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目录

Contents

从最高人民法院六个典型案例看知识产权惩罚性赔偿的适用

An Analysis of Punitive Damages in China through 6 Typical IP Cases

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最高人民法院在2021年3月2日公布了《关于审理侵害知识产权民事案件适用惩罚性赔偿的解释》（以下简称“解释”），随即在3月15日公布6个侵害知识产权民事案件适用惩罚性赔偿典型案例。最高人民法院如此迅速公布典型案例，是为了指引各级法院正确适用惩罚性赔偿。

The Supreme People's Court ("SPC") issued the *Interpretation on Awarding Punitive Damages in Civil Intellectual Property Infringement Cases* (the "Interpretation") on 2nd March 2021. It also published six typical cases to guide the Chinese courts on correctly awarding punitive damages in IP infringement disputes.

最高人民法院公布的6个案例，分别是：

- 天赐案（天赐案）：广州天赐高新材料股份有限公司、九江天赐高新材料有限公司侵害技术秘密纠纷二审民事判决书（(2019)最高法知民终562号）；
- 欧普案（欧普案）：再审申请人欧普照明股份有限公司因与被申请人广州市华升塑料制品有限公司侵害商标权纠纷案再审民事判决书（(2019)粤民再147号）；
- 小米案（小米案）：中山奔腾电器有限公司等与小米科技有限责任公司等侵害商标权及不正当竞争纠纷上诉案二审民事判决书（(2019)苏民终1316号）；
- 阿迪达斯案（阿迪达斯案）：阿迪达斯有限公司与阮国强等侵害商标权纠纷上诉案二审民事判决书（(2020)浙03民终161号）；
- 五粮液案（五粮液案）：冯某与宜宾五粮液股份有限公司等侵害商标权纠纷上诉案二

The Supreme People's Court ("SPC") issued the following six cases:

- The Tianci case: Guangzhou Tianci High-tech Materials Co Ltd, Jiujiang Tianci High-tech Materials Co Ltd v. Wu Danjin et al., (2019) Zuigaofa Zhi Min Zhong No. 562.
- The Opple case: Opple Lighting Co Ltd v. Guangzhou Huasheng Plastic Products Co Ltd, (2019) Yue Min Zai No. 147, the retrial of a trademark infringement dispute.
- The Xiaomi case: Xiaomi Technology Co Ltd v. Zhongshan Besteng Electric Co Ltd, (2019) Su Min Zhong No. 1316, a trademark infringement and unfair competition appeal.
- The Adidas case: Adidas Co Ltd v. Ruan Guoqiang et al., (2020) Zhe 03 Min Zhong No. 161.
- The Wuliangye case: Yibin Wuliangye Co Ltd v. Feng et al., (2020) Zhe 01 Min Zhong 5872.
- The Erdos case: Inner Mongolia Erdos Resources Co Ltd v. Beijing Miqi Trading Co Ltd, (2015) Jing Zhi Min Chu Zi No. 1677, a trademark infringement dispute.

This article analyses the above six cases and dis-

审民事判决书（2020）浙01民终5872号）；

- 鄂尔多斯案（鄂尔多斯案）：内蒙古鄂尔多斯资源股份有限公司与北京米琪贸易有限公司侵害商标权纠纷案一审民事判决书（（2015)京知民初字第1677号）。

本文希望通过对该6个案例的分析，对《解释》的具体适用标准进行初步探讨，以期对将来的案件有所帮助。

一、适用惩罚性赔偿的构成要件

最高人民法院本次公布的六个案例，其中五个案例是关于商标侵权，只有一个案例是关于商业秘密侵权，这主要是因为《民法典》于2021年1月1日生效，《专利法》和《著作权法》则到2021年6月1日生效，尚没有可引用的合适判例。虽然之前有个别法院在著作权侵权案件中[（2016）京0107民初4684号判决书]实际适用了惩罚性赔偿，但在判决书中仍然是通过适用酌定赔偿的名义，而不是直接明确惩罚性赔偿，以避免缺乏法律依据的问题。但是随着《民法典》、《专利法》和《著作权法》的相继生效，相信最高人民法院还会继续公布知识产权惩罚性赔偿的典型案例。

