

北京市高级人民法院 关于侵害知识产权民事案件适用 惩罚性赔偿审理指南

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北京市高级人民法院 关于侵害知识产权民事案件适用 惩罚性赔偿审理指南

为有效执行知识产权侵权惩罚性赔偿制度，依法惩处严重侵害知识产权行为，加大知识产权司法保护力度，充分发挥惩罚性赔偿制度的震慑作用，坚决遏制严重侵害知识产权行为的发生，严格统一惩罚性赔偿制度的适用标准，根据《中华人民共和国民法典》《中华人民共和国专利法》《中华人民共和国商标法》《中华人民共和国著作权法》《中华人民共和国反不正当竞争法》《中华人民共和国种子法》《中华人民共和国民事诉讼法》以及《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》等法律及司法解释的规定，结合北京法院知识产权审判工作实践，制定本指南。

第一部分 一般规定

1.1 【适用原则】

在侵害知识产权民事案件中，适用惩罚性赔偿应坚持依法适用、积极审慎的原则，在充分尊重和体现知识产权价值基础上，实现惩罚性赔偿对故意严重侵害知识产权行为的遏制作用。

1.2 【请求适用】

惩罚性赔偿的适用应以权利人请求为前提。权利人未依法请求惩罚性赔偿的，不得主动适用惩罚性赔偿。

1.3 【请求内容】

权利人请求惩罚性赔偿，应明确惩罚性赔偿的基数、基数确定方法及计算方式、倍数及赔偿总额，并提供相应证据。

权利人请求惩罚性赔偿，但无正当理由拒不明确请求惩罚性赔偿的基数、基数确定方法、倍数或者赔偿总额导致惩罚性赔偿无法适用的，一般不予支持。

1.4 【赔偿仲裁后不宜再行请求】

当事人就侵害知识产权损害赔偿纠纷的解决达成仲裁协议并经仲裁机关作出仲裁裁决后，权利人一般不宜就同一侵权行为再行提起惩罚性赔偿诉讼，但该仲裁裁决被依法撤销或者裁定不予执行的除外。

1.5 【与行政罚款、刑事罚金的关系】

侵权人因同一侵权行为被判决承担惩罚性赔偿的民事责任，并被处以行政罚款或者刑事罚金，应优先承担惩罚性赔偿的民事责任。

第二部分 法定要件

2.1 【法定适用要件】

惩罚性赔偿适用于故意侵权且情节严重的侵害知识产权案件。恶意侵权属于故意侵权的情形。

2.2 【侵权故意的认定】

综合考虑案件具体情况，下列情形一般可以认定故意侵害知识产权：

- （1）恶意抢注并使用他人驰名商标；
- （2）在同一种或者类似商品上使用他人已注册驰名商标；
- （3）在宣传或者提供侵权商品或者服务时遮挡、清除权利标识；
- （4）在商标授权程序中知悉他人商标权，仍然实施侵害该商标权的行为；
- （5）不当取得的知识产权被依法撤销、宣告无效后，仍然实施或者使用该知识产权且被认定构成侵权；
- （6）知识产权行政主管部门发出侵权通知后，仍然继续实施侵权行为。

2.3 【情节严重的考量因素】

判断侵权情节是否严重，可以综合考虑侵权手段、次数、规模，侵权持续时间、地域范围，以及侵权人在侵权诉讼或者行政

查处过程中的行为表现等因素。侵权行为造成严重后果的，可以推定为情节严重。

2.4 【情节严重的认定】

综合考虑案件具体情况，下列情形一般可以认定为侵害知识产权情节严重：

- （1）侵害知名度较高的体育赛事节目、展会知识产权；
- （2）同一侵权人多渠道传播侵权视频；
- （3）针对同一权利人或者同一知识产权多次实施侵权行为；
- （4）侵权规模较大且侵权行为持续时间较长；
- （5）权利人商业信誉遭受重大损失；
- （6）无正当理由拒不履行行为保全裁定；
- （7）侵权人采取暴力、胁迫等违法或者不当手段阻碍国家工作人员依法调查取证。

2.5 【侵权故意且情节严重的认定】

综合考虑案件具体情况，下列情形一般可以认定为故意侵害知识产权且情节严重：

- （1）主要以侵害知识产权为业；
- （2）在电影、电视剧、综艺节目、体育赛事节目或者网络游戏公开传播前或者公开传播初期擅自传播侵权作品；
- （3）经合法授权提供权利商品或者服务的同时，擅自提供侵害同一知识产权的商品或者服务；

（4）在广告宣传、合作磋商、签订合同、样品展示及体验服务等过程中提供权利商品或者服务，但实际交易时仅提供或者主要提供侵害同一知识产权的商品或者服务；

（5）行政处罚或者行政裁决认定侵权后，同一侵权人再次或者继续实施同样的侵权行为；

（6）当事人在自愿达成的和解协议中确认侵权后，同一侵权人再次或者继续实施同样的侵权行为；

（7）生效判决、调解书、仲裁裁决认定侵权后，同一侵权人再次或者继续实施同样的侵权行为；

（8）采取增设企业、变更企业名称、变更法定代表人、利用关联企业等方式再次或者继续实施同样的侵权行为。

第三部分 惩罚性赔偿的计算

3.1 【赔偿总额】

适用惩罚性赔偿确定的赔偿总额为基数及基数与倍数乘积之和。权利人为制止侵权行为所支付的合理开支另行计算。

3.2 【基数的确定方法】

权利人请求惩罚性赔偿的，可以选择按照下列方法确定赔偿基数：

（1）权利人因侵权行为所受到的实际损失；

(2) 侵权人因侵权行为所获得的利益;

(3) 许可使用费的合理倍数或者权利使用费。

法定赔偿数额不得作为计算惩罚性赔偿的基数。

侵权人因侵权行为所获得的利益,是指侵权人因侵害知识产权所获得的财产性收益,通常是指侵权人因侵权所获得的营业利润,但对于主要以侵权为业的侵权人可以计算其销售利润。

3.3 【基数确定方法的适用顺序】

依照商标法、种子法适用惩罚性赔偿时,一般先按照权利人的实际损失确定赔偿基数,权利人的实际损失难以计算时按照侵权人的侵权获利确定赔偿基数,权利人的实际损失及侵权人的侵权获利均难以计算的,可以参照许可使用费的合理倍数确定赔偿基数。

