

Research on Judicial Application of Punitive Damages System for Copyright Infringement

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Abstract: With the development of science and technology, the phenomenon of copyright infringement is becoming more and more common and diversified. Especially in the field of the Internet, the means of copyright infringement are hidden and the proof is difficult, which brings new challenges to the judicial protection of copyright. The "Copyright Law" revised in 2020 introduces a punitive compensation system, which significantly increases the punishment of copyright infringement and is conducive to the formation of a unified approach to intellectual property protection. However, in judicial practice, there are still problems and disputes in the application of the punitive compensation system for copyright infringement. In this regard, we should clarify the applicable conditions of punitive damages for copyright, and clarify the criteria for determining 'subjective intent' and 'serious circumstances'; optimize the calculation method of punitive damages; clarify the boundary between punitive damages and statutory damages.

1. Concept and nature of punitive damages for copyright infringement

1.1 Concept of punitive damages for copyright infringement

Punitive damages in the modern sense originated from the case of *Wilkes v. Wood* in 1763.^[1] It presents different meanings in different legal dictionaries. According to the "Oxford Law Dictionary," punitive damages are defined as damages that exceed the plaintiff's property losses when the court awards the defendant to the plaintiff for a series of egregious wrongful acts such as violence, oppression, malice, fraud, and disregard for the rights and interests of others. Its purpose includes both the punishment of the defendant's wrongdoing and the deterrent and exemplary role of other similar wrongdoers.^[2] Black Law Dictionary holds that punitive damages are 'compensation other than compensatory damages to the plaintiff when the defendant's behavior has malicious, fraudulent or reckless intent, and the purpose of such damages is to punish the infringer so as to prevent others from re-offending'.^[3] Its core lies in the independent legal consequences beyond compensatory liability. The difference between the two is that the former holds that punitive damages have the function of compensating the infringed in addition to the function of punishment and containment, and punitive damages are the sum of actual damage compensation and punitive damages, while the latter holds that the function of punitive damages is only to punish and contain, and the amount of compensation is the compensation other than the actual damage compensation.

Most scholars in China believe that punitive damages is a concept different from compensatory damages,^[4] refers to the compensation that the amount determined by the court exceeds the actual amount of damage for serious infringement of subjective fault. Punitive compensation for copyright infringement refers to the fact that the right holder can obtain punitive multiples in addition to the actual loss compensation in the case of serious losses caused by the infringer's malicious, intentional, fraudulent or laissez-faire methods in the case of copyright infringement. Its prominent feature is the punitive nature of the damage caused by the infringer's malicious, intentional and other subjective mentality.

1.2 The nature of copyright punitive damages

There is a great controversy in the theoretical circle about the legal attribute of the punitive compensation system. One theory advocates that punitive damages should belong to public law liability, because the principle of autonomy of private law requires that the tort liability system should strictly follow the value orientation of "damage filling," and the most important goal of the punitive damages system is deterrence,^[5] are different from the nature of compensatory damages for restitution, so punitive damages belong to public law liability. Another theory holds that punitive damages belong to private law liability, because punitive damages are the liability for compensation between equal subjects and meet the constituent elements of civil liability, so punitive damages belong to private law liability. In addition, another view holds that punitive damages belong to the responsibility of economic law combining public law and private law. The reason is that the legal attribute of punitive damages not only conforms to the dual attributes of public law and private law of economic law, but also conforms to the punishment and reward function of economic law.

In fact, punitive damages for copyright infringement should be classified as civil liability. First of all, from the comparison of the forms of responsibility, the status of both parties in public law responsibility is not equal, and the way of criminal responsibility is often manifested as restricting personal freedom and imposing fines, which is far more severe than punitive damages in the form of property compensation. Secondly, in terms of regulatory objects, punitive damages are mainly applicable to acts that infringe on private rights and interests, with a wide range of scope; the economic law takes the maintenance of the overall interests of the society as the core goal, and the core purpose of punitive damages for copyright is obviously inconsistent with it. Finally, from the perspective of China's judicial practice, the newly revised 'Copyright Law' has clearly incorporated punitive damages into the civil liability system, and judicial decisions are generally based on this as a basis for compensation, further confirming its civil attributes in the substantive law.

