

Interpretation of the System of Deprivation of Tortious Benefits under Article 1182 of the Civil Code

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Abstract

On the basis of summarizing the Tort Liability Law and practical experience, Article 1182 of the Civil Code adjusts the application order of the system of deprivation of tortious benefits, which is conducive to further depriving tortious benefits to deter tortious acts and provide more adequate protection for victims. However, its scope of application, methods and standards for calculating benefits, and standards for court discretion need to be further clarified. It can be considered to limit the scope of application of profit deprivation to commercializable spiritual personality rights and interests, and identity rights and interests involving the illegal separation of guardians from their wards. When identifying profits, it should be clarified that they can be either an increase in property due to the tort or expenses saved due to the tort. Profits refer to the net profit obtained from the tort and must have a causal relationship with the tortious act. Calculation standards can be divided into comparative standards and constructive license fees or similar market standards according to the type of profit. When exercising discretion, the court should give priority to the tortious benefits, then make a final judgment by comprehensively considering other factors, and clarify the residual status of the court's discretion.

Keywords

Profit deprivation, Personal rights and interests, Actual loss, Court discretion.

1. Introduction

It is generally believed that personal rights and interests are rights and interests directly related to the person without direct property content. However, in specific circumstances, they have commercial utilization value, such as endorsing commercial products for others or promoting products with personal portraits. Article 993 of the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code") clearly stipulates that civil subjects may license others to use their names, portraits, etc., recognizing the commercialization of personality rights at the legal level. However, with the development of society, some infringement phenomena are emerging, such as the images of celebrities being printed on products they have never endorsed, and citizens' personal information being leaked, leading to annoying harassing calls. These incidents all reflect that personal rights and interests may contain intangible commercial value. Some people, targeting this commercial value, seek huge commercial interests through infringement. Based on the theory that "no one shall benefit from their illegal acts", the benefits obtained from infringing upon others' personal rights and interests should be deprived, so that the infringer gains no benefit from the infringement, thereby curbing the occurrence of tortious acts.

The provisions of Article 20 of the Tort Liability Law of the People's Republic of China (hereinafter referred to as the "Tort Liability Law") first established the rule of deprivation of tortious benefits in China's civil legislation, which has important practical significance for effectively depriving the benefits obtained from infringing upon personal rights and interests

and protecting the rights and interests of victims. Article 1182 of the Civil Code modifies the "retrieval progressive" order established by Article 20 of the Tort Liability Law, adjusting the original order of "actual loss - profit deprivation - court discretion" to a "free concurrence" order of "actual loss, profit deprivation - court discretion" [1]. This change means that it is no longer the case that compensation can only be made based on profits when the loss is difficult to determine and the infringer has thus profited. Instead, loss and profit are placed in the same order, allowing the infringed to freely choose to determine the amount of compensation. Some scholars believe that this change, which eliminates the priority between tort damages and profit deprivation in application, reflects the legislators' granting of an independent status to the right to claim profit deprivation relative to the right to claim tort damages [2]. The infringed can choose the more favorable way to determine the compensation amount according to their own situation, which plays a more positive role in preventing acts that arbitrarily infringe upon others' personal rights and interests for personal gain in practice, and is more conducive to fully protecting the legitimate rights and interests of victims.

The revision of the provisions on the liability for deprivation of tortious benefits in the Civil Code has a certain deterrent effect on illegal acts that infringe upon others' personal rights and interests for gain, but it does not mean that all issues related to profit deprivation have been resolved. The specific interpretation of the profit deprivation rule is not yet fully clear, causing some controversies in academic and practical circles. For example, the scope of application of the profit deprivation rule, the methods and standards for calculating losses, and the standards for court discretion all need to be clarified. This article interprets the liability for deprivation of tortious benefits to clarify the meaning of the profit deprivation rule and provide reference for judicial practice.

