

The Application of Punitive Damages System in the Field of Copyright

Xing Chenyue

China Jiliang University, Hangzhou, China

Keywords: Copyright Protection; Statutory Compensation; Punitive Damages

Abstract: In April 2022, the Higher People's Court of Beijing issued the "Guidelines for the Trial of Civil Cases Involving Infringement of Intellectual Property Rights Applying Punitive Damages", further clarifying the application rules of punitive damages in the field of copyright. However, with the improvement of awareness of intellectual property protection in China, the number of copyright infringement cases (especially concealed and complex infringement acts in the online environment) has continued to rise, and the system still faces many application difficulties. Specifically, the core issues include three aspects: first, the difficulty in calculating punitive damages, as the determination of the base amount and multiple is affected by multiple factors; second, the confusion in the application of statutory compensation and punitive damages, with the scope of application of statutory compensation being too broad; third, the risk of right holders abusing this compensation system. In this regard, in individual cases, measures such as optimizing the sequence for confirming the compensation base, reducing the difficulty of calculation and the claimant's burden of proof, establishing a multiple weight system to clearly delineate the scope of application between statutory damages and punitive damages, and establishing a pre-litigation qualification review system while safeguarding the infringer's right of defense shall be adopted to prevent the abuse of the system.

1. Dilemmas in the Application of the Punitive Damages System for Copyright

1.1 Difficulty in Calculating the Amount of Punitive Damages for Copyright

When revising the Copyright Law, full consideration was given to the standards for calculating the amount of punitive damages. On this basis, subsequent judicial interpretations issued by the Supreme People's Court and the trial guidelines of the Higher People's Court of Beijing have further standardized the calculation rules for the amount of punitive damages for copyright. However, due to the inherent characteristics of the Copyright Law and the continuous changes in copyright infringement methods, right holders face difficulties in proving the base amount of punitive damages when adducing evidence, and courts also struggle to determine the multiple of punitive damages during trials. [1]Therefore, the calculation of the amount of punitive damages for copyright remains a difficult issue in judicial practice. In judicial practice, right holders often abandon their claims for punitive damages due to difficulties in adducing evidence, and courts may also cautiously apply the multiple of punitive damages due to a conservative attitude.

1.2 Confusion in the Application of Statutory Compensation and Punitive Damages

In recent years, copyright infringement cases in China have been on the rise, and the amount of compensation claimed for such infringements has also been expanding. In response to this, the Copyright Law has been amended to raise the upper limit of statutory damages to RMB 5 million, which is more conducive to copyright owners in protecting their rights. However, due to the inherent intangibility and abstractness of copyright, as well as the similarity in the functions and criteria for determining statutory damages and punitive damages, the confused application of the two has often occurred in judicial practice in recent years. Although both statutory damages and punitive damages aim to protect the legitimate rights and interests of copyright owners, their application sequence dictates that the former can only be applied when the court is unable to determine the amount of actual losses. By searching Pkulan's judicial case database, the author statistically analyzed a total of 6,764 compensation cases involving copyright infringement from January 1, 2023, to April 30, 2024. Among these, 6,600 cases applied statutory damages and 164 cases applied punitive damages, indicating that statutory damages occupy a dominant position in the determination of compensation in copyright infringement cases. [2] Undeniably, statutory damages can improve the judicial efficiency of courts and reduce the burden of proof on right holders. However, the confused application of statutory damages and punitive damages will result in the inability to adopt reasonable remedies for specific infringement cases, failing to exert the due punitive function or, conversely, imposing an excessive economic burden on infringers.

