

Guiding Opinions of the Beijing Municipal Higher People's Court on Establishment of Liability for Damages for Copyright Infringement

With a view to protecting the legitimate rights and interests of the copyright owners and the holders of the copyright-related rights, effectively punishing infringing acts, regulating the cultural market order, and harmonizing the enforcement standards, the following opinions on how to establish liability for damages for copyright infringement are hereby presented in accordance with the provisions of the General Principles of the Civil Law of the People's Republic of China, the Copyright Law of the People's Republic of China, and the Supreme People's Court's Interpretation of Several Issues Relating the Application of Law to Cases of Civil Dispute over Copyright, and in consideration of the practice of the copyright-related trial by the courts in Beijing.

Establishment of Liability for Damages

Article 1 If the defendant infringes, with fault, the legitimate rights of a copyright owner or a holder of the copyright-related rights, and the infringement causes injury, he/it shall bear the civil liability for compensating for the losses.

The plaintiff shall present relevant evidence of the infringement by the defendant. The defendant who pleads not faulty shall be under the burden of proof, or he/it will take the unfavorable legal consequences.

Article 2 A defendant may be held at fault under any one of the following circumstances:

- (1) Where he/it fails to cease his act without justification after being warned by the rightholder with evidence;
- (2) Where he/it fails to fulfill the obligation of examination under the laws, regulations, and administrative rules and regulations;
- (3) Where he/it fails to fulfill the obligation of due attention corresponding to a citizen's age, education, occupation, and social experience, or to a legal person's business scope, and trade requirement;
- (4) Where he/it infringes the copyright or the copyright-related rights of the other party to a contract during the execution, or after the termination, of the contract; or
- (5) Any other circumstances where fault may be possibly established;

Article 3 Where a defendant, though not at fault, infringes the legitimate rights of a copyright owner or a holder of the copyright-related rights, and the infringement causes injury, he/it is not liable for damages, but may be ordered to return the profits made because of the infringement. If the profits the defendant has made are of a relatively large amount or if the plaintiff suffers relatively great losses because of his/its act, the defendant may be ordered to appropriately compensate the plaintiff in the light of the circumstances according to the fairness doctrine.

Article 4 If any co-defendant constitutes a joint infringement, he/it shall be jointly and severally liable for the damages.

Anyone who clearly knows, or has good reason to know, about another person's carrying out an infringing act, and still provides him/it with business venue or give him/it other help shall be jointly and severally liable for the damages.

Any trademark licensor or a franchiser who clearly knows, or has good reason to know, about another person's carrying out an infringing act, and who is obliged, and able to prevent such act from happening, but fails to take effective measures to this end shall be jointly and severally liable for the damages.

If two or more defendants constitute an infringement, but are not jointly at fault, they shall be separately liable for the damages.

Principle and Methods for Compensation of Damages

Article 5 The determined amount of damages for infringement shall be sufficient to completely and fully recover the losses the plaintiff has suffered because of the infringement.

If, within the amount of damages claimed by the plaintiff, there is evidence showing that the defendant's profits made because of the infringement are more than the actual losses incurred to the plaintiff, the defendant's profits from the infringement may be taken as the amount of the damages.

Article 6 The amount of damages for infringement of copyright is determined mainly on the basis of:

- (1) the rightholder's actual losses;
- (2) the infringer's illegal profits;
- (3) the statutory damages.

When calculation is made in the ways as mentioned above, the plaintiff's reasonable expenses incurred for ceasing the infringement shall be included in the damages, and stated as such along with other losses in the main text of the ruling.

The method of statutory damages shall not directly apply where the rightholder's actual losses and the infringer's illegal profits can be substantially ascertained or where the amount of damages can be determined according to the specific circumstances of a case, on the basis of sufficient evidence, or by making use of the rule of the market.

