

Author: Jingjing Hu

Ph.D. Candidate in Peking University Law School;

Visiting Fellow in Max-Planck Institute for Innovation and Competition.

hujingjing2007@hotmail.com

Title:

Research On TPP “Intellectual Property Damages” And China’s Approach

Abstract:

Since ACTA has been rejected, the U.S. engaged in another plurilateral negotiation—*Trans-Pacific Partnership Agreement (TPP)*—and proposed a draft on 10th Feb 2011. Based on *Anti-Counterfeiting Trade Agreement (ACTA)* and *Stop Online Piracy Act*, it stands for the most stringent Intellectual Property protection standard up till now. Not only does it enlarges the application of damages in ACTA, but also includes Triple-Damages in case of patent infringement for the first time in international agreement. Accordingly the flexibilities allowed by TRIPs shrink to a great extent. On 13th Nov 2013 another draft of TPP embracing the opinions of all parties was made. It differs from the U.S. draft in that it calls for proper flexibilities of making national IP policies.

The deprivation of infringer’s profit, pre-established damages and enhanced damages are the calculation methods of the actual losses, rather than new calculation standard; and thus they should obey the fundamental tort law doctrines—the Fulfillment Principle and the doctrine of non-differentiation of willfulness and fault—which base on the corrective justice and leave no room for deterrence at all. The introduction of *Punitive Damages* in China’s IP law deserves a second thought. TPP’s IP damages reflect the private enforcement of competition law, which could not be adopted by China. China’s IP enforcement is characterized by the public intervention. It can effectively solve the under-compensation problem in China; it also best accords with China’s domestic status and thus deserve international acknowledge.

Keywords: TRIPs; ACTA; TPP; China Intellectual Property

Draft:

I. Introduction

As ingredient part of globalization, intellectual property (IP) integrity stands for the future of IP law, which gets complete in the game process between the IP monopoly interests and public interests. In 1980's, the aim of IP integrity is achieved mainly via the multiple regime of the World Trade Organization (WTO). A series of multiple agreements like TRIPs Agreement were stipulated thereafter.

Since a TRIP-plus agreement—"Substantive Patent Law Treaty"—has been interrupted by the developing countries in the WIPO negotiation, the issue of public health got more attentions and IP strong countries like the America realized that WTO was no longer the preferable way to achieve their goals and shifted to vertical forums including bilateral agreements, regional agreements and plurilateral agreements. Each of these agreements is pursuing wider, stronger IP protection, therefore offsets the flexibilities allowed by TRIPs, ushering the TRIPs-plus era.

The TRIPs-plus plurilateral regime started from the Anti-Counterfeiting Trade Agreement (ACTA). On 28th Sep 2007, the 43th signatory parties passed the "WIPO Development Agenda" which meant to "take the interests of all countries into consideration". Followed by the ACTA negotiation of the U.S., Europe and Japan etc., which aiming to build foundation for a global agreement. Leading by the U.S., ACTA agreement did not adopt the transparent model of WTO, but underwent in a secret way, in order to avoid widespread criticisms. However the agreement was rejected in the first round of ratification presented by the European Parliament.

Like ACTA, Trans-Pacific Partnership Agreement is also a plurilateral agreement. It was initiated in 2005 by four parties of APEC—Brunei Darussalam, Chile, Singapore and New Zealand (P-4). It pursues an expansionist goal: to create "a high standard that could serve as a model for a broader APEC-wide agreement"¹. The strong expansionist of P-4 highly accords with the stringent IP standard in ACTA. Both agreements are meant to build a country group of geographically diversified yet sharing the same goal of reaching a high standard IP agreement in the end. The negotiation went through in secret way as ACTA, any parties should not disclose the documents until the fourth year of the end of the negotiation. In Nov 2010, a TPP text drafted by the U.S. was leaked on the internet. Its IP chapter mainly absorbs ACTA and the Stop Online Piracy Act; its protection standard is

¹ See Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27, 32-33 (2011).

even beyond the U.S. IP laws and any current IP international agreements, fully reflecting the interest request of the expansionists. On 13 Nov 2013, WikiLeaks released another TPP document—“*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*”. Focusing on the IP infringement compensation stipulations in both documents, this paper aims to answer the following questions through comparative methodology:

- What are the differences between TPP and TRIPs, ACTA with regard to IP damages?*
- What are the characters and flaws of the TPP’s IP damages?*
- What’s the legitimate status of China’s IP damages? Many scholars agree that it is quite necessary for China to participate the TPP lest being left in a negative international trade position. If it is true, merely as far as IP damages regarded, can China simply amend its laws to fit the requirements of the TPP? What are the substantial hedges?*

| | TRIPs | P.R.C. IP Law | U.S. IP Law | ACTA | TPP (U.S.) | TPP (2013) |
|----------------------------|--|---------------------------------------|--|--|--|--|
| Actual Losses | Knowingly/ With reasonable grounds to know. | Fault liability. | Strict liability. P: Adequate to compensate—No less than royalty. When damages are not | Knowingly/ With reasonable grounds to know. | Strict Liability. Damages | Strict Liability [PE opposes]; Damages+Profits [Some oppose] |
| Recovery of Profits | May | <i>Proxy</i> | found, may increase up to 3 times.[Comp] | At least in C&TM-C. | +Profits | At least in C&TMC. [Only JP] <i>Proxy</i> |
| Statutory Damages | May | <i>Proxy</i> | TM: Damages+Profits—may increase no more than 3 times.[Comp] C: Damages+Profits TM, C: The plaintiff may elect between damages above or statutory damages. | May be seen as <i>Proxy</i> . | At least in C&TM-C. <i>Deter + Compensate</i> | C&TMC. <i>Sufficient</i> . Statutory Damages or/and Additional Damages |
| Additional Damages | No. | Willing + Seriousness--up to 3 times. | P: Up to 3 times. TM: Intent--3 times. C: Willful--up to 150,000; 2 times. | No. | P: Up to 3 times. | C&TMC. <i>Appropriate</i> . [Only U.S.] P--up to 3 times. |

C: Copyright and related right infringement
TM: Trademark

TMC: Trademark counterfeiting
P: Patent

II. THE IP DAMAGES IN TPP TEXTS

A. Actual Losses & Gained Profits through Infringement

To pay compensations that adequately fulfill the losses of the right holder, either the TRIPs agreement or ACTA requires the infringer to *know or with reasonable grounds to know* the infringing activities.² It is a fault liability that immune the innocents from compensation liabilities. In China it is also the doctrine of liability fixation for general tort; and since the IP infringement is not been regulated as exception to the general tort, the fault liability also applies in case of IP infringement.

In America the IP infringement is deemed as strict liability—the compensation liability incurred by the infringing act no matter the infringer knows or not. No matter which liability doctrine is being taken, the infringer should pay the compensations that adequate to the losses of the right holder so as to replace he/she to where he/she should be but for the infringement. Either Civil Law or Common Law accept such concept and defy it as *the doctrine of fully compensation* and *principle of equity* individually.

However, unlike substantial objects, IP is characterized by its incorporeality that accounts for its difficulty to calculate its values. Actual losses caused by infringement are hard to be directly determined or proved by evidences while the profits gained by the infringers are not. As for such profits, the TRIPs agreement leaves legitimate flexibilities to the signatory parties. In China it is seen as a *proxy* to the actual losses, which means it can only been applied when the plaintiff fail to prove his/her actual losses. While in U.S. it is seen as part of plaintiff's losses since it needs to be added together with the damages to compensate the plaintiff as a whole amount. Legislator emphasized that such sum "*shall constitute compensation and not a penalty*"³. Although ACTA admits

² TRIPs art. 45(1): "The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity." ACTA art. 9(1): "Each Party shall provide that, in civil judicial proceedings concerning the enforcement of intellectual property rights, its judicial authorities have the authority to order the infringer who, knowingly or with reasonable grounds to know, engaged in infringing activity to pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement..."

³ 15 U.S. Code § 1117: "When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125 (a) or (d) of this title, or a willful violation under section

that the infringer's profits that attributable to the infringement may be presumed to be the amount of actual damages, TPP(U.S.) insists that these two damages are in parallel positions and thus should be added together. Yet this opinion did not get much support from other TPP parties. Japan, Australia, Singapore, Canada and Malaysia propose "*there is no obligation for a Party to provide for the possibility of the remedies in 2(actual damages) and 2bis(profits gained through infringement) to be ordered in parallel*"⁴ and Japan stresses that a party may presume the remedies in 2bis to be the amount of the remedies in 2⁵.