依照专利法、著作权法适用惩罚性赔偿时,一般先按照权利人的实际损失或者侵权人的侵权获利确定赔偿基数,权利人的实际损失或者侵权人的侵权获利均难以计算的,可以参照许可使用费的合理倍数或者权利使用费确定赔偿基数。

依照反不正当竞争法对侵犯商业秘密行为适用惩罚性赔偿时,一般先按照权利人的实际损失确定赔偿基数,权利人的实际损失难以计算的,可以按照侵权人的侵权获利确定赔偿基数。

3.4 【基数确定方法的选择适用】

法律规定各基数确定方法存在适用顺序的,一般优先适用在

先方法确定惩罚性赔偿基数；在先方法难以确定惩罚性赔偿基数的，权利人可以选择在后方法确定惩罚性赔偿基数。

3.5 【实际损失的计算】

计算权利人因侵权行为所受到的实际损失，可以根据案件具体情况，综合考虑以下因素：

- （1）权利人商品销售减少情况；
- （2）权利人商品价格下降情况；
- （3）权利人商品利润下降情况；
- （4）权利人客户或者用户减少情况；
- （5）权利人广告收益减少情况；
- （6）权利人为恢复商誉所支付的合理费用；
- （7）权利人为其权利客体支出的创作、研发成本情况；
- （8）权利人网站中相关内容的点击、下载、浏览量情况；
- （9）权利许可使用合同或者转让合同因侵权导致不能履行或者难以正常履行产生的预期利益损失。

3.6 【侵权获利的计算】

计算侵权人因侵权行为所获得的利益，可以根据案件具体情况，综合考虑以下因素：

- （1）侵权商品销售数量及单位利润情况；
- （2）侵权商品利润占侵权人整体利润的比重；
- （3）侵权人自认的侵权商品销售数量、价格、利润等情况；

(4) 网络平台显示的侵权商品销售数量、价格、评价及收益等情况;

(5) 被行政执法机关查处或者司法机关查封、扣押的侵权商品数量及价格情况;

(6) 侵权人相关账户资金流动或者纳税情况;

(7) 侵权人网站、宣传资料、财务报告等公开披露的相关数据;

(8) 因侵权行为带来的广告收益情况;

(9) 侵权内容在相关网站的点击、下载、浏览量情况;

(10) 侵权人因实施侵权行为而减少支出的许可使用费情况;

(11) 侵权人主要因实施侵权行为获取的投融资、技术转移、政府资金或者土地支持、高新资质等收益情况。

3.7 【商品单位利润的计算】

计算权利人商品或者侵权商品的单位利润,可以根据案件具体情况,综合考虑以下因素:

(1) 当事人公开宣传、披露的利润情况;

(2) 主管部门、行业协会、第三方平台等发布的统计报告或者行业报告显示的利润情况;

(3) 相同或者可替代商品的利润情况;

(4) 当事人自认的商品单位利润情况;

(5) 当事人在行政审批、投融资过程中披露的利润情况。

3.8 【举证妨碍规则的适用】

权利人已经尽了必要举证责任，但侵权获利的证据主要由侵权人掌握，且侵权人无正当理由拒不提供相关证据、仅提供明显少于其实际获利的部分证据，或者故意提供虚假证据，妨碍惩罚性赔偿基数认定的，可以根据案件具体情况，参考权利人的主张及相关证据确定惩罚性赔偿的基数。

3.9 【许可使用费或者权利使用费的考量因素】

参照许可使用费的合理倍数或者权利使用费确定惩罚性赔偿的基数时，可以根据案件具体情况，综合考虑以下因素：

- （1）许可使用合同的实际履行及相应证据情况；
- （2）许可使用与侵权使用的可比性；
- （3）许可使用费是否受到诉讼、并购、破产、清算等因素的影响；
- （4）许可人与被许可人之间是否存在亲属关系、投资关系或者实际控制关系等关联关系；
- （5）同行业或者相关行业通常的许可使用费或者权利使用费标准；
- （6）许可使用合同的备案情况。

3.10 【许可使用费倍数的考量因素】

以许可使用费的合理倍数计算惩罚性赔偿基数的，可以根据案件具体情况，综合考虑权利客体的性质，商业价值，研发成本，

创新高度，可能带来的竞争优势，侵权行为与被许可行为所涉及的权利性质、许可期限、范围的异同等因素确定该倍数。

3.11 【知识产权的贡献度】

按照侵权获利方法确定惩罚性赔偿基数时，应根据案件具体情况，适当考量权利人知识产权对于商业价值的贡献程度或者比例，合理确定知识产权贡献度。

3.12 【知识产权贡献度的考量因素】

确定知识产权对商业价值的贡献度，可以根据案件具体情况，综合考虑以下因素：

- （1）权利客体的创造性、独创性、显著性或者价值性；
- （2）权利客体的创作研发成本及市场价格情况；
- （3）权利人商品与同类商品的市场价格、销售数量、利润比较情况；
- （4）侵权商品的生产经营成本、市场价格、单位利润等情况；
- （5）侵权内容分别占权利客体、侵权客体的数量比例或者重要程度情况。

3.13 【倍数的确定】

惩罚性赔偿的倍数应与侵权人的侵权故意及情节严重程度相适应。惩罚性赔偿的倍数应在法定范围内酌情确定，但当事人

另有约定的除外。

3.14 【倍数的考量因素】

确定惩罚性赔偿的倍数，除综合考虑本指南第 2.2 条、第 2.3 条、第 2.4 条、第 2.5 条规定的情形外，还可以根据案件具体情况，综合考虑以下因素：

- （1）侵权故意程度；
- （2）侵权持续时间；
- （3）侵害知识产权的数量；
- （4）侵权行为对行业造成的危害；
- （5）侵权人是否多次侵害知识产权；
- （6）侵权人是否如实提交侵权获利证据。

3.15 【侵害专利权倍数的考量因素】

在侵害专利权案件中确定惩罚性赔偿的倍数，除考虑本指南第 3.14 条规定的因素外，还可以根据案件具体情况，综合考虑以下因素：

- （1）专利类型；
- （2）专利创新高度；
- （3）专利是否属于国务院专利行政部门认定的高价值发明专利；
- （4）专利技术是否属于关键核心技术、重点领域或者新兴产业的技术、国家重点支持的高新技术；

