

PUNITIVE DAMAGES FOR COPYRIGHT INFRINGEMENT IN CHINA: INTERPRETATIONS, ISSUES AND SOLUTIONS

by GUANGLIANG ZHANG*

INTRODUCTION

In recent years, China has continuously strengthened intellectual property enforcement while actively building a compensation mechanism to combat intellectual property infringement, with “compensation as the mainstay and punishment as the supplement.”¹ The Civil Code of the People’s Republic of China (“Civil Code”), which was promulgated on May 28, 2020, provides a general provision on punitive damages for intellectual property infringement.² Since 2019 China has also been amending its Copyright Law and other intellectual property laws. The introduction of punitive damages is an essential feature of this round of intellectual property law revisions,³ which aims to provide China with a fully established punitive damages system for intellectual property infringement.

*Professor, Renmin University of China Law School; Director, Renmin University of China Institute of International Intellectual Property; Deputy Secretary General, China Intellectual Property Law Society. The Author would like to thank Mark A. Cohen and Jiang Ge for their valuable comments on earlier drafts. The views expressed in this Article, as well as all errors, are the Author’s.

¹ See Opinions on Strengthening Reform and Innovation in the Field of Intellectual Property Adjudications (关于加强知识产权审判领域改革创新若干问题的意见) (promulgated by the Gen. Off. Cent. Comm. Communist Party & Gen. Off. State Council, Feb. 27, 2018); Opinions on Strengthening Intellectual Property Protection (关于强化知识产权保护的意见) (promulgated by the Gen. Off. Cent. Comm. Communist Party & Gen. Off. State Council, Nov. 24, 2019); Plan for the Construction of the Rule of Law in China (2020–2025) (法治中国建设规划(2020–2025年)) (promulgated by the Cent. Comm. Communist Party, Jan. 10, 2021).

² Article 1185 of the Civil Code stipulates that “in case of willful infringement of intellectual property rights, if the circumstances are serious, the infringed person has the right to claim the corresponding punitive damages.” Civil Code of the People’s Republic of China (promulgated by the Nat’l People’s Congress, May 28, 2020, effective Jan. 1, 2021), art. 1185 [hereinafter Civil Code].

³ For example, Article 54, Paragraph 1 provides: “An infringer of copyright or related rights shall make compensation on the basis of the right holder’s actual loss arising therefrom or the illegal gains of the infringer; and where the right holder’s actual loss or the infringer’s illegal gains are difficult to be calculated, compensation may be made on the basis of royalties. For deliberate infringement upon copyright or related rights, if the circumstances are serious, compensation may be made on the basis of the amount equal to, but not more than fivefold, the amount determined by the aforesaid methods.” Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990,

To clarify and unify the applicable standards for punitive damages, the Supreme People's Court issued the Interpretation on the Application of Punitive Damages in Civil Intellectual Property Infringement Cases ("Judicial Interpretation").⁴ In addition, courts in Beijing, Tianjin, and Shenzhen have successively issued judicial policies applicable to punitive damages for intellectual property infringement.⁵ Nevertheless, because the system was newly introduced, there are still some ambiguities in the punitive damages provisions as well as issues concerning their application.

This Article first interprets the provisions on punitive damages for copyright infringement under the Civil Code, the Copyright Law (as amended in 2020), and related judicial interpretations, as well as decisions on punitive damages for intellectual property infringements made by Chinese courts.⁶ The Article then explores ongoing disputes and proposes solutions.

amended Nov. 11, 2020, effective June 1, 2021), art. 54, ¶ 1 [hereinafter Copyright Law].

⁴ 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 Judicial Interpretation].

⁵ See, e.g., Guiding Opinions of the Beijing High People's Court on the Determination of Damages in Intellectual Property Infringement and Unfair Competition Cases and the Adjudicatory Standards for Statutory Damages (北京市高级人民法院关于侵害知识产权及不正当竞争案件确定损害赔偿的指导意见及法定赔偿的裁判标准) (promulgated by the Beijing High People's Ct., Apr. 21, 2020) [hereinafter Beijing Standards]; Minutes of the Judicial Committee of the Tianjin High People's Court on the Application of Punitive Damages in Intellectual Property Infringement Cases (天津市高级人民法院关于知识产权侵权案件惩罚性赔偿适用问题的审判委员会纪要) (promulgated by the Judicial Comm. Tianjin High People's Ct., Oct. 20, 2020) [hereinafter Tianjin Minutes]; Guiding Opinions of Shenzhen Intermediate People's Court on the Application of Punitive Damages in Civil Intellectual Property Infringement Disputes (For Trial implementation) (深圳市中级人民法院关于知识产权民事侵权纠纷适用惩罚性赔偿的指导意见) (promulgated by the Shenzhen Intern. People's Ct., Nov. 18, 2020) [hereinafter Shenzhen Opinions].

