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Punitive damages under the new Chinese Civil Code – a critical and comparative analysis

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ABSTRACT

Punitive damages have their roots in the common law system. Recently, punitive damages have been increasingly discussed also in non-common law jurisdictions. This Article scrutinizes whether it is viable for a jurisdiction with a civilian legal system to adopt punitive damages in the realm of tort law. It is argued that societal development has brought unprecedented challenges to tort law where merely compensatory damages can no longer provide sufficient remedies to victims. We conduct research mainly from the perspective of China, which has been very progressive in introducing punitive damages into various areas of private law in the past decades and recently codified it in its new Chinese Civil Code. The discussion of Chinese law is proceeded with a comparison with the German law, which is also a civilian legal system that used to have a great influence on the making of Chinese law. We find that the German private law put much emphasis on disgorgement damages, while the Chinese legislator put his trust in punitive damages. German disgorgement damages and Chinese punitive damages focus both on the avoidance of efficient breaches of ubiquitous individual legal rights, such as personality rights or intellectual property rights, but the Chinese legislator makes punitive damages also available in several other legal situations. We provide recommendations for the future implementation of the Chinese punitive damages law in order to maintain a balance between efficient protection for claimants and sanctions on wrongdoers.

KEYWORDS

Punitive damages;
disgorgement damages;
functions of tort law; Chinese
Civil Code; German law

I. Introduction

In most common law cases, when damages are claimed, they are sought in order to compensate losses (so-called compensatory damages).¹ This is also the case in civilian legal systems, where awards of damages for wrongs traditionally operate exclusively to compensate for losses. Nevertheless, in *Rookes v. Barnard*, Lord Devlin made it clear that

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¹(W)here no loss has been suffered no substantial damages of any kind can be recovered', see *Stoke-on-Trent City Council v. W & J Wass Ltd* [1988] 1 WLR 1406 (CA) 1410 (Nourse LJ).

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‘tort does not pay’ or better should not pay.² This implies that in at least in some situations tort law seems to have additional functions beyond compensation for losses suffered. It is argued that non-compensatory damages are needed, e.g. in cases where a wrongdoer estimates the benefit made out of his wrongdoing would be larger than the entire cost which he would pay for such breach of law (*efficient breach of law*).³ Non-compensatory damages in this situation can include either *disgorgement damages* in order to strip off profits (also called *gain-based damages*)⁴ or *punitive damages*, with punishment and deterrence as their main functions.⁵ With the latter having its roots in the common law system. However, in recent years the concept of punitive damages as a remedy is increasingly being discussed in non-common law jurisdictions. A prominent example is China, one of the countries adopting in principle a civilian legal system. China has introduced punitive damages into a number of (specific) legislation and the new Chinese Civil Code that became effective in January 2021 now codifies punitive damages as part of general Chinese tort law. Curiously, Germany, also a civil law country, sees an increasing debate about the legitimacy of punitive damages or at least over-compensatory remedies for wrongs such as disgorgement damages.⁶ Although, traditionally, a firm stance has been taken to defend ‘pure’ private law without any punitive elements, German courts have increasingly accepted over-compensatory remedies in some situations of efficient breach of law – especially in the area of intellectual property (‘IP’) rights and personality rights.⁷

This article analyses whether the new Chinese Civil Code is actually breaking new ground for the Chinese legal system when introducing punitive damages or whether it only codifies what had already existed before. In addition, it addresses the challenges that the Chinese legal system faces with regard to its approach to punitive damages. This article also examines whether the Chinese punitive damages provisions prior to the enactment of the Chinese Civil Code were really law in action or ultimately only ‘law in the books’ as they were not applied in practice and what this means for Chinese law in 2021.

As Chinese law has adopted a unique approach regarding punitive damages for an ‘in principle’ civil law jurisdiction, this article compares Chinese law with its German counterpart (one of the most traditional Civil Law systems) for an examination of the law of over-compensatory damages in general and punitive damages in particular.

This article comprises of seven sections.⁸ After the introduction, the next section discusses the possible functions of punitive damages. The third section examines the evolving law of punitive damages in England and the United States and provides a theoretical response to the reception of punitive damages by China. The fourth section examines the legislative and judiciary practice in China prior to the codification of punitive damages in the new Civil Code, followed by an evaluation of such codification. The fifth section

²*Rookes v. Barnard*, [1964] AC 1129 (HL) 1227.

³André Janssen, *Präventive Gewinnabschöpfung* (Mohr Siebeck, 2016) 3 ff.

⁴See in general on disgorgement damages topic Ewoud Hondius and André Janssen (eds), *Disgorgement of Profits – Gain-Based Damages Throughout the World* (Springer, 2015); Janssen (n 3).

⁵Dan B Dobbs, *The Law of Torts* (West Group, 2000).

⁶Ina Ebert, *Pönale Elemente im deutschen Privatrecht* (Mohr Siebeck, 2004); Steffen Klumpp, *Die Privatstrafe – eine Untersuchung privater Strafzwecke* (Duncker & Humblot, 2002); Janssen (n 3).

⁷See e.g. German Supreme Court, *Neue Juristische Wochenschrift (NJW)* 1995, 861, 861 for personality rights and German Supreme Court, *Gewerblicher Rechtsschutz und Urheberrecht (GRUR)* 2001, 329, 331 for IP rights.

⁸The Article covers mainly tort law. Efficient breach of contract and the privity of contract render the damages for contract breach to a differing analytical framework and thus only tort law is to be discussed here.

provides comments on the current Chinese legal position on punitive damages from a German perspective. The penultimate section offers an outlook for the law on punitive damages in China, with some recommendations. The final section concludes this article.

II. Possible functions of punitive damages

Punitive damages can be traced back to English common law and even beyond.⁹ With early versions of punitive damages appearing in the Code of Hammurabi, the Bible, and the laws of the Hittites,¹⁰ and the laws of the Romans.¹¹

It has been pointed out that the purposes of punitive damages are primarily to punish and deter wrongdoing.¹² In the United States, the Supreme Court has made that clear in cases like *Pacific Mutual Life Insurance Co. v. Haslip*¹³ and a number of later decisions.¹⁴ In awarding punitive damages, US courts have often used words such as 'wilful', 'wanton', 'high-handed', 'oppressive', 'malicious', and 'outrageous'¹⁵ to describe the manner by which the wrong has been committed by the defendant. The *Second Restatement of Torts (1979)* also stated that punitive damages were a penalty that was applied in addition to compensatory damages in situations where a defendant's conduct was determined to be reprehensible.¹⁶ In England, punitive damages have been more frequently referred to as 'exemplary damages',¹⁷ indicating a different function from compensatory damages with a stronger moral implication.¹⁸ The Canadian Supreme Court has recently recognized that, although compensatory damages are usually sufficient to deter wrongdoing, punitive damages are needed when compensatory damages are insufficiently deterrent.¹⁹

Noteworthy, *Street* questioned 'if it is conceded that the law of torts ought to achieve certain public ends such as punishment, the state should receive any fine; why should the claimant get a windfall?'.²⁰ *Edelman* pointed out that once the tie

⁹David G Owen, 'Punitive Damages in Products Liability Litigation' (1976) 74 Michigan Law Review 1257 ff.

¹⁰John Y Gotanda, 'Punitive Damages: A Comparative Analysis' (2004) 42 Columbia Journal of Transnational Law 391 ff.

¹¹Anthony Geraci, 'Gore's Metamorphosis in State Farm v Campbell: Where Guideposts Make a Detour' (2004) 17 St Thomas Law Review 1 ff.

¹²In *Broome v. Cassell & Co* [1972] AC 1027 (HL) 1129, Lord Hailsham argued that the main aim is deterrence, both general and specific, and punishment is incidental to punishment, at 1073. *Rookes v. Barnard* [1964] AC 1129 (HL) (Lord Devlin): They are not concerned with compensating the claimant for loss suffered and thus 'are essentially different from ordinary damages ... the object ... is to punish and deter', at 1221. See also American Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001): 'Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. (...) The latter, which have been described as "quasicriminal", (...) operate as "private fines" intended to punish the defendant and to deter future wrongdoing'. Benjamin C Zipursky developed a theory of a personal right to be punitive, see 'A Theory of Punitive Damages' (2005) 84 Tex L. Rev 105.

