Goss IP

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INSIDE

Dear readers,

Did you know that China has its first Civil Code? On May 28th, the National People's Congress approved the first Civil Code that will take effect on January 1st, 2021.

We talk then about a copyright battle between the famous Hello Kitty and Miffy, cute characters liked by people from all over the world, which have similar style. So here arises the question: can a drawing style qualify for copyright protection in China?

As usual we also cover some food law related topic. In the first article we discuss the case of the yoghurt 简爱 (JianAi or *"Simple Love"*) which launched a new product branded as "其他没了" (qita meile) which literally means *"there is nothing else"*.

The other article discusses the plant-based *"beef"* and the related labeling regulations. Recently the topic became quite hot since also Starbucks adopted this kind of beef from two suppliers, *"Beyond Meat"* and *"Omnipork"*.

In April this year the Chinese Supreme People's Court issued several Opinions. We focus here on 2 of them. The first one is briefly called *"10 Opinions"* and it contains Guiding Opinions on Several Issues concerning Proper Trial of Civil Cases related to the Covid19 epidemic, focusing on different aspects, like dispute resolutions, force majeure, protection of rights and so on.

The last article regards the Opinions about the strengthening of the Judicial protection of Intellectual Property Rights with special regard to the raise of the amount of tort compensation.

Enjoy your reading!

Fabio Giacopello

HFG
LAW & INTELLECTUAL PROPERTY

UPDATE

China's first Civil Code approved

On Thursday, May 28th, at the end of the "two sessions" political meetings in Beijing, the National People's Congress approved the first Civil Code, that will take effect on January 1st, 2021.

China enacted the General Principles of Civil Law in 1986, and laws covering areas such as property, tort liability, contract, marriage, and inheritance continued to be added or updated. These laid the groundwork for a civil code.

The legislative process to compiling the Civil Code started in June 2016. It incorporates existing civil laws, such as those protecting the right to residence and the right to privacy, along with regulations in some new areas of law: targeting the actual lives of the people, the Civil Code addresses modern fields that need regulation, including new problems emerging from urbanization, environment protection, the application of AI technologies and the development of the digital economy, privacy of personal data online and virtual property protection.

The Civil Code contains 7 parts:

1. General Provisions; 2. Real Rights; 3. Contracts; 4. Personality Rights; 5. Marriage and family; 6. Successions; 7. Torts.

A major innovation of China's Civil Code is embodied in the part on personality rights. The part on personality rights includes provisions on a civil subject's rights to life, body, health, name, portrait, reputation and privacy, among others.

The part features stipulations on regulating studies related to human genes or embryos, banning sexual harassment, and, among other prominent issues of public concern, strengthening privacy protection. In the code, the concept of privacy is more clearly defined: the scope of protected personal information has been expanded to include email addresses and location data.

The Civil Code also made some innovative step regarding intangible assets. For what concerns the voice of a person, it would be naturally protected under portraiture right.

Regarding individual privacy, the Civil Code legislated that individual information shall not be illegally collected, used, processed or transmitted, nor shall be illegally traded, provided or disclosed to others. The Civil Code also intake the protection on data and property of fictitious assets, made principal legislation on fictitious assets.

The Civil Code also specifically legislate for the first time that: *"Where the intellectual property rights of others are intentionally infringed upon and the circumstances are serious, the infringed shall have the right to claim corresponding punitive damages."* [Art. 1185, Civil Code] With such article at hand, we can see a determination of the Chinese authority trying to strengthening IPR protection.

Together with the latest Amendments to the Copyright Law (Draft), we might be able to see some exciting judgements in the near future.

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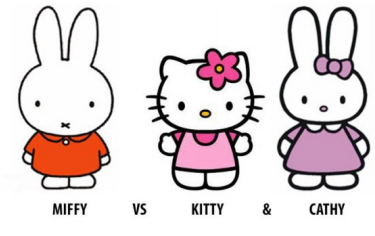
HIGHLIGHT

Line & Friends, Hello Kitty and Miffy: the battle for copyright

Brown, Hello Kitty, Miffy. These subjectively cute characters are liked by people from all over the world, from kids to adults. As their style is similar, this has led to some conflicts between two of these authors. Can you guess which ones?

