

A Research on Punitive Damages for Intellectual Property Infringement in China

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Introduction

In order to strengthen intellectual property protection, in recent years, China has continuously strengthened the revision and improvement of intellectual property laws and regulations, and intensified the punishment of intellectual property infringement. Since June 1, 2021, the relevant laws on punitive damages in the field of intellectual property rights in China have all been formally implemented. However, how to reasonably apply the punitive damages system in judicial practice, that is, the elements and factors that should be considered in the application of punitive damages, is the main core issue discussed by Chinese academic and practical circles, and also one of the focus of foreign enterprises involved in China. On the basis of investigating the background of punitive damages for intellectual property infringement in China and the process of its introduction, this paper analyzes and interprets the elements of punitive damages for intellectual property infringement litigation in China, hoping to give some reference to the academia and business circles concerned about this issue.

Chapter 1: The background, process and basis of the introduction of punitive damages in the field of intellectual property in China

1. Background

China's modern intellectual property system was initially established in the late 1970s, and the promulgation of the Outline of the National Intellectual Property Strategy in 2008 marked that China's intellectual property system entered a stage of strategic improvement. According to WIPO's World Intellectual Property Index Report from 2013 to 2020, China has ranked first in the world in terms of patent filings for four types of intellectual property (invention patents, utility models, designs and trademarks),

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both originating in and originating in China, every year since 2012. China has developed into an intellectual property power and is on its way to becoming one. It is necessary to further improve the protection level of intellectual property rights to build a strong intellectual property right country, and the construction of punitive damages system becomes an important choice to build a strong intellectual property right country, which is also an important background for China to introduce punitive damages in the field of intellectual property rights. In addition, the development of Sino-US economic and trade frictions since March 2018 has further strengthened China's understanding of the importance of intellectual property development. The Economic and Trade Agreement signed by China and the US in January 2020 requires China to strengthen the application of penalties in the field of intellectual property, which has also accelerated the development of punitive damages system in China.

In 2019, China revised the Trademark Law to raise the standard of punitive damages. The Civil Code¹⁾, which was formally implemented in January 2021, provided relevant provisions on the application of punitive damages to intellectual property rights, providing a superior legal basis for the application of punitive damages to intellectual property rights; In June 2021, the Copyright Law and the Patent Law²⁾, which were amended and formally implemented, added provisions on punitive damages. Since then, China has completed the system construction of punitive damages for intellectual property rights at the legislative level. In 2021, China issued the Outline of Building a strong Country with Intellectual Property Rights³⁾, marking that China's intellectual property system has entered a new stage of development. In addition, China has also proposed that "protecting intellectual property rights is protecting innovation" and "innovation is the primary productive force", giving higher priority to the development of intellectual property rights. It can be seen that the construction of China's intellectual

1) The Civil Code of the People's Republic of China was promulgated in May 2002 (Order of the President of the People's Republic of China No. 45) and officially implemented on January 1, 2021.

2) The Patent Law of the People's Republic of China was promulgated in March 1984 and has been amended four times, including 1992, 2000, 2008 and 2020. The punitive compensation system was amended in 2020 and officially implemented in June 2021.

3) The CPC Central Committee and The State Council of China issued the Outline of Building a Strong Country with Intellectual Property Rights (2021-2035) on September 22, 2021, and issued a notice, requiring all regions and departments to earnestly implement it in light of the actual situation. The main purpose is to make an overall plan to promote China's development as a strong IPR country, comprehensively improve the level of IPR creation, utilization, protection, management and service, and give full play to the important role of the IPR system in socialist modernization, and formulate a program to build China into a strong IPR country. See the website: https://www.cnipa.gov.cn/art/2021/9/23/art_2742_170305.html.

property punitive compensation system is consistent with its development goal of building a strong country in intellectual property, which is also an institutional response to international intellectual property competition.

Based on the situation of intellectual property development in China itself, according to the white paper “Status of Intellectual Property Protection in China” issued by the State Intellectual Property Office of China over the years,⁴⁾ the number of civil cases of intellectual property accepted by the courts shows a growing trend (as shown in the figure below), most of which are IPR infringement cases. On the one hand, the increase of IPR infringement cases in China is due to the increase of IPR rights, on the other hand, the development of China’s social and economic development, and the increasing awareness of IPR protection. Despite the increasing number of IPR infringement cases in China, according to a research report by the Intellectual Property Research Center of Zhongnan University of Economics and Law in 2012, the cost of infringement was low and the cost of safeguarding rights was high in the IPR field at that time.⁵⁾ In 2019, Zhan Ying, a professor at the research Center, published research results showing that the average amount of compensation awarded for intellectual property infringement in China was still low, with “legal compensation” accounting for the majority of cases.⁶⁾ Therefore, new compensation calculation rules are needed to solve the problems in China’s judicial practice, and the punitive compensation system is referable and meets the needs of China’s social

4) The State Intellectual Property Office of China issues a white paper on the status of intellectual property protection in China every year. It aims to provide the international community with a comprehensive understanding of the basic status of intellectual property protection in China, the principles and positions China has pursued, the international obligations it has undertaken and the important measures it has taken. Since 1998, China has compiled and published a White paper on IPR protection for more than 20 consecutive years to introduce China’s IPR protection to all sectors at home and abroad. See the website: <https://www.cnipa.gov.cn/col/col91/index.html>.

5) For example, an empirical study was conducted on 4768 judicial cases of intellectual property infringement in China from 2008 to 2011. The results show that the widely criticized problem of “low compensation” for intellectual property infringement does exist in China, and courts tend to over-apply the “statutory compensation” standard in the judgment of compensation. See Zhan Ying, Zhang Hong, *An Empirical Study on the Judicial precedents of Intellectual Property Infringement in China -- Focusing on the Cost of rights Protection and Infringement Cost*, Science Research Management, No.7, 2015, pp. 145-153.

6) The research team conducted another empirical study on 11,984 IPR infringement cases in China, and found that the average amount of compensation awarded for IPR infringement was still low, and the situation that “legal compensation” accounted for the absolute majority was still unchanged. Although punitive damages had appeared in judicial practice, the application rate was very low. Zhan Ying, “Investigation and Reconsideration of the Judicial Status of Intellectual Property Infringement Damages in China -- Based on the In-depth Analysis of 11984 Judicial Cases of Intellectual Property Infringement in China”, *Legal Science (Journal of Northwest University of Political Science and Law)*, No. 1, 2020, pp. 191-200.

and economic development. This is also consistent with China's development goal of building a strong intellectual property power. China should take the initiative to improve intellectual property protection standards and safeguard intellectual property development achievements, so as to achieve the goal of promoting intellectual property development.



The academic research on whether China needs to introduce punitive damages in the field of intellectual property can be traced back to 2002, when scholar Zhuang Xiufeng proposed that punitive damages should be added to protect intellectual property rights.⁷⁾ Later, Chinese scholars had a wide discussion on whether China should introduce punitive damages in the field of intellectual property rights until 2013, when punitive damages were introduced into the Trademark Law. Chinese scholars have affirmed the positive significance of introducing punitive damages in the field of intellectual property from the aspects of intellectual property protection and innovation promotion, but at the same time there are some doubts. It can be divided into three aspects:

First, based on the analysis of China's economic development level, it is believed that punitive damages do not adapt to China's economic development level at that time, because the introduction of punitive damages means

7) Zhuang Xiufeng believes that according to the relevant provisions of the intellectual property law, natural persons and legal persons who infringe on the intellectual property rights of others and cause damage should be compensated. However, because the existing law adopts the actual loss principle, there is still no way to deal with especially serious infringement of intellectual property rights. Therefore, punitive damages should be applied to the infringement of intellectual property rights. See Zhuang Xiufeng, "Punitive Damages Should be Added to Protect Intellectual Property", *Journal of Law*, No.5, 2002, pp. 58-59.

that China needs to adopt strong protection policies in the field of intellectual property, which is unfavorable to the development of intellectual property in China at that time.⁸⁾ In addition, some people think that China, as a developing country, does not need to give strong protection of intellectual property rights above the minimum protection standard stipulated in TRIPS Agreement, because it will break through the “filling principle” of civil remedies, and the responsibility of punitive damages is obviously too heavy.⁹⁾

The second is the analysis of the concept of private law in civil law, which holds that punitive damages are in conflict with the concept of private law in civil law.¹⁰⁾ Punitive damages are fines for tort doers, which are incompatible with the compensatory nature of private law.¹¹⁾ In addition, some people believe that the confusion of the boundary between public and private law will confuse the different standards of proof established in the two fields, resulting in unfair evidence system for the infringer.¹²⁾

8) Skeptics believe that the introduction of punitive damages means that we adopt a strong policy to protect intellectual property rights, which is not suitable for our economic development level. See He Yudong, Shi Hongyan, Lin Shengye, “Debate on Introducing Punitive Damages for Intellectual Property Infringement”, *Intellectual Property Rights*, No.3, 2013, pp. 54-59.

