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China started introducing the concept of punitive damages into its IP legal framework in 2013 with the revision of the Trademark Law. Punitive damages were, then, added to the Seed Law (2015), the Anti-Unfair Competition Law (2019), the Patent Law (2020), the Copyright Law (2020), the Civil Code (2020) and the SPC's Several Provisions on the Concrete Law Application Matters Concerning the Trial of Disputes over Infringement of New Plant Varieties Right II (2021).

In all these laws and judicial interpretation, the principle is basically the same: in "serious" cases and when the acts of infringement are intentional, "...the amount of damages may be determined as no less than one time but no more than five times" the amount that is determined according to the calculation methods provided by the law (losses, illegal gains or reference to a royalty rate).

On March 3, 2021, the Supreme Court released a "Judicial Interpretation on the Application of Punitive Damages in the Trial of Civil Cases Involving Infringement of Intellectual Property Rights" (the 2021 Interpretation) to coordinate and unify the criteria and language used in these different laws. Consequently, it has been observed that punitive damages have been increasingly awarded by People's Courts.

The aforesaid 2021 Interpretation is about to be superseded, as of May 1st, by a New Interpretation of the SPC, which introduces a few additional clarifications or modifications.

1. The need to adjudicate punitive damages claims is clarified.

Article 1 of the New Interpretation eliminates the ambiguity of the 2021 Interpretation which provided that, when a claim of punitive damages is submitted by the plaintiff, the court shall examine and handle the matter in accordance with law. Now, it is clear that the court shall adjudicate the matter.

2. Submission deadline of punitive damages claims is clarified.

The New Interpretation confirms the rule established in 2021: (1) the plaintiff must submit a specific claim, because the court may not – unlike what is done in Common Law countries – award punitive damages out of its own initiative, (2) the amount of the claim must be clear and supported by a method of calculation (it is not enough to ask for an additional amount of damages), and (3) the claim must be submitted before the conclusion of the first instance debate (i.e., before the end of the hearing).

What the New Interpretation adds, however, is a clear and final rejection of any punitive damages claim that might be submitted after the above deadline (first instance debate). In the 2021 Interpretation, the door was not entirely closed: it was still possible, for the plaintiff, to file a punitive damages claim during the second instance, but the court could only mediate "on the basis of the parties' voluntary consent", and in case the mediation fails, the plaintiff will need to file a separate action. In the New Interpretation, the mediation remains, but in case of failure, the possibility to file a claim for punitive damages is definitively closed (Articles 3 & 4).

3. In cases related to the Anti-Unfair Competition Law, punitive damages are restricted to the misappropriation of trade secrets.

Punitive damages were introduced in the Anti-Unfair Competition Law by the 2019 amendment, but only for trade secrets cases. Yet, the 2021 Interpretation did not provide any restriction in this regard. Article 5 of the

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New Interpretation clarifies that only cases involving the misappropriation of trade secrets are eligible. It is regrettably confirmed that all the other intentional and serious cases where a competitor commits one of the "confusing acts" enumerated in Article 7 of the Anti-Unfair Competition Law, or behaves in an unethical manner, in violation of the general principle established in Article 2 of the said law, are excluded from the punitive damages regime.

4. Determination of the intention to infringe

The 2021 Interpretation listed six circumstances where the court may make a preliminary finding that the infringing act is intentional. Article 6 of the New Interpretation deletes the word "preliminary" and clarifies that the defendant may adduce contrary evidence to escape the liability for punitive damages. Furthermore, Article 6 specifies that the court may rely on any of such circumstances and adds two more.

The first five circumstances that reveal the intention of the infringer are basically the same as in the 2021 Interpretation:

The infringer continues infringement despite having been notified by the plaintiff. Here, the New Interpretation adds a precision: the notice must be effective. The exact meaning of this word is not clear. Does a cease-and-desist letter qualify as effective? Additional guidance would be welcome.

The legal representative or manager of the infringer occupies, at the same time, or in the past, a managerial position of the plaintiff. The New Interpretation adds that the infringer should know or should have known about the infringed IP right.

There is some sort of a relationship (employment, cooperation, licensing, agency, representation) between the infringer and the plaintiff. The New Interpretation adds that based on such relationship, the infringer had access to the infringed IP right.

There is some sort of business relationship between the infringer and the plaintiff; and like in the preceding circumstance, the New Interpretation adds that based on such relationship, the infringer had access to the infringed IP right.

The infringer is engaged in piracy, counterfeiting of a registered trademark, and the act of counterfeiting a patent, which is added by the New Interpretation.

The New Interpretation adds two more circumstances:

After reaching a settlement with the plaintiff, the infringer engages in the same or similar infringing acts. The defendant conceals his activities by using various methods, like creating affiliated companies, changing legal representatives or controlling shareholders, or setting up companies under concealed ownership, or signing disclaimer agreements to evade legal liability for infringement of the IP rights in question.

5. Definition of the word serious

Compared to article 4 of the 2021 Interpretation, Article 7 provides a wider definition of the term "serious". Besides the general circumstances regarding the means, frequency, duration, geographical scope, scale and consequences of the acts of infringement, the New Interpretation underlines more generally the infringer's awareness and general attitude.