Dick Bruna, the author of Miffy (created in 1955), stated in 2008 that he regarded Hello Kitty (created in 1974) as an infringement of his Miffy copyright.

His company, Mercis BV went into a legal battle against Sanrio, the company that owns the rights to Hello Kitty, as Hello Kitty also has a bunny named Cathy (created 1976) closely resembling Miffy. The legal case never made it to a judgment due to the Tsunami that hit in 2011, as both companies agreed to drop the lawsuit under the condition that Sanrio stopped marketing Cathy and the legal fees would be used to help build up the region after the Tsunami hit. A good settlement.



Since then, the companies have not quarreled about any copyright infringement question. However, it is interesting to know if drawing a character in a certain style would be also giving you protection for that style.

Can a drawing style qualify for copyright protection in China?Is there copyright for drawings in China?

Copyright in China for drawings exists for intellectual creations with originality in the artistic domain insofar they can be reproduced in a tangible form.

Copyright means that the author, the maker of the work, has various exclusive rights. The two most important of these rights are the right of reproduction and the right of publication.

The right of reproduction means that only the author has the right to make copies of the work. The right of publication means that only the author can decide whether to make a work available for the public.

If the work is created by a person, not working for a company, the right of copyright exists for the lifetime of the author plus 50 years after his death. In case it is a company that created the work, the copyright exists for 50 years. Only with permission of the author, you can use the copyrighted work, although there are some exceptions in this regard.

Can you enforce your rights in China?

In accordance with the Berne Convention, copyright is protected from the date of creation. This also applies to China.

However, in order to effectively enforce copyright in China, it is advice to register it with the Chinese government. This registration process usually takes one month. After successful registration, you will obtain a copyright certificate.

This certificate is very handy. Instead of you having to prove you are the owner, the certificate reverses the burden of proof, and now the infringer has to prove that you are not the copyright owner. Registration of copyright in China is highly recommended.

Can style be protected as copyright in China?

There has been no case law in China that has confirmed that a style can be protected as a copyright. However, from the law itself it seems clear that if the character is the same or highly similar to the original, that would be a copyright infringement as it would be plagiarism.

As such, the author could ask for the infringer to stop the infringing activity and, amongst others, ask for compensation,

From a practical perspective it seems that the current companies are ok with fair competition and are not seeking any action against one another. Further cooperation between Sanrio and Line & Friends is already happening.

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WATCH OUT

Extreme labeling: claims trademarks

简爱 (pron: Jian Ai, i.e. *"Simple Love")* is a Chinese yoghurt brand by Guangzhou Pucheng Dairy co. Ltd that built a strong market positioning on a clean-label strategy – purportedly, amongst the first to do so in China back in 2015. Its ingredient list includes only milk, sucrose, lactic acid bacteria. *"There is nothing else"*, indeed!

To stress lack of any additive, they applied for trademark registration on the sentence "其他没了" (pron: qita meile), meaning *"there is nothing else"*.

Registration was indeed granted with the number 16926255 on class 29, covering the following goods: jelly; dried edible fungi; tofu products; milk products; fish food; canned fruit; snack mainly with fruit and vegetable; pickled vegetables; eggs; meat; edible oils and fats; green salad; milk drinks (mainly milk); rice milk (milk substitute); yoghurt.

We were fascinated to analyze this case from various legal angles: trademark protection, food regulatory, consumer protection. We share here some comments.

Are negative claims allowed?

Currently, *"no-additive"* claims (or similar) are not forbidden, however they shall reflect and absolute *"zero"* amount in the product – no maximum threshold is allowed for those claims.

At the same time, these claims are widely used in the food industry, many times in misleading or fraudulent way.