9) According to the author; As a developing country, China has no obligation nor need to provide protection to intellectual property rights higher than the standard of protection stipulated in TRIPs. Because TRIPs does not stipulate punitive compensation liability for infringement of intellectual property rights, it is not necessary for our country to “exceed Britain and catch the United States” on the issue of intellectual property damage compensation. See Liu Ping, Tan Jia-ying, “Questions on the Introduction of Punitive Damages in Intellectual Property Law in China”, *Science, Technology and Economics*, No. 4, 2013, pp. 41-45.

10) Yin Zhiqiang believes that punitive damages, as a basic system, is widely applied in common law countries, especially the United States, while civil law countries generally stipulate punitive damages for specific matters in the form of a separate law. In our country, punitive compensation has characteristics of administrative law, which is a system of encouraging individuals to make up for lack of administrative law enforcement, rather than the basic content of civil law, which should not be provided in the future civil law code. See Yin Zhiqiang, “Need to Introduce Punitive Damage System in Chinese Civil Law”, *Journal of Law*, No.3, 2006, pp.76-79.

In addition, Sun Xiaomin et al. believe that the introduction of punitive damages can not theoretically demonstrate its scope of application, and how to determine the amount of punitive damages scientifically and reasonably, but also destroy the internal harmony of civil and commercial law, violate the filling principle of civil and commercial law, and has theoretical obstacles that are difficult to overcome in theory. Sun Xiaomin, Zhang Bing, *Question on Punitive Damages System -- A Comment on Article 47 of Tort Liability Law*, *Law Forum*, No.2, 2015, pp. 70-83.

11) In his own thesis, Cao Xinming proposes that some Chinese scholars believe that the adoption of punitive liability of intellectual property law violates the spirit of civil law and does not conform to the fair principle. See Cao Xinming, “Punitive Damages for Intellectual Property Infringement Liability Analysis -- and the Revision of the Three Laws in the Field of Intellectual Property”, *Intellectual Property Rights*, No. 4, 2013, pp. 3-9.

12) Yi Jianxiong et al. believed that punitive damages broke this boundary and replaced the case that should have applied the standard of proof of “beyond reasonable doubt” with the standard of proof of “high probability”, which resulted in the unfairness of the evidence system of the right holder. See Yi Jianxiong, Deng Hongguang, *Punitive Damages Should Be Introduced in the Field of Intellectual Property Rights*, *Application of Law*, 4, 2009, pp. 92-95.

Third, from the perspective of empirical analysis, it is believed that China's existing intellectual property system is sufficient to complete the function of punitive damages, and the reason for the low level of intellectual property protection is law enforcement.¹³⁾ Some scholars believe that the improper application of punitive damages will easily lead to the arbitrariness of the determination of the amount of compensation, leading to excessive litigation by the infringed to seek high compensation.¹⁴⁾

Of course, when some of the above scholars raised doubts, they also supported China's introduction of punitive damages system in the field of intellectual property rights, and at the same time, they believed that China should apply more strict standards in the system design of introducing punitive damages in intellectual property rights.¹⁵⁾ Feng Xiaoqing, a Chinese academic, responds to these doubts in his research, and the dominant view in Chinese academia remains in favour of the introduction of punitive dam-

13) He Yudong et al. put forward that the second reason for opposing the introduction of punitive damages in the civil liability for intellectual property infringement is that the existing compensation system for intellectual property infringement is very complete, and the reason for the low level of intellectual property protection is not the lack of legislation, the current problem is law enforcement rather than legislation. See He Yudong, Shi Hongyan, Lin Shengye, "Debate on Introducing Punitive Damages for Intellectual Property Infringement", *Intellectual Property Rights*, No.3, 2013, pp. 54-59.

14) Even this function also implies a possibility: the infringed party carries on excessive litigation in order to obtain high compensation, even regards the litigation as a means of making profits. See Wen Shiyang, Qiu Yongqing, *Punitive Damages and Intellectual Property Protection*, *Application of Law*, No.12, 2004, pp. 50-51.

15) Wen Shiyang et al. pointed out that the preventive function of civil liability is mainly accomplished through punitive civil liability, so punitive compensation system should be introduced in the compensation for intellectual property infringement. See WEN Shiyang, QIU Yongqing, *Punitive Damages and Intellectual Property Protection*, *Application of Law*, No.12, 2004, pp. 50-51.

Cao Xinming believes that from the perspective of cultivating the general public's awareness of intellectual property rights, the state, enterprises or society need to pay a considerable amount of publicity or education costs, and the application of punitive liability can greatly improve people's awareness of intellectual property rights and respect for intellectual property rights. See Cao Xinming, "Punitive Damages for Intellectual Property Infringement Liability Analysis -- and the Revision of the Three Laws in the Field of Intellectual Property", *Intellectual Property Rights*, No. 4, 2013, pp. 3-9.

Yi Jianxiong et al. pointed out: Intellectual property infringement cases compared with general civil tort case has certain particularity, simply apply the principle of compensatory damages is not conducive to curb the occurrence of infringement of intellectual property rights, even if with criminal responsibility and administrative responsibility, and also there are a lot of limitations, and introduce the punitive compensation system can solve the problem to a great extent, The new problems caused by the introduction of punitive damages system can either be overcome or accepted. Therefore, we should introduce punitive compensation system in intellectual property infringement cases. See Yi Jianxiong, Deng Hongguang, *Punitive Damages Should Be Introduced in the Field of Intellectual Property Rights*, *Application of Law*, 4, 2009, pp. 92-95.

ages in the intellectual property sector.¹⁶⁾ With the development of China's social economy and intellectual property rights, doubts about the introduction of punitive damages in the field of intellectual property rights in China have been decreasing. Especially after the introduction of punitive damages in the Trademark Law in 2013, mainstream studies have turned to the system design and application of punitive damages in the field of intellectual property rights.¹⁷⁾ With the deepening of the academic discussion, the possibility and feasibility of punitive damages in the field of intellectual property rights in China are constantly being promoted.

In addition, Zhao Peng, associate professor of China University of Political Science and Law, summed up the reasons for China's introduction of punitive damages system as "making up for the shortage of public resources, giving play to individual efficiency advantages, and remedying the slack of administrative organs"¹⁸⁾, consider the reasons for the introduction of punitive damages in the field of intellectual property rights in China

16) Professor xiao-qing feng pointed out: the field of intellectual property infringement damages into the justification of the system of punitive damages, from the system of punitive damages contains the humanities spirit and rational two angles, by investigating the system "to strengthen the fault liability", "show tolerance, the restorative justice idea", and with the tools of deterrence theory, corrective justice classical theory to understand them. Feng Xiaoqing, Luo Jiao. Research on Punitive Damages for Intellectual Property Infringement: Humanistic Spirit, Institutional Rationality and Normative Design, Journal of China University of Political Science and Law, No.6, 2015, pp.24-46.

17) Yuan Xiuting analysis: With the formal establishment of relevant rules in the revised Trademark Law, the specific application of punitive compensation for intellectual property infringement and its impact on judicial practice have attracted more and more attention. See Yuan Xiuting, "Judicial Application of Punitive Damages System for Intellectual Property Rights", Intellectual Property Rights, No.7, 2015, pp. 21-28.

Feng Shujie et al. pointed out that the determination of the amount of compensation for intellectual property infringement should be based on the principle of filling up, and punitive damages should be applied only to malicious infringements. Under the policy background of strengthening the protection of intellectual property rights, the application of punitive damages is not broad. See Shujie Feng, Ye Xia, "Vigilant Use of Punitive Damages in the Field of Intellectual Property Law: A Case Study of Trademark Law and Its Practice", Intellectual Property Rights, No.1, 2018, pp. 42-48.

18) Zhao Peng pointed out that the causes of introducing punitive damages can be summarized as follows: first, to make up for the shortage of public resources. The public expects the government to eliminate all ills in social life, but there is always a limit to how much support the public finances can provide. Second, give play to individual efficiency advantage. Efficient law enforcement requires the detection of illegal acts at a low cost. However, in the field of product quality, food safety and other areas involving consumer rights and interests protection, the regulatory departments cannot appear at the scene of illegal acts in the first time, while consumers are direct users of products and services. Third, remedy the slack of administrative organs. In all countries that rely on public law enforcement, there is insufficient law enforcement power, and the system construction of performance management and administrative accountability lags behind, which further magnifies the problem. See Zhao Peng, Reflections on Punitive Damages in Administrative Law, Journal of Legal Studies, No. 1, 2019, pp. 41-55.

from the perspective of pragmatism.

2. Process

For a long time, China has implemented the compensatory compensation system for tort acts, that is, to make up the actual loss of the right holder. In 1993, China set up punitive damages for the first time in the Law on the Protection of the Rights and Interests of Consumers, which is the “one-for-two” punishment for fraud by operators. In 2009, in the Food Safety Law, the provision of “one to ten”. In the Tort Liability Law passed in the same year, the specific phrase “punitive damages” appeared in Chinese law for the first time. In 2013, the revised Trademark Law stipulated that those who maliciously violated the exclusive right to use a trademark in serious circumstances should be compensated “one to three times”, which was the first time that a punitive compensation system was introduced in the field of intellectual property law.

