RESEARCH ON STATUTORY COMPENSATION FOR PERSONAL INFORMATION RIGHTS INFRINGEMENT

Shao Denghui

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Article 69 of China's Personal Information Protection Law establishes a compensation system for damages resulting from violations of personal information rights. However, it does not adequately address the challenge of quantifying such damages. The intangible and uncertain nature of the consequences of personal information rights infringement makes it difficult to calculate the amount of damages within the existing legal framework, leading to issues such as the difficulty for victims to exercise the right to claim compensation, the difficulty in curbing illegal acts of personal information rights infringement, and the risk of arbitrary rulings by judges. Statutory compensation has unique value in relieving victims, deterring illegal acts, and improving the efficiency of litigation, and can serve as a supplementary scheme for calculating compensation. The structure of the statutory compensation system should clearly define the order of application, prohibit its application out of the prescribed order, adopt a differentiated compensation amount based on the classification of personal information, establish mechanisms to prevent excessive compensation amounts for different scenarios, and clearly define the discretionary factors for compensation, thereby improving the effectiveness of the application of statutory compensation.

I. INTRODUCTION

Article 69 of *China's Personal Information Protection Law* establishes three rules for calculating the amount of damages: the losses suffered by the victim, the benefits obtained by the infringer, and compensation determined by the court at its discretion. While this system appears comprehensive, its practical effectiveness is limited. According to the general principles of the burden of proof, the victim in a lawsuit for damages should provide evidence of the damage and the amount of compensation. In personal information

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rights infringement lawsuits, it is difficult for the victim to prove the damage, let alone the specific amount of compensation. If the actual amount of loss or profit cannot be proven, the victim's lawsuit may be dismissed, and thus the necessary relief cannot be obtained. Of course, the *Personal Information Protection Law* provides a catch-all rule for determining the amount of damages beyond actual losses and profits from the infringement 'based on actual circumstances'. However, 'actual circumstances' are an abstract concept that not only struggles to provide clear guidance for rulings in individual cases but may also exacerbate the risk of arbitrary rulings. In summary, the calculation of compensation has not been adequately addressed in the *Personal Information Protection Law*.

In related discussions, statutory compensation has attracted the attention of academics.[1] In fact, during the drafting of the *Personal Information Protection Law*, there were also proposals to introduce statutory compensation, but these proposals were not adopted.[2] This may stem from concerns over the adverse effects of statutory compensation. Such concerns are linked to a lack of relevant domestic research. Existing research on statutory compensation is only incidental to other research topics, and insufficient attention has been paid to how to curb the adverse effects, such as 'sky-high compensation'. The overemphasis on adverse effects obscures the unique value of statutory compensation.

In view of this, this paper conducts an in-depth and systematic study of statutory compensation in the field of personal information protection, based on China's judicial practice and drawing on the legislative experience of relevant countries and regions, to provide recommendations on the normative design of statutory compensation, with a view to contributing to the improvement of the damage compensation system of the *Personal Information Protection Law*.

II. THE EXISTING RULES FOR CALCULATING THE AMOUNT OF DAMAGES AND THEIR IMPROVEMENT

The three rules for calculating the amount of damages established by the *Personal Information Protection Law* need further improvement.

1 *See* Yang Lixin, *Problems and Solutions of Personal Information Protection in Private Law*, 1 Social Science Front 193, 201 (2021); Cui Congcong, *On Damages of Personal Information*, 6 Journal of Beijing University of Posts and Telecommunications (Social Sciences Edition) 35, 38 (2014).

2 *See* Peng Chengxin & Xu Sumin, *System Construction of Mental Damage Compensation of Infringing Rights and Interests of Personal Information*, 3 Nanjing Journal of Social Sciences 84, 92 (2022).

A. Rules Based on Actual Losses

The primary function of tort law is to compensate for harm; if no harm has been caused, there is no need for compensation.[3] The *Personal Information Protection Law* also stipulates, based on the ethical requirement of 'corrective justice', that the amount of damages shall be determined based on the actual losses suffered by the right holder. Scholars generally agree that the term 'damages' in article 69 of the *Personal Information Protection Law* should include both property losses and mental distress, and that compensation shall therefore cover both types.

Actual losses are generally determined based on the difference in damage. According to the difference theory, damage refers to the difference between the hypothetical state of benefits the plaintiff should have enjoyed in the absence of the infringement (the subtrahend) and the actual state of benefits the plaintiff has enjoyed in the actual situation where the infringement has occurred (the minuend).[4] Accordingly, the victim must fulfil the specific burden of proof regarding the facts of the damage and the specific extent of the damage when filing a compensation claim. However, in practice, fulfilling this burden of proof is not easy, and compensation for property losses and mental distress faces difficulties due to insufficient information.

1. Calculation of Property Losses. — In cases where personal information rights are infringed upon, victims may file compensation lawsuits for property losses. For such compensation claims to be upheld by the court, the prerequisite is to prove the extent of property damage and the amount of loss. However, this burden of proof becomes difficult or even impossible due to the following challenges. First, traditional tangible property can be physically controlled in a specific time and space, whereas personal information can be non-exclusively replicated, disseminated, and shared on a large scale. The rights attached to personal information can be repeatedly infringed upon without mutual exclusion. Even if there is no property loss at a particular stage of personal information rights infringement, it may still be causally linked to actual damage occurring downstream. The boundaries of such damage are uncertain, and the property loss that the right holder can prove may be less than the actual loss. Second, unlike tangible property that occupies a distinct physical space, personal information is intangible, and the

3 *See* WANG ZEJIAN, TORTS, at 175-176 (Peking University Press, 2009).

4 *See* WANG ZEJIAN, DAMAGES, at 63 (Peking University Press, 2017).

harm it causes is also intangible. Victims cannot directly perceive changes in the extent of property damage through their senses, making it difficult to convert property losses into specific compensation amounts supported by evidence. Third, the separability of personal information from its subject allows infringing acts to remain visually 'invisible'. The concealment of infringements means that right holders may not even be aware of the fact that their rights have been infringed upon, let alone prove the specific amount of property loss. Due to the above reasons, even if the right holder can prove the existence of property damage, it is difficult to provide sufficient evidence to verify the specific amount. Even if such evidence can be provided, the associated costs would be enormous. Due to the typical inability to meet the established evidentiary standards, courts are likely to dismiss the victim's claims for compensation for property losses. Even if compensation is awarded, the amount can be minimal.

Influenced by the concept of personal information as property, some courts determine property losses by using the market price of personal information as the basis for calculating the amount of compensation. While this method is simple and easy to implement, it may not be reasonable. Unlike traditional tangible property where the amount of losses can be determined by market transaction value, personal information lacks a unified transaction market, and transaction prices depend on specific transaction circumstances. The determination of compensation amounts lacks objective standards, leading to significant discrepancies in rulings in individual cases. Personal information is non-consumable and non-competitive. The infringement of personal information does not substantially reduce its transactional value. Therefore, the transaction price of an individual's personal information is generally low. Compensation calculated based on this price is also low, making it difficult to achieve the deterrent effect of damages. More importantly, the protection of personal information rights safeguards diverse values such as human dignity, personal safety, and property interests. Using transaction prices as the standard for calculating compensation undermines and disregards more important values such as human dignity and personal safety.