- (5) 专利权剩余有效期;
- (6) 侵权产品中侵害专利权的数量;
- (7) 侵权人是否因侵害同一专利权承担过损害赔偿责任及承担损害赔偿责任的具体情况。

3.16 【侵害商标权倍数的考量因素】

在侵害商标权案件中确定惩罚性赔偿的倍数,除考虑本指南第 3.14 条规定的因素外,还可以根据案件具体情况,综合考虑以下因素:

- (1) 权利人的商誉和市场地位;
- (2) 权利商标的知名度情况;
- (3) 权利商标与侵权标识相同或者近似程度;
- (4) 侵权人抢注、攀附商标的情况;
- (5) 侵权人与权利人的同业竞争情况;
- (6) 侵权人是否在伪劣商品上使用侵权标识;
- (7) 侵权人对权利商标提出异议、撤销或者无效宣告请求及其审查情况。

3.17 【侵害著作权倍数的考量因素】

在侵害著作权或者与著作权有关的权利的案件中确定惩罚性赔偿的倍数,除考虑本指南第 3.14 条规定的因素外,还可以根据案件具体情况,综合考虑以下因素:

- (1) 权利人或者权利客体的知名度和影响力;

- (2) 权利客体涉及的商业模式、收费标准等;
- (3) 侵害同一著作权或者与著作权有关的权利的权项数量;
- (4) 侵权人实施侵权行为的手段、方式;
- (5) 侵权人从侵权内容中的获利情况;
- (6) 侵权行为是否发生在权利客体的热播期、热映期或者集中宣传推广期间;
- (7) 侵权平台的规模, 侵权持续传播时间, 侵权内容的数量及点击、下载、浏览量情况;
- (8) 侵权人被其他权利人追究侵权的情况。

3.18 【侵犯商业秘密倍数的考量因素】

在侵犯商业秘密案件中确定惩罚性赔偿的倍数, 除考虑本指南第 3.14 条规定的因素外, 还可以根据案件具体情况, 综合考虑以下因素:

- (1) 商业秘密的类型及市场价值;
- (2) 技术信息的创新程度;
- (3) 商业秘密的成本投入情况;
- (4) 权利人采取保密措施的情况;
- (5) 商业秘密可保持竞争优势的时间;
- (6) 侵权获取商业秘密手段的恶劣程度;
- (7) 侵权行为是否导致商业秘密被公开。

3.19 【侵害植物新品种权倍数的考量因素】

在侵害植物新品种权案件中确定惩罚性赔偿的倍数，除考虑本指南第 3.14 条规定的因素外，还可以根据案件具体情况，综合考虑以下因素：

- (1) 授权品种是否属于禁止进出口的种子；
- (2) 授权品种的市场规模；
- (3) 侵权品种的生产、繁殖规模；
- (4) 侵权品种的销售价格及数量；
- (5) 侵权品种是否以次充好、以假乱真；
- (6) 侵权品种售出后的种植规模；
- (7) 是否危及国家粮食安全。

3.20 【约定惩罚性赔偿的适用】

权利人请求适用其与侵权人约定的惩罚性赔偿的，一般予以支持。

权利人请求适用的惩罚性赔偿不同于其与侵权人约定的，侵权人主张应在该约定范围内适用惩罚性赔偿的，可以支持侵权人的主张，但权利人提出异议并提供有效证据证明该约定明显不合理的除外。

3.21 【惩罚性赔偿的约定内容】

当事人可以约定适用惩罚性赔偿的基数、基数确定方法、倍数及赔偿总额。

当事人约定惩罚性赔偿的倍数不在法定范围内,并请求适用约定的惩罚性赔偿倍数的,一般予以支持,但对方当事人提出异议并提供有效证据证明该约定明显不合理的除外。

3.22 【以许可使用费作为基数的约定】

当事人可以约定以许可使用费或者其合理倍数确定惩罚性赔偿基数,但对方当事人提出异议并提供有效证据证明该约定明显不合理的除外。

3.23 【法定赔偿中的惩罚性考量因素】

对于故意侵权且情节严重的侵害知识产权案件,权利人请求适用惩罚性赔偿,但赔偿基数难以确定需要适用法定赔偿的,酌情从高确定赔偿数额。

第四部分 惩罚性赔偿对网络服务提供者的适用

4.1 【一般规则】

网络服务提供者明知网络用户利用其网络服务实施侵权行为,无正当理由不采取或者延迟采取删除、屏蔽、断开链接等必要措施,致使发生严重侵害知识产权行为,权利人请求对网络服务提供者适用惩罚性赔偿的,一般予以支持。

网络服务提供者教唆网络用户利用其网络服务实施侵权行

为，网络用户经教唆严重侵害他人知识产权的，权利人请求对网络服务提供者适用惩罚性赔偿的，一般予以支持。

4.2 【明知的认定】

综合考虑案件具体情况，下列情形一般可以认定网络服务提供者明知网络用户利用其网络服务实施侵权行为：

- （1）接到权利人发出的侵权通知；
- （2）接到知识产权行政主管部门发出的侵权通知；
- （3）因网络用户利用其网络服务实施同样的侵权行为而参加相关诉讼、仲裁等程序；
- （4）与网络用户以分工合作方式提供侵权客体。

4.3 【情节严重的认定】

综合考虑案件具体情况，网络服务提供者实施的下列行为，一般可以认定为情节严重的情形：

- （1）网络用户的行为被依法认定侵权后，仍然教唆或者继续教唆该网络用户实施同样或者类似的侵权行为，网络用户经教唆实施相关侵权行为的；
- （2）网络服务提供者因网络用户利用其网络服务实施侵权行为被依法认定侵权后，仍然教唆或者继续教唆网络用户实施同样或者类似的侵权行为，网络用户经教唆实施相关侵权行为的；
- （3）网络用户拒不履行认定其侵权的生效判决、裁定，仍然为该网络用户继续实施同样的侵权行为提供网络服务；