B. Statutory Damages

When both the actual losses and profits gained through infringement cannot be determined or proved by evidences, the judicial authorities are entitled at its discretions to award an amount of damages. It is known as statutory damage or pre-established damage and allowed by the TRIPs agreement. In China's IP law, such damage, like the gained profits through infringement, is the proxy to the actual losses and thus can only applied when the actual losses and gained profits cannot be determined or proved. It also be seen as the proxy in case of copyright and trademark infringement in America. But instead of being placed as supplementary damage in China, it parallels with the amount of actual losses and gained profits and thus entitles the plaintiff to elect between them.⁶ Such approach is also taken by ACTA and even entitles the judicial authorities to choose.⁷ However, TPP(U.S.) no longer treat the statutory damages as merely compensative, but even add deterrence aim upon it. The article 12.4 of TPP(U.S.) clearly states: "*Pre-established damages shall be in an amount sufficiently high to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement*". But such view is revised in the

1125 (c) of this title, shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action...Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party."

⁴ See note 198, "*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*".

⁵ See note 200, "*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*".

⁶ 15 U.S. Code § 1117: "In a case involving the use of a counterfeit mark (as defined in section 1116 (d) of this title) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a) of this section, an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services in the amount of..." 17 U.S. Code § 504 : "Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,..."

⁷ ACTA art. 9.4.: "Where a Party provides the remedy referred to in subparagraph 3(a) or the presumptions referred to in subparagraph 3(b), it shall ensure that either its judicial authorities or the right holder has the right to choose such a remedy or presumptions as an alternative to the remedies referred to in paragraphs 1 and 2."

article QQ.H.4.X of TPP(2013) : “*pre-established damages shall be set out in an amount that would be sufficient to compensate the right holder for the harm caused by the infringement*”, which is proposed by all parties except Vietnam.

C. Additional Damages

By definition, additional damages are “provided by statute in addition to direct damages” and “can include expenses resulting from the injury, consequential damages (i.e. indirect damages), or punitive damages”.⁸

Either TRIPs or ACTA mention additional damages or any damages similar to it. In the U.S. IP law, there are enhanced damages that enhance the actual damages for times or within a higher damage range at the discretion of judges. For instance, the court shall enter judgment to increase the damages up to three times the amount of found or assessed in a patent infringement lawsuit⁹; and the judiciaries impose a willfulness doctrine to its application.¹⁰ U.S. maintains this regulation in the TPP(U.S.) art.12.4. as well as the TPP(2013) art.QQ.H.4.Y, yet it is opposed by other parties.

The term “additional damages” appears on TPP(2013) art.QQ.H.4.X. It is regulated that in civil judicial proceedings, with respect to infringement of copyright or related rights or trademark counterfeiting, each party shall/may establish/maintain a system that provides pre-established damages and/or additional damages.¹¹ Additionally, in awarding additional damages the court shall consider relevant matters “including the seriousness, extent, blatancy of the infringing conduct and the need to deter future infringements” and the damage amount shall be “*appropriate*”.¹² Such requirements make the additional damages quite similar to the punitive damages. Just as indicated in the footnote of TPP(2013), “for greater certainty, additional damages may include exemplary or punitive damages”¹³, which means other damages can also be included besides punitive damages.

⁸ See Bryan A Garner, *Black's Law Dictionary (Ninth Edition)*, p. 445.

⁹ 35 U.S. Code § 284.

¹⁰ See Kurt Patrick Goudy, “Congress Must Eliminate Punitive Damages From Patent Infringement Cases: Awarding Punitive Damages For Willful Patent Infringement Is Unconstitutional, Contradicts Public Policy, And Must Be Stopped”. ProQuest LLC, p.714.

¹¹ Art.QQ.H.4.X(1)(2), “*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*”.

¹² Art.QQ.H.4.X(4), “*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*”.

¹³ See “*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*”, p. 69.