Authorities in general have a very suspicious approach towards these claims, and actually it is reasonable to think that – very likely – those claims will be soon be officially forbidden. In fact – under the current draft of new GB 7718 released on December 2019 for public comments:

4.4.2.1 When using "no" or "not contain", the content of such ingredient or component shall be 0. If regulated in other lawful statement, regulations, or food safety standard, shall comply along. Food additive, contaminant, substance not allowed to add per regulation or standard, or substance ought not to exist in food product, is not allowed to use word or phrase such as no, not contain, or synonyms to make claims. Synonyms claim for content ref appendix D.

Same scenario for negative claims for a common ingredient (in this case: *"sugar"*): today it is allowed if there is absolute zero; tomorrow very likely it will not:

4.4.2.2 Expressions such as "Not added", "not used", or synonyms are not allowed.If those expressions are regulated in other laws, regulations, or food safety standard, they shall comply with such provisions.

Other kind of negative claims are allowed at specific conditions – for example, nutritional claims of *"0 sugars"* can actually be used if the content is not more than 0.5%.

Can a negative claim be registered as trademark?

According to the PRC trademark law, a trademark cannot be registered – amongst other reasons - if:

- ✔ it has nature of fraud, misleading the public about the characteristics of the goods such as the quality or the place of origin; or
- ✔ it lacks distinctiveness; or
- ✔ where it only directly indicates the quality, principal raw materials, function, use, weight, quantity or other features of the goods.

In this case, we can consider that it is a least controversial whether *"there is nothing else"* satisfies the conditions for trademark registration: it seems a common sentence, rather than a distinctive trademark; and the content may potentially be misleading (the claim is vague, it does not clearly specifies what else exactly is missing).

This trademark application was indeed initially rejected on the grounds of lack of distinctiveness, and registration was granted only after appeal in 2017.

We can also see that several other similar applications by the same company have been rejected:

- ✔ 其他没了 in class 5, 35, 32;
- ✔ 其他没了研究所 in class 29,
- ✔ 无他 in class 32
- ✔ 0% in class 29
- ✔ Naked in class 30 and 32

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"There is nothing else" is widely used on the presentation and packaging of all Simple Love's products.

It is used for flavored and non-flavored yoghurts, and it implies to lack not only of additives, but also of sugar (in non-flavored yoghurt) and more in general in lack of any ingredient not declared on the label.

This in our opinion adds a potential misleading and/or descriptive note to the trademark, for the reason that – by law – any ingredient present in the final product must be labeled (and obviously, what is not labeled shall not be in the product).

In this picture, the trademark is inserted within what seems to be a list of ingredients: *"raw milk, sugar, lactic acid bacteria, there is nothing else".*

While the product brand "简爱 " is clearly declared as a registered trademark ®, no such statement seems to be done for *"there is nothing else".* It could actually be argued that – in the above picture - *"there is nothing else"* is not used as a trademark, but just as a common sentence, a voluntary claim.

Challenge by consumers

The website www.caixin.com.cn published a very interesting article on this topic, in which it also compared Simple Love's yogurt with other similar products, *"Herun"* yogurt (another *"no-additives"* yogurt) and *"San Yuan"* yogurt (just an ordinary yoghurt). Simple love sells for almost 2-3 times more expensive and it has the highest fat content (4.5 % versus 3.1% of San Yuan and 3.6% of Herun).

Simple Love has used very direct comparison with other *"ordinary"* yoghurt (which also use other additives ingredient such as cream, edible flavor, milk powder and other additives such as sodium citrate, glyceryl monostearate).

Chinese regulatory allows a rather narrow range of food additives in original taste (i.e. non-flavored) yoghurts (such as propylene glycol esters of fatty acid, propylene glycol alginate, phosphoric cide, nisin); on the other hand, flavored yoghurt allow a much broader range of additives.

When some consumers started to complain that the claim may be misleading, and that additives such as thickeners may actually be hiddenly used in this product, the brand published on its WeChat account a reply statement that *"there is nothing else"* is a registered trademark that truthfully reflects the clean-label philosophy of the brand, and also showed an analysis report by a qualified laboratory showing that additives such as benzoic acid, sorbic acid, aspartame were declared as *"not detected"* in the product.

