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Enthusiastic claimants, reluctant courts: The empirical and critical analysis of punitive damages in Chinese intellectual property law

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Abstract

The availability of punitive awards varies across different common law jurisdictions. In recent years, China, as a civil law jurisdiction, has progressively introduced a comprehensive punitive damages system in Intellectual Property (IP) law in recent years. To investigate how this common law product functions in the civil law system, this paper scrutinizes the evolution and functions of punitive damages and depicts the map of punitive damages in Chinese IP law. Then this paper reports and analyses 657 IP judgments involving the application of punitive damages that were tried and decided in all parts of mainland China by all levels of courts from June 1, 2021, to May 31, 2022. Our empirical data shows that punitive damages are frequently sought by claimants, yet courts are reluctant to award them due to the complexities in determining the basis for calculation and judges' reluctance towards detailed legal reasoning. Furthermore, a critical analysis of the application of punitive damages in IP trials is provided, critiquing the court's preference for statutory damages, the complexity in determining the basis and multipliers for calculation, and the strict standard of proof, which accounted for the small portion of punitive damages awarded in judicial practices.

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KEYWORDS

Chinese intellectual property law, empirical legal study, punitive damages

1 | INTRODUCTION

Punitive damages have been playing an exceptionally potent role, serving as a supplementary sanction in exceptional cases where compensatory damages do not provide sufficient levels of deterrence and retribution.¹ Generally, in tort law, punitive damages are monetary damages awarded apart from compensatory damages when the defendant has engaged in malicious misconduct.² The term “punitive damages,” also known as “exemplary,” “vindictive” damages, and “smart money,”³ has an illustrious historical precedent in various jurisdictions.⁴ Similar provisions allowing for a multiple of actual damages could be found in ancient legal systems.⁵ Though the availability of punitive awards varies across different common law jurisdictions, punitive damages are viewed as nonexistent in continental European civil law nations.⁶ Following the civil law tradition, successful plaintiffs can only obtain compensatory damages, and the concept of punitive damages is considered contrary to the fundamental separation of criminal law and private law.⁷ However, as a unique jurisdiction of the civil law system,⁸ China seems to be more open to introducing punitive damages in private laws, notably in Intellectual Property (IP) law by drawing inspiration from the concept of enhanced damages in US IP law.⁹

Still, the implementation of such a common law product into the civil law context by Chinese courts remains an underdeveloped area of study. This study reports and analyses 657 IP judgments that involved punitive damages rendered across all regions of mainland China by courts at all hierarchical levels in the first year following the introduction of punitive damages in Chinese IP law. It aims to investigate how this imported legal mechanism, namely punitive damages, functions in the Chinese jurisdiction in practice. To begin with, Section 2 maps out the legal frameworks of punitive damages in the Chinese IP law and provides critical comments on related provisions. In addition, Section 3 presents a comprehensive empirical examination of the impact of IP punitive damages on Chinese IP litigation. Several hot issues, including how courts interpret statutory requirements and whether the introduction of a comprehensive IP punitive damage system will open the door to excessive punitive awards, are covered in this part, illustrated by various charts and tables. Furthermore, in Section 4, this paper provides a critical examination of statutory requirements and methods of gauging punitive damages. Finally, this paper provides recommendations for the application of punitive damages in Chinese IP law.

2 | PUNITIVE DAMAGES IN CHINESE IP LAW: A FRAMEWORK

2.1 | Punitive damages in Chinese law

In China, punitive damages were first adopted in Article 49 of the *Consumer Protection Law* in 1993, to cope with the unsound market and the prevalence of counterfeit goods at that time.¹⁰ Before the enactment of the *Chinese Civil Code*, punitive damages were implemented in various fields of law in a scattered manner, including *Labour Contract Law* (2007),¹¹ *Food Safety Law* (2009),¹² *Tort Law* (2009),¹³ *Tourism Law* (2013),¹⁴ *Trademark Law* (2013),¹⁵ *Seed Law* (2015),¹⁶ and *Anti-Unfair Competition Law* (2019 Amendment).¹⁷

In 2020, the *Civil Code* systematically regrouped and compiled the existing civil law into six books with 1260 articles. Punitive damages clauses in private law are also included in the *Civil Code*. Moreover, it codifies punitive damages as a part of Book I on General Provision in Article 179, providing that “[w]here any law provides for punitive damages, such a law shall apply.” The *Civil Code* sets up punitive damages for IP infringement, product liability, and environmental pollution, respectively.¹⁸

2.2 | Punitive damages in Chinese IP legal system

In general, a court may award compensatory damages, punitive damages, and statutory damages in IP trials. Compensatory damages may be awarded based on the amount of actual loss, the profits of the infringer, or the royalties of the disputed Intellectual Property Rights (IPRs). Punitive damages of one to five times the amount of actual loss, profits, and royalties may be awarded against the infringer if it committed the infringement intentionally under serious circumstances. When the above three bases for calculation are unavailable, the court may use its discretion to award statutory damages.¹⁹

In terms of the Chinese IP legal system, the *Civil Code* provides a general principle for the application of punitive damages for IP infringements. Meanwhile, punitive damages are formally established in the *Trademark Law*, the *Seed Law*, the *Anti-Unfair Competition Law*, the *Patent Law*, and the *Copyright Law*. Additionally, the Supreme People's Court issued a series of policy documents and judicial interpretations, further clarifying the application of punitive damages in IP trials. Finally, several regional courts released judicial guidance on punitive damages, providing detailed factors that courts must rely on when awarding punitive damages in IP trials.²⁰

2.2.1 | Laws

Punitive damage mechanism was first introduced in the Chinese IP system via the amendment of the *Trademark Law* in 2013.²¹ Compared to the fierce controversy over the revision of the *Copyright Law* and the *Patent Law*, academia and the industry have consistently urged the imposition of punitive damages on perpetrators of malicious infringement of trademark rights during the third revision of the *Trademark Law*.²² According to Article 63 of the 2013 *Trademark Law*, “[i]f the infringement is committed in bad faith (malicious) with serious circumstances, the amount of damages shall be more than one time, but less than three times of the amount determined in the aforesaid method.” Later, the 2019 Amendment to *Trademark Law* amended the multiplier to “more than one time, but less than five times.”²³ Punitive damages were introduced in the *Seed Law* in 2015 and amended in 2021 regarding the infringement of rights related to plant varieties.²⁴

Simultaneously, the 2019 Amendment to the *Anti-Unfair Competition Law of the People's Republic of China* included a new punitive damages mechanism. To be more specific, a multiplier of punitive damages at “more than one time but less than five times” was available only with respect to “malicious” infringement of trade secrets.²⁵ Following the 2017 revision of the *Anti-Unfair Competition Law*, the US government ignited the trade war with China, accusing it of insufficient and ineffective protection for foreign trade secrets.²⁶ Consequently, the introduction of punitive damages in the 2019 Amendment to the *Anti-Unfair Competition Law* was, in part, a quick response to the US government's allegations and “to facilitate the negotiation of a deal to end the trade wars.”²⁷

Furthermore, Article 1185 of the *Civil Code* marks the establishment of a punitive damages system in China in the form of a general rule, that not only covers all scopes of IPRs but also expands the availability of damages. That is, the petitioner shall have the right to seek corresponding punitive damages in cases where a tort is committed “intentionally” against another's IPRs under “serious circumstances.”²⁸ Furthermore, Article 179(2) stipulates that “[w]here any law provides for punitive damages, such a law shall apply.” As a special regime for damages, the requirement for applying punitive damages could benefit from greater specificity and clarity. Despite this, the *Civil Code* adopts a more generalized approach to punitive damages provisions.

To conform to the general rule established by the *Civil Code*, both Article 71 of the *Patent Law* and Article 54 of the *Copyright Law*, which were amended in October and November 2020, respectively, adopted a punitive damages mechanism, limited the scope of application of punitive damages to “intentional” infringements involving “serious circumstances,” and set the multiplier for punitive damages at “more than one time but less than five times.”²⁹ As a result, there are two different standards of subjective state of mind when determining punitive damages for IP infringement: “intentional” for copyright and patent infringements, and “malicious” for trademark and trade secret

infringements. Without proper judicial interpretation from the Supreme People's Court, the two different wordings will cause uncertainty when determining the subjective element of the infringer in practice.

Noteworthy, the above provisions do not indicate that the legislators have made duplicate rules on punitive damages. Theoretically, Article 1185 of the *Civil Code* serves as a general rule that provides protection for those IPRs that are not covered in existing IP laws, while punitive damages clauses in current IP legislation are considered specific rules for certain protected subject matters. For example, the basic standards of punitive damages provided in the *Civil Code* remain applicable when the infringer intentionally infringes on a third party's geographical indication under serious circumstances (Table 1).

2.2.2 | Judicial interpretations

The Supreme People's Court issued the *Interpretation on the Application of Punitive Damages in the Trial of Intellectual Property Cases* (hereinafter the *Interpretation*) in February 2021,³⁰ setting out explanations and clarifications regarding inconsistencies between the *Civil Code* and judicial practices. The *Interpretation* clarifies that the main purposes of implementing punitive damages for IPRs are to punish serious IP infringements and comprehensively strengthen IP protection.³¹ Besides, the *Interpretation* provides detailed requirements for determining subjective and objective elements, and the basis and multiplier of calculation when applying punitive damages in IP trials.

In particular, the *Interpretation* clarifies that the subject element "intention" includes the "malicious" act prescribed in Article 63 of the *Trademark Law* and Article 17 of the *Anti-Unfair Competition Law*.³² The *Interpretation* also concludes that the type of infringed IPRs, the status of the IPRs, the popularity of relevant products, the relation between the defendant and the plaintiff or party of interest, and other factors, should be fully taken into consideration when determining whether an infringement is intentional.³³ In terms of "serious circumstances," Article 4 states that the method and frequency of infringement, the duration of the infringement, its geographical scope, scale and consequences, the infringer's action during litigation, among other factors, should be thoroughly evaluated when determining an infringement has "serious circumstances."³⁴

Regarding the amount of punitive damages, Article 5 mandates that courts calculate punitive damages based on the plaintiff's actual loss, the defendant's illegal income or profits obtained from infringement, and a reasonable multiple of the license fee.³⁵ Additionally, Article 5(3) introduces a "obstruction of evidence" provision. It stipulates that the court may base its calculation on the plaintiff's claims and evidence if the defendant unjustifiably withholds relevant financial records or submits false documents.

