

# Whether the System of Punitive Damages Should Be Introduced to Better Protect the Copyright in the Digital Era

Xiaonan Liu\* Wei Song

School of Public Affairs, University of Science & Technology of China ,No.96 JinZhai Road Baohe District , Hefei , Anhui , 230026,P.R.China

The research is financed by a National Social Science Fund Project named "Research on copyright issues in digital publishing". No.14BFX104.

## Abstract

Since the system of punitive damages introduced to the "Copyright Law", domestic academics have been continuously involved in this dispute. In this paper, in the perspective of legal cases and current situation of compensation for damage of copyright infringement, analyze the introduction of punitive damages of "Copyright Law". Then, from the view of Copyright owners' strategy of litigation and relevant judicature and legislation, analyze whether should introduce the system of punitive damages to better protect copyright, and put forward to other paths of dealing with damages, hoping to do my best to help to perfect judicature and legislation.

**Keywords:** protection of copyright; compensation for damage of infringement; punitive damages

## 1. Introduction

After the revision of the "Copyright Law", the protection of copyright (relative right) has been significantly improved. In respect of the modification of the clause of compensation for damage of copyright infringement, "Law of copyright revision draft" (The following in short is as "the draft") includes "reasonable multiple of the right transaction cost" in the law. It improves the standard of legal compensation (from five hundred thousand upgrade to one million), and increases punitive damages. Thus, in terms of legislation of compensation for damage of copyright infringement, "the draft" has formed the compensation system, including actual loss, the illegal income, reasonable multiple of the right transaction cost, statutory compensation, punitive damages, etc. However, the domestic academia has been in disputed after the punitive damages introduced into the "Copyright Law". In general, the supporters think that, the network technology reduces the cost of infringement, and infringers are in a trendy style. But the obligees' cost in safeguarding the rights and interests is still high, the traditional compensatory compensation are not enough to compensate for the loss of obligees, so "the draft" should refer to and introduce the punitive damages system which originated in the Anglo-American Legal System. However, skeptics do not think so. They believe that intellectual property right is a private right, and the introduction of punitive damages violate the basic principles of the civil law, so it makes the boundaries of private law and public law not clear. Moreover the introduction of punitive damages easily make obligees appears the phenomenon of anti-infringement, which waste precious judicial resources. So, In the digital era, in order to protect copyright better, Whether should "Copyright Law" introduce and apply the punitive damages?

## 2. The current situation and problems of compensation for damages of copyright

### 2.1 The proportion of infringement disputes for network copyright are increasing

In recent years, infringement disputes for copyright have gradually increased. Taking Shanghai city as an example, 7388 cases of copyright disputes in the first instance were accepted in 2016, increased by 22.06% compared with the same period of last year. Among them, 5168 cases of damaging the right to network dissemination of information were accepted, which increased by 25.62% compared with the same period of last year. We can see, more than half of the number of disputes has been occupied by network copyright disputes. In a sense, with the development of network technology, copyright era taking the right of communication for information network as the core has emerged, and the proportion of infringement disputes for the right to network dissemination of information in infringement disputes of copyright will further increase.

### 2.2 The litigation strategy of copyright owners

In the infringement disputes for the right to network dissemination of information, regardless of the service provider of network, or the user of network terminal, most defendants are the company. Taking the first instance of the People's Court of Pudong District of Shanghai as an example (retrieval information is: category of case: intellectual property rights, keywords of title: right to network dissemination of information, closing date: January 1, 2014 to December 31, 2014, court seat: Pudong District of Shanghai), the retrieval results indicated that in the 41 civil judgments of the first instance, all the defendants are companies. We can see that the natural persons (network users) who without permission from the copyright owners have uploaded infringing works on the network are mostly excluded from the scope of tort liability. So, based on the consideration of the cost in safeguarding the rights and interests and the performability of judgments, the copyright owners selectively

ignore the natural persons who have uploaded the infringing works in choosing the defendants. However, these disadvantages of this selective litigation strategy mainly lie in the fact that: it is not enough to deter many deforciantes who are natural persons and upload infringing works.