2. Calculation of Compensation for Mental Distress. — In most cases, the consequences of personal information infringement manifest as subjective feelings such as anxiety, unease, and fear.[5] There are numerous

5 *See* Li Dongyu, *The Moral Damage Compensation on the Personal Information Interests Infringement*, 4 Law and Economy 134, 135 (2023).

cases in which victims claim compensation for mental distress. Mental distress is easy to fabricate or exaggerate, making it difficult to prove or disprove.[6] To prevent the overuse of mental distress compensation, Chinese legislation and judicial practice adopt a strict restrictive stance on such compensation. Article 69 of the *Personal Information Protection Law* regarding damages does not attach a severity condition, and there is significant academic debate over whether severity should be used as a standard. Some argue that if the victim cannot prove that the mental distress has reached a severe level, they should not be entitled to claim compensation for mental distress.[7] Opposing views contend that the 'severity' requirement sets a high bar for mental distress compensation, which is unfavorable to the victim's remedy.[8] Therefore, the severity of the damage should only affect the compensation amounts and should not be a prerequisite for determining the existence of the right to claim compensation.[9] Regardless of whether the academic community supports or opposes the 'severity' requirement, there is a consensus that 'minor mental distress is not compensable'. In practice, courts have not relaxed the 'severity' requirement. When victims cannot prove mental distress or the mental distress does not reach a severe level, courts often dismiss compensation claims on this basis.[10] In disputes involving the infringement of personal information rights, victims typically only experience certain mental distress or anxiety, which generally does not reach a severe level. The 'severity' requirement may reduce the likelihood of obtaining compensation.

Mental distress is a subjective experience, and this intangible damage is inherently immeasurable. Mental distress resulting from the infringement of personal information rights is even more difficult to quantify, and the corresponding damage is generally less severe. Victims often struggle to adequately prove the extent of changes in their mental state before and after the infringement. As a 'third party', the court finds it challenging to obtain sufficient information through the burden of proof to 'price' the damage and to convert it into compensation that aligns with the extent of the damage using existing legal techniques. To strengthen remedies for victims, courts

6 *See* Xie Hongfei, *'Damage' in the Tort Liability for Personal Information Leakage: Also on the Conceptualization of Damage in a Risk Society*, 5 Journal of National Prosecutors College 21, 33 (2021).

7 *See* Cheng Xiao, *On Civil Liability of Infringing Personal Information*, 2 Jinan Journal (Philosophy & Social Sciences) 39, 46 (2020).

8 *See* Shi Jiayou, *The Progress and Limitation of Personality Rights Legislation: Remarks on the Draft of the Chapter of Personality Rights in China's Civil Code for the Third Reading*, 5 Tsinghua Law Journal 93, 97 (2019).

9 Cui Congcong, *supra* note 1.

10 *See* Tian Ye, *Risks as the Harm: Redefining 'Damage' of Tort in Big Data Era*, 10 Political Science and Law 25, 29 (2021).

must enhance the information-providing function of the burden of proof and increase the risk of failing to meet the burden of proof. However, it is difficult to prove the mental distress resulting from the infringement of personal information rights, leading to a paradox: the more one seeks to strengthen remedies for victims, the more one exacerbates the risk of losing the case. At the very moment when the burden of proof is most needed to provide courts with sufficient pricing information, the burden of proof fails to function. Improving the precision of quantifying mental distress implies that the information acquisition and cognitive costs for decisions in individual cases will inevitably increase. Courts would have to incur excessive costs in cases where it is inherently impossible to quantify compensation amounts precisely. If the benefits (precise quantification of harm) outweigh the costs, especially considering the possibility of victims exaggerating their mental suffering, judicial efficiency and cost expenditures would face significant pressure, severely impacting both judicial efficiency and costs. In summary, accurately quantifying the amount of damages for mental distress is either impossible or involves excessive costs, leading to a decline in judicial efficiency and an increase in judicial costs.

B. Profit Surrender Rules

In cases involving the infringement of personal information rights, it is common for victims to suffer minimal or no actual losses, while personal information processors may reap substantial profits. If the compensation for victims is limited to actual losses, even if victims receive some compensation, infringers will still retain substantial profit margins. The incentive of benefits exceeding costs may lead personal information tortfeasors to engage in infringements that are inconsistent with overall social efficiency. From the perspective of law and economics, if the costs of violating the law are far lower than the benefits gained from such violations, this will effectively encourage such infringements to occur.[11] In light of this, article 69 of the *Personal Information Protection Law* establishes that the amount of damages is determined based on the benefits obtained by personal information processors, meaning that the infringer's profits serve as the basis for calculating the victim's compensation amount. This principle is also referred to in academic circles as 'profit restitution', 'profit deprivation', 'profit compensation', or 'profit surrender'. Here, the basis for calculation

11 *See* LI JING, ECONOMIC ANALYSIS OF TORT LAW, at 52 (Intellectual Property Publishing House, 2016).

shifts from the victim's actual losses to the benefits obtained by the infringer. The legislator has effectively established the rule that 'profits are deemed as damages' based on the corresponding relationship of 'property changes' between the infringer and the victim, presuming the infringer's profits as another manifestation of actual losses.[12]

Profit surrender is a system arrangement for distributing the profits derived from infringement between the infringer and the victim. The bias in the distribution amount is related to the policy rationale underlying this rule. In theory, the indirect assessment of actual damages theory and the infringement preclusion theory form the basis for establishing the profit surrender rule or its policy rationale.[13] Unfortunately, neither of these theories provides reasonable guidance for appropriately determining the amount of damages.

Firstly, if profit surrender is viewed as a method for indirectly estimating the plaintiff's damages, it functions as a compensatory liability rule, with the negative consequence of inadequate compensation and the risk of incentivizing infringement. Under this interpretive approach, profit surrender should only target the portion of profits causally linked to the infringement of personal information rights, while portions not causally linked to the infringement should be deducted when calculating the compensation amount. In most cases, the value of an individual victim's personal information is low or even negligible, and 'the damage suffered by an individual victim is actually insignificant compared to the overall benefits obtained by the personal information processor.'[14] Therefore, the benefits should not be simply attributed to the contribution of the dispersed personal information of specific victims. Furthermore, the personal information processor's own factors (capital, technology, and operational capabilities) may have a greater impact on profits than the contribution of an individual victim's personal information. If the total profits of the personal information processor are reduced by profits unrelated to the infringement and necessary costs or expenses, the amount of profits that victims are entitled to claim for return will be very small. In such cases, the substantial surplus of profits retained by the infringer after compensation may serve as an economic incentive to commit more violations.

12 *See* ZHOU YOUJUN, TORT LAW, at 63 (China Renmin University Press, 2011).

13 In fact, the prevention of unjust enrichment is also the basis for the justification of the rule of surrender of profits. Although it is not entirely identical to the doctrine of estoppel in terms of reasoning, the results are similar. Therefore, the discussion mainly focuses on indirect assessment of damages and estoppel.

14 Wu Aibin, *The System Construction of Punitive Compensation in the Public Interest Litigation of Personal Information*, 5 Theoretical Exploration 111, 112 (2023).