Consumers then argued that *"not detected"* is not equivalent to *"absolutely not added"*, or that those reports only showed results for some additives, but other additives might potentially be used. This could be in theory a good point.

However, in practice, market supervision authorities would accept as sufficient the report provided by the brand, which would shift the burden of the proof to the consumer.

On the other edge of the spectrum, famous Chinese food industry analyst Mr. Zhu Danpeng criticized the *"there is nothing else"* marketing by Simple Love.

"The quality of yogurt has nothing to do with the use of additives. As long as the additives are used within the standard range, they are actually safe. The quality of yogurt mainly depends on factors such as the quality of the milk source, the level of protein, and the time interval between raw milk and yogurt…*Taking the stabilizer as an example, the common starch, pectin, xanthan gum, etc. in the yogurt ingredient list are all stabilizers, and are also all natural ingredients. Adding stabilizer to the stirred yogurt can avoid the milk separation product during storage and transportation with no harm".*

Is registering a (forbidden) claim as a trademark a smart way to move?

In general, as we have seen above, it is very difficult that trademark protection can be granted to a food-claim. However, as we have seen with *"there is nothing else"*, this sometimes can happen.

If a judge would consider a claim such as *"there is nothing else"* as misleading, the producer or the seller might have to pay high punitive damages to the consumer – depending on the judge interpretation, up to 300% or to 1000% of the price paid by the consumer.

However, they may defend themselves by arguing that it is just using a registered trademark, officially approved by China Intellectual Property Office, which they have the right to use. Would this suffice to disclaim the brand?

The answer – of course – is very hard to predict. Certainly, the trademark protection granted to the claim would be a very strong base for the brand to defend itself. At the same time, the trademark should be recognizable and distinctive as such, which in the example above was not the case (the trademark was actually disguised as a common sentence/claim).

Even if granted, a trademark such as *"there is nothing else"* is also at risk of invalidation procedure without time limitation as it may be considered misleading, or non-distinctive, or in breach of the law (if and when the new GB 7718 will enter into effect).

Nicola Aporti
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NEWS

New meat is coming

Since April 22 Starbucks is serving, in its stores in China, prepackaged meals with plant-based meat ingredients. In particular, we see four meals offered, two with plant-based *"beef"* by Beyond Meat (a lasagna and a roll) and two with plant-based *"Omnipork"* by PLANT A FOODS HONG KONG LIMITED (a prepacked mixed vegetables salad, which also includes mushroom-taste Omnipork and a pasta).

Ingredients

Omnipork sub-ingredient lists count 16 items: water, concentrated soy protein, isolated soy protein, methyl cellulose, yeast extract, maltodextrin, potato starch, granulate sugar, edible salt, food flavorings, pea protein, rice protein, barley malt extract, beet red, edible dextrose, shiitake mushroom.

Beyond-Meat plant-based beef has a sub-ingredient list counting 18 items: water, pea protein isolate, rapeseed oil, refined coconut oil, rice protein, flavors, cocoa butter, green pea protein, methyl cellulose, potato starch powder, apple juice, salt, potassium chloride, vinegar, concentrated lemon juice, lecithin, pomegranate powder, beet juice powder.

Various authorities and food industry representatives and entities are working on an *"Analysis of the Status Quo of the Vegetarian Meat Industry and the Recommendation Report on Standards Establishment"* on the necessity and standard framework for the formulation of six national recommended standards for vegetarian meat products such as *"Classification of Vegetarian Meat Products"* and *"Quality Requirements for Halogen Meat Products".*

Names

Both Omnipork and Beyond-Meat plant-based beef are not sold as such; they are ingredients in foods sold by Starbucks.

Therefore, they appear on the labels of these products:

✔ **Omnipork** is defined in the ingredient list as " 新善肉 ", which can be translated as *"New Virtuous Meat"*. It also appears in the product name, i.e. *"New Virtuous Meat mushroom grains bowl (salad)".*

新善肉 has been applied for registration as trademark in various classes in 2018 and 2019.

