

FORMULATING COPYRIGHT DAMAGES IN CHINA

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I. INTRODUCTION

Due to the intangible nature of intellectual property (IP), it has always been challenging and controversial to determine damages for its infringement.¹ In China, multinational enterprises (MNEs) have long criticized the unreasonably low damages granted by courts for copyright infringement,² the average of which is around RMB 15,000 (approximately \$2,320).³ It is also quite common that the courts grant only a small percentage of the amounts claimed by plaintiffs despite successful proof of

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¹ See, e.g., Shujie Feng & Xiao Ma, *To Increase Damages of Intellectual Property Infringement in China: A Double-Edged Sword for the Market*, 23 J. WORLD TRADE 39, 39 (2019).

² See, e.g., Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 SMU L. REV. 169, 191 (2015); Michael N. Schlesinger, Note, *Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 94, 132 (1995); William Weightman, *China’s Progress on Intellectual Property Rights (Yes, Really)*, DIPLOMAT (Jan. 20, 2018), <https://thediplomat.com/2018/01/chinas-progress-on-intellectual-property-rights-yes-really/>; see also Feng & Ma, *supra* note 1 (describing the conventional impression regarding the insufficient damages for IP infringement in China and the recent increase in damages in trademark and patent cases in the country); Jonathan M.W.W. Chu, *Something to Copy? A Critical and Comparative Review of Damages Assessment in Copyright Infringement Actions in China and England and Wales*, 34 EUR. INTELL. PROP. REV. 444, 450–51 (2012) (describing the enormous disparity between recoverable damages and the actual loss suffered by software copyright holders in China).

³ See, e.g., Zheng Tang, *Judicial Enforcement of Intellectual Property Rights in China—From Technical Improvement to Institutional Reform*, 27 ASIA PAC. L. REV. 176, 185 (2019); Yurong Zhang, *A Study on Punitive Damages for the Infringement of Intellectual Property Rights in China*, 43 EUR. INTELL. PROP. REV. 433, 434 (2021). *But see* Weightman, *supra* note 2 (stating that the average copyright damages decided by the Beijing Intellectual Property Court was around RMB 458,000).

copyright infringement.⁴ In addition, courts occasionally grant shockingly low damages. For example, in *Fuzhou Junli Video Intellectual Property Agency Co. v. Beijing Citylight Metropolitan Entertainment Co.*, the Beijing Intellectual Property Court recently ruled that the defendant was liable for damages of only RMB 930 (approximately \$140) for copyright infringement via its karaoke business.⁵ Therefore, numerous copyright holders are unable to recover infringement losses and litigation expenses even if they win the case, and many MNEs have hesitated to initiate copyright litigation in the country.⁶

Damages for IP infringement have been quite concerning to China's major trading partners, particularly the United States (US). China and the U.S. agreed on the terms for the so-called "Phase One" trade deal in December 2019 and signed the agreement on January 15, 2020.⁷ Among others, this Phase One Agreement requires China to provide deterrent-level civil remedies for IP infringement, including increasing "the range of minimum and maximum pre-established damages."⁸

In response to the above criticisms and the Phase One Agreement, China revamped the damages scheme in its 2020 amendment to the Copyright Law ("Copyright Law 2020") by providing new criteria for calculating damages, increasing statutory damages, and introducing punitive

⁴ See, e.g., Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 477–78 (2014). See also Tang, *supra* note 3, at 185 (indicating that claimants in IP infringement cases "only received 35 percent of damages they claimed between 2008 and 2012").

⁵ Fuzhou Junli Shixun Zhishi Chanquan Daili Youxian Gongsi Su Beijing Chengshi Zhiguang Daduhui Yule Youxian Gongsi (福州君立视讯知识产权代理有限公司诉北京城市之光都会娱乐有限公司) [*Fuzhou Junli Video Intell. Prop. Agency Co. v. Beijing Citylight Metropolitan Ent. Co.*], 2020 Jing 0105 Min Chu No. 18387, 2020 Jing 73 Min Zhong No. 1825 (Beijing Intell. Prop. Ct. 2020) (China).

⁶ See, e.g., Jonathan Ling, Note, *Argh, No More Pirating America's Booty: Improving Copyright Protections for American Creators in China*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 313, 345–46 (2019); Nilay Patel, Note, *Open Source and China: Inverting Copyright?*, 23 WIS. INT'L L.J. 781, 791 (2005); see also Huaiwen He, *The Trend in Damages for Copyright Infringement in China: An Empirical Study on Practices in the Beijing Courts*, 61 J. COPYRIGHT SOC'Y 453, 473 (2014) (indicating that "China might end up with a more costly system with little increment in damages awards for [copyright] infringements"); Weightman, *supra* note 2 ("Many businesses have complained that pursuing intellectual property cases in Chinese courts is not worthwhile because the damages awarded are too small.").

⁷ Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China–U.S., Jan. 15, 2020.