¹³499 U.S. 1 (1991). It was stated that 'punitive damages are imposed for purposes of retribution and deterrence.'

¹⁴For example, in *Cooper Industries, Inc. v. Leatherman Tools Group, Inc.* (2001) the Court stated: 'Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'

¹⁵*Rookes v. Barnard* [1964] AC 1129 (HL) 1229 (Lord Devlin).

¹⁶§ 908.1 (Second) Restatement of Torts: 'Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.'

¹⁷See Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper 132, 1993) 5.31.

¹⁸Law Commission, *Aggravated, Exemplary and Restitutional Damages* (1997) <www.lawcom.gov.uk/project/aggravated-exemplary-and-restitutionary-damages> accessed 17 January 2022; Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 Oxford Journal of Legal Studies 87.

¹⁹*Royal Bank of Canada v W Got & Associates Electric Ltd* [2000] 178 DLR (4th) 385 (SCC) 394–395.

²⁰Harry Street, *Principles of the Law of Damages* (Sweet and Maxwell, 1962) 34.

between damages and compensation is broken, even if a claimant recovers more than the loss suffered, this need no longer seem a windfall.²¹ What punitive damages have in common with disgorgement damages is that they are both calculated other than exclusively by reference to the claimant's loss. However, disgorgement damages can never exceed the wrongdoers' profits, while punitive damages can as their primary function is to punish (and to deter). *Sharkey* further advanced an alternative rationale for punitive damages, arguing that punitive damages serve a beneficial role to compensate for 'societal damages,' that is, damages to others directly harmed but not before the court.²²

After the promulgation of the *PRC Tort Liability Law* in 2009, Chinese scholars have pointed out that it was 'quite revolutionary' to introduce punitive damages, as its primary purpose was to punish.²³ Further, 'preventing and punishing tortious conduct'²⁴ must be understood in a broad sense, including compensation as a measurement of punishment.²⁵ It has been agreed by most Chinese academics that punitive damages serve to both punish illegal behaviour and prevent future wrongs.²⁶ It is argued that from an economic perspective, punitive damages for civil liability could internalize the public sector's costs of policing illegal behaviours and empower individuals to pursue wrongdoers at their own costs, which could be more transparent and efficient.²⁷ Therefore, punitive damages could be applied to redress torts and restore market order.²⁸

This article presents the view that *if* a legal system accepts punitive damages, its punitive function should be fully recognized. What calls for more attention, in the discourse of punitive damages, is its function of deterrence. This is because deterrence is a normative, forward-looking exercise, while punishment is backward looking.²⁹ With accidental harms already governed by tort law, deterrence encourages efficient levels of care and activity by tortfeasors and victims. Some privately beneficial acts give rise to external harms that individuals do not take into account absent external intervention from government.³⁰ Therefore, punitive damages function to adjust the level of care and prevent future socially harmful behaviours.

²¹James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 22.

²²Catherine M Sharkey, 'Punitive Damages as Societal Damages' <<https://ssrn.com/abstract=407080>> accessed 17 January 2022.

²³L E Ascher, 'Punitive Damages under the New Chinese Tort Liability Law' (2013) 2 China-EU Law J 185, discussing Art. 47 of the Tort Liability Law (2009).

²⁴Art. 1 of Tort Liability Law (2009).

²⁵Shengping Gao, *People's Republic of China Tort Liability Law: Contested Points and Examples of Legislation and Case Study* (Beijing University Press, 2011). 高聖平, 《〈中華人民共和國侵權責任法〉立法爭點, 立法例及經典案例》, 北京大學出版社, 2011年.

²⁶Xinbao Zhang and Qian Li, 'The Legislative Option of Punitive Damages' (2009) 3(4) Tsinghua Law Review 5, 20. 張新寶, 李倩, '懲罰性賠償立法選擇', 《清華法學》(2009).

²⁷Yujun Feng, *Law and Economic Analysis: Seeking solutions for Chinese Problems* (Economic Science Press, 2008) 225. 馮玉軍, 《法律與經濟推理 – 尋求中國問題的解決》, 經濟科學出版, 2008年出版, 第225頁.

²⁸Guankui Yu, *The Study on the Application of Punitive Damages* (Law Press, 2015) 199. 於冠魁, 《懲罰性賠償適用問題研究》, 法律出版社, 2015年, 第199頁.

²⁹Anthony J Sebok, 'What Did Punitive Damages Do – Why Misunderstanding the History of Punitive Damages Matters Today' (2003) 78 Chi-Kent L Rev 163, 206; Hanoch Sheinman, 'Tort Law and Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP, 2014) 367.

³⁰Alex Raskolniko, 'Deterrence Theory: Key Findings and Challenges' *Cambridge Handbook of Compliance*, forthcoming: *Columbia Law & Economics Working Paper No. 610*, 1.

III. The evolution of punitive damages

A. The US and the UK

In the United States, empirical studies have shown that the blunt assumption of the unpredictability and excessiveness of punitive damages was incorrect.³¹ There have also been similar findings regarding the application of punitive damages in the United Kingdom (save for Scotland, which does not recognize punitive damages).³² One key finding is that punitive damages are awarded more frequently than conventionally thought.³³ Another significant finding is that the level of punitive damages awards has been rather modest and that there is considerable uniformity in the quantum of awards.³⁴ Many courts have found that in cases where a defendant was deemed to have had a general awareness that what he did was contrary to the law coupled with the hope that the expected benefits would outweigh the possible liability (efficient breach of law), this was sufficient for punitive damages to be awarded. It is unnecessary to prove that the defendant engaged in a precise mathematical process in this regard. In common law jurisdictions, there is explicit support of the legitimacy of punitive damages by the judiciary, the legislature and legal scholars. First, there is indirect support by courts for the legitimacy of punitive damages in recognition of the broad range of aims of tort law, which reach beyond compensation.³⁵ Second, punitive damages are justified for redressing those harms that would not have been pursued by individual victims, absent government intervention. Third, in practice, the award of punitive damages in general seems to be quite well exercised and better ‘controlled’ than what had been imagined just by reading about some punitive damages blockbuster awards.³⁶

B. China

Traditionally, Chinese tort law and relevant sector laws consider certain factors to gauge the amount of compensation for damages. The primary factor is either the actual loss of the claimant, the value of the products being produced or sold, or the price paid by the consumer.³⁷ When the primary factor is indecisive (e.g. due to lack of evidence), the gains of the defendant may be taken into consideration. In the area of IP law, if neither the rights holder’s actual loss nor the defendant’s gains can be determined, royalties or license fees may, as in many other jurisdictions, also serve as a base for calculation. If the above three factors cannot be determined in an IP infringement case, statutory damages, usually with a cap of millions of yuan, may be awarded.³⁸ In recently enacted

³¹Theodore Eisenberg and others, ‘Juries, Judges, and Punitive Damages: An Empirical Study’ (2002) 87 Cornell L Rev 743.

³²J Goudkamp and E Katsampouka, ‘An Empirical Study of Punitive Damages’ (2018) 38 Oxford Journal of Legal Studies 90, 92.

³³Punitive damages were awarded in 39.7% of the occasions when they were sought in sampled cases, see Goudkamp and Katsampouka (n 32) 110.

³⁴Goudkamp and Katsampouka (n 32) 115, the range of awards in the sample was £588 to £33,851.9, disregard outliers.

³⁵Edelman (n 21) 15.

³⁶Goudkamp and Katsampouka (n 32) 103.

³⁷Xianya Wu, ‘The Conditions for Applying Punitive Damages for Trademark Infringement’ (2019) 11 The People’s Jurisprudence (Cases) 89. 吳獻雅, 侵犯商標權懲罰性賠償的適用條件, 《人民司法(案例)》, 2019年第11期, 89頁.