1.3 Risk of Right Holders Abusing the Punitive Damages System

Since the introduction of the punitive damages system into the Copyright Law, the compensation standard for copyright infringement has been significantly improved. [3] According to the White Paper on the Trial of Punitive Damages for Intellectual Property Infringements recently released by the Chaoyang District People's Court of Beijing, over the past five years, the number of cases in which right holders have requested the application of punitive damages and the amount of compensation claimed in the jurisdiction have been rising, with the average compensation amount awarded being nearly 4.1 million yuan. In view of the common "patent troll" behavior in the field of patent law, copyright owners may also engage in passive rights protection or even induce infringement for the sake of high compensation, using the punitive damages system as a tool for profit-making. Once this situation occurs, it will greatly consume judicial resources and affect the punitive damages system for copyright from playing its due role.

2. Analysis of the Causes of the Dilemmas in the Application of the Punitive Damages System for Copyright

2.1 Causes of the Difficulty in Determining the Amount of Punitive Damages

Pursuant to the judicial interpretations of the Supreme People's Court, the method for determining the amount of punitive damages includes two aspects: first, determining the base amount of the compensation; second, determining the multiplier of the compensation amount.[4]

In terms of determining the base amount of punitive damages for copyright infringement, the Guidelines for the Application of Punitive Damages in Civil Cases of Infringement of Intellectual Property Rights issued by the Higher People's Court of Beijing Municipality stipulates three determination standards, in turn: the actual losses suffered by the obligee, the illegal gains obtained by the infringer, and a reasonable multiple of the licensing fee or the right use fee. However, in judicial practice, courts and obligees often face the dilemma of being difficult to determine the base amount

of compensation. [5]The reasons mainly include two aspects: first, it is difficult for the obligee to prove the specific actual losses, the illegal gains obtained by the infringer, and the right use fee. Firstly, the law stipulates that the obligee may calculate the actual losses suffered due to the infringement based on factors such as the reduction in commodity sales, the decrease in commodity prices, and the creation costs. It can be seen that this provision is mainly aimed at obligees who use copyrights for commercial purposes. This part of the right subject can clarify their actual losses according to the operation status and financial statements of commercial activities related to their copyrights. For another part of the right subject, their copyrights are often obtained through creating articles, paintings, etc. When infringed, the actual losses are difficult to quantify into accurate amounts. Secondly, in today's era, information technology is highly developed, and there is a trend of networking in the carriers of copyrights. Moreover, due to the characteristics of rapid network transmission and wide scope, copyright infringement acts are often complex and diverse. For example, some infringers infringe the obligee's copyrights for non-profit purposes such as improving their own popularity, thereby obtaining a certain amount of online traffic on platforms such as Douyin and Xiaohongshu, and such online traffic cannot be intuitively expressed as an actual amount. Finally, it is difficult to determine the right use fee. The obligee needs to prove the right use fee related to their works or the right use fee of similar works. However, in judicial practice, there are often cases where the infringed works have not been licensed for use or there is a lack of relevant standards for licensing fees. Furthermore, the determination of copyright use fees is easily affected by the social environment. For example, in the "Case of Dispute over Copyright Ownership Between China Audio-Video Copyright Association and Tengzhou Longquan Best Leisure Club, etc.", the China Audio-Video Copyright Association found that Long's Club had repeatedly infringed the projection right of its musical works without permission, and claimed to determine the base amount of punitive damages based on its right use fee. However, the plaintiff and the defendant had a dispute over the standard of the right use fee. It is reported that the collection standard for copyright use fees of karaoke in Shandong Province is 9.2 yuan per terminal per day, but during the epidemic period, the operation of Long's Club was severely affected, so the loss cannot be determined according to the standard under normal operation conditions. This makes the determination of the amount of punitive damages rely to a large extent on the judicial discretion of judges. This may lead to difficulties in achieving consistent judgments for similar cases and affect the authority of the judiciary. In addition, judges may also avoid applying the punitive damages system to evade risks and troubles. On the other hand, the obligee is not active enough in adducing evidence. According to the judicial interpretations of the Supreme People's Court, the application of punitive damages is premised on the claim of the obligee. The court shall not apply it on its own initiative, and the obligee needs to put forward justifiable reasons for applying punitive damages. Therefore, the obligee may need to spend a lot of manpower and material resources to find detailed evidence to prove the actual losses and the illegal gains of the infringer. This will greatly dampen the enthusiasm of the obligee to claim punitive damages. At the same time, in order to safeguard their rights quickly, the obligee will be more inclined to directly apply statutory compensation, making the copyright punitive damages system unable to play its due role.[6]