（4）网络用户被依法认定侵权后，该网络用户再次实施同样的侵权行为，经权利人通知后，无正当理由不采取或者延迟采取删除、屏蔽、断开链接等必要措施；

（5）网络服务提供者因网络用户利用其网络服务实施侵权行为被依法认定侵权后，仍然为该网络用户继续实施或者再次实施同样的侵权行为提供网络服务；

（6）主要以教唆、帮助他人侵害知识产权为业。

4.4 【未履行转通知义务】

网络服务提供者无正当理由故意不履行或者迟延履行转通知义务，致使权利人或者网络用户的知识产权受到严重侵害，权利人或者网络用户请求网络服务提供者与他人共同承担惩罚性赔偿责任的，可以依法予以支持。

4.5 【未及时终止措施】

网络服务提供者针对他人恶意投诉行为应当依法终止所采取的措施，无正当理由故意不终止或者迟延终止措施，致使被投诉人的知识产权受到严重侵害，被投诉人请求网络服务提供者与他人共同承担惩罚性赔偿责任的，可以依法予以支持。

前款中的恶意投诉，一般是指以非法获利或者排挤竞争对手为目的，利用网络投诉机制进行无正当理由的投诉，严重影响被投诉人合法权益的行为。

4.6 【直接实施侵权行为的法律责任】

网络服务提供者直接实施故意侵害知识产权行为且情节严重，权利人请求适用惩罚性赔偿的，依法予以支持。

4.7 【网络直播带货的侵权责任】

网络直播带货的行为人明知其直播带货的商品或者服务侵害他人知识产权，仍然从事直播带货行为并造成严重后果，权利人请求适用惩罚性赔偿的，一般予以支持。

网络服务提供者明知网络直播带货的行为人利用其网络服务从事前款规定的侵害知识产权行为，无正当理由不采取合理有效措施予以制止，依法与网络直播带货的行为人共同承担惩罚性赔偿责任。

4.8 【代购的侵权责任】

代购人明知其代购的商品或者服务侵害他人知识产权，仍然代购该商品或者服务并造成严重后果，权利人请求适用惩罚性赔偿的，一般予以支持。

网络服务提供者明知代购人利用其网络服务从事前款规定的侵害知识产权行为，无正当理由不采取合理有效措施予以制止，依法与代购人共同承担惩罚性赔偿责任。

第五部分 程序规定

5.1 【请求的提出或者变更】

权利人提出或者变更惩罚性赔偿的基数、基数确定方法及计算方式、倍数及赔偿总额的，一般在一审法庭辩论终结前提出或者变更。

权利人在一审中请求惩罚性赔偿并在其上诉后变更惩罚性赔偿的基数、基数确定方法及计算方式、倍数或者赔偿总额，一般予以支持，但变更后的索赔数额超出诉讼请求且调解不成的，对超出部分不予支持。

5.2 【一审不提交计算证据的后果】

权利人在一审中请求惩罚性赔偿，且持有其主张的惩罚性赔偿基数确定方法的计算方式及相应证据，无正当理由拒不提交证据，致使其惩罚性赔偿请求未获支持的，二审一般亦不予支持。

5.3 【部分权利人请求】

在侵害同一知识产权的同一案件中，部分共有人请求惩罚性赔偿的，一般及于全部共有人。但是，未明确请求惩罚性赔偿的可依法单独行使权利的权利人，以及明确不同意适用惩罚性赔偿的共有人，一般不宜适用惩罚性赔偿确定其应获得的赔偿数额。

5.4 【对权利共有人的一致适用】

同一知识产权的共有人在同一案件中针对同一侵权人请求适用不同基数、倍数的惩罚性赔偿，可告知其明确一致的基数和倍数，亦可在共有人请求范围内根据案件具体情况合理确定惩罚性赔偿的基数和倍数。

5.5 【针对同一侵权人的分别适用】

权利人起诉同一侵权人侵害其多项知识产权或者同一著作权及与著作权有关的权利的多个权项时，分别请求适用不同基数、倍数的惩罚性赔偿，或者仅对部分侵权行为请求惩罚性赔偿的，一般予以支持。

5.6 【对部分侵权人适用】

权利人仅请求对同一案件的部分侵权人适用惩罚性赔偿的，可以对部分侵权人依法适用惩罚性赔偿，对其他侵权人不宜适用惩罚性赔偿。

5.7 【针对不同侵权人的分别适用】

权利人在同一案件中针对不同侵权人请求适用不同基数、倍数的惩罚性赔偿，不同侵权人分别实施侵权行为的，可以根据权利人的请求分别适用惩罚性赔偿；不同侵权人共同实施侵权行为的，可以根据案件具体情况确定惩罚性赔偿的基数和倍数。

5.8 【部分适用】

同一侵权行为造成的损害后果中，如果部分损害后果能够确定的，可以依权利人请求对该部分损害后果适用惩罚性赔偿，对难以确定损害后果的部分另行依法确定赔偿责任。

5.9 【分阶段适用】

侵权人持续实施侵害知识产权行为，对不符合惩罚性赔偿法定适用要件的持续侵权行为，不宜适用惩罚性赔偿；但侵权人在持续实施侵害知识产权行为过程中满足惩罚性赔偿法定适用要件的，可以自满足惩罚性赔偿法定适用要件时适用惩罚性赔偿。

第六部分 适用范围

6.1 【适用范围】

本指南自下发之日起执行，北京市高级人民法院已经发布文件的相关规定与本指南不一致的，以本指南为准。

Beijing High People's Court

Guidelines on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases

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In order to effectively implement the punitive damages system for infringement of intellectual property rights (hereinafter referred to as IPRs), punish serious intellectual property infringement in accordance with the law, step up judicial efforts to protect IPRs, deter and curb serious intellectual property infringement, and standardize the application of punitive damages, Beijing High People's Court formulates *the Guidelines on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases* (hereinafter referred to as *the Guidelines*) in accordance with *the Civil Code of the PRC*, *the Patent Law of the PRC*, *the Trademark Law of the PRC*, *the Copyright Law of the PRC*, *the Anti-Unfair Competition Law of the PRC*, *the Seed Law of the PRC*, *the Civil Procedure Law of the PRC*, *the Interpretation of the Supreme People's Court on the Application of Punitive Damages in the Trial of Intellectual Property Infringement Civil Cases* and other applicable laws as well as judicial interpretations, and in combination with the practices in the trial of intellectual property cases by the courts of Beijing at all levels.