在《解释》中，适用惩罚性赔偿的前提是被告的侵权故意以及情节严重，前者强调被告的主观意图，后者则强调侵权行为的客观结果，二者作为主客观的两面，应同时被满足的情况下，才能对被告适用惩罚性赔偿。以下分别论述。

cusses the criteria laid down in the Interpretation, focusing on the conditions for awarding punitive damages, calculating damages, and applying punitive damages multipliers.

1. The conditions for awarding punitive damages

Among the six cases, five involve trademark infringement and one trade secret infringement. This is because only the Trademark Law and the Anti-unfair Competition Law, in their current form, have been effective long enough to have been the subjects of litigation. As the Civil Code only took effect on 1st January 2021, and the 2020 amendments to the Patent Law and Copyright Law will only take effect on 1st June 2021, there is currently a lack of decided cases on awards of damages under these laws.

While some courts have already awarded punitive damages in copyright infringement cases, such as (2016) Jing 0107 Min Chu No. 4684, they award damages under the auspices of their discretionary judicial powers. However, with the Civil Code now effective and the 2020 amendments to the Patent Law and Copyright Law soon to take effect, the SPC will certainly issue more typical cases concerning punitive damages for other types of infringement.

In the Interpretation, the conditions for the application of punitive damages are:

the defendant must act wilfully; and

the circumstances must be serious.

Courts may only award punitive damages when both conditions are met. Below is an analysis of each condition.

（一）惩罚性赔偿的主观要件——“故意”的认定

关于被告侵权“故意”的认定，《解释》第三条规定了五种具体情形加一种兜底情况：

（1）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；

（2）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；

（3）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；

（4）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；

（5）被告实施盗版、假冒注册商标行为的；

（6）其他可以认定为故意的情形。

这五种情形规定比较明确，对其认定也比较容易、清楚，法院在适用时基本不存在模糊和不确定性。典型案例中实际并未涉及该五种具体情况的认定，只有天赐案涉及法院对于前述情形中第三项的认定，但这只是因为侵犯商业秘密的案件中，证明被告接触过商业秘密是侵权成立的前提条件。

其他五个案例中，被告被认定故意的情形与《解释》中规定的上述五种具体情形都存在较大差别，可以视作第六种的兜底情形，大致可分以下三种情况：

1、攀附驰名商标

欧普案中，法院认定原告欧普照明股份有限公司的“欧普”商标被多次认定为驰名商标，被告明知原告及其商标所享有较高的知名

1.1 Wilfulness

Regarding the wilfulness of an infringer, Rule 3 of the Interpretation stipulates six circumstances where behaviour is regarded as wilful:

（1）The defendant continues to infringe after being notified or warned by the plaintiff or an interested party;

（2）The defendant, its legal representative, or its manager was the legal representative, manager, or controller of the plaintiff or an interested party;

（3）Where there is a relationship between the defendant and plaintiff or an interested party involving labour, service, cooperation, licensing, distribution, agency, or representation, and the defendant had access to the infringed IP rights;

（4）The defendant and the plaintiff or an interested party engaged in transactions or contract negotiations, and the defendant had access to the infringed IP rights;

（5）The defendant engages in piracy, or trademark counterfeiting; and

（6）Other circumstances that may be considered wilful.

The provisions of the first five circumstances above are simple and straightforward, with almost no ambiguity or uncertainty. No demonstration of how these circumstances apply is included. Only the Tianci case, which involved trade secret infringement and necessarily required proof of exposure to succeed at trial, relates to circumstance 3.