⁸ *Id.* art. 1.27.

damages and a new evidence rule on damages.⁹ The Chinese government highlighted low damages as one of the main issues to be solved by the new Copyright Law.¹⁰ This development echoes President Xi Jinping's earlier declaration that China "must step up efforts to punish illegal infringement of intellectual property rights and force infringers to pay a heavy price"¹¹ and the Supreme People's Court's proclamation that China should better compensate IP right holders, raise statutory damages, and introduce punitive damages to copyright, patent, and unfair competition laws.¹²

Part II of this Article introduces the damages provisions in China's previous Copyright Law ("Copyright Law 2010") and the main changes in the new law. Part III analyzes the background on individual approaches to copyright damages in the new law and evaluates their effectiveness in facilitating copyright protection. Part IV concludes the Article.

II. DAMAGES RULES IN THE CHINESE COPYRIGHT LAW

As mentioned above, provisions governing damages are one of the key changes brought about by Copyright Law 2020. This Part briefly explains the criticisms of previous damages provisions and how the new law addresses them.

⁹ Zhonghua Renmin Gongheguo Zhuzhoquan Fa (中华人民共和国著作权法(2020修正)) [Copyright Law of the People's Republic of China (2020 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 11, 2020, effective June 1, 2021), <http://www.npc.gov.cn/npc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml> [hereinafter Copyright Law 2020].

¹⁰ Shuhong Yuan, Explanation on the Amendment to the Copyright Law of the People's Republic of China (Draft) (关于《中华人民共和国著作权法修正案(草案)》的说明), NAT'L PEOPLE'S CONG. PEOPLE'S REPUBLIC CHINA (Nov. 12, 2020), <http://www.npc.gov.cn/npc/c30834/202011/f254003ab9144f5db7363cb3e01cabde.shtml>; see also Jyh-An Lee and Yangzi Li, *The Pathway Towards Digital Superpower: Copyright Reform in China*, 70 GRUR INT'L 861, 861-62, 868-69 (2021) (articulating that damages provisions were a significant part of the copyright reform in 2020); Peter K. Yu, *The Long and Winding Road to Effective Copyright Protection in China*, 49 PEPP. L. REV. 681, 403-04 (2022) (explaining that provisions governing damages form an important set of upgrades in the Copyright Law 2020).

¹¹ Yanmin Zhang & Qian Zhang, *Xi Jinping: Building a Stable, Fair, and Transparent Business Environment; Accelerating the Construction of a New Economic Institution* (习近平: 营造稳定公平透明的营商环境, 加快建设开放型经济新体制), XINHUA NEWS (July 17, 2017), http://www.xinhuanet.com/politics/2017-07/17/c_1121333722.htm.

¹² An Outline of China's Judicial Protection of Intellectual Property (2016–2020) (中国知识产权司法保护纲要(2016–2020)), Fafa [2017] No. 13 (promulgated by the Sup. People's Ct., Apr. 20, 2017), pts. IV (main objectives), V (key measures), <http://gongbao.court.gov.cn/Details/ac7e2844d6a970a0bac2230ff7f934.html>.

A. Copyright Law 2010

Article 49 of Copyright Law 2010 provided a straightforward way to determine copyright damages: the actual loss incurred by the right holder or, where the actual loss is difficult to compute, the illegal gains of the infringer.¹³ Where neither is ascertainable, the court could impose statutory damages of no greater than RMB 500,000 (approximately \$77,360).¹⁴

The main criticisms of this provision included the following: (1) the copyright holder had no choice between the different means of calculating damages, in particular the right holder's actual loss or the infringer's illegal gains;¹⁵ (2) the maximum statutory damages were too low;¹⁶ and (3) there were no punitive damages that could function as an effective deterrent to infringement.¹⁷ Regarding the first criticism, while some courts insisted that if the actual loss could be proved, the plaintiff could not choose illegal income as damages,¹⁸ others did not strictly follow the order of precedence in Article 49 of Copyright Law 2010. For example, according to the Guiding Opinions of the Beijing Municipal Higher People's Court on the Establishment of Liability for Damages for Copyright Infringement, if a claimant could prove that the infringer's illegal gains were higher than the claimant's actual loss, then the illegal gains may be taken as damages.¹⁹

B. Copyright Law 2020

According to Copyright Law 2020, where the copyright or copyright-related rights are infringed, the determination of damages is based on the actual loss suffered by the right holder or the illegal gains of the infringer.²⁰ In other words, Copyright Law 2020 provides right holders with the choice between their actual loss and the infringers' illegal gains, which-

¹³ Zhonghua Renmin Gongheguo Zhuzhoquan Fa (中华人民共和国著作权法(2010修正)) [Copyright Law of the People's Republic of China (2010 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 49, ¶ 1 [hereinafter Copyright Law 2010].

¹⁴ *Id.* art. 49, ¶ 2.

¹⁵ Chu, *supra* note 2, at 449; Yong Wan, *Copyright Damages in China*, 61 J. COPYRIGHT SOC'Y 517, 528, 543 (2014).

¹⁶ See, e.g., Ling, *supra* note 6, 347–48; Shruti Rana, *The Global Battle Over Copyright Reform: Developing the Rule of Law in the Chinese Business Context*, 53 STAN. J. INT'L L. 89, 102 n.51 (2017); Wan, *supra* note 15, at 543.

¹⁷ Wan, *supra* note 15, at 543.