In 2012, the Copyright Law, the Trademark Law and the Patent Law of China went through the revision process, and provisions on punitive compensation for infringement damage were added to the draft amendments.¹⁹⁾ However, as mentioned above, only after the final deliberation of the Trademark Law in 2013, the Copyright Law and the Patent Law were not amended at last. After that, the construction of punitive damages system in the field of intellectual property rights in China starts from the Trademark Law and develops constantly in the disputes of various parties.²⁰⁾

19) Article 72 (3) of the Copyright Law (revised draft submitted for review) issued in March 2012 stipulates that “for more than two intentional infringements of copyright or related rights, the amount of compensation shall be determined according to one to three times of the amount of compensation in the first two paragraphs”. Released in August 2012 of the patent law (modify the draft proposal) to modify the existing “patent law” the 65th increase paragraph 3: “for deliberately patent infringement behavior, the administrative authority for patent affairs or the people’s court may, according to the circumstances of the infringement of factors such as scale, the harmful consequences, will according to the preceding two paragraphs shall determine the amount of compensation by the highest up to three times”. Article 37 of the Trademark Law (revised draft) issued in December 2012 stipulates that “in case of malicious infringement of trademark rights and serious circumstances, the amount of compensation may be determined in accordance with the above methods not less than one time but not more than three times the amount”.

20) In November 2019, China issued the Opinions on Strengthening Intellectual Property Protection, reaffirming the establishment of a punitive compensation system for intellectual property infringement. The Economic and Trade Agreement signed by China and the United States in January 2020 requires China to strengthen the application of penalties in the area of intellectual property rights. Since 2018, China has accelerated the development of punitive damages in the field of intellectual property, and completed the basic construction of punitive damages system in the field of intellectual property.

i. The Civil Code

During the formulation of China's Civil Code, there was controversy about whether intellectual property rights should be included in the code²¹⁾, With the development and improvement of China's intellectual property rights and the depth of academic discussion, for intellectual property rights "into the Code", lawmakers and most scholars have no objection to that, the controversy is how to intellectual property rights in the civil code of the system design of the controversy, scholars have put forward the intellectual property rights" into the "first, in the design of" codification".²²⁾ Some scholars also put forward that due to the differences in the structure of rights between civil law and intellectual property law, the most scientific legislative choice is to make a good connection between civil code and intellectual property law.²³⁾ This is also the legislative choice made by China's Civil Code later, to maintain the independence of intellectual property law and make the two systems better connected. There is no dispute about whether punitive damages for intellectual property should be set up in the Civil Code, and then intellectual property should be set up in the civil Code, and punitive damages for intellectual property should be included in the civil Code. In December 2019, the Civil Code (Draft for public Com-

21) According to Feng Xiaoqing et al., based on the reflection on the attribute of intellectual property rights, we can see that the intellectual property law has a great deviation and treason from the traditional civil law, which is not completely consistent with the traditional civil law's concept of the sanctity of private rights and the autonomy of private law. Therefore, intellectual property law should not be included in the draft of Civil Code, intellectual property law should still maintain its relative independence. See Feng Xiaoqing, Liu Shuhua, On the Private Property of intellectual Property and Its Tendency to Public Ownership, Chinese Law Science, No.1, 2004, 63-70.

22) According to Feng Xiaoqing et al., based on the reflection on the attribute of intellectual property rights, we can see that the intellectual property law has a great deviation and treason from the traditional civil law, which is not completely consistent with the traditional civil law's concept of the sanctity of private rights and the autonomy of private law. Therefore, intellectual property law should not be included in the draft of Civil Code, intellectual property law should still maintain its relative independence. See Feng Xiaoqing, Liu Shuhua, On the Private Property of intellectual Property and Its Tendency to Public Ownership, Chinese Law Science, No.1, 2004, 63-70.

Professor Wu Handong believes that:the codification of intellectual property law in China should take two steps: the first step is to set up intellectual property rights in the Civil Code to realize the rational return of intellectual property rights as private rights. The second step is to formulate a special code of intellectual property law to realize an integrated, systematic and rational arrangement of intellectual property. See Wu Handong, "Intellectual Property Law in the Codification of Civil Law", Chinese Law Science, No. 4, 2016, 24-39.

23) Xiong Qi pointed out that the most scientific legislative choice is to maintain the independence of copyright law, patent law and trademark law, and pay attention to the connection with civil law in terms of institutional arrangement and legal interpretation, in view of the differences in the evolution path and right structure between intellectual property law and civil law. Xiong Qi, "The Systematic Orientation of Intellectual Property Law and Civil Law", Journal of Wuhan University (Philosophy and Social Sciences), No.2, 2019, pp. 128-138.

ment) was issued, which introduced intellectual property rights into the Civil Code and added that punitive damages could be applied to intellectual property rights. The Civil Code, promulgated in May 2020, provides for an umbrella punitive compensation system for intellectual property rights (implemented on January 1, 2021).

ii. Trademark Law

Under the debate of various parties, China introduced punitive damages into intellectual property rights for the first time in the revision of Trademark Law in 2013, and then started the development of punitive damages in the field of intellectual property rights in China. In December 2012, the Draft Amendment to the Trademark Law of the People's Republic of China was published. In August 2013, the Trademark Law was amended to add punitive damages clauses that are more than doubled and less than tripled (implemented on May 1, 2014). The Trademark Law was the first to make a breakthrough in the introduction of punitive damages system. In April 2019, the Trademark Law was again amended to modify the scope of punitive damages for trademark infringement to be between one and five times (implemented on November 1, 2019). In the legislative investigation of the introduction of punitive damages in the field of intellectual property rights in China, the introduction of punitive damages in the Trademark Law is the least controversial, and the legislative departments and academic circles generally believe that the introduction of punitive damages in the field of trademarks should be introduced.

iii. Copyright Law

In March 2012, China issued the first draft of the Revision of the Copyright Law, followed by the second draft of the Copyright Law in July, and the third draft of the Copyright Law in October. After continuous revision, the National Copyright Administration of China submitted the Copyright Law of the People's Republic of China (Revised Draft) to The State Council for review in December 2012. The punitive compensation system was introduced in the first draft and continued until the draft was submitted for review. The Chinese legislative department has shown a firm attitude towards the introduction of punitive compensation system in the copyright law.²⁴⁾ Upon receipt of the document, the former Office of Legislative Affairs of The State Council immediately sent it to relevant central government organs, some local governments, enterprises and institutions, experts and scholars for comments, and publicly solicited comments from the pub-

24) See Chen Jingyi, On the Introduction of Punitive Damages System in the Field of Copyright -- Based on the Third Amendment of Copyright Law, *Science and Technology and Law*, 2015, 5, pp. 910-947.

lic through the Internet. In December 2017, the National Copyright Administration revised the submitted manuscript and submitted it for review again due to disputes over many contents of the manuscript. The former Legislative Affairs Office of The State Council and the National Copyright Administration made revisions to the revised manuscript. The Ministry of Justice, together with the Publicity Department of the CPC Central Committee, made further amendments to the Copyright Law of the People's Republic of China (Draft Amendment). A draft amendment in April 2020, agreed by The State Council, added provisions on punitive damages. In November 2020, the Copyright Law was amended to increase the punitive damages clause by more than doubling and less than five times (implemented on June 1, 2021).

iv. Patent Law

In July 2012, the State Intellectual Property Office (SIPO) published the Draft amendment to the Patent Law of the People's Republic of China, adding punitive damages. The punitive damages provision added to the proposed revision draft of the patent Law has been widely endorsed by both academics and businessmen.²⁵⁾ The opposing opinion points out that the introduction of punitive compensation system may block the ethical return of tort relief and reduce the function of compensatory compensation,²⁶⁾ or think patent punitive damages do not conform to China's national conditions of the system design.²⁷⁾ In July 2015, SIPO submitted the Draft amendment to the Patent Law of the People's Republic of China for review to The State Council. The former Office of Legislative Affairs of The State Council, after receiving the case, conducted in-depth investigation and study, solicited opinions from relevant departments, local governments and organizations twice, and publicly solicited opinions from the public, and repeatedly studied, revised and improved the disputes among all parties. In 2018, the Ministry of Justice, together with the State Intellectual Property

25) See Zhan Ying, "Focus and Controversy of the Fourth Amendment of China's Patent Law", *China Science and Technology Forum*, No.11, 2015, pp. 125-130.

26) Li Xiaoqiu points out that the introduction of punitive compensation system for patent infringement may block the ethical return of tort relief, reduce the function of compensatory compensation, rigidly draw on the existing legislative practice of punitive compensation system, promote the increase of the functions of patent administrative organs, and lead to the lack of operability of patent legislation. See Li Xiaoqiu, "Punitive Compensation System for Patent Infringement: Introduction or Rejection", *Studies of Law and Business*, No. 4, 2013, pp. 136-144.

27) Xiao Hai and others pointed out that this proposal also has many inadequacies that cannot be effectively applied in theory and practice, and ignores the fact that China is a big manufacturing country and a technology catch-up country. See Xiao Hai, Chang Zhewei, "Punitive Damages Should Not Be Introduced in Patent Infringement Damages", *Journal of Beihua University (Social Science Edition)*, No.3, 2018, pp. 67-72.

