How Fair is Patent Litigation in China? Evidence from the Beijing Courts

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Abstract

By conducting field research and analysing judgments delivered in Beijing courts from 2004 to 2011, we find that the popular notion held by China's trade partners of the inadequacy of intellectual property protection is only partly supported by the empirical evidence. The likelihood of winning lawsuits is higher for foreign than domestic plaintiffs and the extremely low damages ruled by Chinese courts are due to particular causes. Courts lack consistent methods to calculate incurred losses in intellectual property right (IPR) infringements and consequently routinely apply the statutory damages whose upper limit is restricted by legislation. Efforts by Chinese legislators to enhance compensation by lifting the upper limit of awardable statutory damages in the Third Amendment of Chinese Patent Law (2008) did not seem to have an effect on our sample. Chinese policymakers should instead focus on the cause of the issue by providing more implementable guidelines for courts to calculate losses. Courts need to develop applicable conventions for calculating damages, based on objective criteria of how much compensation ought to be payable, which is also the basis of calculating reasonable statutory damages. Thus, the new provision of the "right of information" on pirated goods proposed by the ongoing Fourth Amendment provides a significant weapon to combat counterfeiting.

Keywords: intellectual property protection; patent litigation; Beijing courts; inadequate enforcement; trade war; discrimination; damage

Since late March 2018, China and the US have been sliding towards the quagmire of a full-blown trade war, triggered by the Trump administration's Section 301 decisions of retaliatory tariffs on Chinese imports.[1] One of the key issues involved

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1 See the report "A trade war between America and China takes shape." *The Economist*, 7 April 2018, https://www.economist.com/news/finance-and-economics/21739975-two-countries-threaten-descend-sequence-tit-tat-retaliations. Accessed 17 April 2018.

 doi:10.1017/S0305741019000754 First published online 2 September 2019

in Section 301 of the Trade Act of 1974 is intellectual property rights (IPR), as China has been frequently criticized by its trading partners for being the source of counterfeit commercial goods and being unfair to foreign right-holders. In its annual reviews of the global state of intellectual property rights protection and enforcement, the Office of the United States Trade Representative (USTR) has placed China on top of the "Special 301 watch list," the "priority watch list," and "priority foreign countries." China has constantly remained under the surveillance of the US "Section 306 of the Trade Act of 1974" and been subject to the "Out-of-Cycle Review of Notorious Markets," accompanied by the threat of economic sanctions.[2] The inadequacy of protection and enforcement of IPR in China has been deemed a particularly acute problem, which, in 2009, triggered the World Trade Organization (WTO) dispute between China and the US under the TRIPS Agreement.[3] Furthermore, China receives the most attention in the "Report on the Protection and Enforcement of Intellectual Property Rights in Third Countries" published by the European Commission (EC) in 2018. According to the EC's report, China is the only country in which IPR protection requires urgent improvements. More than two-thirds of all European companies surveyed described IPR protection in China as highly inadequate.[4]

Critics of the inadequacy of protection and enforcement of IPR in China have recently been increasingly focused on fairness issues, that foreign right-holders tend to be discriminated against in the courts and damages may not be properly compensated. However, studies regarding the status of IPR enforcement in China tend to make factual assertions without sound empirical research. Those who highlight the perceived inadequacy of IPR protection in China often refer to the "written law" that is restricted to the level of legislation. Clermont and Eisenberg found in 1996 through their empirical study that, in the US, foreign parties win a higher percentage of cases in courts than domestic parties.[5] However, Moore's empirical research on an original dataset of over 4,000 patent cases suggests that, in the US, the win rate data are evidence of juries' prejudice against foreign parties. In patent jury cases between domestic and foreign parties, the domestic party has won 64 per cent of cases, with the foreign party winning the remaining 36 per cent. Moore's research found that, in the US, domestic and foreign parties have won at equal rates when the cases are adjudicated by judges.[6] With regard to the situation in China, Sepetys and Cox have reported from their results based on a small dataset that foreign plaintiffs tend to receive higher damages than Chinese plaintiffs at Chinese courts. It is worth noting that the size and coverage of their sample were relatively small.[7] Lan's study has suggested that in Chinese courts, intellectual property cases are generally tried in a

