difficulty of proof makes the right holders equally trembled. This kind of rights protection directly inhibits the enthusiasm of rights holders to defend their rights. Finally, statutory compensation has become the basis for the current judgments generally adopted by Chinese courts. However, since the legal and judicial interpretations do not have clear quantitative criteria, judges have great discretion in determining the specific amount of compensation, which is likely to result in different judgments in the law. There are huge differences in applicability and results, making it difficult for the public to anticipate possible legal outcomes.

In the long run, the legal property rights of intellectual property rights holders are difficult to be effectively guaranteed, and the enthusiasm of most rights holders for innovation will be hampered. In summary, it is not difficult to find that the existing compensation methods can not guarantee the rights of intellectual property rights.

### **3.2. Problems in the Punitive Compensation System in the Trademark Law and Their Causes of Formation**

As the pioneering measure of intellectual property infringement damages, the punitive damages system was introduced for the first time. Article 63 of the revised Trademark Law still has some problems that need to be refined. There are mainly the following problems:

(1) Is the "malicious" provision in the Trademark Law reasonable?

Article 63 of the Trademark Law stipulates that it must be subjectively malicious, but does not provide for the degree of malice. However, in our country, the concept of "malicious infringement" is generally not used in legislation, and more is the concept of "intentional" infringement. In particular, in the field of intellectual property rights, the subjective fault of the infringer is regulated. "Intentional." In theory, the two are not synonymous, and the connotation and extension of the two are very different. Obviously, the degree of "maliciousness" is even worse than "intentional", and "malicious" requires additional elements to supplement. In this way, it is more appropriate and more in line with the "malicious" of Article 63 of the Trademark Law to be more appropriate and more in need of certainty.

(2) The definition of "serious circumstances" in the Trademark Law is vague

If "malicious" is the subjective factor in judging the punitive damages of trademark infringement, then "serious circumstances" is the objective factor of its judgment. However, Article 63 does not further define the "severe circumstances". Generally speaking, we think that "serious circumstances" means that the harm of the infringement is far beyond the expectations of the society and the public about the general infringement. The manifestation is that the harmful consequences are wide in scope, deep in difficulty, large in money loss, and bad in social influence. and many more. The specific definition of "serious circumstances" relates to fairness and justice when determining the amount of punitive damages.

## **4. The Perfect Measures of China's Intellectual Property Punitive Compensation System**

The violation of intellectual property rights is extremely harmful to the business entities in the market. Failure to effectively protect the rights and interests of intellectual property rights often leads to the choice of the right holders and the infringement, and the possibility of paying for the rights may not be rewarded. The Yiwu City Court of Zhejiang Province is the first grassroots court in the country to pilot patent cases. After three and a half years and nearly 600 patent cases, Gong Yiqing, the head of the intellectual property court of Yiwu City Court, said: "In cases of serious infringement, malicious infringement and other serious cases, a punitive damages mechanism

should be introduced to increase compensation. "Therefore, the author believes that in the context of the occurrence of intellectual property infringement, it is of practical significance to promote the application of the punitive damages system in the intellectual property legal system. At the same time, the four compensation methods under the compensatory compensation system also need to be sound. This paper believes that it can be improved by the following methods.

#### **4.1. Suggestions on the Perfection of China's Intellectual Property Infringement Damage Compensation System**

(1) Improve the evidence system to determine the loss of the right holder or the benefit of the infringer

In the case of intellectual property infringement, the evidence of infringement has the characteristics of concealment and volatility. At the same time, because many enterprises in China still have many irregularities in financial treatment, and the profit reduction of rights holders themselves will be affected by many factors. It is difficult to collect comprehensive evidence for the loss of the right holder, and the court has to use the system of statutory compensation more. Therefore, in order to accurately calculate the loss of the right holder or the benefit of the infringer, the author believes that the most critical issue is to improve the existing evidence system.

