

知识产权惩罚性损害赔偿： 基于新电商模式的探讨

Punitive damages for IP infringement:
In the new e-commerce context

赵克峰 Zhao Kefeng



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电商模式新发展

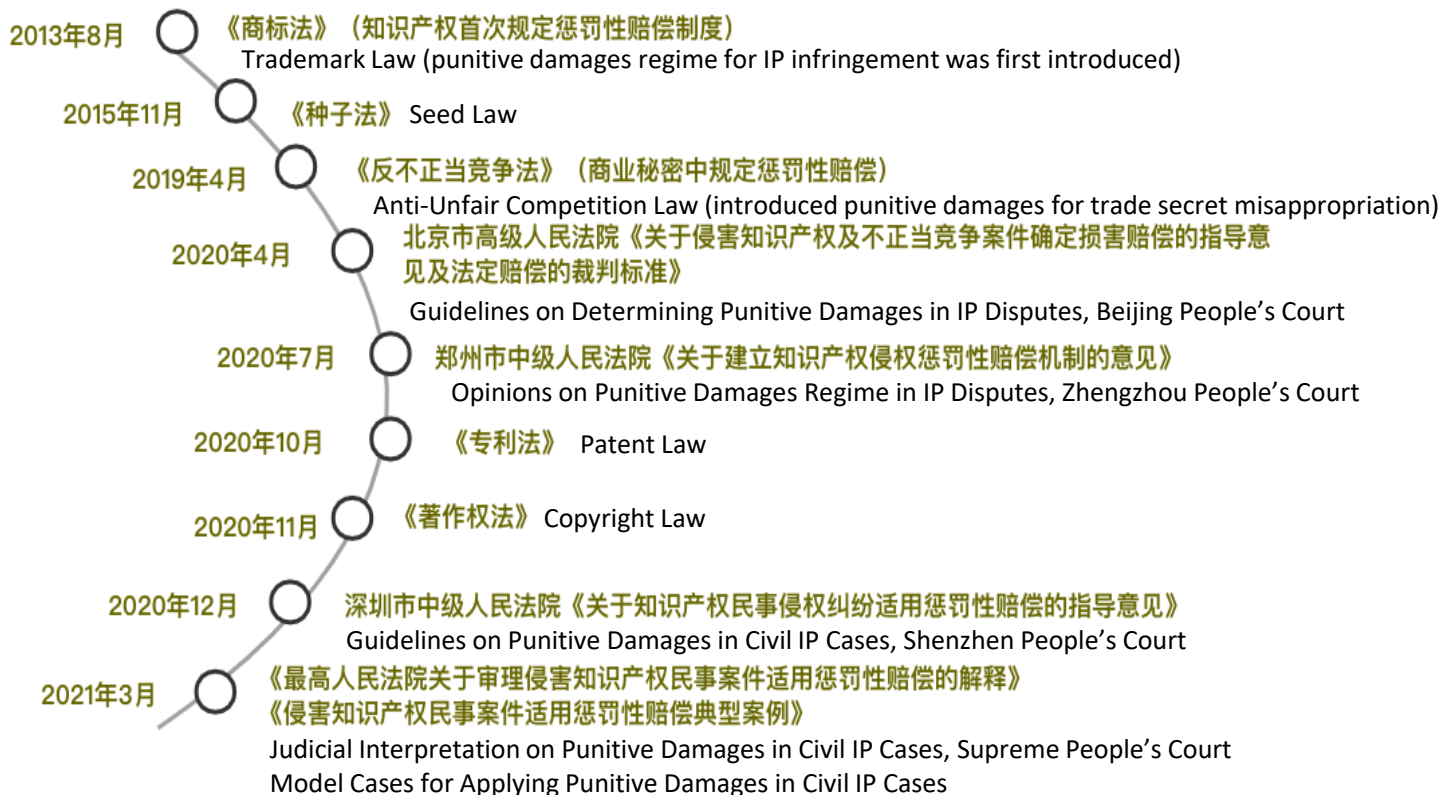
New developments in e-commerce



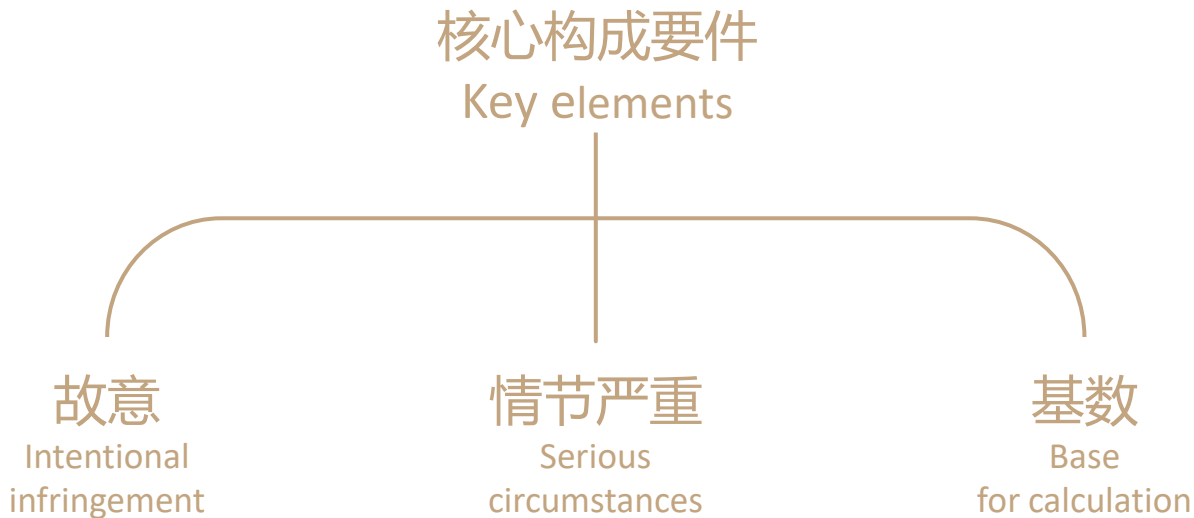
中国知识产权惩罚性赔偿制度

Punitive damages for IP infringement in China

Punitive damages for IP infringement in China



Punitive damages for IP infringement in China



Key elements of punitive damages — intentional infringement

《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》第三条第二款：

Article 3 (2), Judicial Interpretation by Supreme People's Court:

对于下列情形，人民法院可以初步认定被告具有侵害知识产权的故意：

The People's Court can establish a prima facie case of intentional infringement if

- (一) 被告经原告或者利害关系人通知、警告后，仍继续实施侵权行为的； The defendant continues infringement despite being notified or warned by the plaintiff or interested parties;
- (二) 被告或其法定代表人、管理人是原告或者利害关系人的法定代表人、管理人、实际控制人的； The defendant or legal representative or manager thereof is the legal representative, manager, or actual controller of the plaintiff or interested parties;
- (三) 被告与原告或者利害关系人之间存在劳动、劳务、合作、许可、经销、代理、代表等关系，且接触过被侵害的知识产权的； The defendant is related to the plaintiff or interested parties in the forms of employment, service provision, partnership, licensing, distribution, agency, and representation, among others, and has accessed the IP in question;
- (四) 被告与原告或者利害关系人之间有业务往来或者为达成合同等进行过磋商，且接触过被侵害的知识产权的； The defendant is engaged in business dealings or contract negotiations with the plaintiff or interested parties, and has accessed the IP in question;
- (五) 被告实施盗版、假冒注册商标行为的； The defendant has committed acts of piracy or trademark counterfeiting;
- (六) 其他可以认定为故意的情形。 Other circumstances that can be determined as intentional.

Key elements of punitive damages — serious circumstances

《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》第四条：

Article 4, Judicial Interpretation by Supreme People's Court:

对于侵害知识产权情节严重的认定，人民法院应当综合考虑侵权手段、次数，侵权行为的持续时间、地域范围、规模、后果，侵权人在诉讼中的行为等因素。 In determining serious circumstances, the People's Court shall consider means, number of violations, duration, geographic scope, scale, and consequences of the infringement, and the conduct of the infringer during the proceedings.