2. Scope of Application

The scope of application of profit deprivation refers to the scope of "personal rights and interests" in the phrase "causing property losses by infringing upon others' personal rights and interests". Personal rights and interests include personality rights and interests and identity rights and interests. Personality rights and interests can be divided into material personality rights and interests (non-material personality rights and interests), as well as specific personality rights and general personality rights. The scope of the object applicable to the norm does not adopt an enumerative approach but uses the general term "personal rights and interests", which raises some questions. Does this mean that all infringements of personal rights and interests can apply the profit deprivation rule? If not, which infringements of personal rights and interests can apply the profit deprivation rule?

2.1. From the Perspective of Personality Rights and Interests

From the perspective of literal interpretation, Articles 1183 and 1182 of the Civil Code are adjacent and both use the term "personal rights and interests". The first paragraph of Article 1183 stipulates that "if the infringement of a natural person's personal rights and interests causes serious mental damage, the infringed has the right to claim compensation for mental damage". Regarding the scope of "personal rights and interests" in this article, it should include both personality rights and interests and identity rights and interests, and among personality rights and interests, it includes both material personality rights and interests (right to life, right to body, right to health) and spiritual personality rights and interests. Judicial interpretations also provide evidence for this view. If, based on literal interpretation, the scope of "personal rights and interests" in these two adjacent norms should be the same, but Article 1007 of the Civil Code stipulates: "The sale of human cells, tissues, organs, and remains in any form is prohibited. Any sale in violation of the preceding paragraph shall be invalid." The law clearly prohibits the sale of human components related to life, body, and health, which cannot be

commercially circulated in the market, and the commercial use of these material personality rights and interests is absolutely prohibited by law. Therefore, the meaning of "personal rights and interests" in Articles 1182 and 1183 of the Civil Code is different and should not be understood in the same way. Personality rights and interests that can apply the tortious profit deprivation rule should exclude material personality rights and interests.

According to the provisions of Article 990 of the Civil Code, personality rights and interests can be divided into specific personality rights and general personality rights. Among specific personality rights, except for material personality rights, there is generally room for the application of profit deprivation, even including personal information. Paragraph 2 of Article 69 of the Personal Information Protection Law of the People's Republic of China stipulates the rule of deprivation of benefits from infringing upon personal information. General personality rights refer to other personality rights and interests enjoyed by natural persons based on personal freedom and dignity, in addition to specific personality rights. Is there room for the application of the tortious profit deprivation rule to general personality rights? The "Case of He v. Shanghai Zimou Artificial Intelligence Technology Co., Ltd. on Network Tort Liability" gives an affirmative answer [3]. The defendant company operated an accounting software, where users could create or add "AI companions" virtual characters, set names, avatars, identity relationships, etc., and set the interaction content between "AI companions" and users through system functions, which the system called "training". The plaintiff, a public figure, did not authorize the defendant. The software in question projected the overall image of the plaintiff, which was a combination of his name, portrait, personality traits, and characteristics, onto the AI character, allowing users to "train" it to create an experience of real interaction with the plaintiff. This not only infringed upon the plaintiff's right to name and portrait but also violated his interests in personal freedom and respect for personality, constituting an infringement of his general personality rights. This case provides an example for the application of the profit deprivation rule to the passive commercial use of general personality rights. Therefore, both specific personality rights and general personality rights have room for the application of the tortious profit deprivation rule.

According to systematic interpretation, Article 1179 of the Civil Code has made comprehensive provisions on the situation of property losses caused by infringement of material personality rights and interests, leaving no room for the application of Article 1182 [4]. Therefore, the meanings of "personal injury" in Article 1179, and "personal rights and interests" in Articles 1182 and 1183 are different, and their applicable scopes are not consistent [5]. Therefore, the "personal rights and interests" in Article 1182 should be restricted to spiritual personality rights and interests at the level of personality rights and interests, excluding material personality rights and interests. Moreover, these spiritual personality rights and interests should be able to be commercially used, have commercial value, and the infringer can gain benefits from the infringement. That is, the spiritual personality rights and interests within the scope of application of this article should be those that can be commercially used.