### *2.3 The applicable principles of compensation for damages*

2.3.1 Statutory compensation is customary. Because of the essential attributes of copyright—immateriality of object and persons' nature of seeking advantages and avoiding disadvantages, actual losses of copyright owners and the illegal gains of the infringers are difficult to determine, therefore, the courts have become a habit of applying principle of statutory compensation to determine the amount of compensation. For example, in the 41 civil judgments of the first instance of the people's Court of Pudong District of Shanghai, except for one case dismissing the claim and one not seeing the result of the judgment, the other judgments apply the statutory damages. Using the same way to search the Intermediate people's Court of Zhengzhou, Henan (keyword is right to network dissemination of information, closing date is 2014), the 11 civil judgments of the first instance all apply the statutory damages.

There is no doubt that once the statutory compensation become a customary, the legal regulations on the actual loss of obliges and illegal income of infringer are almost idle, but those are not the intention of lawmakers or the purpose of standard. Moreover, it also shows the lack of judicial cognizance of compensation for damage of copyright. Specifically, on the one hand, according to the infringement act to determine the amount of compensation may actually become judges' free appreciation; on the other hand, it also reflects the lack of court's investigation on the judicial practice. From that most of the companies are defendant we can see, it is possible for the courts on its own initiative to investigate and determine the amount of the illegal gains of infringer.

2.3.2 The application of statutory compensation is significant difference. According to the relevant judicial interpretation, when it is difficult to determine the actual loss of the right owners or the infringer's illegal gains, the courts should use reasonable fees, the type of works, the nature of the infringement, the consequences and other circumstances to determine the amount of compensation. However, in judicial practice, due to the lack of applicable specific quantitative standards, the difference of judging the proportion of compensation is also very obvious. Specifically, on the one hand, there has regional differences. In the developed areas, the proportion of compensation is generally higher than that of less developed areas. In a sense, this shows that there are regional differences in the judicial protection of copyright; on the other hand, there has difference of the judge. In the lack of specific standards, the judges' discretionary power will play a key role, but different judges, however, may differ in their judgment and standards, which in turn can lead to damage to the dignity of the law.

### *2.4 The determination of reasonable fees*

In the case of compensation for damages of copyright, reasonable fees generally include attorney fees, notarial fees, express fees and other fees. Making attorney fees as an example, in the judicial practice, in order to determine attorney fees, the judges will generally consider the case of workload, fee scale and other factors, but the attorney fees as judged by the judge are generally lower than the agency fees of appealing for compensation. Therefore, if copyright owners apply for a lawsuit for compensation for damages of copyright, they will suffer losses in terms of attorney fees. So, this logic of determining attorney fees is worth discussing. Specifically, on the one hand, the court fail to consider the direct impact of the lawyer's professional ability and popularity on attorney fees, if the lawyers' ability and popularity are excellent, their fees must be high; on the other hand, the court fail to consider the indirect impact of the object of action on the attorney's fees in the case of compensation for damage of copyright. If attorney fees are strictly charged according to the relevant fee scale, it is unlikely to encourage the excellent lawyers to take part in the cases about compensation for damages of copyright.

### *2.5 The apportionment of expense in litigation*

There is a gap between Appealing for the amount of compensation and judgment for the amount of compensation, which means that the plaintiffs must share the expenses in litigation. For example, in the same case, when the appeal for compensation is 100 thousand yuan, the amount of compensation for the actual determination is 10 thousand yuan, so the compensation ratio is 10%; if the appeal for compensation is 10 thousand yuan, according to the logic (the judges believe that the accusers' appealing of the compensation is higher than the actual loss), the amount of compensation will generally be about one thousand yuan. That is to say, compared with the probability of the cost of other civil cases, it is necessary to share the expenses in litigation of compensation for damages of copyright. Therefore, in the case of actual loss and illegal income are difficult to determine, if we do not consider the disputes' particularity of compensation for damage of copyright, according to the petition for sharing costs is clearly unreasonable. This undoubtedly adds to the copyright owners' costs in safeguarding the rights and interests.

### **3. Reflection on Introducing Punitive Damages in “Copyright Law”**

#### *3.1 Fully realize the particularity of copyright*

The "Law on the Protection of the Rights and Interests of Consumers", "Patent Law", "Trademark Law" and other laws introduced a system of punitive damages, but the introduction of punitive damages in other laws does not mean that the "Copyright Law" should be introduced, so we must be fully aware of the particularity of the copyright.