2. Analysis of the Dilemma and Causes of Judicial Application of Punitive Damages for Copyright Infringement

2.1 It is difficult to identify the applicable conditions of punitive damages

Although Article 54 of the 'Copyright Law' clearly regards 'subjective intent' and 'serious circumstances' as the subjective and objective elements to be satisfied at the same time in the application of punitive damages, and the 'Interpretation of the Supreme People's Court on the Application of Punitive Damages in Civil Cases of Infringement of Intellectual Property Rights' also lists the specific situations that can be regarded as 'subjective intent' and 'serious circumstances' in practice for reference, the current law does not give clear guidance on what aspects the referee should pay attention to and what methods should be adopted to make a comprehensive judgment in judicial practice. As a result, there are great differences in the identification process of 'subjective intent' and 'serious circumstances' in different courts.

First, it is difficult to identify the constitutive element of ' subjective intent '. First of all, the scope of ' intentional ' is still controversial. Scholars who hold the view of " direct intent " believe that the identification of the " intentional " elements of punitive damages should be limited to direct intent, on the grounds that the standard of " indirect intent " will lead to the wide application of punitive damages. Starting from the ambiguity of the boundary of intellectual property rights, scholars holding ' direct + indirect intent ' believe that indirect intentional acts are necessary to be curbed by punitive damages.^[6] Secondly, the judgment of ' intention ' lacks uniform standards. Because intention is the subjective psychological state of the actor, it is difficult to directly prove through evidence. The judge can only judge whether the actor's behavior conforms to the psychological state of " intention " according to the behavior of the infringer, the contact situation before the infringement, the attitude after the infringement and other factors. This kind of identification standard is subjective and difficult to form a unified standard.

Secondly, in view of the judgment of the seriousness of the circumstances, although the ' interpretation ' lists the problems that need to be considered in judging the seriousness of the circumstances from an objective perspective, for example, when making a legal judgment, the court should comprehensively evaluate and consider the various factors of the infringement, including but not limited to the specific methods used by the infringement, the frequency of occurrence, the length of duration, the size of the scope of the impact, the scale involved, and the consequences caused by it. However, in judicial practice, the court has not formed a unified standard on the extent to which the infringement can constitute ' serious circumstances ', and the problems arising in judicial practice cannot be fully covered in the scope of judicial interpretation.

In order to promote the unity and predictability of the application of law, it is urgent to further improve the criteria for determining ' subjective intent ' and ' serious circumstances ', refine the considerations, and establish a more operational referee guidance mechanism.

2.2 Compensation base is difficult to determine

According to the provisions of the Copyright Law, there are three ways to calculate the compensation base, namely, the actual loss of the right holder, the illegal income of infringement and the reference use fee. The revision of the " Copyright Law " has changed the order of actual loss and illegal income, and now the two are juxtaposed. The right holder is free to choose the base of compensation, and the reference royalty is ranked in the last order. The provisions of the Copyright Law seem to provide a clear basis for the calculation of copyright punitive damages. However, in judicial practice, the calculation of the amount of damages is still a difficult problem.

First of all, the calculation of the cardinal number faces the dilemma of being difficult to prove. Due to the professional and hidden characteristics of intellectual property infringement, it is difficult for the right holder to fully prove the facts of infringement and the results caused by it, which makes it difficult to evaluate the actual loss accurately, objectively and comprehensively. At the same time, the relevant financial information obtained by the infringement is directly controlled by the infringer in most cases, and the infringer usually does not voluntarily disclose it, so it is difficult for the right holder to prove the infringer 's interests obtained by the infringement.

Secondly, the calculation of the reference usage fee is still controversial and less applicable. At present, there is no unified understanding on whether the calculation of license fee is based on the license fee or the multiple of the license fee. In addition, due to the lack of authoritative third-party institutions to evaluate the reference royalty in judicial practice, the royalty is not really activated and is less applied to the compensation base.

2.3 The boundary between punitive damages and statutory damages is not clear

Statutory compensation is stipulated by statute law. When one party's behavior causes damage to the other party's person, property or rights, the former pays the latter the money used for compensation or compensation, with a view to restoring the state without breach of contract or infringement. The second paragraph of Article 54 of the Copyright Law stipulates the application of statutory compensation, that is, when the compensation base of punitive damages cannot be determined, the judgment shall apply statutory compensation.