¹⁸ *Id.* at 528.

¹⁹ Guiding Opinions of the Beijing Municipal Higher People's Court on the Establishment of Liability for Damages for Copyright Infringement (北京市高级人民法院关于确定著作权侵权损害赔偿责任的指导意见), Jing Gao Fafa [2015] No. 12 (promulgated by the Beijing Municipal Higher People's Ct., Jan. 11, 2005), art.5.

²⁰ Copyright Law 2020, *supra* note 9, art. 54, ¶ 1.

ever is preferable for them. This approach is different from the one taken in the Beijing Municipal Higher People's Court's Guiding Opinions, which allowed the plaintiff to claim the infringer's illegal gains from infringement as damages only when the plaintiff could prove that the illegal gains were higher than his or her actual loss.²¹ According to Article 54, Paragraph 1 of Copyright Law 2020, the plaintiff can claim the infringer's illegal gains as damages without proving that they are higher than the actual loss.²² Thus, the new rule resolves the differences between courts regarding whether the plaintiff could claim illegal gains as damages if the actual loss could not be demonstrated.

Copyright Law 2020 also allows courts and claimants to use royalties to calculate damages.²³ When it is difficult to calculate the claimant's actual loss or the infringer's illegal gains, the court can calculate damages by reference to royalties.²⁴ Additionally, Copyright Law 2020 introduces punitive damages for willful infringements.²⁵ Where the case is serious, the court may order the infringer to pay compensation ranging from one to five times the damages amount determined based on actual loss, illegal income, or royalties.²⁶ Furthermore, the new law amends the provision concerning statutory damages by raising the maximum amount from RMB 500,000 (approximately \$77,360) to RMB 5 million (approximately \$773,550) and by setting a minimum amount of RMB 500 (approximately \$77), which was not provided before.²⁷

Copyright Law 2020 adds a new evidence rule concerning the calculation of damages. Article 54, Paragraph 4 stipulates that when the right holder has provided evidence regarding the infringement but the alleged infringer holds the relevant account records or materials, the court may order the latter to provide said account books and materials.²⁸ If the alleged infringer refuses to comply with the court's order, or provides false account records and materials, the court may determine the damages amount by reference to the rights holder's claims and the evidence provided by them.²⁹

²¹ See *supra* text accompanying note 19.

²² Copyright Law 2020, *supra* note 9, art. 54, ¶ 1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* art. 54, ¶ 2.

²⁸ *Id.* art. 54, ¶ 4.

²⁹ *Id.*

III. ANALYSIS

While Copyright Law 2020 has addressed most criticisms of prior damages provisions, the new damages rules have resulted in new policy issues. Some damages rules in the new law are entirely new to China, whereas others legislate existing judicial practices in the country. This Part examines the background and policy issues surrounding the damages provisions in China's new Copyright Law.

A. Overhaul of the IP System

Damages rules in Copyright Law 2020 should be understood from a broader perspective. Some represent China's overall IP reform over the past few years and are consistent with the new damages rules in other IP laws—namely the Trademark Law, the Patent Law, and the Anti-Unfair Competition Law.

1. Punitive Damages

Punitive damages first appeared in China's IP system in the 2013 amendment to the Trademark Law.³⁰ Punitive damages in Copyright Law 2020 are part of larger reform across different categories of IP. This reform originated from President Xi Jinping's announcement in 2018 that China would implement a punitive damages scheme in its IP system to raise the costs for infringers.³¹ China then introduced punitive damages in different IP laws over the past two years, including Article 17 of the 2019 Anti-Unfair Competition Law³² and Article 67 of the 2020 Patent Law.³³

³⁰ Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法(2013修正)) [Trademark Law of the People's Republic of China (2013 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective May 1, 2014), art. 63, ¶ 1, <http://ipr.mofcom.gov.cn/zhuanti/jkblh/iplaws/trademark/sbf2.pdf> [hereinafter Trademark Law].

³¹ John Zarocostas, *China's Xi Jinping Signals Higher Focus on IP, Market Opening to Ease US-Sino Tensions, but Global Leadership Friction in Innovation to Persist*, IP WATCH (Nov. 15, 2018), <https://www.ip-watch.org/2018/11/15/chinas-xi-jinping-signals-higher-focus-ip-market-opening-ease-us-sino-tensions-global-leadership-friction-innovation-persist/>.

³² Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法(2019修正)) [Anti-Unfair Competition Law of the People's Republic of China (2019 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Apr. 23, 2019), art. 17, http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302771.html.

³³ Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法(2020修正)) [Patent Law of the People's Republic of China (2020 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective June. 1, 2021), art. 67, <http://www.npc.gov.cn/englishnpc/c23934/202109/63b3c7cb2db342fdadacdc4a09ac8364.shtml> [hereinafter Patent Law].

Article 1185 of the 2020 Civil Code also provides: “In case of an intentional infringement of another person’s intellectual property rights, where the circumstances are serious, the infringed person has the right to request for corresponding punitive damages.”³⁴ Therefore, punitive damages in Copyright Law 2020 are not the only IP reform in this area in the country.