✔ **Beyond-Meat plant-based beef** is labeled as vegetable beef ("植物牛肉").

Under Chinese labeling regulations:

✔ the name of a product shall be the name provided by national, trade or local standard;

In this regard, due to lack of specific regulation, we could not identify any specific standard (nor regulated definition) for 新善肉 - New Virtuous Meat, as well as for 植物牛肉 - Vegetable beef.

✔ in the lack of any of the above, a common or usual name which is not misleading or confusing to the consumer shall be used.

"Vegetable beef" might be considered as complying with this requirement, as it seems to allow a consumer to understand the nature of the product.

This is however more questionable for *"New Virtuous Meat"* (is it cultivated meat? is it meat from sustainable farms? Or is it a plant-based meat alternative?). Even more so, as *"New Virtuous Meat"* appears in the finished product name.

When a *"coined"*, *"fanciful"*, *"transliterated"*, *"brand"* name, *"folk"* name or *"trade mark"* contains misleading words or terminologies, a specific name which indicates the true nature of the food in the same word size, shall be used in close proximity to this name in the same display panel.

"New Virtuous Meat" seems rather belonging to this kind of denomination – and even more so, considered that it is pending approval for trademark registration.

As Omnipork and Beyond-Meat plant-based beef are currently not available for retail sale as food ingredients, and we were not able to inspect the label on these two products.

Continue reading

We can assume – though – that on their labels the products name will be more elaborated than they are in the ingredient list of finished products sold in Starbucks, and that they will include (or will be accompanied by) the indication of the product category (for example: *"vegetable proteins for industrial use"*, or *"bean products"* etc…).

Regulatory framework is needed

Innovation is much faster than regulatory.

The regulatory framework for plant-based meat is in fact far from being established, and currently producers need to rely on other standards (national, locals, industry, group) such as *"bean products"*, *"vegetable proteins for industrial use"*, *"non-fermented soybean product"*, *"gluten products"*, *"pea protein"*, etc..., while only producers based in China can apply for own enterprise standard (for example, a Q/TZECB 0004-2014 for *"soy bean vegetarian meat"*).

Regulators seem working on this, and in November 2019 China Plant-Based Food Industry Alliance announced to be working on a Group standard for artificial meat – likely to focus on three categories of vegetarian, artificial plant meat, and cell meat.

Other plant-based meats will be soon launched, attracting huge attention by customers and investors. Regulatory framework is needed, to avoid - amongst other thing - confusion in labeling and product denomination.

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UPDATE

TEN OPINIONS of Supreme Court on COVID-19 related Civil Cases

On April 20th 2020, Chinese Supreme People's Court (the "SPC") issued Guiding Opinions (I) on Several Issues concerning the Proper Trial of Civil Cases Related to the COVID-19 Epidemic (the "Opinion"), which provides definite and practical guidance on the civil cases and judicial procedures influenced by COVID-19 epidemic.

Ten principles are specified by SPC in the Opinion, mainly focused on the following four aspects:

- to explore diversified dispute resolution and adhere to the priority of mediation;
- to clarify and refine the judicial application of force majeure in civil and contractual disputes;
- to emphasize the protection of the rights and interests of employees and consumers;
- to protect the interests of limitation periods and litigation rights.

As known, the COVID-19 epidemic has been significantly impacting the commercial relationship, contractual performance and judicial procedures over months.

The Opinion offered official answers to the following frequently asked questions.

Q1: How to apply force majeure and other principles in civil cases whose performance has been affected by COVID-19 epidemic?