In the judicial practice where the parties request the application of punitive damages for copyright, most of the court's judgments are applicable to statutory compensation, showing a trend of statutory compensation for punitive damages. First of all, the function of punitive damages is similar to that of statutory compensation. The core of punitive damages lies in punishment. The key of statutory compensation is compensation, but it also has the function of punishment. Especially in the case of intentionally increasing the amount of statutory compensation after the amendment of the law, the punitive effect of statutory compensation is more prominent. Secondly, China's intellectual property law usually stipulates that statutory compensation is applicable when punitive damages cannot be calculated. Statutory compensation is regarded as a bottom-up calculation method of punitive damages system. Such provisions further blur the boundary between punitive damages and statutory compensation, which leads to the emergence of statutory compensation of punitive damages to a certain extent. In addition, most of the cases of copyright cases are more complex. With the emergence of new infringement methods such as Internet infringement, the number of cases of copyright rights protection has surged, and the court review is more difficult. In this case, judges have a tendency of conservatism and tend to choose simple and safe legal compensation as a safe haven for punitive damages.

3. Suggestions for improving the judicial application of punitive damages for copyright infringement

3.1 Clarify the applicable conditions of punitive damages for copyright.

3.1.1 Clear ' subjective intent ' identification criteria

First of all, it is necessary to clarify that the category of intention includes indirect intention. The word " intention " can be divided into " direct intention " and " indirect intention " according to the difference between cognitive factors and will factors. 'Direct intention ' refers to the psychological state that the tort subject still expects to occur when he knows that his own actions may cause damage and have certain social harm. " Indirect intent " refers to the mental state of the subject of infringement who is letting it happen while knowing that his own actions may cause damage. Under the background of concealment and scale of infringement, it is difficult to distinguish the subjective psychology of the infringer in judicial practice, and the burden of proof of the copyright owner is too high. Therefore, the explicit inclusion of ' indirect intent ' into the connotation of subjective elements is conducive to the realization of the punishment function.^[7]

Secondly, it is necessary to further clarify the judgment criteria of ' intentional ' in the judicial practice of copyright punitive damages. How to judge the subjective intention can be divided into two angles. The first angle is from the intention itself, and the second angle is from other aspects. As far as subjective intention itself is concerned, the following factors can be referred to when it is clear. First, the popularity of the plaintiff and his works. The higher the popularity, the higher the possibility of the infringer's access to the work product, and the greater the probability of the infringement intention. Second, the defendant's intellectual property rights are exactly the same as the plaintiff and

the defendant cannot prove its legal source. The infringer uses the copyright product for profit. When the infringer's copyright product is highly similar to the copyright owner's product, and the infringer cannot prove the legal source of its copyright product, its subjective mentality is highly likely to be intentional. In addition, the "Guidelines for the Trial of Copyright Infringement Cases" issued by the Beijing High Court listed two forms of malicious infringement, namely repeated infringement and implementation, laissez-faire, and encouragement of infringement. It can also be used as a reference factor for judging subjective intent. Considering the possibility of intentionality from other aspects, it mainly draws on the practice of the United States in judging the intentional infringement of patents. When receiving the infringement warning letter, the infringer has the obligation to seek the advice of a professional lawyer. This approach can be applied to the field of copyright to determine whether the perpetrator has an intention to infringe.

3.1.2 Clarify the criteria for judging 'serious circumstances'

On the basis of the seven typical "serious circumstances" listed in the "judicial interpretation of punitive damages," each place can supplement the considerations in time according to the current situation of judicial practice, but it must be based on the premise of meeting the elements of behavior identification and amount identification of punitive damages. When supplementing the consideration factors, we should start from the value function of the punitive compensation system to ensure that the punishment effect can truly reflect the severity of the infringement. First, it is prudent to assess whether the punitive damages system has truly achieved the expected containment effect. The containment effect means that the infringer restrains his behavior due to the high cost of illegality, effectively regulates the serious infringement behavior, and urges the infringer to take active measures to prevent the recurrence of similar violations. Secondly, through the comprehensive analysis of whether the punitive damages system can effectively curb other similar acts and potential infringements. Clear legal provisions will make any infringement of the rights and interests of others will face severe legal sanctions, so as to promote the public to enhance legal awareness and reduce the occurrence of infringement. Third, judges need to be alert to the negative impact of punitive damages system may bring. To set a reasonable amount of compensation, it is necessary to ensure that the right holder is fully compensated and reasonably motivated, but also to avoid the abuse of the system and prevent the abuse of punitive damages.