To implement the new punitive damages scheme in the IP system, the Supreme People’s Court issued the Interpretation on the Application of Punitive Damages in Civil Intellectual Property Infringement Cases (“2021 Interpretation”) in March 2021.³⁵ The 2021 Interpretation provides courts with some guidelines on punitive damages, such as factors used to determine intentional infringement,³⁶ serious circumstances,³⁷ and bases of calculations.³⁸ Examples of serious circumstances include scenarios in which the defendant commits the same or similar infringement after he or she has been subjected to administrative punishment or an unfavorable court judgment, where the defendant infringes upon IP rights in the course of business or obtains huge profits from the infringement, or where the right holder suffers huge loss from the infringement.³⁹

2. Burden of Proof Regarding Damages

Like the recently amended Patent Law,⁴⁰ Copyright Law 2020 includes a burden-shifting provision stipulating that a court has the discretion to order the defendant to provide account records and other evidence relating to illegal sales and to rely on the plaintiff’s evidence of damages if the defendant fails to produce evidence or produces false evidence.⁴¹ This burden-shifting provision first appeared in the 2013 amendment to the Trademark Law.⁴² The new evidence rules in the Copyright Law and the Patent Law aim to help right holders overcome the burden to prove the infringer’s illegal gains as damages. Since the infringer holds most evi-

³⁴ Zhonghua Renmin Gongheguo Min Fa Dian (中华人民共和国民法典) [Civil Code of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., May 25, 2020, effective Jan. 1, 2021), <http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml>.

³⁵ Interpretation of the Supreme People’s Court on the Application of Punitive Damages in Civil Intellectual Property Infringement Cases (2021) (最高人民法院关于审理侵害知识产权民事案件适用惩罚性赔偿的解释), Fashi [2021] No. 4 (promulgated by the Judicial Comm. Sup. People’s Ct., Mar. 2, 2021) [hereinafter Interpretation 2021].

³⁶ *Id.* art. 3.

³⁷ *Id.* art. 4.

³⁸ *Id.* art. 5.

³⁹ *Id.* art 4(2).

⁴⁰ Patent Law, *supra* note 33, art. 71, ¶ 4.

⁴¹ See *supra* text accompanying notes 28–29.

⁴² Trademark Law, *supra* note 30, art. 63, ¶ 2.

dence regarding illegal gains, it is often difficult for IP holders to prove damages. It is therefore quite common for plaintiffs to fail to secure adequate damages because they are unable to prove the infringers' illegal gains.⁴³

Before Copyright Law 2020, even if the defendants provided accounting records or other materials regarding their illegal gains, some plaintiffs still challenged the authenticity of the evidence provided by the defendants.⁴⁴ In most of these cases, instead of computing the illegal gains based on the information provided by the defendants, courts normally granted statutory damages to avoid disputes over the credibility of the defendants' evidence.⁴⁵ Similar phenomena might continue to exist under Copyright Law 2020 because it is still easier for courts to grant statutory damages than damages based on the infringers' illegal gains. Even if the infringer refuses to comply with the court's order or provides false account records and materials, the court under Copyright Law 2020 can at most "determine the damages amount by reference to the rights holder's claims and the evidence provided."⁴⁶ This result seems like a penalty on the defendants for refusing to provide evidence or providing false evidence, but it is not much different from an award of statutory damages.

The application of a similar provision in the Trademark Law in *Shanghai Diandianle Information Technology Co. v. Shanghai Changmeng Mo-*

⁴³ See, e.g., *Hanhua Yimei (Tianjin) Tuxiang Jishu Youxian Gongsi Su Nanjing Paina Gongmao Youxian Gongsi* (汉华易美(天津)图像技术有限公司诉南京派纳工贸有限公司), [Hanhua Yimei (Tianjin) Image Tech. Co. v. Nanjing Paina Indus. & Trade Co.], 2017 Su 01 Min Zhong No. 2501 (Nanjing Interm. People's Ct. 2017) (China) (granting damages of RMB 5,000 for infringing copyright in photographs); *Huagai Chuangyi (Beijing) Tuxiang Jishu Youxian Gongsi Su Dongguan Shi Lingrui Jixie Youxian Gongsi* (华盖创意(北京)图像技术有限公司诉东莞市菱锐机械有限公司) [Huagai Creative (Beijing) Image Tech. Co. v. Dongguan Lingrui Mach. Co.], 2016 Yue 19 Min Zhong No. 326 (Dongguan Interm. People's Ct. 2016) (China) (granting damages of RMB 2,500 for infringing copyright in photographs).

⁴⁴ See, e.g., *Gong Kaijie Su Zhejiang Fanya Dianzi Shangwu Youxian Gongsi Deng* (龚凯杰诉浙江泛亚电子商务有限公司等) [Gong Kaijie v. Zhejiang Fanya Elec. Com. Co.], 2007 Pu Min San (Zhi) Chu No. 120 (Pudong District People's Ct. 2008) (China) [hereinafter *Gong Kaijie v. Zhejiang Fanya*]; see also Feng & Ma, *supra* note 1, at 51 (claiming that even if defendants have provided evidence on their sales or profits, "the complainants and the courts would question the credibility of the evidence and doubt whether the defendants have disclosed all their sales or profits").