2 USTR 2006, 2013, 2014, 2017, 2018.
3 Yu 2011; WTO 2009.
4 EC 2015, 2018.
5 Clermont and Eisenberg 1996.
6 Juries were found tending to favour in-state parties over out-of-state parties, see Moore 2003, 1510, table 1.
7 Sepetys and Cox 2009.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

fairer manner and foreign parties tend to be treated more favourably. However, Lan did not discuss specifically the issues of damages award and injunctive relief, which are the focuses of intellectual property enforcement that China's trade partners complain about most acutely.[8] So far, the existing empirical studies have not yet reached concrete conclusions on the status quo of IPR protection in China, mainly because datasets with sufficient details of litigation and covering a longer time span are lacking.[9] To fill this gap, we went through the first instance verdicts on *all* patent infringement disputes from the Beijing First Intermediate People's Court over eight years, combined with field research via interviews with judges, lawyers and other practitioners, trying to establish a full picture of the "law in action" on this issue. In this sense, our research provides an empirical basis for assessing the restoring and deterring function of the judicial enforcement of IPR in China.

Fairness in the Judicial Enforcement of IPR: Empirical Evidence

Fairness in litigation means that right-holders shall not be discriminated against, and incurred losses shall be properly compensated. Our research focuses on civil damages awards in patent disputes, as allowing infringed parties to recover economic damages from infringers is a vital component of the IPR enforcement system and reflects much of the fairness concerns. To fill the gap left in previous empirical studies, we collected and analysed data to test the level of fairness in patent litigation at Chinese courts, focusing on two main issues: discrimination and low damages. Our empirical research is based on our newly established dataset that includes the complete set of first instance verdicts (with substantive decision content)[10] – 318 in total – on patent infringement disputes that took place at the Beijing First Intermediate People's Court from 2004 to 2011.

We focused on the courts in Beijing for data collection for two reasons. First, patent cases in China are highly concentrated in a handful of major urban jurisdictions, especially Beijing, Shanghai, Jiangsu, Shandong and Zhejiang. Interviews with intellectual property (IP) judges and attorneys suggest that the courts in Beijing have been adjudicating a large proportion of all patent disputes in China in the past two decades. Prior empirical work has confirmed this fact.[11] Second, due to their geographical advantage, the Beijing courts have been playing a key role in China's IP enforcement reform. Beijing is thus an ideal laboratory to investigate the impact of legal reforms. The time span in our study, 2004 to 2011, is the period when the full sample of court judgments is available, and when patent litigation in China started to take off after China joined the WTO

8 Lan 2012.
9 Jin examines 166 decisions selected and published by the Gazette of the Supreme Court from 1985 to 2014. However, for such a long time span, this dataset is not big enough, see Jin 2015.
10 Only judgments with substantive decision content are considered. Verdicts with only procedural rulings are excluded.
11 Lan 2012; Sepetys and Cox 2009.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

Table 1: **Comparison of Foreign and Domestic Right-holders**

	Group 1 (foreign)	Group 2 (domestic)
Number of lawsuits	74	244
Winning lawsuits (%)	75.7	62.3
Damages award ratio (%)	25.3	18.8
Average duration of lawsuits (months)	11.7	6.1
Average damages claimed (*euros*)	173,622	78,010
Highest damages claimed (*euros*)	2,999,586	1,470,300
Highest damages compensation (*euros*)	759,132	398,934
Average damages compensation (*euros*)	45,555	18,022
Average litigation costs (*euros*), *paid by:*	1,773.30	999
– *plaintiffs*	712	600
– *defendants*	1,023	394

in 2001. The fact that a large share of lawsuits in this period involved foreign plaintiffs allows us to see whether they were discriminated against in the courts. Furthermore, the Third Amendment to China's Patent Law became effective in 2008, that is, in the middle of our sample. This enables us to test whether right-holders are receiving fairer damages compensation due to the Third Amendment in 2008.

