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# ELECTRONIC EVIDENCE IN INTELLECTUAL PROPERTY LITIGATION: FROM THE CHINESE PERSPECTIVE

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Since the promulgation of the newly amended Civil Procedure Law of China in 2013,<sup>1</sup> the legal position of electronic evidence has been clarified as one form of direct evidence. This article provides an analysis of electronic evidence in intellectual property litigation from the Chinese perspective. In particular, three significant elements of electronic evidence will be discussed. They are the legal position, the admissibility of evidence and the probative force of electronic evidence. Since the legal position of electronic evidence has been clarified in China, the courts will first determine whether electronic evidence is admissible, based on the criteria of legitimacy, authenticity and relevance. If the electronic evidence is admissible, the courts will further determine the probative force of the evidence based on the reliability and integrity of the evidence. Such a mechanism is one of the latest improvements in the legal process in China.

## Introduction

With the rapid development of information technologies over the last decade, the role of electronic evidence has affected all aspects of the legal process in China, especially in intellectual property (IP) litigation. According to an official working paper by the High People's Court of Zhejiang Province, over 50 per cent of the cases of IP litigation held at the court are electronic evidence related. Among the total of 5,583 IP cases, 84.63 per cent deal with copyright, 62.06 per cent are trademark cases and 53.81 per cent are patent cases that involve electronic evidence.<sup>2</sup> In light of this situation, there have been numerous developments in the law of evidence in recent

times. This article will explain what electronic evidence is, how Chinese courts respect it, whether it will be accepted by the court and how to estimate the contributory value of the evidence to the conclusion of facts under the recently reformed Chinese civil procedure system.

## Electronic evidence

Due to the importance of electronic evidence in legal practice, the newly amended Civil Procedure Law of China has been updated and the courts have started to accept electronic evidence as one form of direct evidence. The Civil Procedure Law stipulates that "electronic data" may be accepted as evidence in civil litigation.<sup>3</sup> The acceptance of electronic evidence under the Civil Procedure Law of China is one of the latest significant developments in the legal process. Before the Civil Procedure Law came into effect in 2013, there was no official term of "electronic evidence". Hence in legal practice, electronic evidence was classified as "audiovisual material".<sup>4</sup> However within the previous system of evidence, "audiovisual material" is considered as circumstantial evidence but not direct evidence, which needed additional evidence or an intervening inference to lead to a conclusion of fact. In IP disputes, such as copyright infringement on the internet, electronic evidence may be the only evidence that the rights owner may acquire. In such cases, it is possible that the electronic evidence on its own may be enough to get to the conclusion of fact. Thus, the ambiguous legal position of electronic evidence had to be improved. As a result, the new Civil Procedure Law of China has solved the problem by recognising electronic evidence as direct evidence instead of circumstantial evidence, so

<sup>1</sup> *The Civil Procedure Law of China was adopted on 31 August 2012, and effective as of 1 January 2013.*

<sup>2</sup> *See Research Team of High Court of Zhejiang Province, 'Research on Examination and*

*Admissibility of Electronic Evidence in IP Litigation', Falvshiyong (Application of Law), 2011 (3), p 30.*

<sup>3</sup> *Article 63, Civil Procedure Law of China.*

<sup>4</sup> *See Research Team of IP Court of Beijing*

*High Court, 'Several Questions of Electronic Evidence in IP Cases', Falvyukeji (Science Technology and Law), 2008 (1), p 30.*

that the Civil Procedure Law will be compatible with the development of information technology.

Although the legal position of electronic evidence has improved, there is no definition of electronic evidence or electronic data provided by any Chinese legislation, including the latest Civil Procedure Law of China. However, in legal practice the definition of electronic evidence provided by the Model Law on Electronic Commerce of China is widely accepted by the Chinese courts.<sup>5</sup> According to the Model Law, electronic evidence refers to the material “formed by modern information technology” that may prove the facts of the relevant case.<sup>6</sup> The Model Law further explains that the term “electronic” means “technical characteristics such as digital, magnetic, wireless spread, optical or other similar means.”<sup>7</sup> Unlike its counterparts in some developed countries, the Chinese version of the definition employs a broader and more abstract approach, with an emphasis on the core function of electronic evidence, which is “to prove the facts of the case”, but not enumerating the concrete expressions of electronic evidence.<sup>8</sup> Such a broad approach is largely influenced by the UNCITRAL Model Law on Electronic Commerce.<sup>9</sup> Therefore, under the newly amended Civil Procedure Law, material in electronic form that may prove the facts of the relevant case are recognised as electronic evidence and accepted by the Chinese courts.

### Admissibility of electronic evidence in IP litigation

With regard to the admissibility, Chinese courts will accept electronic evidence if the following three criteria are met: legitimate, the criteria of authenticity and the criteria of relevance.