3.1.1 Copyright owners are more likely to have moral risk. There is no doubt that, due to fraud or bad quality of product, although consumers may get some times amount of compensation, the majority of ordinary consumers does not expect to happen that. In contrast, in the case of uncertainty for statutory compensation, once Introducing system of punitive damages, it is more likely to exacerbate the moral risk of copyright owners. Copyright owners are more likely to want to be infringed and gain profits from lawsuits, because in the digital era, the right owner finds that the cost of getting facts of infringement is cheaper (having a networking computer that you might find). But usually by right owners statement, only can it prove the time of fact of infringement, so for obtaining more punitive damages, the right owners may delay the time of application for litigation (as long as it does not exceed the limitation of litigation), which is not conducive to the order for market dealing of copyright.

3.1.2 Copyright owners are more likely to get compensation outside of lawsuits of copyright. The strong protection (introduction of punitive damages) of patent rights and rights of registered trademark has its inherent reasons. The research and development of patents need considerable funds, and the trademark has exchange value (appraisal of trademark), so, generally, when patent infringement and trade mark infringement are committed, unless the rights owners has investigated the infringer's tort liability through litigation, it will suffer irreversible economic losses. Therefore, if we do not grant patent rights and trademark rights protection, it may undermine the enthusiasm of technology research and hinder the rise of national brands, and thus affect the promotion of China's competitiveness.

Even if the obligees fail to find the fact of infringement and obtain full economic compensation from tort litigation, but also does not necessarily hit the enthusiasm of creation, obligees are more likely to get other compensation except the compensation from judgement. The reason is that sometimes creative work is not only for the pursuit of economic, but also for the pursuit of interests, hobbies and other factors. Moreover, with the works published and the expansion of the scope of works, the rights owners may gain popularity. Then, with the expansion of popularity, rights owners can get some compensation from other ways. For example, the film and television works may encounter infringement, but after the film stars getting popularity, through advertising and other ways, they can obtain a lot of reward. Moreover, academic monographs may encounter piracy, which caused reduction of royalty incomes, but publication of monographs may establish the basis for promotion of author. In addition, the academic reputation arised by promotion can increase the remuneration and times of reports and lectures. As the words of Posner: "many authors have gained considerable interest from the publication, and far more than any royalty."

#### *3.2 Have a clear understanding of the difference of times between the right to reproduce and the right to network dissemination of information*

Because of the low cost of using Internet to Infringe, the supporters of introducing punitive damages into the “Copyright Law” usually demonstrates the rationality of punitive damages from the point of view of legal economics. However, in our view, obliterating the difference between the right to reproduce and the right to network dissemination of information is not conducive to deeply consider the controversial issue of introducing punitive damages. In general, the differences between the both include, but are not limited to the following aspects:

3.2.1 The difference of creation cost. With the development of the Internet, the virtual network space is gradually formed. Virtual network space is a kind of "hyperspace", which is composed of material space, spiritual space, social space, cultural space and objective knowledge space. In the virtual space, the speed of dissemination of information is fast, and the scope of dissemination is broad. Not only that, there is a vast amount of free sharing knowledge in the virtual space, as well as the uploading infringing works without permission. Therefore, from the point of view of the creation cost of works of copyright, the combination of virtual space and physical space reduces the creative cost of the infringing works compared with the traditional entity space. Furthermore, when the sharing knowledge and previous infringing works are free to be used by infringers, on the one hand it reduces the work cost, on the other hand, the introduction of punitive damages improves strength and force of the protection for copyright, thus it must form conflict between the both.

3.2.2 The differences in cost of finding facts of infringement. In the era of copyright, which is mainly based on the right of reproduction, it is difficult for copyright owners to find out the facts of infringement, so the cost of finding out the facts of infringement is great. For example, through going to physical stores, the right owners can find the fact of infringement in the production and sale of infringing copies. Therefore, in the conventional era of

copyright, which is mainly based on the right of reproduction, obligees mainly rely on the administrative organizations for law enforcement to discover the facts of infringement. However, in the era of copyright, which is based on the right to network dissemination of information, the cost of finding the facts of infringement is much lower. As long as there is a computer that can access the Internet, it can find facts of infringement. Once the fact of infringement is found, whether to investigate the infringer's tort liability, the power of decision is decided by the copyright owners. In the case of the scarcity of resources for law enforcement, if the copyright owners provide the infringing information to the administrative organizations for law enforcement, it can increase the possibility of the administrative penalty or even criminal punishment of the infringers. In other words, from the point of view of principle of the legal and economic that the possibility of investigating accountability is inversely proportional to the intensity of sanctions, in the digital era, the "Copyright Law" is not suitable for the introduction of system of punitive damages.