As for the magnitude of punitive damages in IP trials, the defendant's subjective element, the seriousness of the infringement, and other factors should be evaluated by the court.³⁶ It is worth noting that neither the *Civil Code* nor IP sector-specific laws provide caps on the maximum sum of awards, leaving a great degree of flexibility to the courts.

Concerning procedural factors, the *Interpretation* states that the claimant that requests punitive damages shall specify the amount of compensation, calculation method, and the facts and grounds on which the request is based when filing the lawsuit. One should raise such a claim before the court debate concludes in the first instance trial. If the plaintiff adds the request for punitive damages in the trial of second instance, the court may conduct mediation between the parties, and shall notify the claimant to file a separate lawsuit if mediation fails.³⁷

3 | ENTHUSIASTIC CLAIMANTS, RELUCTANT COURTS: EMPIRICAL STUDY OF APPLICATION OF PUNITIVE DAMAGES IN IP TRIALS

In the United States, capricious, the practice of awarding capricious and arbitrary punitive damages has long drawn criticism.³⁸ Businesses complained that "skyrocketing" punitive damages imposed by juries were out of control, unpredictable, and imposed crippling financial costs on companies.³⁹ Likewise, concerns echoed by Chinese

TABLE 1 Summary of punitive damages clauses in IP laws.

Law	Cause of action	Subjective elements	Objective elements	Basis for calculation	Multiplier
Civil Code (2020)	IP infringement	Intentional	Serious circumstances	No	No
Patent Law (2020)	Patent infringement			1. Actual loss 2. Profit 3. License fee	1x ≤ X ≤ 5x
Copyright Law (2020)	Copyright infringement				
Seed Law (2021)	Plant variety right infringement				
Trademark Law (2019)	Trademark infringement	Malicious			
Anti-Unfair Competition Law (2019)	Trade secret infringement			1. Actual loss 2. Profit	

scholars highlight how disproportionate compensation in IP trials could lead to a chilling effect on the dissemination and exploitation of knowledge, potentially in turn impeding innovation and fair competition.⁴⁰

Prior empirical studies show that up to 2020, even though the number of cases in which punitive damages are awarded keeps rising, punitive damages are far from excessive and are rather rarely awarded in IP trials.⁴¹ Statistics from the Supreme People's Court indicate that in 2021, punitive damages were granted in 895 IP cases, representing just about 0.17% of all IP cases adjudicated that year.⁴² Experienced judges, academics and legal practitioners also raised some open questions about the application of punitive damages.⁴³ To date, however, there has been no comprehensive quantitative study about the impact of IP punitive damages on IP litigation after the introduction of "punitive damages" in IP law. This study examines critical questions surrounding punitive damages in IP law, such as judicial interpretations of intentionality and grave circumstances, and the potential for a comprehensive punitive damages system to lead to excessive awards.

3.1 | Methodology

This study employs an empirical methodology to investigate the frequency and extent of punitive damages awarded in Chinese IP trials. This study draws extensively on the empirical methodologies outlined in the prior empirical research. Particularly, this paper examines the methodologies for data access, coding, and defining research scope as utilized in a UK study,⁴⁴ alongside the methods Chinese scholars employ to gather and statistically analyze case data from various sources.⁴⁵

3.1.1 | Scope of the study

This study captures and reviews every decision in which punitive damages were sought, delivered between June 1, 2021, and May 31, 2022, electronically accessible to the public on China Judgments Online.⁴⁶ Judgments available on another professional legal database, Beidafabao (known as PKU Law),⁴⁷ were also cross-checked. The selection of this 1-year period was motivated by the significant uptick in copyright and patent cases involving punitive damages following the enactment of the "punitive damage clauses" in *Copyright Law* and *Patent Law* on June 1, 2021. Another reason for this selection is that the large and diverse range of published samples from this 1-year period allows us to examine how punitive damages were employed in IP trials across China. In addition, it is practically manageable to investigate a limited number of cases in detail and to draw meaningful conclusions about their application.

Electronically published decisions of the first, second instance, and petition for retrial are covered and examined in this study. In terms of jurisdictional scope, this study encompasses samples from courts at all levels across 25 provinces and municipalities in mainland China.

3.1.2 | Accessing the data

To retrieve the cases, the Chinese term '惩罚性赔偿' (in Chinese pinyin: Cheng Fa Xing Pei Chang; in English: punitive damages) was applied in the full-text search box of China Judgments Online. The time of publication was limited from June 1, 2021, to May 31, 2022. Causes of action were confined to "IP infringement and unfair competition."⁴⁸ Then 2523 results were organized by date of publication. However, sample cases that had no substantial relation to punitive damages were excluded in this research. Only the effective decisions were collected to avoid double counting. Each of these judgments was reviewed by the author, ultimately

selecting 657 samples according to two specific criteria: (1) punitive damages were “substantially” sought by the claimant, specifically including cases where the claimant presented a well-founded claim for punitive damages; and (2) punitive damages were awarded or refused on factual grounds, which means that judgments that only involved a passing reference to rules of punitive damages were excluded. In addition, the reasons why the claims were upheld and rejected by the courts are analyzed in detail, respectively.

3.1.3 | Coding the data

A group of elements was recorded when coding the cases. First, in terms of the level of trials, trials of first instance, second instance, and petition for retrial were selected. Second, five categories of causes of action, including copyright infringement, patent infringement, trademark infringement, unfair competition, and plant variety right infringement, were covered.⁴⁹ Third, generally, this study tries to categorize claimants as natural persons, corporations, and associations, while labeling the defendants as associations, corporations, Karaoke Bars (KTV), natural persons, and small businesses (restaurants, hotels, and teahouses). Fourth, the amounts of punitive damages requested and awarded are recorded. Fifth, the reasons why the claims were held or rejected are categorized. Finally, other useful and relevant information is recorded as notes.

3.1.4 | Limitations

This empirical study has two primary limitations concerning the selection of samples. First, there is the dominance of serial litigation between the China Audio–Video Copyright Association (CAVCA)⁵⁰ and Karaoke Bars in the successful copyright litigation category, which might influence the testing of the statistical significance of differences between groups. Moreover, this research does not cover all cases decided by Chinese courts in the selected 1-year period, due to the major impediments of online publication of judgments. As a result, punitive damages were awarded in 73 of the analyzed cases (11.11% of the sample cases) in this 1-year period. The percentage of punitive damages awarded in this research is similar to another empirical study of 698 punitive damages related IP cases in 2021 by a well-known Chinese IP database, IP House. It was discovered that punitive damages were only awarded in 105 IP cases (15.04% of the sample cases) in 2021.⁵¹

It is worth noting that not all of the judgments are available online.⁵² Other empirical studies reveal that only a small percentage of judgments are published on China Judgments Online,⁵³ and the phenomenon of selective publication is ubiquitous among Chinese courts.⁵⁴ Particularly, Supreme People's Court explicitly contends that a judgment rendered by a people's court may not be published on the Internet as the people's court holds it inappropriate to publish.⁵⁵ In practice, courts take advantage of the discretion granted by the above provision to shield the public from a significant number of judgments.⁵⁶ Moreover, some judges usually gather the cases decided previously and upload all the documents at the end of the year for the annual assessment.⁵⁷

Admittedly, unpublished judgments will inevitably affect the analysis and findings of this empirical research. However, the problem of online publication of judgments is beyond the scope of this study. Although 73 cases can be relatively hard to model, it is important to note that this study also attempts to examine the reasons for not awarding punitive damages in the other 584 cases. Moreover, to offset the negative effect caused by selection bias and “inevitable” undercounting, a series of leading and typical IP cases involving punitive damages will be further investigated. Furthermore, conventional wisdom about punitive damages derived from academic research may support a comprehensive analysis.

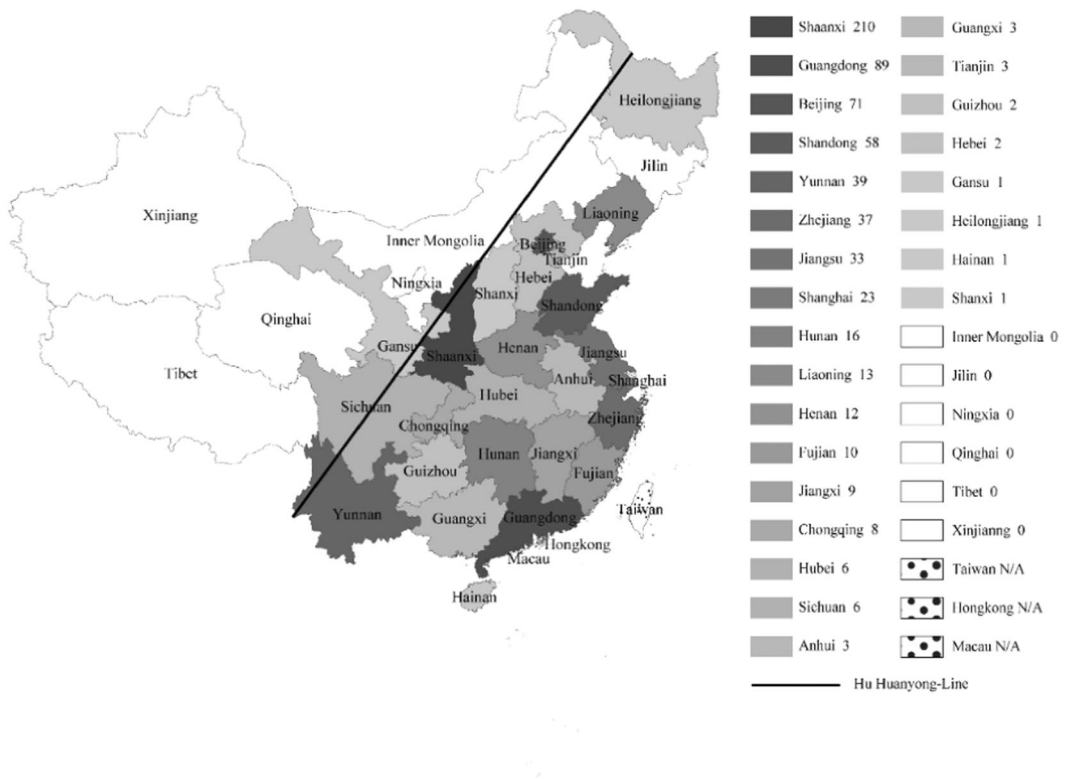


FIGURE 1 Geographical distribution of punitive damages claims in sample cases.

