

## **Comments on RFC for Opinions of the Supreme People's Court on Imposing Heavier Sanctions on Intellectual Property Infringements**

The Computer & Communications Industry Association (CCIA) appreciates the opportunity to comment on the Supreme People's Court's review of "Opinions on Strengthening Sanctions for Intellectual Property Infringement (Draft for Comments)." This submission expresses CCIA's comments on two key aspects of the review.

Draft Opinion 6. For acts of infringing intellectual property such as manufacturing and selling infringing products, the people's court shall generally rule that to stop the infringement according to law. If the people's court does not order infringement to stop due to public health, environmental resource protection, etc., it shall adopt alternative measures such as monetary compensation.

It is suggested that the preceding paragraph be amended to read as follows:

For acts of infringing intellectual property such as manufacturing and selling infringing products, the people's court shall properly apply the liability for permanent injunction, considering the balance of interests according to the specific circumstances of the case, the likelihood of irreparable harm in the absence of an injunction, the proportionality of an injunction to the harm suffered by the intellectual property rights owner, the public interest, and the suitability of alternative measures such as more adequate compensation or economic compensation to settle the dispute. If the people's court does not order infringement to stop, it shall take alternative measures such as monetary compensation.

**Note:** As to injunctive relief, injunction is just one of the several available remedies, and may not necessarily be suitable in all cases, especially in cases involving high-tech products, which usually include multiple components, technologies, and many patents. Imposing injunctions could lead to serious imbalance between the parties' interests, significantly impact supply chain, and injure public interest. Therefore, it is imperative to consider balance and proportionality in assessing injunctive relief. This will be consistent with the international trends in major jurisdictions, and

meet China's own needs to drive high-tech industry development.

International trends have moved towards balance and proportionality in the grant of injunctions. In 2006, the U.S. Supreme Court in its *eBay v. MercExchange* decision rejected automatic injunctions and required the plaintiff (patentee) to pass a four-factor test before obtaining a permanent injunction, such factors including proving irreparable harm, monetary damages' inadequacy to compensate, balance of the parties' interest, and public interest. In particular, the Court rejected the idea that infringement of a patent is automatically an irreparable harm. Similarly, in 2017, the European Commission issued two guiding documents calling for its member states to consider proportionality in assessing injunction.

Proportionality in injunction is also in China's own interest. China is a world manufacturing hub. While it is difficult for parties who do not practice their intellectual property rights (NPEs) to obtain an injunction in the US, an injunction is nearly automatic in China. Because of this, NPEs have shifted to target Chinese manufacturing operations, including those conducted by multinational corporations. Much of this litigation will be without merit, but manufacturers will settle rather than face the potential of an injunction. Continuing availability of automatic injunctions will lead to a continued increase in NPE litigation against Chinese manufacturers and decreased manufacturing as a result. Particularly in cases where monetary damages are adequate to compensate the intellectual property owner for its harms, granting injunctions should not be favored.

Considering these trends, it is the right time to reiterate the 2009 SPC policy to "properly decide on injunctive relief, and may, based on consideration of the balance of interests under the circumstances of the case at issue, resolve disputes with alternative remedies such as more adequate compensation or damages." In fact, this spirit was also somewhat embodied in the 2018 Judicial Interpretation re Conduct Preservation and should be reiterated in this Opinion.

Draft Opinion 13. Correctly apply the standards for determination of punitive compensation, support intellectual property rights holders' claims for punitive damages according to law, and give full play to the deterrent effect of punitive damages on acts of infringement.

It is suggested that the preceding paragraph be amended to read as follows:

Correctly apply the standards for determination of punitive compensation, determine whether the intellectual property right holder's claim for punitive compensation is reasonable based on the evidence available and according to law, and give proper play to the deterrent effect of punitive damages on acts of infringement.

**Note:** We suggest that, at present, we should still adhere to the principle that patent owners should be reimbursed for the harm they actually suffered as the basic principle for determining damages. Punitive damages should only apply in exceptional cases. While punitive damages should be applied against truly abusive conduct, if punitive damages can apply to cases of infringement that are not abusive but merely done with some level of knowledge of the patent, it can prevent innovation by significantly increasing the risk to innovators.

Punitive compensation should be determined by the people's court at its discretion based on evidence. Where evidence is conclusive, upholding the intellectual property right holder's claim for punitive compensation shall be supported and encouraged. However, if evidence is obviously insufficient or unable to support the right holder's claims, the basis for the application of punitive compensation shall be prudently considered.

In addition, regarding the amount of punitive damages, it is suggested that there is no need to exceed the protection level of other developed countries, which typically are limited to a maximum of trebled damages. Maintaining a reasonable level of punitive damages is also the legal guarantee to maintain orderly competition in the market.