3.2.3 The difference of an advance on the cost of protecting rights. The advance on the cost of protecting rights mainly refers to the cost of collecting and fixing evidence (as a reasonable cost by the infringers' burden). It is conceivable that when the infringing act is inconsistent with the location (domicile) of the copyright owner, the cost of proof preservation is lower in the networked computer of the notary office in the place where the copyright owner is located. It can be imagined that when the locus delicti is inconsistent with the location of the copyright owners, the cost of deposition by witnesses in the networked computers of the notarial offices which are at the location of copyright owners is lower than the cost of collecting and fixing evidence at the location of infringers. Accordingly, because of the low cost of an advance on the cost of protecting rights, so obligees are more likely to investigate the tort liability of the infringers through litigation or other ways, which can compensate for its economic losses.

### *3.3 Reflect on the statement of popularization of the copyright infringement*

It is argued that "with the popularity of network and low cost of infringement, the infringers of internet copyright present a trend towards popularity, because any computer users who can carry on simple computer operation are likely to become infringers of copyright." This is also an important reason for the introduction of punitive damages in the "Copyright Law". In the framework of the legal system, at this stage, the rapid expansion of the Internet has greatly reduced the cost of infringement, but in recent years the cases of copyright infringement are increasing year by year. But it is clear that the statement about popularity of infringers of copyright infringement is not reasonable and logical.

3.3.1 Objectively examine the causes of the growth of copyright infringement cases. In fact, in the age of the Internet, whether they are engaged in criminal activities or are allowed to act in accordance with the law, the technological progress reduces cost. In this aspect, technological progress does increase the possibility of the popularity of infringers of copyright infringement. For example, when the right to network dissemination of information gradually becomes the core of the copyright era, the network will inevitably become the main battlefield of opposing copyright infringement, and determine the increase of proportion of the cases of tort of the right to network dissemination of information. However, as mentioned earlier, in the copyright era which make right to network dissemination of information as the core, the cost of finding infringement is low, so it may actually reduce the number of acts of undetected copyright infringement (large amount of acts of infringement is not found or investigated for civil liability). Accordingly, the convenience of the obligees to discover the facts of the infringement will inevitably increase the possibility that the infringer is liable for tort liability, which will undoubtedly raise the number of copyright infringement cases. That is to say, without considering the influence of the "dark figure" of infringement, which may increase the number of copyright infringement cases, according to the latter and imagination, it is questionable that blindly put forward the statement of popularity of infringers of copyright infringement.

3.3.2 The statement of popularity of infringers of copyright infringement violate principle of proportionality. The principle of proportionality includes the principle of suitability, the principle of necessity and the narrow principle of proportionality. In short, the principle of suitability is mainly from the point of view of purpose and means. In order to achieve a certain goal, do not resort to deception; the principle of necessity focuses on the choice of the means, and choose the way to minimize the damage to achieve the purpose of legislation; The narrow principle of proportionality mainly inspects that the input and the benefit should correspond. In the modern constitutional society, the principle of proportionality has penetrated into every category of public law and gradually evolve into a universal criterion in the whole legal system. For example, in the laws of copyright, the types of civil offence are more than the types of administrative malfeasance (the applicable conditions of administrative responsibility are more harsh than civil responsibility), and the types of administrative malfeasance are more than the types of criminal illegal activities (modest suppress character of criminal law), so this is the concrete embodiment of the principle of proportionality. Therefore, from the perspective of infringers for copyright; on the one hand, the first people of direct infringement or network users who without the copyright owner's permission are the first time to spread infringing works through network media, should bear

tort liability; on the other hand, within the limits laid down by law, the network service providers still have direct or indirect liability for infringement. Then, for those hundreds of millions of retailers who are not the first time to spread works, if before each dissemination, people should get permission from the copyright owners, which will make the cost of being law-abiding high, and also restrict people's freedom of action; for example, if hundreds of millions of retailers are as infringers, the enforcement cost will be infinitely high, and the country's resources of administrative enforcement of law and judicial resources will be unbearable. That is to say, if hundreds of millions of Internet users may be investigated tort liability at any time, which means that from the principle of proportionality to assess non legitimacy of systems of copyright, and then through the theory of liability of infringement to dispel the conflict between the popularity of infringers and the principle of proportionality.