Are foreign right-holders discriminated against?

First, we want to see whether being a foreign party puts a plaintiff in an inferior position. Table 1 compares the lawsuits brought by foreign plaintiffs with those by domestic plaintiffs. This direct comparison seems to show that foreign right-holders are advantaged in the amount of compensation awarded, both in terms of the actual amount and as a percentage of the damages claimed (the latter referred to hereafter as the "damages award ratio"). In Group 1, namely lawsuits involving (one or more) foreign parties, the mean plaintiff's damages award ratio is 25.3 per cent, while in Group 2, for 244 domestic cases, it is 18.8 per cent. The average compensation award in Group 1 is 45,555 euros, almost 2.53 times as much as that in Group 2. Furthermore, the highest damages award in Group 1 is 759,132 euros, which is 1.90 times as much as that in Group 2. Among all the foreign plaintiffs, 75.7 per cent won their claim, while only 62.3 per cent of domestic plaintiffs won their suits.

We further apply a series of statistical models to control for the impact of other factors, such as types of patents, cost of litigation, and so on. Among the results, the notions of discrimination, or xenophobia, are not supported in our sample: (1) being a foreign plaintiff has instead a positive and significant effect on the likelihood of winning the suit; (2) being a foreign plaintiff seems to have an insignificant effect on the damages award. Although the problem of low damages in general indeed deserves concern, foreign right-holders are not discriminated against at this point, as winning the litigation is probably the most desirable

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outcome where (as is typical) it results in the issuing of an injunction to stop the infringing activities; this is an effective way to build a reputation for toughness and send a credible "message" to all the other actual and potential infringers. However, we found that receiving sufficient damages award to cover the actual losses incurred cannot often be expected. Calculating actual damages is difficult for courts, and judges therefore tend to simply award statutory damages with an awardable upper limit restricted by law. Thus, the actual damages award is extremely low on average. We will discuss this issue further hereinafter.

(Why) Are damages awards so low?

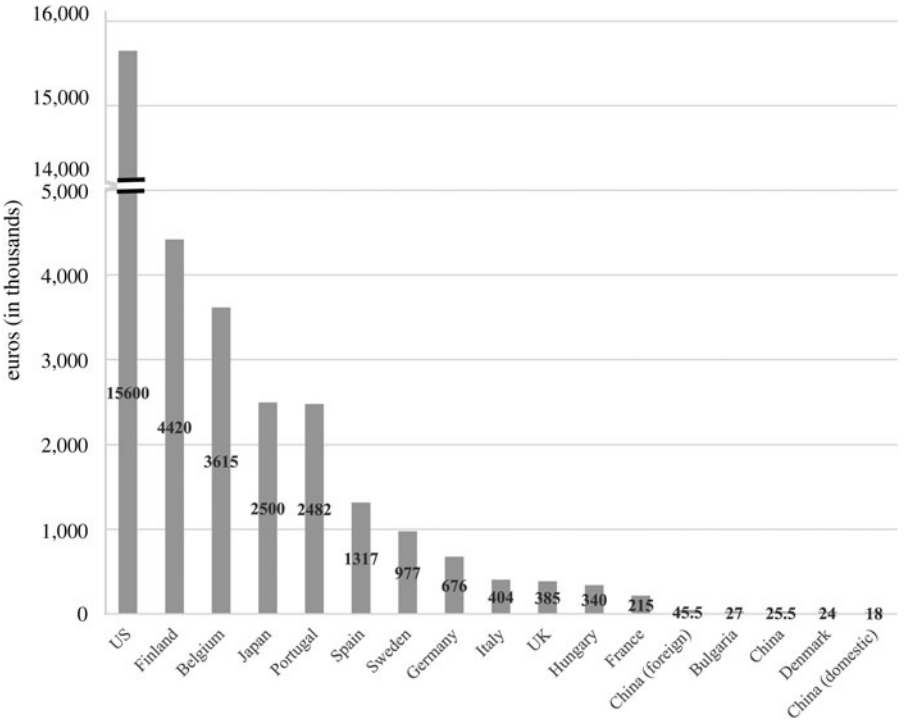
The most prominent fact throughout our sample is that damages awards are in general very low and they do not seem to compensate fairly for the pecuniary losses of right-holders. On average, a damages award is approximately 20 per cent of the right-holder's total damages claim. In our sample, the highest damages award for a foreign plaintiff is 0.759 million euros, whereas that for a domestic plaintiff is 0.398 million euros. To provide a more complete picture, the following cross-country comparison (see Figure 1) shows that damage awards in China and other civil law countries in IP cases are generally lower than that in the US. Between 1997 and 2016 in the US, the median damages award for patent cases is 5.3 million euros;[12] in comparison, the average damages award between 2000 and 2013 in the US is 15.6 million euros.[13] The big gap between the median and the average is driven by a dozen cases involving mega awards, as Lex Machina found that the top one per cent of largest awards account for nearly half the total in the full sample. For instance, the largest damages award in a US patent court in 2013 was $US1 billion. As a contrast, damages awards for patent cases in civil law countries are generally lower. On average, 2.5 million euros are paid as damages award to each patent holder in Japan.[14] Between 2010 and 2015, the average damages award exceeds 1 million euros in only 4 out of 28 EU countries (4.4 million in Finland, 3.6 million in Belgium, 2.5 million in Portugal, and 1.3 million in Spain); the averages in Germany and France are merely 0.67 and 0.21 million euros, respectively.[15]