Secondly, based on the theory of deterring infringement, if all or most of the profits obtained through the infringement are transferred to the victim, thereby rendering the infringing behavior unprofitable, this may achieve the effect of deterring the motive for infringement. However, the potential risks include unjust enrichment and excessive deterrence. The victim's losses are logically distinct from the profits of the personal information processor, and there is no strict correspondence between the two. Due to the severe disproportion between losses and profits, it is inappropriate to interpret all profits as the victim's damages. If the majority or even all of the profits from the infringement are distributed to the victim, the victim would receive a 'windfall' far exceeding their actual losses, which conflicts with the moral justice principle of prohibiting unjust enrichment. Given that the victim's losses are minimal or nonexistent, such a distribution of profits could lead to excessive compensation, akin to punitive damages. If the infringing act only causes harm and does not generate any social benefits, it is advisable to impose punitive damages to completely prevent such infringing acts. The issue is that the purpose of the personal information processor is not to cause harm but to make profits, and the utility derived from such behavior should be accounted for in the overall social welfare. From the perspective of law and economics, if the costs borne by the infringer exceed the actual harm caused, this may lead to wasteful preventive measures, and activities that are risky but beneficial to the society may be unduly restricted, resulting in a loss of overall social welfare due to excessive deterrence.[15]

In practice, the allocation of benefits in individual cases often oscillates between assessing actual damages and balancing the prevention of harm, primarily because courts often need sufficient information to determine an appropriate allocation ratio. Since courts do not possess sufficient information regarding the infringing and non-infringing components of the benefits, they must rely on information disclosure mechanisms to obtain the necessary information from the parties involved.[16] The burden of proof is the primary mechanism through which courts obtain information. However, neither the traditional burden of proof nor the reversal of the burden of proof can meet the information needs of the court for assessing compensation amounts. Generally, the victim is required to provide evidence of the profits derived from the infringement. However, evidence of such profits is typically unevenly distributed, with the evidence materials generally being held by the

15 *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 4 Harvard Law Review 869, 873 (1998).

16 *See* Tun-Jen Chiang, *The Information-Forcing Dilemma in Damages Law*, 1 William & Mary Law Review 81, 91-92 (2017).

infringer. Compared to securing evidence of their own losses, victims often find it even more difficult to prove infringing profits than to prove actual losses. In some cases, victims may not even be aware of the evidence held by the infringer that could prove their profits. As a result, victims often cannot provide evidence, leaving courts without sufficient information to determine profit allocation.

Of course, legislators may explore the reversal of the burden of proof in the future, but the effect would also be limited. On the surface, the reversal of the burden of proof incentivizes infringers to provide evidence at a lower cost. However, this is not the case. The reversal of the burden of proof merely changes the party responsible for providing evidence but does not fundamentally alter the information dilemma in decision-making. Specifically, the interests between infringers and victims are adversarial. Even if victims are granted the right to request infringers to provide evidence or infringers are obligated to proactively provide evidence of profits, rational infringers have no incentive to provide evidence that is unfavorable to themselves. Any institutional design that expects infringers to proactively provide information on profits is irrational. To overcome the deterrent effect of conflicting interests on the motivation to provide evidence, legislators can naturally incentivize infringers to provide better evidence by increasing the potential costs of failing to meet the burden of proof. That is, if the infringer cannot prove the amount of profits gained from the infringement, they should be required to 'surrender' all profits. Even faced with such strong incentives, infringers would still find it extremely difficult to prove at a low cost the decisive or exclusive contribution of the infringed personal information to 'incremental profits' or the extent of profit changes. It is virtually impossible to distinguish personal information from the infringer's capital, technology, and other factors, and clearly establish the causal relationship between these factors and profits. In such cases, requiring infringers to 'surrender' all profits as a penalty for failing to provide sufficient evidence would result in enormous compensation. This result is overly harsh for infringers, as the harm suffered by victims is far less than the profits gained. Excessive compensation may be harmful to the development of the digital economy and the overall welfare of the society.

C. Discretionary Compensation Rules

Personal information rights infringement damages have the characteristics of dynamism and uncertainty. Proving the existence of damages and the extent of losses has become a major obstacle for victims to seek compensation. Victims should not bear the adverse consequences solely for their inability to prove the existence of harm or the extent of losses (or the amount of damages) due to insufficient effort. If courts dismiss claims based on the burden of proof principle, the right to claim damages would be rendered unattainable, which would be overly harsh. Therefore, when actual losses and the benefits gained from the infringement cannot be determined, the *Personal Information Protection Law* establishes the rule that 'the amount of damages shall be determined based on the actual circumstances' to strengthen the substantive fairness of remedies. Judges can swiftly determine the amount of damages based on the abstract concept of 'actual circumstances', avoiding the litigation costs and procedural delays caused by prolonged disputes over the amount of damages, thereby improving litigation efficiency. This approach to some extent balances the relationship between fairness and efficiency, promptly providing right holders with appropriate compensation. However, the concept of 'actual circumstances' is also dangerous, as it cannot provide strict or meaningful guidance for determining the amount of damages.

The provision that 'the amount of damages shall be determined based on the actual circumstances' effectively grants judges broad and significant discretion. From the strict provision of article 69 of the *Personal Information Protection Law* regarding the application order of the methods for calculating compensation, it is evident that the legislator presumes that the determination of compensation for the vast majority of personal information rights infringement cases can be resolved within the traditional framework for calculating compensation. This provision is applicable to a small number of cases, hence it is designated as a catch-all provision. However, this assumption may backfire, as the discretionary approach, intended as a catch-all provision, may become the primary or even the sole method of calculation. This is because the inherent difficulty in quantifying damages and the evidentiary challenges in proving such damages create widespread challenges in calculating compensation. Specifically, personal information rights infringement damages often manifest as non-material damages such as legally unrecognized risks and mental distress. Such damages are difficult to remain in a relatively stable state due to the multi-chain flow of information, and widespread and significant uncertainty is their fundamental attribute, leading to difficulties in monetarily quantifying damages. Under evidence law, the burden of proof is a mechanism for courts to compel the disclosure of information necessary to assess the amount of damages.[17] However, legislators might have set expectations for the victim's ability to provide evidence. The legal requirements for evidence are likely to be mismatched with the victim's capacity to provide such evidence. As a result, courts often cannot obtain sufficient information through the burden of proof to determine the compensation the victim is entitled to. Even if substantive standards and procedural controls are improved, they can only reduce the uncertainty to a certain extent. Yet, they cannot eliminate the widespread and significant uncertainty in the field of damages for personal information rights infringement. To address the challenge of quantifying damages, legislators have established a catch-all provision to determine compensation amounts based on actual circumstances, aiming to use this vague calculation method as a flexible solution for quantifying compensation amounts. However, while this approach alleviates the quantification challenges posed by uncertainty, it also introduces new issues. This is because the concept of 'actual circumstances' is abstract, granting judges excessive discretionary power, especially when considering the widespread uncertainty of damages. Such broad discretionary authority, both in scope and in its absolute nature, deviates from the fundamental requirements of the rule of law.

The *Personal Information Protection Law* provides a general framework for discretionary compensation without establishing detailed rules for the adjudication of individual cases. As a result, it is hard to offer guidance for determining compensation amounts, nor can it impose reasonable constraints on the arbitrary risks associated with discretionary compensation. Therefore, determining compensation amounts based on actual circumstances effectively grants judges broad discretion to determine compensation amounts within a wide range, which may affect the certainty of rulings in individual cases and the stability of the law. In practice, discretionary compensation that oscillates between case-specific justice and strict enforcement of the burden of proof has not gained widespread acceptance. From an economic perspective, judges determining compensation amounts fall under the third-party objective pricing model. If they strictly enforce the burden of proof to obtain such information, victims unable to prove the compensation amount would be unable to receive compensation, resulting in an outcome that is detrimental to personal information protection and litigation incentives. To avoid this outcome, judges do not require victims to provide an exact amount of loss. Instead, they comprehensively consider factors such as the degree of fault of the infringer, the specific act and manner of the infringement, and

17 *Id*.

the consequences and impacts caused in the individual case to determine the amount of damages, thereby seeking case-specific justice. Discretionary compensation is merely the best estimate based on the amount of loss proposed by the victim and a comprehensive consideration of various factors, lacking clear calculation criteria and detailed calculation processes. The discretionary process is difficult to universalize into precise reasoning.