3.2 | Statistical analysis

3.2.1 | Geographical distribution

Figure 1 depicts the complete picture of the geographical distribution of punitive claims in IP trials in the 1-year period. In general, claimants elected punitive damages in trials of first instance (77.02%), second instance (22.68%), and petition for retrial (0.3%). From a geographical perspective, almost all the sample cases were decided by courts on the right side of Hu Huanyong-line.⁵⁸ Since over 94% of the population of China resides on 43% of its land, it is unsurprising that more intentional IP infringements with serious circumstances were committed in the eastern part of the country. Moreover, claimants from coastal areas sought punitive damages in IP trials more frequently than those from inland. For example, claimants from coastal areas like Guangdong (89), Shandong (58), Jiangsu (33) and Shanghai (23) elected punitive damages in more than 20 cases. A notable exception is Shaanxi (210), a province in central China, where claimants elected punitive damages in a majority of cases.⁵⁹

3.2.2 | Causes of action

Five categories of causes of action, including copyright infringement, patent infringement, trademark infringement, unfair competition, and plant variety rights infringement, are covered in this study.

As shown in Table 2, punitive damages were awarded in 73 (11.11%) cases. Most of the punitive damages claims in the sample pertained to copyright infringement (61.49%) and trademark infringement (28.77%). By

TABLE 2 Number and percentage of claims for punitive damages by cause of action.

Cause of action	Number	Awarded	Not awarded	Percentage of awarded (%)
Copyright	404	47	357	11.63
Patent	29	1	28	3.45
Trademark	189	23	166	12.17
Plant variety right	4	1	3	25
Unfair competition	31	1	30	3.23
Total	657	73	584	11.11

contrast, punitive damages were elected in only a small number of unfair competition disputes (4.72%), patent infringement (4.41%) and plant variety rights infringement (0.61%). An examination of the success rate of claims for punitive damages by cause of action reveals that the success rate of punitive damages claims in copyright (11.63%) and trademark cases (12.17%) far exceeds the success rate in patent (3.45%) and unfair competition (3.23%). It is also noteworthy that a large number of successful cases in the copyright group are derived exclusively from CAVCA's serial litigation.

3.2.3 | Type of claimant and defendant

This study categorized the claimants and defendants as association, corporation, Karaoke Bar (KTV), natural person, and small business (restaurants, hotels, and teahouses).

Statistics show that associations (49.62%) were the most common litigants, while natural persons were the least (2.44%). Corporations constitute the second largest claimant (47.94 per cent) while being the second most common defendant (42.92%) of the time. Karaoke bars were the largest defendants (43.84%) of the time, while less litigation was filed against small businesses (4.87%) and natural persons (8.37%). Of the 657 cases, the most common pairing of plaintiff and defendant can be found in the "music industry," namely the CAVCA and Karaoke Bars. This rights management association brought massive litigation against Karaoke bars, for providing unauthorized copyrighted content.

The success rate of associations (13.50%) is higher than that of corporations (8.89%) and natural persons (6.25%). Regarding the type of defendant, the Table 3 shows that punitive damages were awarded against corporations in 26 cases (9.22%), Karaoke Bars in 42 cases (14.58%), natural persons in four cases (7.27%) and small businesses in one case (3.12%). Punitive damages were awarded much more frequently against Karaoke bars than against other types of entertainment businesses like hotels, cafeterias, and teahouses. It is also worth noting that determining whether these patterns are representative of other time periods will require further investigation.

3.2.4 | Application of punitive damages

By breaking down the legal requirements of punitive damages, it can be concluded that three elements, including the plaintiff's application, the subjective state of mind of the defendant, and the gravity of the circumstances, are required to be evaluated by a court when awarding punitive damages in IP cases. Scholars believe that a lower standard, together with a nonexhaustive list of factors supporting "seriousness" of infringement, would lead to general concerns regarding excessive litigations and abuse of punitive awards.⁶⁰ Furthermore, scholars predict that this trend may lead to increasing social costs and chilling effects.⁶¹ However, the empirical study shows that

TABLE 3 Number and rate of punitive damages awards by type of claimant and defendant.

Type of claimant	Number	Awarded	Percentage of awarded (%)
Association	326	44	13.50
Corporation	315	28	8.89
Natural person	16	1	6.25
Type of defendant	Number	Awarded	Percentage of awarded (%)
Corporation	282	26	9.22
Karaoke bar	288	42	14.58
Natural person	55	4	7.27
Small business	32	1	3.12

TABLE 4 Number and percentage of reasons for rejecting punitive damages claim.

Reason for rejection	Number	Percentage (%)
Noninfringing	11	1.88
Withdrawal of punitive damages claim	19	3.25
Procedural reason	11	1.88
Claimed both statutory damages and punitive damages	4	0.68
No legal basis ^a	12	2.05
No intentional or/and serious circumstances finding	336	57.53
No basis or method for calculation	5	0.86
No evidence for actual loss, profit and license fee	154	26.37
Unspecified	28	4.79

^aCourts may find a claim of punitive damages has no legal basis when the infringement was committed before the related punitive damages clauses took effect.

punitive damages were rarely awarded, and courts rejected most of the claims for punitive damages for various reasons (Table 4).

Due to the intangible nature of IPRs, right holders find it arduous to prove their actual loss and the defendant's profit from infringement, as well as the license fee. Therefore, in practice, courts calculated compensatory damages using all three methods in only two cases, while awarding statutory damages in 582 cases. In the above cases, courts refused to award punitive damages in cases in which the act of the defendant did not constitute an infringement (1.88%), and the infringement was committed before the related punitive damages clauses took effect (2.05%). Punitive damages might not be awarded due to procedural reasons (1.88%) as the claimant did not claim punitive damages before the end of court debate in the trial of the first instance or failed to conduct a mediation after claiming punitive damages in the trial of the second instance. Additionally, 3.25% of the punitive award claims were withdrawn by claimants during the trials.

Claims of punitive damages in over half of the sample cases (57.53%) were rejected by courts because there was no sufficient evidence supporting the finding of the infringer's intention or/and the seriousness of the infringement. As the basis for calculating the amounts of punitive damages does not exist, judges refused to award punitive damages in 26.37% of the sample cases, even if the statutory requirements were met.⁶² Notably, in five cases (0.86%), the courts directly rejected the punitive damages claims when claimants could not provide a basis or

TABLE 5 Number of factors for determination of intention and seriousness when awarding punitive damages.

Determination of intention		Determination of serious circumstances	
Factor	Frequency	Factor	Frequency
Article 3.1	2	Article 4.1	50
Article 3.2	2	Article 4.2	0
Article 3.3	3	Article 4.3	1
Article 3.4	6	Article 4.4	0
Article 3.5	5	Article 4.5	14
Article 4.1	50	Article 4.6	1
Other factors ^a	6	Other factors ^b	6
Unspecified	3	Unspecified	4

^aHere the other factors include “concealing evidence of infringement,” “selling infringing products,” “trademark squatting,” and “free riding.”

^bHere the other factors include “seriously undermining the plaintiff’s goodwill,” “repetitive infringement,” and “selling seeds without license.”

method for calculating punitive damages. The courts also rejected 4.78% of the claims for punitive damages without offering further explanations.

3.2.5 | Determination of intention and serious circumstances

All IP laws require the judges to assess the subjective state of mind of the infringer and the gravity of infringement when awarding punitive damages. Article 3⁶³ and Article 4⁶⁴ of the *Interpretation* list several factors for determination of intention and seriousness, respectively. In addition, courts are also granted discretion to consider other factors that support the determination of an intentional act and serious circumstances.

Table 5 demonstrates that Article 4.1 serves as a primary factor for determining both the intention of the infringer and the gravity of the infringement in most cases (50) where punitive damages were awarded. Regarding the determination of intention, besides all the factors listed in Article 3 and Article 4, courts also took some other factors into consideration in trials, such as considering concealing evidence of infringement and free riding as intentional misconduct, and regarding repetitive infringement as serious circumstances. Furthermore, courts tend to consider an infringement an intentional act, referring to Article 4.5. However, the court awarded punitive damages without clarifying how it determined the intention of the infringer in three cases and the gravity of the infringement in four cases.

3.2.6 | Calculation of damages

As Figure 2 shows, the amounts of damages awarded in 30 (41.10%) of 73 cases were discretionary within the scope of statutory damages, without clarifying the multiplier for calculation. In addition, the amounts of damages awarded in 17 cases (23.29%) were based on the amounts of damages requested by claimants. For the remaining 26 cases (35.61%), the amounts of damages were the outcome of a specified basis times a multiplier. The basis for calculation varied, including actual loss (13.04%), profit (46.15%), licensee fee (15.38%), a discretionary amount (23.08%), and requested amount (3.85%).