D. Summary

The characters of IP damages in TPP texts can be concluded as follows:

- a. For Adequate compensation, the requirement of proving the awareness of the infringers is gradually being discarded.
- b. Pre-established compensations change from proxy to adequate compensation and deterrence.
- d. Additional damages are gradually being accepted. Also, the requirement of proving the willingness of the infringers is omitted, if not being discarded.

In one word, the right holders' burden of proof has been alleviated while the infringers' burden of compensation responsibilities has been aggravated; and deterrence is a major, no longer a subordinate, target for IP compensation in both TPP texts.

III. CRITISICM OF THE DETERRING DAMAGES

Deterring damages¹⁴ is quite different from compensatory damages. The compensatory damage centers on the injured party and the amount of damages should exactly adequate to the losses of the injured party. That is to say, there is compensation standard for awarding the compensatory damages, i.e. the losses. Thus the criterion for the compensatory damage is "*sufficient*". While the deterring damage centers on the infringer since it meant to deter future infringements. There is no clear compensation standard for awarding the deterring damages. To award a deterring damage, the judge should at least consider the seriousness of the infringement and the willingness of the infringer (the infringer's aspect) upon the foundation of the injured fact (the injured party's aspect). Thus the criterion for the deterring damage is "*appropriate*". Specifically, the damages should be enough to deter future infringements while can not as high as to cause *chilling effect*¹⁵. Although such criterion is too abstract to reach a consensus, the damage stipulations in TPP texts, especially TPP(U.S.) , are to a great certainty go too far.

The pre-established damage, additional damage and enhanced damage are all meant to deter future infringements through a kind of *punishment*— subjecting the infringers to a higher amount of damages compared with the actual losses. Seeing the completeness and advances of the historical *punitive damage* regime, its theories can be referred to analyze these damages.

¹⁴ Deterring damages is not a formal legal term; this paper uses it as a description, rather than a definition, of those IP damages with deterring aim or nature.

¹⁵ In a legal context, a chilling effect is the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction.

According to legal dictionaries, punitive damages are damages “*requested and/or awarded in a lawsuit when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless*”¹⁶; and pure negligence cannot construct punitive damages.¹⁷ The Supreme Court has held three guidelines help determine whether a punitive damage violate constitutional due process and the *reprehensibility* of the conduct being punished is at the primary place.¹⁸ Although the term of punitive damage did not appear in the TPP texts,

Deterrence should only focus on the malice infringers who knowingly or with reasonable grounds to know the infringing activity and exclude other innocent infringers. And only in this way can the damages function as deterrence tools. While according to the TPP regulations, even innocent infringers may become the deterring objectives, which is likely to stir up the chilling-effect and obstacle innovations and competitions. On the other hand, willful or serious infringements could not be deterred effectively since they receive the same punishment as the innocent infringements.

However, among all of these deterring damages in TPP(U.S.) and TPP(2013), only TPP(2013) art.QQ.H.4.X(4) expressly limited the application conditions to the *seriousness* of the infringements and the *need* to deter future infringements. The lack of conditions does not mean as giving the parties national legislation flexibilities, but rather means that the legal outcome—detering damages—come along with the infringing acts, with no more conditions required. It is because the international agreements provide the minimum standards and requirements and allow the signatory parties certain flexibilities to further interpret the terms or set higher standards.

It is unjust to exert deterrence twice upon merely one behavior. According to TRIPs § 61, criminal procedures and penalties shall to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. On April 2007 U.S. accused China that its IP criminal thresholds are so low that many infringements with “commercial scale” cannot be regulated and TRIPs § 41.1 and § 61 are breached. On 26th Jan 2009 WTO released “*Panel Report, China-Measures Affecting The Protection And Enforcement Of Intellectual Property Right*”(WT/DS362/R) in which “*commercial scale*” is interpreted as “the magnitude or extent of typical or usual commercial activity”.¹⁹ Yet U.S. did not accept this explanation. ACTA § 23 regulated that willful copyright or related

¹⁶ See Bryan A. Garner, *Black's Law Dictionary (Ninth Edition)*, West, p.448.

¹⁷ See English-Chinese Dictionary of Anglo-American Law.