The remaining five cases are cited to describe examples of item 6, the catch-all of other circumstances that may be considered wilful. The five cases cover the following three situations:

1.1.1. Freeriding on a well-known trademark

In the Opple case, the plaintiff, Opple Lighting Co Ltd, sued the defendant for trademark infringement. The court found that Opple’s “欧普” trademark had

度和美誉度，但其仍故意模仿、使用多个与原告驰名商标近似的商标，且使用在相同商品上，主观恶意明显。

小米案中，法院肯认原告小米科技公司的“小米”商标的驰名程度，同时列明被告的多种故意攀附行为，用以证明被告的明显恶意。

2、使用与知名度较高的商标几乎完全相同的标识

五粮液案中，法院认定被诉侵权产品上的侵权标识与原告五粮液公司主张的涉案权利商标标识相同或高度近似，且二者使用于相同产品上，产品的款式、颜色、商标的标识位置等几乎完全相同，此种全面摹仿涉案注册商标及产品的行为足见其侵犯涉案商标专用权、攀附商标专用权人商誉的主观意图十分明显。

鄂尔多斯案从原告商标知名度高，以及被告使用与涉案商标几乎完全相同的标识两方面来论述被告的主观恶意。

3、重复侵权

阿迪达斯案中，法院认定，被告因侵犯原告商标权被两次行政处罚，被告在接受问询时自认知道自己的侵权行为，辅以被告侵犯了原告多枚相同的商标的情形，来证明被告的主观恶意。

been recognised as a well-known trademark many times. The defendant knew that Opple and its trademark had a good reputation. Yet, they wilfully imitated and used multiple trademarks similar to the plaintiff's well-known trademarks and used them on identical goods with obvious subjective wilfulness.

In the Xiaomi case, the court affirmed the fame of the plaintiff's "Xiaomi" trademark, and listed the defendant's various acts of imitation to prove the defendant's obvious wilfulness; due to the various instances of infringement, the court held that the defendant had acted with obvious wilfulness.

1.1.2 Use of marks almost identical to the famous trademarks

In the Wuliangye case, the court found that the infringing mark was the same as or very similar to the plaintiff's trademark. Moreover, the infringer used a mark identical in terms of style, colour, and position on the same product. Such comprehensive imitation showed the defendant's blatant wilfulness.

In the Erdos case, the court affirmed wilful infringement based on two factors: the reputation of the infringed brand and the defendant's use of trademarks that were almost identical to the plaintiff's.

1.1.3 Repeated infringement

In the Adidas case, the court found that local administrations (Administration of Market Regulation) had punished the defendant twice for infringing the plaintiff's trademarks. Because of the continuing and repetitive nature of the infringement, the court concluded that infringement was wilful.

Please note that repeated infringement is presumed to be wilful and constitutes a serious circumstance. Therefore, for cases concerning repeated infringement, a court may award punitive damages based on repeated infringement alone.

1.2 Serious circumstances

Rule 4 of the Interpretation describes the following seven circumstances as serious:

（二）惩罚性赔偿的客观要件——“情节严重”的认定

1、关于“情节严重”的认定，《解释》第四条规定了六种具体情形加一种兜底情况：

（1）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；

（2）以侵害知识产权为业；

（3）伪造、毁坏或者隐匿侵权证据；

（4）拒不履行保全裁定；

（5）侵权获利或者权利人受损巨大；

（6）侵权行为可能危害国家安全、公共利益或者人身健康；

（7）其他可以认定为情节严重的情形。

六种具体情形中，1、3、4、6的情形明确清楚，在案件中认定应无太大争议，但情形2和5则不同。

2、关于“以侵害知识产权为业”的认定

情形2中规定的“以侵害知识产权为业”，是否包括“主要”以侵害知识产权为业，可能存在一定争议。

在五粮液案中，法院考虑了被告的经营模式（包括被诉侵权产品的推销流程、储藏方式以及店招和店内装潢情况），侵权持续时间（包括两家个体工商户成立时间、首次受到行政处罚时间、侵权持续周期、侵权手段均基本一致或相近），认定被告“基本”以侵权为业。

在天赐案中，最高人民法院则进一步总结了“以侵害知识产权为业”的认定标准：“界定行为人是否以侵权为业，可从主客观

（1）The defendant committed identical or similar infringing acts after receiving an administrative penalty or being subject to a court judgment for IP infringement;

（2）The defendant’s business is IP infringement;

（3）The defendant forged, destroyed, or concealed evidence of infringement;

（4）The defendant refused to comply with a preservation ruling;

（5）The defendant made huge infringement profits, or the IP owner suffered huge infringement losses;

（6）The infringement may endanger national security, public interest, or personal health; and

（7）Other circumstances considered serious.

