

Study on the Application of Punitive Damages for Copyright Infringement

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Abstract: With the development of the Internet, the object of copyright has broken through the limitations of the inherent physical carrier, making the dissemination more convenient, but the resulting infringement is also endless. At the time of reform, the legislature responded to the call of the times, and punitive damages in the field of copyright came into being. However, the application of punitive damages in the field of copyright is faced with ambiguous elements of the application of punitive damages for copyright infringement, difficult to prove the amount of punitive damages, and disputes over the scope of the base of punitive damages. In this regard, we should clarify the specific conditions for the application of punitive damages for copyright infringement, construct a system of disclosure of evidence in copyright infringement cases to ease the difficulty of proof, and clarify the scope of the base amount of punitive damages.

Keywords: Copyright; Copyright Infringement; Application of Punitive Damages.

1. Introduction

The dissemination of copyright works breaks through the limitations of traditional carriers and spreads freely in the invisible world of the Internet. [1] The phenomenon of copyright infringement is also getting more and more intense. From the viewpoint of the current situation of copyright infringement, although China has already possessed a relatively perfect system of punitive damages for intellectual property rights in theory, the current situation of copyright infringement in China is not optimistic. According to the statistics of "The Status of Judicial Protection of Intellectual Property Rights in China's Courts" in 2022, there were 438,480 new intellectual property rights civil cases of first instance in local people's courts nationwide, and 255,693 copyright cases, accounting for 58.31%. [2] It can be seen that copyright infringement has become more and more serious in China. [2] It can be seen that the proportion of copyright infringement cases is extremely large, in the face of such a large base of copyright infringement cases, reasonable protection is necessary, Article 54 of the Copyright Law, which came into effect on June 1, 2021, provides for the system of punitive damages for copyright infringement, aiming at punishing and curbing the unlawful acts of copyright infringement, and facilitating the effective resolution of a large number of copyright infringement cases. However, from the perspective of the application of punitive damages for copyright infringement, there are still dilemmas, analyzing the deficiencies in the application of punitive damages for copyright infringement and seeking solutions is a top priority.

2. Overview of the Punitive Damages System for Copyright Infringement

2.1. History of Punitive Damages for Copyright Infringement

Punitive damages are defined in Black's Law Dictionary as "the excess of (a court's) award over actual damages when the defendant's conduct was reckless, malicious, or fraudulent." [3] There are also provisions for damages in famous codes

such as the Twelve Copper Tables and the Code of Hammurabi. *Wilkes v Wood* is considered to be the first case of punitive damages in the United Kingdom, where the judge in the case argued that "the system of damages is designed to satisfy the victim's need to deter future occurrences of similar events and to highlight the jury's distaste for the act itself. The jury has the power to award, and must punish, the offense." [4] In modern times, the United Kingdom has limited the application of punitive damages due to unclear conditions for their application and suspicions of abuse. And throughout the United States, is more willing to believe that punitive damages on the curbing effect of infringement, as well as the promotion of the development of intellectual property rights, and did not set too many restrictions, but in the absorption of the British experience on the basis of a more perfect punitive damages system, the modern U.S. law has been the formation of a perfect punitive damages liability system. [5] And Germany and other typical civil law countries on the punitive damages of intellectual property rights to take a more negative attitude, but in recent years because of the protection of intellectual property rights is a general trend, so the voice of opposition compared to the previous has decreased.

2.2. Components of Punitive Damages for Copyright Infringement in China

Article 1185 of the Civil Code of the People's Republic of China and Article 54 of the Copyright Law of 2020, both of which provide for punitive damages for copyright infringement, show that the constitutive elements of punitive damages for copyright infringement include the following aspects. Objective aspect, caused serious consequences, including repeated infringement; scale infringement of copyright; destruction of evidence of infringement; profiteering from infringement; serious damage due to infringement; as well as comprehensive consideration of the means of infringement, infringement of the impact of other serious circumstances. In terms of subjectivity, the infringer is subjectively intentional, and the intentionality includes informing the infringer of the infringement of copyright and then still infringing; the infringer and the infringed person have some kind of contact with the infringed person, such as

cooperation, agency, labor, business dealings, etc., and the comprehensive consideration of the type of infringed copyright object, popularity, the relationship between the infringer and infringed person and other factors, and other factors, it is deemed to be the intentional situation. In terms of procedure, copyright punitive damages need to be applied on the initiative of the right holder. On the basis of satisfying the subjective and objective elements and the procedural elements, the infringer may claim compensation ranging from one to five times the actual loss, illegal income, royalties or statutory damages.