¹⁸ The others are the reasonableness of the relationship between the harm and the award and the difference between the reward and the civil penalties authorized in comparable cases. See Bryan A. Garner, *Black's Law Dictionary (Ninth Edition)*, West, p.448.

¹⁹ *Panel Report, China-Measures Affecting The Protection And Enforcement Of Intellectual Property Right*, WT/DS362/R.[R/OL]. www.wto.org/english/tratop_e/dispu_e/362r_e.doc

rights piracy on a commercial scale includes those carried out as commercial activities for direct or indirect economic or commercial advantage.²⁰ In other words, any willful infringements intent to gain monetary profits should be charged with crime, regardless of the scale of the commercial activity. TPP § 15(U.S. draft) simply replicated this regulation. As a result, almost all kinds of willful copyright or related rights piracy can be treated as crime. It is much likely that the infringers not only been punished by criminal measures but also been adjudicated to pay deterring damages like additional damages or enhanced damages, which means the infringers being punished twice for one behavior in contrary to a widely accepted view that “one behavior can only be punished once”²¹. Over-deterrence generates chilling effect towards innovation, which is exactly the target of IP law. Moreover, over-deterrence is inefficient since the limited public resources are being employed to safeguard the private rights.

IV. IP DAMAGES IN CHINA

A. FUNDAMENTAL DOCTRINES

The traditional tort law is built upon two doctrines: the *fulfillment doctrine* and the *doctrine of non-differentiation of willfulness and fault*. The fulfillment doctrine requires compensation should adequate to the harms of the injured party caused by the infringement, no more and no less, so that the plaintiff can be replaced to where he/she should but for the infringement. Damages that over the amount of the actual losses makes the right holder gets more than what he/she deserves. Such outcome obviously disobeys the jurisprudence of tort law—*corrective justice*. The doctrine of non-differentiation of willfulness and fault means the infringer is required to fulfill the losses of the injured party caused by his/her behavior, no matter the subjective aspect is willful or fault. While in modern society, the deterrence shall merely focus on malice or willful behaviors and leave the innocent infringers alone, ensuring the liberty of normal behaviors for the civilians. China’ IP infringement is a subdivision of the tort law; accordingly these basic principles certainly apply to IP infringement remedies including damages.

Although like many other countries, China’s IP law also regulate that the compensation can be made in accordance with the deprivation of the infringer’s profits, pre-established damages and enhanced damages. But there are critical

²⁰ ACTA § 23.1. “Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale. For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.”

²¹ This is a principle in Administrative Law as well as a common sense.

differences. In U.S. IP law the calculation methods are in horizontal places allowing the plaintiff to choose, while in China they are placed vertically, that is to say, the latter methods are nothing more than proxies to the actual losses and can only been used when the plaintiff is unable to prove the damages by the former method. Instead of new calculation standards, they are just varies calculation methods of the actual losses. Consequently the basic principles of tort law still need to be followed.

However deterrence is obviously contradict to these principles and thus by no means acceptable to China's IP law. Although actual damages also generate deterring effects more or less, actually it just side effect of the damages and cannot be seen as the pursuing target of the compensation. Given such view, the recent development of China's IP law deserves a second thought.

B. RECENT DEVELOPMENT: PUNITIVE DAMAGE

China's three IP laws are all under the third amendments. The newly revised "Trademark Law of P.R.C. (2013)" includes a stipulation: "*With regard to serious willful infringements, the courts have the authority to increase damages to an amount that is from one-to-three-times the amount of the injury found or assessed.*" Similar regulations also can be found in the official drafts of copyright law and patent law, with just the difference of increasing times. This regulation is widely defined as *Punitive Damages* and its introduction arouse great debates. Its advocates preclude that the current status of IP compensation cries for such stringent regulation to guard the right holders. Specifically, the awarded damages can barely cover the losses and the suing expenses of the injured party.

As mentioned above, the punitive damage does not fit the civil law regime at all given its deterring aim and application presumption of willingness. Theoretical flaw by no means can be justified or overlooked by the reality need.

The advocates fail to dig out the substantial question lying below the under-compensation superiority. The advocates' logic is too simple: to solve the under-compensation problem, just ask for more damages. Actually under-compensation arises from difficulties of proving the losses rather than legislative incompleteness. China's IP monetary remedy regime is up to the minimum standard of the TRIPs; in order to ease the burden of proof, it even established *the deprivation of profits* and *pre-established damage* by absorbing the experiences from countries like Japan and U.S.