³⁸The so-called discretionary damages have been proposed and adopted by courts which allows judges more discretion to determine the amount of damages without being constrained by the caps of statutory damages. It first appeared officially on the third conference on intellectual property trials of the Supreme People’s Court. It has been put in place since 2013.

sector laws in which punitive damages have been introduced along with a range of multipliers, the courts can exercise their discretion to determine the exact multiplier to be applied in a particular case.³⁹

Four features can be observed in China's development of punitive damages *before* the enactment of the Chinese Civil Code. First, punitive damages were initially introduced in areas where certain tortious behaviours were deemed reprehensible by the public. In China, compensatory damages were the accepted remedy for torts, from the enactment of the General Principles of the Civil Law in 1986.⁴⁰ The Law on the Protection of Rights and Interests of Consumers introduced punitive damages for the first time in 1993,⁴¹ pioneering punitive damages as a remedy in the areas of product quality⁴² and food safety,⁴³ resulting in part from the national fury triggered by manufacturers of adulterated formula milk powder which caused irreversible developmental problems to many infants across China. In 2009, the introduction of the Tort Liability Law was a breakthrough as it explicitly provides for punitive damages for products liability.⁴⁴ A set of IP laws⁴⁵ and unfair competition law⁴⁶ followed which likewise provided for punitive damages. The General Provisions of the Civil Law (2017), the preliminary legislation paving way for the Chinese Civil Code, provide that '[W]here any law provides for punitive damages, such a law will apply.'⁴⁷

³⁹Refer to the following subsection IV.A.2 for details.

⁴⁰These compensatory remedies require totaling of the damages that have accrued as a result of a civil wrong and compensating the victims in order to put them back into the status or position they would have been in had no injury occurred. Although not being literally referred to in the General Principles of the Civil Law, it has been argued that principle of 'full compensation', equivalent to the principle of 'making the victim whole' in English law, could be deduced from this doctrine. See Jiang Bai, 'A General Clause of Punitive Damages Should Be Established in China's Future Civil Code' (2019) 14 *Frontiers of Law in China* 388, 389–90.

⁴¹Art. 55 of the Law on the amended Protection of Rights and Interests of Consumers of 2013 (enacted in 1993, amended in 2009 and 2013) provides: '[W]here business operators knowingly provide consumers with defective commodities or services, causing death or serious damage to the health of consumers or other victims, the victims shall have the right to require business operators to compensate them for losses in accordance with Articles 49 and 51 of this Law and other provisions of laws, and have the right to claim punitive damages of not more than two times the amount of losses incurred.'

⁴²Chapter V Penalty Provisions (Arts. 49, 50, 52 & 61 & 63) of the amended Product Quality Law of 2018 (enacted in 1993, amended in 2000, 2009, 2018). These provisions provide punitive damages against suppliers, producers and sellers with damages of double or triple of the value of the products illegally produced or sold.

⁴³Art. 148 of the amended Food Safety Law of 2018 (enacted in 2015 and 2018) provides 'In addition to claiming damages, a consumer may require a producer of food failing to meet the food safety standards or a trader knowingly dealing in such food to pay an indemnity of ten times the price paid or three times the loss; or if the amount of the additional compensation is less than 1,000, it shall be 1,000 yuan ...'. The caps are set as ten times the price or three times the loss.

⁴⁴Art. 47 of the Tort Liability Law provides that 'If the product is still produced or sold knowing that there is a defect, causing death or serious damage to the health of others, the infringed person has the right to request corresponding punitive damages.' Notably this provision does not provide any further detail for the calculation of punitive damages.

⁴⁵Art. 63 of the amended Trademark Law of 2019 (enacted in 1982, amended in 1993, 2001, 2013, 2019); Art. 54 of the amended Copyright Law of 2020 (enacted in 1990, amended in 2001, 2010, 2020); Art. 71 of the amended Patent Law of 2020 (enacted in 1984, amended in 1992, 2000, 2008, 2020). They all provide punitive damages with a damage multiplier between one and five times of the actual loss of the right owner, or the illegal profit made by the wrongdoer; or, if the loss and profit cannot be reasonably gauged, the license fee for the use of the intellectual property right had it been acquired through a licence.

⁴⁶Art. 17 of the amended Anti-Unfair Competition Law (2019), enacted in 1993, amended in 2017, 2019 provides: 'The amount of compensation for the damage caused to a business by any act of unfair competition shall be determined as per the actual loss of the business incurred for the infringement or if it is difficult to calculate the actual loss, as per the benefits acquired by the tortfeasor from the infringement. If a business infringes upon a trade secret maliciously with serious circumstances, the amount of compensation may be determined to be more than one time but not more than five times the amount determined by the aforesaid method.'

⁴⁷Art. 179 of the General Provisions of the Civil Law.

Second, recent legislation for punitive damages were crafted with caps on the maximum amount of damages that can be awarded. The introduction of caps was intended to prevent excessive and unpredictable awards and impose constraints on the discretionary power of the courts. These caps vary from two to five times the actual loss, or the unlawful gains, or royalties that would have been paid had the tort not taken place. The Tort Liability Law is an exception in which no methods of calculation have been provided.

Third, PRC courts awarded over-compensatory damages in a gradual and incremental way. Courts have initially awarded damages of the claimant's requested amount of compensation as well as additional damages of a relatively large sum at the court's own discretion, to embody 'punitive factors'.⁴⁸ Later, with more explicit legislation, PRC courts have become more willing to award punitive damages per se instead of over-compensatory damages justified by 'punitive factors'.⁴⁹

Fourth, punitive damages as a remedy have been more frequently incorporated into legislation and awarded by the courts in the areas of IP rights, personality rights and unfair competition. In those areas, the dispersed effect of harm is greater than in other areas of tort law and there is thus a higher demand for effective (punitive) remedies. The reason that the dispersed effect of harm is greater than normal is that intellectual property rights / personality rights can be violated by anyone, at any time, for an unlimited number of times, and the rights holder can do very little to effectively protect his rights.

IV. The way towards codification of punitive damages in China

A. Judiciary experimentation

1. The data

The reception of punitive damages by Chinese courts is not as straightforward as the legislative process. At first glance, the courts have been reluctant to award punitive damages so far despite the availability of such damages in certain statutes.

We conducted a preliminary survey with the database 'Lawsdata'⁵⁰ and verified with the database 'China Judgements Online'.⁵¹ The first round of searches used the keyword 'punitive damages' within a period between 2015 and 2019 and limited to decisions made by all 31 Higher People's Courts. The searches generated 2228 cases in total. The vast majority were cases involving civil claims, which amount to a total number of 2188. There were 39 cases involving administrative issues and only one case involving a criminal offence. Among civil claims, within the *Lawsdata* categorization system, there were 752 cases labelled as 'contracts, management of affairs without mandate, unjust enrichment' (referred to as 'contracts, etc.' thereafter) and 651 cases labelled as 'tort'. There were 316 cases involving IP rights and unfair competition and 344 cases

⁴⁸Lianfeng Wang and Jialing Jian, 'Research on the Legal Application of Punitive Damages for Trademark Infringement – Empirical Analysis Based on 123 Judgments in China' (2020) 5 *Electronics Intellectual Property* 73, 95. 王蓮峰，蹇佳伶，'商標侵權懲罰性賠償的法律適用研究 -- 基於我國123件判決書的實證分析'，(2020)《電子知識產權》第5期，73頁。

⁴⁹Refer to subsection IV.A.2 for details.

⁵⁰<www.lawsdata.com>. It is a proprietary database of Chinese legislation, regulations and judgments run by Lawsdata Co; accessed 17 January 2022.

⁵¹<<https://wenshu.court.gov.cn>>. It is a free access database of judicial judgements run by the Chinese Supreme People's Court; accessed 17 January 2022.

involving labour and employment disputes. There were also 49 cases involving companies, securities, insurance and bills; eleven cases on property, six cases on personality rights and one case on maritime and shipping law. This shows that punitive damages have largely been raised in the cases involving contracts and torts.