被告有下列情形的，人民法院可以认定为情节严重： The following acts of the defendant may be determined as “serious circumstances”:

- (一) 因侵权被行政处罚或者法院裁判承担责任后，再次实施相同或者类似侵权行为；（重复侵权） Committing the same or similar offense again despite administrative penalties or adjudicated delinquent by the court for prior infringement; (repeat infringement)
- (二) 以侵害知识产权为业； Infringing IP rights as primary business activity;
- (三) 伪造、毁坏或者隐匿侵权证据； Forging, destroying or concealing evidence of infringement;
- (四) 拒不履行保全裁定； Non-compliance with preservation orders;
- (五) 侵权获利或者权利人受损巨大； Making significant gains or causing heavy losses to the rights holder;
- (六) 侵权行为可能危害国家安全、公共利益或者人身健康； Endangering national security, public interests, or personal health;
- (七) 其他可以认定为情节严重的情形。 Other circumstances that can be determined as serious.

Key elements of punitive damages — base for calculation

《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》第五条第一、二款：

Article 5 (1) & (2), Judicial Interpretation by Supreme People's Court:

人民法院确定惩罚性赔偿数额时，应当分别依照相关法律，以原告实际损失数额、被告违法所得数额或者因侵权所获得的利益作为计算基数。该基数不包括原告为制止侵权所支付的合理开支；法律另有规定的，依照其规定。

The People's Court shall determine the amount of punitive damages based on the actual losses of the plaintiff, the amount of the defendant's illicit gains, or the benefits from the infringement, excluding the reasonable expenses paid by the plaintiff to stop the infringement, unless the law provides otherwise.

前款所称实际损失数额、违法所得数额、因侵权所获得的利益均难以计算的，人民法院依法参照该权利许可使用费的倍数合理确定，并以此作为惩罚性赔偿数额的计算基数。

Where it is difficult to quantify the actual losses, illicit gains, or benefits from the infringement as provided in the preceding paragraph, the People's Court shall instead determine the base amount of punitive damages by multiplying the licensing fees of the infringed IP as appropriate.

新电商模式下对惩罚性赔偿的认定

Determining punitive damages in cases involving new e-commerce formats

如何取证?

How to gather evidence?

恶意?

Intentional infringement?

情节严重?

Serious circumstances?

基数?

Base for calculation?



Determining punitive damages in cases involving new e-commerce formats



“故意”的取证
Evidence of intentional
infringement



“情节严重”的取证
Evidence of serious
circumstances



计算基数的取证
Determination of base for
calculation

通知后继续侵权

Continued infringement after notice

何为适格的权利人通知警告？

What qualifies as a valid notice or warning?

- 电商、直播平台上的权利投诉? Infringement report to e-commerce or livestreaming platforms?
- 在直播间评论、弹幕中发出警告? Warning in the chatbox of livestreaming sessions?
- 《商洽函》《权利告知函》? Negotiation letter or C&D (cease and desist) letter?

适格的警告信的构成要件：

Elements of a valid warning letter:

- 发出者所享有的权利 Rights held by the issuer
- 涉嫌侵权人的侵权行为 Infringement acts of the suspect
- 对涉嫌侵权人的主张 Threatened actions against the suspect

公证样品+公证律师函+两个月后公证样品

Notarized sample + notarized attorney's letter + sample notarized 2 months later

其他 Others

- 直播带货者常年进行直播销售？

Does the streamer performs live selling sessions as regular routine?

- 主播在直播中使用行业黑话，如“驴家” (LV)， “寇家” (COACH) ？

Does the streamer refer to brand names implicitly by creating slight variations?

- 利用直播话术诱导消费者购买？

Verbally trick consumers into purchase?

- 在直播、商品宣传图中特意隐去侵权标识？

Intentionally remove infringed logos in livestreaming or product posters?