The New Interpretation reiterates the examples of serious circumstances listed in the 2021 Interpretation, specifying that, in any of these circumstances, the court shall (instead of "may") determine that the infringement is serious. Furthermore, the New Interpretation adds some precisions to the scenarios: (1) Refusing to comply with a preservation order, with the added precision that such refusal must be without justifiable reasons; (2) "Being an infringer by trade" is described as "deriving primary profits from infringing gains"; (3) enormous illegal gains or losses to the right holder is emphasized with a more precise wording: "serious damage to the right holder's business reputation, market share, or other interests".

6. Basis of calculation of the punitive damages

The New Interpretation does not change the basis of calculation set up in the IP laws and in the 2021 Interpretation: the multiplication (up to five times) only applies to the damages as calculated according to one of the three calculation methods provided by the laws (losses, gain or reference to a royalty rate).

More precisions are provided with references to the operating profit or the sales profits of the defendant (in case the defendant is an infringer by trade), or to the average profit margin in the same industry during the same period as published by statistical authorities or industry associations, or even the right holder's profit margin, if profit margin is difficult to ascertain.

Article 10 of the New Interpretation considers the situation where the defendant refuses to comply with the court

order over the disclosure of the defendant's books. Then the court may calculate the punitive damages on the basis of the claim submitted by the plaintiff and the evidence of the case.

7. Coefficient of 1 time to 5 times

Finally, the New Interpretation (Article 11) reiterates the general principle governing the choice of the multiplying coefficient (degree of the defendant's subjective fault and seriousness of the infringing acts). The New Interpretation adds a precision: the multiplier for punitive damages shall be determined within the statutory range and need not be a whole number, which, basically, allows the court to decide on a number employing a multidimensional and more nuanced approach.

Article 12 of the New Interpretation stipulates that "the total amount of damages awarded by people's courts shall not exceed five times the calculation base". The SPC intends to explicitly dictate how the wording of the law should be implemented, insisting on the maximum total amount of the damages, which includes the compensatory part (calculated according to the law) and the punitive part (added by the court). This seems in contradiction with the practice of many courts who, first, calculate the punitive multiplication, and then add the result to the compensatory damages. This practice has some logic and intends to avoid the situation where the punitive damages would be a multiplication by a coefficient of one: if the result is not added to the compensatory amount, the total amount would be exactly the same as the compensatory amount, losing therefore any punitive effect.

Comment

Following the previous 2021 Interpretation, this New Interpretation ushers in some welcome precisions rather than major changes.

In all IP laws, the regime of calculation of compensatory damages is restrained in the same boundaries: the plaintiff must prove his losses, or the gains of the infringer, or make a calculation by reference to an adequate rate of royalty, and only if this calculation is impossible, may the court decide ex officio, within the statutory limit of 5 million CNY.

The practice has revealed that, due the difficulty to justify a claim for damages according to the three legal methods stipulated in the law, most of the cases end up being adjudicated on the statutory basis.

On April 21, 2009, the SPC granted some leeway to the courts by issuing an "Opinion on Several Issues Concerning the Use of Intellectual Property Trial to Serve the Overall Interests in the Context of the Current Economic Situation", in which it stipulated that "Where it is difficult to prove the exact prejudice suffered from or profits yielded from the infringement, yet there is evidence proving that the aforesaid amount obviously exceeds the limit of statutory damages, the compensation should be ascertained and set above the limit of statutory damages by taking into account all the evidence....".

The punitive damages regime seems to correspond to that trend allowing the courts to free themselves from the double boundaries resulting from the strict calculation method and the statutory limit.

It was even noted that in an Opinion dated 24 December 2024, the SPC intended to allow the courts to award punitive damages calculated on the basis of the "discretionary" estimation: Art.16 of such Opinion stipulated that "where actual losses or infringer's profits are difficult to calculate, and no comparable license fees are available, the court may rely on existing evidence to reasonably estimate a base for punitive damages, comprehensively considering the infringer's intent, means, scale, and impact of infringement."

However, this possibility is not mentioned in the New Interpretation, and furthermore the regime is bound by its own structural limits.

Literally speaking, the term "punitive" affixed to the word "damages" is an oxymoron. Punitive relates to a sanction justified by an illegal behavior, whereas damages correspond to the compensation of a prejudice. In Common Law countries, the system allows the court to decide, after the compensatory damages claimed by the plaintiff have been awarded, to punish the infringer with an additional amount. Such an additional amount is unrelated to the claim but decided in consideration of the infringer's behavior.

With China being a civil law country, the civil procedure law mandates that the full amount of damages – compensatory and punitive - cannot exceed the amount claimed by the plaintiff. If the plaintiff claims too little, the court cannot award more, even if, based on the evidence of the case, it wishes to do so. Furthermore, there is just no way for the plaintiff to foresee what the judge might consider to be an appropriate level of punitive damages.

The logical approach to punitive damages in China would be to treat the plaintiff's claimed base amount as a floor, and then, allow the plaintiff to request the application of punitive damages without having to submit a specific amount, but only the evidence that such punishment is justified. Then the court could be free to apply the multiplier on top of whatever base is ultimately determined.