

## Introduction and Implementation Study of Punitive Damages in Intellectual Property Law

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**Abstract.** With the development of our country economy and the deepening of exchanges with foreign countries, the protection of intellectual property becomes increasingly important. Infringement of intellectual property rights has high social market value; infringement act will not only seriously damage the interests of the obligee, but also kill a social creativity. Intellectual property law system in our country is gradually perfect, but still has some shortcomings, unable to restrain the infringement of intellectual property rights, so the introduction of the punitive damages is urgently needed. This paper introduces the characteristics and current situation of the infringement of intellectual property rights in China, analyzes the necessity and feasibility of introducing punitive damages, and discusses the applied conditions of punitive damages.

### Introduction

The purpose of punitive compensation British and American intellectual property law is to make up for the victim's personal losses and economic damage, the second is no serious infringement, deliberately, brutal, not only to further curb the infringement behavior of the infringer, can also severely deter possible infringement intention. Compared with compensatory damages, both are one of the forms of the tort liability, but the punitive damages can more effectively protect intellectual property rights [1]. For the construction of our country's intellectual property law, the introduction of punitive damages, complement compensatory damages deterrent deficiency, promote intellectual property protection in our country.

### Characteristics and current situation of the infringement of intellectual property rights in China

**The characteristics of infringement of intellectual property rights in China.** Compared with tangible property rights infringement, intellectual property infringement exist the following features: the holder of the rights of the cost is high, the tort damage calculation difficulties congenital deficiency, object. Cost high in forensics difficulties, rights through judicial channels for compensation is not enough to make up for losses during; Tort damage calculation difficulties mainly because is mostly indirect losses, loss of infringement is difficult to have a set of mature scientific calculation method to calculate indirect losses; Congenital deficiency object refers to information is the object of intellectual property rights, and the information can be Shared and quickly replicate, openness, easy to contact resistance, almost anyone can use through the infringement, and the obligee cannot be like protection and occupy the tangible property to govern the intellectual property rights, only through legal means to maintain and protect [2].

**The current situation of the infringement of intellectual property rights in China .** Due to the illegal cost is low, the infringement of intellectual property rights piracy and counterfeit market difficult regulatory enforcement, infringement of intellectual property rights in China have been around a long time, infringement form early is given priority to with pirated, counterfeit, later developed into a variety of forms, complicated tort, clear clear regulators, laws and regulations, so it is urgent to perfect the system of intellectual property law. Peaked in 2010 cases of infringement in our country, compared with 2009, increased by 40.81%, the case shall conclude the increased 36.74% [3]. With improvements in the consciousness and the popularity of social media, is given priority to

with writers, musicians, writers, the novel the obligee to try through sina weibo, post bar send out the voice of human rights, no small impact, cause huge social discussion.

### **The necessity of introducing punitive damages in intellectual property law**

**The administrative protection has limitations.** As with foreign exchange deepens, especially after joining the WTO, western countries through various channels to put pressure on our government, hope as soon as possible to establish the protection of intellectual property rights system in our country, our country government based on the perspective of maintaining market order, protecting the innovation also began to consciously promote the construction of relevant laws and regulations, but in order to promote construction effect, better protection for intellectual property rights, introducing the administrative protection of intellectual property rights in our country, and then the new protection has higher limits, did not achieve the desired effect. This is because the higher cost of intellectual property cases investigation and trial of the technology and knowledge level, but the general administrative staff is does not have the ability, this makes the case of the treatment effect is very bad [4]. In addition, the intellectual property rights belong to private rights and executive power belongs to public power, public power excessive intervention in private right can lead to many contradictions, and therefore the administrative organ should as far as possible to avoid intervention in cases of infringement of intellectual property rights, to introduce the punitive damages in intellectual property law as soon as possible.

**The criminal sanctions is not reasonable.** French criminal sanctions to protect intellectual property rights, although also can realize to the inhibition of tort and the infringer's punishment, but the side effects of criminal sanctions is obvious. Is a criminal sanctions will inevitably limit the personal freedom of the person, which in turn affect its creative freedom, is not conducive to the creation of the social economy [5]. Second, the intellectual property infringement is not an assault, rushed to criminal sanctions, are likely to lead to the deterioration of crime and derivative, the infringer is not good, but cause the cross infection of crime.