⁶ Since the Copyright Law (as amended in 2020) became effective on June 1, 2021, there has not yet been a decision involving the imposition of punitive damages for copyright infringement. However, punitive damages have been awarded in trademark and unfair competition cases following the addition of the punitive damages provisions to the Trademark Law and the Law Against Unfair Competition during their amendment in 2013 and 2017, respectively. The ongoing dispute over the determination of punitive damages for copyright infringement mainly revolves around issues similar to those found in trademark infringement and unfair competition.

I. *INTERPRETATION OF PROVISIONS ON PUNITIVE DAMAGES FOR COPYRIGHT INFRINGEMENT*

A. *Requisites for Punitive Damages for Copyright Infringement*

Strict statutory requirements must be met to trigger the application of punitive damages for copyright infringement. Pursuant to the Civil Code, the Copyright Law, and the Judicial Interpretation, the following requisites must occur: (a) willfulness on the part of the infringer; (b) seriousness of the circumstances surrounding the infringement; (c) a request of punitive damages by the right holder; and (d) a determinable base amount for calculating punitive damages.

1. *The Willfulness of the Infringer*

Willfulness is an essential element for the application of punitive damages for copyright infringement. As the Civil Code, the Copyright Law, and related judicial interpretations do not define “willfulness” in the context of punitive damages, the term should be construed to encompass both direct and indirect willfulness. Some courts, however, hold that the term generally refers to direct willfulness.⁷

Article 3 of the Judicial Interpretation stipulates the factors and circumstances used to determine “willfulness.” In determining the presence of “willfulness,” the court should comprehensively consider all facets of the case and decide whether the infringer has *knowingly* committed copyright infringement and has intended the same, or has otherwise allowed it to happen.⁸ The factors to be considered include the type of copyrighted works infringed, the status of the rights, the popularity of relevant works, and the defendant’s relationship with the plaintiff or other interested parties.⁹

2. *Serious Circumstances Surrounding the Infringement*

The seriousness of the circumstances surrounding the infringement is an objective element for the application of punitive damages for copyright infringement. When determining the seriousness of these circumstances, the court should comprehensively consider factors such as the means, frequency, duration, geographical scope, scale, and consequences of the infringement, as well as the infringer’s behavior in the course of the

⁷ See Beijing Standards, *supra* note 5, art. 1.13 (“Applicable Conditions of Punitive Damages”).

⁸ See Su Zhifu, *On the Objective, Positioning, and Judicial Application of Punitive Damages in the Intellectual Property System in China*, CHINESE APPLIED L., no. 1, 2021 at 132, 142.

⁹ See Judicial Interpretation, *supra* note 4, art. 3.

lawsuit.¹⁰ The defendant may be deemed to have committed infringement under serious circumstances when (a) he or she has committed the same or similar infringement after having previously been imposed an administrative penalty or held liable by a court for infringement; (b) the infringer is in the business of committing intellectual property infringement; (c) the infringer has forged, destroyed, or concealed evidence of infringement; (d) the infringer has refused to abide by an injunction order; (e) the infringer has obtained huge profits from the infringement or caused huge loss to the right holder due to the infringement; or (f) the infringement may endanger national security, the public interest, or personal health.¹¹

3. Request by the Right Holder

Punitive damages must be applied pursuant to a claim by the right holder, as provided under the Civil Code, the Copyright Law, and related judicial interpretations.¹² The need for such a request is also the consensus in judicial practice. For example, the Beijing High People's Court pointed out that punitive damages should be applied based on the parties' claims.¹³ The Shenzhen Intermediate Court proposed that the court should not award punitive damages *motu proprio*.¹⁴ In *Xie Ziruo v. Shuizhai Garment Factory*¹⁵ and *Jiaruibao Co. v. Xu*,¹⁶ the court, in view of the fact that the plaintiffs had not requested punitive damages, did not award those damages even though conditions for the application of punitive damages had been met.