1. General Provisions

1.1 Application Principles

In the intellectual property infringement civil cases, the punitive damages shall be applied in accordance with relevant laws and in an active and prudent manner in order to curb intentional and serious

intellectual property infringement, based on fully respecting and reflecting the value of the IPRs.

1.2 Application Subject to Claims

The punitive damages shall be applied subject to the claims of the right holder, and shall not be applied without the said claims.

1.3 Content of the Claims

In case of the claims for punitive damages, the right holder shall specify the base amount, its determination and calculation methods as well as the multiple thereof and the total amount of the damages, and provide relevant evidence.

In case of the claims for punitive damages, where the right holder fails to specify the base amount, its determination and calculation method as well as the multiple thereof and the total amount of the damages without justifiable reasons, and thus the punitive damages fail to be applied, the said claims shall generally not be supported.

1.4 No Claim for Punitive Damages after a Prior Concluded Arbitration Case

Where the parties have agreed to settle the intellectual property infringement dispute for damages by arbitration and the competent arbitration authorities have rendered an arbitral award thereof, the right holder shall generally not bring a lawsuit in respect of punitive

damages for the same infringement, unless the said award has been revoked or ruled as unenforceable in accordance with relevant laws.

1.5 Relationship with the Administrative Penalty and Criminal Fine

Where the infringer is punished by the civil liabilities of punitive damages as well as the administrative penalty or criminal fine for the same infringement, the civil liabilities of punitive damages shall be executed prior to others.

2. Statutory Requirements

2.1 Statutory Application Requirements

Punitive damages shall be applied in the intentional intellectual property infringement cases with serious circumstances. Malicious infringement falls within intentional infringement.

2.2 Determination of Intention

Based on the specific circumstances of the case, the following intellectual property infringement may be deemed as intentional in case of/that:

(1) the bad-faith filing and using of others' well-known trademarks;

(2) the use of others' registered well-known trademark on the

same kind of or similar goods;

(3) the covering or removal of the signs of IPRs during the advertisement or provision of the infringing goods or service;

(4) the infringer knows others' trademark right during the trademark right granting proceedings, but still commits infringement of the said trademark right;

(5) the infringer still implements or uses such IPRs as have been revoked or invalidated in accordance with relevant laws due to improper acquisition, which has been deemed as infringement; or

(6) the infringer still continues the infringement after the competent intellectual property authorities have sent a pre-warning notice of infringement.

2.3 Consideration of Serious Circumstances

Where determining whether the infringement is serious or not, such factors may be taken into consideration as the means, frequency, scale, duration and geographical scope of the infringement as well as the reaction of the infringer during the infringement lawsuit or administrative investigation. Where the infringement has caused serious consequences, the said infringement may be deemed as serious circumstances.

2.4 Determination of Serious Circumstances

Based on the specific circumstances of the case, the following intellectual property infringement may be deemed as serious in case of:

- (1) infringement of IPRs in a high-profile sports event program or exhibition;
- (2) dissemination of infringing videos through multi-channels by the same infringer;
- (3) repeated infringement of the same right holder or the same IPR;
- (4) long-lasting and large-scale infringement;
- (5) serious losses to the goodwill of the right holder;
- (6) failure to perform the behavior preservation order without justifiable reasons; or
- (7) the infringer's obstruction of the evidence investigation by the competent public officers through illegal or improper methods such as violence or coercion.

2.5 Determination of Intention and Serious Circumstances

Based on the specific circumstances of the case, the following intellectual property infringement may be deemed as both intentional

and serious in case of:

- (1) operating mainly by infringement of IPRs;
- (2) disseminating the infringing works without permission before the film, TV series, variety show, sports event program or online game is released or launched in public or at the early stage of release or launch;
- (3) providing such goods or services as related to the IPR under legal authorization, but at the same time, providing such goods or services as infringement of the same IPR;
- (4) providing such genuine goods or services as related to the IPR in advertising, negotiating, signing contracts, displaying samples customer experience and other activities, while providing or mainly providing infringing goods or services of the same IPR in case of actual trades;
- (5) re-committing or continuing such infringement by the same infringer as has been determined as infringement in an administrative penalty or administrative decision;
- (6) re-committing or continuing such infringement by the same infringer as has been determined as infringement in a settlement agreement reached voluntarily by relevant parties;

(7) re-committing or continuing such infringement by the same infringer as has been determined as infringement in an effective judgment, conciliation statement, arbitral award; or

(8) re-committing or continuing the same infringement by setting up a new company, changing the name of the company, replacing the legal representative, making use of the affiliate and etc.

3. Calculation of Punitive Damages

3.1 Total Amount of Damages

The total amount of damages shall be the sum of the base amount and the product of the base amount and its multiple. The reasonable costs and expenses incurred by the right holder for stopping the infringement shall be calculated separately.

3.2 Determination Methods of the Base Amount

Where the right holder claims for punitive damages, the following may be adopted to determine the base amount thereof:

(1) actual losses incurred by the right holder due to the infringement;

(2) profits gained by the infringer from infringement; or

(3) the royalty fee or the reasonable multiple of the license fee.

Statutory amount of damages shall not be used as the base

amount in calculation of punitive damages.

Profits from infringement refer to the property income acquired by the infringer from infringement, and generally means the operating profits thereof. However, for the infringers who operate mainly by infringement of IPRs, profits from infringement may be calculated based on the sales profits.

3.3 Application Order of the Determination Methods for the Base Amount

Where punitive damages are applied in accordance with *the Trademark Law* and *the Seed Law*, it is generally preferred to calculate the base amount in accordance with the actual losses suffered by the right holder. Where it is difficult to calculate such losses, the base amount shall be determined in accordance with the profits gained by the infringer from infringement. Where it is difficult to calculate the said losses and profits, the base amount may be determined by reference to the reasonable multiple of the license fee.

Where punitive damages are applied in accordance with *the Patent Law* and *the Copyright Law*, it is generally preferred to calculate the base amount in accordance with the actual losses suffered by the right holder or the profits gained by the infringer from infringement. Where it is difficult to calculate such losses or profits,

the base amount shall be determined by reference to the royalty fee or the reasonable multiple of the license fee.