Office and other departments, repeatedly studied, coordinated and revised the draft Amendment to the Patent Law of the People's Republic of China in light of the new situation and requirements. In January 2019, it was released for comment and then discussed and approved by the 33rd executive meeting of The State Council. In October 2020, the Patent Law was amended to increase the punitive damages clause by more than doubling and less than five times (implemented on June 1, 2021).

v. Seed Law and Anti-Unfair Competition Law

In May 2015, the Seed Law (Revised Draft) was published. In November 2015, the revised Seed Law was deliberated and passed, stipulating punitive damages for more than one time and less than three times (implemented on January 1, 2016). In December 2021, the Seed Law was amended to modify the punitive compensation scope of seed infringement to more than one time and less than five times (implemented on March 1, 2022).

In April 2019, the Law on Unfair Competition was amended to increase the punitive damages clause from more than doubling to less than five times (implemented on April 23, 2019).

3. Foundation

According to the World Intellectual Property Index Report 2020 released by WIPO, China ranks first in the number of patent and trademark applications in the world. According to WIPO's Global Innovation Index 2020 report, China ranks 14th. In addition, according to the 2020 Evaluation Report on China's Intellectual Property Development issued by the Intellectual Property Development Research Center of the State Intellectual Property Office of China in October 2021, the indexes of China's comprehensive development, creation, application, protection and environment of intellectual property showed a year-on-year growth trend from 2010 to 2020. From the perspective of international comparison, the overall situation of intellectual property development in China rose from the 17th place in 2015 to the 8th place in 2019. In terms of intellectual property protection, according to the report "The Status of Intellectual Property Protection in China 2020", China's intellectual property protection effectiveness has been widely recognized by the innovation bodies of various countries and the international community, with a social satisfaction score of 80.05. Reports from various aspects show that China has built an efficient and modern intellectual property system over the past several decades, which has contributed to China's economic and social development. In addition, punitive damages have been introduced in the Trademark Law in 2013, which is practical and operable. It is on the basis of certain success in China's economic and social development and intellectual property development that the social, economic

and legal basis for the introduction of the punitive compensation system for intellectual property rights has been established. Externally, China is constantly opening up to the outside world and opening its market to other countries. It needs to continuously improve the level of intellectual property protection and create a world-class business environment, which also reflects the practical need for China to introduce the punitive compensation system for intellectual property.²⁸⁾

Chapter 2: The legislative status of punitive compensation system for intellectual property infringement in China

The punitive compensation system in modern Chinese law can be traced back to the “double refund” stipulated in Article 49 of the Consumer Rights and Interests Protection Law in 1994²⁹⁾, and then provisions on the punitive compensation system appeared in the Food Safety Law and Tort Liability Law promulgated in 2009.³⁰⁾ The development of punitive damages system in the field of intellectual property rights in China is marked by the introduction of Trademark Law in 2013. At present, the specific legal provisions of punitive damages in the field of intellectual property in China are shown in Table 2-1, among which the Trademark Law and Seed Law have been amended, and the Civil Code, Copyright Law, Patent Law and Anti-Unfair Competition Law are the first to introduce punitive damages. Table 2-2 is a judicial interpretation of the rules on the application of punitive damages in the field of intellectual property formulated and issued by the Supreme People’s Court of China on the basis of the relevant laws and regulations on punitive damages for intellectual property rights, stipulating the conditions for the application of punitive damages in more detail. In the following, this article will explain the provisions related to the application of punitive damages in detail.

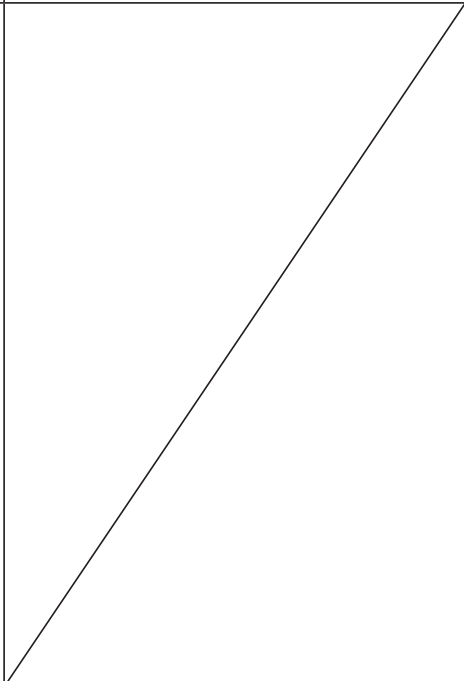
28) See Chapter 4 of China’s Outline for Building a Strong Country with Intellectual Property Rights (2021-2035).

29) China’s Tort Liability Law was issued in December 2009 and formally implemented in July 2010. It will expire after the official implementation of the Civil Code in 2021. The Consumer Rights and Interests Protection Law and the Food Safety Law are still in effect until now.

30) See Huang Yaqin, Research on the Judicial Application of Punitive Damages System in China, Law Forum, No. 4, 2016, pp. 104-114.

Table 2-1 Punitive damages related to intellectual property rights in China

Law	Amended provisions	In force provisions
The Civil Code	/	<p>(Officially implemented on January 1, 2021)</p> <p>Article 179 Where punitive damages are provided for in paragraph 2 of the law, such provisions shall apply.</p> <p>Article 1,185 Where the intellectual property rights of another person are intentionally infringed and the circumstances are serious, the infringed shall have the right to claim corresponding punitive damages.</p>
Copyright Law	/	<p>(Officially implemented on June 1, 2021)</p> <p>Article 54 Where copyright or copyright-related rights are infringed upon, the infringer shall pay compensation according to the actual losses suffered by the right holder or the illegal gains of the infringer. Where it is difficult to calculate the actual losses of the right holder or the illegal gains of the infringer, compensation may be made by reference to the use fee of the said right. In case of intentional infringement of copyright or copyright-related rights, where the circumstances are serious, compensation may be made not less than one time but not more than five times the amount determined in accordance with the above methods.</p>
Patent Law	/	<p>(Officially implemented on June 1, 2021)</p> <p>Article 71 The amount of compensation for the infringement of a patent right shall be determined on the basis of the actual loss suffered by the right holder as a result of the infringement or the profits gained by the infringer as a result of the infringement. Where it is difficult to determine the loss of the right holder or the benefit obtained by the infringer, it shall be reasonably determined by reference to the multiple of the royalty of the patent license. In case of intentional infringement of the patent right, where the circumstances are serious, the amount of compensation may be determined not less than one time but not more than five times the amount determined according to the above methods.</p>

<p>Trademark Law</p>	<p>(2013) Article 63 The amount of compensation for infringement of the exclusive right to use a trademark shall be determined on the basis of the actual losses suffered by the right holder as a result of the infringement; Where the actual loss is difficult to determine, it may be determined on the basis of the profits obtained by the infringer as a result of the infringement; Where it is difficult to determine the loss of the right holder or the benefit obtained by the infringer, it shall be reasonably determined by reference to the multiple of the licensing fee of the trademark. Where a malicious infringement of the exclusive right to use a trademark is serious, the amount of compensation may be determined not less than one time but not more than three times the amount determined in accordance with the above methods. The amount of compensation shall include reasonable expenses paid by the right to stop the infringing act.</p>	<p>(Officially implemented on November 1, 2019) Article 63 The amount of compensation for infringement of the exclusive right to use a trademark shall be determined on the basis of the actual losses suffered by the right holder as a result of the infringement; Where the actual loss is difficult to determine, it may be determined on the basis of the profits obtained by the infringer as a result of the infringement; Where it is difficult to determine the loss of the right holder or the benefit obtained by the infringer, it shall be reasonably determined by reference to the multiple of the licensing fee of the trademark. Where a malicious infringement of the exclusive right to use a trademark is serious, the amount of compensation may be determined not less than one time but not more than five times the amount determined in accordance with the above methods. The amount of compensation shall include reasonable expenses paid by the right to stop the infringing act.</p>
<p>Anti-unfair Competition Law</p>		<p>(Officially implemented on April 23, 2019) Article 17 The amount of compensation for a business operator injured by an act of unfair competition shall be determined on the basis of the actual loss suffered by the business operator as a result of the infringement. If the actual loss is difficult to calculate, it shall be determined on the basis of the profits obtained by the infringer for the infringement. Where a business operator maliciously commits an act of infringing on trade secrets and the circumstances are serious, the amount of compensation may be determined not less than one time but not more than five times the amount determined according to the above methods. The amount of compensation shall also include reasonable expenses paid by the operator to stop the infringing act.</p>

Seed Law	<p>(2015) Article 73 Paragraph 3 The amount of compensation for the infringement of the right to new plant varieties shall be determined according to the actual losses suffered by the right holder as a result of the infringement. Where the actual loss is difficult to determine, it may be determined on the basis of the profits obtained by the infringer as a result of the infringement. Where it is difficult to determine the loss of the right holder or the benefit obtained by the infringer, it may be reasonably determined by reference to the multiple of the licensing fee of the new plant variety right. The amount of compensation shall include reasonable expenses paid by the right to stop the infringing act. Where the infringement of the right to new plant varieties is serious, the amount of compensation may be determined not less than one time but not more than three times the amount determined according to the above methods.</p>	<p>(Officially implemented on March 1, 2022)</p> <p>Article 72 Paragraph 3 The amount of compensation for the infringement of the right of new plant varieties shall be determined according to the actual losses suffered by the right holder as a result of the infringement. Where the actual loss is difficult to determine, it may be determined on the basis of the profits obtained by the infringer as a result of the infringement. Where it is difficult to determine the loss of the right holder or the benefit obtained by the infringer, it may be reasonably determined by reference to the multiple of the licensing fee of the new plant variety right. If a person intentionally infringes upon the right of new plant varieties and the circumstances are serious, the amount of compensation may be determined not less than one time but not more than five times the amount determined according to the above methods.</p>
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Table 2-2 Relevant judicial interpretations

