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## 主 論 文 の 要 旨

論文題目

ENHANCING CONSUMER PROTECTION WITH A FOCUS ON THE ENFORCEMENT OF THE PRIVATE RIGHTS OF CONSUMERS: THE FAKE-HUNTING LAWSUITS DILEMMA IN CHINA

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## 論 文 内 容 の 要 旨

### 1. Objectives of this study

This study attempts to prove that a change of focus from market regulation to rights enforcement is needed to enhance consumer protection in China. This change of focus requires legal improvement at different aspects of enforcement. The conventional perspective viewing enforcement of consumer rights is insufficient. This study aims to shed light on how to improve enforcement strategy of consumer protection in China. This study has objectives at three levels.

First, this study attempts to demonstrate insufficiencies with current enforcement strategy of consumer protection in China. This study is going to investigate the profound reasons behind the fake-hunter problem. With materials of fake-hunter problem, this study will further demonstrate what have been impeding the development of consumer protection in China.

Second, this study aims to illustrate the necessity to focus on the private rights of consumers in China in order to enhance consumer protection. There has been a long-time

debate around the characterization of consumer protection law, which led private law approach in the enforcement of consumer rights to be insufficient. Legal mechanisms on consumer protection in China reflect the essence of market regulation; however, legal improvement should be made with the focus on rights protection.

In addition, this study conducts a case study of China, which is a jurisdiction deeply affected by the socialist law of the former Soviet Union. The problems China is confronting now are largely associated with the influence of the former Soviet Union law and the unique path-dependency of China. This piece of analysis may provide experience and prospects in terms of legal transplantation and institution development for other jurisdictions with similar factors.

## 2. Problem statement

The first statute on consumer protection was enacted in 1993 (effective from January 1, 1994), the *PRC Law on Protection of Consumer Rights and Interests*. In order to empower consumers to redress their damages, and also deter business operators, a punitive damage system was introduced into this law.<sup>1</sup> In this sense the punitive damage system can be private enforcement of consumer law; in other words, it was a system that encouraged each consumer to become the enforcer of the law through financial motivation.<sup>2</sup> However, in the following years after the law came into force, the consumer problems still remained serious. With the purpose to enhance consumer protection through deterring business operators, the *PRC Law on Protection of Consumer Rights and Interests* and the *PRC Food Safety Law* introduced punitive damage, and the amendment of *the PRC Law on Protection of*

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<sup>1</sup> Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版)[Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-261.

<sup>2</sup> Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 211-212.

*Consumer Rights and Interests* increased the maximum of punitive damage in 2013.<sup>3</sup>

Whilst the malpractices of businesses had not been put under control, new problems occurred. Taking advantage of the punitive damage provision, some people started to look for counterfeit products and sue for profit, and they were called fake-hunters (da-jia-ren).<sup>4</sup> Since the name of first person who won a fake-hunting case was Hai Wang, the resulting widespread increase of fake-hunters was named the “Wanghai phenomenon.”<sup>5</sup>

On one hand, advocates argue that punitive damage is a powerful tool to regulate fakes and counterfeits.<sup>6</sup> In order to stop the malpractice of the counterfeits suppliers, consumers should be encouraged to fight against them through civil lawsuits; therefore, punitive damage is not only a punishment to the counterfeit suppliers, but also a reward to consumers.<sup>7</sup> In this sense, despite the fact that plaintiffs may have already known that the products being supplied are counterfeits, they should not be denied the right to claim for punitive damages.<sup>8</sup>

On the other hand, opponents against awarding punitive damage to fake-hunters focus on fairness and justice in fake-hunter cases. To put it concretely, although the *PRC Law on Protection of Consumer Rights and Interests* provided punitive damage for

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<sup>3</sup> Lixin Yang (杨立新), 我国消费者保护惩罚性赔偿的新发展 [The New Development of Punitive Damages for Consumer Protection in China], *The Jurist* 法学家 2 (2014): 78-90.

<sup>4</sup> Feng Xu (徐风), and Shumin Zhu (朱树民), 职业打假人: 钢丝上的舞者 [Professional Da-Jia-Ren (fake-hunter): the Dancer on the String], *Democracy and Legal System* 民主与法制 14 (2007): 12-14.

<sup>5</sup> Lixin Yang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science* 河北法学 5 (1997): 1-9.

<sup>6</sup> Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13.