The second round of searches aimed to narrow the scope of cases down to those decided by the Supreme People's Court. Other conditions for the search remained the same. In total, there were 37 civil cases involving issues of punitive damages. Among those cases, ten cases labelled 'torts' were selected for further analysis. There are two cases on personality rights,⁵² one case on insurance,⁵³ one case on unfair competition,⁵⁴ two cases on torts of traditional types,⁵⁵ and four on IP rights.⁵⁶ The Supreme People's Court did not award punitive damages in any of these cases. This is not because of punitive damages *per se* but because the claims were partly or entirely rejected by the Supreme People's Court, usually on the basis that there was insufficient evidence to prove the causality between the harm and the loss.

It can be observed that PRC courts have been reluctant, or at least conservative, in awarding punitive damages or even employing the term 'punitive damages' in their judgments. Nevertheless, claimants have been enthusiastically requesting for punitive damages since 2016.⁵⁷

Empirical studies of judicial decisions at various levels of PRC courts in different provinces have verified our findings. An empirical study on the application of punitive damages in trademark infringement cases revealed that out of a total of 123 cases from 2013 to 2019, punitive damages were only awarded in seven cases.⁵⁸ Another study revealed that as of the whole year of 2019, Beijing courts (at all levels) had only awarded punitive damages in five cases concerning IP rights disputes.⁵⁹ From 2016 to 2018, Jiangsu courts have determined that in 158 cases, the defendant's conduct constituted repeated infringements or malicious infringements, but only awarded punitive damages in less than one per cent of those cases.⁶⁰

Although at first glance it appears that punitive damages are rarely awarded by PRC courts, a closer scrutiny of the cases reveals that over-compensatory claims were frequently accepted by the courts, if it could be established that there was both malicious intention and large-scale infringement. The most litigated areas involving punitive damages are IP rights infringement, unfair competition and personality rights (the first two are often raised concurrently)⁶¹ And the following subsection examines cases involving these three abovementioned areas.

⁵²(2014) Zui Gao Fa Min Shen No. 1114; (2017) Zui Gao Fa Min Shen No. 1757.

⁵³(2017) Zui Gao Fa Min Shen No. 146.

⁵⁴(2018) Zui Gao Fa Min Shen No. 1270.

⁵⁵(2017) Zui Gao Fa Min Zhong No. 869; (2018) Zui Gao Fa Min Zai No. 420.

⁵⁶(2017) Zui Gao Fa Min Shen No. 4698; (2019) Zui Gao Fa Zhi Min Zhong No. 424; (2019) Zui Gao Fa Min Shen No. 885; (2019) Zui Gao Fa Zhi Min Zhong No. 21.

⁵⁷The number of cases filed per year are 2015: 98; 2016: 172; 2017: 479; 2018: 669; 2019: 770.

⁵⁸Wang and Jian (n 48) 74–75.

⁵⁹Liping Cao, 'The Value of Punitive Damages in Intellectual Property Compensations' *China Intellectual Property Magazine*, vol. 158 <www.chinaipmagazine.com/journal-show.asp?3486.html> accessed 17 January 2022. 曹麗萍, '懲罰性賠償在知識產權賠償制度中的價值定位', 總第 158 期, 中國知識產權網.

⁶⁰Judicial Protection of Intellectual Property by Courts of Jiangsu Province, IP House <www.iphouse.cn/report/index>, accessed on 17 January 2022.

⁶¹In case of concurrence, the court may dismiss one claim and base the assessment on either IP or unfair competition, see *Tencent v ByteDance Technology* (2017) Yue 03 Min Chu No. 559.

2. Cases

This subsection examines cases in which over-compensatory damages have been awarded. The criteria of case selection are: first, the type of the case. As shown in subsection IV.A.1, the areas that have been most litigated and most likely to be awarded over-compensatory damages were IP, unfair competition and personality rights. Hence, cases involving these three areas of law are selected. Since IP and unfair competition issues often have been raised concurrently, cases involving both issues are examined together. Second, the amount of the award. The amount of damages awarded in the selected cases is significantly higher than that of a normal compensatory damages award, and, in some cases, calculated with a damage multiplier. Based on those cases, the following part identifies the ‘punitive factors’ that courts had relied on in order to grant an over-compensatory award and probes whether those factors have been codified in the legislation.

In earlier cases involving IP and unfair competition issues, it was a common practice by the judiciary to award a relatively small amount of compensation for IP infringement or only a fraction of the requested amount. It has been a step forward for the courts to be more willing to award damages at the higher end within the scope of statutory damages,⁶² or fully grant the requested amount by the rights holder.⁶³ These judicial decisions have demonstrated the courts’ tougher stance towards enforcement of IP laws. More recently, in line with legislation expressly permitting punitive damages,⁶⁴ PRC courts have been granting punitive damages more explicitly and frequently.

Since 2017, in the case of *FILA v Zhongyuan Shoes*⁶⁵ and *Balanced Body Inc. v Yongkang*,⁶⁶ damages of three times the defendant’s gains have been awarded. In both cases, there was malicious intention as the defendant had conspicuously and repeatedly used marks which were very similar or even identical to the trademark owner’s marks. In *Xiaomi v Mijia* (2019), intentional free riding and taking unfair advantage of the existing trademark Xiaomi was found to be malicious and damages of 50 million yuan, as triple the amount of the defendant’s gain, was ordered by an Intermediate Court and affirmed by the Higher Court of Jiangsu Province.⁶⁷ In January 2021, a similar decision, granted by an Intermediate Court, awarded punitive damages against a Chinese enterprise for trademark infringement with a multiplier of three, up to 30 million yuan.⁶⁸ Similar cases have been reported by the Higher People’s Courts at the provincial level as landmark cases of the year.⁶⁹

In the area of personality rights, *Moyan*, the Chinese Nobel laureate in literature, sued Yuci Corporation for unauthorized use of his images and falsely claiming association

⁶²In the areas of IP rights and unfair competition, an early decision is *Tencent v Qihoo 360* (2013) Min San Zhong Zi No. 5.

⁶³*Gree v Aux*, (2017) Yue 73 Min Chu No. 390. The Guangzhou Intellectual Property Rights Court rendered an order of damages of 40 million Yuan in full recognition of the right owner’s request; confirmed by Guangdong Higher People’s Court (2018) Yue Min Zhong No. 1132.

⁶⁴Art. 63(1) of the amended Trademark Law. It for the first time introduced punitive damages calculated as on triple of the amount of the ‘base’ (actual loss, or illegal profit, or license fee).

⁶⁵(2017) Jing 0102 Min Chu No.2431; (2017) Jing 73 Min Zhong No. 1991. Damages of 3 million Yuan was awarded.

⁶⁶(2018) Hu 0115 Min Chu No. 53351.

⁶⁷*Xiaomi v Mijia*, decided by Nanjing Intermediate People’s Court (2018) Su 01 Min Chu No.3207 and confirmed by Jiangsu Higher People’s Court (2019) Su Min Zhong No. 1316.

⁶⁸*Wyeth v Huishi*, (2019) Zhe 01 Min Chu No. 412.

⁶⁹White Paper: Judicial Protection of Intellectual Property in Jiangsu Province 2019 <www.jsfy.gov.cn/art/2020/04/22/25_100050.html>; White Paper: Judicial Protection of Intellectual Property in Shanghai 2019 <<https://mp.weixin.qq.com/s/JHd5ntfzWHSbus2wz1q5A>>; White Paper: Judicial Protection of Intellectual Property in Fujian Province 2019 <<https://baijiahao.baidu.com/s?id=1664917490709037843>>; accessed 17 January 2022.

between him and Yuci Corporation's products.⁷⁰ The factors considered were: (1) The market value of the claimant's name. (2) The degree of the defendant's fault.⁷¹ (3) The degree of damage to the claimant's reputation. (4) The scope of infringement. The Court relied on Article 18 of a Judicial Interpretation⁷² which provides that

if the infringed person's property loss due to the infringement of his personal rights and interests or the benefits obtained by the infringer cannot be determined, the people's court may determine the amount of compensation within the range of less than 500,000 yuan based on the specific circumstances of the case.⁷³

Hence, the Court determined that 'compensation amount below 500,000 yuan' referred to the general compensation standard. According to the specific circumstances of this case, the amount of compensation determined under this standard cannot cover the claimant's loss, nor can it play a punitive effect on the defendant's infringement. Hence, the Court awarded 200 million Yuan in damages for the infringement of personality rights.

