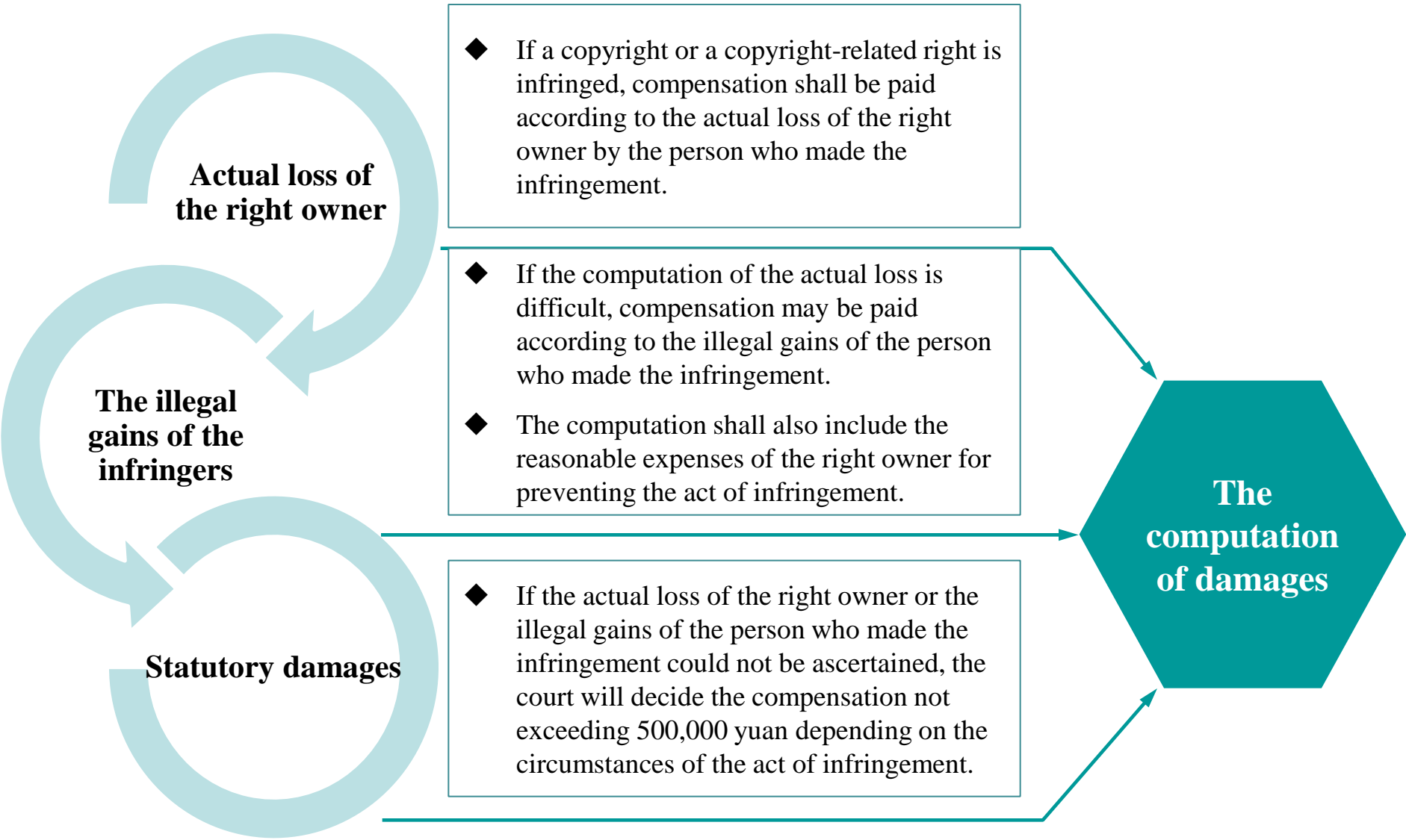


The Contast of Computation mode on Damages For the IPR Infringement

**Weng Cailin
Tenwen&Eternal
Law Firm**

1. The Computation Mode in China Copyright Law



2. The Computation Mode in the US Copyright Law Varies .

All creative works are automatically protected by the US Copyright Law, but registered works are afforded much greater protection.