On average, the damages award for patent cases in China is even lower. Cohen found that between 2005 and 2013, the annual average damages award across China ranges from 3,050 to 35,900 euros.[16] In our sample from Beijing, the overall average damages award is 25,518 euros, and the annual average damages award ranges from 13,008 to 31,156 euros, which are comparable to Cohen's results. However, although an average domestic plaintiff in our sample receives only 18,022 euros for damages award, an average foreign plaintiff receives

12 PwC 2017.
13 Lex Machina 2014.
14 Yang 2014.
15 European Observatory on Counterfeiting and Piracy 2017.
16 Cohen 2015.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

Figure 1: **Average Damages Award in China and Other Civil Law Countries**[17]



more than 2.5 times as much (45,555 euros), which is only lower than that in France (which ranks 10th out of the 28 EU countries) but almost double as much as that in Denmark.

Through interviewing judges in Beijing courts and conducting data analysis based on our sample as well as on their judgments on this issue, we propose three possible reasons for the extremely low damages awards as found above.

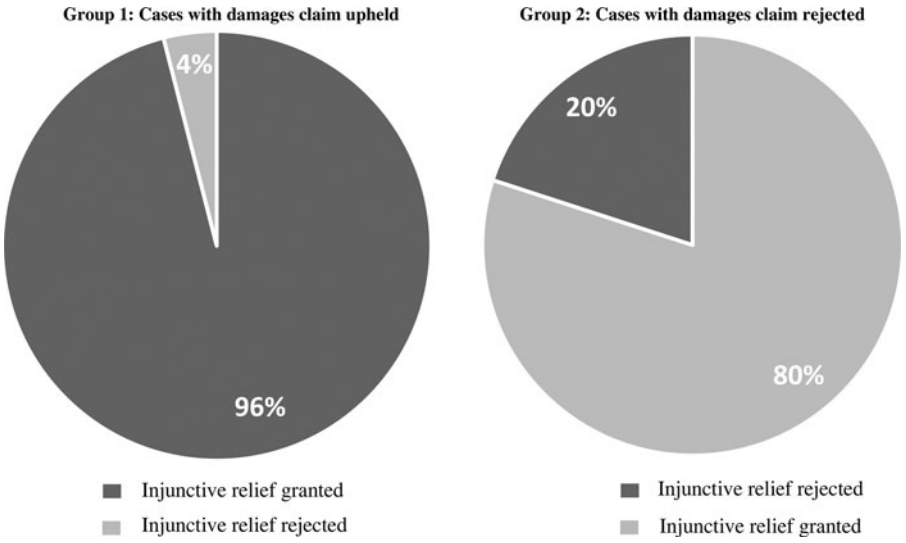
Focus on injunctive relief instead of monetary remedy