- 因侵权被行政处罚或者法院裁判承担责任后，再次实施相同或者类似侵权行为：**重复侵权——保留投诉、维权成果**
Committing the same or similar offense again despite administrative penalties or adjudicated delinquent by the court for prior infringement: repeated infringement—the decisions in previous complaints or enforcement actions still apply
- 以侵害知识产权为业：**主播常年直播带货** Infringing IP rights as primary business activity: the streamer performs live selling sessions as regular routine
- 伪造、毁坏或者隐匿侵权证据：**如著作权权属证明、商标注册证、经销授权** Forging, destroying or concealing evidence of infringement: e.g. copyright registration certificate, trademark registration certificate, authorized distributor letter
- 拒不履行保全裁定：**持续侵权，保全裁定生效后两个月再次公证** Non-compliance with preservation orders: continued infringement; notarize two months after the conservatory order becomes effective
- 侵权获利或者权利人受损巨大：**见基数的取证** Making significant gains or causing heavy losses to the rights holder: see Determination of Base for Calculation
- 侵权行为可能危害国家安全、公共利益或者人身健康：**业务领域、产品性能（是否有国标、强制认证）**
Endangering national security, public interests, or personal health: business field, product quality (is the product compliant with national standards or CCC certified?)

- 从电商平台上的销售量、评论数等获得的产品数量、价格：**需权利人与电商平台间进行协作**
- Establish product quantities and prices by the sales volume and the number of reviews on e-commerce platforms: the rights holder needs to collaborate with e-commerce platforms
- 经济学统计报告，用经济学统计出的合理许可费或侵权产品导致的原被告导致的数量增减导致的侵权获利

Quantify the reasonable amount of licensing fees and the benefits that come at the expense of the plaintiff in economics report

- 被告的自认（网站、公众号、他案中.....）
- Self-confession by the defendant (e.g. on website, WeChat Official Account, or in other cases)

恶意投诉及惩罚性赔偿的适用

Malicious complaints and applicability of punitive damages

E-commerce Law on malicious complaints

《电子商务法》对恶意投诉的规制

E-commerce Law on malicious complaints

法律规定

Legislation

司法实践

Judicial practice

E-commerce Law on malicious complaints — Legislation

因通知错误造成平台内经营者损害的，依法承担民事责任。恶意发出错误通知，造成平台内经营者损失的，加倍承担赔偿责任。

《电子商务法》第四十二条第三款 Article 42 (3), E-commerce Law

Where a false notice causes losses to the platform vendor, the rights holder shall bear civil liability. Where the false notice is issued in bad faith and causes losses to the platform vendor, the compensation liability shall double.

E-commerce Law on malicious complaints — Legislation

《最高人民法院关于审理涉电子商务平台知识产权民事案件的指导意见》第六条 Article 6, Guidelines on the Trial of Civil IP Disputes Involving E-commerce Platforms, Supreme People' s Court

人民法院认定通知人是否具有电子商务法第四十二条第三款所称的“恶意”，可以考量下列因素：

The People's Court may determine “bad faith” as referred to in Article 42 (3) of the E-commerce Law if the notifying party:

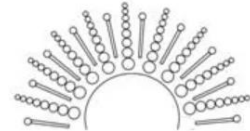



- 提交伪造、变造的权利证明； Submitted forged or altered certificates of rights;
- 提交虚假侵权对比的鉴定意见、专家意见； Submitted fake appraisal/expert opinions on infringement;
- 明知权利状态不稳定仍发出通知； Sent out notice where the legal status of the rights is known to be ambiguous;
- 明知通知错误仍不及时撤回或者更正； Did not withdraw or correct the notice known to be false;
- 反复提交错误通知等。 Submitted false notices repeatedly, etc.