Where punitive damages are applied to infringement of trade secrets in accordance with *the Anti-Unfair Competition Law*, it is generally preferred to determine the base amount in accordance with the actual losses suffered by the right holder. Where it is difficult to calculate such losses, the base amount may be determined in accordance with the profits gained by the infringer from infringement.

3.4 Adoption of the Determination Methods for the Base Amount

Where there is a statutory application order for the determination methods, it is generally preferred to determine the base amount of punitive damages with the previous method. Where it is difficult to determine the base amount with the previous method, the right holder may choose a following method to determine the said base amount.

3.5 Calculation of Actual Losses

In case of calculation of the actual losses suffered by the right holder due to the infringement, based on the specific circumstances of the case, the following factors may be taken into consideration:

- (1) sales decline of the right holder's goods;
- (2) price decline of the right holder's goods;

- (3) profits decline of the right holder from relevant goods;
- (4) decrease of the quantity of the right holder's customers or users;
- (5) advertising revenue decline of the right holder;
- (6) reasonable costs and expenses incurred by the right holder to recover the goodwill thereof;
- (7) costs and expenses incurred by the right holder in creating, researching and developing the subject matter of relevant IPRs;
- (8) clicking, downloading and browsing of relevant content on the right holder's website; and
- (9) losses of expected profits arising out of failure to perform or normally perform the license agreement or transfer agreement of IPRs due to the infringement.

3.6 Calculation of Profits from Infringement

In case of calculation of the profits gained by the infringer from infringement, based on the specific circumstances of the case, the following factors may be taken into consideration:

- (1) sales quantity and unit profit of the infringing goods;
- (2) percentage of profits from the infringing goods to the whole profits of the infringer;

(3) such sales quantity, price, profits and other circumstances of the infringing goods as acknowledged by the infringer;

(4) such sales quantity, price, comments, profits and other circumstances of the infringing goods as indicated on the online platform;

(5) quantity and price of such infringing goods as have been investigated and punished by the competent administrative authorities or seized by the competent judicial authorities;

(6) money flow on the infringer's relevant accounts or taxes paid by the infringer;

(7) data disclosed on the infringer's websites, promotional materials, financial reports and etc.;

(8) revenue from the advertisement due to the infringement;

(9) clicking, downloading and browsing of the infringing content on relevant websites;

(10) decline in license fees that shall be paid by the infringer due to the infringement; and

(11) such investment, financing, transfer of technology, government grants or land concession, high-tech qualification and etc., as acquired by the infringer mainly due to the infringement.

3.7 Calculation of Unit Profit of Goods

In case of calculation of the unit profit of the right holder's goods or the infringing goods, based on the specific circumstances of the case, the following factors may be taken into consideration:

- (1) profits publicized or disclosed by relevant parties;
- (2) profits indicated in the statistics or industrial reports issued by the competent authorities, industrial association, a third-party platform and etc.;
- (3) profits of identical goods or their substitutes;
- (4) such unit profit of goods as acknowledged by relevant parties; and
- (5) profits disclosed by relevant parties in the process of administrative approval or investment and financing.

3.8 Application of the Rule of Spoliation of Evidence

Where the right holder has fulfilled the necessary burden of proof, but the evidence for the profits from infringement is mainly under the infringer's control and the infringer refuses to provide the said evidence without justifiable reasons, or only provides part of the said evidence obviously less than the actual profits, or intentionally provides false evidence, in order to affect the determination of the

base amount of punitive damages, the base amount may be determined by reference to the right holder's claims and relevant evidence based on the specific circumstances of the case.

3.9 Consideration of License Fees or Royalty Fees

In case of determining the base amount of punitive damages in accordance with the reasonable multiple of the license fee or in accordance with the royalty fee, based on the specific circumstances of the case, the following factors may be taken into consideration:

- (1) the actual performance of the license agreement and the corresponding evidence;
- (2) comparability between licensed use and infringing use;
- (3) whether the license fee is affected by any lawsuit, merger and acquisition, bankruptcy, liquidation, and etc.;
- (4) whether there is correlation such as kinship, investor-investee relationship, or actual control relationship between the licensor and the licensee;
- (5) the normal standardized license fee or royalty fee in the identical or associated industry; and
- (6) record keeping of the license agreement.

3.10 Consideration of Determining the Multiple of License Fees

In case of determining the base amount of punitive damages in accordance with the reasonable multiple of license fees, the said multiple may be determined based on the specific circumstances of the case and taking into consideration the nature, commercial value, research and development cost, innovation height and potential competitive advantages of the subject matter of IPRs as well as the similarities and differences in respect of the nature of the right, the licensed period and scope and other factors related to the infringement and the licensed use.

3.11 Contribution of the IPRs

In case of determining the base amount of punitive damages in accordance with the profits from infringement, such base amount shall be determined based on the specific circumstances of the case and taking the contribution or ratio of the right holder's IPRs to the commercial value into consideration while determining the contribution of the IPRs reasonably.

3.12 Consideration of the IPRs' Contribution

In case of determining the contribution of IPRs to the commercial value, the following factors may be taken into consideration based on

the specific circumstances of the case:

(1) creativity, originality, distinctiveness or value of the subject matter of IPRs;

(2) research and development costs and market price of the subject matter of IPRs;

(3) comparison between the right holder's goods and other similar goods with respect to market price, sales quantity, and profits;

(4) operating cost, market price, unit profit and etc. of the infringing goods; and

(5) quantitative proportions or importance of the infringing content to the subject matter of IPRs and the subject matter of the infringement respectively.

3.13 Determination of the Multiple

The multiple determined for the punitive damages shall be proportionate to the infringer's intention of the infringement and the serious circumstances thereof. The multiple of punitive damages shall be determined within the statutory scope, unless otherwise agreed by the parties.

3.14 Consideration of Determination of the Multiple

Besides the circumstances stipulated in 2.2, 2.3 and 2.4 hereof as

well as the specific circumstances of the case, the following shall also be taken into consideration with respect to determining the multiple of punitive damages:

- (1) seriousness of intention;
- (2) duration of infringement;
- (3) the number of infringed IPRs;
- (4) damages caused by the infringement to the industry;
- (5) whether the infringer carries out the infringement of IPRs repeatedly; and
- (6) whether the infringer renders evidence proving the profits from infringement in good faith.