Judicial interpretation	Post No.	The implementation date
Interpretation on the Application of Punitive Damages in the Trial of Civil Cases Concerning Intellectual Property Infringement	Interpretation of Law [2021] No.4	March 3, 2021
Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Disputes over Copyright (Revised in 2020)	Interpretation of Law [2020] No. 19	January 1, 2021
Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases (Revised in 2020)	Interpretation of Law [2020] No. 19	January 1, 2021
Provisions of the Supreme People's Court on Issues Concerning the Application of Law in the Trial of Patent Dispute Cases (Revised in 2020)	Interpretation of Law [2020] No. 19	January 1, 2021
Some Provisions of the Supreme People's Court on the Specific Application of Law in the Trial of Disputes Concerning Infringement of New Plant Variety Rights (II)	Interpretation of Law [2021] No. 14	July 7, 2021

Chapter 3 The application of punitive damages in intellectual property rights infringement in China

1. Interpretation of the application of punitive damages for intellectual property rights in China

Punitive damages are a special right to claim compensation in the field of intellectual property in China. According to Article 2 of the Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Civil Cases Concerning Intellectual Property Infringement issued by the Supreme People's Court of China in March 2021 (hereinafter referred to as the Interpretation), The plaintiff requesting punitive damages shall specify the share, calculation method and basis of the compensation when suing. At the same time, if the second paragraph provides that the plaintiff increases his claim for punitive damages before the end of the debate in the court of first instance, the court shall allow it; If it is added in the second instance, mediation shall be conducted according to the voluntary principle, and if the mediation fails, it shall be notified to Sue separately at that time. Therefore, it can be seen that the precondition for the application of punitive damages is that the parties make a clear request for the application of punitive damages, and the court will conduct the review, which is also in line with the principle of "don't Sue and ignore" in the field of civil litigation in Chinese courts. The court needs to consider the two elements of "intent/malice + serious circumstances" when reviewing whether punitive damages should be applied, and will further consider the compensation base and how to determine the multiple of application.

i. Determination of intent

The applicable conditions of punitive damages for intellectual property rights in China are "intentional+serious circumstances" and "malicious+serious circumstances". The Civil Code, Patent Law, Copyright Law and Seed Law limit the application conditions to "intentional+serious circumstances", while the Trademark Law and Anti-Unfair Competition Law limit the application conditions to "malicious+serious circumstances". The second paragraph of Article 1 of the Interpretation specifies that in the application of punitive damages for intellectual property rights, "intentional" includes "malicious", and the two belong to the inclusion relationship. As for the interpretation of intentional in the application of punitive damages in the field of intellectual property rights, Judge Su Zhifu of Beijing High Court held that "intentional" should be interpreted by "willism",

which is direct intentional and indirect intentional,³¹⁾ In the judicial practice of trademark law, the requirement of “bad faith” in trademark punitive damages is usually interpreted as direct intent.³²⁾ Therefore, in the application of judicial practice in China, the elements of “intent” and “malice” are coordinated and unified.

In Chinese judicial practice, the identification of intent involves the definition of the “fault” of the party concerned. “Knowing” and “should have known” are usually used to distinguish the subjective degree of fault of the party concerned. In the process of applying punitive damages, China’s judicial practice will be deliberately limited to subjective faults of “knowing”. As pointed out in Article 6 of the Guiding Opinions on the Application of Punitive Damages in Civil Infringement Disputes of Intellectual Property Rights (hereinafter referred to as the Guiding Opinions) issued by Shenzhen Intermediate People’s Court of China in November 2020, “Willful” means that the infringer subjectively knows that his actions will lead to the occurrence of the tort, but wants or allows such a result to occur. If the infringer causes an infringement through negligence, it generally does not constitute “intentional”.³³⁾

The specific circumstances for the determination of intent are also listed in the *Interpretation*: (1) The defendant continues to commit the infringing act after being notified or warned by the plaintiff or an interested party; (2) The defendant or its legal representative or manager is the legal representative, manager or actual controller of the plaintiff or an interested party; (3) There is a labor, service, cooperation, licensing, distribution, agency or rep-

31) Su Zhifu pointed out: To intellectual property rights in the ZhuanMenFa interpreted as deliberately “malicious”, in the civil code of penal provisions of the intellectual property right fails to make a special limited “intentionally” cases, as usually be the understanding of “intentionally”, namely “intentionally” on the context of punitive damages shall adopt “meaning”, will be interpreted as including direct intent and indirect intent two kinds of situations, This understanding is more consistent in legal interpretation. See Su Zhifu, “On the Objective, Positioning and Judicial Application of Punitive Damages System for Intellectual Property Rights in China”, China Applied Law, No. 1, 2021, pp. 132-145.

32) Beijing High People’s Court: Article 1.13 of the Guiding Opinions on Determining Damages in Cases of Infringement of Intellectual Property Rights and Unfair Competition: The application of punitive damages shall be in accordance with the provisions of the law. Punitive damages shall be applied to acts that infringe upon trademark rights or trade secrets in bad faith, and the circumstances are serious. “Malicious” generally means direct intent. “Serious circumstances” generally refers to the action of the accused caused serious damage consequences.

33) Article 6 of the Guiding Opinions on the Application of Punitive Damages to Civil Infringement Disputes of Intellectual Property Rights issued by Shenzhen Intermediate People’s Court: “Intentional” in this Opinion means that the infringer subjectively knows that his or her behavior will lead to the occurrence of the infringement result, but wishes or allows such result to occur. If the infringer causes an infringement through negligence, it generally does not constitute “intentional”.

representative relationship between the defendant and the plaintiff or an interested party, and the defendant has had contact with the intellectual property rights infringed; (4) The defendant has business dealings with the plaintiff or an interested party or has conducted consultations for the conclusion of a contract, and has had access to the intellectual property rights infringed; (5) the defendant commits acts of piracy or counterfeiting of a registered trademark; (6) other circumstances that can be regarded as intentional.³⁴⁾ If the above circumstances exist, the court may preliminarily determine that the defendant has the intent to infringe intellectual property rights.

For the determination of “intentional” in judicial practice, judge su zhifu of Beijing high court summed up five situations that can be identified as “intentional” : (1) the defendant knows that the trademark it uses belongs to the same or similar trademark of the trademark registered by the plaintiff, but still uses it in a wide range; (2) After being warned by the right holder or punished by the administrative organ, the defendant continues to commit acts of infringement or unfair competition; (3) counterfeiting the mark of the plaintiff’s rights; (4) There is a labor or service relationship between the plaintiff and the defendant, or there is an agency, licensing, distribution or cooperation relationship, or there has been consultation between the plaintiff and the defendant, and the defendant is aware of the existence of the intellectual property rights of others; (5) The defendant refuses to perform the order of act preservation.³⁵⁾

In addition to the above, the guideline issued by the Intermediate People’s Court of Shenzhen, China also lists eight situations in which the defendant can be found to have “intentional” behavior : (1) the infringer, its controlling shareholder or legal representative repeatedly or in a disguised way commits the same tort after the effective judgment is made; (2) The infringer or

34) The Supreme People’s Court on the infringement of intellectual property rights civil cases for the interpretation of the punitive damages “([2021] no. 4) article 3: for the cognizance of intentional violation of intellectual property rights, the people’s court shall consider is the infringement of intellectual property rights object type, the right to state and related product awareness, the defendant and the plaintiff or the relationship between the interested parties and other factors. (1) The defendant continues to commit the infringing act after being notified or warned by the plaintiff or an interested party; (2) The defendant or its legal representative or manager is the legal representative, manager or actual controller of the plaintiff or an interested party; (3) There is a labor, service, cooperation, licensing, distribution, agency or representative relationship between the defendant and the plaintiff or an interested party, and the defendant has had contact with the intellectual property rights infringed; (4) The defendant has business dealings with the plaintiff or an interested party or has conducted consultations for the conclusion of a contract, and has had access to the intellectual property rights infringed; (5) the defendant commits acts of piracy or counterfeiting of a registered trademark; (6) other circumstances that can be regarded as intentional.