<sup>7</sup> *Ibid.* See also Junhai Liu (刘俊海), 论消费者权益保护理念的升华与制度创新——以我国《消费者权益保护法》修改为中心 [Upgrading of the Philosophy of Consumer Protection and the Systematic Innovation ——Focusing on the Amendment of Consumer Protection Law], *Law Science Magazine* 法学杂志 5 (2013): 27-38.

<sup>8</sup> Lixin Yang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science* 河北法学 5 (1997): 1-9.

consumers, this law was not to encourage them to bring lawsuits to the court for profits.<sup>9</sup> Considering consumers have weaker status in bargaining against the business operators, the consumer protection law introduced punitive damages to empower consumers in redressing their damages.<sup>10</sup> If punitive damage becomes a mechanism largely benefiting fake-hunters, and even nurturing a fake-hunting industry, then it fails to realize the original institutional purpose.<sup>11</sup>

The problem with regards to the conflicts around fake-hunters is not only limited to how the law should be interpreted, but also concerning which direction consumer protection should be further enhanced. Specifically, whether punitive damage system can be considered effective in regulating the business operators and helpful for consumers to enforce their lawful rights require more consideration.

### 3. Structure of this dissertation

Despite development in legislation on consumer protection in China, problems remain in the enforcement of consumer rights. To shed light on how to improve enforcement strategy of consumer protection in China, this study is going to investigate the profound reasons behind the phenomenon of fake-hunting. This dissertation consists of four main parts: introduction (Chapter I), analysis on the enforcement of consumer protection in China (Part I), proposals for China to enhance consumer protection (Part II) and the conclusion (Chapter VIII).

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<sup>9</sup> Heng Deng (邓恒), 探求惩罚性赔偿的实质意义 审视职业打假人的法律地位 [On Punitive Damage and Professional Fake-Hunters], *People's Court Daily* 人民法院报, published on 12 April 2017, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

<sup>10</sup> Mingrui Guo (郭明瑞), “知假买假”受消费者权益保护法保护吗?——兼论消费者权益保护法的适用范围 [Should Intentional Counterfeit Purchase Be Protected by Consumer Law?], *Contemporary Law Review* 当代法学 6 (2015): 68-73.

<sup>11</sup> Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58.

Part I includes Chapter II, Chapter III and Chapter IV, covering general analysis of consumer enforcement problems in China centered on fake-hunting lawsuits dilemma. In other words, while the legislative purpose of punitive damages in consumer law was to punish the business operators and prevent similar incidents from occurring again, both the administrative and judicial enforcement agencies started to challenge the properness of supporting the claims of fake-hunters in the face of fake-hunting lawsuits. Part II includes Chapter V, Chapter VI and Chapter VII. Chapters in Part II will make proposals at three principal aspects concerning enforcement problem in China.

Chapter II addresses the problem of fake-hunting lawsuits dilemma. The fake-hunting lawsuits dilemma represents the gap between legislation and its enforcement on consumer protection. To put it more concretely, the legislative purpose of punitive damage in consumer law has been facing challenges from both administrative and judicial enforcement agencies, with regards to the increasing fake-hunting lawsuits. What stays behind this gap is the divergence in viewing consumer protection and consumer rights. Chapter II points out that the problems arose from fake-hunting lawsuits dilemma are at two levels: (1) whether the fake-hunters, who buy fakes intentionally for profit, should be awarded punitive damage; and (2) whether punitive damage is an eligible instrument to enforce consumer protection.

Chapter III demonstrates that behind the divergent understanding of the nature of punitive damages and consumer rights is the tension between economic law and civil law. Moreover, the split understanding of consumer rights as collective rights or private rights also has resulted in problems with regards to enforcement of consumer protection in China. The legislative purpose of punitive damage under consumer law was mainly from the perspective of protecting the collective rights of consumers, taking punitive damage as a legal instrument for a regulatory purpose. Meanwhile, the focus on private rights in

consumer protection is not addressed enough.

Chapter IV investigates how to rectify the problem resulting from the insufficient focus on the private rights of consumers. Chapter IV aims to find China a model to perceive its own problem through a comparative study with Japan. Japan confronted the similar problem of insufficiency in consumer redress, yet Japan took a different approach to enhance the enforcement of private rights of consumers. The comparative analysis shows that for China, it is necessary to rethink the purpose and function of punitive damage in consumer protection, in particular with regards to fake-hunting lawsuits.