SPC Reply:

Civil cases directly impacted by COVID-19 or epidemic control and prevention measures	
Contract **IMPOSSIBLE** to perform	Contract **DIFFICULT** to perform
Force majeure can apply and civil liabilities shall be fully or partially exempted.	Re-negotiation and mediation are encouraged.
The party seeking to be discharged from liability due to force majeure shall demonstrate: 1. casual relation between force majeure and failure of contractual obligations; 2. the other party has been duly notified.	Termination is not supported.
If the party attributes to the failure of contract performance or further losses, it should bear corresponding responsibility.	If continued performance is obviously unfair to one of the parties, that party can seek judicial support for revisions to the contract terms.
If the pandemic or related control measures render the purpose of the contract unachievable, the court should support either party's request to rescind the contract.	After revision of the contract, any further claim of liability exemption is not supported.

Law provisions and references:

- Article 180 of General Principles of the Civil Code;
- Article 117 and 118 of PRC Contract Law;
- Subsidies, tax relief, or other financial support associated with the pandemic or related control measures;
- Other relevant provisions.

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Previously, Shanghai High Court published its replies of law application on COVID-19 epidemic related civil cases on February 17, 2020.

We can conclude that the courts uniformly consider both the outbreak of the virus itself and the administrative measures taken by governmental authorities as possible disruptions in contract performance.

As emphasized by SPC and Shanghai High Court, if any party claims to invoke force majeure, timely notification and direct causation shall be demonstrated.

Q2: How to handle labor issues during the COVID-19 period?

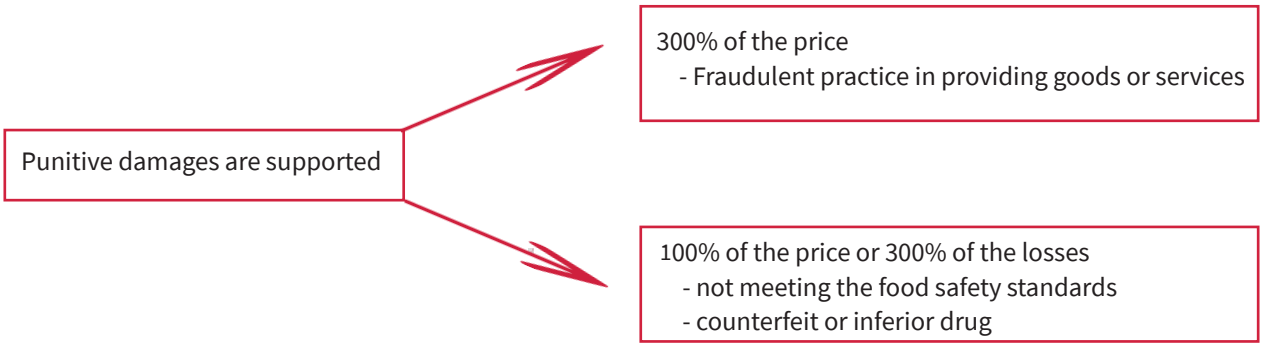
SPC Reply:

✓ Flexible working mode during the epidemic is encouraged.

✗ Termination is rejected if it is merely on the grounds that the employee is a confirmed COVID-19 patient, an asymptomatic infected person, or a person who has been quarantined in accordance with the law, that the employee comes from a region seriously hit by the epidemic.

Q3: Can consumer claim for punitive damages in the event of fraudulent or counterfeit epidemic prevention materials, such as masks, goggles, protective clothing and disinfectants?

SPC Reply:



Q4: Any temporary judicial process flexibility to protect the litigation rights?

SPC Reply:

Judicial process	**Suspension** of the limitation of action within the last six months shall be supported due to the empidemic or control measures.
	Extension of limitation period can be claimed, and it shall be supported where the party concerned who is a confirmed COVID-19 patient, a suspected COVID-19 patient, an asymptomatic infected person or related person in close contact with the said patient applies for an extension.
	Flexible preservation measures shall be adopted to effectively reduce the burden on enterprices.
	Standards for judgment should be unified. Courts at higher levels shall strengthen the guidance to the courts at lower levels by issuing typical casses.

For the full content of the Opinion, please click here: https://www.chinacourt.org/law/detail/2020/04/id/150152.shtml

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BUSINESS

Calculating and taking profit from infringement

On April 21st, 2020, the Supreme People's Court issued the Opinions on Comprehensively Strengthening the Judicial Protection of Intellectual Property Rights, putting into force a series of measures aimed at tackling the key difficulties in the judicial protection of intellectual property rights with special regard to "*effectively raise the amount of tort compensation*".