Observing from the perspective of China's status reality, even if China admit the deterrence target of IP damages since the establishment of punitive damage,

China should not agree with the IP damage regulations in TPP for the following reasons.

According to WIPO, in 2013 China ranked the third in the world concerning PCT patent filing.²² But the increase in the quantity of patents issued in China “*has not yet been matched by the quality of the patents*”²³ since that “*the substantive review of patent applications in China is very poor given the comparatively low number of examiners and low pendency period*”²⁴. Seeing that lawsuit can make the right holders profitable, right holders are incentivized to sue instead of utilizing their IP right and ultimately become patent trolls.

Besides, solving under-compensation problem by harsh damages can easily encourage its opposite side—*over-compensation*—and leads up to *anti-commons*²⁵. A product normally contains more than one patent, supposing a small technology firm used lots of patent without getting grants, all of the right holders are titled to sue for compensations. And since the financial ability of the defendant is quite limited, after the first compensation including punitive damages, the defendant would be on the verge of bankrupting and other potential plaintiffs would get nothing. In other words, punitive damages encourage the injured parties rush for the courts and left the patents being unutilized, giving rise to great waste of social recourses and ultimately discourage innovation.

What’s more, other relevant factors need to be considered. Firstly, seen from the perspective of culture, the traditional Chinese Confucianism esteems “和「He」” which means peace and harmonious. Law suit is by no means the primary way resorted by “君子「Jun zi: man with high moral standard」”. Secondly, in China the socialist public ownership takes the leading position and multiple ownerships are allowed to exist and develop.²⁶ It is undeniable that the economic development cannot live without the administrative interferences. Normally the administrative measures are much more effective and economical than the damage compensations. And the public tends to admit and respect such public

²² See “2013 PCT Yearly Review: The International Patent System”,

http://www.wipo.int/export/sites/www/freepublications/en/patents/901/wipo_pub_901_2013.pdf.

²³ The World Bank & Dev. Research Center Of The State Council, The P.R.C., China 2030: Building A Modern, Harmonious And Creative High-Income Society 173-78, 208-18(2012), at 178.

²⁴ See Mark Liang, Chinese Patent Quality: Running the Numbers and Possible Remedies, 11 J. Marshall Rev.Intell.Prop.L. 478,499(2012), at 499.

²⁵ In 1998 professor Garrett Hardin gave rise to the theoretical mode of “anti-commons” that describes ownership dilemma caused by over-privatization and underuse of social resources. See Garrett Hardin, The Tragedy Of The Commons, 162 Science 1243, 1243-48(1968).

²⁶ Article 6. “CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA”: “The basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of ‘from each according to his ability, to each according to his work.’”

power. For instance, cancelling of business license or the administrative penalties can exert more deterrence than the same amount of the damage compensation awarded by court. Thirdly, China follows the tradition of Statute Law. It would be inappropriate to entitle the judges with wide range of discretions. China is a big country with uneven economic development; diversified juries standards caused by discretions would certainly arouse public critics.

C. CHINA'S IP ENFORCEMENT EXPERIENCE: THE PUBLIC INTERVENTION OF IP LAW

As can be seen from both TPP texts, deterrence damages particularly focus on copyright and related rights infringement and trademark counterfeiting which may disturb market order and be adjusted by competition law. In America, the competition law mainly employs the route of *private enforcement* which also been followed by the IP damage regulations of TPP(U.S.).

In China, competition law is the supplement of IP law to protect the unregistered trademarks and safeguard the market order. Even though the unfair competition law of P.R.C. admits that the right holder has right to claim damage compensation caused by unfair competition infringement, the tort law still play a role in the lawsuit and thus the proof burden for the right holder cannot be omitted. Generally the registered trademarks would resort to the Trademark Law, rather than competition law, for protection. Therefore the private enforcement of competition law does not bear independent significance. The fundamental doctrines of fully compensation and the doctrine of non- differentiation of willfulness and fault cannot be evaded whatsoever.