2.2. From the Perspective of Identity Rights and Interests

Personal rights include personality rights and identity rights. Does the "personal rights and interests" in this provision include identity rights and interests? Some scholars believe that generally, only when personality rights that can be commercially used (such as the right to name, right to portrait) are infringed can they cause property damage to the infringed [6]. Identity rights such as parental rights, guardianship rights, and inheritance rights have personal exclusivity, are not transferable in legal nature, have no commercial transaction value, and are difficult to be commercially used both legally and factually, thus excluding identity rights from the "personal rights and interests" in this article [7]. Wang Liming also believes that the scope of application of profit deprivation can be considered to be limited to personality

rights and interests. He believes that although cases of infringing upon identity rights and interests, such as illegally separating a ward from the guardian's control, may constitute torts, the actor usually does not have the purpose of making profits, and generally only causes mental or property losses to the victim. These problems can be sufficiently solved through systems such as property damage compensation or mental damage compensation, and there is no need to apply profit deprivation [8].

Theoretically, identity rights and interests have strong personal exclusivity and ethical colors, and it seems that it is difficult for actors to benefit from generally infringing upon identity rights and interests. However, from a practical perspective, regarding the situation of illegally separating a ward from guardianship: judicial interpretations have clearly stipulated that if a ward is illegally separated from guardianship, the guardian has the right to claim compensation for mental damage. Illegally separating a ward from guardianship is also known as human trafficking. From a positivist perspective, isn't the purpose of actors trafficking women and children to seek profits? It is precisely because there is profit to be made that such tortious acts are so rampant. Actors usually have the purpose of making profits when trafficking, and objectively, there is the possibility of making profits. The premise for the application of profit deprivation is that the infringement of personality rights and interests causes property losses. Only when the actor's act infringes upon others' personality rights and interests and causes property losses can the infringed claim the actor's tort liability for compensation in accordance with this article [9]. Then, does illegally separating a ward from guardianship cause property losses to the guardian and their family? The answer is beyond doubt. Many guardians will spend all their money and even their lives searching for their relatives, resulting in search expenses; at the same time, human trafficking may also cause personal injury to the victim, leading to medical expenses, etc. In addition, the mental damage caused by human trafficking to the ward and the guardian is profound and difficult to measure with money. These property losses are often accumulated over time and difficult to accurately quantify, making it difficult for the parties to prove how much loss they have suffered. Therefore, it is necessary to apply the profit deprivation rule to deprive the actor of the illegal benefits obtained from infringing upon identity rights and interests to compensate for the property losses suffered by the victim and provide some comfort to the victim and their family. Therefore, identity rights and interests should not be completely excluded from "personal rights and interests", and there is room for the application of profit deprivation in the case of illegally separating a ward from guardianship.

3. Methods and Standards for Calculating Profits

Article 1182 of the Civil Code stipulates: "If the infringement of others' personal rights and interests causes property losses, compensation shall be made according to the losses suffered by the infringed or the benefits obtained by the infringer". The victim can choose to determine the amount of compensation based on actual losses or tortious benefits. Some scholars believe that this actually creates a rule of "profits being deemed as damages" [10]. However, this is not the case. Profits and damages are of different natures and perform different functions. The former mainly plays a deterrent role, aiming to deprive the infringer of tortious benefits, while the latter aims to compensate for damages and make up for actual losses. In practice, there are two main situations where parties claim compensation based on profits: one is that the parties cannot prove their actual losses, and the other is that the actor's profits are greater than the victim's damages. The victim knows best which choice is more beneficial to themselves and thus makes a more beneficial choice based on their own situation. To accurately apply the profit deprivation rule, it is necessary to clarify the methods and standards for calculating profits. Only by clarifying the meaning of profits can we avoid the actor bearing excessive liability and prevent profit deprivation from alienating into punitive damages.