Our sample indicates that judges tend to focus more on ceasing IPR infringements than on issuing a monetary remedy for the losses incurred. As Figure 1 shows, for those plaintiffs whose claims are at least partially upheld by the court, the likelihood of being granted injunctive relief is 96 per cent, which is extremely high. Irrelevant is whether the case ultimately resulted in an outright or partial win for the plaintiff. Injunctive relief is only excluded where the

17 The US data is from Lex Machina (2014); European data is from EC (2017); Japanese data is from Yang and Yamanouchi (2014); and the data for China is from our sample. We also add average damages awards for foreign plaintiffs – "China (foreign)" – and domestic plaintiffs – "China (domestic)" – in Figure 1 for comparison.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

Figure 2: **Supporting Damage Claim/Granting Injunctive Relief**



plaintiff has completely lost the lawsuit, that is, when the court does not uphold any of the plaintiff's claims. More interestingly, Figure 2 suggests that even among the decisions rejecting the plaintiffs' claims for damages, 20 per cent of those plaintiffs are nonetheless granted injunctive relief, which is in fact a partial win for the right-holders. This implies the courts' strong intention to cease infringements once they are identified. However, the judges appear generally confused about the methods of calculating damage compensation for patent infringement.[18] This explains why they are reluctant to grant reasonable compensation. Another key reason could be inherent in problems with providing evidence of losses and methods of calculation, which will be further discussed below.

Difficulties in providing proof and calculation of damages

As a rule, so far, Chinese courts ought to adhere to the principle of restoration, a basic principle of civil law, in calculating patent right damages. The indemnification obligation of civil law systems primarily has a compensatory purpose, that is, restoring the injured party's pre-damage status.[19] Thus, Article 65, Patent Law of the People's Republic of China (PRC) addresses the "actual losses of the infringed" and the "illegal gains of the infringer" (the latter has been more often applied to date) as the first method to measure the prejudice suffered by the right-holders. However, one problem in measuring the "actual losses of the infringed" is that the right-holder is required to bear the burden of establishing,

18 Zhang 2017.
19 He 2013.

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with reasonable probability, the causality between the defendant's infringement and the prejudice suffered by the plaintiff. This is often extremely difficult for right-holders. The same problem applies to the calculation of the "infringer's illegal gains," as the plaintiff needs to prove that the infringer's revenues are directly attributable to the alleged infringement. Moreover, infringers often do not maintain complete transaction records, rendering the full extent of their gains difficult to determine.[20] Therefore, under the current provisions, these two calculation methods are not often applied. Instead, statutory damages are the most routine recourse for judges determining the amount of compensation to award. This also explains why judges are more willing to grant an injunction once the existence of the infringing activity is verified but appear reluctant to grant appropriate damages to right-holders.

Problem of statutory damage

Some institutional features in patent litigation also contribute to the problem of low damages. Article 65, Patent Law of the PRC provides four different methods of damages award calculations: (a) compensation of suffered damage; (b) return of unlawful gains; (c) payment of an appropriate multiple of a licence fee; and (d) statutory damages. The wording of this provision – "when (a) is not applicable, then (b) … when (c) is not applicable, then (d) …" – suggests that the plaintiff cannot choose the method of calculation. Rather, the four methods have to be applied sequentially and the usage of "statutory damages" becomes the last resort if calculation by all other means has failed. However, a study conducted by China Patent Agents (2009) revealed that the courts imposed statutory damages in 99 per cent of patent infringement cases. In our sample, before the Third Amendment in 2008,[21] cases with damages calculated through statutory damages (within the limitation of 500,000 yuan/67,715 euros) comprise 95.3 per cent of all disputes with a successful outcome. After the enactment of the Third Amendment, the application of statutory damages within the revised limitation of 1,000,000 yuan (135,430 euros) was awarded in 96.3 per cent of successful claims. Among all these decisions, the judges' wording does not precisely address the preconditions of statutory damages, that is, why the "return of unlawful gains" cannot be resorted to. The judges seem to have routinely followed one single phrase to substantiate the application of statutory damages in a rather indiscreet manner: "due to the difficulties of precisely proving the damages amount … ." Therefore, the lack of necessary evidence to specify the damages amount has led to the phenomenon of courts tending to apply statutory damages routinely within the range stipulated in the legislation. Thus, courts fail to calculate the prejudice suffered by right-holders sufficiently, objectively and reasonably.