Statutory Damages

- ◆ Statutory Damages are easier to calculate and will often be higher than Actual Damages.
- ◆ The amount of damages is set by law, regardless of the actual damages suffered by the plaintiff.
- ◆ They usually range from \$750-\$30,000 per infringement, though awards can go as low as \$200 per infringement for ‘innocent infringers’ and up to \$150,000 per infringement when the court determines that the defendant acted ‘willfully’.
- ◆ It is at the court’s discretion how much to award within the defined damages range.

Actual Damages

- ◆ Actual Damages is the quantifiable monetary loss the plaintiff has suffered, or the profit the infringer has gained, from infringing your copyrights. There are 2 general ways .
- ◆ One method involves seeing what the plaintiff’s average income from their copyrighted work was before and after the infringement and compare it to the income from when their work was being infringed. The difference is the Actual Damages.
- ◆ The other method looks at how many instances of infringement took place and awards damages based on what the copyright owner would have received had she sold or licensed the work.

3. The Computation Mode in the EU Copyright Law Varies.

The computation of damages varies according to whether the infringer who engaged in an infringing activity knowingly, or with reasonable grounds to know.

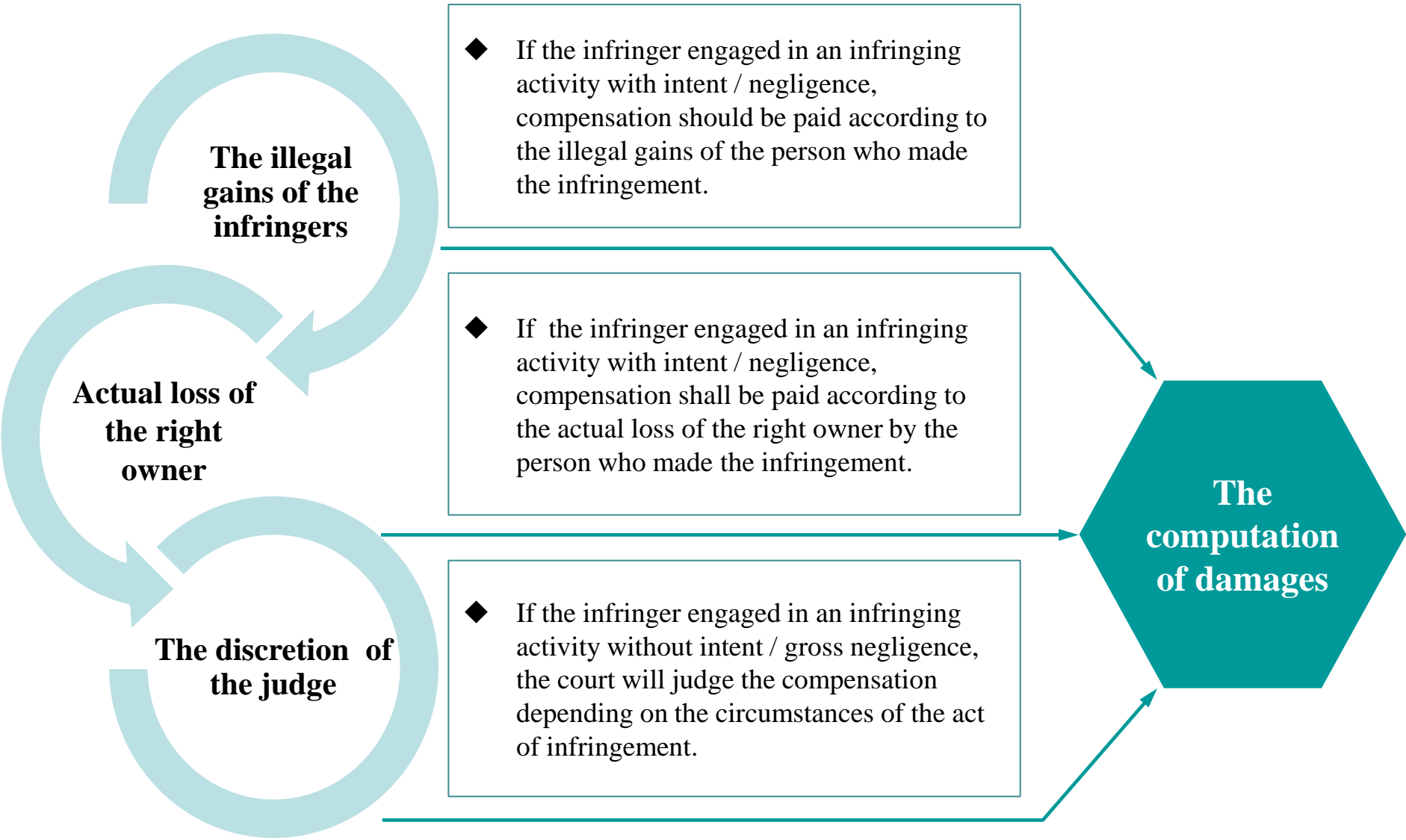
Knowingly / with Reasonable Grounds to Know