As shown above, courts have been willing to award relatively large sum of damages if 'punitive factors' can be found, and although these factors vary from case to case, some commonalities have emerged. The first factor is the *defendant's refusal to provide all the profit data and financial accounts information* without justifiable reasons. A second factor is *repeated infringement* despite warnings and requests by the claimant to remove infringing items. A third factor is *large scale production and sales of infringing items*. A fourth factor is *intentionally using the infringed IP rights or personality rights* in online and offline activities. A fifth factor is the *duration of harm* caused by the defendant who knew or ought to be aware of the infringing nature of the act. A sixth factor is the *value of the right being infringed*, for example, a trademark's value or the commercial value of a celebrity's name. The last factor is the *detrimental effect of the unauthorised use of rights* for the rights holder.

To summarize, a finding of malicious intention and a large-scale infringement could provide grounds for an award of punitive damages. A finding of malicious intention can be derived from culpable knowledge, either explicit knowledge of the tortious nature of the act or recklessly turned a blind eye to such acts. The magnitude of an infringement can be assessed based on the frequency and scale of an infringement. These factors provide a strong moral justification for awarding punitive damages for punishment and deterrence purposes, and this is a major difference between pure disgorgement damages and punitive damages.

B. Codification of punitive damages in the Chinese Civil Code

The National People's Congress Standing Committee adopted a piecemeal approach by first enacting a series of separate statutes governing individual civilian matters, with

⁷⁰(2017) Yue 0306 Min Chu No.16325; (2019) Yue 03 Min Zhong No. 20874.

⁷¹The defendant had falsified the claimant's voice and matched it to a commercial advertisement. The deception clearly indicates malice.

⁷²Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Infringing Personal Rights and Interests by Using Information Network (2013).

⁷³Judicial interpretation is the official interpretation made by the Supreme People's Court on the application of certain laws with legal binding force.

the intention to integrate them into a unified code when the time is ripe.⁷⁴ The final result came in the form of the Chinese Civil Code, which came into force on 1 January 2021. It consists of seven so-called books, i.e. General Rules, Property Rights, Contracts, Personality Rights, Marriage and Family, Right of Inheritance, and Tort Liability. The part on Tort Liability is based on the Tort Liability Law from 2009, albeit with certain structural adjustments.

Art. 179 of the Chinese Civil Code in book I on General Provisions includes a directive clause, providing that 'Where any law provides for punitive damages, such a law shall apply.'⁷⁵ Book VII on Tort Liability puts forward provisions for punitive damages. Art. 1185 of the Chinese Civil Code in book II 'Damages' provides for punitive damages specifically for intellectual property rights infringement.⁷⁶ Chapters IV and VII foresee punitive damages for defective products⁷⁷ (Art. 1185 of the Chinese Civil Code) and environmental pollution (Art. 1232 of the Chinese Civil Code).⁷⁸ Notably, punitive damages in these three provisions (for IP rights infringement, environmental pollution and defective products, respectively) are awarded based on different criteria. Punitive damages for the first two types of torts should be awarded based on an assessment of the degree of tortfeasor's intention and the gravity of infringement. Intention could be interpreted as explicit knowledge or constructive knowledge where the tortfeasor recklessly turned a blind eye to potential infringements.⁷⁹ However, the provision for products liability narrows the culpable knowledge to explicit knowledge only and thus makes the threshold higher for establishing malicious intention.

There are inconsistencies between the Chinese Civil Code and the judicial practice so far. In tort cases, particularly in IP rights infringements cases, PRC courts have clearly adopted a higher standard where only malicious intention can justify an award of punitive

⁷⁴Since the 1980s, China has enacted a series of standalone civil laws, including the General Principles of Civil Law ('GPCL'), General Provision of the Civil Law, Marriage Law, Inheritance Law, Adoption Law, Security Law, Contract Law, Property Law, and Tort Liability Law. These existing legislations are systematically integrated into the Civil Code and will cease to be effective concurrently when the Civil Code take effect.

⁷⁵Art. 179 of the Chinese Civil Code: 'Civil liability shall be assumed primarily in the following manners:

- (1) Cessation of infringement.
- (2) Removal of obstacles.
- (3) Elimination of danger.
- (4) Restitution of property.
- (5) Restoration to the original condition.
- (6) Repair, reworking, or replacement.
- (7) Continued performance.
- (8) Compensation for loss.
- (9) Payment of liquidated damages.
- (10) Elimination of adverse effects and rehabilitation of reputation.
- (11) Making an apology.

Where any law provides for punitive damages, such a law shall apply.

The manners of assuming civil liability as set forth in this article may be applied alone or by a combination.'

⁷⁶Art. 1185 of the Chinese Civil Code: 'Where any harm caused intentionally by a tort to the intellectual property rights of another person has serious circumstances, the victim of the tort shall have the right to require corresponding punitive damages.'

⁷⁷Art. 1207 of the Chinese Civil Code: 'Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product, or fails to take effective remedial measures as required by the preceding Article, and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive damages.'

⁷⁸Art. 1232 of the Chinese Civil Code: 'Where a tortfeasor violates the provisions of laws and intentionally causes environmental pollution or ecological damage, resulting in serious consequences, the victim shall have the right to claim corresponding punitive damages.'

⁷⁹Liming Wang, 'On the Rules on Punitive Damages for Infringement of Intellectual Property Rights in the Civil Code' (2019) 8 *Political Science and Law* 95, 103. 王利明, '論我國民法典中侵害知識產權懲罰性賠償的規則', (2019) 《政治與法律》, 第 8 期, 95 頁.

damages.⁸⁰ If the purpose for using the term ‘intention’ is to maintain consistency with other provisions in the Chinese Civil Code, a legislative technique may be utilized here by maintaining the current provision as a general clause, followed by a list of factors defining malice and the gravity of the infringement. Commentators agree that intention should be an essential factor for punitive damages to be awarded, but to a higher degree with clear evidence of malicious intention than other types of damages.⁸¹ When specific factors can be established in a case, the courts need not re-assess the situation using the general clause. This will enhance the certainty of punitive damages while not overloading the judiciary with repeated assessment of similar cases.

In March 2021, the Supreme People’s Court issued a Judicial Interpretation on the Application of Punitive Damages in IP Cases incurring Civil Liability⁸² setting out explanations of ‘intention’ and ‘serious circumstances’. The clarifications were in response to the ‘punitive factors’ approach adopted by the cases mentioned in this subsection.

Punitive damages are a game changer. The reception of punitive damages by the Chinese legal systems has blended hybrid features of civilian and common legal systems.⁸³ The ‘impure’ tort liability law enables the law to be adaptable to societal changes, particularly when the aggregated harm is significant while the individual’s loss is less obvious, and when the rights being infringed upon are so similar to public goods that individual rights holders are sufficiently incentivized to sue on their costs. To incentivize potential wrongdoers to internalize the costs of infringements *ex ante* helps to improve social welfare both for the rights holders and consumers in general.⁸⁴ Punitive damages shift the loss of the rights holder to the potential wrongdoer and encourage parties to turn to market to price the use of property or appropriately estimate the costs of breach of law.⁸⁵

Moreover, in China, criminal sanctions used to play a heavy role in maintaining order in society. A less stringent and less intervening criminal law regime will help foster a lively civil society and free markets.⁸⁶ Punitive damages as a remedy for civil wrongs could complement the punitive function of criminal law, without being too harsh.⁸⁷

V. Comments on the Chinese legal situation on punitive damages from a German perspective

Given the constraints of this article, it is challenging to comment on the Chinese legal situation on punitive damages from a German perspective, which can therefore only be done from a bird’s-eye view. We start with outlining the function of German tort law and law of

⁸⁰Ibid, 101; Jian Song, ‘Analysis and Thoughts Based on Empirical Research of Punitive Damage’ *IP Economy* (20 October 2020) <www.ipeconomy.cn/index.php/index/article/content/id/1693.html> accessed 17 January 2022. 宋健, ‘懲罰性賠償實證研究分析與思考’, 知產財經網.