4. Determinability of the Calculation Base of Punitive Damages

It is an essential requirement that the calculation base of punitive damages is determinable. In computing the amount of punitive damages to award, the court may use as the base the actual loss suffered by the right holder, the profits the infringer has derived from the infringement, or the royalties for the infringed works. Statutory damages, stipulated dam-

¹⁰ See *id.* art. 4.

¹¹ See *id.*

¹² See Civil Code, *supra* note 2, art. 1185; Copyright Law, *supra* note 3, art. 54; Opinions on Strengthening Intellectual Property Protection, *supra* note 1, art. 7; Judicial Interpretation, *supra* note 4, art. 1.

¹³ See Beijing Standards, *supra* note 5, art. 1.14 (“Applicable Methods of Punitive Damages”).

¹⁴ See Shenzhen Opinions, *supra* note 5, art. 3.

¹⁵ See *Xie Ziruo v. Xiangcheng Shuizhai Yimeng Garment Factory*, (2019) Yue 192 Min Chu No. 24307 (Guangdong Internet Ct.) (China) (civil decision).

¹⁶ See *Tianjin Jiaruibao Metal Prods. Co. v. Xu Guizhen*, (2019) Jin 116 Min Chu No. 5880 (Tianjin Binhai New Dist. People's Ct.) (China) (civil decision).

ages,¹⁷ and damages for mental distress cannot be used as benchmarks for computing punitive damages.¹⁸ If the base amount cannot be determined, punitive damages cannot be awarded.¹⁹

B. Computing the Amount of Punitive Damages

If all requirements for the application of punitive damages are met, the court may award damages in an amount equal to, but not more than fivefold, the base damages (i.e., the plaintiff's lost profits, the defendant's illegal gains, or the royalties for the infringed copyrighted works). However, the Copyright Law and related judicial interpretations do not provide guidance on determining the precise multiple of base damages for specific situations. The Judicial Interpretation does provide that when the court determines the appropriate multiple, it should comprehensively consider factors such as the degree of the defendant's subjective fault and the severity of the infringement.²⁰

II. DISPUTES OVER PUNITIVE DAMAGES FOR COPYRIGHT INFRINGEMENT

A. Determining the Amount of Punitive Damages

Making a reasonable determination of the amount of punitive damages is an important manifestation of the court's pursuit of the public interests and positive social effects.²¹ The lack of a unified standard for determining the base damages and the multiple thereof is a major issue

¹⁷ Stipulated damages refer to a pre-agreed sum of money payable as compensation for any repeated act of infringement. The main purpose is to deter repeated and malicious infringements, and it has the dual functions of compensation and punishment. Agreed damages are generally enforceable by courts. *See, e.g., Wanda Children's Culture Dev. Co. v. Beijing Taotao Zhihui Culture Media Co.*, (2020) Jing 491 Min Chu No. 2853 (Beijing Internet Ct.) (China) (civil decision).

¹⁸ *See Tang Wei, On Punitive Damages for Copyright Infringement—Centered on the Third Amendment to the Copyright Law*, ELEC. INTELL. PROP., no. 12, 2013, at 51, 54.

¹⁹ For example, in *Adidas AG v. Ruan*, the court of first instance denied the application for punitive damages for trademark infringement as the base amount (the defendant's illegal profits) could not be decided. Having ascertained the amount of the defendant's illegal profits, the court of second instance reversed the decision of first instance and awarded punitive damages. *See* (2020) Zhe 03 Min Zhong No. 161 (Zhejiang Wenzhou Interim. People's Ct.) (China) (civil decision).

²⁰ *See* Judicial Interpretation, *supra* note 4, art. 6.

²¹ *See Li Yang & Chen Xicheng, On the System of Punitive Compensation for Copyright—and the Intellectual Property Punishment Clauses of the Civil Code*, INTELL. PROP., no. 8, 2020, at 34, 44.

concerning the calculation of punitive damages for copyright infringement.²²

The ongoing dispute over the determination of base damages mainly revolves around whether the compensation base should be just the royalties for the copyrighted work or a multiple of those royalties. The provisions of the Copyright Law and the Judicial Interpretation differ on the matter. The Copyright Law provides that punitive damages for copyright infringement can be equal to, but not more than fivefold, the royalty amount.²³ By contrast, Article 5, Paragraph 2 of the Judicial Interpretation provides that the base for calculating punitive damages can be reasonably determined by reference to a multiple of royalties.²⁴