- ◆ The infringer who engaged in an infringing activity knowingly, or with reasonable grounds to know, should pay the rightholder damages appropriate to the actual prejudice suffered as a result of the infringement.
- ◆ The damages should take into account all appropriate aspects, such as the negative economic consequences, including lost profits, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement.
- ◆ In appropriate cases, the damages are set as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

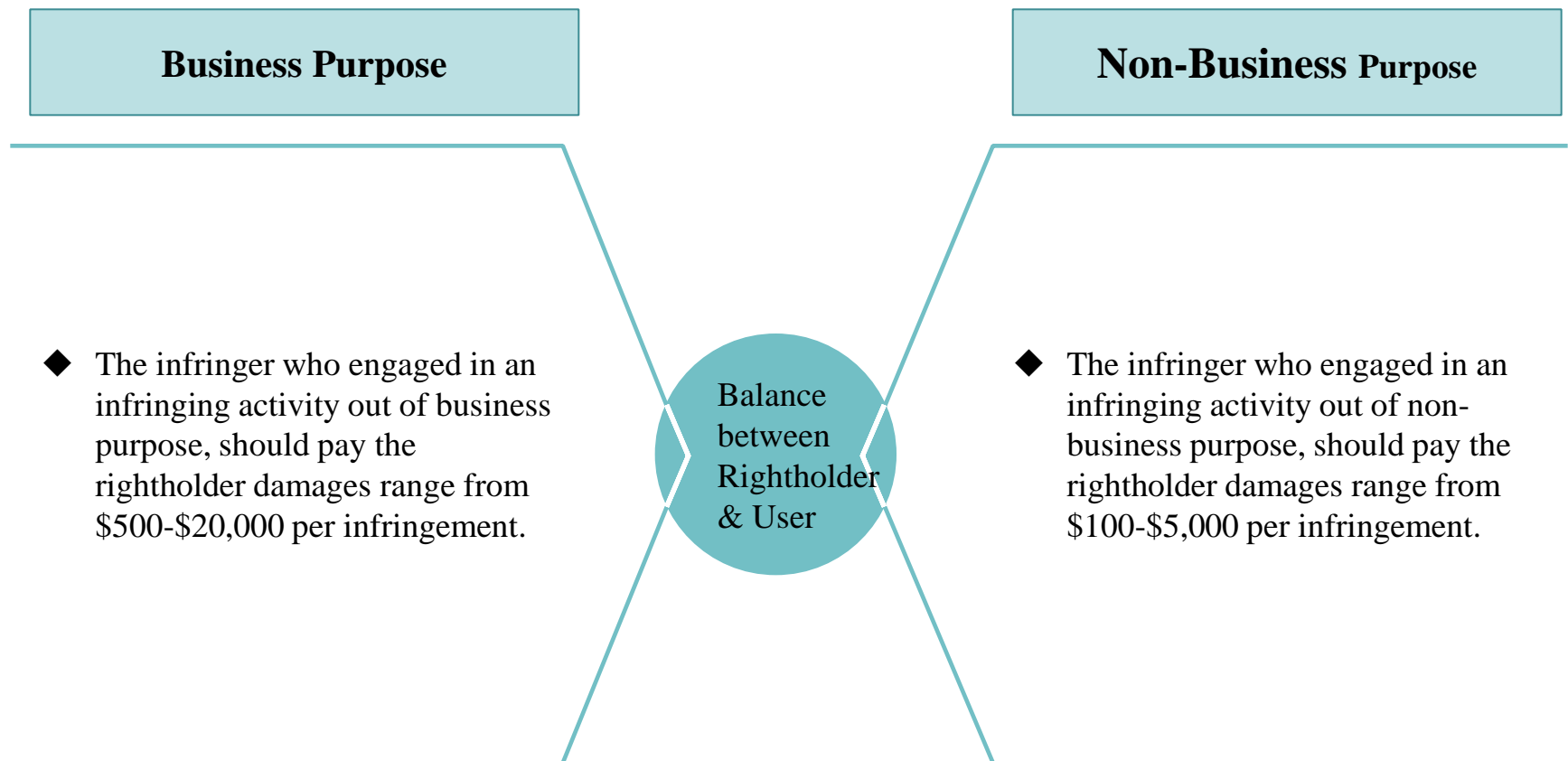
Not Knowingly

- ◆ Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

4. The Computation Mode in Japan Copyright Law



5. The Computation Mode in the Canada Copyright Law Varies.



6. The Computation Mode in the Germany Copyright Law.

The court will judge the compensation depending on the transfer fee, license fee or other revenue standards.

- ◆ The competent authorities usually have their own standards of transfer fee and license fee.
- ◆ The parties sometimes have economic communications, so they probably have standards of transfer fee and license fee.
- ◆ In the same industry, there are standards of transfer fee and license fee.

These standards are objective, and are easy to use in the cases.

So the transfer fee, license fee and other revenue standards are generally used as the damages.

7. Several issues to discuss

- >The difficulties of computation on plaintiff's loss
 - Need to prove the decrease of market share caused by infringement, or
 - Need to prove the drop of price caused by the infringement, or
 - Need to prove the exactly same situation with that of legal license
- >The difficulties of computation on defendant's profit
 - The defendant is not willing to disclose his financial records to the court