⁴⁵ See, e.g., *Gong Kaijie v. Zhejiang Fanya*, *supra* note 44; Feng & Ma, *supra* note 1, at 51. See also Guangliang Zhang, *Statutory Damages for Copyright Infringement in China: Alienation and Redemption*, 63 J. COPYRIGHT SOC'Y 597, 612 (2016) (indicating that with the option of statutory damages, judges did not have incentives to adopt more scientific method to calculate damages).

⁴⁶ See *supra* text accompanying notes 28–29.

bile Network Technology Co. illustrated the ill function of this burden-shifting design.⁴⁷ In this case, the Shanghai Intellectual Property Court decided the damages amount by reference to the plaintiff's claim and evidence according to Article 63, Paragraph 2 of the Trademark Law because the defendant refused to provide account records.⁴⁸ The court eventually decided on damages of RMB 3 million (approximately \$464,130) after considering factors relevant to the infringement.⁴⁹ This result is the same as the direct application of Article 63, Paragraph 3, the statutory damages provision in the Trademark Law.

B. Statutory Damages

Because both the plaintiff's actual loss and the defendant's illegal gains from infringement are quite difficult to prove, statutory damages have become the Chinese courts' most frequently used method of determining damages.⁵⁰ Under Copyright Law 2010, if the plaintiff failed to prove his or her actual damages and the infringer's illegal gains, the court could at most grant statutory damages of RMB 500,000 (approximately \$77,360).⁵¹ These maximum statutory damages were apparently inadequate to compensate for the loss in some highly valuable copyrighted works.⁵²

In response to this constraint, the Supreme People's Court explained that if either the actual damages or the illegal gains exceeded the upper limit of statutory damages, the court should award a reasonable amount of

⁴⁷ Shanghai Diandianle Xinxi Keji Youxian Gongsì Deng Su Shanghai Changmeng Yidong Wangluo Keji Youxian Gongsì (上海点点乐信息科技有限公司等诉上海畅梦移动网络科技有限公司) [*Shanghai Diandianle Info. Tech. Co. v. Shanghai Changmeng Mobile Network Tech. Co.*], 2019 Hu 73 Min Zhong No.130 (Shanghai Intell. Prop. Ct. 2019) (China).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., ROBERT P. MERGES & SEAGULL HAIYAN SONG, *TRANSNATIONAL INTELLECTUAL PROPERTY LAW: TEXT AND CASES* 465 (2018); Feng & Ma, *supra* note 1, 50–51; He, *supra* note 6, at 471–73; Ling, *supra* note 6, 344; Zhang, *supra* note 45, at 605–06, 612; Zhang, *supra* note 3, at 433–34.

⁵¹ See *supra* text accompanying note 14.

⁵² See, e.g., Shanghai Meishu Dianying Zhipia Chang Su Zhuhai Tianxingzhe Wenhua Chuanbo Youxian Gongsì Deng (上海美术电影制片厂诉珠海天行者文化传播有限公司等) [*Shanghai Animation Film Studio v. Zhuhai Tianxingzhe Commc'n Co.*], 2012 Hu Gao Min San (Zhi) Zhong No. 67 (Shanghai Higher People's Ct. 2012) (China) (acknowledging the “enormous market value” of the infringed work but only being able to grant damages of RMB 500,000). See also Feng & Ma, *supra* note 1, at 50 (arguing that “[i]t's difficult to justify the limit of statutory damages”).

damages beyond this upper limit.⁵³ Some courts therefore went beyond the maximum statutory damages by creating the concept of “discretionary damages.” For example, in *Zhidou v. Dassault*, the disputed work was the plaintiff’s computer program, which the defendant installed on seventy-three computers.⁵⁴ The Shanghai Higher People’s Court explained that although the plaintiff’s actual loss in this case was difficult to gauge, it obviously exceeded the maximum statutory damages of RMB 500,000 (approximately \$77,360).⁵⁵ After considering the defendant’s behavior, the duration of infringement, and the obviously bad-faith nature of the infringement, the court ruled that the damages were RMB 9 million (approximately \$1,392,391).⁵⁶ What is noteworthy in this case is that the court explicitly defined the concept of “discretionary damages” and applied it in the damages calculation.⁵⁷ According to the Shanghai Higher People’s Court, when the copyright holder’s actual damages exceed the upper limit of statutory damages but are difficult to compute, the court could determine a discretionary damages amount higher than that limit.⁵⁸ In *Beijing China Youth Book Inc. v. Beijing Tianying Kyushu Network Technology Co.*, the Beijing Intellectual Property Court similarly held that when determining the discretionary damages higher than the maximum statutory damages, the court should consider factors such as the market value of the plaintiff’s copyrighted work, the number of copies released in

⁵³ Opinions on Several Issues Concerning Intellectual Property Trials Serving the Overall Objective Under the Current Economic Situation (关于当前经济形势下知识产权审判服务大局若干问题的意见), Fafa [2009] No. 23 (promulgated by the Sup. People’s Ct., Apr. 21, 2009).