Local courts are also divided on the matter. For example, both the Beijing High Court and the Tianjin High Court hold that licensing fees or royalties should be used as the base for calculating punitive damages.²⁵ By contrast, the Shenzhen Intermediate Court uses “a reasonable multiple of the license fee” as the base.²⁶

Opinions in the academic circle are divergent as well, with some scholars arguing that Article 54 of the Copyright Law should be interpreted more broadly so that “a certain multiple of royalties may be used as the base for calculating punitive damages.”²⁷ In the view of these scholars, only a multiple of royalties can approximate the actual loss suffered by the right holder.²⁸ Other scholars, however, contest this view, claiming that the provisions under the current intellectual property laws, which allow the use of a multiple of royalties to calculate compensatory damages²⁹ for infringement, have already imposed sanctions on the infringers. Therefore, a punitive damages system that uses a multiple of royalties as

²² See Ding Wenyan & Zhang Leilei, *Research on the Judicial Determination of Punitive Damages for Intellectual Property Infringement*, INTELL. PROP. NO. 2, 2021, at 72, 72.

²³ See Copyright Law, *supra* note 3, art. 54.

²⁴ See Judicial Interpretation, *supra* note 4, art. 5, ¶ 2.

²⁵ See Beijing Standards, *supra* note 5, art. 1.18 (“Base of Punitive Damages”); Tianjin Minutes, *supra* note 5, art. 5 (“Calculated Base of Punitive Damages”).

²⁶ See Shenzhen Opinions, *supra* note 5, art. 9 (“Calculation of the Base of Punitive Damages”).

²⁷ See Liu Chengjun, *On the Important Amendments and Positive Impacts of the Copyright Law*, ELEC. INTELL. PROP., no. 1 2021, at 4, 10.

²⁸ For example, in *Opu Lighting v. Huasheng Plastic Products Co.*, the base amount is twofold the license fees, and the punitive damages are threefold the base amount. See (2019) Yue Min Zai No. 147 (Guangdong High People’s Ct.) (China) (civil decision).

²⁹ Compared with punitive damages, compensatory damages refer to damages awarded by the court to compensate for the losses suffered by the right holder, usually computed based on the lost profits of the right holder or the illegal gains of the infringer.

its calculation base lacks legitimacy and reasonableness.³⁰ Such a system is too harsh for infringers and runs counter to the original objectives of the law.³¹

Regarding the determination of the multiple of base damages, the Copyright Law and related judicial interpretations only specify the parameters, i.e., “equal to but less than fivefold.” In an individual case, it is totally within the court’s discretion to award an amount that is twofold or fivefold the base damages.³² Some degree of arbitrariness in the application of punitive damages is inevitable due to a lack of refinement in the standard for determining the multiple of base damages.³³ In addition, as the implementation of punitive damages is an important way for China to strengthen intellectual property enforcement, and some right holders frequently request the application of these damages, some courts tend to award punitive damages that are fivefold the base amount. All of these developments lead to risks that the punitive damages system might be abused and alienated.

B. Coordination of Civil, Criminal, and Administrative Liabilities

According to current laws in China, serious copyright infringers may be held civilly, administratively, and criminally liable at the same time³⁴ — that is, the infringer may be subject to three types of penalties: civil punitive damages, criminal fines, and administrative fines for serious copyright infringements. All three types of penalties require the perpetrator to pay money.³⁵

Whether the infringer should still pay punitive damages after having been held criminally and administratively liable for the same infringement is currently a disputed matter in China’s judicial practice. Against a background of strengthening intellectual property protection, the courts have been more inclined to award punitive damages even after the infringers have already been meted criminal or administrative penalties for the same

³⁰ See Zhang Guangliang, *The Construction of the System of Compensation for Intellectual Property Damages*, LAW SCI., no. 5, 2020, at 119, 130.

³¹ See Luo Li, *On the Introduction and Implementation of Punitive Damages in Intellectual Property Law*, SCI. L. no. 4, 2014 at 22, 31.

³² See Ding & Zhang, *supra* note 22, at 85.

³³ See *id.* at 79.

³⁴ See Copyright Law, *supra* note 3, art. 53; Criminal Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, amended Dec. 26, 2020, effective Mar. 1, 2021), arts. 217–218.

³⁵ See Ouyang Fusheng, *Determination of Punitive Compensation for Infringement of Intellectual Property Rights—On the Dilemma of the Application of Article 1185 of the Civil Code*, ELEC. INTELL. PROP., no. 10, 2020, at 74, 83.

infringement. For instance, in *Tianci v. Newman*,³⁶ the court of second instance awarded punitive damages fivefold the base amount even though the three defendants had been imposed criminal penalties amounting to RMB 1 million, RMB 1 million, and RMB 250,000, respectively. In this case, the court regarded the infringers' criminal liabilities as evidence of malicious infringement and serious circumstances for the purpose of awarding punitive damages.