In terms of determining the multiplier of punitive damages for copyright infringement, Article 54 of the new Copyright Law stipulates that the multiplier of the punitive damages amount shall be not less than one time and not more than five times. In addition, both the judicial interpretations of the Supreme People's Court and the trial guidelines of the Higher People's Court of Beijing Municipality list some reference factors for determining the multiplier of punitive damages for copyright infringement, which can be comprehensively considered based on factors such as the popularity of the obligee or the subject matter of the right, and the infringement methods of the infringer. However, this may lead to inconsistent judgments for similar cases in judicial practice due to different reference factors. Specifically, due to differences in judges' capabilities, court judgment practices, or local

economic levels, and the Copyright Law endows judges with discretionary power ranging from one time to five times, it is difficult to determine the final multiplier of punitive damages according to clear standards, resulting in a great deviation between the final judgment result and the claim of the obligee. Although this method of determining the multiplier of punitive damages for copyrights is commonly used in countries with a common law system, as common law countries, judges can refer to legal sources such as judicial precedents when hearing cases. However, China is a country with a traditional civil law system, and the copyright punitive damages system has been established for a short time with relatively few accumulated relevant cases. Therefore, when facing disputes, judges mainly consider the compensatory principle and may adopt a conservative way to determine the multiplier.

2.2 Causes of the Confusion between Punitive Damages and Statutory Compensation

Article 49 of the Copyright Law stipulates: "Whoever infringes upon a copyright or a right related to a copyright shall compensate the right holder for the actual loss suffered; if the actual loss is difficult to calculate, compensation may be made according to the illegal gains of the infringer." It can be seen that when the actual loss cannot be determined, the judge may apply statutory compensation to the infringer according to the specific circumstances of the case, comprehensively considering factors such as the manner and means of the infringement, the subjective fault of the infringer, and the type of right. Since both statutory compensation and punitive damages need to refer to factors such as the subjective and objective aspects of the infringer when applied, the determination standards of the two overlap to a certain extent. In addition, the new Copyright Law has raised the upper limit of the statutory compensation amount to 5 million yuan, which already has a certain punitive nature. Although both statutory compensation and punitive damages have the functions of punishing the infringer and compensating the right holder, their functions are completely different. Statutory compensation in the field of copyright is a way to compensate the right holder when the actual loss of the right holder, the illegal gains of the infringer, and the right use fee are difficult to determine, emphasizing the compensation function. The punitive damages system, in addition to compensating the right holder for the actual loss, also imposes economic punishment on the infringer to curb its illegal acts, emphasizing the punishment function. Therefore, according to the characteristics of statutory compensation and punitive damages, some cases may meet the application conditions of both statutory compensation and punitive damages at the same time. However, based on their own understanding or the right holder's failure to claim punitive damages, the judge may only award statutory compensation for cases that already meet the application conditions of punitive damages, which cannot effectively protect the rights and interests of the right holder and combat copyright infringement.[7]

2.3 Causes of the Risk of Right Holders Abusing the Punitive Damages System

The implementation of the new Copyright Law and the issuance of judicial interpretations by the Supreme People's Court are aimed at improving the punitive damages system in the field of copyright, emphasizing the function of the punitive damages system in curbing infringement, providing right holders with a powerful weapon to protect their copyright, and thus regulating the entire copyright industry. [8]However, due to the further increase in the amount of punitive damages and the expansion of the compensation multiple, when right holders request the court to apply punitive damages, they can obtain a much higher compensation amount than before. Tempted by economic interests, individual right holders, when learning that their copyright has been infringed, will passively take rights protection measures or directly ignore the infringer's infringement. In the worst case, they may take various methods to encourage and induce the infringer to continuously infringe on their rights or