⁵⁴ Shanghai Zhidou Diandongche Jishu Youxian Gongsi Su Dasuo Xitong Gufen Youxian Gongsi (上海知豆电动车技术有限公司诉达索系统股份有限公司) [*Shanghai Zhidou Electric Vehicle Tech. Co. v. Dassault Systèmes Co.*], 2018 Hu Min Zhong No. 429 (Shanghai Higher People’s Ct. 2018) (China) [hereinafter *Zhidou v. Dassault*].

⁵⁵ *Id.*; see also Zhang, *supra* note 45, at 609 (discussing a similar judicial approach to granting damages that exceed the maximum statutory damages); *id.* at 615 n.88 (“Discretionary damages can also solve the problem of judges awarding statutory damages that exceed the maximum cap.”).

⁵⁶ *Zhidou v. Dassault*, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*; see also Beijing Zhongqingwen Wenhua Chuanmei Youxian Gongsi Su Beijing Tianying Jiuzhou Wangluo Jishu Youxian Gongsi (北京中青文文化传媒有限公司诉北京天盈九州网络技术有限公司) [Beijing China Youth Book Inc. v. Beijing Tianying Kyushu Network Tech. Co.], 2018 Jing 73 Min Chu No. 105 (Beijing Intell. Prop. Ct. 2020) (China) [hereinafter *China Youth Book Inc. v. Tianying Kyushu*] (similarly applying the concept of “discretionary damages” to grant damages higher than maximum statutory damages). *But see* Zhang, *supra* note 45, at 601–03 (defining “discretionary damages” as an approach adopted by courts before China introduced statutory damages in its Copyright Law).

the market, the normal revenue, and the duration and scale of the infringement.⁵⁹ The Beijing Intellectual Property Court further explained that the purpose of discretionary damages was to compensate copyright holders as much as possible when the losses surpassed the maximum statutory damages.⁶⁰

However, discretionary damages were not stipulated in Article 49 of Copyright Law 2010. While an award of discretionary damages might compensate the copyright holder more fairly, the court ran the risk of overstepping the legislators' authority in devising this mechanism.⁶¹ The emergence of discretionary damages also revealed that RMB 500,000 (approximately \$77,360), the maximum amount for statutory damages, was outdated in light of the increasing developments in the creative industry and the growing number of high-value copyrighted products in China.

Copyright Law 2020 has increased the maximum amount for statutory damages to RMB 5 million (approximately \$773,550), which is ten times the maximum amount in Copyright Law 2010.⁶² Since statutory damages remain the most commonly used approach by Chinese courts, this enhancement will certainly improve copyright protection in the country.⁶³ Moreover, with the new maximum statutory damages, Chinese courts will use discretionary damages less often. The reduced use will avoid controversy over the lack of a statutory basis for discretionary damages. After all, discretionary damages emerged to address the inadequate compensation provided by maximum statutory damages. It is also noteworthy that although the United States Trade Representative has viewed the enhancement of the maximum amount as a positive development, it has criticized the introduction of minimum statutory damages of RMB 500 (approximately \$77) as being "insufficient to deter future infringement."⁶⁴ Nevertheless, whether this new minimum will have a negative impact on copyright protection still depends on how Chinese courts determine statutory damages under the new Copyright Law.

C. Royalty-Based Damages

Royalties for the copyrighted work have become an independent method for assessing damages in Copyright Law 2020. When it is difficult

⁵⁹ Beijing China Youth v. Tianying Kyushu, *supra* note 58.

⁶⁰ Zhidou v. Dassault, *supra* note 54.

⁶¹ See Zhang, *supra* note 45, at 609–10.

⁶² Copyright Law 2020, *supra* note 9, art. 54, ¶ 2; Copyright Law 2010, *supra* note 13, art. 49, ¶ 2.

⁶³ *But see* Zhang, *supra* note 45, at 618 (claiming that "[s]tatutory damages have never been intended as measures to strengthen the protection of copyright").

⁶⁴ OFF. OF THE U.S. TRADE REPRESENTATIVE, 2021 SPECIAL 301 REPORT 42 (2021).

to calculate the actual loss or illegal gains, the court can calculate damages by reference to royalties for the copyrighted work.⁶⁵ In fact, although royalty-based damages are not the most popular method adopted by Chinese courts, this method has been commonly used in Chinese judicial practices. This royalty-based method was previously introduced to the Patent Law in 2008⁶⁶ and the Trademark Law in 2013.⁶⁷

Before Copyright Law 2020, when Chinese courts determined copyright damages, they usually considered whether the copyright holder had licensed the work to a third party or the infringer.⁶⁸ However, there was no legal basis for courts to use royalties to calculate copyright damages. Some courts viewed these lost royalties as the copyright holder's actual loss,⁶⁹ whereas others considered royalties in the determination of statutory damages.⁷⁰

In *Beijing China Youth Book Inc. v. Beijing Tianying Kyushu Network Technology Co.*, the Beijing Intellectual Property Court provided a comprehensive explanation regarding the use of royalties to calculate copyright damages.⁷¹ The court explained that the copyright holder's actual loss was royalties, which the infringer should have paid.⁷² This royalty-based approach was the best to reflect the market value of the plaintiff's copyrighted work and to compensate for the plaintiff's loss to the greatest extent.⁷³ The court also pointed out that sometimes it was difficult to find a previous license of the same copyrighted work subject to the same method of use and period as the disputed infringement.⁷⁴ Such difficulty

⁶⁵ Copyright Law 2020, *supra* note 9, art. 54, ¶ 1.