Although all IP laws provide that the multiplier should be more than one time and less than five times, courts still adopted a multiplier of 0.5 times in two cases (7.69%). In general, the courts seem to be conservative in deciding the

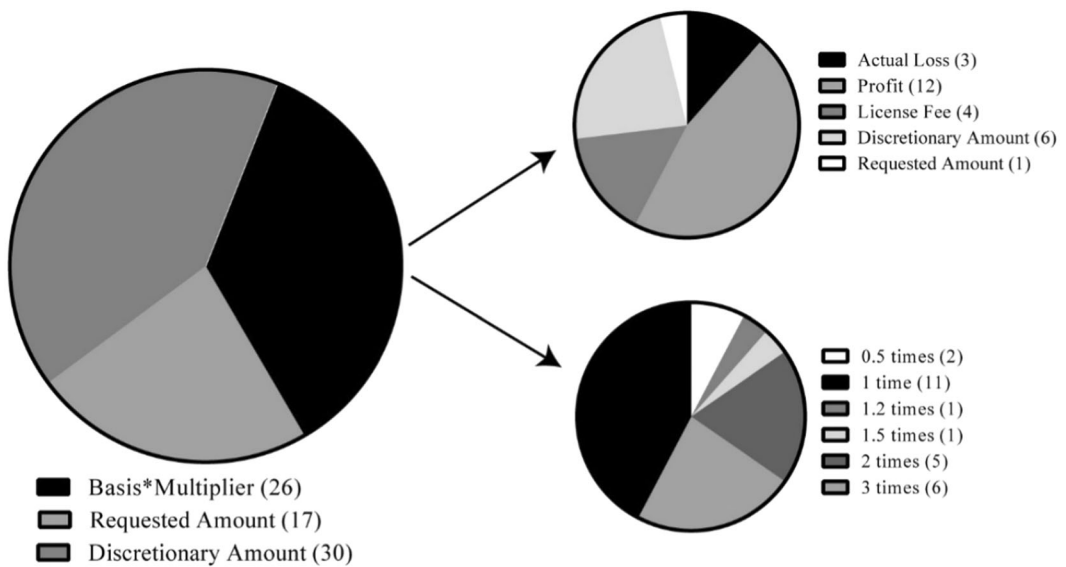


FIGURE 2 Type of basis for calculation when awarding punitive damages.

multipliers. Most of the cases were applied with a multiplier of one time (42.31%), two times (19.23%), and three times (23.08%). The multiplier can be a noninteger, as the courts adopted multipliers of 1.2 times and 1.5 times in trials.

Table 6 reveals the results of the ANOVA test of the three groups of damages awarded in the sample cases. It showed that there was a significant difference among the punitive group, discretionary group, and nonpunitive group with $F_{(2, 654)} = 41.734$, $p < 0.001$. Interestingly, no significant difference can be found between the nonpunitive and the discretionary groups. The Tukey's b method for the post hoc test showed the amounts of nonpunitive and discretionary damages are similar, while the amounts of punitive damages are significantly higher than others with mean = 4,384,351.60, SD = 11,090,211.70. In other words, the discretionary amounts of damages awarded in 47 cases indicate no punitive nature, but they are quite similar to statutory damages.

4 | (RE)POSITIONING PUNITIVE DAMAGES IN CHINESE IP LAWS: A CRITICAL ANALYSIS

Although punitive damages have been fully institutionalized in Chinese IP law, their application in judicial practice seems to be unsatisfactory. The above empirical study shows that from June 2021 to May 2022, the application of punitive damages in judicial practice has fallen short of legislative expectations. The introduction of punitive damages in IP law, especially a lower threshold for establishing "intention," made claimants more enthusiastic about electing them in IP trials. However, the courts' preference for statutory damages, the complexity of determining the basis and multipliers for calculation, and a strict standard of proof, account for the small proportion of punitive damages awarded in IP trials. Unsurprisingly, the gap between the law in books and the law in action is huge.

4.1 | Courts' preference for statutory damages over punitive damages

In judicial practice, judges are usually conservative towards the awarding of punitive damages.⁶⁵ Even if a right holder explicitly requests punitive damages, the judge either does not respond explicitly or refuses to award them

TABLE 6 Type of damages awarded.

Damages Awarded	N	Mean \pm SD	ANOVA			
			F	df-between-group	df-within-group	p
Nonpunitive ^a	584	179,251.08 \pm 781,189.41	41.734	2	654	<0.001
Discretionary ^b	47	274,835.30 \pm 668,416.53				
Punitive ^c	26	4,384,351.60 \pm 11,090,211.70				

^aThis group include compensatory damages and statutory damages awarded in 584 of the sample cases.

^bThis group refers to punitive damages that were awarded with a discretionary amount in the absence of basis for calculation in 47 of the sample cases.

^cThis group only contains punitive damages that explicitly awarded through calculation in 26 of the sample cases.

for reasons such as the difficulty of determining the basis or multipliers for calculation.⁶⁶ For example, in 47 IP cases, the judges decided to apply punitive damages but ultimately awarded de facto statutory damages. Specifically, the court awarded damages within the scope of statutory damages to the claimant, considering the subjective state of mind of the infringer, the seriousness of the infringement, and other factors.

Furthermore, aside from two cases where actual loss can be determined, judges awarded statutory damages in 629 out of 657 cases in total, accounting for 95.73% of the sample cases. This result resonates consistently with prior empirical studies on statutory damages.⁶⁷ Notably, courts tend to favor a discretionary amount of statutory damages when claimants are unable to substantiate their actual loss or the infringer's profit, even if the defendant committed infringement intentionally under serious circumstances in these cases.⁶⁸ Obviously, statutory damages are preferred by judges in practice, which ultimately undermines the legislative purpose and expected functions of the punitive damages mechanism. Admittedly, while several factors contribute to this unsatisfactory outcome, the reluctance of judges to engage in detailed legal reasoning, coupled with the complexities involved in calculating damages, emerges as primary reasons.⁶⁹

Indeed, before the introduction of punitive damages in Article 63 of 2013 Amendment to the *Trademark Law*, statutory damages functioned as the "last-resort" for calculating damages when the right holder's actual loss, the profit of the defendant and a reasonable license fee are unavailable.⁷⁰ In essence, statutory damages are designed to provide a straightforward and efficient method of determining the amount of compensatory damages in cases characterized by a high degree of uncertainty.⁷¹ However, findings from this empirical study indicate that courts continue to favor statutory damages over punitive damages for achieving punitive and deterrent objectives, even following the punitive damages system's introduction. The "last resort" remains the most vital tool to punish intentional infringers and deter the reoccurrence of intentional infringements in judicial practice.⁷²

Generally, judges are reluctant to award punitive damages for several practical reasons. On the one hand, legal professionals have observed a persistent deficiency in articulating legal reasoning across judgments in Chinese practice.⁷³ Such deficiency can also be observed in the sample cases where judges refused to specify the reason for rejecting punitive damages.⁷⁴ Practically, Chinese judges are reluctant to provide detailed legal analysis in their judgments as they are overloaded with piles of cases under tight deadlines⁷⁵ and confronted with the pressure of lifetime responsibility for the judgments they decide.⁷⁶ Therefore, statutory damages have become an "economically reasonable" choice for judges in deciding damages in IP trials, as they do not have to get themselves entangled with the complex and time-consuming investigations of statutory requirements and the basis and multiplier for calculation.⁷⁷ Furthermore, a path dependency on statutory damages, coupled with certain extra-legal factors such as judicial conservatism, makes some judges subjectively inclined to favor statutory damages in IP trials.⁷⁸ In certain sample cases, courts allocated statutory damages to the plaintiff, while taking into account punitive factors such as the infringer's intent and the gravity of the infringement. By doing so, judges may draw upon their accumulated judicial experience from previous trials to punish malicious misconduct, while concurrently

avoiding providing detailed legal reasoning for subject and object tests and a complex calculation of damages at the same time. Although the Supreme People's Court urges courts of all levels to improve the quality of their legal reasoning in adjudicative instruments,⁷⁹ Chinese judges exhibit a reticent approach to extensive legal reasoning, driven by the rationale that brevity reduces the potential for errors and conserves time. Ultimately, the abuse of statutory damages discourages the claimant from proactively providing proof of their actual loss and profits of the infringer, and further impedes the application of punitive damages, thus forming a "vicious circle."

To change the status quo that courts award excessive statutory damages but only rare punitive damages in IP trials, scholars suggest imposing certain restrictions on the application of statutory damages. For example, statutory damages awards should be awarded upon a claimant's request,⁸⁰ or plaintiffs should be required to prove that all nonstatutory forms of damages are inapplicable before applying statutory damages.⁸¹ However, less application of statutory damages does not necessarily result in an increase in punitive awards. Instead, this paper argues that it is paramount to unify the standards concerning the determination of punitive damages, such as the determination of intention and seriousness, the basis for calculation, and a reasonable multiplier.

4.2 | Intention and serious circumstances: An appropriate standard for misconduct

Punitive damages allow courts to award an increased amount of damages that aim at imposing an additional pecuniary burden on the infringer as a result of their subjective blameworthiness. When referring to the legal texts, judges become increasingly confused that the subjective element for awarding punitive damages in *Trademark Law* and *Anti-Unfair Competition Law* is "malicious," while the *Civil Code*, *Copyright Law*, and *Patent Law* define it as "intentional."⁸² Some judges even adopted divergent standards in evaluating the subjective state of mind of the infringer in different types of IP trials.⁸³ Regarding the objective elements, some factors listed in Article 4 were rarely taken into consideration by courts in practice.

4.2.1 | Establishing "intention" under Chinese IP law

Nonetheless, the Supreme People's Court timely issued the *Interpretation* in response to this tricky problem before the NPCSC made a clarification. Article 1 of the *Interpretation* clarifies that the subject element "intention" includes "malice,"⁸⁴ indicating that "malicious" should be interpreted as "intentional" in judicial practice, despite some semantic differences. Theoretically, the *Interpretation* lowers the threshold for establishing the subjective state of mind for awarding punitive damages. For punitive damages to be available, the defendant must have known, or ought reasonably to have known, that they were infringing others' legitimate rights.⁸⁵ It is reasonable to conclude that this clarification in Article 1 of the *Interpretation* encourages the election of punitive damages in the subsequent IP trials, because the possibility of a punitive-damages award is a low-risk, high-reward proposition.⁸⁶

Article 3 of the *Interpretation* lists various specific circumstances under which the court may initially find that the defendant has willfully infringed.⁸⁷ The list is nonexhaustive, and the presumption of "intention" can be rebutted if the defendant is able to present evidence that proves otherwise. However, in 50 of the 73 sample cases that were awarded punitive damages, the subjective state of mind of an infringer is considered intentional if the infringer continues to commit the same or similar infringement after receiving administrative punishment,⁸⁸ or a court ruling⁸⁹ or injunction⁹⁰ due to prior infringements. Interestingly, the above circumstances are covered in Article 4 of the *Interpretation* which provides subjective elements for determining "serious circumstances."⁹¹ Although the two elements are logically juxtaposed, they cannot be separated in practice. For most judges, the objective elements may also serve as important references for determining the intention of the infringer.