Due to the widespread nature of damages that are difficult to quantify, judges frequently resort to discretionary compensation. The issue is that such discretionary compensation is 'highly detrimental to legal stability'.[18] In practice, there are discrepancies in the amounts awarded, with instances of 'no compensation' or 'minimal compensation' being prominent. Judges' discretionary awards cannot justify the differences caused by pursuing individual justice and may also reduce the informational value of the burden of proof in assessing damages. Specifically, the court can obtain better information on damages by requiring the plaintiff to bear a strict burden of proof, meaning that the plaintiff must provide evidence to prove the amount of damages. If the burden of proof is strictly enforced, victims may suffer unfair outcomes such as receiving no compensation or insufficient compensation. Judges may sacrifice the strictness of the burden of proof for the sake of fairness in individual cases, making discretionary or even speculative determinations of compensation amounts in the absence of sufficient information. Victims may receive better relief in individual cases. The potential issue is that the role of the burden of proof in determining compensation amounts may be diminished, reducing the incentive for plaintiffs in similar situations to provide rigorous evidence in the future.[19]

III. STATUTORY COMPENSATION AS A SUPPLEMENTARY SCHEME

The *Personal Information Protection Law* continues to use the method of calculating damages from the industrial age, which is no longer suitable for the social relationship structure of the information society. It is necessary to establish a supplementary scheme in addition to the scheme of determining damages based on losses or profits. Statutory compensation is a supplementary institutional mechanism to address this issue.

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18 Ran Keping, *Property Interests in Portrait Rights and Their Remedies*, 4 Tsinghua Law Journal 67, 76 (2015).

19 Tun-Jen Chiang, *supra* note 16, 94-99.

A. The Concept of Statutory Compensation

Statutory compensation is an institutional arrangement in which the amount or range of compensation is predetermined by legislation, also known as preset compensation or fixed compensation. As a method of calculating damages, the most distinctive feature of statutory compensation is that the amount of compensation is predetermined by law, which reduces the burden of proof regarding the amount of compensation and alleviates the strictness of evidence investigation.[20] Traditional tort law is based on the principle of compensation for damages, and the actual damages constitute the basis for quantifying the amount of compensation. In contrast, statutory compensation is directly stipulated by law, rather than strictly calculating the actual amount of losses based on actual damages.[21] Therefore, legislation often regards it as a supplementary rule to simplify the calculation of damages when actual losses or gains cannot be calculated.

The statutory compensation system originated in Anglo-American countries and is commonly applied in the field of intellectual property rights.[22] This system is gradually expanding to other areas, including personal information protection. For example, the *Illinois Biometric Privacy Act* in the United States and the *Personal Information Protection Act of South Korea* have adopted the statutory compensation system.

B. Justification for Statutory Compensation

There are three main reasons for introducing statutory compensation in the field of personal information protection.

1. Corrective Justice: Strengthening Relief for Victims. — The remedial function for victims is an important reason to support statutory compensation. This is because statutory compensation can mitigate the barriers posed by harm to obtaining compensation.

On the one hand, statutory compensation mitigates the strict requirements for damages. Article 69 of the *Personal Information Protection Law* establishes the requirements for damages. The requirements for damages

20 *See* Yang Tao, *Dilemmas and Discretionary Norms of Intellectual Property Rights Statutory Damages*, 3 Law Review 80, 82-83 (2024).

21 *See* Li Yongming, *Research on Statutory Compensation for Intellectual Property Rights Infringement*, 5 China Legal Science 176, 177 (2002).

22 *See* He Yudong, *The Alienation and Return of the Statutory Compensation System for Intellectual Property Rights Infringement*, 2 Tsinghua Law Journal 143, 144 (2020).

make it difficult for victims to obtain compensation, and most cases cannot be remedied or resolved because no identifiable damage has been caused.[23] The reason victims cannot obtain compensation is that judicial authorities interpret damage in a traditional and narrow manner, and their refusal to recognize intangible damage excludes many emerging types of damage from compensation. In judicial practice, the inability to prove damage is a key reason claims are not supported.[24] Damage resulting from the infringement of personal information rights is intangible and typically does not manifest in the form of immediate physical injury or property loss. Instead, it often takes the form of discrimination, identity theft or fraud, damage to reputation, loss of information confidentiality, unauthorized de-anonymization, and new forms of damage caused by negative emotions such as fear, anxiety, and unease.[25] Additionally, personal information rights infringements are often the result of large-scale infringements, with damages typically being minor. Cases involving direct and significant economic loss or physical injury or severe mental distress warranting compensation are rare. However, the cumulative impact of such dispersed and large-scale minor damages on society is significant.[26] According to traditional views, such minor damages should be excluded from the compensation system, and victims cannot obtain compensation.[27] To mitigate the strictness of the criteria for damage, some scholars both domestically and internationally suggest a flexible expansion of the concept of damage, proposing to recognize 'risk' as damage and provide compensation.[28] However, since risk is considered a subjective conjecture, even if 'risk-based damage' is acknowledged, it does not aid in calculating compensation amounts.

Statutory compensation that weakens the requirement to prove actual damage may become a potential solution for determining the amount of compensation, as it no longer uses damage as the basis for calculation.[29] In other words, even if there is no actual damage, the victim can still claim statutory damages. Some legislation even stipulates a statutory compensation

23 *See* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 3 Boston University Law Review 793 (2022).

24 *See* Ye Mingyi, *Protection of Personal Information by Tort Law*, 4 Chinese Journal of Law 83, 90 (2018).

25 Danielle Keats Citron & Daniel J. Solove, *supra* note 23.

26 *See* Shi Cheng, *Compensation Liability of Risk Damage Caused by Personal Information Breach*, 2 Modern Law Science 136 (2024).

27 *See* ZENG SHIXIONG, PRINCIPLES OF DAMAGE COMPENSATION LAW, at 140 (China University of Political Science and Law Press, 2001).

28 *See* Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 4 Texas Law Review 737 (2018).

29 *See* Wang Qian, Tan Tian & Zhu Xiang, *Intellectual Property Rights Infringement Damages: Issues and Reflections*, 5 Intellectual Property 34, 39 (2016).

system that does not require damage. For example, privacy regulations at the federal and state levels in the United States stipulate statutory compensation clauses that do not require damage.[30]

On the other hand, statutory compensation alleviates the burden of proof of damage. One of the key values of statutory compensation lies in reducing the burden of proof, lowering the standard of proof for the extent of damage from the general standard required for factual determinations to a lower standard of probability.[31] Compared to other calculation methods, a statutory compensation system serves as an alternative mechanism designed to address the challenges of proving damage, as they impose lower evidentiary requirements for damage and may not even require proof of the actual existence of damage. As noted by some scholars, statutory damages are set to approximate the possible actual damages, without the need to provide evidence of such damage or even the existence of actual damage.[32]

Statutory compensation is essentially a presumption of damage, and the amount of compensation may not necessarily fully compensate the actual damage suffered by the right holder. However, this presumption is of considerable value to the victim. In some cases, compensation based on actual damage may be more just, but the amount of compensation may not be easy to determine, and statutory damages may be better in such cases.[33] Although controversial, the introduction of statutory compensation is justified by the fact that it is difficult to quantify the damage caused by personal information rights infringement, i.e., to avoid the result of difficulty in proving actual damage that cannot be compensated. The weakening of the requirement for damage and the reduction of the burden of proof of damage have, to a certain extent, alleviated the difficulty in determining the amount of damages in cases where actual losses or gains are difficult to determine, making it easier for right holders to obtain compensation, provide relief to victims, and strengthen the protection of rights. Statutory compensation is an alternative to actual damages and profits and is intended to enable right holders to obtain compensation even in the face of the difficulty in the burden of proof.

