

On Punitive Compensation in Infringement of Computer Software Copyright

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Abstract

In today's era, intellectual property is a strategic resource and core competitiveness for a country's development. However, in practice, the infringement of computer software copyright has occurred from time to time in China. The infringer has a high profit, but the actual loss of the computer software copyright owner and the illegal income of the infringer are difficult to calculate, which needs to be controlled through the punitive compensation system. This article introduces the history of the punitive damages system, analyzes the relevant provisions in the current laws of our country, expounds the functions of the punitive damages system around the infringement of computer software copyright, analyzes the necessity of introducing the punitive damages system in our country and the problems that should be paid attention to, and finally, combines the cases in practice to further understand the punitive damages in computer software copyright infringement cases, In order to make punitive damages play a better role in computer software copyright infringement, better safeguard the legitimate rights and interests of the obligee, and form a good trend of protecting intellectual property rights in the whole society.

Keywords

Computer software copyright; Punitive damages; Intellectual property infringement; Damages.

1. Introduction

In recent years, with the rapid development of computer network technology, due to the intangible and reusable nature of the object of intellectual property rights, the concealment and complexity of infringement, computer software copyright infringement has occurred from time to time. In practice, it is difficult to calculate the illegal gains of the infringer or the actual losses suffered by the obligee, and the compensation obtained by the obligee is usually difficult to fully compensate for its losses. Therefore, we need to improve the cost of infringement and curb the illegal acts of the infringer through punitive compensation, a highly deterrent system, so as to better protect the rights of computer software copyright owners.

2. The History of Punitive Damages System and Relevant Provisions in China's Current Laws

Punitive compensation, also known as exemplary compensation or retaliatory compensation, refers to a monetary compensation paid by the perpetrator to the victim that exceeds the scope of his property damage. The function of punitive damages mainly includes compensation for the loss suffered by the victim, punishment and containment of illegal acts. Punitive liability system originated from a legal remedy measure of common law in Anglo American law system, and its appearance is to make up for the insufficient application of compensatory liability[1].

The system of punitive damages can be said to have come into being at the same time with the system of law. The provisions on multiple damages can be found in ancient laws such as the Roman Law and the Hammurabi Code, and the practice of "double compensation" can also be found in the famous laws of the Tang Dynasty. This multiple compensation system has some similarities with the current punitive compensation system. The modern multiple compensation system first appeared in Britain. In 1763 AD, the concept of punitive damages was first adopted by the British courts, and then affected the American courts, and finally created the type of "punitive damages" in Anglo American law. By the middle of the 19th century, punitive damages had been widely adopted by the courts[2].

In fact, the punitive damages system has been introduced into China for a long time. As early as 1993, the Consumer Rights Protection Law established the punitive damages system. In 2013, the Trademark Law introduced the punitive damages rules in the field of intellectual property for the first time (Article 63, paragraph 1); In 2015, the Seed Law introduced punitive compensation rules in cases of infringement of the right to new plant varieties (Article 73, paragraph 3); The Anti Unfair Competition Law of 2019 introduced punitive damages rules in cases of infringement of trade secrets (Article 17, paragraph 3). After the promulgation of the Civil Code, both the Patent Law and the Copyright Law in 2020 introduced punitive damages rules. So far, China's punitive damages system in the field of intellectual property has been basically established[3].

Among the current laws in China, Article 49 of the Consumer Protection Law, Paragraph 2 of Article 113 of the Contract Law, and Article 96 of the Food Safety Law all contain provisions on punitive damages. On May 28, 2020, the Civil Code formally determined the general provisions and basic rules of the punitive damages system for intellectual property infringement. The newly revised Copyright Law also introduced the system of punitive damages for infringement. According to the provisions of Article 1185 of the Civil Code and Article 54 of the Copyright Law, punitive damages for copyright require that the infringer's subjective aspect is intentional and objective aspect is serious, and the court will not actively invoke punitive clauses. The original Copyright Law stipulated a certain order for the right to claim compensation, that is, to exercise the right to claim compensation according to the order of the actual loss of the obligee, the illegal income of the infringer and the statutory compensation. Article 54 of the Copyright Law, in view of the difficulties in judicial application, allows the obligee to choose to exercise the right of claim for compensation according to the actual losses suffered by the obligee or the illegal income of the infringer, and no longer stipulates the order[4].

3. Functions of Punitive Damages System

The main purpose of the compensation system is not to punish the actor. In practice, the emergence and development of punitive damages system has not weakened the traditional compensatory damages system, but has developed an exceptional compensation system beyond the general damages system. It is generally believed that punitive damages have the following three functions:

3.1. Compensation function

Punitive damages are attached to compensatory damages and are not independent claims. When the victim suffers from illegal infringement, punitive damages can play a unique role in the relief of property loss, mental pain or personal injury. First of all, compensatory damages can not provide adequate compensation for mental damage. The basic feature of mental damage is that it can not be calculated with money price, but can only be combined with various reference coefficients for reference, which is also difficult to determine a clear standard. Therefore, in many cases, it is necessary to use punitive damages to make up for the deficiency

of compensation for mental damage. In the early common law, punitive damages were adopted mainly because the victims suffered intangible damages such as mental pain and emotional injury, and there was no specific quantitative standard for these injuries, so punitive damages were needed to compensate for the losses. Secondly, although the tort liability system can provide remedies for personal injury, in many cases it is difficult to prove and quantify the degree of damage and the amount of loss of personal injury. Therefore, compensatory compensation cannot fully remedy the actual damage of the victim. Punitive damages can more fully compensate for the damage suffered by the victim. Finally, only through punitive damages can the additional losses be compensated for by the various expenses and energies incurred by the victim after the lawsuit is filed, especially the expenses related to the lawsuit[5].