3.1. Methods for Calculating Profits

First, it should be clarified that profits can be the positive increase in the infringer's property or the failure of the infringer's property to decrease negatively [11]. In other words, profits can be the increase in existing property due to the tort, or the expenses saved by the actor due to the tort. Profits usually refer to the former. For example, if an infringer uses a celebrity's portrait for commercial promotion without permission, even if the infringer does not have an actual increase in property, the license fee that they would have otherwise paid is avoided due to the tort, and this saved expense should also be interpreted as profits. This method has been adopted in China's intellectual property field. For example, Article 54 of the Copyright Law of the People's Republic of China (hereinafter referred to as the "Copyright Law"), Article 71 of the Patent Law of the People's Republic of China (hereinafter referred to as the "Patent Law"), and Article 63 of the Trademark Law of the People's Republic of China (hereinafter referred to as the "Trademark Law") clearly stipulate that the compensation amount can be reasonably determined with reference to the license fee. Looking at the above legal provisions, it can be found that there are preconditions for determining compensation with reference to the license fee, that is, first, the compensation amount is determined according to the actual losses suffered by the right holder due to the infringement or the infringer's benefits from the infringement. If the right holder's losses or the infringer's benefits are difficult to determine, the compensation amount can be determined with reference to the license fee. In German judicial practice, there are three ways to calculate the amount of compensation for personality rights infringement: actual loss, profit compensation, and value return, where value return refers to the payment of constructive license fees. At the same time, the application of these three methods needs to adhere to certain principles: first, the victim cannot obtain additional benefits from the infringement, that is, the victim can only choose one of the three methods and cannot claim them simultaneously; second, the victim has the right to freely choose among the three methods [12]. Summarizing the above legislative and practical experience, profits can be not only the benefits obtained from the infringement but also the expenses saved due to the infringement.

In addition, profits should be the net profit obtained by the actor due to the infringement. Not all benefits obtained by the actor due to the infringement need to be returned; only the benefits obtained by the actor due to the infringement should be returned. The profits obtained by the actor due to the infringement should be limited to the increased profits due to infringing upon others' personal rights and interests. When calculating profits, the actor's relevant costs should be deducted [13]. In a case published by the People's Procuratorate of Huainan City, the person in charge of a decoration company illegally obtained citizens' personal information and arranged for staff to call owners to obtain business opportunities and make profits. The procuratorate believed that the person in charge of the decoration company infringed upon citizens' personal information, damaged public interests, and filed a claim for compensation for public welfare damages, with the compensation amount based on the net profit from the decoration business obtained through making harassing calls. Considering that the decoration company had paid honest labor in the decoration activities, the procuratorate did not use the total contract price as the compensation standard but deducted relevant costs and calculated the net income as the compensation standard according to the general profit rate of the industry [14]. The decoration company not only paid honest labor in the decoration process but also may have incurred labor costs, material consumption of decoration materials, etc. All these costs should be deducted accordingly when calculating profits.

Finally, it should be noted that profits must be the benefits obtained due to the infringement, and there must be a causal relationship between the profits and the act of infringing upon personal rights and interests. It is necessary to consider the contribution of the victim's personal rights and interests to the actor's total profits. Profits should be limited to the benefits obtained by the actor due to infringing upon the victim's personal rights and interests, while

profits obtained due to the actor's business model, trade secrets, etc., should be deducted [15]. German scholar Schultz believes that when determining the return of profits, it should be determined according to different consideration factors, such as the contribution of goods, copyrights, labor, enterprises, etc., to the profits. As long as the actor uses others' personality rights and interests without permission, even if various resources, manpower, material resources are added in the use, or their own customer resources are used, it can be considered as benefits obtained due to the infringement [16]. However, when calculating the specific amount, it is necessary to determine the final profits according to the contribution of infringing upon others' personal rights and interests to the total profits, that is, profit allocation. For example, if a company uses a celebrity's portrait in advertising without permission, and the company also conducts some eye-catching promotional activities, consumers may buy its products due to the celebrity effect or be attracted by the promotional activities. In this case, it is necessary to allocate profits and calculate the benefits obtained due to infringing upon others' personal rights and interests according to the proportion of the impact of infringing upon others' personal rights and interests in the entire business activities.