2.3. Commentary on the Constituent Elements of Punitive Damages for Copyright Infringement in China

The amendments to the provisions on punitive damages in the 2020 revised edition of the Copyright Law are more specific than the previous Copyright Law, improving the blueprint for punitive damages for intellectual property rights and making the cost of copyright infringement significantly higher. Firstly, the provisions on punitive damages for copyright are more specific, further clarifying the elements of punitive damages for copyright, the method of applying punitive damages, and the method of calculating the amount of punitive damages. Secondly, on the issue of determining the calculation method of damages, the calculation method of determining damages by license royalties is added. Finally, the provision on statutory damages was amended to increase the cost of the offense from 500,000 to 5 million. This is aimed at avoiding the situation where the judge is too conservative and overly relies on statutory compensation, which infringes on the legitimate interests of the right holder. It is not difficult to see the determination of the state to protect copyright behind this amendment of the Copyright Law, and at the same time, it complements the provisions on punitive damages in the Civil Code, the Trademark Law, and the Anti-Unfair Competition Law, and jointly builds a system of punitive damages for intellectual property infringement.

3. Dilemma of Judicial Application of Punitive Damages for Copyright Infringement in China

3.1. Vague Elements of the Application of the Punitive Damages System

First, the objective application of the punitive damages system is vague. The law is concise, Article 54 of the Copyright Law does not explain what is "infringement of copyright under aggravating circumstances", which will inevitably lead to the judge in the determination of "infringement of copyright under aggravating circumstances" has a high degree of discretion, subjective arbitrariness is large. In this regard, Article 4 of the Judicial Interpretation of Intellectual Property Rights lists six circumstances that can be recognized as serious infringement of intellectual property rights, copyright infringement as a type of infringement of intellectual property rights, of course, can be applied to the enumerated circumstances for the determination of "aggravating circumstances", but in practice there are many different types of infringement of copyright, and with the development of the times and the advancement of the means of information dissemination, infringement of copyright can be considered as serious infringement. However, in practice,

copyright infringement behaviors are diverse, and with the development of the times and the advancement of the means of information dissemination, copyright infringement behaviors will only become more complicated, and the simple enumeration often fails to exhaust the circumstances of "aggravated copyright infringement" in practice, the definition of "aggravated circumstances" is unclear, and the objectivity of punitive damages for copyright infringement is vague, resulting in the determination of "aggravated circumstances". The definition of "aggravating circumstances" is unclear, and the objective elements of punitive damages for copyright infringement are ambiguous, resulting in punitive damages for copyright infringement not operating effectively.

Secondly, the subjective application of the punitive compensation system is vague. Due to the ambiguity of the legislation, the interpretation of "subjective intent" is quite controversial. A view that "subjective intent" only contains "direct intent" and does not contain "indirect intent", the reason is that the punishment of punitive damages for copyright infringement is more severe, has a "quasi criminal law". The reason is that the punishment of punitive damages for copyright infringement is more severe and has the nature of "quasi-criminal law", which can not be biased in favor of the right holders, but should take into account the perpetrators appropriately, and in order to balance the rights and interests of the perpetrators and the right holders, the "indirect intent" should not be interpreted as the subjective element of the punitive damages for copyright infringement. Another viewpoint is that "subjective intent" includes "direct intent" and "indirect intent", the reason is that both "direct intent" and "indirect intent" are the subjective elements of punitive damages for copyright infringement. "or "indirect", the essence of the perpetrator is "intentional", with the condemnable, filling compensation is not enough to stop the subjective state of mind for the behavior of intentional infringement of copyright infringement, and moreover, the punitive damages for copyright infringement Already the subjective state of mind is "negligence" of the infringer excluded, this move has balanced the rights and interests of the actors and rights holders, no need to exclude the "indirect intent". At the same time, in practice, it is difficult to distinguish between "direct intent" and "indirect intent", if the emphasis on the "indirect intent" exclusion, undoubtedly inappropriate to increase the difficulty of the judicial trial.

3.2. Difficulty of Proving Punitive Damages

First, it is difficult to quantify the actual loss of the right holder. Intellectual property is a kind of knowledge wealth without form, and intangibility is the essential attribute of intellectual property. [6] Copyright is intangible, it can be perceived by people, but cannot be touched by people, the tangible is only his carrier. The value of the copyright will also change according to the author's well-known degree, as well as the exquisite degree of the work, as well as the market recognition and other factors, with uncertainty. Therefore, even if the existence of the infringement of the facts through the proof of evidence, meet the subjective and objective elements of punitive damages for copyright, but due to the uncertainty of the value of copyright, as well as the actual loss, the benefit of the dilemma of proof, resulting in difficulties based on the actual loss of the base. Combined with punitive damages for copyright infringement related cases, most of which only cited the fact of infringement, but did not list the

number of specific losses caused by infringement, which also reflects the actual loss of the right to quantify the dilemma.