First, the electronic evidence must be legitimate. This means that the electronic evidence concerning certain facts must exist in a legitimate form, and the collection, investigation and preservation of such evidence must be in compliance with the law.<sup>10</sup> In accordance with *Evidence Stipulation in Civil Litigation*, which is the judicial interpretation published by the Supreme People’s Court

of China for implementing the Civil Procedure Law, any evidence shall be legitimate unless it is obtained against the prohibitions of law or prejudices the legitimate rights of others.<sup>11</sup> In light of this interpretation, if any electronic evidence is obtained unlawfully or may prejudice the legitimate rights of others, it must be excluded from the litigation. In legal practice, Chinese courts will exclude electronic evidence if it is obtained by unlawful measures such as the interception of communications without proper legal authority. However, with regard to the term of “prejudice other’s legitimate rights”, most Chinese courts will tend to interpret the meaning of this on a case-by-case basis.<sup>12</sup> For instance, in the landmark copyright case of *Shusheng*, the plaintiff logged into the defendant’s website to download the infringing copy of his work as a piece of electronic evidence. During the legal proceedings, since the plaintiff logged in as a visitor and did not pay for the downloaded copy, the defendant argued that such electronic evidence should be excluded, as it was acquired against the defendant’s legitimate rights. Considering that this activity of obtaining evidence did not prejudice the defendant’s legitimate right, the court hearing the case did not accept the defendant’s argument, and accepted the electronic evidence.<sup>13</sup> The reason that Chinese courts intend to limit the scope of illegal electronic evidence is that they “encourage the right owners to obtain evidence by themselves.”<sup>14</sup>

Meanwhile, the Model Law on Electronic Commerce also provides a set of rules to determine the criteria of legitimate evidence. Chinese courts will also take these rules into consideration. In light of the Model Law, under two circumstances, if the court holds that the authenticity of the evidence is compromised, the court may exclude the electronic evidence.<sup>15</sup> The first circumstance concerns whether the evidence is obtained via a legitimate activity. If it is obtained via an illegal measure such as secret recording or illegal detention, the electronic evidence will be excluded. The second circumstance concerns the technological approach. If the electronic evidence is obtained via an uncertified computer program or via illegal software, from which the computer device is proved

5 See Research Team of IP Court of Beijing High Court, ‘Several Questions of Electronic Evidence in IP Cases’, *Falvyukeji (Science Technology and Law)*, 2008 (1), p 29.

6 Article 101, Model Law on Electronic Commerce of China.

7 Article 9, Model Law on Electronic Commerce of China.

8 See Barry Sookman, ‘Legal Framework for E-commerce Transactions’, *CTLR*, 2001 7(4), pp 85-87.

9 Article 2, UNCITRAL Model Law on Electronic Commerce.

10 See Yi Chang and Jian Wang, ‘The

Independent Legal Position of Electronic Evidence’, *Faxuluntan (Jurisprudence Forum)*, 2004 (1), p 67.

11 Article 68, *Evidence Stipulation in Civil Litigation by the Supreme Court of China*.

12 See Research Team of IP Court of Beijing High Court, ‘Several Questions of Electronic Evidence in IP Cases’, *Falvyukeji (Science Technology and Law)*, 2008 (1), p 33.

13 See *Zheng Chengsi v Shusheng Digital Technology Co. Ltd.*, Hai Min Chu Zi No.12509, 2004 at Municipal People’s Court of Haidian District, Beijing, affirmed by Yi Zhong Min Zhong Zi No.3463, 2005 at

Municipal No.1 Intermediate People’s Court, Beijing. For further detail of the case, please see Jiarui Liu, ‘New Development in Digital Copyright Protection in China: The Landmark Case of Zheng Chengsi v Shusheng’, *EIPR*, 2006 28 (5), p 304.

14 See Research Team of IP Court of Beijing High Court, ‘Several Questions of Electronic Evidence in IP Cases’, *Falvyukeji (Science Technology and Law)*, 2008 (1), p 33.

15 Article 106, Model Law on Electronic Commerce of China.

to be in an abnormal condition, it will also be excluded by the court. The term “uncertified computer programs” refer to the programs that are not verified by the Chinese authority to conduct transactions in the relevant business.<sup>16</sup>

Secondly, the criteria of authenticity must be met. Compared with other forms of evidence, electronic evidence is much easier to modify, due to its electronic form. Therefore, the standard of authenticity is also one of the vital issues that a Chinese court will take into consideration. In legal practice, the court will deduce that the electronic evidence is authentic if any of the following three conditions is satisfied. The first condition is based on party autonomy. If both of the interested parties accept the evidence, then it will be considered authentic.<sup>17</sup> The second condition is based on the technological approach. If the evidence contains an electronic signature or is secured by proper technological measures, or the computer device from which the electronic evidence is acquired may be proven to be in a proper condition, then the electronic evidence will be considered authentic. The third condition is based on a witness. Since most electronic evidence in IP litigation is from the high-tech area that the hearing judges are not familiar with, the court may seek a professional opinion from a suitably qualified expert. If the evidence has been approved by a competent witness with his or her statement, or approved to be unmodified by a competent expert, then the court will determine that the electronic evidence is authentic. Thirdly, the criteria of relevance must be met. With regard to this standard, the court will consider whether the electronic evidence is substantially relevant to the dispute in question.<sup>18</sup> Such a decision will be made by the court on a case-by-case basis.