(2) Improve the statutory compensation system and determine the quantitative standard system

Under the current circumstances, according to China's actual national conditions, the adoption of statutory compensation has slowed down the trial pressure brought about by the rising number of IPR infringement cases in China, but it still lacks the legitimate rights and interests of defending rights holders. In practice, the lack of statutory compensation quantitative standard system is a prominent major problem. Then, for the determination of the base amount of statutory compensation, some scholars have pointed out that it is necessary to divide the discretionary factors of statutory compensation and calculate the amount of compensation. The proportion of factors in order to finally ensure the quantitative application of statutory compensation in judicial practice, in order to truly establish a standardized standard of compensation.[3] Therefore, establishing a quantitative standard system for statutory compensation and clarifying the scope of application of statutory compensation and punitive damages become the key to the correct application of the law in judicial practice.

#### **4.2. Suggestions on the Perfection of Punitive Compensation System in the Trademark Law**

(1) "Malicious" in the Trademark Law should be limited to the category of "direct intentional"

The author believes that punitive damages are aimed at those morally reprehensible and subjectively malicious violations, so the subjectively vicious requirements are naturally higher than the requirements for compensatory compensation. The general negligence It is impossible to apply punitive damages, it must be more than simple negligence, mistakes, the definition of gross negligence as "malicious" within the scope of obvious irrationality and "malicious" should be limited to the "direct intentional" category and "malicious" should be " The difference between indirect and intentional is more in line with China's national conditions and specific trademark judicial practice, because the subjective requirements for punitive damages in the revised versions of the Copyright Law and the Patent Law are limited to "intentional". Therefore, only in the subjective state that the infringer is "directly deliberate", knowing that the infringement committed by himself is likely to involve infringing on the trademark rights of others while disregarding the rights of others, and continuing to fearlessly implement the infringement, or is implementing In case of infringement, in order to avoid being discovered by the right holder and therefore taking measures to deliberately cover up the infringement, or after the court made the infringer's

infringement judgment, the infringer ignored the court's judgment and continued to repeatedly commit the infringement. In such a situation, it constitutes "maliciousness", and in such a bad situation, punishment must be imposed.

(2)The "severe circumstances" in the Trademark Law should be more refined

Some scholars have pointed out that in order to clearly define the "severe circumstances" considerations, a combination of generalization and enumeration can be adopted.[4] And it should be improved by adopting the way in which the relevant authorities in China have refined the criteria for the determination of "serious circumstances" in judicial interpretation or guidance cases. So to further clarify the scope of "serious circumstances", the author believes that "serious circumstances" include at least one of the following situations: First, the infringer repeats the infringement, which is based on the court, the administrative agency or other third-party private subjects. Secondly, the infringement caused serious damages, including but not limited to the infringer's infringement caused by the huge actual loss of the right holder or the serious damage of the right holder's goodwill; Third, the infringement has caused great harm to the public interest, including but not limited to the infringing product of the infringer, causing damage to the personal and property of the ordinary consumer, and other interests due to serious damage to the infringement, or the public's trademark rights. People have formed bad negative evaluations, etc. Fourth, the trademark infringer has a long period of infringement; fifth, the way the infringer is implemented; sixth, other serious circumstances.

## 5. Conclusion

Obviously, the call for introducing punitive damages measures in the damage of intellectual property infringement has already attracted great attention from all walks of life. In 2013, with the promotion of the Trademark Law, the level of protection of trademark rights holders was significantly improved. Therefore, in the subsequent "Copyright Law (Draft for Review)" and "Patent Law (Draft for Review)", attempts were made to introduce a punitive damages system, and the regulations were more advanced than the corresponding provisions in the Trademark Law. For the sake of meticulousness, it is obvious that such a change is necessary. As one of the characteristics of the level of science and technology and the level of the rule of law in China, the level of intellectual property protection is one of the largest developing countries in the world. It is supposed to establish a model image that gives property owners high standards of protection. It is imperative to apply the punitive damages system in the field of intellectual property rights!

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