⁶⁶ Zhonghua Renmin Gongheguo Zhuanli Fa (中华人民共和国专利法(2008修正)) [Patent Law of the People's Republic of China (2008 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 2008, effective Oct. 1, 2009), art. 65, ¶ 1, http://www.gov.cn/flfg/2008-12/28/content_1189755.htm.

⁶⁷ Trademark Law, *supra* note 30, art. 63, ¶ 1.

⁶⁸ *See, e.g.,* Wan, *supra* note 15, at 530.

⁶⁹ *See, e.g., id.*

⁷⁰ *See, e.g., id.* at 535–36; Chen Junyi Deng Su Chongqin Zhongbai Jiulong Baohuo Youxian Gongsi (陈俊邑等诉重庆重百九龙百货有限公司) [*Chen Junyi v. Chongqing Zhongbai Kowloon Dep't Store Co.*], 2019 Yu Min Zhong No. 840 (Chongqing Higher People's Ct. 2019) (China); Yangshi Guoji Wangluo Youxian Gongsi Su Shanghai Quan Tudou Wenhua Chuanbo Youxian Gongsi (央视国际网络有限公司诉上海全土豆文化传播有限公司) [*CCTV Int'l Network Co. v. Shanghai Tudou Cultural Transmission Co.*], (2013) Hu Yi Zhong Min Wu (Zhi) Zhong No.228 (Shanghai Interm. People's Ct. 2013) (China).

⁷¹ *Beijing China Youth v. Tianying Kyushu*, *supra* note 58.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

would allow the court to use the royalties of a comparative license agreement to calculate damages.⁷⁵

The Supreme People's Court had a different interpretation, which stated that when the court determines statutory damages, it should take into consideration the reasonable royalties for the work together with other factors, such as the type of work and the nature and result of the infringement.⁷⁶ While the Beijing Intellectual Property Court and the Supreme People's Court took different views on the legal basis for considering royalties when determining damages, there is no doubt that royalties have played an important role in damages calculation even before Copyright Law 2020.

D. *Optimal Deterrence Against Copyright Infringement*

Punitive damages are awarded to punish infringers and deter potential infringers in the future.⁷⁷ Nevertheless, punitive damages are not the only legal measure for punishing and deterring copyright infringement in China. Apart from punitive damages, Copyright Law 2020 introduces an additional penalty if the public interest is harmed.⁷⁸ If illegal income is RMB 50,000 (approximately \$7,740) or more, the court may impose a fine ranging from one to five times the illegal income.⁷⁹ In the case of a lack of illegal income, of difficulties in calculating such income, or when the illegal income is less than RMB 50,000, the court may impose a fine not higher than RMB 250,000 (approximately \$38,680).⁸⁰ Although both punitive damages and the administrative penalty are designed to punish infringers by strengthening the deterrent effect, the former provides compensation to the plaintiff whereas the latter is the infringer's public law liability to

⁷⁵ *Id.*

⁷⁶ Interpretation of the Supreme People's Court's on Certain Issues on the Applicable Law in the Adjudication of Civil Copyright Cases (最高人民法院关于审理著作权民事纠纷案件适用法律若干问题的解释), Fashi [2002] No. 31 (promulgated by the Judicial Comm. Sup. People's Ct., Oct. 12, 2002), art. 25, ¶ 2.

⁷⁷ See, e.g., Kuris Andrews & Jeremy De Beer, *Accounting of Profits to Remedy Biotechnology Patent Infringement*, 47 OSGOODE HALL L.J. 619, 637 (2009); Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 20 (2010); Phillip Johnson, *Compounding Uncertainty: The Need for Guidelines in the Assessment of Additional Damages for Copyright Infringement*, 2019 INTELL. PROP. Q. 136, 141–42; Deming Liu, *Reforming Additional Damages in Copyright Law*, 2017 J. BUS. L. 576, 577–78; Colin Morrissey, Note, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059, 3086–87 (2010).

⁷⁸ Copyright Law 2020, *supra* note 9, art. 53.

⁷⁹ *Id.*

⁸⁰ *Id.*

the government. In some circumstances, copyright infringers will also be subject to criminal liabilities, such as imprisonment and fines.⁸¹ In some serious cases, criminal liability can be as high as ten years of imprisonment.⁸²

The various liabilities above represent China's resolve to curb copyright infringement with deterrence. The 2021 Interpretation states that (1) the defendant is not allowed to claim a reduction or exemption of liability for punitive damages on the grounds that administrative or criminal fines have been imposed on the same infringement;⁸³ and (2) when determining the amount of punitive damages, the court may consider that administrative or criminal fines have been imposed on the defendant for the same infringement.⁸⁴ Although the 2021 Interpretation aims to roughly differ-

⁸¹ Zhonghua Remin Gongheguo Xingfa (中华人民共和国刑法(2020修正)) [Criminal Law of the People's Republic of China (2020 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2020, effective Mar. 1, 2021), art. 271:

Whoever falls under any of the following circumstances to, for profits, infringe upon any copyright or any right related to copyright shall, if the amount of illegal income is relatively large or there is any other serious circumstance, be sentenced to imprisonment of not more than three years and a fine or be sentenced to a fine only; or if the amount of illegal income is huge or there is any other especially serious circumstance, be sentenced to imprisonment of not less than three years nor more than ten years and a fine:

- (1) reproducing and distributing or communicating to the public through an information network any written work, musical work, work of fine arts, audiovisual work, computer software, or other work set out by a law or administrative regulation without the permission of its copyright owner;
- (2) publishing any book of which another person has the exclusive right of publication;
- (3) reproducing and distributing or communicating to the public through an information network any audio or video recording without the permission of its producer;
- (4) reproducing and distributing any audio or video recording of, or communicating to the public through an information network, any performance without the permission of its performer;
- (5) producing or selling any work of fine arts on which the signature of author is fake;
- (6) intentionally evading or disrupting the technical measures taken by a copyright owner or the holder of a right related to the copyright to protect the copyright or right related to the copyright in a work or audio or video recording, among others, without the permission of the copyright owner or right holder.

⁸² *Id.*

⁸³ Interpretation 2021, *supra* note 35, art. 6, ¶ 2.

⁸⁴ *Id.*

entiate the infringer's monetary liabilities under the law, the relationship between these liabilities is still unclear.

While multiple punitive liabilities seem to be an effective way to curb copyright infringement, they may also create unnecessary costs for the rest of society. In addition to the extraordinary costs for judicial and administrative bodies,⁸⁵ too much punitive liability would unduly stifle creativity.⁸⁶ Creators may hesitate to create because of the unduly heavy liabilities. Therefore, more punitive liabilities do not necessarily foster a better environment for creators. In the United Kingdom, for example, British courts refused to grant punitive damages in copyright infringement cases in which the defendants were already criminally liable for the same infringement.⁸⁷ When setting up various punitive measures against copyright infringement in the law, China's copyright policy only emphasizes strengthening the deterrent effect⁸⁸ but fails to consider the optimal deterrence for society. Time will tell how these multiple punitive measures will affect the incentives for creativity in the country.

E. Overall Assessment

Under Copyright Law 2020, a claimant can choose to claim damages based on his or her actual loss or the infringer's illegal gains. However, the flexibility provided by the new law will not substantially change the plaintiff's litigation strategy because most claimants hesitate to claim damages based on either of these options, both of which are difficult to prove.⁸⁹ Therefore, it is highly likely that statutory damages will still be the most frequently used approach for damages calculation in copyright litigation in China. Similarly, based on existing judicial practices, the new evidence rule will not significantly change the way claimants seek damages because its legal effect is quite similar to that of statutory damages. There-

⁸⁵ See, e.g., Oren Bracha & Talha Syed, *The Wrongs of Copyright's Statutory Damages*, 98 TEX. L. REV. 1219, 1238, 1245 (2020) (explaining that copyright policymakers should treat enforcement costs seriously to achieve optimal deterrence).

⁸⁶ See, e.g., JYH-AN LEE, *NONPROFIT ORGANIZATIONS AND THE INTELLECTUAL COMMONS* 109 (2012); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 183-207 (2004).

⁸⁷ Kimberlee Weatherall, *Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement*, 33 SYDNEY L. REV. 229, 258 (2011).

⁸⁸ See, e.g., Zhang, *supra* note 3, at 438 ("Punitive compensation for [IP] infringement is an important system to ensure strict protection by increasing the amount of damages, which will play a significant role in fighting against malicious infringement, and maintaining fair market competition. The introduction of punitive damages conforms to the trend of further strengthening the protection of [IP] in China and is beneficial to technological progress and innovation.").

⁸⁹ See *supra* text accompanying note 50.

fore, courts and claimants may rely more on statutory damages than on the new evidence rule.

Nevertheless, Copyright Law 2020 has brought about several fundamental changes to the rules governing damages. Punitive damages, the most important of the various forms of damages, will deliver more deterrence against willful infringement. Moreover, with the increase of maximum statutory damages, there will be less necessity for courts to determine discretionary damages without statutory basis. This will certainly benefit the rule of law for copyright development in the country.

IV. CONCLUSION

China's new Copyright Law provides more flexibility and alternatives for claimants to pursue damages. Right holders can now choose to claim damages based on their actual loss or the infringers' illegal gains. The new law also introduces two new independent approaches to damages calculation: royalty-based damages and punitive damages. While royalty-based damages existed in judicial practices before Copyright Law 2020, punitive damages are entirely new to China's copyright system. This Article argues that punitive damages will undoubtedly generate new opportunities for copyright protection in China, whereas statutory damages will remain the most popular approach to damages determination. In addition to the substantive law of damages calculation, the new law presents evidence rules concerning account records and materials held by alleged infringers. However, the legal effect of the new evidence rule is virtually the same as that of statutory damages. Therefore, this new rule will be less likely to substantially change the courts' determination of copyright damages.