2. Optimal Deterrence: Strengthening the Prevention of Infringement. — Another justification for statutory compensation stems from its deterrent effect, namely, its ability to curb the illegal acts that legislators intend to prevent. In the view of economists, rational maximizers will respond to the

30 Danielle Keats Citron & Daniel J. Solove, *supra* note 23, 797.

31 Yang Tao, *supra* note 20, 82.

32 *See* Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 3 University of Kansas Law Review 523 (2018).

33 *Id.*, 542.

costs of behavior, and legal liability is the 'price' in the world of legal rules. Compensation liability in tort law is the basic form of liability. Statutory compensation can transfer the losses suffered by the victim to the perpetrator who caused the losses, and the internalization of externalities sends a cost signal to potential infringers, thereby creating an incentive to refrain from illegal acts in advance. It is precisely for the purpose of deterrence that even if the plaintiff has suffered no damage or the defendant has no profit, the court will still award a certain amount of statutory compensation for deterrence.

Due to information asymmetry, technological dominance, service monopolies, and incentives driven by the commercial value of information, the processing of personal information gives rise to what economists refer to as negative externalities. The law allows for the objective valuation of damage incurred in involuntary transactions through third-party pricing (typically by a court), thereby compensating right holders for their losses.[34] The non-competitive and intangible nature of personal information and the covert nature of information processing make it difficult to detect infringements. 'Even if personal information is infringed upon hundreds or thousands of times, it may only be detected once.'[35] According to general legal principles, the lower the probability of compensation, the higher the actual compensation amount should be to offset the drawbacks of low probability. In judicial practice, even if the victim successfully claims compensation, the compensation received is disproportionate to the benefits obtained by the infringer. Failing to provide compensation that exceeds the actual losses of the plaintiff results in unjust enrichment of the wrongdoer.[36] Although the total damage caused by infringers is enormous, the probability of bearing liability for compensation is low, and not all of the negative externalities of infringers' behavior are internalized. Therefore, deterrence is insufficient, leading to inefficient relief.

Statutory compensation is compatible with the deterrent function of preventing infringement. The range of statutory compensation is broad and flexible, and is compatible with diverse policy objectives. The amount of statutory compensation may be close to fully compensating for damage,

34 *See* Deng Yuting & Li Liming, *A Study on the Deterrent Mechanism and Application of Rules for Punitive Damages in Patent Infringement Cases: From the Perspective of Legal Economics*, 8 Intellectual Property 46, 54 (2020).

35 Wang Cheng, *The Construction of Punitive Damages for Infringement of Sensitive Personal Information*, 4 ECUPL Journal 34, 40 (2024).

36 Sande Buhai, *supra* note 32, 542.

or close to preventing infringement, or applicable for other purposes.[37] The applicability of statutory compensation in personal information rights infringement cases is justified based on the concept of deterrence. Although the amount of statutory compensation is usually fixed within a limited range, it appears excessive in comparison with the possible damage caused by personal information rights infringement. Therefore, such compensation awards can achieve a certain degree of deterrence, thereby suppressing the behavior that legislators intend to reduce. In fact, even if the victim has not suffered any damage, the court may still award statutory compensation for deterrence purposes. Even in certain circumstances, excessive deterrence can be caused by the devastating impact of massive compensation.[38] The reduction of potential infringements due to deterrence avoids social losses, and the avoidance of losses is equivalent to an increase in social welfare.[39]

3. Procedural Value: Incentivizing Litigation and Improving the Efficiency of Adjudication. — The third type of rationale focuses on the procedural effects of statutory damages, regarding their impact on the behavior of potential or actual litigants and on the litigation process itself. The statutory compensation system has multiple procedural values.

Firstly, it strengthens the private enforcement of the *Personal Information Protection Law*. China's *Personal Information Protection Law* has established a hybrid enforcement mechanism combining public law enforcement and private litigation. In the modern digital environment, personal information rights infringement is dispersed, covert, and large-scale, leading to enormous costs in public law enforcement. Law enforcement resources are limited, and public law enforcement exhibits selectivity. The low probability of law enforcement may increase the likelihood of evading sanctions. To fill the gaps in public law enforcement, legislators have established private litigation rights to ensure the implementation of the law. Private litigation rights function like a 'private attorney general' in enforcing the law.[40] Private litigation is an economic activity involving interests and cost-benefit analysis. From an economic perspective, rational actors decide whether to engage in certain behaviors based on cost-benefit analysis. The expected net benefits of litigation serve as an important economic incentive

37 *See* Wang Minquan, *Calculation of Damages for Trademark Infringement: Focusing on Reasonable Royalties, Profits from Infringement, and Statutory Compensation*, 3 Yuedan Law Journal 135 (2018). *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 1 Missouri Law Review 103, 105 (2009).

38 *Id*.

39 *See* Dai Xin, *Supplementary Deterrence and 'Commutation upon Compensation'*, 3 Social Sciences in China 127, 129 (2010).

40 *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of Transunion v. Ramirez*, 101 Boston University Law Review 62, 70 (2021).

for victims to file lawsuits. As a monetary return, net benefits from litigation can encourage private law enforcement and alleviate the burden on regulatory agencies. Within the existing compensation and remedy framework of the *Personal Information Protection Law*, victims often find it time-consuming and difficult to prove actual damage, resulting in low and arduous litigation returns. The economic incentives for private litigation are insufficient. In order to provide relief to victims and encourage private enforcement of the law, a statutory compensation system can be adopted and constructed to supplement existing compensation remedies. In cases where the damage caused by personal information rights infringement is minor or even non-existent, the amount or range of statutory compensation is usually higher than the actual amount of damage, which means an increase in litigation gains and can encourage private law enforcement. This is because statutory damages almost always bring higher litigation returns to plaintiffs at a lower cost.[41] In fact, statutory damages reflect the legislator's encouragement for specific types of litigation. In order to incentivize 'private attorneys general' to file lawsuits to protect the public interest, even if the victim has not suffered actual losses, the infringer may be ordered to pay statutory compensation. In this sense, statutory compensation exists as a bounty system to promote private enforcement of the law.

Secondly, it reduces the burden of proof. In lawsuits for damages, courts sometimes lack sufficient information to determine the amount of compensation. To enable courts to obtain sufficient information on damages, it is a viable solution to impose the burden of proof on plaintiffs through institutional arrangements.[42] In other words, the burden of proof is an important institutional arrangement for courts to obtain information, but its effectiveness is significantly reduced in cases involving personal information rights infringement. On the one hand, the damage suffered by the victim is relatively minor, but the cost of providing information is high. Paying exorbitant costs for trivial compensation clearly defies rationality, and in some cases, there is even a significant risk of receiving no compensation at all due to failure to meet the evidentiary standards. The asymmetry between costs and benefits undermines the information-gathering function and legitimacy of the traditional burden of proof. After all, the premise of requiring one party to provide evidence of damages is that the cost of providing such evidence is relatively low, and the benefits of obtaining such evidence (facilitating a

41 Sande Buhai, *supra* note 32, 547.

42 Tun-Jen Chiang, *supra* note 16, 91.

more accurate ruling for damages) outweigh the costs of collecting it.[43] On the other hand, while the damage caused by individual instances of information infringement may be minor, the aggregated harm from large-scale and decentralized incidents can result in significant costs. Private litigation plays a role in preventing social losses and promoting overall social welfare. High costs of providing information will hinder the public interest protection function of private litigation. Legislators need to balance the social benefits brought by the requirement for information sufficiency with the costs incurred: whether to continue using traditional burden of proof rules, or to reduce the burden of proof to achieve rights remedies. This article argues that, in order to encourage individuals to seek legal remedies for individual damage and facilitate the realization of public interests, when there is a significant disparity between the amount of compensation and the cost of proof, lowering the burden of proof is more in line with the efficiency value of protecting personal information rights and interests. Statutory compensation is a mechanism for reducing the cost of evidence. Since statutory compensation is not highly correlated with actual damage, the victim has a lower obligation to prove actual damage, and the cost of evidence is also reduced accordingly. The provision of statutory damages in lieu of actual damage may reduce or eliminate the cost of proving actual damage and bring quick and convenient returns on litigation. It is worth noting that the award of statutory compensation may differ from the actual damages. However, compared with the unfair compensation brought about by the heavy burden of proof and the serious setback to the goal of 'protecting the rights and interests in personal information' under the *Personal Information Protection Law*, this may be a beneficial solution, even though it may to some extent undermine the existing evidence incentive mechanism.