20 Zhang 2017.

21 The Third Amendment of Chinese Patent Law was promulgated on 27 December 2008 and entered into force on 1 October 2009 (hereinafter the Third Amendment), see Wechsler 2009.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

In this context, there are no applicable conventional methods for calculating damages, which are based essentially on the investigation, using objective criteria, of how much compensation ought to be payable.[22] In response, knowing that the courts are likely to apply statutory damages, plaintiffs tend to claim damages close to the statutory upper limit. Among all 318 disputes, 44 cases claimed damages of exactly 500,000 yuan, that is, precisely the legislative upper limit of statutory damage, representing 13.8 per cent of the entire sample.

In addition, it is acknowledged that in civil litigation in China, "discovery" is limited compared to that in the US, UK, Australia, New Zealand and other common-law jurisdictions.[23] In the US, for instance, parties to a dispute are entitled to documents from the opposing parties' records that may pertain to the dispute. By contrast, in China, as in other civil law jurisdictions, plaintiffs can only petition the people's court to ensure that evidence is preserved. Thus, it is fairly difficult for right-holders to obtain the required information from the infringers to prove the losses they have suffered.

Has the Third Amendment Been Effective in Enhancing Damages Compensation?

As courts often apply statutory damages, it has been proposed to increase the maximum payable statutory damages in Chinese patent law to increase damages ruled by courts. Although Chinese legislators have taken this step in the Third Amendment, we find, unfortunately, that this has barely affected judicial practice.

Through the Third Amendment, Article 65, para. 2, Patent Law of the PRC was introduced in 2008, under which the maximum statutory damages award was raised from 500,000 yuan (67,715 euros) to 1,000,000 yuan (135,430 euros). Since then, the courts have been able to grant statutory damages of up to 1,000,000 yuan (135,430 euros) when the patentees' losses, the infringers' profits from infringement, or the appropriate exploitation fees are difficult to determine. This well-intentioned new provision aims to enhance the damages award standards for patent infringements, but unfortunately, we find that it has not been effective in practice. The Third Amendment has evidently had little influence on judicial practice in terms of damages awards (there is no turning point in our sample before or after 2008/2009 in average damages), and it has not brought the desired improvements to enhance the damages in judicial patent infringement cases (the average damages ratio remains around 20 per cent in the post-2008 period; in our econometric models explaining damages awards, we see that including the Third Amendment does not add significant explanatory power for the post-2008 subsample). In this sense, right-holders seeking to protect their patents in China have gained little from the Third Amendment. This provides a further explanation for persistent low damages awards ruled by Beijing courts, and also for the post-2008 subsample.

22 Zhang 2017.
23 Pejovic 2001.

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Will the Fourth Amendment Bring Fairer Compensation for Right-holders?