⁸¹Hong Zhang, ‘Punitive Damages to Torts Liability’ (2020) 1 *Wuhan University Journal of Humanity & Social Science* 89, 90–91; 張紅 ‘侵權責任之懲罰性賠償’, (2019) 《武漢大學學報（哲學社會科學版）》, 第1期, 89頁; Liming Wang (n 79) 103.

⁸²Judicial Interpretation No. [2021] 4, came into effect on 3 March 2021.

⁸³Lixin Yang, ‘Vivid Chinese Characters in the Tort Liability Book of the Chinese Civil Code’ *Procuratorate Daily* (4 August 2020) <www.spp.gov.cn/spp/llyj/202008/t20200804_474692.shtml> accessed 17 January 2022. 楊立新, ‘民法典侵權責任編的鮮明中國特色’, 《檢察日報》.

⁸⁴Jiang Bai, citing *Grimshaw v. Ford Motor*, see n 48, *Frontiers of Law in China*, 389–90.

⁸⁵Mark Lemley, ‘Property, Intellectual Property, and Free Riding’ (2005) 83 *Texas Law Review* 1046.

⁸⁶Bai (n 40) 405–07.

⁸⁷Shengming Wang (ed), *The Interpretation of the Tort Liability Law of the People’s Republic of China* (Law Press, 2010) 244. 王勝明(主編), 《中華人民共和國侵權責任法釋義》, 法律出版社.

damages, before moving on to areas of potential overcompensation in Germany and finally concluding with some short comparative remarks.

A. The function of German tort law and law of damages

Looking at the German Civil Code ('Bürgerliches Gesetzbuch' or 'BGB') from 1900, the functions of tort law and the law of damages seem to be very clear. § 249 of the German Civil Code, which is applicable to all kind of obligations, states that the only functions of the law of damages in general and of tort law in particular are restoration and compensation.⁸⁸ It seems that every kind of windfall profit for the claimant must be avoided as this would amount to an unacceptable overcompensation. Even more problematic is the concept of punitive elements to German private law. The German Civil Code does not foresee them, the German courts reject them categorically⁸⁹ and even naming punitive elements in the context of private law is highly problematic for some traditionalists. The strict separation of criminal and private law is to many the holy grail of German private law and the 'extinction' of punitive elements from private law is celebrated as a great achievement of modern society. Any kind of punitive elements in private law is (in opposite from the new Chinese Civil Code) considered to be an '*atavism*', which needs to be avoided at all costs⁹⁰ – only a 'pure' private law without any punitive elements can be a good private law. A similar faith seems to have the function of deterrence respectively prevention (in the following only 'prevention') to the traditional opinion in Germany: Prevention is exclusively considered to be a by-product of compensation but cannot be a stand-alone deterrent function and can therefore never supersede the function of compensation.⁹¹

However, is German law really all that rigid? Is it really exclusively about compensation and no other functions can play any role whatsoever? Are there absolutely no areas in German private law slowing for overcompensatory damages (or even punitive damages)? Is the gap between the German and Chinese legal systems in this regard really as big as it seems to be? In order to answer these questions, we focus on three areas of potential overcompensation of the claimant: (1) the infringement of personality rights, (2) the infringement of IP rights and finally (3) the infringements of unfair competition law, which have also been examined extensively in the Chinese law part of this article.

B. Areas allowing for potential overcompensatory damages in German private law

1. Infringement of personality rights

The protection of personality rights in Germany is mainly based on case law. The concept of personality rights emerged just after the Second World War. However, even after the

⁸⁸§ 249 of the German Civil Code:

'(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.

(2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.'

⁸⁹This is underlined by the fact that according to the German Supreme Court (see German Supreme Court, BGHZ 118, 312) (American) punitive damages awards are in principle unenforceable in Germany.

⁹⁰See e.g. Heinrich Honsell, 'Der Strafgedanke im Zivilrecht: Ein juristischer Atavismus' in Aderholt and others (eds), *Festschrift für Harm Westermann zum 70. Geburtstag* (Otto Schmidt, 2008) 315 ff.

⁹¹See Karl Larenz, *Lehrbuch des Schuldrechts, Band 1: Allgemeiner Teil* (14th edn, Beck, 1987) 423.

concept of personality rights ('Allgemeines Persönlichkeitsrecht') was introduced into the German Private Law by the German Supreme Court, the situation remained in favour of wrongdoers as the sums to be paid for infringements of personality rights were very low.⁹² Thus, it remained a profitable business of the paparazzi to first infringe personality rights (especially of celebrities) and then only pay a small sum for compensation afterwards.

The turning point was the judgment 'Caroline of Monaco I', decided in 1994 by the German Supreme Court.⁹³ In that leading case a publisher violated the personality rights of Princess *Caroline of Monaco* (i.e. a completely fictitious interview plus paparazzi photos were published) in order to sell more copies of two different magazines of the defendant. This decision differed from previous decisions because the judges emphasized the preventive function of damages in a manner that was not mentioned previously – while still trying to reject any punitive purpose of tort law.⁹⁴ In this case, the German Supreme Court emphasized that the compensatory function needed to step back in order to make way for the preventive function. The amount of damages awarded for *intentional* infringements of personality rights must constitute a 'real counterweight' to the profits made by violating these rights. The profits obtained from the infringement are according to the Supreme Court a very important factor to be considered in deciding the extent of the damages awarded.⁹⁵ In Germany, this decision is considered to be the starting point for disgorgement damages for infringements of personality rights by the press, even though the German Supreme Court shies away from clearly labelling its approach as disgorgement damages. As a consequence, there has been a clear rise in the amount of damages awarded for personality rights infringements (up to almost 600,000 euros/claim) and are therefore no longer merely symbolic.

2. Infringement of intellectual property rights

German law on IP rights was almost purely case law-based for many decades; however, after the implementation of the Enforcement Directive 2004/48/EC (in particular Art. 13 of the Directive) which is now statutory law in the different German IP right law codes,⁹⁶ the claimant has three options to calculate the damages claimed for intentional and negligent IP rights infringements ('dreifache Schadensberechnung')⁹⁷: (a) ask for the actual damages, (b) a fictitious license fee; or (c) disgorgement damages. The German IP law does not foresee punitive damages or damage multipliers.

Despite the almost 150-year-old history of disgorgement damages in German IP law they did not play an important role in practice for many years.⁹⁸ The main reason was that the wrongdoer could deduct not only the costs directly associated with the particular infringing act (*direct costs* such as e.g. material) from the profit, but also a part of his general overhead (*indirect costs* such as rent or utilities). As this was very tedious and

⁹²German Supreme Court, BGHZ 20, 345 et seq.; German Supreme Court, BGHZ 26, 349 et seq.; German Supreme Court, BGHZ 35, 363 et seq.

⁹³German Supreme Court, *Neue Juristische Wochenschrift* 1995, 861, 865.

⁹⁴Ibid.

⁹⁵Ibid.

⁹⁶See e.g. for copyright infringements (§ 97(2) UrhG), for patent infringements (§ 139(2) PatG), and for trademark infringements (§ 14(6) MarkenG).

⁹⁷See Janssen (n 3) 275 ff.