Thirdly, it improves judicial efficiency. As the economic value of personal information continues to grow, personal information rights infringement has become frequent, easy to occur, and widespread. The increase in the number of cases inevitably leads to a rise in total social costs, rendering it imperative to prioritize the improvement of judicial efficiency. Personal information rights infringement damage inherently possesses significant uncertainty, making it difficult to quantify the monetary value of the harm caused. Therefore, it is challenging to determine compensation amounts at a reasonable social cost. As a third-party pricing mechanism, the information costs and difficulties for the court to determine compensation

43 *Id*., 133-134.

amounts are relatively high. In practice, victims often spend considerable time and effort gathering evidence but are unable to provide the court with sufficient information to precisely calculate the compensation amounts. The resulting 'price' is merely an approximate valuation of uncertain damage, and the sum of the private costs and public costs (judicial costs) of such valuation often exceeds the compensation that the victim ultimately receives. Given the relatively minor nature of personal information rights infringement damage, the high costs and low returns will lead rational victims to abandon this inefficient remedy, resulting in institutional failure. Legislators must construct more efficient alternative or supplementary remedies based on a balance between the social benefits of accurately calculating compensation and the costs incurred. Statutory compensation is seen as a simple, reasonable, and direct solution to the issue of potentially difficult and expensive litigation.[44] The amount of statutory compensation is no longer determined based on the actual damage suffered by the victim, but is calculated according to a predetermined amount set by the legislature. Although this may deviate from the actual damage, it is a system design that sacrifices compensatory value in return for an improvement in efficiency value.[45] For victims, statutory compensation relieves them of the heavy burden of proof, allowing them to obtain compensation at a lower private cost. For judges, the application of statutory compensation does not require the precise quantification of actual damage. They only need to determine the amount of compensation based on the amount specified by legislation and the actual circumstances of the case. The procedure is simple, the burden of reasoning is lighter, and the waste of judicial resources due to cumbersome procedures is avoided.

Statutory compensation is an institutional tool for pursuing judicial efficiency under market conditions. It ensures the economic efficiency of judicial adjudication while guaranteeing a certain degree of accuracy, thereby preventing litigation costs from becoming an obstacle to relief for victims.

IV. NORMATIVE STRUCTURE OF STATUTORY COMPENSATION

In terms of the normative structure of statutory compensation, legislators should promote the standardization of statutory compensation by designing provisions on the application order, compensation amounts, and scope limitations.

44 Sande Buhai, *supra* note 32, 524.

45 He Yudong, *supra* note 22, 145.

A. Subordinate Application and Prohibition of Out-of-Sequence Use

In the institutional design, the order of application between statutory compensation and existing compensation calculation rules under the *Personal Information Protection Law* should be clearly defined. In the legislative examples within the field of personal information protection, the order of application for statutory compensation and traditional compensation rules generally follows two models: parallel and sequential. The legislation in the United States often adopts a parallel model for the application of actual damages and statutory compensation. For instance, the *Illinois Biometric Information Privacy Act* allows victims to choose between statutory damages or actual damages, exemplifying the parallel model.[46] Similarly, *California's Consumer Privacy Act* stipulates a parallel model of determining the application of statutory damages or actual damages based on the larger amount, without general and strict rules on the order of application, leaving it to case-by-case discretion.[47] In China, legislative examples in the field of intellectual property, where statutory compensation has been established, predominantly adopt the sequential model.

Based on the above legislative examples, if statutory compensation is incorporated into legislation in the field of personal information, it is advisable to adopt a sequential approach in legislation to clarify the relationship between statutory compensation and other calculation methods. The parallel approach treats actual damages and statutory compensation as equivalent or determines which method to apply based on the amount, thereby strengthening rights remedies and personal information protection, which is more favorable to victims. However, this type of legislation is not suitable for us. First, in theory, due to the influence of the idea of damage compensation, the mainstream view in Chinese academia still positions damages as compensation, and the calculation of compensation amount based on actual damage is the prevailing view. Statutory compensation is not strictly calculated based on damage and therefore is regarded as an exception to the principle of damage compensation. When it is difficult or impossible for the parties to prove the actual amount of damages, it is necessary to regulate the upper and lower limits of the amount of compensation per person per case. In fact, in the United States, statutory compensation is also mainly regarded as a supplementary solution

46 *See* ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT, at https://www.ilga.gov/Legislation/ILCS/Articles?ActID=3004&ChapterID=5 (Last visited on October 14, 2025).

47 *See* CALIFORNIA CONSUMER PRIVACY ACT, at https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5 (Last visited on October 14, 2025).

when actual damage cannot be accurately calculated. Second, in areas where statutory compensation has already been adopted, sequential legislation is commonly used. For example, the *Copyright Law*, the *Trademark Law*, the *Patent Law*, and their accompanying judicial interpretations in China all place statutory compensation clauses after actual losses, surrender of profits, and court discretion, and add the limiting condition that they are only applicable when 'the other three calculation methods still cannot determine the amount of compensation'.[48] Adopting a parallel approach would conflict with the existing legal system, unnecessarily increasing the costs of institutional coordination and rule interpretation. Third, it prevents traditional rules of damages from being rendered meaningless in practice. The 'enormous discretionary power and sparse theoretical obligations'[49] of statutory compensation may reduce the applicability of existing methods of calculating compensation due to improved trial efficiency and low-risk misjudgments, resulting in an excessive risk of applying statutory compensation and ultimately deviating from the legal principle of damage compensation. Statutory compensation is not the optimal solution for calculating compensation, but a compromise solution when the amount of compensation cannot be calculated using existing methods. It should not be distorted into a universal and absolute solution. Therefore, if statutory compensation is adopted in the field of personal information protection in the future, strict restrictions should be placed on its order of application, placing it after the calculation methods for actual losses and benefits obtained. Specifically, if the actual losses of the victim or the amount of profits obtained from the infringement can be determined, the above calculation rules shall apply. In this case, there is no possibility of applying statutory compensation. When other calculation methods are exhausted and the actual losses of the right holder or the profits obtained by the infringer cannot be determined or are difficult to determine, it is necessary to apply statutory compensation. In principle, it should not be applied out of order.

B. Setting the Amount of Statutory Compensation

The amount of statutory compensation is derived from direct provisions by legislators. Determining the amount is key to the construction of the system.

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48 *See* Jiao Heping, *Legislative Choice for the Relationship Between Punitive Compensation and Statutory Compensation for Intellectual Property Rights*, 4 ECUPL Journal 138 (2020).

49 Jiang Ge, *Returning from Statutory Damages to Conventional Damages of Intellectual Property*, 2 Studies in Law and Business 192 (2019).