cause more serious losses, so that the infringement can quickly reach a serious level. Therefore, in judicial practice, it may lead to situations where the amount of punitive damages is inconsistent with the actual loss of the right holder or significantly exceeds the actual loss. By searching the judicial case database of Pkulaw, the author learned that in practice, some collective copyright management organizations conduct rights protection by initiating the punitive damages system and file lawsuits against a large number of potential infringers at one time. Since such organizations are engaged in copyright management, their operating income is usually not high. Therefore, obtaining high compensation through the punitive damages system has become an effective way to make profits. Although most of the cases are initiated by the China Audio-Video Copyright Association, and their claims are legitimate and reasonable, it cannot be ruled out that those with ulterior motives engage in rights protection behaviors similar to "patent trolls".

3. Exploration of Paths to Improve the Punitive Damages System for Copyright

3.1 Clarify the Calculation Standards for the Amount of Punitive Damages for Copyright

First of all, the calculation of relevant amounts should be clarified. Although the trial guidelines of the Higher People's Court of Beijing stipulate the reference factors for calculating the actual loss of the right holder, a more reasonable calculation method should still be formulated in combination with the characteristics of copyright infringement. Since copyright includes copyright property rights and copyright personal rights, in addition to calculating the loss caused by the infringement of copyright property rights, the loss of copyright personal rights also needs to be considered. In addition, by searching the judicial case database of Pkulaw, the author found that there are few cases where right holders choose the right license fee as the calculation standard, indicating that the calculation of the license fee is more difficult than the actual loss and illegal gains. In fact, the right license fee often differs greatly from the standard under normal operating conditions due to changes in the market and social environment. For example, the license fee for karaoke during the epidemic should be lower than the standard, and more consideration should be given to the timeliness of the right license fee.

Secondly, the burden of proof on right holders should be reduced. In judicial practice, the base amount of punitive damages often cannot be confirmed due to insufficient evidence, making right holders resort to statutory compensation and other methods to protect their rights. The main reason is that right holders bear too much responsibility for proving the base amount of punitive damages. Although the judicial interpretation of the Supreme People's Court stipulates the obstruction of proof system, which shifts part of the burden of proof to the infringer, it is not commonly used in judicial practice for the purpose of improving trial efficiency. In this regard, the author believes that the burden of proof system can be appropriately improved, and the burden of proving the causal relationship between the infringing act and the damage result in the burden of proof can be assigned to the infringer. At the same time, when the right holder has fulfilled the burden of proof and meets the conditions for applying punitive damages, the base amount of compensation can be directly calculated according to the specific circumstances of the case.[9]

Finally, the application order for determining the compensation base should be optimized. Current judicial interpretations stipulate that when punitive damages are applied to copyrights, the compensation base shall first be determined based on actual losses or the infringer's profits; only when both are difficult to calculate may royalty fees or license fees be referenced. The author argues that actual losses, the infringer's profits, and royalty fees should be applied in combination when calculating the punitive damages base. This is because these three calculation methods do not conflict with each other in judicial practice, and their combined application is more conducive to accurately determining the amount of compensation and fully protecting the rights of copyright owners. Secondly, the original application order of the calculation methods should not be changed; instead,

combined application should be adopted as a supplement to optional application. When the compensation base can be accurately confirmed based on the former methods, the priority of actual losses or the infringer's profits should continue to be maintained.