Part II consists of three Chapters. Chapter V conducts a review of purpose and function of punitive damage in China. China introduced punitive damage in 1993 with the purpose of consumer protection through market regulation. However, problems appeared around applying punitive damage as a regulatory instrument. With a focus on private rights of consumers, it is more eligible to consider punitive damage as remedial enforcement of consumer protection in China. Based on the review of punitive damage system in China in Chapter 5, Chapter 6 and Chapter 7 are concerning how to improve the current system at interpretation and institution levels to enhance the enforcement of private rights of consumers.

Chapter VI first deals with the inconsistency in the application of punitive damage based on fraudulent acts under the Consumer Protection Law. For long time, it has been under debate whether the court should order punitive damages in fake-hunting lawsuits based on fraudulent acts under the Consumer Protection Law. After analyzing the previous discussions, this chapter demonstrates the nature of punitive damage liability. Moreover, from the perspective of redressing the private rights of consumers, punitive damages should not be ordered to fake-hunters. In addition, in order to protect consumers from fraudulent

advertising and mislabeling, to encourage consumer organizations to bring injunctive lawsuits can be an alternative to punitive damage through fake-hunters.

Whilst Chapter VI principally aims at solving the enforcement inconsistency at interpretation level, Chapter VII is going to address the private rights of consumers at institution level. In China, enforcement of consumer rights showed a titling emphasis on public interests of consumers. However, the private interests of consumers are not addressed enough. This chapter takes the latest cases that approved punitive damage in consumer public interests litigation, and demonstrates the problems with current collective redress mechanisms. To solve the problems and enhance the enforcement of consumer rights, China should develop compensatory group litigation led by consumer organizations.

Chapter VIII is the concluding chapter. Based on an overview of the inconsistency and imbalance in China's enforcement strategy of consumer protection, it concludes that both the notion and legal system addressing the private rights of consumers should be established. Furthermore, China needs to revise the previous approach from emphasizing collective rights of consumers through market regulation. Rather, legal improvements need to be made to enhance consumer protection with focus on enforcement of private rights of consumers.

#### **4. Main findings of this study**

The modernization of legal system has been a crucial issue in China. However, it is such a big topic to be discussed in fragmented studies of various fields. First of all, this study aims to approaching the problems, practical and theoretical, focusing on the enforcement dilemma caused by fake-hunters under the present law in China. Based on literature review and case analysis, this study correlated the civil-economic law gap with the

enforcement problem in Chinese context. From a comparative analysis, it concludes that the focuses on private rights of the consumers and the relevant legal system that support consumers to enforce their rights need to be established in China.

#### **4.1 Fake-hunting lawsuits dilemma represented inconsistency in consumer protection strategy of China**

The “Wanghai phenomenon,” i.e. fake-hunting lawsuits dilemma, is very unique in China and also a hot issue in consumer rhetoric for decades. The occurrence of this phenomenon was along with the introduction of punitive damage in the “Consumer Protection Law.” The widespread of the conflicts has been resulted from the gap in legal methodology with regards to consume protection. It proved that fake-hunting lawsuits dilemma is not merely the problem of interpretation.<sup>12</sup> Efforts made to justify or deny the legitimacy of fake-hunting lawsuits from the perspective of whether fake-hunters are consumers are seldom successful in persuading the other side. Up to the present, there remains no consensus with regards to this dilemma.

Nevertheless, the fake-hunting lawsuits dilemma raised the question about what caused the fundamental divergence, and where consumer protection should go forward. From the gap between legislation and enforcement, it is to be noted that there is a lacking focus on the private rights of consumers from many advocates of fake-hunters. As a result, regulators put largely more focus on the market dimension of consumer protection, rather than on the disadvantages of individual consumers in transaction and redress. Moreover, behind this gap is the decades-long tension between economic law approach and civil law approach of consumer protection. This tension has its historical roots in the path-dependency of legal

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<sup>12</sup> See *supra* discussion in Section 2.4.



development of contemporary China.

The neighboring country Japan provided a model for China to rethink about the possibility of legal institution design for consumer protection. Clarification between public and private law reduces the inconsistencies at interpretation level; collaboration among acting agencies contributes to collective enforcement. Based on consumer transaction and focused on private rights, consumer contract system constitutes the foundation to branch the mechanisms of consumer protection and group litigation greatly contributed to the empowerment of consumers in redress. In China, the focus on private rights of consumers should be revived to enhance consumer protection, and the purpose of punitive damage system in consumer law requires reconsideration. Moreover, legal improvement also needs to be made to support consumers to enforce their rights.