#### *3.4 The uncertainty of the nature of Statutory damages*

The supporters of the introduction of punitive damages in the "Copyright Law" generally believes that statutory damages can neither fully compensate for the loss of copyright owners nor deter (potential) infringers. Although this view is a bit arbitrary, but it says that the practice of nature of statutory damages express vaguely. When the actual loss of the copyright owners or the infringer's illegal income is difficult to determine, the courts could determine the amount of compensation by considering all kinds of Infringement circumstances. Of course, if the copyright owners can prove that the actual loss exceeds the amount of statutory damages (even if the exact amount cannot be determined), then the statutory damages can not be applied. Obviously, the embarrassment of judicial practice lies in the fact that the amount of statutory damages, the actual loss of the obligees or the amount of the illegal gains of the infringers may be not the same. In other words, statutory damages may be less than or equal to the full compensation or actual punitive damages. Therefore, as mentioned above about accustomed using of statutory damages and uncertainty of nature of statutory damages, even if the punitive damages are introduced into "Copyright Law", it is simply two or three times as much as statutory damages in the application, but whether the punitive damages are in reality as well as in name, it is still uncertain. In short, in the fundamental crux of the problem of accustomed using of statutory damages and not fully compensating loss of obliges for copyright, which have not been properly solved, hastily introducing punitive damages still need further consideration.

### **4. The path choice of protection of copyright which is in the digital era**

In recent years, the rapid growth of copyright cases, especially the right to network dissemination of information, which is closely related to the progress of network technology. If in accordance with the logic of the supporters for punitive damages, it is bound to fall into the vicious spiral that when the technology progress, protection of copyright is more strengthened, so it isn't obviously a good plan to deal with compensation for damage of copyright which is in the digital era. In the long run, copyright issues which are triggered by technological progress, we can counter the acts of copyright infringement by promoting technological progress. For example, by tracer technique to determine the number of times of spreading infringement works and precisely lock infringers and other technical protection measures, which can counter the acts of copyright infringement. In addition, according to the problem of copyright protection which is in the digital era, even if the "Copyright Law" does not introduce the system of punitive damages, we still have replaceable paths to choose, which can make it easy to realize the principle of fully compensation of copyright infringement in the true sense as soon as possible.

#### *4.1 The litigation strategy of adjusting the disputes over compensation for damages for copyright infringement*

In a sense, the rapid increase of cases for copyright infringement is related to the choice of litigation strategies by copyright owners. Now there is such a phenomenon that the obligees generally do not, even ignore the tort liability of natural persons, which means that the cost of infringement of natural persons is almost zero, therefore opportunism of infringement acts of the natural persons will certainly be exacerbated. Therefore, to deter the infringers who are the first to upload infringing works without copyright owners' permission (usually natural persons), copyright owners can properly adjust the litigation strategy (only Investigating direct or indirect infringement liability of companies or other organizations), and selectively bring the natural persons, who are investigated about direct infringement liability, into the scope of the subject of copyright infringement. Thus, it is possible to reduce acts of copyright infringement from the source and also save rare judicial resources. There is no doubt that, to some extent this is similar to the punitive damages which can suppress the infringement, and it also can save the legislative cost.