Second, the infringer's illegal income is difficult to identify. In specific judicial practice, infringers often grasp their own specific accounts of profit due to infringement, due to the right to provide the sales volume and total sales, the infringer gained profit accounts and other evidence is insufficient, cannot constitute the amount of illegal income recognized by the chain of evidence, the rights of people tend to have difficulty in proving. In the system of obstruction of proof, as well as the reversal of the burden of proof in the implementation of the case, although to a certain extent increased the burden of proof of the infringer, but after all, the key evidence in the hands of the infringer, the infringer thus took the initiative in the face of the interests of many infringers in order to minimize the loss, to avoid compensation, will often cover up the real evidence, do not provide evidence, or to provide irrelevant data.

Thirdly, it is difficult to determine the royalties of the copyright right. 2020 Article 54 of the revised Copyright Law stipulates that compensation can be made with reference to the royalties of the right. However, it is difficult to ascertain when the royalties are calculated. At the same time, the billing standard of royalties is not clear, and the law and relevant judicial interpretations do not specify whether the royalties are calculated in accordance with the "general license royalties", "exclusive license royalties", or "exclusive license royalties". The law and relevant judicial interpretations do not specify whether the calculation is based on "general royalties", "exclusive royalties" or "exclusive licenses".

3.3. The Range of Punitive Damages Bases is Controversial

There is a controversy in the academic community as to whether statutory damages can be used as a base for punitive damages, and there are two theoretical models, namely, the concurrent model and the single model. The concurrent model, as its name suggests, integrates statutory damages and punitive damages, and statutory damages can be used as the base for punitive damages. The rationale in support of the concurrent use model is that, in cases where the right holder has difficulty in adducing evidence, the use of statutory damages as the base for punitive damages to punish the perpetrator is conducive to maximizing the effect of punitive damages for copyright infringement and protecting the rights of copyright holders. The single model, on the other hand, refers to the fact that statutory damages and punitive damages are clearly separated, that statutory damages should not contain punitive elements, and that statutory damages cannot be used as the base for punitive damages. The argument in favor of the single model is that the loss or profit is calculated through the evidence provided by the plaintiff and the defendant, and it is reasonable to use it as the base for calculating the multiplier of punitive damages. Statutory damages, on the other hand, are conclusions reached by the judge through his discretion, and are too subjective. Using this as a base, different judges will have different standards, which may lead to abnormally high or low compensation standards, which is not conducive to a fair trial.

4. Improvement of Punitive Damages System for Copyright Infringement in China

4.1. Clarifying the Elements of Application of Punitive Damages for Copyright Infringement

First, to clarify the objective elements of the application of punitive damages. In the case of "aggravating circumstances" enumeration is not complete. Judges want to accurately identify what is "aggravating circumstances" need to grasp the "aggravating circumstances" of the determination of the standard, in order to be able to respond to all changes. The severity of the infringement of the circumstances not only control the infringement of the infringement can be applied to the punitive damages system, but also determines the infringement of the amount of punitive damages high and low. [7] On the one hand, the "seriousness of the circumstances" as an objective element, reflecting the copyright infringement on the degree of damage to the legal interests of the property attributes of copyright is more obvious, "seriousness of the circumstances" is often manifested in the perpetrator of copyright infringement led to the right to produce a larger Therefore, property loss should be the primary criterion for judges to evaluate the "seriousness of the situation". On the other hand, in line with the principle of comprehensive and objective, the judge to evaluate the "aggravating circumstances" should also take into account the means of infringement, the number of infringement, the duration of infringement, the geographical scope, scale, consequences, the infringer's litigation behavior, etc., to give full play to the punitive damages for copyright infringement of punitive damages, deterrence, and protection of the copyright prosperity and development. "Serious circumstances" include, but are not limited to, repeated infringement, the same or similar violation of copyright infringement after administrative penalties or court judgments, copyright infringement has caused serious losses to the state as well as the public interest and other serious circumstances.

Secondly, to clarify the subjective elements of punitive damages. The subjective elements of "intent" should include "direct intent" and "indirect intent". First of all, from the meaning of "subjective intent", "subjective intent" itself can be interpreted as "direct intent" and "indirect intent". ", there is no expansion of the interpretation, the civil law also does not make a strict distinction between "direct intent" and "indirect intent". Secondly, from the perspective of the function of punitive damages for copyright infringement, punitive damages for copyright infringement are essentially to protect the rights and interests of copyright holders, so as to stimulate the innovation and vitality of copyright holders, and to promote the prosperity and development of culture, and to emphasize whether the "subjective intent" is "direct" or "indirect". "or" indirect "but gives the perpetrator to avoid punitive damages excuse, leading to the perpetrator to" indirect intent" escape, as a reason to defend, thus weakening the punitive damages for copyright infringement. Function. Finally, from the perspective of judicial practice, "direct intent" and "indirect intent" not only has the difficulty to distinguish between the theory, but also has the difficulty to distinguish between the practice, forcing the judge to distinguish between the two differences, futilely increase the judge to judge the punitive damages for copyright

infringement cases Difficulty, reduce the accuracy of the judge's trial. In summary, "subjective intent" should include "direct intent" and "indirect intent".