Similarly, in the field of computer software copyright, due to the development of Internet technology and the convenience and concealment of infringement, computer software copyright is vulnerable to infringement. However, it is difficult to prove and quantify the damage degree and loss amount of the obligee. Compensatory compensation cannot fully remedy the actual damage of the obligee, while punitive compensation can fully compensate all kinds of losses suffered by the obligee by playing its compensation function.

3.2. Punishment function

Punitive damages are mainly applied to those illegal and morally reprehensible acts, that is, to punish intentional and malicious illegal acts. This punishment is different from compensatory damages. Compensatory compensation is a kind of transaction in nature. It requires to compensate the victim for all economic losses, which is equal to exchanging the same property for losses. For the wrongdoer, compensation for the damage caused by his intentional act is also like a transaction. In this way, compensatory compensation is difficult to punish the rich, or even make the civil compensation law controlled by the rich. Punitive damages impose heavier economic burden on the wrongdoer to punish the wrongdoer, so as to achieve the effect of punishment.

In the case of computer software copyright infringement, the infringer often has a fluke mentality, thinking that if his behavior is caught, it is no more than no benefit; If one's illegal act is not caught, it is a good thing to gain pure benefits. In such a state, infringers have no worries about infringement, and infringement of computer software copyright can not bring them any losses and risks. Therefore, we need to introduce punitive compensation system to give full play to its punitive function, impose heavier economic burden on the wrongdoer to punish the wrongdoer, so as to achieve the effect of punishment and better protect the rights of computer software copyright owners.

3.3. Containment function

Containment is the traditional interpretation of the rationality of punitive damages. Containment can be divided into general containment and special containment. General containment refers to the containment of infringers and ordinary people through punitive damages. In particular, containment refers to the deterrent effect on the infringer itself. Some people believe that the purpose of punitive damages is to punish past faults and "use it as a model to contain future faults". Therefore, the word "punitive" is sometimes replaced by the word "exemplary", which summarizes the two functions of punitive damages, namely, punishment and containment. In the case of malignant infringement, the traditional rules of damages cannot play a containment role. The application of punitive damages system can put malignant infringers in a worse situation than when they are not engaged in infringement, and the implementation of infringement will not pay off, so as to intimidate the infringers and effectively curb the occurrence of malignant infringement[6]. From the perspective of economics, in some cases, the defendant has obtained great benefits through illegal acts, but it

is difficult to prove the damage and loss to the victim, or even if it can be proved, it is not too much. The victim may not be willing to file a lawsuit in order to obtain compensation that is not very high, or may even be unwilling to file a lawsuit for fear of being unable to prove the existence of the damage and facing the risk of losing the lawsuit. In this case, punitive damages can encourage the victim to file a lawsuit to obtain compensation, expose the illegal act and curb the illegal act[5].

The function of containment is even more so in computer software copyright infringement. Article 54 of the Copyright Law stipulates that "where a person intentionally infringes upon copyright or copyright related rights, and the circumstances are serious, he may be compensated for not less than one time but not more than five times the amount determined in accordance with the above method.", This kind of punitive compensation makes people who want to infringe the copyright of computer software have "concerns", because once they infringe the copyright of computer software, according to the law, they will be in a worse situation than when they are not engaged in infringement, and the implementation of infringement will not pay off, so that they can better curb the occurrence of infringement of computer software copyright.

4. Necessity and Precautions of Introducing Punitive Compensation System

The introduction of punitive compensation system for infringement, on the one hand, is based on the relevant decisions and arrangements of the CPC Central Committee and the State Council, to implement the requirements put forward in the 2017 inspection report and review comments on copyright law enforcement of the Standing Committee of the National People's Congress, and to solve the problem of light punishment for infringement; On the other hand, it aims to strengthen the connection with other laws. The punitive damages system for infringement introduced in the revision of the Copyright Law in 2020 not only follows the same line as Article 1185 of the Civil Code, but also complements Article 63 of the Trademark Law, Article 71 of the Patent Law and Article 17 of the Anti unfair Competition Law. Since then, China has established a systematic basic system of punitive damages for intellectual property rights, increased the cost of infringement of intellectual property rights, has a strong deterrent effect on combating repeated infringement and large-scale infringement, and has great theoretical and practical significance for strengthening the protection of intellectual property rights holders and related industries[7].