The effectiveness of intellectual property protection needs to be improved from many angles, and how to calculate damages with an effective way is surely one unavoidable point.

The judicial community have been constantly exploring the hope that a common way to calculate damages for intellectual property rights can be found, with a view to harmonizing judicial standards or increasing the predictability of rights holders and perpetrators.

However, with the deepening of judicial practice, the concept of compensation calculation is in line, but the general calculation method has been difficult to be widely recognized and affirmed.

According to the provisions of China's Trademark Law, Patent Law and Copyright Law, there are four methods of calculating the amount of damages for intellectual property infringement:

- the actual loss of the right holder,
- the infringer's profit of infringement,
- the multiple of the license fee,
- the statutory compensation.

In light of the application of several calculation methods, there are many research achievements in the theoretical field, and from the practical point of view, in addition to the application of the highest proportion of statutory compensation, the number of cases based on tort profit is gradually increasing.

The reasons include that the infringement profit can often be proved by the infringer's account books, tax records, sales platform, sales records and other materials, combined with evidence production orders and other evidence mining measures, more convenient than other calculation methods.

Therefore: can the amount of damages calculated in the form of infringement profits be a common way of calculating in all intellectual property infringement cases?

The main principle of compensation for intellectual property rights is the principle of filling out, that is, the purpose of compensation is to fill in the loss of the right holder. The inherent logic of calculating damages for tort profit to compensate the right holder's loss lies in that principle.

Under normal circumstances, the direct profit of the infringer belongs to the benefit that the right holder should have obtained, and this benefit can be equated with the loss caused by the tort to the right holder.

However, the cases relating intellectual property infringement involve a variety of complex circumstances, the infringer's profit is not always equivalent to the loss of the right holder, and such cases in the field of intellectual property infringement is not uncommon.

Some specific types of case adjudication also reflect the limitations of the method of calculation of infringement profit.

With the increasing recognition of the market value of intellectual property rights, the continuous improvement of the litigation ability of right holders and other parties, the number of claims by rights holders is also rising, and the first issue that arise is how scientifically and accurately determine the amount of intellectual property damages.

It will be a difficult problem during a litigation practice, but many experts pointed out that the economic calculation of the amount of damages may be one of the effective ways to solve the problem.

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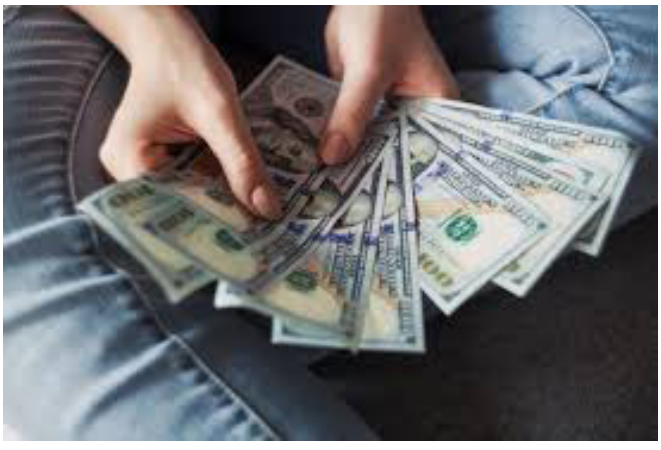
During the examination of the evidence, there will be the explanation of the specific calculation formula and basis of the amount of compensation, and even hire economic analysis experts to appear in court, the court refers to the opinions of economic experts to make a judgment on the amount of damages, will undoubtedly be conducive to intellectual property infringement cases of high award of fine judgment.

However, when the economic analysis of damages is calculated the next question is: how to integrate the legal perspective of intellectual property rights, the specific situation of infringement and the principle of civil damages and then determine the exploration direction of the calculation method of damages?



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