⁹⁸See with more details *ibid*, 283 ff.

the results often disappointing, claimants by far preferred claiming for a fictitious license fee instead – as such, disgorgement damages hardly had any practical relevance. This changed radically in 2000 when the German Supreme Court held that the wrongdoer's overheads cannot any longer be deducted from the illegal profits – only the direct costs are still deductible.⁹⁹ This milestone decision was an enormous boost for the importance of disgorgement damages in German IP law and it is fair to say that disgorgement damages are now probably predominant in IP law practice.¹⁰⁰ Claimants now have a strong incentive to ask for disgorgement damages as they are regularly much higher than the actual losses or the fictitious license fee. It is also interesting to note that the German Supreme Court (after 2000) keeps emphasizing that the primary function of disgorgement damages in IP law is prevention and not compensation anymore – while still rejecting any punitive function.¹⁰¹ As such, even if the right holder does not suffer any losses he can still ask for disgorgement damages.

3. Infringement of unfair competition law

Like the German IP law, the German unfair competition law does not foresee punitive damages or damage multipliers. However, similar to infringements of IP rights, under § 33a(3)2 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* or 'GWB'), profits made by a corporation in breach of unfair competition law can be taken into account when calculating damages.¹⁰² The concept of disgorgement of profits was introduced in this legal area in reaction to the fact that a precise calculation of the concrete loss suffered is not always feasible.¹⁰³ However, asserting claims under § 33a(3)2 of the GWB is plagued by severe evidentiary difficulties as only the profit that directly results from the breach of unfair competition law can be disgorged. The provision appears to be of very little relevance in practice and thus can be considered a paper tiger.¹⁰⁴

C. Some comparative remarks from a German perspective

1. The different traditional conception of tort law

Traditional conception of tort law differs between China and Germany. While 'real' punitive damages are unknown in Germany private law (both in legislation and in case law) and the emphasis is evidently on compensation, the Chinese legal situation is different. Even though compensation is still a guiding principle of Chinese private law, it is apparent that punitive elements play an important role in the mind of the legislators, as can be seen from the numerous punitive damages provisions in the Chinese Civil Code and other

⁹⁹German Supreme Court, *Neue Juristische Wochenschrift* 2001, 2173 ff.

¹⁰⁰Janssen (n 3) 381 ff.

¹⁰¹See e.g. German Supreme Court, *Neue Juristische Wochenschrift* 2009, 3722 (3729).

¹⁰²§ 33a GWB:

'(1) Whoever intentionally or negligently commits an infringement pursuant to § 33(1) shall be liable for any damages arising from the infringement.

(2) (...)

(3) § 287 of the German Code of Civil Procedure [Zivilprozessordnung] shall apply to quantify the harm caused by the infringement. In quantifying the harm, account may, in particular, be taken of the proportion of the profit which the infringer has derived from the infringement under paragraph 1.

(4) (...).'

¹⁰³Tobias Helms, 'Disgorgement of Profits in German Law' in Ewoud Hondius and André Janssen (eds), *Disgorgement of Profits: Gain-Based Damages Throughout the World* (Springer, 2016) 219 (226 ff.).

¹⁰⁴For more information see Janssen (n 3) 531 ff.

legislation. However, we will have to wait and see whether (and to what extent) Chinese judges are willing to give these provisions effect in practice, as some resistance towards punitive damages awards has been observed. The current discussion in Germany about whether or not tort law also has a preventive function is much less prominent in China, as it has been accepted that punitive damages have a role to play, include (besides punishment) the element of prevention and deterrence.

2. About disgorgement damages and punitive damages

This article has shown that disgorgement damages are more common in Germany than in China and that the German Supreme Court tries to use disgorgement damages for a real preventive effect – at least in the area of personality rights and IP rights. Some authors have therefore advocated for an introduction of disgorgement damages into the German Civil Code, either as a general rule of the law of damages or at least as a general rule of tort law.¹⁰⁵ Disgorgement damages try to fight efficient (profitable) breaches of law and are strictly limited to the illegal profits of the wrongdoer. Their purpose is not punishment. Punitive damages can exceed the amount of the unlawful profit (by a large amount) as their primary aim is punishment.

3. The (partly) overlapping sphere of application of (German) disgorgement damages and (Chinese) punitive damages

Despite the fact that disgorgement damages and punitive damages are conceptually different, it is apparent that the German and Chinese legal systems use both instruments (at least partly) in the same areas to address the same legal phenomena, especially in the areas of personality rights and IP rights. As they are ubiquitous legal rights, both legal systems want to protect them against efficient breaches. That each legal system does it with different legal instruments does not detract from their common goal, i.e. the effective protection of these rights. However, Chinese private law goes considerably further than the German private law and introduces punitive damages in areas other than these ubiquitous individual legal rights, e.g. in Art. 1207 of the Chinese Civil Code (punitive damages for defective goods) and arguably also Art. 1232 of the Chinese Civil Code (punitive damages for environmental pollution). Hence, the sphere of application of (Chinese) punitive damages is much wider than (German) disgorgement damages.

4. The legal effect of (German) disgorgement damages and (Chinese) punitive damages in practice

It would be easy to conclude that as the Chinese private law contains many punitive elements (while the German private law merely has a few areas with 'only' disgorgement damages) it is also more effective in practice. However, the reality is more complicated. Firstly, we need to bear in mind that Chinese judges were quite reluctant to grant severe punitive damages, while the German Supreme Court in the last decades has been eager awarding disgorgement damages as an effective remedy. Hence, the amount of German disgorgement damages e.g. in a case of an IP right infringement might be higher than the Chinese award of punitive damages in a similar Chinese case.

¹⁰⁵Janssen (n 3) 606 ff.; Gerhard Wagner, *Neue Perspektiven im Schadensersatzrecht: Kommerzialisierung, Strafschadensersatz, Kollektivschaden* (Beck, 2006) 105 ff.

Secondly, we also need to take into consideration that the legal requirements for the award of (German) disgorgement damages and (Chinese) punitive damages might differ. For example, while under the German legal system *negligent* IP infringements suffice for disgorgement damages, Art. 1185 of the Chinese Civil Code requires an *intentional* violation of IP rights for the award of punitive damages. Further empirical research is required to analyse how effective both legal systems are with their different legal approaches, before final and accurate conclusion can be reached.

VI. The way forward in China

Coming back to the situation in China, what is the way forward for further developing punitive damages? What are the challenges for the Chinese legal system?

A. Quantification

It has always been challenging to gauge the amount of punitive damages to be awarded. In practice, courts have used different terms such as ‘calculation’, ‘estimation’, ‘quantitative’, ‘discretionary’ and ‘discretionary compensation’ to describe the process of calculation. Many courts employ a mixed approach, referred to as ‘calculation-plus’, to determine the amount of an award. That is, based on the calculation of claimant’s actual loss, or defendants’ gain, the court additionally considers the nature and scale of the infringement, the state of mind of the defendant, and other relevant factors to determine the final amount of the award.¹⁰⁶

Punitive damages are a severe penalty, thus the amount of every punitive damages award needs be carefully gauged. e.g. by following the general clause contained in the Chinese Civil Code, which provides a list of punitive factors, including malice and the seriousness of IP infringement and environmental pollution in the sector laws which are to be connected with the Chinese Civil Code pursuant to Art. 179 of the Chinese Civil Code. A first factor can be that for torts capable of being awarded with punitive damages, the tortious act(s) should have been committed with malicious intention, before punitive damages are awarded. Culpable knowledge and persistent infringement despite warnings from the rights holder should result in the courts deciding that malicious intent was present. For IP rights infringement, malice means having explicit knowledge about the infringing nature of the act or the item being dealt with.¹⁰⁷ This is because all IP rights, except some copyrighted works,¹⁰⁸ are publicized information. If implied knowledge could result in an award of punitive damages, claimants may always argue that there is a malicious intention to infringe and the burden of proof would shift to the defendants. This would significantly increase the compliance costs and result in a chilling effect on innovation and businesses. Explicit knowledge can be established if the defendant had received a notice specifying the infringement from the rights holder, or if the IP right is so well known that it is almost impossible for the defendant not to know it.

¹⁰⁶Gree v Aux (n 63).