35) See Su Zhifu, “On the Objective, Positioning and Judicial Application of Punitive Damages System for Intellectual Property Rights in China”, *China Applied Law*, No. 1, 2021, pp. 132-145.

its controlling shareholder or legal representative continues to commit the infringing act after being repeatedly warned by the right holder or punished by the administrative organ; (3) There is a labor or service relationship between the right holder and the infringer, or there is an agency, licensing, distribution or cooperation relationship, or there has been consultation, and the infringer is aware of the existence of the intellectual property of the other person; (4) the infringer continues to carry out the relevant act without justifiable reasons after receiving the warning letter from the obligee; (5) the infringer uses the well-known trademark of the right holder on the same or similar goods; (6) if the infringer registers a well-known trademark of the right holder, or if the trademark registration application is deemed to be similar to the prior trademark, the application continues to be used after rejection; (7) The infringer takes measures to cover up the infringement, falsifies or destroys the evidence of infringement, etc.; (8) Other circumstances.³⁶⁾

Through analysis of the above content, It can be concluded that when the court determines that the defendant has “intentional” subjective fault, the main reason is that there is an antecedent act, which makes the defendant in the state of “knowing”, and then the tort occurs. The specific circumstances listed above can play an auxiliary reference role in judicial practice, and do not have a restrictive role in the trial of individual cases. Although is given a variety of judicial explanation and practice can be identified as “intentionally” situation, some scholars think that the subjective evaluation is bigger, difficult to quantify and specific, it is hard to judge, and the punitive damages shall be applicable to the specific case or not depends on the discretion of the judge, will lead to instability and unpredictability of justice³⁷⁾.

ii. Determination of the seriousness of the circumstances

In addition to the determination of “intentional”, “serious circumstances” is also an important condition for the application of punitive damages in intellectual property rights, which together constitute the scope of application of punitive damages. Article 4 of the Interpretation stipulates: “In determining the seriousness of intellectual property infringement, the people’s court shall comprehensively consider the means of infringement,

36) See Article 8 of the Guiding Opinions on the Application of Punitive Damages in Intellectual Property Rights Civil Infringement Disputes issued by Shenzhen Intermediate People’s Court.

37) Ding Guofeng et al. pointed out that both “malicious” and “intentional” belong to subjective judgment, and the biggest characteristic of subjectivity is that it is difficult to quantify and concretization, and it is difficult to make a judgment standard on what is “intentional”. See Guofeng Ding, Qing Zhang, “Reflection and Improvement: An Applicable Approach to the Creation of Punitive Damages Liability in the Field of Intellectual Property in China”, *Electronic Intellectual Property Rights*, No.8, 2021, pp. 50-62.

the number of times, the duration of the infringement, the geographical scope, the scale, the consequences, and the infringer's behavior in the litigation.” (1) Repeat the same or similar infringing act after being punished by the administration or judged by the court to be liable for infringement; (2) engaging in infringement of intellectual property rights; (3) forging, destroying or concealing evidence of infringement; (4) refusal to perform an order of preservation; (5) the infringement has made a profit or caused great damage to the right holder; (6) The infringing act may endanger state security, public interests or personal health; (7) other circumstances that can be deemed as serious. This is also according to the typical cases listed in judicial practice.³⁸⁾

In addition, China's Supreme People's Court released in 2021 on the trial of violations of the law of plant variety rights disputes specific application problem of certain rules relating to the (2) of article 17 listed the assault position paper. on the clue is serious situation: (a) was administrative penalty or the court's responsibility for infringement, after again commit the same or similar tort; (2) to infringe upon the right to variety; (3) forging the certificate of variety right; (4) Selling authorized varieties in packages without signs or labels; (5) violation of the provisions of subparagraphs 1, 2 and 4 of paragraph 1 of Article 77 of the Seed Law; (6) refusing to provide the place of production, reproduction, sale or storage of the infringing property sued.³⁹⁾ At the same time, it is emphasized that in the case of the first to the fifth, the amount of compensation can be determined according to more than two times of the base when applying punitive damages. Paragraph (5) also includes: article 77 of the Seed Law:(1) promoting and selling crop varieties that should be examined and approved and have not been examined and approved; (2) forest tree varieties that should be examined and approved for promotion and sale as improved varieties without examination and approval; ... (4) promoting crop varieties that should be registered and have not been registered, or selling them in the name of registered varieties, etc.

Some scholars summarize the judicial practice of intellectual property trials in China and believe that the circumstances constituting “serious circumstances” usually include the following five elements:(1) long infringement time; (2) Wide infringement area; (3) Tort has great social impact; (4)

38) Article 4 of the Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Civil Cases Concerning Intellectual Property Infringement (Interpretation of Law (2021) No. 4).

39) Article 17 of the Provisions on the Specific Application of Law in the Trial of Disputes Concerning Infringement of New Plant Variety Rights (II).

The number of infringements; (5) Serious consequences of infringement damage. At the same time, we should pay attention to the general application of punitive damages in the field of intellectual property law and consider that the conditions should be strictly applied.⁴⁰⁾ In addition, in the case of infringement of trade secrets, if the infringement causes the trade secrets to become known to the public, it will usually be considered as “serious”. The above factors inevitably make judges have more discretionary power, but judges often take into account the factors of litigation risk and turn to apply other provisions of law.⁴¹⁾

iii. Determination of the compensation base

According to China’s intellectual property rights apply punitive damages in the law, the trademark law, the anti-unfair competition law of the seed law from the expression on the analysis of law, the base of punitive damages in the first place to the holder of the actual loss, unable to determine the actual loss to the profit ascertained base, such as the former two are unable to determine the base of licence fee is used to determine the compensation. In Copyright Law and Patent Law, the actual loss of the right holder or the profit of the infringer is taken as the compensation base, which is a parallel relationship rather than a sequence relationship. When the two cannot be determined, the license fee is applied to determine the compensation base, and there is a sequence of application in this case. The licensing fee shall be calculated according to the duration of the infringement. It should be noted that punitive damages can be applied only when the above three bases can be determined. Therefore, in judicial practice, it is necessary for the right holder to make clear the base of the claim for compensation, and it is also

40) Feng Shujie believes that: combined with the common situations in practice, the “serious circumstances” include: the infringement time is long, the infringer is in the state of infringing others’ trademark rights for a long time; The infringement area is wide, such as the manufacturing place and the sales place of the infringing product cover many relevant areas; Where the infringer is subject to administrative punishment for the same kind of infringement or is adjudicated by the judicial organ and commits the same kind of infringement; Where the infringing products or services involve industries or industries that affect public safety, such as food and drugs; Where the damage has serious consequences and the infringement has caused huge economic losses or other serious consequences to the right holder. See Shujie Feng, Ye Xia, “Vigilant Use of Punitive Damages in the Field of Intellectual Property Law: A Case Study of Trademark Law and Its Practice”, *Intellectual Property Rights*, No.2, 2018, pp. 42-48.

41) Ding Guofeng et al. pointed out that under what circumstances can the element of “serious circumstances” be identified, the judge will inevitably have the choice space of excessively free ruling. However, the judge will always take into account the consideration of litigation risk and choose to apply the provisions of other laws. See Guofeng Ding, Qing Zhang, “Reflection and Improvement: An Applicable Approach to the Creation of Punitive Damages Liability in the Field of Intellectual Property in China”, *Electronic Intellectual Property Rights*, No.8, 2021, pp. 50-62.

necessary to bear the corresponding provisions of proof. Based on the provisions of the above-mentioned law on the compensation base, Article 5 (3) of the Interpretation also takes the amount of compensation determined by the plaintiff's claims and evidence as a kind of base.

In December 2020, the Supreme People's Court of China issued a number of provisions on the application of law in the trial of civil disputes involving patents, trademarks and Copyrights.

On how to calculate the compensation base of patent punitive damages, there are the following provisions: "The actual loss of the right holder = the total number of sales reduction caused by the infringement of the patent product \times the reasonable profit of each patent product", if the total number of sales of the right holder is difficult to determine, then "the actual loss of the right holder = the total number of sales of the infringing product in the market \times the reasonable profit of each patent product"; In addition, "the profit of the infringer = the total number of the infringing products sold in the market \times the reasonable profit of each patented product", the profit of the infringer due to infringement is generally calculated in accordance with the operating profit of the infringer, and for the infringer whose business is entirely based on infringement, it can be calculated in accordance with the sales profit. It is difficult to determine the loss of the right holder and the profit of the infringer, so the compensation base can be determined by referring to the patent licensing fee. If there is no or the licensing fee is unreasonable, punitive damages shall not be applied.⁴²⁾

42) Interpretation of the Provisions of the Supreme People's Court on the Application of Law in the Trial of Patent Dispute Cases (Revised in 2020) No. 19. Article 14: the actual loss suffered by the right holder as a result of infringement as provided for in Article 65 of the Patent Law may be calculated on the basis of the sum of the decrease in sales of the patented product caused by the infringement multiplied by the reasonable profit of each patented product. If it is difficult to determine the total amount of the decrease in the sales volume of the right holder, the product of the total number of the infringing products sold on the market multiplied by the reasonable profit of each patented product can be regarded as the actual loss suffered by the right holder because of the infringement. As provided in Article 65 of the Patent Law, the benefit to the infringer from the infringement may be calculated by multiplying the total number of the infringing products sold on the market by the reasonable profit of each infringing product. The profits obtained by the infringer due to the infringement are generally calculated according to the operating profits of the infringer. For the infringer whose business is solely based on the infringement, they may be calculated according to the sales profits. Article 15: the interests of the obligee's loss or the gain is difficult to determine, a patent license fee can consult, the people's court may, depending on the type of patent infringement and the nature of the plot, the nature and scope of the patent license, factors such as time, refer to the patent license fee multiples of reasonable compensation; Where there is no reference for the royalty of the patent license or the royalty of the patent license is obviously unreasonable, the people's court may determine the amount of compensation in accordance with Paragraph 2 of Article 65 of the Patent Law on the basis of the type of patent right, the nature and circumstances of the infringement and other factors.