Furthermore, based on the specific conditions of the cases, the courts interpret the term "intentional" more flexibly and broadly than what is written in the *Interpretation*. The intention of an infringer is determined based on

their knowledge, which encompasses not only the knowledge of the existence of others' IPRs, but also knowledge of the high probability that their act might infringe on other's IPRs. The subjective state of mind of an infringer may be considered intentional if they commit activities such as trademark squatting,⁹² selling infringing products,⁹³ repetitive infringing activities,⁹⁴ and free riding.⁹⁵

4.2.2 | Identification of "serious circumstances" under Chinese IP law

In judicial practice, the determination of the gravity of an infringement is always closely tied to the assessment of the subjective state of the infringer. Article 4 of the *Interpretation* provides a miscellaneous provision that grants courts discretion to assess the gravity of an infringement on a case-by-case basis in determining whether it was conducted under serious circumstances.

Among the 73 IP cases that were awarded punitive damages, the courts explored various factors that may support the determination of "serious circumstances." As mentioned above, the courts assume an infringement is under serious circumstances when a defendant continues to commit the same or similar infringement after receiving administrative punishment or a court ruling or injunction due to prior infringement. Other factors were also taken into consideration in a few cases, such as "selling a large number of infringing products,"⁹⁶ "committing infringement for a long time,"⁹⁷ "committing infringement on a large scale,"⁹⁸ "committing infringement in a large geographical scope,"⁹⁹ "selling infringing products that endanger personal health and safety,"¹⁰⁰ "selling seeds without license,"¹⁰¹ "seriously undermining the plaintiff's goodwill,"¹⁰² and "repetitive infringements."¹⁰³

4.2.3 | A freeride on public power: An effective litigation strategy?

Article 6 of the *Interpretation* articulates that "where the defendant claims the reduction or exemption of liability for punitive damages on the ground that administrative fines or criminal fines have been imposed on the same infringement and such fines have been fully paid, the people's court shall not support such a claim."¹⁰⁴ That said, despite the concerns about double jeopardy, the defendant might be subjected to administrative punishment, compensatory damages, punitive damages, or even criminal punishment for the same infringement.¹⁰⁵ Additionally, Article 2 of the *Interpretation* provides that "if the plaintiff claims punitive damages in the trial of the second instance, the court may conduct mediation under the principle of respecting the parties' willingness, and shall notify the plaintiff to file a separate lawsuit if mediation fails."¹⁰⁶ Under this provision, a claimant awarded damages in one lawsuit may file another lawsuit seeking punitive damages for the same infringing activity. This may encourage claimants to seek more damages by free riding on public power.

On the one hand, for plaintiffs, turning a private dispute into a criminal prosecution or administrative proceeding would be tantamount to applying the power and resources of the state to conduct the necessary investigation for themselves. Considering the scenario where a right holder claims punitive damages in civil litigation after the defendant has received a criminal or administrative penalty. Legal authorities have already gathered pertinent evidence, some of which the claimant could not collect promptly. That evidence could also prove the intention of the infringer and the seriousness of the infringement. More importantly, evidence collected through criminal or administrative measures significantly reduces the cost to the claimant and makes it more likely that the claim will eventually be upheld by the court.

On the other hand, judges tend to rely on prior administrative orders, court rulings, and injunctions to decide cases because the relevant authorities have already conducted the necessary investigations in the former proceedings. Consequently, the whole procedure will be less time-consuming if the judges refer to prior court rulings or administrative decisions. In practice, the judges awarded punitive damages against an infringer simply because he or she had received a prior court decision or administrative penalty due to previous infringement.¹⁰⁷

However, researchers and legal practitioners should neither have unjustified expectations regarding the positive effects of punitive damages, nor ignore their potential detrimental impacts on the public. For example, CAVCA benefited the most by adopting this free-riding strategy. In a series of lawsuits, they sought punitive damages by simply demonstrating that the defendants (mostly karaoke bars) had received court rulings or administrative fines due to previous copyright infringements. As a result, the court awarded punitive damages in 42 out of 288 lawsuits against karaoke bars, which is much higher than other types of defendants.¹⁰⁸ Therefore, it is more difficult for karaoke bar owners to operate their businesses because they are more likely to receive punitive damages in IP trials. In a broader sense, the primary goal of punitive damages is to maintain a fair balance between efficient protection of the IPRs and effective deterrence and punishment of misconducts.¹⁰⁹ Thus, the courts should not abuse their discretion to simplify the requirements for granting punitive damages, but rather follow the instructions of the *Interpretation* and fully examine the two statutory requirements. Furthermore, the courts should stick to the principle of proportionality and try to avoid imposing excessive burdens on infringers.

4.3 | Calculation of punitive damages

Logically, a lower standard for establishing the intention of infringers without further limitations on the determination of the gravity of infringement might lead to more punitive awards in IP trials. However, the above empirical study reveals that punitive damages were awarded in only 11.11% of IP cases in which claimants substantially elected them. The primary reason is that the complexity of proving the basis for calculation leads to a low success rate of punitive claims. If punitive damages are not available due to a lack of solid evidence of compensatory damages, then statutory damages will be applied. The extremely low rate for application of compensatory damages subsequently affects the frequency of awarding punitive damages in IP trials.

4.3.1 | Identifying the basis for calculation

Due to the intangible nature of IPRs, the likelihood of precisely assessing the loss, profit, and royalties is exceedingly low.¹¹⁰ Emphasizing the precise calculation of the basis would possibly render these three methods unusable and make punitive damages ineffective. Thus, those infringers who merit punishment and deterrence may escape punitive damages due to the absence of a basis for calculation.

To further alleviate the “difficulty of proof,” it is reasonable for courts to hold a lower level of expectation on precision of calculation. Thus, in judicial practice, a plaintiff does not need to prove the exact amount of a punitive claim. Instead, they can prove either a specific amount or a reasonable range of damages. Judges, therefore, should not overly concern themselves with the precise amount of damages to be awarded when applying the rules of calculation. Based on the evidence provided, courts may gauge the basis for calculation by referring to a rough estimation of the actual loss, profit, or royalties. For example, the Wenzhou Intermediate People's Court held that “it is not appropriate for the court to simply reject a claim of punitive damages because the basis for calculation cannot be determined precisely when the right holder has made every effort to provide it.”¹¹¹ Thus, the court awarded three times punitive damages based on a rough estimation of the actual loss to the claimant.¹¹²

Furthermore, where part of the damages arising out of the same infringement can be determined, punitive damages may be applied to the said part as required by the claimant.¹¹³ In a recent trademark case, the defendant argued that punitive damages cannot be awarded if precise amounts of the basis for calculation cannot be ascertained. This argument was rejected by the Shanghai IP Court on the grounds that it would undermine the punitive damages mechanism's functions of deterrence and punishment. Therefore, the court ruled that, for the part of damages that can be determined by the evidence provided, punitive damages can be awarded to this part; as for the rest of damages that are difficult to calculate, statutory damages may be applied to this part separately.¹¹⁴

4.3.2 | Obstruction of evidence mechanism

In IP trials, most claimants are unable to provide evidence of the basis for their calculations because, in most cases, the relevant account books and materials are under the control of the infringers. The evidence obstruction mechanism stipulated in IP law may be applied to encourage claimants to produce sufficient evidence to support their claims.¹¹⁵ Under this mechanism, the court may order the infringer to submit the account books and materials related to the infringement that are under their control. Where the infringer fails to provide such material or provides false materials, the court may determine the amount of compensation in reference to the claims of the right holder and the evidence furnished thereby. In practice, some courts adopted a preponderance of the evidence standard to support a plaintiff's claim where the defendant refused to submit evidence under its control without justification, deciding a reasonable basis for calculating punitive damages.¹¹⁶ Furthermore, the claimant may apply to the court for an investigation and the collection of evidence and materials that are under the control of a third party. For example, in *FILA v Zhongyuan Shoes*, the Beijing IP Court requested that the online platforms provide access to the transaction records of the defendant to determine the basis for the calculation.¹¹⁷

4.3.3 | Determination of the multipliers

Article 6 of the *Interpretation* requires the court to fully consider the infringer's subjective state of mind, the gravity of the infringement, and other factors when determining the multiplier of punitive damages. In general, the subjective state of mind and the seriousness of the infringement reflect the degree of culpability, which determines the amount of punitive damages. As a result, the court may adopt a reasonable multiplier within the statutory range by referring to the infringer's subjective state of mind and the infringement's objective seriousness. Nevertheless, to avoid excessive punishment for the infringer, the court may adopt a lower multiplier for calculating the amount of punitive damages if the infringer has already fully paid either the administrative or criminal fines for the same infringement. Article 6 of the *Interpretation* only sets out the factors to be considered in determining the multiplier and grants the court discretion to perform a comprehensive determination of the multiplier on a case-by-case basis.

For most courts, interpreting the statutory limitation on multipliers for calculation is a tricky question. Under Chinese IP sector-specific laws, if an infringer intentionally infringes IPRs and falls under serious circumstances, compensation may be determined at one to five times the amount determined by referring to actual loss, profit, and royalties. Some courts held that the total amount of compensation should be the sum of the basis times the multiplier determined.¹¹⁸ Nonetheless, if the defendant intentionally commits the infringement under serious circumstances, the court will not award extra compensation if it adopts a multiplier of one.¹¹⁹ Other courts decided that the total damages should be the sum of the calculated basis plus the basis multiplied by the determined multiplier.¹²⁰ Consequently, the claimant may obtain compensation consisting of more than two times and less than six times the basis determined, which contradicts the statutory language. Moreover, courts have adopted a multiplier of 0.5 times, resulting in compensation set at 1.5 times the calculated basis.¹²¹

Scholars suggest removing the statutory limit on multipliers in the relevant clauses, allowing courts to determine a reasonable multiplier based on the specific circumstances of the case.¹²² However, from the perspective of legal practice, this paper considers the above argument untenable. Removing the statutory limit would grant judges greater discretion in determining the multiplier through case-by-case analysis. This could inevitably lead to an increased risk of either excessive or insufficient awards. Punitive damages punish the infringer and deter potential infringers from similar misconduct in the future, but a grossly excessive punitive damages award serves no legitimate purpose and constitutes an arbitrary deprivation of property.¹²³

5 | CONCLUSION

Punitive damages were "imported" into China's legal system through legal transplantation from the common law system, particularly the US IP law, with punitive damages clauses in Chinese IP law being the most recent examples.¹²⁴ Indeed, the punitive damages system in Chinese IP law and enhanced damages in US IP law share similarities in deterring potential misconduct and punishing infringers from a functional comparative perspective.¹²⁵ However, significant differences in legal systems, such as sources of law and modes of trial, may lead to different outcomes in judicial practice. In addition, the path dependency of Chinese judges and extra-legal factors further impede the application of punitive damages in IP trials. Therefore, more comparative studies on the application of punitive damages in US IP trials, such as the role of the jury,¹²⁶ and the constitutional constraint on the amount of punitive award,¹²⁷ may provide practical implications for both judicial practice and the theoretical framework of Chinese IP punitive damages systems.