Article 7 The "rightholder's actual losses" as referred to in the above Article 6, paragraph one (1) may be calculated on the basis of:

- (1) the amount of the plaintiff's reduced profits as a result of the defendant's infringement;
- (2) the relevant State provisions on royalties where the defendant commits infringement by publishing newspapers or books, or in a similar manner;
- (3) the plaintiff's reasonable license fees;

- (4)the product of multiplying the reduced sales volume of the plaintiff's reproductions by the profit of each reproduction;
- (5)product of multiplying the number of the defendant's infringing reproductions by the profit of each reproduction of the plaintiff;
- (6)the losses of the anticipated profit as a result of the plaintiff's inability to perform or difficulty in normally performing, a licensing contract because of the defendant's infringement;
- (7)the losses caused as a result of devaluation of the plaintiff's works because of the defendant's infringement; or
- (8)any other methods for determining the right owner's actual losses;

Article 8 "The infringer's illegal profits" as referred to in the above Article 6, paragraph one (2) shall include the following:

- (1)profits from the sales of the product;
- (2)business profit; and
- (3)net profit;

Under normal circumstances, the amount of the defendant's business profit shall be taken as the amount of the damages;

Where the circumstances or consequences of infringement are serious, the profits from the sales of the product may be taken as the amount of the damages;

Where the circumstances of infringement are minor and the infringement is stopped by the infringer himself/itself during the court trial, the net profit may be taken as the amount of the damages;

For the above methods to apply, the plaintiff shall induce *prima facie* evidence to prove the profit the defendant has made because of the infringement, or after justification is stated, the defendant raises objection with counter evidence; where the defendant does not present evidence, or where the evidence is not sufficient to support his claim regarding the facts, the plaintiff's claim may be supported.

Article 9 In application of the "statutory damages" as referred to in the above Article 6, paragraph one (3), the amount of damages shall be determined with account comprehensively taken of the following factors:

- (1)under normal circumstances, the plaintiff's possible losses or the defendant's possible profits;
- (2)the class of the work involved, reasonable royalties, popularity and market value of the work, reputation of the rightholder, and the originality of the work;
- (3)the infringer's subjective fault, and the manner, time, extent and consequences of the infringement.

Article 10 The statutory damages shall be calculated on the basis of each work as the unit of calculation.

Article 11 Where a plaintiff lodges a claim for nominal damages, the claim shall be supported where the infringement is established, and the basic facts of the plaintiff's actual losses ascertained.

Article 12 Where an alleged infringing act continues during the legal proceedings and the plaintiff claims for additional damages and presents relevant evidence before the first-instance court defense ends, the plaintiff's further losses during the proceedings shall be added to the damages.

Where the plaintiff suffers such losses that they are necessary to be counted as additional damages during the court trial of second instance, the court of second instance shall mediate regarding the amount of damages. Where the mediation fails, the court may decide anew the amount of damages, and explains the reasons in the ruling.

Article 13 The "reasonable expenses" as referred to in the above Article 6, paragraph two include:

- (1) lawyer's fees;
- (2) fees for notarization, and fees for discovery and adduction of evidence;
- (3) fees for auditing;
- (4) accommodation and transportation expenses;
- (5) expenses for printing litigant documents; and
- (6) any other reasonable expenses the rightholder has paid for to cease the infringement or bring an action;

Said expenses shall be reviewed as to their justification and necessity.

Article 14 The "lawyer's fees" as referred to in the above Article 13, paragraph one (1) refer to the lawyer's fees as agreed between an interested party and his lawyer in accordance with law. Determination of the amount of damages to be supported may be made in line with the principles as follows:

- (1) where it is necessary to appoint a lawyer as agent *ad litem* because of the professional technicality and complexity of a case;
- (2) where the defendant's infringing act is substantially established and he/it is liable for damages, the lawyer's fees to be supported are determined in the proportion of the amount of the damages determined in the ruling to that claimed in the suit; where it is ruled also to support other claims, the amount of damages should be duly increased;
- (3) where the defendant is not liable for damages, but he/it is ordered to bear the civil liabilities for ceasing the infringement and making a public apology, the lawyer's fees to be supported may be duly determined according to how the plaintiff's litigant claims are supported, but the supported lawyer's fees generally do not exceed a third of the lawyer's fees.