**The innate characteristics of the decision.** Innate characteristics of intellectual property rights is easy to share, copy, protect the difficulty is very big, greatly facilitate the infringer's secondary infringement and infringement for many times, and compensatory damages cause crime cost is low, it is hard to avoid the infringer under great benefits temptation again the implementation of infringement. Also said compensatory damages are insufficient to offset the infringer through secondary infringement or more to get benefits from infringement; this is the important reason for the infringement occurred again [6]. Introduce the punitive damages, while income confiscated the infringer, heavier penalties twice, make compensation income is much higher than infringement, tort law cost, and it can significantly reduce the infringement.

### **The feasibility of the introduction of punitive damages in intellectual property law**

The author to our country's legal system, social situation and national conditions after fully analysis, think that the feasibility of the introduction of punitive damages in intellectual property law is mainly embodied in the following aspects: one is the legal system of our country's present related legal system of punitive damages and fit well, won't appear irreconcilable conflicts and contradictions; Second, although the legal construction for so many years, our country should be very mature legislative technology, legislation have accumulated enough experience, even in the current law has appeared on the relevant provisions of the punitive damages; Three is for punitive damages legislative research, our country jurists have given a lot of academic report, theory foundation is very solid and mature [7].

### **The introduction of punitive damages in intellectual property law applicable conditions**

Introduce the punitive damages in intellectual property law must first determine the calculation method of compensation, because the punitive compensation is related to whether can the healthy development of intellectual property law system in our country. The new "trademark law" regulation on the basis of the compensatory damages to calculate the amount of compensation for sexual punishment, the author thinks that the following problems: one is the amount of punitive damages is not reasonable. Deterrence, punishment the infringer is the main purpose of punitive damages, the compensation for the determination of mainly refers to the infringer malicious, rather than the loss of the holder of the size, and compensatory damages has been making up for the loss of the obligee. Apply punitive damages in the premise condition is the holder of the great losses by the infringer, but does not mean that punitive compensation should be affected by its applicable conditions. Although the "patent law" are no conditions on the application of the punitive damages and make clear a regulation, but its allow judges to measure specific compensation, but highest must not exceed 3 times the amount of compensatory punishment [8]. General case, the infringer malicious degree is higher, the higher the punitive compensation should be. Secondly for the infringer punitive damages may be unfair. Famous degree, nature of intellectual property rights may be directly related to compensatory damages, such as degree of malicious but the infringer did not have positive correlation with the amount of compensatory damages, if calculated on the basis of the amount of compensatory damages punitive compensation is unfair to the infringer, obviously because of the low degree of the infringer malicious, great loss of the patentee, compensatory damages may be high.

In the current market environment, the holder of the enterprise market competitiveness, profitability and product price is likely to be seriously affected by intellectual property rights, intellectual property rights once been infringed, the obligee is likely to appear bigger loss, and a huge amount of compensatory damages, abroad such as the apple v. samsung infringement, such as domestic G2000 infringement of trademark rights case, chint v. schneider patent infringement dispute [9]. If the court on the basis of compensatory damages to calculate the punitive compensation amount, is probably beyond the compensation ability of the infringer, the inability to pay, on the one hand, can lead to the infringer to the holder of the empty nominal high compensation, the majesty of the court verdict for damage; On the other hand punitive damages of deterrence and targeted no is reduced, not conducive to the realization of the function of the punishment. Considering the situation of our country, the author thinks that the amount of punitive damages can be specified to 2 times the amount of compensatory damages, but not more than 2 million yuan, the highest it avoids the problem of law enforcement is differ, high randomness, and to ensure that the verdict is carried out smoothly.

Since "malicious" is a precondition for punitive damages, so it is very important how to judge whether it is malicious. In the existing laws and regulations of the rarely used the word "malicious", only in the property law has a "malicious" and "general principles of the civil law" has a "malicious collusion", not the meaning of "malicious" and "intentionally" the difference between the necessary explanation and illustration. The United States "patent law" is just "intentionally" as the premise condition for punitive damages, but in the concrete operation is more "intentionally" here "malicious", such as in *Eead Crop. V. Portec, Inc.*, a federal circuit court of the United States of America such concerns: "the infringer in knowing others after investigating the scope of the patent, patent and the patent is invalid or not tort formed the goodwill is convinced that". Is identified as "malicious", "the Australian patent law stipulated in article 122 (1 a) should be considered whether to deter the infringer; whether the obligee after warning the infringer to infringement; whether the infringer repeatedly infringement; the badness of the infringement. The current our country ruled that intellectual property infringement is whether it is malicious more considering the above situation [10].