3.2. Standards for Calculating Profits

Two standards can be adopted when determining the standards for calculating profits: comparative standards and constructive license fees or similar market standards. The comparative standard is exactly the calculation of the above-mentioned profit type of positive increase in property. It compares the total profits of the actor before and after the infringement, subtracts the total profits obtained without using others' rights and interests from the total profits obtained by infringing upon others' rights and interests, and takes the profit difference as the profit [17]. This calculation standard seems simple, as it only requires subtracting the two total profits to obtain the profit, but there are some problems in actual operation. For example, the infringer may not have engaged in such business activities before, so there is no "total profits obtained without using others' rights and interests" for reference; or the total profits obtained by infringing upon others' rights and interests may be mixed with other factors, not entirely due to the increased profits brought by the infringement. In these cases, the final profit amount obtained may not be accurate. In the aforementioned case of the decoration company infringing upon citizens' personal information, the method adopted by the procuratorate to calculate profits using the general profit rate of the industry after deducting relevant costs is a good approach. Although the amount obtained in this way is not necessarily equal to the actual profits of the decoration company, it has certain reference value. If the obtained amount is higher than the profits of the decoration company, the decoration company will naturally provide evidence to prove its actual profits, which to a certain extent alleviates the difficulty of proof for the infringed. At the same time, reference can be made to the year-on-year increment and proportional increment methods proposed by Chen Xianjie. The year-on-year increment is to calculate the benefits obtained by the infringer by multiplying the year-on-year growth of product sales and service revenue after the infringer's infringement by the reasonable profit rate of each product or service; the proportional increment is, for example, when the infringer illegally discloses others' privacy to increase program ratings, the court takes its advertising revenue as a consideration factor [18]. When using the comparative standard, it is necessary to comprehensively consider the method of calculating profits, deduct corresponding costs, and finally obtain the profit amount after appropriate profit allocation.

For the profit type of avoiding negative reduction of property, that is, the expenses saved due to the infringement, the constructive license fee or similar market standard can be adopted for determination. Professor Wang Liming also believes that determining the actor's profit amount according to the constructive license fee is a feasible standard [19]. Taking the infringement of the right to portrait as an example, if an infringer infringes upon a celebrity's right to portrait,

and thus avoids paying the celebrity's portrait license fee, the profit can be determined according to the license fee usually charged by the celebrity for similar advertising endorsements. In practice, there may be cases where a celebrity has commercial value but has never endorsed commercially, or the portrait of an ordinary person is infringed. In these cases, where there is no previous license fee for reference, the similar market standard can be used for determination, which can refer to the license fee of people with similar influence in similar commercial activities. In the case of *Mo Yan v. a technology company for personality rights infringement*, the defendant used Mo Yan's name and photo without authorization to make corporate promotional advertisements, but Mo Yan had never accepted any corporate endorsement offers before the case, meaning there was no previous license fee for reference [20]. In this case, the author believes that a celebrity with high popularity like Mo Yan has huge commercial value behind his personality rights and interests. Even if there is no previous license fee for reference, the license fee of others with similar popularity can be used as a reference. The same applies to ordinary people; it can be determined according to the cost of hiring others for similar commercial activities. It should be noted that compensating according to the constructive license fee may not be sufficient to protect the victim, because this method is equivalent to forcing the victim's personal rights and interests to be passively commercialized, which may violate the victim's true will and cannot effectively curb the infringer's illegal acts [21]. Taking Mo Yan's case as an example, when the defendant infringed upon his personality rights, it also fabricated a large amount of false information for advertising, which may have defamed Mo Yan's reputation. Even if the similar market standard is used to determine profits, it violates Mo Yan's true will, as he may not be willing to participate in such commercial activities at all.

4. Standards for Court Discretion

When both the actual loss and the tortious profit are difficult to determine, and the infringer and the infringer cannot reach an agreement on the compensation amount through negotiation, and then file a lawsuit in court, the people's court needs to determine the compensation amount according to the actual situation. What constitutes the actual situation and how to determine the compensation amount according to the actual situation need to be studied, which involves the issue of standards for court discretion. According to the profit deprivation rule, court discretion is the last calculation method in the application order, but from China's judicial practice, most cases determine the amount of property loss through court discretion [22]. This is mainly because the current legal provisions are relatively vague, lacking operability in practice, and the court discretion method gives judges greater discretionary power. The court discretion method has certain rationality. Judges can comprehensively consider various factors such as the method of infringement and the consequences of damage to determine the compensation amount, which is conducive to protecting the victim to a certain extent. However, completely leaving the determination of the actor's compensation amount to the court's discretion also has certain drawbacks. First, the court discretion method provides insufficient protection for the victim, and in practice, the compensation amount is generally low; second, the court discretion method lacks clear standards and main reference factors, with uncertainty and excessive discretionary power of judges; finally, the court discretion method should be a residual provision, but in practice, the court's preference for its application leads to the neglect of determining losses and profits, and instead, it escapes to the court discretion method, making the profit deprivation rule lose its due value [23]. Therefore, it is necessary to clarify the standards for court discretion to ensure the normal operation of the profit deprivation rule.