Among the above circumstances, circumstances 2 and 5 are discussed. For circumstance 2, whether the situation that a defendant’s primary business is IP infringement can be disputed.

In the Wuliangye case, the court held that the defendant’s business model for the duration of the infringement was basically trademark infringement.

In the Tianci case, the SPC described what infringing IP rights as a defendant’s business meant. They said:

> *Whether the defendant is engaged in infringement as its business can be confirmed from two aspects. In terms of objective aspect, the defendant has conducted the infringement, which is the defendant’s main business, and constitutes its main source of profit. In terms of subjective aspect, the defendant, including the company’s actual controller and managers, are aware that their acts constituted infringement, and still conduct infringing acts.*

The difficulty with circumstance 5 is that the word huge cannot be quantified. Considering the differences between various IP rights, how huge an amount is huge enough for matters to be considered severe could vary greatly according to the IP involved. The writer

两方面进行判断。就客观方面而言，行为人已实际实施侵害行为，并且系其公司的主营业务、构成主要利润来源；从主观方面看，行为人包括公司实际控制人及管理层等，明知其行为构成侵权而仍予以实施。”最高人民法院从主观和客观两个方面总结了认定标准。

3、关于“侵权获利或者权利人受损巨大”作为“情节严重”的认定

情形5的内容不确定性较大，因为“巨大”难以量化；但考虑到知识产权各领域的差别较大，“巨大”的标准不宜统一量化，期冀最高人民法院公布更多典型案例，对于不同的知识产权领域的“侵权获利或者权利人受损巨大”提供进一步指导。

在欧普案中，法院从权利人受损严重的角度做出了全面的分析：“情节严重是指被控侵权人从事的侵犯商标专用权的行为从方式、范围、所造成的影响等方面均对权利人产生了较大损失和消极影响。本案中，首先，华升公司生产并且在京东商城、天猫商城、淘宝商城以及阿里巴巴批发网等多渠道、多途径销售被诉侵权产品，侵权持续时间长，从本案起诉至再审期间均未停止侵权，且侵权产品种类多，销售数量巨大，其仅在天猫网“oupute旗舰店”其中一款台灯产品的月销量就达1561件，截止2016年8月的总销量就达63935件。其次，华升公司不仅在商品上使用被诉侵权商标，还在网站以“欧普特官方旗舰店”的名称经营，并且不断扩大生产规模，另行成立了新的公司“广州市华辉欧普特科技有限公司”，专门从事灯饰产品的研发与生产。第三，华升公司的侵权行为不仅造成市场混淆，而且侵权产品还因生产质量不合格被行政处罚，给欧普公司通过长

hopes that the SPC will publish more typical cases to provide further guidance on such matters.

In the Opple case, the court comprehensively analysed serious circumstances from the perspective of how serious the plaintiff was harmed and stated that:

> *Serious circumstances mean that the infringer's trademark infringement has caused substantial losses and a negative impact on the IP right holder through its infringement method, scope, and influence. In this case, first of all, Huasheng produces and sells allegedly infringing products on JD.com, Tmall, Taobao, and the Alibaba wholesale network. The infringement lasted for a long time and has not stopped at any time during this litigation. In addition, there are many types of infringing products and a huge sales volume. Its monthly sales of one of its desk lamp products in its "Oupute flagship store" on Tmall alone reached 1,561 units, and its total sales reached 63,935 units in August 2016. Secondly, Huasheng not only used the infringing trademark on goods, but also on the website named "Oupute Official Flagship Store". It has been expanding its production scale, and established a new company named "Guangzhou Huahui Oupu Technology Co Ltd", which specialises in the development and production of lighting products. Third, Huasheng's infringement has not only caused market confusion, but has also led to the imposition of penalties by the administrative authorities due to product quality issues. Those penalties have negatively affected the business reputation accumulated by Opple. Moreover, Huasheng's registered business scope and approved business items do not include the manufacture of lighting and lamps. In addition, lamp products are subject to national compulsory standards, and unqualified products can cause safety incidents, which harm consumers and affect public safety. It can be seen that Huasheng's infringement has a large impact, and the consequences are serious enough to be considered serious circumstances.*

The above analysis gives detailed insight into how a

久努力积累起来的商业信誉带来负面评价。况且，华升公司注册的经营范围和批准的经营项目并不包含照明灯具的制造，加上灯类产品属于国家强制认证产品，产品质量不合格极易引发安全事故，损害消费者利益，影响社会公共安全。由此可见，华升公司的侵权行为影响大，后果较为严重，足以认定属于情节严重情形。”

虽然以上论证没有涉及认定“侵权获利或者权利人受损巨大”的标准，但提供了对于侵权行为的严重后果的不同维度的考量。

二、惩罚性赔偿数额的确定

（一）惩罚性赔偿的基数的认定

首先应当注意的是，不同的知识产权法律在惩罚性赔偿的基数计算方式上存在细微差别。

1、以原告实际损失数额作为基数

需要指出的是，《商标法》、《反不正当竞争法》和《种子法》对于原告的实际损失与侵权人的侵权获利，二者的适用存在先后顺序，即只有在原告实际损失无法确定的前提下，才可以适用侵权人的侵权获利。而《专利法》和《著作权法》允许原告选择适用实际损失和侵权获益。

在阿迪达斯案中，法院认为，在实际损失可以查明的情况下，应优先以原告实际损失作为惩罚性赔偿计算的基数。

关于原告的实际损失，实务中尤其是被告的侵权行为与原告的损失之间的因果关系难以证明，导致实际损失难以计算。阿迪达

court might consider the seriousness of infringement.

2. Determining the amount of punitive damages

2.1 Calculating ordinary damages

There are subtle differences in how courts calculate ordinary damages under different IP laws.

2.1.1 Plaintiff’s losses

Under the Trademark Law, the Anti-Unfair Competition Law and the Seed Law, damages are primarily quantified based on the plaintiff’s losses. If the plaintiff’s losses are unknown, a court may quantify damages based on the infringer’s profits.

In contrast, under the Patent Law and the Copyright Law, the plaintiff may claim damages based on either their losses or the defendant’s profits.

In the Adidas case, the court held that if the plaintiff can prove their actual losses, punitive damages must be awarded based on those losses. However, it is difficult to prove the causal link between a plaintiff’s losses and a defendant’s infringement in practice. There are only a few situations where a court would award damages based on the plaintiff’s losses.

In the Adidas case, the court attempted to quantify the plaintiff’s losses. The court held that the plaintiff’s losses could be calculated using the plaintiff’s lowest unit price, multiplied by the number of infringing products sold by the defendant and the plaintiff’s gross profit margin, as expressed by this formula:

2.1.2 Defendant’s illegal gains or the infringement profits

In practice, Chinese courts generally use the defendant’s illegal gains or infringement profits as the basis for quantifying damages. This involves taking the number of infringing products sold and multiplying it by the infringing product’s unit profit.