 - The gains and costs are always difficult to calculate
 - It is difficult to determine whether the profit is generated by infringement
- >The practice of statutory damages in China
 - Most of the verdicts in China deciding damages between 100 and 5000 US dollars during the past years, registration not required.
 - Judges are inclined to use statutory damages in most of the cases.
 - Judges would consider more about the balance between copyright owner and the infringers.
 - Now the statutory damages decided is dramatically going up.

8. Suggestions

- > Combination of statutory damages and other damages Computation
- > Deletion of top limits of statutory damages
- > Registration of copyright encouraged but not compulsory
- > License fees as an important basis of damages computation but same situation not required.

9.Cases to share

A famous Chinese TV Station's new media branch vs a popular App on unauthorized communication of a well-known sports game

Damages decided by the court more than US\$700,000

Much higher than the top of statutory damages

Not exactly based on plaintiff's loss or defendant's profit

Represented by Weng Cailin, Tenwen&Eternal Law Firm.

10. About Us

- > Tenwen&Eternal Lawfirm, established in 2003 at Shanghai
- > More than 40 lawyers, half of whom specializing in copyright law
- > One of the earliest lawfirm focusing on copyright law in China
- > Representing many prestigious clients such as CCTV, TVB, Xinhua News Agency, IFPI etc.
- > Having one of the biggest legal team in China handling anti-piracy cases
- > Most influential copyright lawyers in All-China Lawyers' Association
- > Landmark cases represented by Tenwen&Eternal

Contact Information:

Weng Cailin

Senior Partner of Tenwen&Eternal Law Firm

email: wengcailin@126.com

Tel: 008613701852510

Thank You !