In addition, the private enforcement of competition law is criticized for over-deterrence. Given China's development status urging for more encouragement and business liberties rather than deterrence, over-deterrence is worse than under-compensation. And the latter can be effectively solved by administrative measures.

In comparison with the private enforcement of competition law, China's own experience—"the public intervene of private law (IP law)"—bears much more values. China's cultural tradition of "*the country enjoys priority*" provides growing earth for the *externality* of public power. Since 19th century, state regulation has being enlarged. Specifically, law used to negatively admit and protect the private right; gradually law begins to actively administrate the private right. As a result, the public right character of IP right becomes obvious.

The preamble of TIRPs states, “*recognizing intellectual property rights are private rights*”²⁷; meanwhile it is also widely accepted that IP right concerns significant public interests. This public side of IP right receives much attentions in China and the IP law is injected with strong instrumental reason, making it contains certain kind of public policy meaning. Thus the need of public interests naturally becomes the direct force for public intervention of IP law. From the perspective of domestic, the maximum of public interests depends on the interest balance in IP field. Given that the balance between private and public incline to guard personal interests at the cost of satisfying public welfare, the active protection given by the administrative authorities need to be strengthened to rehabilitate the balance relationship.

The permeation of public power would not alter the fundamentally private right nature of IP. On the contrary, the fusion of “public” and “private” enables IP to further fit the development requirement of the society on two grounds. On one hand, IP is more than still property ownership but rather a dynamic mechanism. On the other hand, IP is basically a kind of information; and the artificial monopoly of such information would threaten public interests. Therefore adjustments by the impartial administrative authorities are indispensable. Especially the deterring or punishing measures shall be in the hand of the public authorities rather than individual. Otherwise it is likely to appear the renaissance of private penalty. As for the concern over power abuse, the executive of administrative power can be monitored through judicial practices.

V. CONCLUSION

The arguments of this paper can be concluded as follows:

- a. Objection to the punitive damages in China’s IP law because the deterrence should not be the objective of tort law, lest the plaintiff get windfalls;
- b. Objection to the private enforcement of competition law in China;
- c. In order to fully guard IP rights as well as the market order, the administrative power, instead of individual right, should be utilized to deter future infringements.
- d. Basing on the points above, the IP damages stipulations of TPP(U.S.) and TPP(2013) can by no means been accepted by China.

In the “*Charting The Course—GIPC International IP Index*” issued by the U.S. chamber of commerce in Jan 2014, China ranks the last place among five countries on the ranking of IP law practice. The results took into account six factors: physical counterfeiting rates, software piracy rates, civil and procedural

²⁷ WTO, “TRIPS: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS”, Preamble.

remedies, pre-established damages and/or mechanisms for determining the amount of damages generated by infringement, criminal standards including minimum imprisonment and minimum fines, effective border measures.²⁸ The administrative measure is the ingredient force of IP enforcement in China but it did not been considered at all. U.S. just turned blind eyes toward China's efforts to protect IP. Thus there is no surprise that China got the lowest points. On another report issued by State Intellectual Property Office of the P.R.C.—“*IP Protection Society Satisfaction Investigation Report*”, the administrative enforcement is considered. The result shows that public is not satisfied with it and asking for much strict administrative enforcement.²⁹ As can be seen from this, the administrative measure plays important role in IP protection. It is admitted that each nation has the right to make its own decisions and one-fit-all strategy is by no means the priority option. Then China's IP domestic policies and path deserve to be admitted and respected.

According to TPP(2013), one of its objectives is to “*reduce impediments to trade and investment by promoting deeper economic integration through effective and adequate creation, utilization, protection and enforcement of intellectual property rights, taking into account the different levels of economic development and capacity as well as differences in national legal systems*”³⁰. Such objective can only been achieved through giving the parties more flexibilities which allow the parties to stipulate national IP laws and policies according to their own statuses and requirements. Only in this way can the TPP agreement been accepted by all of APEC parties including China.

²⁸ See U.S. chamber of commerce, “*Charting The Course—GIPC International IP Index*”.

²⁹ See State Intellectual Property Office of the P.R.C., “*IP Protection Society Satisfaction Investigation Report*”.

³⁰ See art. QQ.A.2.b “*Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions*”, p.2.