Nevertheless, statutory damages remain the primary method to punish intentional infringers and deter the reoccurrence of intentional infringements, while a clear and comprehensive guide for awarding punitive damages in IP trials is in the making. Admittedly, it will take considerable time and legal resources to amend the relevant legal provisions. Rather, on the one hand, further clarification concerning multiplication should be introduced in the form of a judicial interpretation or a leading case to clear up confusion in practice. For example, the Supreme People's Court should clarify that judges are required to provide a full and clear explanation regarding the calculation of damages in the judgment. Moreover, where the evidence provided allows for determining part of the damages arising from the same infringement, punitive damages may be applied, while statutory damages may be applied to the portion that is challenging to calculate separately. In addition, the total amount of compensation shall be the sum of the basis and the basis times the multiplier determined, and the multiplier can be noninteger, but should be within the statutory range of one to five times. Furthermore, the Supreme People's Court may provide detailed explanations and instructions on the interpretation of statutory requirements and calculation of damages in a series of leading cases to unify the standard for the application of punitive damages. On the other hand, before introducing such clarification, the most important task is to make a consistent and proportionate interpretation to maintain law enforcement predictability.

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DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available in China Judgements Online 中国裁判文书网 at <https://wenshu.court.gov.cn>. These data were derived from the following resources available in the public domain: <https://wenshu.court.gov.cn/>, <https://wenshu.court.gov.cn/>.

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ENDNOTES

¹ Jason Taliadoros, 'The Roots of Punitive Damages at Common Law: A Longer History' (2016) 64 CSLR 251.

² John Y. Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 CJTL 391, 395.

- ³ David G. Owen, 'A Punitive Damages Overview: Functions, Problems and Reform' (1994) 39 Vill. LR 363, 364.
- ⁴ Richard C. Ausness, 'Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation' (1986) 74 KLJ 1, 3.
- ⁵ Ibid, at 3-4. Similar provisions allowing some multiple of actual damages could be found in the legal systems of ancient Babylonia, Israel, Rome, India and medieval England. See also Taliadoros, Jason, 'Thirteenth-Century Origins of Punitive or Exemplary Damages: The Statute of Westminster I (1275) and Roman Law' (2018) 39 JLH 278.
- ⁶ Cedric Vanleenhove, 'A Normative Framework for the Enforcement of US Punitive Damages in the European Union: Transforming the Traditional No Pasaran.' (2016) 41 VLR 347; Volker Behr, 'Myth and Reality of Punitive Damages in Germany' (2004) 24 JLC 197.
- ⁷ Helmut Koziol, 'Punitive Damages: An European Perspective' (2008) 68 LLR 741, 748, 755-56.
- ⁸ Lei Chen, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' (2010) 78 TR 159.
- ⁹ Dong Zhu, 'Commentary on article 1185 of the Civil Code (Punitive damages for IP infringement)' (2022) 9 Intellectual Property 109. See also 35 U.S. Code § 284 (2), 15 U.S. Code § 1117 (a) and (b).
- ¹⁰ Article 55 of *Consumer Protection Law* (enacted in 1993, amended in 2009 and 2013). However, Chinese scholar Jin Fuhai argues that punitive damages were first adopted in Article 232 of Chinese Civil Procedure Law in 1991. See Jin Fuhai, *Study on Punitive Damages Mechanism* (Law Press 2008), 1.
- ¹¹ Abolished. Article 82 and 87 of *Chinese Labour Contract Law* (enacted in 2007, amended in 2012, abolished on 2020).
- ¹² Amended. Article 148 of *Food Safety Law* (enacted in 2009, amended in 2015, 2018 and 2021).
- ¹³ Abolished. Article 47 of *Tort Law* (enacted in 2009, abolished in 2020).
- ¹⁴ Amended. Article 70 of *Tourism Law* (enacted in 2013, amended in 2018).
- ¹⁵ Amended. Article 63 of *Trademark Law* (enacted in 1982, amended in 1993, 2001, 2013 and 2019).
- ¹⁶ Article 72 of *Seed Law* (enacted in 200, amended in 2004, 2013, 2015, 2021).
- ¹⁷ Article 17 of *Anti-Unfair Competition Law* (enacted in 1993, revised in 2017 and amended in 2019).
- ¹⁸ Article 1185, Article 1207, and Article 1232 of *the Civil Code*.
- ¹⁹ Statutory damages may be awarded by court in patent infringement within the range of RMB 30,000 to RMB 5 million, in trademark infringement with no more than RMB 5 million, in copyright infringement within the range of RMB 500 to RMB 5 million.
- ²⁰ Shenzhen Intermediate People's Court (2020), Tianjin Higher People's Court (2020), Shandong Higher People's Court (2022), Zhengzhou Intermediate People's Court (2022) and Beijing Higher People's Court (2022). Unlike the judicial interpretation issued by the Supreme People's Court, those guidelines are issued by Higher People's Court and Intermediate People's Court, and only offer guidance on judicial practice for courts of certain regimes.
- ²¹ Article 63 of *Trademark Law* (n 15).
- ²² Weijun Zhang, Lizhou Wei, and Yanbing Li, 'The Third Revision of Chinese Trademark Law-Analysis and Comment' (2014) 45 IIC-IRIPCL 556.
- ²³ Article 63 of *Trademark Law* (2019 Amendment).
- ²⁴ Article 72 of *Seed Law* (2022 Amendment).
- ²⁵ Article 17 of *Anti-Unfair Competition Law* (2019 Amendment).
- ²⁶ Kelly Olson, 'China Respects Others' Trade Secrets—Unless it Wants Something, Experts Say' (CNBC 2018) <<https://www.cnbc.com/2018/10/04/trade-secret-protection-remains-a-challenge-in-china-even-experts.html>> accessed 10 October 2022.
- ²⁷ Paolo Beconcini, 'The State of Trade Secret Protection in China in Light of the US-China Trade Wars: Trade Secret Protection in China before and after the United States-China Trade Agreement of January 15, 2020' (2020) 20 UIC RIPL 108, 112.
- ²⁸ Article 1185 of the *Civil code*.
- ²⁹ Article 71 of *Patent Law*; Article 54 of *Copyright Law*.
- ³⁰ Judicial Interpretation [2021] No. 4 of the Supreme People's Court. *Interpretation on the Application of Punitive Damages in the Trial of Intellectual Property Cases*, issued by the Supreme People's Court on 3 March 2021.
- ³¹ Ibid.

- ³² Ibid, Article 1.
- ³³ Ibid, Article 3.
- ³⁴ Ibid, Article 4.
- ³⁵ Ibid, Article 5.
- ³⁶ Ibid, Article 6.
- ³⁷ Ibid, Article 2.
- ³⁸ Theodore Eisenberg, Michael Heise, Nicole L. Waters, and Martin T. Wells, 'The Decision to Award Punitive Damages: An Empirical Study' (2010) 2 JLA 577; Peter S. Menell, Mark A. Lemley & Robert P. Merges, *Intellectual Property in the New Technological Age: 2018* (2018), 838. (Punitive damages go beyond "the unjust nature of restitution of copyright law"); Patrick R. Gool, 'Corrective Justice and Copyright Infringement' (2014) 16 VJETL 251, 285. (Punitive damages are considered "unjust, over-compensatory, and unnecessary"). Péter Mezei, 'Copyright Liability and Music 'Piracy': Capitol Records v Thomas-Rasset' (2021). In: Enrico Bonadio and Aislinn O'Connell (eds.), *Intellectual Property Excesses* (Hart Publishing 2022).
- ³⁹ Sony BMG Music Entertainment v. Tenenbaum, 721 F.Supp.2d 85 (2010); Capitol Records Inc., et al., v Jammie Thomas-Rasset, 692 F.3d 899 (2012). See also Eliot T. Tracz, 'Half Truths, Empty Promises, and Hot Coffee: The Economics of Tort Reform' (2017) 42 SHLJ 311.
- ⁴⁰ Yinliang Liu, 'Categorized Application and Risk Avoidance of the Intellectual Property Punitive Damages' (2022) 14 CJL 171; Gunagiang Zhang, 'The Construction of a Penalty System for IP Damages' (2020) 5 LS 119. Shujie Feng, Xiao Ma, 'To Increase Damages of IP Infringement in China: A Double-Edged Sword for the Market' (2019) 53 JWT 39; Ge Jiang, 'The nonpunitive Nature of 'Punitive Damages' in Copyright and Patent Law, (2015) 6 CJL 80.
- ⁴¹ Fusheng Ouyang, 'Determination of the Amount of Punitive Damages for Infringement of IPRs: On the Predicament of the Application of Article 1185 of the Civil Code' (2020) 10 EIP 74. The author conducted an empirical study of the application of punitive damages from May 2014 to December 2019 and found punitive damages were awarded only in four cases out of 159 valid trademark cases; See also Ying Zhan, 'The Reinvestigation and Reconsideration of the Current Judicial Situation of Compensation for IP Infringement in China' (2020) 38 LS 191. Zhan conducted an empirical study of the application of punitive damages from January 2012 to December 2015, and found that punitive damages were awarded only 1 case out of 3085 valid trademark cases.
- ⁴² According to the statistics published by the Supreme People's Courts, 519,418 IP cases were decided by all levels of courts in China in 2021. See Supreme People's Court, *Intellectual Property Protection by Chinese Courts in 2021* (People's Court Press 2022), 51. <<https://www.ncac.gov.cn/chinacopyright/upload/files/2022/4/6c4fc69b0553ba40.pdf>> accessed 22 September 2022.
- ⁴³ Fusheng Ouyang (n 46).
- ⁴⁴ James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 OJLS 90.
- ⁴⁵ Fusheng Ouyang (n 46), Ying Zhan (n 46).
- ⁴⁶ China Judgments Online is an online public database which offers the largest collection of judgments and decisions from Chinese courts. It is supported by the Supreme People's Court.
- ⁴⁷ PKU Law is an online judicial database for both Chinese and English-language resources on Chinese law founded and maintained by Chinalawinfo Co., Ltd., and the Legal Information Centre of Peking University.
- ⁴⁸ All cases were collected through China Judgments Online from 1 August to 2 October 2022. See <[https://wenshu.court.gov.cn/website/wenshu/181217BMTKHNT2W0/index.html?pageld=8aacc40aa060f182c13fb7b4a0bde02e&s21=\(2021\)%E8%BE%BD0192%E6%B0%91%E5%88%9D2054%E5%8F%B7](https://wenshu.court.gov.cn/website/wenshu/181217BMTKHNT2W0/index.html?pageld=8aacc40aa060f182c13fb7b4a0bde02e&s21=(2021)%E8%BE%BD0192%E6%B0%91%E5%88%9D2054%E5%8F%B7)> accessed 2 October 2022.
- ⁴⁹ Article 123 of the *Civil Code* provides that "intellectual property rights are the proprietary rights enjoyed by right holders in accordance with the law in respect of the following objects: (1) works; (2) inventions, utility models, and designs; (3) trademarks; (4) geographic indications; (5) trade secrets; (6) layout designs of integrated circuits; (7) new varieties of plants; and (8) other objects specified by laws."
- ⁵⁰ China Audio-Video Copyright Association (CAVCA) was established in 2008 and is the only collective management organization for copyrights of sound recordings and music videos in China, approved by the National Copyright Administration of the People's Republic of China (NCAC) and registered with the Ministry of Civil Affairs of the People's Republic of China (MCAC). A brief introduction of CAVCA can be accessed at <<https://www.cavca.org/en/introduction>> accessed 24 February 2024.