Figure 1 above indicates the huge chasm between the levels of damages awards in patent litigations in the US and Chinese courts. This being so, the US, one of China's most important trade partners, has put huge pressure upon Chinese legislators and courts to enhance damages in IP litigations payable to foreign right-holders. This is viewed as a weapon to fight against counterfeiting and product piracy. However, compared with other countries, the US is actually an outlier with regard to the amount of damages awarded in patent litigation, partly due to the mechanism of punitive damage in its IP law: 35 US Code §284 allows a court to award up to triple damages if the infringer has knowingly, deliberately, intentionally, wilfully or wantonly infringed the patent. According to the US Supreme Court, three factors guide a decision to award enhanced damages: (1) whether the infringement was wilful; (2) whether the infringer had a good faith belief that the patent was invalid; and (3) the party's conduct during the litigation. It is worth noting that the mainstream doctrine of US IP scholars interprets the punitive damages rather from the perspective of moral reasons.[24] The academia in recent years still stresses the accountability of perpetrator and the necessity of punishment.[25] Although China's mainstream IP scholars tend to affirm the feasibility to introduce punitive damage to Chinese patent law,[26] some hold that the principle of restoration rooted in civil law tradition is enough to deter infringement. They argue that the purpose of damage in IP law lies rather in prevention than punishment, because the pursuit of punishment targets is likely to conflict with the goal of encouraging innovation.[27] Despite this opinion, the new Chapter 7 in the proposed Fourth Amendment (first draft) suggests that Chinese policymakers aim to enhance the standards of damages awards by introducing punitive damages. Correspondingly, new evidence rules granting the "right of information" to right-holders have been proposed.

The proposed "punitive damages"

Following the rationale of ex-compensatory damages as a strategy to enhance compensation, a new paragraph of "punitive damages" has been proposed, which articulates:

> For patent infringement conducted deliberately, the people's court may, according to the circumstances of the infringement such as [the] nature and degree of the wrongdoing, [the] scale of the infringement and [the] harm caused, double or triple the amount of compensation calculated according to the preceding two paragraphs.

The first draft of the Fourth Amendment does not explicitly address how to measure punitive damages. Presumably, Chinese courts will still encounter

24 Ellis Jr. 1982.
25 McMichael 2013; Sommers 2015.
26 He, Shi and Lin 2013.
27 Jiang 2015.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

difficulties in assessing an appropriate amount in each case. The wording of the first draft sets a range of punitive damages as "double or triple the amount calculated according to the preceding paragraphs," namely the amount computed either according to the "actual loss of [the] infringed," the "illegal gains of [the] infringer," a "reasonable multiple of [the] should-be licence fee," or statutory damages of no more than 1 million yuan (135,430 euros). Thus, the scope and parameters for determining punitive damages depend on those for calculating general damages.[28]

Our findings indicate that the Third Amendment, despite granting judges more discretionary power by raising the ceiling of statutory damages, has barely enhanced damages awards. It could be inferred that the new proposal to introduce punitive damages would not change the de facto compensation level if the courts continue to lack applicable guidelines based on objective criteria for calculating damages. As the real power of the law lies in its enforcement, in China the chasm between legislation and judicial practice accounts for the failure of the Third Amendment and the persistent phenomenon of low damages awards. Leaving aside the debate on whether punitive damages are compatible with the Chinese civil law system or not,[29] the new "punitive damages" provision risks being just as inconsequential as the Third Amendment's failed reform.

The proposed "right of information for right-holders"

The proposed Article 61, para. 2 in the Fourth Amendment introduces a new provision on the "right of information on pirated goods." At first glance, this seems to offer a significant weapon to combat piracy. According to this new rule, if a right-holder has (1) fulfilled obligations to provide proof as far as possible and; (2) identified accounting documents or other information related to the infringement, which are in the defendant's possession, the plaintiff can compel the defendant to deliver them up to the court via a judicial order. If the defendant refuses to comply with this order, the court may regard the defendant's refusal as the evidence needed to verify the alleged infringement and award damages in accordance with the plaintiff's claim. This provision contains one of the most important but controversial rules in the Fourth Amendment, which intends to relieve an infringed party from the unreasonably heavy burden of proving its losses. The new provision thus introduces a possible solution to the problems of proving losses and calculating damages. However, the application of this rule lacks detailed and reliable standards because judges have discretion in evaluating whether the plaintiffs have indeed fulfilled their burden to prove losses as far as possible and whether (or when) to order defendants to disclose the required information in their possession.[30] If the proposed provision becomes law in its current

28 Owen 1989; Zhang 2017.
29 Li 2014; Yu 2008; Wen and Qiu 2004; Jiang 2015.
30 Wan 2014.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

version, it could give rise to some severe problems, both substantive and procedural, given that it contains no specification on:

(1) the extent to which plaintiffs must first prove their claim;
(2) the scope of the information that the court could order defendants to submit; and
(3) whether and to what extent the plaintiff's application is required for the court's order; or
(4) any circumstances the court should take into account that could hurt the defendant's right to privacy or violate data protection law.