On how to calculate the compensation base of trademark punitive damages, it stipulates: “the interests obtained by infringement = the sales volume of the infringing goods × the unit profit of the goods”. If the unit profit cannot be ascertained, it shall be calculated according to the profit of the registered trademark goods. “Loss due to infringement = decrease in sales of goods due to infringement/sales of the infringing trademark × unit profit of the registered trademark”.⁴³⁾

On how to calculate the compensation base of punitive damages for copyright, it stipulates: “The actual loss of the right holder = the decrease in the distribution of the copy caused by the right holder’s infringement/the sales volume of the infringing copy × the profit of the unit of the right holder’s issuance of the copy”, if the decrease in the distribution is difficult to determine, it shall be determined according to the market sales volume of the infringing copy. The provisions do not specify the calculation method of the infringer’s illegal income.⁴⁴⁾

From the above calculation of the base of punitive damages, it can be seen that when applying punitive damages in China’s intellectual property field, the calculation of the base revolves around three aspects, namely, the loss of the right holder, the profit of the infringer and the royalty of the right license, and the court adjusts the base according to the specific evidence in specific cases. If the above compensation base cannot be ascertained, statutory damages will be applied, thus making punitive damages impossible to apply.

iii. Determination of the penalty multiple

Based on the calculated compensation base, considering the multiple of the application of punitive damages becomes the key factor of the applica-

43) Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases (Revised in 2020) (2020) No. 19. Article 14: the benefits derived from infringement as provided for in the first paragraph of Article 63 of the Trademark Law may be calculated on the basis of the product of the sales volume of the infringing commodity and the unit profit of the commodity; Where the unit profit of the commodity cannot be ascertained, it shall be calculated as the unit profit of the commodity with a registered trademark. Article 15 :the losses incurred by infringement as provided for in the first paragraph of Article 63 of the Trademark Law may be calculated on the basis of the product of the decrease in sales of the goods caused by the infringement or of the sales volume of the infringing goods multiplied by the unit profit of the goods with the registered trademark.

44) Interpretation of the Supreme People’s Court on Some Issues Concerning the Application of Law in the Trial of Civil Disputes over Copyright (2020 Amendment), No. 19. Article 24:the actual loss of the right holder may be calculated on the basis of the product of the decrease in the distribution of copies caused by the right holder’s infringement or the sales volume of the infringing copies and the profit per unit of the right Holder’s distribution of such copies. Where the reduction in distribution is difficult to determine, it shall be determined according to the market sales of infringing copies.

tion of punitive damages. “Interpretation” of article 6 of the regulation, the court in determining the multiples of punitive damages should be comprehensive consideration of the defendant’s subjective fault, tort factors such as serious degree, and at the same time also can consider the defendant on the same tort has been related to factors such as administrative punishment and criminal penalties has been completed, the final decision for punishment. Therefore, when applying punitive damages in China, the multiple of punishment is determined by the judge according to the actual situation of the case, and the legal provisions are relatively broad.

For the application of punitive damages for intellectual property rights, some scholars believe that the application conditions of punitive damages for intellectual property rights in China are vague and the compensation base is difficult to determine.⁴⁵⁾ However, scholar Liu Yinliang pointed out that the uncertainty of intellectual property rights determines the fundamental conflict between intellectual property rights and punitive damages, and it is difficult to apply them comprehensively. Therefore, it can be applied to intellectual property punitive damages in a typed way, which is conducive to reducing or avoiding the institutional risks of intellectual property punitive damages.⁴⁶⁾ From the perspective of pragmatism, the typed application is a feasible method to solve the problem of the application of intellectual property punitive damages, and the type is clear to avoid the ambiguity and instability of the application. In this article, through investigation found that the field of intellectual property in China apply punitive damages in suitable conditions “intentionally + if the circumstances are serious, the

45) Sun Yurong et al. pointed out that the judicial application dilemma of the punitive compensation system for intellectual property rights in China is mainly reflected in the ambiguity of the applicable conditions of the punitive compensation clause and the difficulty in determining the calculation base of the amount of punitive compensation. See Sun Yurong, Li Xian, “Legal Application and Improvement of Punitive Compensation System for Intellectual Property Rights in China”, *Journal of Beijing Union University (Humanities and Social Sciences)*, No. 1, 2021, pp. 101-109.

46) Liu Yinliang believes that the purpose of punitive damages system is to deter future infringements by punishing past infringements, which presupposes the certainty of rights, feasible judgment of infringements and small negative impact of excessive deterrence. The uncertainty of intellectual property rights determines that it is in fundamental conflict with punitive damages and it is difficult to apply punitive damages system comprehensively. Based on the premise of the punitive damages system and the moral accountability of the tort, the punitive damages for intellectual property can be applied in a typed manner. The punitive damages may be applied to the malicious infringement of intellectual property, but it is difficult to apply to the general infringement of intellectual property. The typed application is beneficial to reduce or avoid the institutional risk of punitive damages for intellectual property rights. See Liu Yinliang, “The Categorical Application and Risk Avoidance of Intellectual Property Punitive Damages: From the Perspective of International Intellectual Property Rules”, *Legal Research*, No. 1, 2022, pp. 171-187.

situation through judicial interpretation clear can constitute, gave the court more reference conditions, cannot constitute the difficulty of China's intellectual property rights shall be applicable to the punitive damages applies the difficulty lies more with the determination of base of compensation and punishment a multiple choice.

In the determination of the compensation base, the actual loss or infringement profit as the compensation base can be calculated accurately, but also can be determined in a discretionary manner. However, as punitive compensation has its particularity, it should be based on the principle of prudence, and only under the premise that the proof satisfies the high probability standard, the discretionary method should be applied to summarize the compensation base.⁴⁷⁾ And the difficulty lies in the difficult problem of proof, the uncertainty of the intellectual property rights to achieve any proof to prove standard with more uncertain factors, such as his losses uncertainty, evidence of infringement profit is in of the uncertainty of the party and the licence fee are the important factors that affect compensation base, the need to adjust the evidence rules.⁴⁸⁾

In addition, the difficulty also lies in the lack of detailed evaluation criteria for the selection of penalty multiple. Although a multiple of one to five times of penalty compensation is prescribed, there is no specific stipulation on the conditions for the application of the multiple of one to five times of compensation. The ambiguity of selection leads judges to often choose to apply other provisions. Some scholars pointed out that because

47) Su Zhifu pointed out that in the application of punitive damages, when the actual loss or tort profit is taken as the compensation base, it can be accurately calculated, but also can be determined by discretion. However, considering the particularity of punitive damages, the final amount of compensation is 1 to 5 times of the compensation base. Therefore, when determining the actual loss or tort profit by the discretionary method, the principle of prudence should be followed, and on the premise that the evidence provided by the parties on the basis of the calculation of compensation meets the high probability proof standard, In order to apply the discretionary method to summarize the calculation of the actual loss of the right holder or the profit of the infringer. See Su Zhifu, "On the Objective, Positioning and Judicial Application of Punitive Damages System for Intellectual Property Rights in China", *China Applied Law*, No. 1, 2021, pp. 132-145.

48) Zhan Ying believes that: in view of the "low compensation" and "legal compensation" in general use are related to "difficult to provide evidence", to improve the system of evidence is the key to improve our intellectual property rights trial work. At the same time, we also need to further clarify the evidence rules and calculation methods of the compensation amount, especially the determination method of the contribution rate of the intellectual property involved in the illegal profits, as well as the identification rules and reference methods of the evidence of the intellectual property license fee. See Zhan Ying, "Investigation and Reconsideration of the Judicial Status of Intellectual Property Infringement Damages in China -- Based on the In-depth Analysis of 11984 Judicial Cases of Intellectual Property Infringement in China", *Legal Science (Journal of Northwest University of Political Science and Law)*, No. 1, 2020, pp. 191-200.

the range of one to five times is large, it is difficult for judicial decisions to be refined, so it seems necessary to establish the index system of weight coefficient and the classification calculation rules of compensation amount. At the same time, we should also see that multiple determination can not be generalized, should be based on the case reference weight coefficient to judge differently.⁴⁹⁾

2. Investigation on typical cases of punitive damages for intellectual property rights

Table 3-1 Typical cases of punitive damages in the field of intellectual property in China

NO.	Type	Case name	“Intent/malice” requirement	“Serious circumstances” requirement	Compensation for the base	Compensation for multiple
1	trade secret	Guangzhou Tianci Company and Anhui Newman Company infringement of technical secrets dispute case ⁵⁰⁾	After the trial of the related criminal case and the verdict of guilty, the defendant never stopped the infringement	The defendant’s self-confessed sales have exceeded 37 million yuan, including domestic and foreign sales, export to more than 20 countries and regions	Infringement profit	2.5 times
2	new varieties of plants	Dispute case of Infringement of new plant variety right between Jiangsu Pro-Tilling Agriculture Company and Jiangsu Jindi Company ⁵¹⁾	Selling propagation materials of authorized varieties without permission; There is no information to conceal the infringement	Not obtain the seed production and operation license, and sold the seed packaging without logo	Infringement profit	2 times

49) Professor Wu Handong pointed out that China’s intellectual property law stipulates punitive damages to be one to five times the amount of the established compensation. This clear proportion norm makes it convenient for judges to operate and increases the stability of the law. However, due to the large range of one to five times ratio, it is difficult for judicial adjudication to be refined. It seems necessary to establish the index system of weight coefficient and the classification calculation rules of compensation amount. At the same time, we should also see that multiple determination can not be generalized, should be based on the case reference weight coefficient to judge differently. See Wu Handong, “The Private Law Foundation and Judicial Application of Intellectual Property Punitive Damages”, Law Review, No.3, 2021, pp. 21-33.