4.2. Building a Discovery System for Copyright Infringement Cases

Difficulty of proof for the application of punitive damages for copyright is undoubtedly a major roadblock, in order to prove that the infringer's profitability, the infringer often need to provide the infringer's transaction records, profit breakdown, etc., but the above vital information is often controlled by the infringer, the infringer cannot obtain the above information. Therefore, the establishment of evidence disclosure system seems to be imperative, the so-called evidence disclosure system, that is, civil litigation rules in the discovery system, the parties in the litigation to provide evidence of their own proof, at the same time you can ask the other party and even know the case of the third party to provide evidence, in addition to be protected by the privilege of confidentiality, the other party and the third party should be disclosed to the other side, in order to understand the case comprehensively Facts and expose the nature of the case. More simply put, the burden of proof is on both parties, and the court can supervise the other party's performance. The rule of the order of the instrument, the obstruction of evidence system also reflects the essence of the discovery system, in 2017 "RIO Rui Ao cocktail unfair competition dispute case" the judge required the defendant Dongte company to provide financial data and other materials to verify the illegal income from the sale of imitation cocktails, but also reflects the shadow of the evidence discovery system.

In the face of the embarrassing plight of the infringer in the field of copyright, the author calls for the establishment of a perfect discovery system in the intellectual property sector. Meanwhile, for the infringer who violates the court's order on the discovery of evidence and impedes the presentation of evidence, the court will take appropriate sanctions, such as treating the facts to be proved to the detriment of the infringer as verified, and making a decision on the validity of the claim of the infringer in the event of the infringer's intentionally destroying or falsifying the evidence to mislead the court. decision that the infringer's claim is valid; the third party's refusal to cooperate may affect its social credit, and other measures. As a rational economic man, the infringer will pursue the maximization of interests, such as if the infringer to infringe the interests of the base claim for one million, in the infringer's financial records of the infringement of the profit income less than one million, in order to avoid the judge presumed that the interests of one million and their own unfavorable judgment, a rational infringer will take the initiative to provide the financial books and other data. It can be seen that the evidence disclosure system also plays a role in forcing the infringer to provide evidence, improve the ability of the parties to prove, saving judicial resources, innovation of the evidence system, for the development of copyright protection role.

4.3. Clarifying the Base Range of Punitive Damages

The author believes that a single model should be supported on a dialectical basis and that statutory damages should not be used as a base for punitive damages. On the one hand, the functions of statutory damages and punitive damages are different, with statutory damages aiming at

remedies of a fill-in-the-blank type and punitive damages aiming at remedies of a punitive nature. The purposes of statutory damages are also different. The purpose of statutory damages is to provide the infringed copyright owner with another hope and possibility of relief in the event of failure of proof, while the purpose of punitive damages is to prevent the possibility of further infringement of copyright through punishment. If the institutional purpose of statutory damages is no different from compensatory damages, they should be used as the basis for punitive damages; if statutory damages have an institutional purpose that goes beyond compensatory damages, they should be avoided as the basis for punitive damages. [8] Due to the different functions and purposes of statutory compensation and punitive damages, they should play their own roles and should not be mixed, and the boundary between statutory compensation and punitive damages should be clarified, i.e., to play the punitive role of punitive damages, to remove the punitive element of statutory compensation, to play the filling function of statutory compensation, and to form a binary structure that divides and cooperates between punitive damages and filling compensation including statutory damages, so that the functions of the two can be realized. The duality of punitive damages and compensatory damages, including statutory damages, should be formed, so that the functions of both can be maximized. On the other hand, under the single model, can force the right to actively prove, statutory compensation cannot be used as the base of punitive damages, the right to get more compensation, can only be more active to prove, promote the judicial virtuous circle.

5. Conclusion

The establishment of punitive damages for copyright infringement is a response to the seriousness and prevalence of intentional infringement of copyright, and the academic discussion is also for the better use of punitive damages for copyright infringement in judicial practice. To this end, the specific conditions for the application of punitive damages for copyright infringement should be clarified, the construction of evidence disclosure system to solve the problem of proof in copyright infringement cases, and the scope of punitive damages should be clarified, in order to safeguard the interests of copyright owners and promote the prosperity and development of intellectual property rights.

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