#### **4.2 Resolve inconsistency and imbalance in present enforcement mechanisms**

Addressing the significance of private rights of consumers requires specific institution improvement. Rethinking the conventional wisdom, legal improvements should be made to rectify the disadvantages of consumers. In response to the inconsistencies and imbalance in present enforcement mechanisms, three particular discussions were conducted, with focus on how to protect consumer interests in transaction and support consumers in redress.

First, China should apply punitive damage in the direction of remedial enforcement. Different from the common law traditions, China is in general civil law jurisdiction, though hybrid in terms of mechanisms. Punitive damage was first introduced in 1993 with the purpose of consumer protection through market regulation. Despite resistance at the early period, punitive damage has been commonly considered as a *status quo* in the

field of consumer protection. Meanwhile, it proved that punitive damage system in current legislation is not to be considered effective as a regulatory instrument. Rather, the eligible direction would be applying punitive damage mainly in terms of civil remedy to litigation cost and time loss, and therefore motivate and empower consumers to enforce their private rights. In addition, considering the compatibility between punitive damage and the judicial system in China, it is not necessarily feasible for introducing large-amount punitive damages to China and to realize deterrence is more workable through public enforcement.

Second, to clarify interpretation of “fraudulent act” with a focus on private rights of consumers is necessary. To solve the inconsistencies in legal application requires clarification of interpretation. Current theories demonstrate great diversities regarding what “fraudulent act” in the PRC Consumer Protection Law should cover and how punitive damages should be awarded subsequently. Focusing on the private rights of consumers, legal improvements should be made at different aspects. Above all, it should be clarified that the liability of punitive damages based on “fraudulent acts” under Article 55 of the Consumer Protection Law should be deemed civil liability of tort. Moreover, from a perspective of private rights of consumers, fake-hunters should not be awarded punitive damages as their rights are not violated. In addition, with regards to the regulation of fraudulent advertising, including misleading information, fake-hunters are too random and profit driven to be effective. In this situation, injunctions by consumer organization can be a more promising alternative.

Thirdly, China needs to address the private rights of consumers in collective redress mechanism. With fake-hunting lawsuits being restricted, another approach of expand the application of punitive damage in public interest litigation can be noted as recent development. However, the present judgements that approved punitive damages in public

interest civil proceedings contain a lot of problems, including the ambivalence regarding the scope of claims, *res judicata* and whether to refund the consumer. What has been neglected is the protection of the access to redress of individual consumers. In this sense, consumer association should be cautious to claim for punitive damages with an automatic standing in order not to infringe the private claims of consumers.

On the other hand, to protect “public interests” is not the only possible function of consumer associations. Rather, associations should be encouraged to enhance enforcement of consumers’ rights through compensatory collective redress. In addition, in case the civil punitive damages are to be further used in public interest proceedings, to establish recovery system is more helpful to consumers compared with disgorgement. Overall, the private rights of consumers should be addressed in a more sufficient manner.

#### **4.3 Enhance consumer protection with focus on private rights of consumers**

To enhance consumer protection, it requires the notion and system focusing on private rights of consumers, different from conventional ideas emphasizing the public interest or collective rights of consumers. Punishment, in particular through punitive damage, is not the ultimate purpose but only one of the means of consumer protection. It is necessary for China to change the focus from regulating the market order to supporting consumers to enforce their rights.

Above all, to retrieve the focus on private rights of consumers is needed to protect consumer interests in transaction. From the analysis in this study, it can be observed that the consumer protection in China has been focused on market regulation. At the same time, private law approach that may support consumer to redress their rights is not well emphasized. As a result, inconsistencies and imbalances occurred in the enforcement, which

is represented by the fake-hunting lawsuits dilemma. To rectify this this situation, “consumer in transaction” or “consumer in contract” needs to be noted through the establishment of relative legal institution with a private-rights focus.

Furthermore, the application of punitive damage should be adjusted as remedy of litigation cost to empower consumers in individual redress. While punitive damage was introduced in China against particular social background with a regulatory purpose, it is not sufficient for market purification. In the context of China, the positive effects of punitive damages in empowering consumer can be maintained. Based on clarification of applicable conditions, this system can be expected to motivate and support consumers in redress, performing a compensatory function as civil remedy.