First, it is necessary to clarify the standards for court discretion. In the case of *Mo Yan v. a technology company for personality rights infringement*, the court pointed out in the judgment

essentials that when determining the amount of damages, if the actual loss and the tortious profit are difficult to determine, the compensation amount should be determined by comprehensively considering factors such as the consequences of the infringement, the circumstances of the infringement, the nature of the infringement, and the degree of fault of the infringer. Among them, the damage consequence is the core consideration factor, which is determined by the compensatory function of damage compensation. Therefore, in principle, it should be limited to the actual loss. In this case, the court mainly considered the market value of the plaintiff's endorsement, the degree of damage to the plaintiff's image, the method of infringement, the duration and scope of the infringement, the nature of the infringement and the degree of fault of the infringer, and the judgment standards of similar cases when exercising discretion [24]. It can be seen that the reference factors for the court discretion method are relatively comprehensive. In this case, the court mainly based on the actual loss, with other factors as auxiliary or reference factors. From the perspective of the compensatory function of damage compensation, this conservative approach seems understandable, but the important deterrent effect of the profit deprivation rule has not been well reflected. To deter actors, it is necessary to ensure that actors cannot profit from infringement as much as possible, which in terms of court discretion means that the court needs to consider the infringer's profit situation when exercising discretion. If the victim's loss cannot be effectively compensated and the infringer still has profits after bearing the compensation liability, it will certainly make the victim feel cold and make them reluctant or even give up defending their rights; people are rational animals. If they can obtain huge benefits with a small infringement cost, not depriving all the tortious profits will not curb such illegal acts, but only make lawbreakers see the profit behind the infringement. Therefore, when the court determines the compensation amount at its discretion, it first needs to consider the actor's profit situation, and other factors are only auxiliary standards for the final determination of the compensation amount [25].

Finally, it should be noted that the court discretion method is a residual provision. When the victim's personal rights and interests are infringed and property losses are incurred, the victim should first determine the compensation amount according to their actual loss or the tortious profit. When personal rights and interests are infringed, they should first seek self-relief and require the infringer to compensate for their actual loss or return the tortious profit. When the actual loss and the tortious profit are really difficult to determine, the victim should negotiate with the infringer to determine the compensation amount; if the two parties cannot reach an agreement on the compensation amount and file a lawsuit with the people's court, the court will then determine the compensation amount at its discretion. Court discretion is a supplementary relief method to make up for the methods of determining actual loss and tortious profit, and we cannot rely too much on the court discretion method, but should make the profit deprivation rule work. At the same time, when the court determines the compensation amount at its discretion, it not only needs to consider the infringer's profit situation and other common reference factors (such as the reference factors mentioned by the court in Mo Yan's case) but also can comprehensively determine the final compensation amount with reference to the aforementioned methods and standards for calculating profits.

5. Conclusion

The provisions on the liability for deprivation of tortious benefits in the Civil Code have taken a further step compared with the Tort Liability Law. The adjustment of the order of profit deprivation can more effectively exert the deterrent effect of the system itself. However, this clause is relatively general and abstract, with poor operability in practice and many application difficulties. General Secretary Xi Jinping proposed that "the rule of law is the most effective guarantee for human rights" [26]. To effectively safeguard citizens' personal rights and

interests and curb the infringer's illegal acts, it is necessary to further clarify and interpret the scope of application of the liability for deprivation of tortious benefits, the methods and standards for calculating profits, and the standards for court discretion.

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