There are four main types of models for setting the amount of statutory compensation: range-based, fixed value-based, upper limit-based, and lower limit-based models. The range-based model refers to the range of compensation amounts specified by legislators, and courts are able to determine the compensation amounts within this range. This legislative model is relatively common in practice. For example, *California's Consumer Privacy Act* stipulates a compensation range of $100 to $750.[50] The fixed value-based model refers to a fixed amount of compensation stipulated by law. For example, the *Illinois Biometric Information Privacy Act* adopts a fixed numerical model with $1,000 per negligent violation and $5,000 per intentional or reckless violation.[51] This model is straightforward but lacks flexibility, as it overlooks the differences in the degree of subjective fault, the nature of infringement, and the severity of consequences, resulting in poor adaptability. The upper limit-based model stipulates an upper limit for the amount of compensation in the law, but does not specify a lower limit. This model is rarely used in practice. *South Korea's Personal Information Protection Act* adopts the upper limit-based model, with statutory compensation not exceeding 3 million won.[52] This model only stipulates an upper limit without specifying a lower limit, which may lead to excessively low compensation amounts and is not conducive to the protection of rights. The lower limit-based model stipulates a minimum amount of compensation but does not specify an upper limit. This approach has also received some support from scholars in China.[53] While the lower limit-based approach may be beneficial for victims to seek compensation and prevent the recurrence of unlawful acts, the absence of an upper limit on compensation amounts may result in excessive compensation due to the broad discretion of judges.

This article argues that if statutory compensation is adopted, its amount should be determined by a range-based legislative model. The lower limit is considered to be the core value of the statutory compensation system, as it ensures victims receive minimum compensation. However, the discretion of judges is broad. Damage caused by infringement of personal information rights is generally minor or even non-existent, and a ceiling may not be conducive to the minimum protection of victims. In order to achieve maximum relief and avoid the disadvantages of excessive judicial discretion,

50 *Supra* note 47.

51 *Supra* note 46.

52 *See* THE PERSONAL INFORMATION PROTECTION ACT OF SOUTH KOREA, at https://elaw.klri.re.kr/eng_service/lawView.do?hseq=53044&lang=ENG&utm_source=chatgpt.com (Last visited on October 14, 2025).

53 Yang Lixin, *supra* note 1.

the range of statutory compensation amounts should not be too broad, nor should the lower and upper limits be raised significantly to deviate seriously from the actual damage. Therefore, it is appropriate to set the compensation amount within a relatively narrow range.

The statutory compensation system, with upper and lower limits, remains insufficient to compensate for the infringement of personal information rights. A refined distinction should be made based on comprehensive consideration, so that different infringements bear different amounts of compensation. In comparative law, there are two main types of statutory compensation amounts for personal information rights infringement, namely the differentiated legislative model and the unified legislative model. The differentiated legislative model adopts diversified measures to determine compensation amounts based on the degree of subjective fault or other relevant factors. For example, the *Illinois Biometric Information Privacy Act* stipulates different amounts of compensation for each violation based on the subjective fault of the infringer, with statutory compensation for negligent behavior set at $1,000 and compensation for intentional or reckless behavior increased to $5,000.[54] The unified legislative model adopts a uniform and one-size-fits-all approach for setting compensation amounts, and does not differentiate the amount setting based on the degree of subjective fault or the type of information. A typical example is *South Korea's Personal Information Protection Act*, which stipulates that data subjects may seek compensation not exceeding the equivalent of 3 million won.[55] The differentiated legislative model is more preferable, as it sets differentiated amounts based on the specific nature of the infringement, providing different incentive structures to deter infringements and encourage litigation rights protection. It also balances the intensity of remedies, the prevention of frivolous lawsuits, and the control of judicial discretion.

In terms of the criteria for differentiation, it is recommended to adopt a binary classification strategy for setting thresholds between general personal information and sensitive personal information. There are three reasons for this. First, the *Personal Information Protection Law* establishes differentiated processing rules based on the typological distinction between general personal information and sensitive personal information, with stricter legal obligations for the processing of sensitive personal information than that of general personal information. From the logical framework of the

54 *Supra* note 46.

55 *Supra* note 52.

typological processing rules under the *Personal Information Protection Law*, the compensation amounts for damages resulting from the infringement of sensitive personal information and general personal information should naturally differ, thereby aligning with the intrinsic logic of the typological processing of personal information. Second, both practical departments and mainstream academic views hold that sensitive information is of critical importance for safeguarding the personal and property safety and dignity of natural persons and should be subject to stricter legal protection.[56] Article 28 of the *Personal Information Protection Law* singles out sensitive personal information for enhanced protection based on this logic. Establishing different compensation amounts based on the classification of personal information types, particularly by increasing the cost of infringing on sensitive personal information, is consistent with this approach. Third, subjective fault should not be used as a standard for distinguishing compensation amounts. In comparative law, the setting of compensation amounts based on fault — distinguishing between intentional and negligent acts — is inconsistent with the liability principle established by *China's Personal Information Protection Law* and exacerbates the conflict in the application of the *Civil Code* and the *Personal Information Protection Law*. Article 69 of *China's Personal Information Protection Law* establishes the presumption of fault liability of personal information processors rather than fault liability. It is more appropriate to set compensation amounts based on the classification of personal information than to set them based on intentional or negligent acts. More importantly, there is a disconnect between the principle of presumption of fault established by the *Personal Information Protection Law* and the principle of fault applied to the right to privacy of private information established in paragraph 3 of article 1034 of the *Civil Code*.[57] Setting the amount of statutory compensation based on subjective fault will further exacerbate the confusion in its application. Personal information processing activities are highly specialized and technical in nature. It is extremely difficult to strictly distinguish and prove the subjective mental state of intent or negligence. Setting compensation amounts based on this standard would lead to unnecessary disputes in litigation over whether the conduct is intentional or negligent.

56 *See* Cheng Xiao, *On the Rules for Handling Personal Information in China's Personal Information Protection Law*, 3 Tsinghua Law Journal 55, 71-73 (2021).

57 *See* Sun Peng & Yang Zaihui, *Identification of Fault Types in Personal Information Infringement and Its Impact on Tort Liability*, 1 Journal of Central South University (Social Sciences) 76, 77 (2024).

The compensation amount should not be set too low, as this could have a negative effect on the willingness to assert rights and the effectiveness of remedies. Of course, the compensation amounts should also not be set too high, as excessive compensation amounts may trigger frivolous litigation. In fact, during the drafting of *China's Personal Information Protection Law*, there was a proposal that each victim should be compensated between 500 and 1,000 yuan for each instance of infringement of personal information rights.[58] Due to concerns that massive compensation amounts would place an excessive burden on personal information processors, this proposal was ultimately not adopted. Although the amount proposed in this plan can be considered reasonable, it does not distinguish between different types of information when setting different amounts. Therefore, slight adjustments can be made in this regard. It is recommended that the statutory compensation limit for infringement of general personal information be set at 500-1,000 yuan per incident, and the compensation range for infringement of sensitive personal information be set at 1,000-1,500 yuan.

C. Limitation on the Total Amount of Compensation

Statutory compensation may lead to unreasonable 'sky-high compensation', especially when applied in cases of continuous infringement or involving a large number of victims. The risk of bankruptcy due to massive compensation payments is extremely high, which may render the infringer unable to continue market activities and hinder the development of the digital economy. It is precisely because of these concerns that the *Personal Information Protection Law* ultimately did not adopt the statutory compensation scheme. The above reasons are reasonable, but they are not sufficient to overturn the legitimacy of establishing statutory compensation. The key issue is how to achieve a balance between protecting rights and interests, ensuring freedom of action, and promoting the development of the digital economy, rather than a blanket rejection. This is because a simple rejection is a manifestation of insufficient attention to the significance of setting statutory limits and their specific implementation.[59]

It is undeniable that statutory compensation may result in huge damages that could bankrupt the infringer. In cases of continuous infringement

58 *See* Cheng Xiao & Zeng Jungang, *Liability for Damages of Personal Information Tort*, 2 Social Sciences in Yunnan 99, 106 (2023).