杭州市余杭区人民法院 (2017)浙0110民初18624号 “拜耳案”

People's Court of Hangzhou Yuhang (2017) Zhe-0110-Min-Chu No. 18624: the “Bayer case”

案件事实 Facts

- 被告李庆于2016年注册2件与原告拜耳公司在先美术作品高度近似的商标;
- In 2016, Li Qing (the defendant) registered 2 trademarks that are highly similar to the prior designs of Bayer (the plaintiff);
- 2016年-2017年, 李庆在淘宝知识产权保护平台针对原告Coppertone品牌防晒产品共投诉249次, 共投诉121个商家, 投诉后主动撤诉19次。
- From 2016 to 2017, Li Qing filed 249 complaints on Taobao's IP protection platform against 121 distributors of the plaintiff's sunscreen product Coppertone. 19 of the complaints were later withdrawn.

李庆注册商标 Marks registered by Li		
拜耳在先使用标识 Designs in prior use by Bayer		

E-commerce Law on malicious complaints — Judicial practice

杭州市余杭区人民法院 (2017)浙0110民初18624号 “拜耳案”

People's Court of Hangzhou Yuhang (2017) Zhe-0110-Min-Chu No. 18624: the “Bayer case”

法院判决 Ruling

被告以恶意抢注的商标对原告产品发起投诉以谋取利益，以及欲通过直接售卖商标以获得暴利，该种通过侵犯他人先权利而恶意取得、行使商标权的行为，违反了诚实信用原则，扰乱了市场的正当竞争秩序，应认定为《反不正当竞争法》第二条规定的不正当竞争行为。

The defendant filed complaints against the plaintiff and attempted to profit from trademark squatting in bad faith despite the prior use by the plaintiff. The acts violated the good faith principle and caused market disruption. They constituted unfair competition as defined in Article 2 of the Anti-Unfair Competition Law.

《电子商务法》对恶意投诉的规制——司法实践

深圳市中级人民法院 (2020)粤03民终6793号 “ANKER案”

Intermediate People's Court of Shenzhen (2020) Yue-03-Min-Zhong No. 6793: the “ANKER case”

案件事实 Facts

- 超人公司注册与安克公司商品上在先使用标识近似的“ANKER”商标； Superman registered trademarks that are highly similar to the designs in prior use by Anker in its product packaging;
- 超人公司于2018年6月开始在各大电商平台以上述商标为权利基础，对安克公司的数据线商品发起投诉，并在案件审理期间持续在京东平台对安克公司的商品发起投诉。 Starting from Jun 2018, Superman filed complaints against Anker's data cables for trademark infringement on major e-commerce platforms, and continued to report Anker's products on JD during the trial of the case.

超人公司 注册商标 Marks registered by Superman	安壳 Anker			ANKER		
安克公司 在先使用 标识 Designs in prior use by Anker	ANKER		ANKER		ANKER	

E-commerce Law on malicious complaints — Judicial practice

《电子商务法》对恶意投诉的规制——司法实践

深圳市中级人民法院 (2020)粤03民终6793号 “ANKER案”

Intermediate People's Court of Shenzhen (2020) Yue-03-Min-Zhong No. 6793: the “ANKER case”

法院判决 Ruling

超人公司在多个商品和服务类别上累计申请了200余件商标，其并未举证证明具有实际使用的真实意图，主观恶意昭然。显而易见，超人公司违反诚实信用原则，置基本的商业道德于不顾，通过以不正当手段恶意申请取得的注册商标作为依据，于2018年9月在京东平台发起的投诉，损害了安克公司的合法权益，原审认定构成不正当竞争，并无任何不当，应予维持。

Superman registered 200+ marks across diverse product and service categories with bad faith, as proven by its failure to demonstrate bona fide intention of use. The trademark complaint filed on Sep 2018 by Superman on JD disregarded good faith / business ethics and harmed the legitimate interests of Anker. This court upholds the previous ruling and finds the defendant liable for acts of unfair competition.

惩罚性赔偿在此类案件中是否适用?

Are punitive damages applicable in this type of cases?



THANKS

GEN 己任

GEN LAW FIRM 己任律师事务所



Suite 1001, China World Office 2

1 Jianguomenwai Avenue

Chaoyang District

Beijing 100004

北京市朝阳区建国门外大街1号

国贸写字楼2座1001室

www.genlaw.com