50) Civil Judgment No. 562 of the Supreme People’s Court (2019). 最高人民法院 (2019) 最高法知民终562号民事判决书。

51) Civil Judgment No. 816 of the Supreme Law Zhimin End of the Supreme People’s Court (2021). 最高人民法院 (2021) 最高法知民终816号民事判决书。

3	trademark	Erdos Company and Miqi Company trademark infringement dispute case ⁵²⁾	As an operator of goods closely related to clothing, the defendant should know the popularity of the trademark involved	The infringement lasts a long time	Infringement profit	2 times
4	trademark	Zhejiang Cosco Shoes Co., Ltd. and Fila company trademark right dispute case ⁵³⁾	As a similar operator should know that the trademark involved has high visibility; In 2010, the approximate trademark application was rejected	The sale amount of goods with infringing trademark is huge	Infringement profit	3 times
5	trademark	Disputes over trademark infringement between Xiaomi Technology Co., LTD and Zhongshan Pentium Co., LTD ⁵⁴⁾	The trademark involved is a well-known trademark	Sales of more than 60 million, infringement of serious consequences	Infringement profit	3 times
6	trademark	Dispute case of trademark infringement between Baroque Wood (Zhongshan) Co., LTD and Zhejiang Life Home Baroque Flooring Co., LTD ⁵⁵⁾	There is a contractual relationship; The defendant receives an infringement warning; Being subjected to administrative punishment; Refusal to enforce a valid ruling	That cost the plaintiffs more than 12 million	Loss of right holder	2 times

52) Beijing Intellectual Property Court (2015) Jingzhimin Chuzi Civil Judgment No. 1677. 北京知識產權法院 (2015) 京知民初字第1677号民事判決書。

53) Beijing Intellectual Property Court (2017) Civil Judgment No. 1991 of Jing73 Minjun. 北京知識產權法院 (2017) 京73民終1991号民事判決書。

54) Civil Judgment No. 1316 of Jiangsu High People's Court (2019). 江蘇省高級人民法院 (2019) 蘇民終1316号民事判決書。

55) Civil Judgment of Jiangsu High People's Court (2017) No. 1297 Su Min Zhong. 江蘇省高級人民法院 (2017) 蘇民終1297号民事判決書。

7	trademark	Opu Company and Huasheng Company trademark infringement dispute case ⁵⁶⁾	The trademark involved is a well-known trademark	Continued infringement during the four-year period from February 2016 to January 2020; There are many kinds of infringing products and huge sales volume	Trade-mark Licensing Fee	3 times
8	trademark	Dispute case of trademark infringement between Chery Automobile Co., LTD and Anhui Chery Automobile Sales Co., LTD ⁵⁷⁾	The defendant received a letter from the plaintiff's lawyer, asking it to stop the infringement, still continued to infringe	The defendant held activities in many cities and promoted them on the Internet throughout the country, with a large influence and wide scope	Trade-mark Licensing Fee	2 times
9	trademark	Dispute case of trademark infringement between Guangzhou Hongri Fuel Appliance Co., LTD and Guangdong Zhimei Electric Appliance Co., LTD ⁵⁸⁾	The trademark involved in the case used to be a well-known trademark, with high visibility; The defendant is a similar operator	The amount of loss of the right holder is huge	Loss of right holder	3 times
10	trademark	Wyeth Company and the original Guangzhou Wyeth Baby Products Company and other trademark infringement disputes ⁵⁹⁾	As a similar operator should know that the trademark involved has high visibility; The infringement continued after the first instance judgment	he original Guangzhou Wyeth company authorized more than 900 dealers in more than 100 prefectural cities across the country to use, the infringement lasted for a long time, the infringement profit is great	Infringement profit	3 times

56) Guangdong High People's Court (2019) YueMinzai No. 147 Civil Judgment. 廣東省高級人民法院 (2019) 粵民再147号民事判決書。

57) Civil Judgment No. 2347 of Guangdong Provincial High People's Court (2017). 廣東省高級人民法院 (2017) 粵民終2347号民事判決書。

58) Civil Judgment No. 477 of Guangdong High People's Court (2019). 廣東省高級人民法院 (2019) 粵民終477号民事判決書。

59) Civil Judgment No. 294 of Zhejiang High People's Court (2021). 浙江省高級人民法院 (2021) 浙民終294号民事判決書。

11	trademark	Dispute case of trademark infringement between Wu-liangye Company and Xu Zhonghua ⁶⁰⁾	The trademark involved is a well-known trademark; The defendant was repeatedly punished by administration and continued infringement	To infringe on intellectual property rights as a business, the consequences of infringement are relatively serious	Infringement profit	2 times
12	trademark	Adidas Company and Ruan Guoqiang and other trademark infringement disputes ⁶¹⁾	The defendant received multiple administrative punishments	Long duration of infringement (continuous administrative punishment from 2015 to 2017)	Loss of right holder	3 times
13	trademark	Dispute case of trademark infringement between Balanced Body Inc. and Yongkang Yixian Sports Equipment Co ⁶²⁾	The infringement mark used by the defendant is identical with the trademark involved in the case and is used on the same goods; The defendant was warned by the plaintiff and signed a settlement agreement with the plaintiff	Product sales channels; Covering a wide area; Tort has great impact and serious consequences	Infringement profit	3 times

It can be found from the sorting of the above cases that punitive damages are mainly applied in the field of trademark infringement in China. At present, there are two typical cases of infringement of new plant varieties and infringement of technical secrets. This is related to the construction of China's intellectual property punitive damages system. Punitive damages were introduced in the Trademark Law in 2013 and implemented in 2014, so there are relatively many typical cases. The Patent Law and the Copyright Law just came into effect in June 2021. In judicial practice, up to now, the Supreme People's Court of China has not issued a typical case of punitive damages applicable to the Patent Law and the Copyright Law with guiding significance. China apply punitive damages in the judicial practice

60) Civil Judgment of Zhejiang 01 Minzhong 5872, Hangzhou Intermediate People's Court (2020). 浙江省杭州市中級人民法院 (2020) 浙01民終5872号民事判決書。

61) Civil Judgment of Zhejiang 03 Minzhong 161, Wenzhou Intermediate People's Court of Zhejiang Province (2020). 浙江省溫州市中級人民法院 (2020) 浙03民終161号民事判決書。

62) Civil Judgment of Shanghai Pudong New Area People's Court No. 53351, Shanghai (2018). 上海市浦東新區人民法院 (2018) 0115民初53351号民事判決書。

in the field of intellectual property cases increased year by year with China intellectual property infringement disputes appear larger proportion, relative to the growing intellectual property disputes, apply punitive damages cases accounted for only a few relatively, the court also cautious attitude to apply punitive damages, with the strict applicability of punitive damages is associated. In addition, whether punitive damages should be applied is more directly related to whether the parties claim punitive damages and whether they can provide enough evidence to meet the conditions of punitive damages.

In the application of punitive damages in the multiple determination, the court usually did not carry out detailed reasoning, but according to the actual situation of the case to make a direct choice. In the typical cases investigated, the compensation multiple applicable to punitive damages is generally three times or less, and there is no case of more than three times. Some of these cases occurred before China's Trademark Law (amended in 2019), when the maximum compensation multiple was three times, which belongs to the maximum compensation multiple applicable. Since China changed its intellectual property law, there has not been a case with punitive damages as high as five times.

Conclusion

By examining China's intellectual property rights of punitive damages system and its applicable elements can be found in the intellectual property field in China apply punitive damages to the more stringent conditions, from each year China court and conclude the total amount of intellectual property cases, so far, apply punitive damages cases related to intellectual property rights is still relatively small. However, with the full implementation of the revised laws related to intellectual property rights, there have been some high-profile cases of sky-high punitive damages, which have also shocked the business community. Believe that the future will continue to produce more of the infringement of copyright, patent right infringement cases involving the application of the punitive damages, the most of the people's court, too, will be released in the near future with guiding significance for the typical cases of punitive damages and compensation cases for those who can produce high applicable elements and considerations, is bound to become more complicated and detailed, This is the key issue that this research will continue to focus on. Further studies will be conducted on the application and changes of punitive damages in the field of intellectual property rights in China in the future, and the impact of the application of punitive damages on promoting the development of foreign enterprises in China.