The most difficult part in calculating the amount of punitive damages for copyright lies in determining the compensation multiple. The existing Copyright Law grants courts a discretionary space of one to five times, which is conducive for courts to make up for the deficiencies in base amount calculation and improve the operability and flexibility of judges in hearing specific cases. Since the punitive damages system aims to punish infringers and is significantly more severe than statutory compensation, an extremely cautious attitude should be maintained in confirming the multiple to avoid causing undue harm due to blind adoption of a high multiple of compensation or failing to effectively combat infringement due to the adoption of a low multiple. At present, the trial guidelines of the Higher People's Court of Beijing list the reference factors for the multiple of copyright infringement in detail, but the final confirmation of the multiple is still an abstract process. For example, what proportion do factors such as the popularity and influence of the right holder or the subject matter of the right, and the degree of subjective intent of the infringer account for in the confirmation of the multiple. Therefore, the author believes that a weight system for confirming the multiple of punitive damages should be clearly formulated, and the weight proportion of each reference factor should be corresponding to the compensation multiple one by one. When hearing cases, the compensation multiple can be determined by directly comparing the corresponding calculation rules. For example, when determining the multiple of punitive damages, full consideration should be given to the weight of important factors. Taking the number of infringements as an example, one infringement can apply a multiple of one time, and two or more infringements can apply a multiple of two to five times. In addition, the weight proportion of the reference factor of subjective intent should be the same as that of the objective serious circumstances. The weight proportion of other secondary reference factors can be determined by the judge exercising discretionary power according to the specific circumstances of the case, but the primary and secondary factors shall not be confused. At the same time, explicit standards are conducive for right holders to understand the relevant provisions before filing a lawsuit, stimulate their enthusiasm for applying for punitive damages, and also have a strong deterrent effect on infringers. Of course, the establishment of this system is obviously difficult. After all, when determining the multiple of punitive damages, courts need to balance many main reference factors. The weight proportion of secondary reference factors and which secondary reference factors should be included in the calculation scope are also legislative difficulties, which need to be continuously improved by China's laws.[10]

3.2 Clearly Distinguish Between Punitive Damages and Statutory Compensation

First of all, the functions of punitive damages and statutory compensation should be clearly distinguished. Since statutory compensation has a certain punitive nature, it often conflicts with punitive damages in judicial application. To this end, the author believes that the scope of application of the two should be properly handled, the punitive function of statutory compensation should be significantly weakened, and its compensation function should be emphasized. In order to better realize the compensation and indemnification function of statutory compensation, the lower limit of statutory compensation should be abolished to more extensively protect the interests of right holders. In addition, the provision that the amount of statutory compensation shall not be used as the base amount of punitive damages should be clearly observed. At present, the maximum amount of statutory compensation has reached 5 million yuan. If a too high calculation multiple is applied, it may impose an excessive burden on the infringer. Finally, for cases of intentional infringement of copyright with serious circumstances, statutory compensation can only be used as a supplementary

measure to punitive damages. Statutory compensation in the field of copyright is a supplementary protection for the right holder when the actual loss of the right holder, the illegal gains of the infringer, and the right use fee are difficult to determine. When there are difficulties in calculating the compensation base, statutory compensation should be applied, and a higher compensation amount should be awarded as appropriate to maximize the protection of the right holder's rights.

Furthermore, judicial organs such as courts should give play to their subjective initiative and accurately apply the two remedies. When hearing cases, judges should actively find out the facts of the case and shall not passively apply statutory compensation due to the difficulties and controversies in the application of punitive damages for copyright. In addition, for specific cases where the degree of subjective seriousness and the degree of circumstances are not very high, the punitive damages system should be applied cautiously.