3.15 Consideration of the Multiple in Patent Infringement Cases

Besides the factors stipulated in 3.14 hereof as well as the specific circumstances of the case, the following shall also be taken into consideration with respect to determining the multiple of punitive damages in patent infringement cases:

- (1) the patent category;
- (2) the innovation height of the patent;

(3) whether the patent has been deemed as a high-value patent by the patent administrative authorities under the State Council;

(4) whether the patent technology is classified into key and core technology, or falls within the focus areas or emerging industry, or recognized as high technology supported by the government;

(5) the remaining valid period of the patent;

(6) the number of patents in the infringing products; and

(7) whether the infringer has undertaken the liability for damages due to infringement of the same patent and if any, the specific circumstances thereof.

3.16 Consideration of the Multiple in Trademark Infringement Cases

Besides the factors stipulated in 3.14 hereof as well as the specific circumstances of the case, the following shall be also taken into consideration with respect to determining the multiple of punitive damages in trademark infringement cases:

(1) goodwill and market status of the right holder;

(2) popularity of the trademark;

(3) identity or similarity between the trademark and the infringing mark;

- (4) bad-faith filing or attaching to others' trademarks;
- (5) horizontal competition between the infringer and the right holder;
- (6) whether the infringer uses the infringing marks on counterfeit goods; and
- (7) objection or request for revocation or invalidation raised by the infringer in respect of the trademark and the specific reviewing circumstances.

3.17 Consideration of the Multiple in Copyright Infringement Cases

Besides the factors stipulated in 3.14 hereof as well as the specific circumstances of the case, the following shall also be taken into consideration with respect to determining the multiple of punitive damages in copyright infringement cases or the cases of infringing related rights:

- (1) popularity and influence of the right holder or the subject matter of the copyright;
- (2) business model, charging rate and etc. in relation to the subject matter of the copyright;
- (3) infringement of the same copyright or the number of

infringements of related rights;

(4) infringing means and methods adopted by the infringer;

(5) infringing profits gained by the infringer;

(6) whether the infringement occurs within the hit period or promotional period of the subject matter of the copyright;

(7) the scale of the infringing platform, dissemination duration of the infringement, the number of the infringing content and the circumstances of the clicking, downloading and browsing thereof; and

(8) infringement alleged by other copyright holders against the infringer.

3.18 Consideration of the Multiple in Trade Secret Infringement Cases

Besides the factors stipulated in 3.14 hereof as well as the specific circumstances of the case, the following shall also be taken into consideration with respect to determining the multiple of punitive damages in trade secret infringement cases:

(1) type and market value of the trade secret;

(2) innovation degree of the technical information;

(3) cost of the trade secret;

- (4) non-disclosure measures adopted by the right holder;
- (5) period during which the trade secret may bring a competitive advantage;
- (6) maliciousness of the means used to infringe on the trade secret; and
- (7) whether the infringement leads to the disclosure of the trade secret.

3.19 Consideration of the Multiple in Cases of Infringement of Rights to New Varieties of Plants

Besides the factors provided in 3.14 hereof as well as the specific circumstances of the case, the following shall also be taken into consideration with respect to determining the multiple of punitive damages in cases of infringement of rights to new varieties of plants:

- (1) whether the authorized plant variety falls within the category of which the seeds are prohibited from importation or exportation;
- (2) the market size of the authorized plant variety;
- (3) the production and reproduction scale of the infringing plant variety;
- (4) sales price and quantity of the infringing plant variety;
- (5) whether the infringing plant variety is counterfeit;

(6) the planting scale after the infringing plant variety has been sold; and

(7) whether the said infringement is harmful to the national food security.

3.20 Application of Agreements on Punitive Damages

Where the right holder claims to apply the punitive damages agreed with the infringer, such claim shall generally be supported.

Where the punitive damages claimed by the right holder are different from such agreed punitive damages and the infringer claims for application of the punitive damages within the said agreed scope, the infringer's claim may be supported, unless that the right holder raises objection thereto and provides justifiable evidence proving the said agreement is obviously unreasonable.

3.21 Content of Agreements on Punitive Damages

The parties may reach an agreement on the base amount of punitive damages, its determination method of the base amount, the multiple and the total amount of damages.

Where the multiple for calculation of the punitive damages agreed by the parties is not within the statutory scope and one party requests to apply such multiple, the said request shall generally be supported, unless the other party raises objection thereto and provides

justifiable evidence proving the said agreement is obviously unreasonable.

3.22 Agreements on Adoption of the License Fees as the Base Amount

The parties may agree to determine the base amount of punitive damages in accordance with the license fee or its reasonable multiple, unless the other party raises objection thereto and provides justifiable evidence proving the said agreement is obviously unreasonable.

3.23 Consideration of Punitive Factors in Statutory Damages

Where the right holder claims for punitive damages in the intentional and serious intellectual property infringement cases and it is difficult to determine the base amount, the statutory damages shall be applied at a higher level based on the specific circumstances of the case.

4. Application of Punitive Damages to Internet Service Providers

4.1 General Rules

Where the internet service provider knows its user takes advantage of its network service to commit the infringement, but fails to take or delays in taking necessary measures, such as removing,

blocking, disconnecting a link, without justifiable reasons, which causes serious infringement of IPRs, the right holder's claim for punitive damages against the internet service provider shall generally be supported.

Where the internet service provider induces its user to take advantage of its network to commit the infringement and the network user infringes on others' IPRs with serious circumstances due to the said inducement, the right holder's claim for punitive damages against the internet service provider shall generally be supported.

4.2 Determination of Knowledge

Taking the specific circumstances of the case into consideration, the internet service provider shall generally be determined that it knows its user takes advantage of the network service to conduct the infringement where:

(1) the said internet service provider receives the right holder's notification of infringement;

(2) the said internet service provider receives the notification of infringement issued by the competent intellectual property authorities;

(3) the said internet service provider is involved in such relevant proceedings, for example litigation and arbitration, as arise out of the same infringement conducted by its user through taking advantage of

the network service; or

(4) the said internet service provider provides the subject matter of the infringement by cooperation with its network user.