### Probative force of electronic evidence in IP litigation

In IP litigation, the Chinese courts will examine the admissibility of the electronic evidence in the first place. If the evidence has passed this test, the court will then decide the probative force of the evidence, which means the contributory value of the evidence to the conclusion

of facts. The probative force consists of two main aspects: the reliability and the integrity of the electronic evidence.

The first aspect is the reliability of the electronic evidence. The court will evaluate the level of reliability based on whether the evidence is generated, transferred and stored using reliable measures. In China, the best and most common way to strengthen the reliability of electronic evidence is to notarise it at the Notary Office. According to the Civil Procedure Law, unless there is evidence to the contrary sufficient to invalidate the notarisation, the court shall take the evidence legalised by the notarisation as the basis for ascertaining fact.<sup>19</sup> In most IP cases, a well-prepared rights owner will appoint a licensed public notary to witness the whole process of the collection of the electronic evidence. When submitting the electronic evidence to the court, a document of notarisation will be attached.<sup>20</sup> It must be emphasised that the notarisation must cover the whole process of collecting the electronic evidence. Otherwise, the evidence may not be considered to be reliable, even with notarisation. For instance, in the notable internet-related copyright case of *Crazy Stone*, the hearing court denied the reliability of a piece of notarised electronic evidence from the plaintiff, because the notary failed to examine whether the computer device was totally formatted before collecting the evidence from the internet.<sup>21</sup>

The second aspect is the integrity of the electronic evidence. An item of electronic evidence is integral if the content remains complete and unmodified since it is generated.<sup>22</sup> The aspect of integrity is of significant importance to determine the probative force of the evidence, because in most IP litigation, electronic evidence functions as samples for the court to compare with the infringing copies. In China, the best way to strengthen the integrity of electronic evidence is to collect or preserve it from routine business activities, instead of obtaining it intentionally for the purposes of the litigation.<sup>23</sup> Generally, the electronic evidence from routine business activities is considered to be natural and reliable. By contrast, evidence that is obtained for a specific purpose is usually prepared by the interested party, thus it may be incomplete or even modified purposely. Therefore, most Chinese courts respect the

<sup>16</sup> According to Section 2 of the ‘Measures for the Administration of Software Products’ (Ministry of Industry and Information Technology), copyright owners of computer programs are encouraged to register their programs at the authorised copyright agency. If the program satisfies the registration, a five-year valid certificate will be issued to prove that the program is certified.

<sup>17</sup> Article 107, Model Law on Electronic

Commerce of China.

<sup>18</sup> Article 105, Model Law on Electronic Commerce of China.

<sup>19</sup> Article 69, Civil Procedure Law of China.

<sup>20</sup> See Chaojun Zhuo and Yanfei Zhang, ‘Preservation of Evidence on the Internet’, *Zhongguogongzheng (China Notary)*, 2007 (3), p 40.

<sup>21</sup> See *Xinchuan Online (Beijing) Information Technology Co. Ltd. v Zigong Branch of China Network Communication Group, Min Shen Zi*

*No. 926, 2008 at Supreme People’s Court of China. Since the infringed work is a popular movie named Crazy Stone, this case is well known as the Crazy Stone case.*

<sup>22</sup> Article 105, Model Law on Electronic Commerce of China.

<sup>23</sup> Article 115, Model Law on Electronic Commerce of China.

electronic evidence from routine business activities as much more convincing than the purposely-made evidence from a party with an interest in the case.<sup>24</sup>

## Conclusion

Since the promulgation of the newly-amended Civil Procedure Law, the legal position of electronic evidence has been clarified as a form of direct evidence. In Chinese IP litigation, the role of electronic evidence has become more significant. In legal practice, the court will first determine whether the evidence is admissible based on the criteria of legitimate, authenticity and relevance. If the evidence is admissible, the court will further determine the probative force based on the reliability and integrity of the electronic evidence. This mechanism is one of the latest improvements in the legal process in China.

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<sup>24</sup> See Research Team of IP Court of Beijing High Court, 'Several Questions of Electronic Evidence in IP Cases', *Falvyukeji (Science Technology and Law)*, 2008 (1), p 35.