3.2 Optimize the calculation method of punitive damages

First of all, it is necessary to reconsider the distribution of the burden of proof between the two parties in view of the problem that the obligee's burden of proof on the calculation base of copyright punitive damages is too heavy. Judges shall appropriately reduce the burden of proof of the right holder, allowing it to provide preliminary evidence only on infringement, damage facts, causality, actual loss and infringement profits, and the specific amount should be submitted by the alleged infringement method; at the same time, it activates the application of the 'evidence obstruction system' in the field of copyright infringement. When a party does not bear the burden of proof, but actually has financial data related to the infringement, if the party has no reasonable reason to refuse to provide it, it needs to bear the corresponding legal responsibility.^[8]

Secondly, in view of the license fee, Germany and the United States often divide the license fee into actual license fee and reasonable license fee when calculating the amount of compensation. Chinese courts can try to use the above license fee classification method to calculate the license fee on the basis of considering the license type, license scale and validity period. Using the royalty as the calculation standard can not only reduce the burden of proof of the copyright owner, but also save the market transaction link, improve the trial efficiency, and reduce the abuse of legal compensation.

Finally, when calculating the amount of compensation, it needs to be combined with the principle of proportionality. The principle of proportionality emphasizes moderation and intervention, and maintains the rationality of punitive damages through the principle of proportionality, so that the punitive damages of intellectual property rights and their amount are only limited to the purpose of promoting the realization of punishment and deterrence related malicious infringement, and preventing improper punishment. When determining the amount of compensation, it is necessary to pay attention to whether the infringer bears administrative responsibility or criminal responsibility, so as to prevent punitive damages from overlapping with the above responsibilities. In addition, under special circumstances, the statutory compensation limit can be broken. In the case that the actual loss, infringement income and royalties cannot be calculated, statutory compensation has become the final calculation method. In practice, it is not excluded that the loss of the right holder can not be calculated but its loss is obviously more than 5 million yuan. At this time, it may be reasonable to make a reasonable judgment based on the principle of proportionality.

3.3 Clarify the boundary between punitive damages and statutory damages

First of all, the order of application of punitive damages and statutory compensation should be clarified, and the court should be required to apply statutory compensation only when the copyright owner is unable to apply punitive damages after exhausting all possible reasonable remedies. In other words, the application of punitive damages and statutory compensation needs to follow a clear order. Secondly, as mentioned above, in judicial practice, judges tend to apply statutory compensation. Therefore, judges should be required to make a clear and clear explanation of why the compensation method is applied instead of the punitive compensation method when applying statutory compensation, rather than simply using vague statements such as 'the infringement does not meet the applicable conditions of punitive compensation', 'the infringement does not reach the extent of the seriousness of the circumstances', and avoiding the explanation of specific reasons. Finally, although the 'Copyright Law' stipulates that the applicable conditions of statutory compensation are that the base of punitive damages is difficult to calculate, the specific circumstances of 'difficult to calculate' are not specified, and judges mainly measure and judge according to their discretion. Therefore, a clear and measurable 'hard to calculate' standard should be established. When it comes to such cases, the court cannot easily determine that the punitive damages base is 'difficult to calculate' and apply statutory compensation. It should be cautious about the possibility of applying statutory compensation and avoid relying too much on discretion. For the 'difficult to determine' factors, we should try to formulate and implement some standardized measures.

4. Conclusion

The "Copyright Law" absorbs the punitive damages system, but the system still faces multiple application dilemmas in judicial practice. The main manifestations are as follows: First, it is difficult to identify the applicable conditions. On the one hand, the subjective intent identification standards are not uniform, the scope of intent is still controversial, and the determination of 'subjective intent' lacks uniform standards; on the other hand, the determination of the objective element 'serious circumstances' is ambiguous, and the judge has a large discretionary space. Secondly, it is difficult to determine the base of damages. On the one hand, the calculation of the base is difficult to prove, on the other hand, the calculation of the reference fee is still controversial and less applicable. Thirdly, due to the similarity between punitive damages and statutory compensation, the boundary between punitive damages and statutory compensation is not clear. In view of the above problems, this paper proposes a perfect path: for the applicable conditions of copyright punitive damages, in terms of subjective elements, it is clear that the scope of intent includes indirect intent, and proposes a

judgment method of 'intent'; in terms of objective elements, starting from the value function of the punitive compensation system, the judgment standard of 'serious circumstances' is proposed. In terms of the calculation base of compensation, it is proposed to redistribute the burden of proof of both parties, learn from the classification of foreign licensing fees, and emphasize that the calculation of punitive damages should conform to the principle of proportionality. In view of punitive damages and statutory compensation, the order of application of the two is clarified, and the judge is required to clearly explain the reasons when applying statutory compensation. At the same time, it is recommended to try to formulate standardized measures for factors that are 'difficult to determine'. The purpose of this paper is to improve the application efficiency of punitive damages system in copyright infringement cases by systematically sorting out the judicial application problems and improvement paths of punitive damages system in copyright infringement cases, and give full play to the deterrent and preventive role of the system.

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