4.3 Determination of Serious Circumstances

Taking the specific circumstances of the case into consideration, the internet service provider shall generally be determined as serious infringement where:

(1) after the network user has been ruled as infringement in accordance with relevant laws, the internet service provider still induces or continues inducing the said user to commit the same or similar infringement who conducts relevant infringement after the inducement;

(2) after the internet service provider has been ruled as infringement in accordance with relevant laws due to the network user thereof taking advantage of the network to conduct infringement, the internet service provider still induces or continues to induce its user to commit the same or similar infringement and the user conducts relevant infringement after the inducement;

(3) the network user refuses to implement the effective judgments and rulings, and the internet service provider still provides network service to the said user to continue the same infringement;

(4) the network user commits the same infringement again after the said user has been ruled infringing in accordance with relevant laws, and the internet service provider fails to take or delays in taking necessary measures, such as removing, blocking, disconnecting a link, without justifiable reasons after receiving the right holder's notification;

(5) after the internet service provider has been ruled infringing in accordance with relevant laws due to its user taking advantage of its network to conduct infringement, the internet service provider still provides network service to the said user to continue or conduct the same infringement again; or

(6) the internet service provider operates mainly by contributory infringement or induced infringement of others' IPRs.

4.4 Failure to Transfer Notification

Where the internet service provider intentionally fails to perform or delays in performing the obligation of transferring notification without justifiable reasons, which leads to serious infringement of IPRs of the right holder or the network user, the right holder's or the network user's claims for joint liabilities of punitive damages against the internet service provider and other infringers may be supported in accordance with the laws.

4.5 Failure to Terminate Measures Timely

The internet service provider shall terminate the measures taken for a malicious complaint. Where the internet service provider deliberately fails to terminate or delays in terminating such measures without justifiable reasons, which leads to serious infringement of the respondent's IPR, the respondent's claim for joint liabilities of punitive damages against the internet service provider and other infringers may be supported in accordance with the laws.

The "malicious complaint" mentioned in the preceding paragraph refers to a complaint raised without justifiable reasons and for the purpose of illegal profits or excluding the competitors by taking advantage of the network complaint system, which has serious impact on the legitimate rights and interests of the respondent.

4.6 Liability for Direct Infringement

Where the right holder claims for punitive damages against the internet service provider who directly infringes on the right holder's IPRs intentionally and seriously, the said claim shall be supported in accordance with the laws.

4.7 Liability for Infringement in Live-streaming E-Commerce

Where the live streamer knows the goods or service sold in the live-streaming e-commerce infringes on others' IPRs, but is still

engaged in such live-streaming e-commerce, which leads to serious consequences, the right holder's claim for punitive damages shall generally be supported.

Where the internet service provider knows that the live streamer takes advantage of its network service to commit the infringement as described in the preceding paragraph, but fails to take reasonable and effective measures to stop the infringement without justifiable reasons, the internet service provider shall be jointly liable for punitive damages.

4.8 Liability for Infringement by Purchasing Agents

Where the purchasing agent knows the goods or service infringes on others' IPRs, but still purchases the said goods or service on others' behalf, which leads to serious consequences, the right holder's claim for punitive damages shall generally be supported.

Where the internet service provider knows that the purchasing agent takes advantage of its network service to commit the infringement as described in the preceding paragraph, but fails to take reasonable and effective measures to stop the infringement without justifiable reasons, the internet service provider shall be jointly liable for punitive damages with the purchasing agent.

5. Procedural Provisions

5.1 Raising or Changing of Claims

The right holder shall generally raise or change claims for the base amount of punitive damages, its determination and calculation method, the multiple and the total amount of damages before the end of the court arguments at first instance.

Where the right holder claims for punitive damages at first instance and after appeal, requests to change the base amount of punitive damages, its determination and calculation method, the multiple or the total amount of damages, the said request shall generally be supported. In case that the changed amount of damages exceeds the claim of first instance and relevant parties fail to reach a settlement, the said exceeding part shall not be supported.

5.2 Consequences of Failure to Submit Computational Evidence at First Instance

Where the right holder's claim for punitive damages at first instance is not supported due to failure to submit such calculation method and corresponding evidence as under the possession of the right holder without justifiable reasons, the said claim shall generally not be supported at second instance.

5.3 Claims Raised by Some Right Holders

In a case involving infringement of the same IPR where some co-holders of such IPR raises a claim for punitive damages, such claim shall generally be applicable to all co-holders. Where the right holders entitled to exercise IPRs independently fail to expressly specify their claim for punitive damages or the co-holders expressly disagrees on the claim for punitive damages, the punitive damages shall generally not be applied to the said right holders or co-holders in case of calculation of damages.

5.4 Application to Co-holders

If the co-holders of the same IPR claim for different bases and multiples for punitive damages against the same infringer in the same case, they may be notified to reach an agreement on the same base amount and multiple or the base amount and multiple may be determined in accordance with the specific circumstances of the case within the scope of the co-holders' claims.

5.5 Application to the Same Infringer Separately

Where the right holder files a lawsuit against the same infringer for infringement of different IPRs or a copyright and related rights thereof, and claims for applying different punitive damages, or punitive damages only against part of the infringement, the said

claims shall generally be supported.

5.6 Application to Some of the Infringers

Where the right holder only requests some of the infringers to be liable for punitive damages, the punitive damages may be applied to the said infringers in accordance with relevant laws, but shall generally not be applied to the other infringers.

5.7 Application to Different Infringers Separately

Where the right holder requests to apply different bases or multiples of punitive damages to different infringers in the same case and the said different infringers separately commit the infringement, the punitive damages may be applied separately based on the right holder's request; where different infringers commit the infringement jointly, the base amount or multiple of punitive damages may be determined in accordance with the specific circumstances of the case.

5.8 Partial Application

Where part of the damages arising out of the same infringement can be decided, punitive damages may be applied to the said part as required by the right holder, and as for the part of damages that may not be decided, the damages may be determined separately in accordance with relevant laws.

5.9 Application of Punitive Damages Based on Different Phases

Where the continuous infringement of IPRs by the infringer fails to meet the statutory requirements for application of punitive damages, no punitive damages shall be applied; but the punitive damages may be applied as of the time when the said requirements can be met.

6. Scope of Application

6.1 Scope of Application

The Guidelines shall come into effect as of the date of issuance. In case that the provisions of any document issued by Beijing High People's Court are inconsistent with *the Guidelines*, *the Guidelines* shall prevail.

(The English version is only for reference. In case of any conflict, the Chinese version shall prevail.)