The necessity of introducing punitive damages system can be roughly summarized as the following three points: First, it is difficult to prevent infringement. Professor Wu Handong once wrote in his paper that the damage to intellectual property is essentially a damage to intellectual property or intangible assets[8]. It is precisely because of the intangibility and replicability of copyright that infringement cases occur frequently, and most infringers are lucky enough to think that if they are caught, they will take out their profits to compensate for the losses, and if they are not caught, they will gain profits in vain. It is difficult for obligees themselves to control their rights from being infringed by others, and it is also difficult to prevent computer software copyright infringement. This requires the introduction of punitive compensation mechanism to curb the occurrence of such violations from the root[9].

Secondly, copyright is open in form. The object of intellectual property has the characteristics of openness in form. For example, trademarks and patents have been archived in relevant administrative departments and can be viewed by all. Published works can be purchased and read in bookstores and libraries, which facilitates infringers to find the object of intellectual property that can bring them the most illegal benefits through comparison. In addition, with

the rapid development of network technology, the infringement of computer software copyright is easier.

Finally, the infringer has a high profit, while the actual loss of the obligee is difficult to calculate. The convenience of intellectual property infringement has brought high profits to the infringer, which is recognized by the legal community. However, the actual loss amount of the obligee is usually difficult to determine, and the future benefits are even more difficult to estimate. Therefore, the analysis and calculation of the actual loss of the obligee can be said to be very difficult. The protection of intellectual property rights is essentially the protection of limited monopoly, because it promotes the development of science and technology through protection on the premise of maintaining an appropriate balance between the interests of obligees and the interests of the public. Therefore, it is conditional to apply punitive damages to infringers who intentionally infringe upon intellectual property rights and the circumstances are serious, which will not undermine the above balance as the premise of protecting intellectual property rights[1].

From the above, we can know that the protection of intellectual property rights is very fragile and difficult to control, and infringement is very easy to occur. Therefore, we need to introduce a punitive compensation system to warn and curb infringers' illegal acts through this highly deterrent system, so as to better protect computer software copyright.

For the application of this article, it should be noted that, first of all, the torts for which punitive damages are applied also need to meet the two requirements of "intentional infringement" and "serious circumstances" on the basis of the requirements of general torts. For example, if the torts last for a long time, are large in scale, involve a large number of product types and quantities, or involve huge sales amounts, or constitute repeated torts, they can generally be considered to constitute "serious circumstances". Secondly, the calculation basis of punitive damages is the actual loss, illegal income or royalties. When claiming punitive damages, the obligee needs to provide evidence to calculate the compensation. Moreover, the Civil Code clearly stipulates that the application of punitive damages should be based on the request of the parties. As a subordinate law, the Copyright Law should be consistent with the provisions of the superior law. Therefore, it should be considered that the provisions of the separate laws of intellectual property rights actually endow the parties with the right to request the court to apply punitive damages. When the parties do not require the application of punitive damages, the court should not take the initiative to apply. If the court considers that the applicable conditions for punitive damages are met, it may exercise the right of interpretation. According to Article 2 of the Interpretation of Punitive Damages, the intellectual property right holder shall, at least before the end of the court debate in the first instance, make a request for the application of punitive damages, and specify the amount of compensation, the calculation method, and the facts and reasons on which it is based[3]. Finally, increasing the amount of compensation for infringement is one of the means to increase the punishment for infringement, but we can't simply believe that the higher the amount of compensation, the greater the protection of intellectual property rights, and the better the effect. The amount of punitive compensation must be reasonably determined according to the evidence on record, to ensure the correct implementation of the punitive compensation system for intellectual property rights, and to avoid abuse in practice[10].

5. Case Analysis of Punitive Damages in Computer Software Copyright Disputes

In the case of Suzhou Taosheng Network Technology Co., Ltd. and Chang Yanfu's infringement of computer software copyright, the court of second instance held that: "punitive damages are a special form of tort damages, and their application should be limited to prevent the abuse of

the system. The application of punitive damages should meet the requirements of the infringer's "intention" and "serious circumstances", including the determination of "serious circumstances". The following circumstances should be mainly considered: long infringement time, large scale and wide scope; Repeated infringement or repeated infringement after administrative punishment or court judgment; To engage in infringement; It has great damage and negative impact on the obligee; The obligee has suffered huge losses, including the sharp decrease in the value of the obligee's intellectual property rights and the damage to the obligee's goodwill caused by infringement; The infringer makes huge profits. In this case, though Chang Yanfu has the subjective intention of infringement, the existing evidence cannot prove that he has the above situation, and his infringement circumstances cannot reach the severity of punitive damages, so the punitive damages claimed by Taosheng cannot be supported.

6. Conclusions

Today, with the rapid development of science and technology, infringement is convenient and easy. Computer software copyright is open in form, and it is difficult to prevent infringement. In practice, it is difficult to accurately calculate the actual loss of the obligee and the illegal income of the infringer. Therefore, the existence of punitive compensation system is very necessary for the computer software copyright field. By giving full play to the compensation, punishment and containment functions of the punitive damages system, the cost of infringement is increased, and the infringement is restrained from the root, so as to better safeguard the rights of computer software copyright owners and create a good atmosphere for intellectual property protection.

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