#### *4.2 Enhance the production capacity of judicial cognizance of compensation for damages of copyright*

To improve the production capacity of judicial cognizance of compensation for damages of copyright is conducive to formulate uniform standards and is more conducive to the impartiality of the judges. In our view, we can start from the following aspects of producing judicial cognizance of compensation for damages of

copyright. On the one hand, according to the actual requirements of the case, the court may investigate tort company's finance , contract and so on by entrusting the organizations of accounting, auditing and other intermediary services, and it can determine the illegal income, and ultimately shift the correlative charges ,which will be as reasonable expenses or litigation expenses, on infringers to increase the actual cost. On the other hand, with the increase of the proportion of infringement disputes for right to network dissemination of information in infringement cases of copyright, aimed at the common types of infringing works (the films, music, photography, art, literature and other works), the local judicial authorities may, according to the actual condition of the local market, formulate quantitative opinions on compensation for damages of copyright in their different works. So it can not only guide the copyright owners to reasonably calculate the specific amount of compensation, but also avoid the obvious difference in the application of compensation for damages of copyright.

#### *4.3 Reduce cost in safeguarding the rights and interests of copyright owners*

As for the normality that the actual losses and illegal incomes are difficult to determine, reducing the cost in safeguarding the rights and interests of copyright owners can compensate for the obligees' pecuniary losses caused by infringement. Accordingly, these also increase the cost of infringers, and they have important practical value for the prevention of acts of copyright infringement. Specifically, it can reduce the cost in safeguarding the rights and interests of copyright owners mainly by two channels: reasonable cost (attorney' procuration) and litigation expense. On the one hand, because of particularity of the disputes over compensation for damages for copyright, according to the size of the object of action, support the litigation that attorney's fees are not more than the standard of attorney's fees of a certain multiple, however it must be based on the principle of encouraging of lawyers on copyright and avoiding the excessively high amount of compensation, on the other hand, improve the existing "Measures for the Payment of Court Fees". According to the particularity of the cases of such as compensation for damages for copyright whose object of action is difficult to determine, infringers should bear the litigation costs.

#### *4.4 Standardize the operation behaviors of network service providers*

In the digital era, for the collecting or fixing evidence's problems that actual losses or illegal incomes are difficult to identify, can through administrative legislation to standardize the Internet service provider's operations behaviors of intellectual property. For example, formulate imperative rules of law. In the range of probably involving infringement acts of right to network dissemination of information, page view, times of download ,and other statistical data shall clearly appear in the webpage in the form of visualization, so it is convenient to make copyright owners inspect, determine the actual pecuniary losses, or guarantee the judicial organizations to easily access the evidence to verify statistical statistics in accordance with the powers by formulating relevant laws and administration regulations. It must be affirmed that this should cohere with the relevant measures of Introduced earlier which are about the costs in safeguarding the rights and interests. That is to say, for the high amount of compensation appealed by the copyright owners, the copyright owners will bear corresponding part of the litigation expenses, otherwise the infringers will pay the full costs of litigation, if we can through the visual statistical data to determine the actual losses of the copyright owners or illegal income of infringers.

### **5. Conclusion**

Punitive damages are still controversial, and this article argues that in addition to the introduction of punitive damages, these measures can be adopted that copyright owners can properly adjust the litigation strategy (only Investigating direct or indirect infringement liability of companies or other organizations), and selectively bring the natural persons, who are investigated about direct infringement liability, into the scope of the subject of copyright infringement; and enhance the production capacity of judicial cognizance of compensation for damages of copyright; and reduce cost in safeguarding the rights and interests of copyright owners, etc. Therefore, it is more beneficial to realize the principle of comprehensive compensation of copyright infringement in the true sense.

### **References**

- Luo Li, J. (2014), "The introduction and implement of punitive damages in Intellectual Property Law", *Legal Science*, (4):22-32.
- Liu Tiegua, J. (2008), "The variation of statutory damages in the judicial application of copyright", *Electronics Intellectual Property*, (4): 52-55.
- Hao yinzhong, Xi zuoli, J. (2004), "The principle of proportionality in the view of Constitutionalism", *Zuel Law Journal*, 21(6): 69-73.
- Yi jianxiong, Deng Hongguang, J. (2009) , " Punitive damages should be introduced in the field of intellectual property rights ", *Journal of Law Application*, (4): 92—95.

- 
- He yudong, Shi hongyan, Lin shengye, J. (2013), “Debate on Introducing Punitive damages into infringement of intellectual property rights”, *Intellectual Property*, (3):54—59.
- Yin Zhiqiang, J. (2006), “Is it necessary to introduce punitive damages into civil law in China? ” , *Law Science Magazine*, (3):76—79.