These concerns are particularly evident when compared with the provisions regarding the right of information in the EU Enforcement Directive.[31] The comparable provision in the EU Enforcement Directive has raised issues of balancing the right to information with opposing rights of privacy.[32] The most recent case law of the European Court of Justice has reflected its endeavours to carefully balance these interests. In addition, the new provision adopted in the Fourth Amendment also risks causing tension between patent enforcement and data protection. Chinese courts should pay attention particularly to the principle of proportionality when applying this new rule.

Concluding Remarks

Our research investigates fairness issues on patent litigation in Chinese courts, starting from two popular notions: (1) discrimination, namely that being a foreign plaintiff is a disadvantage for winning the lawsuit and obtaining damages; and (2) the extremely low compensations ruled by Chinese courts are not adequate to enforce IPR fairly. By conducting field research and analysing judgments delivered in Beijing courts from 2004 to 2011, we find that (1) the notion of discrimination is not supported by the empirical evidence; and (2) low damages ruled by Chinese courts are due to particular causes.

First, in our sample, the likelihood of winning the suit is higher for foreign than domestic plaintiffs. Second, damages ruled by courts are fairly low, because: (1) it lacks consistent reasonable methods for the courts to calculate incurred losses in IPR infringement and; (2) consequently, judges *routinely* apply statutory damages, the upper limit of which is restricted by legislation; (3) Chinese legislators' efforts to enhance compensation by lifting the upper limit of awardable statutory damages in the Third Amendment (2008) did not seem to have an effect on our sample because post-2008 level of damages did not respond to the amendment. Therefore, Chinese policymakers should instead focus on the cause of the issue by providing more implementable guidelines for courts to calculate

31 Art. 8, paras. 1 and 2, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.
32 Kur and Dreier 2013, 444.

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

plaintiffs' incurred losses. Furthermore, Chinese courts need to develop applicable conventions for calculating damages, based on objective criteria of how much compensation ought to be payable, which is also the basis of calculating reasonable statutory damages. In this regard, the new provision regarding the "right of information" on pirated goods proposed by the Fourth Amendment would provide a significant weapon to combat counterfeiting, and meanwhile risk causing tensions between patent enforcement and privacy/data protection.

Acknowledgement

The authors would like to thank an anonymous reviewer for helpful comments. Chenguo Zhang (Coco) is grateful for the support of the German University Excellence Initiative at the University of Bremen.

Biographical notes

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摘要: 通过实地调查和数据分析 2004–2011 年北京法院的专利诉讼判决文书，我们发现中国贸易伙伴对其知识产权保护不足的观念只能在一定程度上受到经验证据的支持。数据分析表明，外国人赢得诉讼的可能性高于本国原告。中国法院裁定的赔偿数额极低有其特定的原因。法院缺乏统一、有效的方法来计算知识产权侵权中发生的损失，因此惯例性地适用法定损害赔偿制度，其额度的上限受到立法的限制。立法者在中国专利法第三修正案 （2008 年） 中通过取消法定赔偿金上限来加大赔偿力度的努力在我们的样本中并未见到成效。中国政策制定者应该为法院提供更多以客观损失（差额）为基础的、有可行性的指导方针来帮助他们解决知识产权损害

https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press

赔偿计算的难题。这才是问题的主因。法院应当回归“应付赔偿金”的客观标准，并逐渐发展出可以适用的一套方法来计算知识产权诉讼中的实际损失。“实际损失”也是合理裁量“法定损害赔偿金”的基础。因此，正在进行中的专利法第四次修订提出的关于被控侵权人的“文书提出义务”等一揽子新规定，为打击假冒提供了重要武器。

关键词: 知识产权保护; 中国; 损害赔偿; 实证; 专利诉讼

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https://doi.org/10.1017/S0305741019000754 Published online by Cambridge University Press