The Determination of Punitive Compensation Base for copyright Infringement

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Abstract. Accurate determination of the compensation base is the key to bringing the punitive compensation system into play. However, in judicial practice, the three legal bases of the actual loss of the obligee, the infringement profit of the infringer and the right licensing fee are all faced with the problem of difficult proof. At present, the calculation of the punitive damages base has been widely discussed, but the research on how to improve the use rate of the legal base to calculate the amount of compensation is still insufficient. This paper analyzes the high burden of proof faced by the obligee in selecting the legal base. Based on this, this paper puts forward the following suggestions: Firstly, the proof standard of presumption and "probability predominance" is adopted to reduce the burden of proof of the obligee. Secondly, improve the applicability of reasonable licensing fees and clarify the quantitative standards. Finally, the agreed compensation is used to calculate the amount of compensation when the actual loss and infringement profit cannot be calculated directly.

Keywords: Punitive Damages, Compensation Base, Agreed Compensation.

1. Introduction

According to the first paragraph of Article 54 of the copyright law of the People's Republic of China, when applying punitive damages in copyright infringement cases, there are three legal ways to calculate the base of punitive damages, namely, according to the actual losses, infringement profits, and royalties. Although China has clear provisions on the calculation of the compensation base, the application rate of the legal base is generally low in judicial practice. Judges tend to choose the way of statutory compensation to determine the base of punitive compensation in judicial decisions, which will present a large space for discretion and make the statutory base null and void. Some scholars have systematically studied the calculation benchmark of the punitive damages system in combination with copyright law, patent law and trademark law [1]. Some scholars analyzed the judicial application status of the punitive damages system in the field of copyright through a large amount of case data, and gave suggestions for improvement from an overall perspective. This study focuses on solving the problem of the implementation of law-based practice. By studying the specific evidentiary problems of actual losses, infringement profits, and royalties, this paper further explores the methods to solve this dilemma, so as to improve the frequency of using the statutory compensation base.

2. The Definition of Legal Base and the Obstacles of Proof

2.1. Concept Definition

In the field of copyright infringement, there are three specific cardinal forms of legal compensation: actual losses, infringement profits, and royalties. Defining the concept of these three cardinal numbers is the logical starting point for analyzing the dilemma of the obligee in adducing evidence. Next, this study will define the concepts of the three legal bases, and then discuss the difficulties of proof in judicial practice.

Actual loss refers to the loss of profits of the obligee caused by the infringement of the infringer. The actual losses are divided into three categories. First, the infringement of the infringer leads to the reduction of the market share of the obligee and the loss of the benefits that should have been obtained. Second, the obligee has to bear additional necessary expenses in order to maintain his business

reputation and commodity image. Third, price erosion, the obligee's encroachment on the market has brought huge competitive pressure, resulting in the loss of interests caused by the obligee's being forced to sell goods at a low price or being unable to sell goods at an expected high price.

Infringement profit refers to the interests obtained by the obligee from the infringement. The calculation method is usually the total sales of the infringing goods multiplied by the profit margin or gross profit margin, or the sales quantity of the infringing goods multiplied by the difference between the unit price and the cost of the goods [2].

The royalties refer to the fees paid for obtaining the authorization of the obligee to reasonably use the intellectual property rights. To calculate the compensation base in this way, it usually needs to be used in accordance with the trading practices or with reference to the authorization of other dealers.

Although there are clear calculation methods for the three legal bases of actual losses, infringement profits, and royalties, there is a huge gap between ideal and reality. In judicial practice, it is difficult for the obligee to complete the burden of proof of the legal base.

2.2. Evidentiary Dilemma

2.2.1. Difficult to calculate the actual loss

Actual loss refers to the loss of profits of the obligee caused by the infringement of the infringer. According to Article 24 of the interpretation of the Supreme People's Court on Several Issues concerning the application of law in the trial of civil disputes over copyright (hereinafter referred to as the interpretation), the actual loss of the obligee can be calculated by multiplying the sales volume of infringing copies or the reduction in the distribution of copies by the unit distribution profit. However, the article of the law does not take the commercial reputation and image of the work lost by the obligee as the discretionary element for the judge to determine the amount of compensation. At the same time, the huge competitive pressure brought by the infringer's occupation of the market, resulting in the loss of interests caused by the obligee's being forced to sell the goods at a low price or unable to sell the goods at an expected high price, could not be listed as the judge's discretion [2].

If the above factors are not considered, the accuracy and rationality of the compensation amount will be affected. If it is considered, it is difficult for the obligee to complete the proof.

2.2.2. The applicable dilemma of infringement profit

In copyright infringement cases, if the obligee chooses to calculate the amount of punitive damages based on the infringement profits, he will face a higher threshold of proof. However, in order to avoid liability, the infringer often conceals, tampers with, or destroys the evidence against him, undermines the integrity of the evidence chain, and affects the judge's accurate judgment of the amount of infringement profits. In addition, the causal relationship between infringement profit and infringement also needs to be carefully considered. When the obligee claims to take the infringement profit as the compensation base, it needs to prove that there is a direct causal relationship between the infringement behavior of the infringer and the benefits obtained. For example, without the permission of the obligee, the infringer uses the obligee's artworks on the food packaging, and the obligee claims to calculate the product of food sales and profits as the compensation base, which is usually not adopted in judicial practice. It is difficult to prove the direct causal relationship between infringement and illegal income, and the proportion of the corresponding quantity and profit contribution rate can not be accurately defined [3].