However, some courts consider the fact that the defendant has been imposed an administrative or criminal fine differently when determining punitive damages. In *Adidas v. Li*,³⁷ where the plaintiff claimed punitive damages, the court noted that the defendants' crime of selling counterfeit products bearing registered trademarks had already been punished through the imposition of criminal fines and confiscation of the proceeds of the crime. Although criminal fines and punitive damages are different in nature, application procedures, and objectives of payment, the two share the same characteristics in the sense that they are meant to penalize and deter infringement. Therefore, in determining whether to apply punitive damages, the court should consider whether the previously imposed criminal fines have served the function of punitive damages to deter infringement. If the criminal fine, which exceeded the punitive damages that should be awarded, was sufficient to deter infringement, awarding punitive damages would no longer be appropriate.

The Supreme People's Court noticed the divided opinions among local courts on this issue and tried to unify the judicial standards through Article 6.2 of the Judicial Interpretation. This provision states that where the defendant claims the reduction or exemption of liability for punitive damages on the ground that administrative or criminal fines have already been imposed on the same infringement and such fines have been fully paid, the court should not support such a claim, but instead may take those fines into consideration when determining the multiple of base damages used to compute punitive damages. In *Arcela v. Cepai Co.*,³⁸ the court rejected the defendant's claims that the person-in-charge of the defendant company has executed the criminal fine, and that punitive damages should be reduced or exempted in accordance with the aforementioned Judicial Interpretation.

In the field of intellectual property, punitive damages have the dual functions of penalizing and deterring infringement and protecting and en-

³⁶ See *Guangzhou Tianci High-Tech Materials Co. v. Hua Man*, (2019) Zuigao Fa Zhi Min Zhong No. 562 (Sup. People's Ct.) (China) (civil decision).

³⁷ See *Adidas Co. v. Li Qiang*, (2019) Yu 0192 Min Chu No. 787 (Chongqing Pilot Free Trade Zone People's Ct.) (China) (civil decision).

³⁸ See *Arcela Co. v. Guangzhou Kepai Co.*, (2020) Yue 73 Min Zhong No. 2442 (Guangzhou Intell. Prop. Ct.) (China) (civil decision).

couraging innovation. Therefore, proportional, coordinated, and moderate deterrence is an inevitable requirement of the punitive damages system. The Judicial Interpretation's requirement that infringers need to bear criminal fines, administrative fines, and civil punitive damages at the same time may result in the stacking of penalties. Such stacking seems to run contrary to the principles of proportionality and non-excessive penalties.

III. SOLUTIONS TO DISPUTES OVER PUNITIVE DAMAGES FOR COPYRIGHT INFRINGEMENT

A. Principles of Dispute Resolution

Damages for copyright infringement in China are principally compensatory; punitive damages are only awarded in circumstances provided by law. The main value of the copyright punitive damages system is to increase the costs of deliberate infringement and to punish and deter potential infringement. However, the ultimate goal of copyright is not to protect prior creators, but to encourage continuous innovation and creation. Damages for infringement therefore need to be appropriately assessed, and judges should be vigilant at all times against the institutional risk of excessively biasing prior creators.³⁹ When awarding punitive damages, the court should be cautious in preventing the application of punitive damages from being abused and becoming a tool for right holders to seek improper benefits.

The disputes over punitive damages for copyright infringement in China essentially relate to the scale of the penalty and whether the penalty is excessive. The settlement of disputes should adhere to the principle of proportionality and the principle that the penalty should be commensurate with the fault committed.⁴⁰

B. Compute the Base Amount for Punitive Damages in Accordance with the Copyright Law and Reasonably Decide the Appropriate Multiple

The base amount is one of the variables used to determine the total amount of punitive damages. A fair and reasonable base amount ensures the justness and effectiveness of punitive damages. In copyright cases, the author's remuneration, including royalties, reflects the market value of the

³⁹ See Jiang Ge, *The Non-Punitive Nature of Punitive Damages in Copyright Law and Patent Law*, LAW STUD., no. 5, 2015, at 80, 91.