59 Li Dongyu, *supra* note 5, 145.

against specific victims, the compensation paid by the infringers is grossly disproportionate to the actual damage caused by their actions. For example, in *Cothron v. White Castle Systems*, the plaintiff *Cothron* claimed that from the effective date of the *Illinois Biometric Information Privacy Act* in 2008 until the lawsuit was filed in 2018, the defendant White Castle collected the plaintiff's fingerprints and disclosed them to third parties without obtaining prior appropriate consent, thereby violating the provisions of the Act. The plaintiff claimed damages for each instance of the defendant's violation. If each unauthorized fingerprint scan could establish statutory compensation separately, such frequent, long-term, and repeated infringements would result in massive compensation.[60] When there are a large number of victims, statutory compensation can also result in huge damages. For example, in the case of *Blanco v. CEC Entertainment Concepts L.P.*, the plaintiff alleged that the Chuck E. Cheese restaurant chain printed information on receipts that exceeded the last five digits of the card number or the expiration date. Intentional non-compliance with the *US Fair and Accurate Credit Transactions Act* would result in statutory compensation of $100 to $1,000. The case was filed as a class action lawsuit. Although the plaintiffs admitted that they had not actually suffered any losses, the 'cumulative effect' made the total statutory damages sufficient to have devastating consequences for the defendant.[61] This could indicate that giving a very small amount of compensation to each person may lead to bankruptcy for the company.[62]

However, the value of the statutory compensation system should not be denied entirely because of the risk of 'sky-high compensation'. Statutory compensation aims to avoid the most undesirable outcome, namely, victims are unable to obtain compensation because actual damage is difficult to prove. Although imperfect, it is the second-best option. Supporting statutory compensation does not mean that it can be applied without restriction. Scholars have proposed two principles to restrict the application of statutory compensation: (1) statutory compensation should not be applied when the actual damage can be determined or is easy to determine; (2) even if the actual damage cannot be calculated, statutory compensation should be as close to the actual damage as possible.[63] Statutory compensation close to actual damage means setting an upper limit on the total amount of statutory compensation to prevent it from deviating too much from the actual damage.

60 *See* Andrew Cook, *Illinois BIPA: A Litigation Nightmare for Employers*, 2 UIC Law Review 363, 378-380 (2024).

61 Sande Buhai, *supra* note 32, 557.

62 Daniel J. Solove & Danielle Keats Citron, *supra* note 28, 782.

63 *See* Oren Bracha & Talha Syed, *The Wrongs of Copyright's Statutory Damages*, 7 Texas Law Review 1219, 1232 (2020).

Setting an upper limit on the total amount of compensation may be a possible approach to prevent massive compensation.

For long-term and repetitive violations of the information rights of specific victims, the number of violations or the total amount of compensation can be limited. On the one hand, if a personal information processor violates the law and infringes on the information of a specific natural person, it can only be considered a single violation, and the victim can only request statutory compensation once when the actual damage cannot be calculated. Limiting the number of violations can prevent massive compensation claims based on statutory compensation for each violation. In fact, the state of Illinois in the United States revised the *Biometric Information Privacy Act* in response to the *Cothron v. White Castle Systems* case, adopting this approach by treating multiple infringements of the same biometric data of the same individual as a single violation and limiting compensation to a single claim, thereby reducing the compensation amounts involved in litigation.[64] However, continuous infringements of different types of information about the same individual cannot be resolved by reducing the number of violations. In such cases, the number of violations can be determined based on the different types of information infringed, but an upper limit should be set on the total amount of compensation. Only in this way can victims be prevented from deliberately delaying claims and unreasonably 'accumulating damages' in order to obtain massive compensation.[65] Of course, the above restrictions apply to statutory compensation. If the actual damage can be determined, compensation shall be based on the actual damage, and statutory compensation shall not apply.

In cases involving a large number of victims, statutory damages can easily lead to excessive deterrence. The experience in comparative law suggests setting an upper limit on the total amount of statutory compensation. For example, the *Fair Debt Collection Practices Act*, the *Electronic Fund Transfer Act*, and the *Migrant and Seasonal Agricultural Workers Protection Act* in the United States all stipulate caps on statutory damages in class action lawsuits.[66] It is important to note that if the upper limit for compensation is set too low, particularly below the actual damages, it may incentivize infringement.

64 *See* ILLINOIS ENACTS AMENDMENT TO BIOMETRIC INFORMATION PRIVACY ACT, at https://www.ilga.gov/Legislation/publicacts/view/103-0769 (Last visited on October 14, 2025).

65 Andrew Cook, *supra* note 60, 380.

66 Sande Buhai, *supra* note 32, 560.

D. Legalization of Discretionary Factors

The legalization of discretionary factors is also an important institutional arrangement for regulating the application of statutory compensation. This is conducive to transforming the determination of compensation amounts from ‘strong discretion’ to ‘weak discretion’, thereby reducing the risk of considerable differences in compensation amounts. Statutory compensation often adopts a range-based legislative model, whereby judges can exercise discretion between the maximum and minimum limits, which is largely dependent on the judge’s free conviction. The wider the range of statutory compensation, the greater the discretion in determining the amount of compensation. In order to avoid the arbitrariness and subjectivity of determining the amount of compensation, which undermines the stability of the law and affects the formation of general social expectations, the discretionary factors applicable to statutory compensation should be detailed as much as possible in the institutional arrangement, i.e., the legalization of discretionary factors. In general, the discretionary factors for statutory compensation for personal information rights infringement include factors related to the infringement, factors related to the results of the infringement, and factors related to the cost of protecting rights. Factors related to the infringement mainly involve the type of personal information infringed, the nature, method, scope, and duration of the infringement, and the nature and degree of fault. Factors related to the results of the infringement mainly involve actual losses and profits from the infringement. Factors related to the cost of protecting rights mainly involve reasonable expenses paid to stop the infringement and related expenses paid for litigation. The above discretionary factors should be clarified in the relevant laws on statutory compensation to enhance the certainty and persuasiveness of judges’ estimates of compensation amounts.

V. CONCLUSION

The compensation system for personal information rights infringement has not achieved the goal of curbing the growing momentum of personal information infringement. Optimizing the rules for calculating compensation amounts is the key to solving this problem. The determination of the compensation amount is not only a matter of quantifying the damage, but also an art that involves rights relief, litigation efficiency, and even the weighing of substantive interests. Statutory compensation can provide remedies to victims, prevent potential infringements, and improve the efficiency of litigation. It is a possible solution for calculating the compensation amount. Within the framework of statutory compensation, the order of application should be determined, the amount of compensation should be reasonably defined, and the legalization of discretionary factors should be promoted to enhance the rationality, predictability, and operability of damages calculation.

(Edited by Gong Li)

个人信息权益侵害的法定赔偿研究

内容提要 我国《个人信息保护法》第69条规定了个人信息权益侵害损害赔偿制度，但并未完全解决损害的量化难题。个人信息权益侵害后果的无形性和不确定性使赔偿额的计算无法在既有法律框架展开，这导致受害人赔偿请求权难以实现、个人信息侵权违法难以遏制、法官恣意裁判的风险较大等问题。法定赔偿在受害人救济、违法行为阻却以及提升诉讼效率方面具有独特价值，可作为赔偿计算的补充性方案。法定赔偿制度的构造应明确适用顺位并禁止越序适用，采用个人信息类型化基础上的差异化赔偿额设定模式，针对不同场景设定防止巨额赔偿的机制，同时应对赔偿的酌定因素予以明确规定，以此提升法定赔偿适用实效。