The author thinks, should make a clear distinction between "intentionally" and "malicious", although the principle of fault is the imputation principles of civil law, intellectual property law as a general civil law, once ruled infringement of intellectual property infringement indicates most infringers have "intentionally". However the punitive compensation is a means of retribution and

deterrence, aimed at punishing has greater subjective vicious or serious consequences of the infringer and tort, if simply "intentionally", its own compensatory punish holder of the make up for the loss, the results would not be enough to trigger the punitive damages. So, compensatory punishment factor should not be punitive damages for determining factors. First of all, the author thinks that should be used with care to use less and punitive damages. Second, the judgement of "malicious" should be strictly limited and narrowed down, can only be judged to be malicious in the following cases: (1) know in advance whether because the holder of the warning or the infringer or know after investigation, the infringer has realized the tort will damage the rights and interests of the obligee, and we will continue to implement the infringement, the intention and the behavior didn't stop; (2) the infringer knowing infringement, and adopt a series of measures to cover up, want to avoid possible punishment; (3) after the court has a clear penalty infringement, continue to infringe on the right holder's intellectual property rights.

## Summary

Introduce the punitive damages can promote the improvement of the enforcement of intellectual property rights in China, strengthen the protection of the holder of the intellectual property right, deter potential infringers, punish infringement, maintaining market order, the goal of the current intellectual property law in our country. But it should also be recognized that punitive damages doesn't solve the problem of the intellectual property infringement compensation through low, the function and purpose of compensatory damages and punitive damages is different, the former is to compensate the holder of the losses, the latter is to punish and deter infringers, so if want to change the status quo of intellectual property infringement compensation through low, still should minimize the right holder of the burden of proof, and conduct a series of reform to ensure that the compensatory damages for itself to the holder of the real bridge.

## References

- [1] Ma Zhiguo, Qinqian. Intellectual property law in our country and generate a macroscopic research - based on our country related literature in recent 10 years statistical mathematical analysis [J]. Science and technology progress and countermeasures, 2015, (16): 94-100.
- [2] Li Judan. A model of intellectual property law system research, evaluation of li md the American intellectual property law (second edition) [J]. Journal of intellectual property rights, 2014, (8) : 90-96.
- [3] Yang Lijuan, Song Jixin. The pitfalls of split each generate revenue and intellectual property, the relationship between the theory of also generate and intellectual property [J]. Journal of intellectual property rights, 2011, (7): 60-63.
- [4] Yan Yonghe. The concept of public interest in intellectual property law interpretation, based on the logic of the market of public interests and supplement the shortage of market logic in the public interest [J]. Journal of jinan university (philosophy and social sciences edition), 2016, 35 (5): 101-109.
- [5] Wang Hongjun, Li Yuanjing. The analysis of the causes of the adverse the implementation of intellectual property law in China, from the Angle of the "most" [J]. Journal of intellectual property rights, 2013, (6): 63-67.
- [6] Maqiang. Consumers' rights and interests protection law of punitive damages provisions apply for the problems in China - in the revised the sentence of "consumer rights and interests protects a law" the implementation of a year for the center [J]. Journal of politics and law, 2016, (3): 140-148.
- [7] Zhang Fuqiang, Jiancong. Thinking of perfecting our country's copyright legislation of punitive damages, based on the analysis of "benefit maximization principle" of law and economics [J]. Journal of intellectual property rights, 2015, (8): 57-62.

- [8] Panjia. Theory of punitive damages applied in the field of patent infringement, and evaluation of the patent law of the People's Republic of China to modify the draft (draft) "article 65 [J]. Journal of chongqing university (social science edition), 2014, 20 (2): 115-122.
- [9] Liu Dahong, Duan Honglei. Consumer protection system of punitive damages in the field of evolution and the future improvement [J]. Journal of law - journal of northwest university of political science and law science, 2016 (4): 114-123.
- [10] Yanmiao. Introduction to China's new food safety law of punitive damages in perfect [J]. Journal of theoretical Tribune, 2014, (6): 101-103108.