3.3 Restrict the Abuse of Punitive Damages by Right Holders

When introducing the punitive damages system into the Copyright Law, strict provisions have been made. The initiation of the system needs to meet two application conditions: intentional infringement and serious circumstances. However, many speculators abuse their identity as right holders and file a large number of claims for punitive damages for copyright, which not only greatly occupies judicial resources but also affects the healthy development of the copyright industry. Therefore, in order to prevent right holders from abusing the punitive damages system, the author believes that a pre-litigation qualification review system for right holders should be established. The purpose of this system is that when a right holder initiates the punitive damages system, the judicial organ should actively review whether the plaintiff is eligible to initiate the punitive damages system, including collective copyright management organizations, right holders who originally obtained or successively obtained copyright, etc., and apply the corresponding compensation method according to different identities. In addition, the court should accurately judge whether a copyright infringement case meets the application conditions of the punitive damages system, carefully review the reference factors for the compensation base and compensation multiple, strictly abide by the principle of no trial without complaint, and shall not apply the punitive damages system when the right holder cannot prove the corresponding actual loss, infringement profit, or right use fee. However, for specific cases that meet the conditions, the punitive damages system should be actively applied to ensure judicial fairness. In addition, when hearing specific cases, the court should actively safeguard the right of defense of the infringer, and shall not directly apply the punitive damages system only based on the evidence adduced by the right holder. Instead, it should reasonably analyze the evidence of both parties and adopt the principle of "preponderance of evidence" to make a correct judgment.

4. Conclusion

Since the 21st century, the status of intellectual property in the modern social economy has become increasingly prominent. As one of the three major components of intellectual property, the improvement of the copyright protection mechanism is directly related to the vitality of cultural innovation and economic development. With the revision of the Copyright Law, the issuance of judicial interpretations by the Supreme People's Court, and the introduction of the trial guidelines by the Higher People's Court of Beijing, the punitive damages system for copyright has been stipulated in detail. However, there are still some application issues to be solved in judicial practice. By analyzing the application issues and their causes of the punitive damages system in the field of copyright, the author puts forward four suggestions for the problems such as the confusion between statutory compensation and punitive damages and the abuse by right holders: clarifying the calculation standards for the amount of punitive damages for copyright, clearly distinguishing

between punitive damages and statutory compensation, restricting the abuse of punitive damages by right holders, aiming to provide useful references for relevant legislative and judicial practices. However, due to the limited research capacity of the author, it is impossible to put forward more feasible suggestions in combination with a large number of cases. Therefore, the views in this paper are only the author's humble opinions. At the same time, the author hopes to communicate and cooperate with more scholars and practitioners to jointly promote the improvement and development of China's intellectual property legal system.

References

- [1] Huang Xijiang. *The Theoretical Origin and Judicial Application of Punitive Damages for Intellectual Property Rights*[J]. *Journal of Jinan University (Philosophy and Social Sciences Edition)*, 2024, 46(02): 107-125.
- [2] Wang Sha. *Issues in the Calculation of the Amount of Punitive Damages for Copyright*[J]. *Cooperative Economy & Science*, 2024, (08): 184-187.
- [3] Zou Yi, Li Yuhua. *Practical Inspection and Improvement of the Judicial Application of the Punitive Damages System for Copyright Infringement*[J]. *Journal of Shandong Normal University (Social Sciences Edition)*, 2024, 69(01): 119-130.
- [4] Huang Yujie. *Restrictions on the Application of Punitive Damages in the Field of Copyright Law*[J]. *Journal of Soochow University (Law Edition)*, 2023, 10(04): 97-108.
- [5] Lu Qing. *Research on the Application of Punitive Damages for Intellectual Property Rights*[D]. Guizhou Minzu University, 2023.
- [6] Yan Lili. *Research on the Subjective Elements of Punitive Damages for Intellectual Property Rights*[D]. Yantai University, 2023.
- [7] Pang Xinyi. *Research on the Application Issues of Punitive Damages for Intellectual Property Rights in China*[D]. Hebei University, 2023.
- [8] Liang Zhiwen. *The System Reconstruction of the Calculation Methods for Compensation for Intellectual Property Infringement*[J]. *Legal Research*, 2023, (02): 60-72.
- [9] Zhu Dong. *Commentary on Article 1185 of the Civil Code (Punitive Damages for Intellectual Property Infringement)* [J]. *Intellectual Property*, 2022, (09): 109-126.
- [10] Guo Shirui. *Research on the Judicial Application of Punitive Damages for Copyright Infringement*[D]. Guangxi Normal University, 2023.