¹⁰⁷Kai Zhu, ‘On the Foundation and Application of Punitive Damage in Tort Law’ (2003) 3 China Legal Science 86, 95; 朱凱, ‘懲罰性賠償制度在侵權法中的基礎及其適用’: 《中國法學》. Also see Wang (n 79) 101.

¹⁰⁸Copyrights do not require registration. However, businesses may voluntarily opt for registration for copyright protection.

A second factor can be the manner, duration and scale of production and sales of the infringing products, including preparatory activities in the course of trade. For example, conceding information about defectiveness of products, making false association between original and counterfeit products in brochures and website would increase the gravity of infringement. Having a chain of organized supply, manufacture and sales of defective or counterfeited goods would also increase the gravity of the tort. If the defendant refuses to provide necessary information without justification, provides untrue information, or destroys evidence, these are aggravating factors which may make it more likely that punitive damages are awarded against the defendant.

A third factor can be the degree of negative impact the tortious act has on the original status of the rights being infringed. For example, to breach someone's privacy could cause the victim little economic loss but devastate his life, e.g. if his medical records were hacked and circulated. When a rights holder suffers from a harm resulting from a tort and the harm cannot be measured monetarily, punitive damages are justified to (also) provide compensation and deter further similar acts.

Caps and multipliers can decide the magnitude and the ceiling of punitive damages. The Chinese Civil Code contains neither caps on the maximum sum of award nor multipliers. However, with Art. 179 of the Chinese Civil Code as a directive clause, there is room for different sectors of law to have their own caps and multipliers. Having no cap risks uncontrolled and excessive awards while having a low cap may not be sufficiently punitive and deterrent.¹⁰⁹ However, there is a paucity of research on the optimal level of caps and multipliers and the practise varies between different jurisdictions. The limited studies available have reached different findings on the effects of caps and multipliers.¹¹⁰ With the most recently amended IP laws in China, the cap is set at a level no more than five times the actual loss, or the defendant's gain, or the license fee. In accordance with Art. 179 of the Chinese Civil Code, punitive damages may be administered by sector laws with greater flexibility.

B. Limitations

Punitive damages should be applied with limitations. A first issue is to consider whether punitive damages may be awarded against any person or entity, regardless of their social and financial status. Punitive damages have been applied to curb other forms of abuse of powers by wealthy and socially influential individuals and entities, who may find compensatory damages easily affordable and are more likely to 'efficiently' breach the law.¹¹¹ Punitive damages awards were higher on average when the defendant was a corporation or a public body as opposed to a natural person.¹¹² In China, scholars argue for a

¹⁰⁹Sandra N Hurd and Frances E Zollers, 'State Punitive Damages Statutes: A Proposed Alternative' (1994) 20 J. Legis. 191; Jacqueline Perczek, 'On Efficiency, Punishment, Deterrence, and Fairness: A survey of Punitive Damages Law and a Proposed Jury Instruction' (1993) 27 Suffolk University Law Review 825.

¹¹⁰Cass R Sunstein, Daniel Kahneman and David Schkade, 'Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)' (1998) 107 Yale Law Journal 2071 suggested multipliers were still quite crude, and no theory of punitive damages justifies a multiplier approach; Jennifer K Robbennolt and Christina A Studebaker suggested that imposing caps on punitive damages may anchor jury judgments and thus draw jurors to the upper bound, see 'Anchoring in the Courtroom: The Effects of Caps on Punitive Damages' (1999) 23 Law and Human Behavior 353.

¹¹¹Peter Frank, Christopher S Kelkar and Erica Sulkowski, 'Punitive Damages' in Roman Weil, Michael Wagner and Peter Frank (eds), *Litigation Services Handbook* (3rd edn, John Wiley & Sons, 2001) 12.1.

¹¹²Goudkamp and Katsampouka (n 32) 116.

consideration of the status of defendant, i.e. whether it is an entity or a natural person.¹¹³ In practice, the more established the business entity is, the higher the standard of duty of care which should be borne by that party, as it is able to commit tortious acts with a greater negative impact. The breach of duty and assessment of the gravity of infringement can be determined by established tort law rules. Hence, the Chinese Civil Code does not need to treat parties differently based on their social and financial status, but can leave such determinations to the courts.

A second issue is whether multiple claims against several wrongdoers conducting the same tortious act is to be allowed. This has not occurred in China yet but it has been taking place in many jurisdictions with a longer history of punitive damages.¹¹⁴ When punitive damages are awarded against multiple defendants who are jointly and severally liable, they will be jointly obliged to pay a single sum the quantum of which will be fixed according to that which is necessary to punish the least blameworthy defendant. When a defendant is liable to pay punitive damages in respect of wrongs committed against multiple claimants, the claimants will share equally the punitive damages component of the award. Moreover, an award should fully redress a claimant's claims at one time, the defendant should not be required to pay multiple punitive damages awards for the same conduct.¹¹⁵ All punitive damages awards must be designed (and limited to the amount necessary) to punish the defendant only for the wrong done, and the harm caused, to the individual claimant or claimants before the court.

VII. Conclusions

The review of the development of punitive damages in China and an examination of the codified punitive damages provisions lead to the following concluding remarks:

- (1) The judiciary practice dealing with damages has been developing incrementally. The punitive damages rules have been refined by judiciary practice. The courts were inclined to grant a higher amount of damages beyond mere compensatory damages when 'punitive factors' could be established. Recently, the PRC courts have become more willing to award punitive damages, along with the promulgation of laws and the issuance of regulations and judicial interpretations.
- (2) The codification of punitive damages in the Chinese Civil Code is a big step forward. The legislation for punitive damages has been, and will be, a developing process. The legislature has enacted sector laws with punitive damages in a piecemeal way in the previous decades and has only recently codified it in the Chinese Civil Code. The Chinese Civil Code includes with its Art. 179 a general clause that recognizes various provisions of punitive damages stipulated in sector laws, such as the Trademark Law and the Tort Liability Law. It is a prompt response to pressing societal needs, such as to restore a sustainable environment, to foster a digital economy and a competitive market, and to better protect individuals' personality rights.

¹¹³Zhu (n 107) 95–96.

¹¹⁴David G Owen, 'A Punitive Damages Overview: Functions, Problems and Reform' (1994) 39 Vill L Rev 363.

¹¹⁵Goudkamp and Katsampouka (n 32) 95. In Rookes, Lord Devlin emphasized that the assessment of punitive damages should be based on the principle of moderation.

- (3) We have observed that the courts have been reluctant in granting punitive damages. This largely resulted from the concerns of lacking criteria for granting and the methods of gauging the sum of punitive damages awards. This article provides some recommendations to address those concerns. In order to maintain a balance between protection for claimants and punishment for wrongdoers, it further discusses possible limitations on the application of punitive damages.
- (4) A more nuanced approach is needed for areas of law like IP rights and personality rights, which are ubiquitous and intangible. As mentioned earlier, the book of Tort Liability in the Chinese Civil Code has incorporated provisions for different types of torts and the criteria to qualify for a punitive damages award vary across the areas of IP rights infringement, environmental protection and product liability. In order to avoid an over-generalized application of punitive damages, it should be made clear that only malicious intention with explicit culpable knowledge in IP rights infringement cases can qualify for a punitive damages award.¹¹⁶
- (5) This article also compared Chinese law with German law and came up with some important comparative legal findings. The traditional conception of tort law differs between the two legal systems as German private law does not foresee punitive elements, while for Chinese legislation punitive elements play an important conceptual role in and outside the Chinese Civil Code. From that conceptual difference, it follows that German private law puts more emphasis on disgorgement damages and their preventive function, while the Chinese legislation focuses more on punitive damages. German disgorgement damages and Chinese punitive damages both focus on the avoidance of efficient breaches of ubiquitous individual legal rights (such as personality rights or IP rights), but the Chinese legislator also makes punitive damages available as a remedy in several other legal situations (e.g. in product liability law). Further empirical research is needed to show whether the Chinese punitive damages provisions are truly effective in practice and whether they are more effective than German disgorgement damages (insofar they as exist).

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¹¹⁶Wang (n 79) 95.