⁴⁰ Regarding the remedies for intellectual property infringement, the proportionality principle requires that the relief measures be adapted to the circumstances of infringement and not be excessive. The principle that the penalty should be commensurate with the fault committed means that the punishment imposed should correspond to the degree of the violator's fault. To avoid unreasonableness and unfairness, the punishment should neither be too light nor too heavy.

infringed works. Therefore, the provision under the Copyright Law that the base amount can be determined by reference to royalties is in line with this legal principle.⁴¹ In view of the fact that the Copyright Law already has a clear provision on the calculation base of punitive damages, the Judicial Interpretation's provision that the base amount be determined by a multiple of royalties runs afoul of black letter law. Therefore, the determination of the base amount should be governed by the Copyright Law rather than the Judicial Interpretation. Theoretically speaking, imposing damages based on a multiple of royalties is inherently punitive and may result to penalty stacking.

Punitive damages require not only a refined calculation base, but also a refined consideration of the multiple of base damages.⁴² The determination of this multiple is an important means to coordinate the penalty ratio and to avoid abuse of punitive damages.⁴³ The court should uphold the principles of proactiveness and prudence and comprehensively consider a variety of factors when determining the multiple of base damages.⁴⁴ This multiple should be assessed by reference to the subjective and objective circumstances surrounding the infringement. Unless there is evident willfulness or malice on the part of the infringer, courts should not readily apply punitive damages equivalent to fivefold the base amount.

C. Maintain the Balance of Interests and Coordinate the Infringer's Liabilities Under Public and Private Law

Under the dichotomy of public and private law, punitive damages in the field of torts (private law) essentially play the role of punishment and prevention rooted in public law. To prevent overlapping liabilities in public and private law, which leads to the stacking of penalties, a high amount of punitive damages should not be awarded if the infringer has been previ-

⁴¹ There are different provisions for determining the base damages for infringement in the Patent Law (2020), the Trademark Law (2019) and the Copyright Law (2020). Both the Patent Law and the Trademark Law provide that the base damages may be reasonably determined based on a multiple of the royalty if it is difficult to determine the loss suffered by the right holder or the illegal profits obtained by the infringer, whereas the Copyright Law provides that the base damages may be based on the royalty amount. This Author believes that the provisions of the Copyright Law, which are more reasonable and fairer than those of the Patent Law and the Trademark Law, represent notable legislative progress.

⁴² See Guan Yuying, *An Analysis of the Applicable Conditions for Punitive Compensation for Infringement of Intellectual Property Rights*, APPLICATION L., 2021, no. 1, at 43, 50.

⁴³ See Zhu Li, *The Policy on the Judicial Application of the Punitive Damages System for Patent Infringement*, INTELL. PROP., no. 8, 2020, at 21, 30.

⁴⁴ See Ding & Zhang, *supra* note 22, at 85.

ously subjected to administrative or criminal penalties for the same act.⁴⁵ Specifically, if the infringer has already been meted a high administrative fine or criminal penalty, a lower amount of punitive damages should be awarded. As a corollary, if the administrative or criminal penalty imposed on the infringer was low, the court may grant a higher amount of punitive damages. If the court considers that the public law liability imposed upon the infringer is sufficient to punish and deter the infringement, it should exercise discretion to not impose punitive damages upon the defendant. Thus, when determining the amount of civil compensation, the court should consider civil, administrative, and criminal liabilities as a whole to prevent a stacking of penalties.⁴⁶

When the Judicial Interpretation is revised in the future, Article 6, Paragraph 2 should be amended as follows: “where the defendant claims a 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 support such claim” to avoid the imposition of excessive penalties.

CONCLUSION

The core of the punitive damages system is to make the total amount of compensation commensurate with the infringer’s willfulness and the seriousness of the circumstances surrounding the infringement. While punitive damages serve the functions of punishing and deterring infringements, protecting the right holders, and inspiring them to innovate, these damages should not be excessive. In determining whether to grant a multiple of base damages in a given case, courts should adhere to the principle of equivalent penalties and keep in mind the underlying purpose of the punitive damages system. Revising the provision in the current Judicial Interpretation that allows the use of a multiple of royalties as the base for calculating punitive damages, and clarifying that the court should not impose high punitive damages or even refuse to award punitive damages when the infringer has already been held criminally or administratively liable for the same infringement, are urgent tasks to improve the copyright punitive damages system in China.

⁴⁵ See Ouyang, *supra* note 35, at 83.

⁴⁶ See Zhu, *supra* note 43, at 31.