# 对于《最高人民法院关于加大知识产权侵权行为制裁力度的意见（征求意见稿）》的 修改建议

## 中华人民共和国最高人民法院：

美国计算机与通信行业协会（CCIA）非常荣幸能有机会就最高人民法院对《关于加大知识产权侵权行为制裁力度的意见（征求意见稿）》提出本修改建议。在本修改建议中，CCIA 谨针对本次征求意见稿的两个主要方面给予修改建议。

**征求意见稿第 6 条：**对于制造、销售侵权产品等侵害知识产权行为，人民法院一般应当依法判决停止侵权。因涉及公共健康、环境资源保护等依法不判令停止侵权的，应当采取经济补偿等替代性措施。

上款建议修改为：

对于制造、销售侵权产品等侵害知识产权行为，人民法院应妥善适用停止侵害的救济方式。在适用停止侵害这一救济方式时，应根据案件的具体情况考虑利益平衡，并考虑在不停止侵害情况下出现不可弥补的损害的可能性、停止侵害与知识产权权利人所受损害在比例上的对应程度、公共利益、以及采取更充分的赔偿或者经济补偿等替代性措施了断纠纷的适当性。人民法院不判令停止侵害的，应当采取经济补偿等替代性措施。

**说明：**关于停止侵害的救济方式，停止侵害只是多种救济方式中的一种，不一定适合所有案件，尤其是涉及高科技产品的案件，其产品往往具有多部件、多技术、多专利的特点。如果一律适用停止侵害，则会造成当事人之间重大利益失衡，并可能对供应链造成重大影响，甚至损害社会公共利益。因此，有必要在考虑停止侵害救济时，引入利益平衡及比例原则的考量。这样既符合主要法域的国际发展趋势，也符合中国加强高科技实业发展的需求。

在适用禁令救济时考虑利益平衡、合乎比例，符合当前国际发展趋势。2006 年美国联邦最高法院在 eBay 诉 MercExchange 案中就废止了自动禁令制度，要求原告（即专利权人）须满足四要素测试才可以得到永久禁令支持，其中即包括证明原告遭受不可弥补的损害、金钱损害赔偿不足以补偿此损害，并考虑双方利益平衡和公共利益。尤其是，美国联邦最高法院

在该案中否决了专利侵权即自动构成不可弥补的损害这一观点。欧盟委员会在 2017 年也发布了两份指南文件，强调成员国在禁令问题上要遵循比例原则。

在适用停止侵害时引入比例原则也符合中国国情。中国是全球制造业的中心。在美国，非知识产权实施主体（NPE）的权利人取得禁令较为困难，而在中国几乎自动给予禁令。为此，很多 NPE 实施主体开始将目光瞄准了中国的制造环节，其中也不乏跨国公司在中国开展的制造业务。多数 NPE 诉讼都是没有合理依据的，但相比于面对承担停止侵害责任的可能，制造商还是更倾向于在诉讼中选择和解。如果继续自动适用禁令，则会导致针对中国制造商的 NPE 诉讼持续增加，从而造成制造业减少。在金钱损害赔偿足以补偿知识产权权利人遭受的损害的情况下，尤其不应该支持适用禁令救济。

因此，在当前形势下，有必要重申 2009 年《知识产权审判服务大局若干问题的意见》，强调“妥善适用停止侵害责任，可以根据案件具体情况进行利益衡量，采取更充分的赔偿或者经济补偿等替代性措施了断纠纷。”类似的平衡思想，也已体现在 2018 年《最高人民法院关于审查知识产权纠纷行为保全案件适用法律若干问题的规定》中，建议在本意见稿中也应予以重申。

**征求意见稿第 13 条：正确把握惩罚性赔偿认定标准，依法支持知识产权权利人的惩罚性赔偿请求，充分发挥惩罚性赔偿对于侵权行为的威慑作用。**

上款建议修改为：

正确把握惩罚性赔偿认定标准，依法根据在案证据认定知识产权权利人的惩罚性赔偿请求的合理性，适当发挥惩罚性赔偿对于侵权行为的威慑作用。

**说明：**我们建议，目前仍应该坚持填平原则（即补偿专利权人实际遭受的损害）是确定损害赔偿的基本原则，惩罚性赔偿只是在例外的情况下才适用。虽然对恶意侵权行为应适用惩罚性赔偿，但如果在不构成恶意侵权而仅仅是对专利有某种程度的知悉，在这种情况下也适用惩罚性赔偿，则会显著增加创新者承担的风险，从而阻碍创新。

人民法院对于惩罚性赔偿应该基于证据确定，在证据确凿的前提下，支持知识产权权利人的惩罚性赔偿请求应当支持和鼓励；但是，如果证据明显不足，或者明显不能支持权利人的主张，则需要慎重考虑惩罚性赔偿的适用依据。

另外，关于惩罚性赔偿的数额，我们建议没有必要超过发达国家的保护水平，即，一般以不超过损害赔偿金的三倍为限。维持一个合理的惩罚性赔偿水平也是维持市场有序竞争的法律保障。