- ⁵¹ Overview of intellectual property punitive damages cases in 2021, IP House, 7 May 2022 <https://mp.weixin.qq.com/s?__biz=MzA4MDYxMjc2NA==&mid=2650077770&idx=1&sn=19919d8eeefcc795399eb84a22e11e50&scene=21#wechat_redirect> accessed 20 October 2022.
- ⁵² Yanjie Ye, 'Study on the 'Partial Internet Access' of Criminal Judicial Documents from the Perspective of Judicial Policy Implementation' (2019) 2 JSU 68.
- ⁵³ Chao Ma, Xiaohong Yu and Haibo He, 'Big Data Analysis: Report on Online Publication of China's Judicial Documents' (2016) 4 CLR 195. The research group focused on the public availability of judicial documents in different provinces from 2014 to 2015 on the China Judgments Online. According to their study, Shaanxi is listed as the first-tier province with nearly 80% of the judicial documents available online, the second-tier provinces with over 50%, while the third-tier provinces with a lower percentage of between 20% and 50%.
- ⁵⁴ Jinjing Yang, Hui Qin, and Haibo He, China's Practice of Disclosing Judgment Documents Online: Progress, Problems, and Improvements' (2019) 6 CLR 125; Guangde Li, 'Value Orientation of Judgment Document Online System in China and Its Jurisprudential Reflection, (2022) 39 SLB 22.
- ⁵⁵ Article 4 of *Provisions of the Supreme People's Court on the Publication of Judgments on the Internet by the People's Courts* (2016 Revision).
- ⁵⁶ Guangde Li (n 59).
- ⁵⁷ Qingmei Xiang and Zheni Liang, 'Online Publication of Adjudication Documents: Issues, Theory and Improvement' (2022) 5 SS 132.
- ⁵⁸ Hu Huan-yong Line depicts a geographical pattern of China's population distribution. See Chen, M., Gong, Y., Li, Y. et al, 'Population Distribution and Urbanization on Both Sides of the Hu Huanyong Line: Answering the Premier's Question' (2016) 26 JGS 1593 <10.1007/s11442-016-1346-4> accessed 20 October 2022.
- ⁵⁹ 91.43% of the 210 cases were part of a serial litigation filed by China Audio-Video Copyright Association (CAVCA) against Karaoke Bars. Similarly, during this 1-year period, CAVCA litigated multiple lawsuits across various courts in Shaanxi province and Yunnan province to minimize legal expenses in this period.
- ⁶⁰ Liming Wang, 'On the Rules on Punitive Damages for Infringement of Intellectual Property Rights in the Civil Code' (2019) 8 PSL 95; Zhuliang Ni, The Normative Construction of the Subjective Elements of Punitive Damages in Intellectual Property (2023) 5 LR 1; Yingliang Liu (n 45); Shujie Feng and Xiao Ma (n 45).
- ⁶¹ Yinliang Liu (n 45).
- ⁶² In a previous empirical study, of the 159 cases analyzed by Fusheng Ouyang, the judgments in 46 cases expressly stated that statutory damages rather than punitive damages should be awarded because the basis for calculation could not be determined. See Fusheng Ouyang (n 46).
- ⁶³ The subjective state of mind will be considered intentional if the act of the defendant falls within the following circumstances listed in Article 3: (1) the defendant still commits the IPRs infringement after being notified or warned by the plaintiff or party of interest; (2) the defendant or its legal representative or manager is the legal representative, manager or actual controller of the plaintiff or party of interest; (3) the defendant has work, labor, cooperation, licensing, distribution, agency, representation or any other relationship with the plaintiff or party of interest, and has been in contact with the infringed IPRs; (4) the defendant has business relations with the plaintiff or party of interest or has any consultation with the plaintiff or party of interest for the purpose of reaching a contract, among others, and has been in contact with the infringed IPRs; (5) the defendant commits any act of piracy or counterfeiting any registered trademark; and (6) any other circumstance that may be determined as an intentional act.
- ⁶⁴ Article 4 further stipulates that an infringement has "serious circumstances" where the defendant: (1) commits the same or similar infringement after it has been subject to any administrative punishment or has assumed liability based on the ruling of the court due to infringement; (2) takes IP infringement as its business; (3) forges, destroys or conceals any evidence of infringement; (4) refuses to perform a preservation ruling; (5) obtains huge benefits from the infringement or causes huge loss to the right holder due to the infringement; (6) the infringement may endanger national security, public interest or personal health; (7) any other circumstance that may be determined as a serious circumstance.
- ⁶⁵ Ying Zhan (n 46).
- ⁶⁶ See Table 5.
- ⁶⁷ Dong conducted an empirical study of 1769 sample cases and found that statutory damages were awarded in 97% of IP cases from 2013 to 2018. See Fan Dong, *Research on Intellectual Property Damage Compensation System*, (2019 Doctor's Dissertation of South China University of Technology); In addition, IP Research Centre of Zhongnan University of Economics and Law collected and analyzed 4768 IP cases and found that statutory damages were awarded in 91.04%

of IP cases from 2008–2012. See China National Intellectual Property Administration, 'Explanation and Application of Punitive Damages in IP Law' (25 May 2015) <https://www.cnipa.gov.cn/art/2015/5/25/art_1415_133117.html> accessed 22 September 2022; Ying Zhan analyzed 11984 IP cases from 2012 to 2015 and found that statutory damages were awarded in 99.62% of copyright cases, 99.6% of trademark cases, and 98.4% of patent cases. See Ying Zhan (n 46); Cao collected and analyzed 9057 IP cases and found that statutory damages were awarded in 95.55% of IP cases from 2011 to 2016. See Xinming Cao, 'A New Design on Standard for Calculating the Amount of Compensation' (2019) 41 MLS 111. As a result of the differences in the databases, time span and total number of judgments selected by the research, the data presented vary from one to another. However, it should be noted that, in all related studies, statutory damages are widely awarded in IP litigations, with the proportion being over 90%.

- ⁶⁸ (2021) Yu 29 Min Chu No.922[(2021)云29民初922号]; (2021) Yun 29 Min Chu No.874[(2021)云29民初874号]; (2020) Yue 0604 Min Chu No. 34654 [(2020)粤0604民初34654号].
- ⁶⁹ Ge Jiang, 'Returning from Statutory Damages to Conventional Damages of Intellectual Property' (2019) 36 SLB 182.
- ⁷⁰ Article 63 of Chinese *Trademark Law* (2013 Amendment, abolished).
- ⁷¹ Qian Wang, Tian Tan and Xiang Zhu, 'Damages for Intellectual Property Infringement: Issues and Reflections' (2016) 5 IP 34.
- ⁷² See part III; see also Fusheng Ouyang (n 46) and Ying Zhan (n 46).
- ⁷³ Xulong Zhuang, 'The Reality Context and Institutional Rationality of the Difficulty of Reasoning in Adjudication Documents' (2015) 11 JLA 83.
- ⁷⁴ See Table 4.
- ⁷⁵ For example, Guangdong IP Courts closed more than 142,000 IP cases in 2021, and every judge decided 530 IP cases in 2021, which reached a record high. See Intellectual Property Protection and Top Exemplary Cases of Guangzhou Intellectual Property Court 2021, <<http://www.gd-copyright.cn/gdcrsp/article/content/202205/1600/1.html>> accessed 10 October 2022. See also Supreme People's Court Monitor, 'Why are Chinese Judges so Stressed?' (27 February 2018) <<https://supremepeoplescourtmonitor.com/2018/02/27/why-are-chinese-judges-so-stressed/>> accessed 24 February 2024.
- ⁷⁶ Xin He, 'Pressures on Chinese judges under Xi' (2021) 85 CJ 49. (Within the Chinese "judicial responsibility system," a key reform initiative is to grant adjudicators the authority to issue rulings independently, while also enforcing enduring accountability for those decisions. The thrust is to "let the adjudicator judge, but hold those who adjudicate responsible.") See also Jeremy Daum, "Judging the judges" (12 December 2021) China Law Translate <<https://www.chinalawtranslate.com/en/judging-the-judges/>> accessed 24 February 2024.
- ⁷⁷ See Ying Zhan (n 46).
- ⁷⁸ Congying Xu, 'Discretionary Award of Damages for Infringement of IPRs' (2018) 11 IP 19.
- ⁷⁹ Supreme People's Court, Notice of the Supreme People's Court on Issuing the Guiding Opinions on Strengthening and Standardizing the Analysis and Reasoning in Adjudicative Instruments, issued on 1 June 2018.
- ⁸⁰ Ying Zhan (n 46).
- ⁸¹ Junhua Liu and Mingxing Ye, 'Coordinated Application of Punitive Damages for Intellectual Property Infringement and Legal Compensation' (2021) 1 CJAJ 115.
- ⁸² Zhuliang Ni (n 65).
- ⁸³ Yang Li and Xicheng Chen, 'On the Punitive Damages System for Copyright: A Review of the Punitive Damages Provisions of the Civil Code for Intellectual Property' (2020) 1 IP 34.
- ⁸⁴ Article 1 of the *Interpretation* (n 30).
- ⁸⁵ Yinliang Liu (n 45); Zhuliang Ni (n 65).
- ⁸⁶ Christopher B. Seaman, 'Willful Patent Infringement and Enhanced Damages After In Re Seagate: An Empirical Study' (2012) 97 ILR 443.
- ⁸⁷ (2021) Jin Min Zhong No. 928 [(2021)津民终928号] (the disputed logo that the defendant used on models produced in 2019 and 2020 is a substantial similar to the claimant's artwork); (2020) Yue 03 Min Chu No.7080 [(2020)粤03民初7080号] (the defendant used the claimant's trademark without permission on goods that were likely to cause confusion).
- ⁸⁸ (2021) Zhe 0381 Min Chu No. 7526 [(2021)浙0381民初7526号] (The defendant GuangZu Footwear Factory was found to have infringed right holder's trademark on January 17, 2020 and July 25, 2021, respectively by the Rui'an Municipal Administration for Market Regulation, but continued to commit infringement. The amounts of profits from infringement were