Article 15 The "fees for notarization" as referred to in the above Article 13, paragraph one (2) shall be borne by the defendant if the following conditions are met:

- (1) that infringement has been substantially established; and
- (2) that the notarization has been taken as evidence on the basis of which the facts are to be ascertained in the case.

Article 16 The “fees for auditing” as referred to in the above Article 13, paragraph one (3) shall be supported according to the proportion of the amount of damages established in the amount of the damages claimed.

Article 17 Where a defendant has been prosecuted, twice or more than twice, for criminal, administrative, or civil liabilities for infringement of copyright or copyright-related rights, the amount of damages shall be determined within the amount of damages determined under these Opinions.

Article 18 The detail in which explanation is made with regard to the amount of damages in the ruling shall depend respectively on such specific circumstances as the complexity of the case, or the seriousness of the dispute between the interested parties.

Article 19 Where a defendant commits the infringing act as provided for in Article 47 of the Copyright Law, and the infringement is of serious circumstances and prejudicial to the public interests, he/it may be imposed the following civil penalties:

- (1) a fine of an amount not exceeding three times as much as that of the damages determined in the ruling;
- (2) confiscation and destruction of the infringing reproductions; and
- (3) confiscation of materials, tools, and equipment used mainly for making the infringing reproductions.

Article 20 If a plaintiff brings a lawsuit as a means for ill purposes, with fabricated facts, and the lawsuit or litigant claims are rejected, the plaintiff may be ordered to pay the defendant in compensation of his/its reasonable expenses in the lawsuit, which include:

- (1) lawyer’s fees;
- (2) accommodation and transportation expenses;
- (3) fees for discovery and adduction of evidence;
- (4) charge for loss of working time; and
- (5) other reasonable expenses incurred in the legal action.

Damages for Mental Injury

Article 21 Where the personal right of the plaintiff as a copyright owner, or the personal right of the plaintiff as a performer, is infringed, with such serious circumstances that application of the liabilities for ceasing the infringement, eliminating ill effects, and making a public apology is not sufficient for recovery of the plaintiff’s mental injury, the defendant shall be ordered to pay for the recovery of the plaintiff’s mental injury.

Where a legal person or other organization sues for compensation of damages for mental injury on the ground of infringement of its personal right as a copyright owner or a performer, the suit shall not be accepted.

Article 22 Under any one of the following circumstances, the defendant may be ordered to pay for the recovery of the plaintiff's mental injury:

- (1) where he/it publishes the plaintiff's work without his authorisation and seriously against his will, and the publication has negative effects on his reputation or social evaluation;
- (2) where he/it plagiarises a large number of the plaintiff's works, and the plagiarism has widespread influence and brings the defendant relatively great reputation;
- (3) where he/it seriously distorts or tampering with another person's work;
- (4) where he/it publishes, in one's own name, a work mainly created by the plaintiff with others without authorization, and the publication brings the defendant relatively great reputation;
- (5) where he/it, who has not participated in the creation, has one's name indicated on the plaintiff's work to seek personal fame and interests;
- (6) where he/it seriously distorts the image in performance, and in doing so causes negative effect on the plaintiff's social image;
- (7) where he/it produces and markets works passing off the plaintiff's authorship, with widespread influence; or
- (8) any other circumstances where the rightholder shall be paid for recovery of his mental injury;

Article 23 The amount payable for recovery of mental injury shall be determined with comprehensive account taken of the factors, such as the extent of the defendant's fault, manner and circumstances of the infringement, extent of influence, profits from the infringement, and the defendant's capability of bearing the liability for damages.

As a rule, an amount not less than RMB 2,000 yuan and not more than RMB 50,000 yuan shall be paid for the recovery of mental injury.

Article 24 Where, after the death of the copyright owner or the holder of the performer's right, his close relative sues for damages for mental injury on the ground that the defendant's infringement of the personal right of the copyright owner or the performer brings him mental agony, the suit shall be accepted.