2.2.3. The dilemma of determining royalties

Whether it is the actual loss or the infringement profit, the obligee has certain difficulties in the issue of proof involved, and the above difficulties also exist when choosing to apply the right use fee. In addition, there is a general lack of a specific amount of royalties agreed in advance in the field of copyright. Even if the amount of licensing fees is agreed, it is difficult to prove whether the amount truly reflects the value of the work in the market, resulting in judges relying too much on the amount in previous cases in judicial decisions. The lack of royalties for reference and the failure of third-party professional assessment are important factors causing the low applicability of royalties [4].

3. Suggestions on Optimizing the Determination of Compensation Base

To sum up, the dilemma of adducing evidence is the fundamental reason for the low application rate of the statutory base, which also makes it difficult to implement the system. In order to solve this dilemma, this study proposes the following solutions. First, reduce the standard of proof of the obligee and reduce the liability of the obligee. Second, improve the utilization rate of fair use fees and quantify the compensation standard. Third, the introduction of agreed compensation and flexible calculation of the amount of compensation.

3.1. Solve the Problem of Difficulty in Adducing Evidence

Faced with the high burden of proof of the obligee, this study believes that the presumption method can be adopted, and the "probability advantage" standard with a lower standard of proof can be applied to alleviate the difficulty of the obligee in proving. According to Article 25 of the provisions of the Supreme People's Court on evidence in civil litigation for intellectual property rights, when the infringer refuses to submit evidence such as his sales records without justified reasons, submits false evidence or destroys evidence, the court may presume that the claim of the obligee on the amount of compensation is tenable. In the civil judgment of the second instance on the civil dispute over infringement of computer software copyright by Guangzhou Xinmou Technology Co., Ltd. and Sichuan Chaomou Co., Ltd., the court repeatedly ordered company B to submit the source code of its game software, but company B refused to provide it without justified reasons. The court thus presumed that the game software of company B and the game software involved in the case constituted a substantial similarity, constituting copyright infringement [5]. By presumption, the burden of proof is reversed to reduce the burden of proof of the obligee, and the infringement is presumed by whether the infringer cooperates with the proof and the authenticity, legality and relevance of the evidence submitted. When the infringer holds financial books and background data but refuses to provide them, it does not need to bear the consequences of "unable to prove". Apply to the court for an order to submit evidence. If the other party refuses to provide or provides false data, the court may directly adopt the claims of the obligee or presume that the relevant evidence is unfavorable to the infringer. The burden of proof of the obligee can be reduced, and the legal base can be better applied by means of presumption, setting up systems such as inversion of the burden of proof and obstruction of proof, and redistributing the burden of proof [6].

3.2. Apply Reasonable Licensing Fees and Specify Quantitative Standards

As far as the current patent infringement practice is concerned, the application rate of reasonable licensing fees as a form of damages has increased year by year in the United States, reaching 81% from 2010 to 2013, and as high as 95% in Germany [7]. This study believes that China can learn from the experience of other countries, improve the application rate of reasonable licensing fees, and calculate the compensation base. The requirement of a reasonable licensing fee for the relevance of evidence is not strict. Both parties can prove it according to the pre-licensing contract. If there is no pre-licensing contract, it can be proved according to the industry practice [2]. In addition, for the problems of copyright infringement, such as the lack of evidence caused by the third party's intervention or the infringer's destruction of data, which is difficult to calculate, it can use the Internet's public dissemination data to calculate. Through the realization standard of traffic or clicks, the clicks are converted into infringement profits. In addition, quantification should be based on the work as the standard, rather than a simple click as a communication behavior. For example, if a user reads only one page of a 50-page comic, it should be considered that it only spreads 1/50. In cases where the punitive damages system is applicable to copyright infringement, judges can guide and evaluate the cases according to the guiding cases in different fields, and set quantitative standards [8]. To promote the establishment of a refined calculation method, it can set the expected amount of damage compensation and quantify the compensation standard by constructing the compensation index system for similar cases, so as to clarify the amount of compensation [9].

3.3. Adopt Agreed Compensation

Based on the above problem of high utilization rate of statutory compensation, this study believes that, according to the third paragraph of Article 25 of the interpretation, the court should allow the parties to agree on the amount of compensation. Therefore, when it is difficult for the obligee to prove the actual loss or infringement profit, resulting in the uncertainty of the compensation base, the use of agreed compensation can be encouraged. The essence of agreed compensation is to improve the applicability of the statutory compensation base, rather than introduce a new calculation method. It determines the specific amount of compensation through consultation between the parties, so as to bypass the problem of the actual loss and the difficulty of proving infringement profits, flexibly determine the amount of punitive compensation, and improve the efficiency of the judge's judicial decision. In addition to agreeing on compensation afterwards, the use of pre-agreed compensation can also be encouraged. Prior agreement on compensation can solve the existing disputes between the two parties and prevent subsequent infringement. If one party infringes in the future, the amount of compensation agreed in advance can be used as the base of punitive damages [10]. In this way, the judge has a more compensation amount for reference, reduces the discretionary space, and better safeguards the legitimate rights and interests of both parties.

4. Conclusion

The system of punitive damages for copyright infringement in China has tended to improve. How to implement the system in judicial practice and how to calculate the amount of punitive damages are the problems that need to be solved at present. At present, the dilemma of the punitive damages system for copyright infringement is that, in the face of high standards of proof, it is often difficult for the obligee to submit evidence that meets the requirements. There are three aspects to solve this dilemma. First, use the "probability dominant" standard of proof and presumption to reduce the burden of proof of the obligee. Second, improve the utilization rate of reasonable licensing fees, and clarify the specific quantitative standards of compensation. Third, the amount of compensation is calculated through the negotiation of both parties by using the ex post agreed compensation and ex ante agreed compensation. The system of punitive damages for copyright infringement is to punish malicious infringers, give the obligee excessive compensation, strengthen the protection of copyright, and solve the current dilemma, so as to fully safeguard the rights and interests of both parties.

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