huge, which should be considered as a case of malicious infringement under serious circumstances); (2021) Chuan 0193 Min Chu No. 5246 [(2021)川0193民初5246号] (After Wenzhou ShuangXiang had received administrative punishment for repetitive infringement on the registered trademark rights of Vans, it continued to infringe on the trademark rights of Vans. The court held an intentional infringement of the trademark rights of Vans, and the circumstances are serious, thus punitive damages should be applied); (2021) Lu Min Zhong No.1307 [(2021)鲁民终1307号] (After receiving administrative punishment from Administration for Market Regulation, the defendant continued to use the disputed infringing trademark. Thus, the court decided that the defendant committed trademark infringement with obvious malicious intention); (2021) Zhe 07 Min Chu No. 219 Civil Judgment [(2021)浙07民初219号] (The defendant received administrative punishment for trademark infringement and then infringed the same trademark twice. The court held that the defendant had intentionally committed the infringement).

⁸⁹ (2021) Zhe 01 Min Zhong No. 10338 [(2021)浙01民终10338号] (Shangri-La Corporation was ordered by Hangzhou Intermediate Court in March 2015 to immediately cease infringement on the copyright of the relevant works managed by the CAVA, but still repeatedly infringed on more than 130 works involved in the former relevant cases in the following 3 years. The court held that the defendant committed copyright infringement with obvious malice).

⁹⁰ (2017) Su Min Zhong No. 1297 [(2017)苏民终1297号] (Jiangsu Higher People's Court found the defendant committed infringement intentionally as it refused to perform the legally binding injunction).

⁹¹ Article 4 of the *Interpretation* (n 30).

⁹² (2022) Jing Min Zhong No.170 [(2022)京民终170号] (Beijing Higher People's Court held that the defendant and its branch corporation squatting the well-known trademark of the plaintiff, and taking an unfair advantage of its reputation. Thus, the defendants maliciously infringed the plaintiff's trademark).

⁹³ (2020) Su 04 Min Chu No.344 [(2020)苏04民初344号] (the court found that the defendant knew that the products she purchased infringed the plaintiff's registered trademark and still distributed them to the public, which could be considered as an intentional infringement); (2021) Hu 73 Min Zhong No. 611 [(2021)沪73民终611号] (after reaching an agreement with the plaintiff through mediation, the two defendants distributed products that infringed the plaintiff's trademark on an online platform. Instead of ceasing their infringing acts, they continued to expand the scale of sale. Thus, the court found that the subjective state of mind of two defendants was malicious).

⁹⁴ (2022) Liao 02 Min Zhong No. 1296 [(2022)辽02民终1296号].

⁹⁵ (2021) Chuan 01 Min Chu No. 2933 [(2021)川01民初2933号] (the mark, slogan, name of service, and decoration of the restaurant the defendant used is the same or highly similar those of the plaintiff's, thus causing confusion among consumers. The court held that the defendant deliberately free ride the goodwill and business resources of the plaintiff to make profits, which should be considered as an intentional IP infringement).

⁹⁶ (2017) Jing 73 Min Zhong No. 1911 [(2017)京73民终1911号] (the court determined the infringement was under circumstances because the defendant used the claimant's trademark on products sold on online platforms, and the sales amount was huge).

⁹⁷ (2021) Jin Min Zhong No. 928 (n 89); (2020) Su 04 Min Chu No. 344 [(2020)苏04民初344号]; (2021) E Zhi Min Zhong No.597 [(2021)鄂知民终597号]; (2021) Yu Zhi Min Zhong No.316 [(2021)豫知民终316号]; (2021) Yu 03 Min Chu No.6065 [(2021)粤03民初6065号].

⁹⁸ (2020) Su 04 Min Chu No. 344 (2020)苏04民初344号.

⁹⁹ (2021) Zhe 0502 Min Chu No. 6134 [(2021)浙0502民初6134号].

¹⁰⁰ (2021) Chuan 01 Min Chu No. 2933 [(2021)川01民初2933号].

¹⁰¹ (2021) Zui Gao Fa Zhi Min Zhong No. 816 [(2021)最高法知民终816号].

¹⁰² (2020) Su 05 Min Chu No. 271 [(2020)苏05民初271号].

¹⁰³ (2021) Zhe 07 Min Chu No. 219 [(2021)浙07民初219号].

¹⁰⁴ Article 6 of the *Interpretation* (n 30).

¹⁰⁵ (2019) Zui Gao Fa Zhi Min Zhong No. 562 [(2019)最高法知民终562号] (although the infringer had already been fined in a related criminal case, the Supreme People's Court still awarded punitive damages with five times of the basis determined); (2021) Hu 0115 Min Chu No.3405 [(2021)沪0115民初3405号] (The defendant has been sentenced to a fixed-term of imprisonment and a criminal fine, while the court awarded compensation with 2.5 times of the basis determined).

¹⁰⁶ Article 2 of the *Interpretation* (n 30).

¹⁰⁷ (2021) Zhe 07 Min Chu No. 219 Civil Judgment [(2021)浙07民初219号]; (2021) Zhe 01 Min Zhong No.10338 [(2021)浙01民终10338号].

¹⁰⁸ See Table 3.

- ¹⁰⁹ Handong Wu, 'The Private Law Basis and Judicial Application of Punitive Damages for IPRs' (2021) 3 LR 21.
- ¹¹⁰ Yinliang Liu (n 45).
- ¹¹¹ (2020) Zhe 03 Min Zhong No. 161 [(2020)浙03民终161号].
- ¹¹² Ibid.
- ¹¹³ (2022) Hu 73 Min Zhong No. 187 [(2022)沪73民终187号].
- ¹¹⁴ Ibid.
- ¹¹⁵ Article 54 Section 4 of Copyright Law, Article 63 Section 3 of Trademark Law, Article 71 Section 4 of Patent Law. Article 95 of *Decision of the Supreme People's Court to Amend the Some Provisions on Evidence in Civil Procedures* (2019) provides that "[w]here a party refuses to submit evidence under its control without justification, and the party who bears the burden of proving the fact to be proven claims that the content of the evidence is adverse to the controller, the court may determine the claim to be tenable."
- ¹¹⁶ (2018) Hu 0115 Min Chu No. 53351 [(2018)沪0115民初53351号].
- ¹¹⁷ (2017) Jing 0102 Min Chu No. 2431 [(2017)京民初2431号]; (2017) Jing 73 Min Zhong No.1991 [(2017)京73民终1991号].
- ¹¹⁸ [(2022) Liao 02 Min Zhong No. 1296 [(2022)辽02民终1296号]; (2021) Zhe 0381 Min Chu No. 7526 [(2021)浙0381民初7526号]; (2020) Yue 03 Min Chu No. 7080 [(2020)粤03民初7080号]; (2021) Chuan 0193 Min Chu No. 5246 [(2021)川0193民初5246号]; (2020) Lu 02 Min Chu No. 1878 [(2020)鲁02民初1878号].
- ¹¹⁹ As the *Chinese Civil Code* explicitly articulates that the term "not less than," "not more than," shall include the figure itself. See Article 1259 of *Chinese Civil Code*.
- ¹²⁰ (2021) Yue 03 Min Chu No. 6065 [(2021)粤03民初6065号]; (2022) Jing Min Zhong No. 170 [(2022)京民终170号]; (2021) Yun 29 Min Chu No. 945 [(2021)云29民初945号].
- ¹²¹ (2021) Lu 1402 Min Chu No. 4757 [(2021)鲁1402民初4757号]; (2021) E Zhi Min Zhong No. 597 [(2021)鄂知民终597号].
- ¹²² Yuanshan Wei, *The Predicament and Outlet of punitive Damages of Intellectual Property in China* (2021 Doctor's Dissertation of Xiangtan University), 223.
- ¹²³ *Capitol Records, Inc. v. MP3tunes* (n 44); Péter Mezei (n 43).
- ¹²⁴ Yinliang Liu (n 45).
- ¹²⁵ Dimitry Karshedt, 'Enhancing Patent Damages' (2017) 51 UCDLR 1427.
- ¹²⁶ Theodore Eisenberg, et al. 'Juries, Judges, And Punitive Damages: An Empirical Study' (2001) 87 CLR 743; Cass R. Sunstein, et al. *Punitive Damages: How Juries Decide*. (University of Chicago Press 2008).
- ¹²⁷ Thomas H. Dupree Jr, 'Punitive Damages and the Constitution' (2009) 70 La. L. Rev. 421; Christopher B. Seaman (n 97).

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