Determination of Amount of Damages for Commonly Seen Infringement

Article 25 Where the plaintiff's losses are determined in the method mentioned in the above Article 7, paragraph one (2), the amount of damages two to five times the amount of royalties prescribed by the State may be determined, with account taken of the following factors:

- (1)the popularity of the work and its market influence during the infringement;
- (2)the reputation of the author;
- (3)the extent of the defendant's fault; and
- (4)the difficulty, and money put, in the creation of the work;

Any literary work of less than a thousand Chinese characters is treated as one of a thousand Chinese characters when calculating the amount of damages.

The reasonable standards which the plaintiff can prove for collecting royalties under similar circumstances shall be taken into account.

Article 26 Where a literary work, a work of fine art, or a photographic work is communicated on the network, the amount of damages may be determined with reference to the relevant State provisions on royalties.

Article 27 Where a literary work, a work of fine art, or a photographic work is used in way of advertisement, including, among other things, use in newspaper commercials, outdoor advertisement, the Internet advertisement, in advertisement at store front, or in advertisement in product manuals, the amount of damages may be determined with comprehensive account taken of the factors, such as the money advertiser spent on the advertisement, fees charged by the advertisement producer for producing the advertisement, fees for the advertising charged by the advertisement distributor, popularity of the work, and its role in the advertisement, defendant's business scale, and manner and extent of the infringement.

The reasonable royalties which the plaintiff can prove under similar circumstances shall be taken into account.

Article 28 Where a literary work, a work of fine art, or a photographic work is used for business purposes, including, among other things, use on the package and in trade dress of goods, in the device of goods, in priced tickets and bills, or in philatelic articles, the amount of damages may be determined with comprehensive account taken of the factors, such as the popularity of the work at issue, its salience in the product, the defendant's business scale, manner and extent of, and profits from, the infringement. The determined amount of damages shall, as a rule, be more than that determined pursuant to the above Article 7, paragraph one (2) and Article 25.

Article 29 In case of infringement of the copyright in a musical work or of the right of the owner of a sound or video recording product, the amount of damages may be determined on the basis or in the ways as follows:

- (1)the reasonable royalties payable to the plaintiff;
- (2)the standards of the royalties of the organization for collective administration of copyright instituting the legal proceedings; or

(3)with reference to the above Article 28 in case of use for business purposes;

Article 30 In Cases of provision of services of downloading pictures, photographs or music, the amount of damages may be determined on the basis of:

- (1)the reasonable royalties payable to the plaintiff;
- (2) he royalties standards of the organization for collective administration of copyright instituting the legal proceedings; and
- (3)the profit made by the defendant from his/its provision of the infringing services ;

Article 31 Where a software end-user infringes the copyright in the computer software, the amount of damages may be determined on the basis of:

- (1) the reasonable royalties payable to the plaintiff; and
- (2)the market price of the authentic software;

Article 32 Where the amount of damages is to be determined in ways pursuant to the above Articles 26 to 31, the amount not more than two to five times the said amount may be determined, with account taken of the factors provided for in the above Article 25, paragraph one.

Article 33 Where the infringing reproductions as shown by the defendant to in the alleged infringing publication or advertisement are more than what are stated in the observations he/it made in the lawsuit, the number as shown in the publications or the advertisement shall be taken as the basis on which the amount of damages is determined, unless the defendant furnishes evidence or justification for denial.

Article 34 Where a publisher, reproducer, or distributor of a book, a sound recording, or video recording product who infringes the copyright or the copyright-related rights should be able to give the specific number of the infringing reproductions, but refuses to present the evidence along the line, or where the presented evidence should not be taken as such, it may be determined that the infringing reproductions are of the following number of:

- (1)not fewer than 3,000 copies of the book; or
- (2)not fewer than 20,000 pieces of the sound recording or video recording product;

Supplementary Provision

Article 35 These Guiding Opinions shall enter into force on the date of issuance.