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Compensation for Infringement of Patent Rights Under China's Revised Patent Law

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The fourth revision of the Chinese Patent Law was approved on October 17, 2020, and will take effect on June 1, 2021. This revision will mainly focus on the areas of "protecting the legitimate interests of patentees", "promoting the implementation and application of patent rights", and "establishing a patent granting system".

In this context, there is a particularly important revision to "protecting the legitimate interests of patent rights", and a punitive compensation system has been introduced for compensation for intentional infringements.

In the field of intellectual property, punitive compensation for infringers has already been introduced in countries where Anglo-American laws are in effect. Also in China, a punitive compensation system was introduced in the Trademark Law revision of 2013. The revised Trademark Law, which went into effect on November 1, 2019, increases the multiple used for punitive compensation and the amount of legal compensation, and a judicial decision in which punitive compensation was imposed has already been issued.

The purpose of the punitive compensation system is not only to compensate right holders for the loss they have suffered as a result of infringement as in Japan, but also to punish intentional infringers, thereby having the effect of warning infringers and potential infringers. By requiring infringers to pay several times the amount of compensation for the actual loss of the right holders and making the cost of infringement higher than the illegal profit, it is possible to strike a blow against infringing actions and to prevent them.

Article 71 of the amended Patent Law is as follows, and the provision for punitive compensation of up to five times has been added to paragraph 1 of the Article.

[Article 71]

The amount of compensation for patent right infringement shall be determined according to the patentee's actual losses caused by the infringement or the benefits acquired by the infringer through the infringement. If it is hard to determine the losses of the patentee or the

benefits acquired by the infringer, the amount of compensation may be determined according to the reasonably multiplied amount of the royalties of that patent. Where the infringement to a patent right is conducted on purpose and results in a serious situation, the amount of compensation may be determined to be more than one time and less than five times the amount of compensation determined according to the above method.

If the losses of the patentee, benefits of the infringer, or royalties of the patent are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of compensation within the range from 30,000 yuan to 5,000,000 yuan.

The amount of compensation shall include the reasonable expenses paid by the patentee for putting an end to the infringement.

In order to determine the amount of compensation, the people's court may, in a case where the patentee has made all efforts to provide evidence while the account books and other materials related to the infringing act are held by the infringer, order the infringer to provide the account books and other materials related to the infringing act. Where the infringer refuses to provide such or provides false account books and materials, the people's court may determine the amount of compensation with reference to the claims of the patentee and the evidence provided by the patentee.

In addition, in Paragraph 1 of Article 71 above, the "loss of the right holders" and the "profit of the infringers" in the calculation of the amount of damage were amended in a selective manner, and in Paragraph 2, the amount of legal compensation was increased, and in Paragraph 4, an order to submit account books, etc. was stipulated, which significantly strengthened the protection of right holders.

In my opinion, punitive compensation is one of several compensation methods, and it should not be easily applied but should be applied based on laws. Yet, the courts should actively apply punitive compensation to cases that meet the relevant conditions so that they can play a role for sanctions and future deterrence against infringements.

Those who manufacture articles should exercise caution with regard to subjective intentional avoidance and avoid the risk of their actions being identified as "intentional infringement". Meanwhile, for right holders who have discovered an act of infringement, the key to gaining the court's support is to collect as much evidence as possible on the circumstances of the subjective intentional infringement.

In the "Supreme People's Court's Judicial Interpretation Plan for 2020", "Interpretation on Some Issues Regarding the Application of Laws for Punitive Compensation for Intellectual Property Rights" is already one of the items to be completed in the first half of 2021.

After the revision of the Patent Law is implemented on June 1, 2021, the conditions and criteria for the application of punitive compensation will be clarified through judicial practice, and relevant judicial precedents will become the focus of attention and research, and thus the power to protect patent rights will be further strengthened.

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