In the Tianci case, the SPC found that the defendant’s infringement profits were equal to its total sales multiplied by its profit ratio. If the court cannot confirm the defendant’s profit ratio, then, given that the defendant

斯案进行了颇有意思的尝试。在该案判决书中，法院认为原告的实际损失可以下列公式进行计算：原告价格最低的正品单价×被告销售的侵权产品数量×原告毛利润率。

2、以被告违法所得数额或者因侵权所获得的利益作为基数

在实务中，法院一般认为被告违法所得数额或者因侵权所获得的利益，可以根据侵权产品的销售量乘以侵权产品的单位利润计算。

在天赐案中，法院认定，被告侵权获利＝其销售总额×其利润率，在被告利润率无法查明的情况下，考虑被告以侵权为业，通过侵权节省了研发费用，因此可以合理推定被告利润率高于原告利润率，因此以原告利润率作为乘数计算被告侵权获利。但最高人民法院同时认定，应综合考虑涉案被侵害技术秘密在侵权产品生产过程中所起的作用，从而确定了50%的贡献率，因此最终确定被告侵权获利的计算方式为侵权产品销售总额×原告产品利润率×涉案技术秘密贡献度。

在小米案中，法院认定，被告侵权获利为被告侵权产品销售总额×行业毛利润率。

鄂尔多斯案中，法院认定，被告因侵权行为的获利可以通过侵权产品销售数量×产品单价×产品合理利润率进行计算。在产品合理利润率无法确定的情况下，法院根据商标知名度和被告侵权情节酌定了合理利润率。

3、以权利使用费或许可使用费作为基数

惩罚性赔偿的基数，按照《解释》第五条的规定，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为准，用该三种方式均不能确定的，参照该权利许可使用费的倍数合理确定。

would have saved R&D costs through infringement, the court can reasonably assume that the defendant's profit ratio is higher than the plaintiff's profit ratio.

$$\text{Lowest Unit Price} * \text{Products Sold} * \text{Plaintiff's Gross Profit Margin} = \text{Damages}$$

Therefore, the plaintiff's profit ratio can be used to calculate the defendant's infringement profits. The SPC also held that it should consider the role of the infringed technical secret in the production process of the infringing product. After consideration, it applied a 50% contribution ratio to the calculation. Therefore, calculating infringement profits involves multiplying the total infringing product sales by the plaintiff's products' profit ratio and the contribution ratio of the relevant technical secrets. The calculation can be expressed as:

In the Xiaomi case, the court calculated the defendant's infringement profits by multiplying the defendant's sales revenue with the industry's average gross profit rate.

In the Erdos case, the court calculated infringement profits by multiplying infringing product sales by the product unit price and a reasonable profit rate for the product. When it was unable to confirm a reasonable profit rate, the court selected one based on the reputation of the trademark and the circumstances of infringement.

2.1.3 Royalties or license fees

If a court cannot confirm the plaintiff's losses or the defendant's illegal gains, it can calculate damages based on a multiple of royalties or license fees.

$$\text{Infringing Product Sales} * \text{Plaintiff's Product Profit Ratio} * \text{Contribution Ratio} = \text{Damages}$$

Please be noted that this method only applies in proceedings under the Trademark Law, Patent Law and Seed Law. No such provisions exist under the Anti-Unfair Competition Law. Moreover, the Copyright Law lacks provisions for awarding a multiple of royalties, resulting in lower damages awards on average.

However, the Interpretation sets out a uniform regula-

需要注意的是，《反不正当竞争法》没有规定参照权利使用费，《商标法》、《专利法》和《种子法》都规定可以参照许可使用费的“倍数”，只有《著作权法》规定的是“参照权利使用费”，并未允许适用权利使用费的“倍数”，这可能造成著作权侵权的惩罚性赔偿计算，在不能确定权利人的实际损失或侵权者的获利，而参照权利使用费的“单倍”作为基数进行计算的时候，计算结果会偏低的情况。

但是在《解释》中，并未对该差别进行区分，而是通过第五条进行了统一规定：“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。

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。”

该条规定似乎与《著作权法》规定相左，但按照法律位阶，法院在计算基数的时候，仍需以《著作权法》作为法律依据，参照“权利使用费”进行计算。

在司法实践中，权利人根据许可使用费的倍数作为赔偿数额的案件比较少见。欧普案即以此作为计算标准。在该案判决中，法院认定，以涉案商标许可使用费的倍数合理确定本案赔偿数额根据，采用了使用许可费×合理倍数×应计赔的侵权时间的计算方式作为惩罚性赔偿的基数，在考虑被告使用涉

tion in the second paragraph of Rule 5 that states:

> *If it is difficult to calculate the actual amount of losses, the amount of illegal gains, and the infringing profits as mentioned in the preceding paragraph, the people's court shall reasonably calculate by reference to a multiple of a license fee for the IP right in accordance with the law, which shall be the base for calculating the amount of punitive damages.*

The Opple case provides an example of royalty-based damages. In this case, the court calculated damages based on the trademark license agreements provided by the plaintiff. The calculation involved multiplying the license fee by a reasonable multiple and the infringement duration. The court considered the defendant's trademark use to be greater in scope and extent than that of authorised distributors. Therefore, it used a multiple of 2.

2.2 Punitive damages multipliers

Under Rule 6 of the Interpretation, courts should consider factors such as the defendant's culpability and the severity of the infringement when selecting an appropriate damages multiplier.

A judge in the Tianci case clarified the principles he applied when selecting an appropriate damages multiplier. He explained that:

> *There is a corresponding relationship between the punitive damages multiplier and the severity of the circumstances that conforms to the principle of applying the law proportionally. To facilitate judicial determinations and limit the abuse of discretion, double punitive damages can be applied when infringement is determined to be serious, triple punitive damages can be applied when the circumstances are more serious, and quadruple punitive damages can be applied when particularly serious. When circumstances are extremely serious, such as meeting the determination requirements of "direct intentional, completely conduct infringement as a business, large scale of infringement, long duration, huge loss or profit, and hindrance of proof", quintuple punitive damages can be applied to construct a general correspondence between the punitive damages multiplier and the severity of the infringement.*

案商标的程度和范围要比欧普公司授权销售商的大得多之后，法院将合理倍数定为2倍。

（二）惩罚性赔偿的倍数的认定

惩罚性赔偿的倍数的认定，根据《解释》第六条的规定，应当综合考虑被告主观过错程度、侵权行为的情节严重程度等因素。

天赐案的合议庭在解释本案判决的时候明确了惩罚性赔偿倍数确定的原则："惩罚性赔偿倍数与情节严重程度具有对应关系，方符合法律适用时的比例原则。为便于司法适用、限制自由裁量的滥用，侵权情节认定为严重时可适用两倍惩罚性赔偿，情节比较严重可适用三倍惩罚性赔偿，特别严重时可适用四倍惩罚性赔偿，情节极其严重时，如满足"直接故意、完全以侵权为业、侵权规模大、持续时间长、损失或获利巨大、举证妨碍"等认定要件，则可以适用五倍惩罚性赔偿，以此构建惩罚性赔偿倍数与侵权情节严重程度之间的一般对应关系。"

三、小结

综上所述，最高人民法院通过第一批六个典型案例，为《解释》在将来实际案件中的适用提供了方向性的指导，典型案例中所提供的惩罚性赔偿认定方法也可供各级法院借鉴。未来，在《专利法》和《著作权法》生效后，相信最高人民法院也会发布包括专利权、著作权等类型的知识产权惩罚性赔偿的典型案例，对于不同类型的知识产权侵权案件适用惩罚性赔偿进行进一步指导，从而完善知识产权侵权案件的惩罚性赔偿的适用。

3. Summary

While punitive damages could deter malicious infringers, there are concerns about the amount of discretion that judges will have when calculating punitive damages. Such concerns involve fears that some courts will abuse such powers, especially when the plaintiff is the trademark squatter.

Now that the SPC has released the first six typical cases, the methods for determining punitive damages in these cases can be used as precedents by Chinese courts to prevent the misapplication of punitive damages.

The writer expects that the SPC will issue more typical cases involving punitive damages. More precedents will help to standardise the proper application of punitive damages by the Chinese courts.

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