

論專利侵害之損害賠償計算

-從美國、中國大陸與台灣之專利修法談起

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摘要

為了專利法制現代化，美國、中國大陸與台灣均進行專利修法，並修訂損害賠償計算。本文試圖以三者修法目的為思考評析損害賠償計算之修訂，並類型化分析三者相關規範。本文探討美國司法實務所發展的分攤法則及整體市場價值法則，而在建立更有效率之專利制度的目標下，美國專利法第 284 條並不適合納入上述法則。本文歸納美國專利懲罰性損害賠償制度之三種認定故意的標準。第一，傳統的故意侵害論，Underwater Devices 案「充分注意之確切義務」之標準為故意侵害設立了一個較低的門檻，比較類似過失。第二，Seagate 案的故意侵害論，為客觀的輕率。第三，專利改革的故意侵害論，三種故意樣態下之客觀的輕率；但可能因此限制法官的裁量權。中國大陸在提高自主創新能力與建設創新型國家之知識產權戰略目標下，第三次專利法修正將於 2009 年施行。新專利法第 65 條將現行最高人民法院司法解釋規定的定額賠償提高到專利法層次，且提高法定額度。從訴訟成本考量，由法院定額不失為較經濟的方法；然而，此方法亦有可能會有因非根據證據而落入主觀判斷賠償數額的缺點。新專利法第 65 條並明訂賠償數額還應當包括權利人為制止侵權行為所支付的合理開支，惟其計量方法仍不明確。雖然新專利法沒有納入懲罰性損害賠償，於提高法定賠償額度與加重其他相關民事與行政責任之配套修改下，新專利法有提高侵權人金錢負擔的效果，應有較大的嚇阻功能，進而鼓勵創新。台灣在因應國內科技政策

與國際規範發展，及配合智慧財產法院設立的背景下，提出專利法修正草案，其中建議現行專利法第 85 條新增「以相當於實施該發明專利所得收取之權利金數額為其損害」規定。然而，針對權利金的合理性及是否以合理權利金作為補償底限，修正草案並沒有明確規定。此外，修正草案建議刪除懲罰性損害賠償，以回歸我國民事損害賠償制度。台灣專利侵害民事訴訟的成本與賠償金額並不高，也沒有敗訴方負擔對方律師費用的規定，在專利侵害全面除罪化之後，懲罰性損害賠償對侵害人可能形成一種「實質上額外的風險」，而非「僅是一種商業上的成本」，因而有其一定的功能意義。以專利法促進產業發展的目的考量，若沒有相關配套措施，實可考慮繼續保留現行懲罰性損害賠償制度。

Damages Calculation in Patent Infringement

**-Perspectives of Patent Reforms in the United States, China
and Taiwan**

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Abstract

For modernization of patent laws, the United States, China and Taiwan are undergoing patent reform, each amending its damages provision. This thesis categorized forms of damages calculation in three countries, and tried to analyze its amendment from the perspective of patent reform in each country. This thesis analyzed the possible impact of specifying the apportionment rule and entire market value rule in Section 284, 35 United State Code. In addition, three standards of willful infringement with enhanced damages were concluded. First, the traditional willfulness doctrine in Underwater Devices case is the affirmative duty of due care which sets a lower threshold of willing infringement that is more akin to negligence. Second, willfulness in Seagate case requires at least an objective recklessness. Third, willfulness in Patent Reform Act of 2009 requires an objective recklessness in three different conditions; such proposal may restrict the discretion of the court. With national intellectual property strategy to improve the domestic capacity of innovation and to build an innovative country, the third amendment to Patent Act of the People's Republic of China becomes in effect in 2009. Article 65 in the new Chinese Patent Act codifies the statutory damages in the range of RMB 10,000 to 1,000,000, compared to the current range of RMB 5,000 to

500,000 provided by the Supreme People's Court judicial interpretation. In the perspective of litigation costs, statutory damages award may be a more economic approach but subjective judgment could have implication caused by lack of factual evidence for damages calculation. Article 65 also codifies that the amount of compensation shall include reasonable cost for ceasing patent infringement by the right holder, however, how to measure the reasonable cost is not clear. Although the new Chinese Patent Act does not include punitive damages, the maximum statutory damages, other related civil liability and administrative penalty are increased. Such amendments may increase the pecuniary burden of the infringer and expect to lead to more deterrent effect on patent infringement and encourage innovation. In the context of international regulation change, national technology policy change and establishment of professional Intellectual Property Court, comprehensive review of Taiwanese Patent Act is ongoing. The proposed bill adds "equivalent amount of royalty for implementing the patent invention as damages" into Article 85 of current Taiwanese Patent Act. However, it is not clearly codified that a reasonable royalty must be justified and such royalty calculation is to set a floor for damages award. The proposed bill abandons punitive damages for willful infringement. In such proposal, the result of willful infringement may not be a substantial additional risk but only a cost of doing business, because the litigation cost and damages award are not so high, and there is no attorney fee award or criminal penalty in Taiwanese patent regulation system. Hence, reconsideration of retaining punitive damages is suggested.