Subsequently, consumer group litigation requires further promotion on both injunction and compensation. Injunctive consumer group litigation can help rectify consumers’ disadvantages in the market, which stands for the collective interests of consumers in general. Meanwhile, compensatory group litigation can support consumers in collective redress, which empowers individual consumers against difficulties and costs in lawsuits.

After all, punitive damage is not a *panacea*, but a *bandage* that tentatively fills the gap left by insufficiency of both public enforcement and private enforcement of consumer law. To enhance consumer protection, legal institution on consumer protection should be improved in a way that easily accessible to every consumer and effective in the enforcement of their lawful rights. It might be more appropriate to consider the fake-hunters as “a product of the time” as well. With the development of public regulation and private redress, the space for fake-hunter will be more and more limited. Nevertheless, how to protect consumer rights and interests in transaction (also in market and in redress) will continue to

be a significant issue in the future.

## **5. Remaining issues**

In the end, there are some remaining issues which are not encompassed by this paper, yet require further exploration in the future. The key issues include but not limited to: (1) consumer contract theory in general; (2) consumer education; (3) interplay between public and private enforcement; (4) counterfeit governance; and (5) disciplinary development in consumer law field.

The first issue concerning the enforcement of consumer private rights will be consumer contract theory in general. Consumer contract system is considered as the foundation for developing theories to protect consumers in transaction. This paper is aimed at illustrating a general picture of enforcement strategy on consumer protection in China. While this study was not able to extend the discussion to details of theories around consumer contract, this issue deserves comprehensive analysis to enhance the protection of consumers in transaction.

Second issue is consumer education. With the focus of supporting consumers to enforce their rights, it is of indispensable importance to inform the consumers about their lawful rights and “weapons” for them. Despite consumers in China enjoy the “right for education,” there is not special law on consumer education in China up to the present. It has been argued that China also needs to learn from other jurisdictions and make improvement at institution level in order to enhance consumer education.<sup>13</sup>

Third issue is concerning the interplay between public and private enforcement.

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<sup>13</sup> Qianqian Cheng (程倩倩), “A Study on Legal Promotion Mechanism of Consumers’ Education,” Master degree thesis of Southwest University of Political Science and Law, published online at [www.cnki.cn](http://www.cnki.cn) as No.11 (2017), accessed July 19., 2018.

This approach has been conducted in many previous studies.<sup>14</sup> The collaboration between administrative and judicial enforcement of law has been an important topic, not only in the field of consumer protection but also in other legal fields.<sup>15</sup> However, in China, studies applying such approach remain few. In this sense, it will be eligible if more efforts might be allocated to this topic.

Fourth issue should be counterfeit governance. In history, consumer protection in China has been focused on how to protect consumers from the harms of all kinds of “fakes.” With economic development, the scope of “fakes” also expanded from mainly defected products to all kinds of “fraudulent acts.” However, the clarified standards for legal application, e.g. punitive damages, become lagged-behind, and therefore fake-hunting lawsuits dilemma occurred. This study mainly focused on how to rectify the problems with enforcement strategy of consumer protection, including how to clarify the applicable conditions at interpretation level. Meanwhile, taking counterfeit governance as a legal or social problem, more comprehensive analysis is necessary.

Fifth issue is with regards to the disciplinary development in consumer law field. As investigated in the paper, the consumer law rhetoric in China has been under the influence of the department theory of law, yet in an undesirable way. In the future, it is expected that studies in consumer law field may be freed from constrains of department theory of law and focus on more crucial issues regarding consumer rights and interest.

At last but not least, this study only provided a small piece of analysis on the consumer protection in China. Due to the limit of time and knowledge, this study might still be insufficient at different aspects. Nevertheless, it will be the greatest pleasure for the

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<sup>14</sup> Fabrizio Gafaggi and Hans-W. Micklitz, “Introduction,” in *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement*, Fabrizio Gafaggi and Hans-W. Micklitz (eds.), (Intersentia, 2009), 1-11.

<sup>15</sup> For instance, anti-trust law, competition law, environmental law, and the forth.

writer if this piece of analysis might provide a little information for those who have interests in Chinese law or consumer protection in China.