



NEWSLETTER

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Lifang & Partners Named Chambers Asia-Pacific Band 1 Intellectual Property Litigation Law Firm

On 5 December 2019, Chambers & Partners (Chambers), an authoritative international legal service provider rating agency released their 2020 Asia-Pacific Guide, in which Lifang & Partners was ranked Band 1 for Intellectual Property Litigation and Band 4 for Competition/Antitrust Law. Three of our partners were listed, including Mr XIE Guanbin, Senior Partner, who has been named a Band 1 IP litigation lawyer for many consecutive years.

Band 1 for Intellectual Property Litigation

A deep-rooted tree is always fruitful, and a lamp with sufficient oil always burns brilliantly. Since its establishment, Lifang & Partners has been intensively engaged in the IP field, optimizing its business structure to meet the development trends of science and technology by enrolling and cultivating talents. Each day, Lifang & Partners pushes forward towards a higher goal. and has, along the way, successfully handled a wealth of classic cases.

Band 4 for Competition/Antitrust Law

Competition and antitrust law is another strong branch of our business derived from the IP sector in which Lifang & Partners has rich experience. The Lifang & Partners antitrust team has a deep understanding of the philosophy of mutualism, attack and defense, and the ability to balance clients' litigation strategies and business needs. With the rich experience that we accumulated through successfully handling cases, our team has seized each and every opportunity to demonstrate their strengths.

Three of Our Partners Were Listed



XIE Guanbin



ZHANG Bin



SUN Xi

Chambers & Partners, founded in London, England in 1990, is one of the most authoritative and influential international legal service provider rating agencies. Chambers is well recognized and trusted by legal professionals due to its wide coverage of around 200 countries and regions and its objective and fair research and evaluation system. Lifang & Partners has been listed in the Chambers rankings since 2010.

Chambers & Partners' ratings are evidence of the strength and performance of the Lifang & Partners team. Chambers quoted one of our clients as having said:

"Their team has a remarkable sense of the client's business. They not only provide top legal services but most importantly they offer the services in a way that better fits into the client's business."

The Beijing IP Court Names the First Internet Patent Case, Handled by Lifang & Partners, a Leading Case

On 6 November 2019, the Beijing Intellectual Property Court held its 5th-anniversary press conference, during which the Court summarized its judicial work and achievements over the past five years, and released its 5th Anniversary Leading Cases. *Sogou v. Baidu*, a Lifang & Partners case, also known as “*the First Internet Patent Case*” of China, was named a Leading Case.

In October 2015, Sogou filed a number of lawsuits at the Beijing Intellectual Property Court against Baidu, in which they contended that “Baidu IME” had infringed upon several of its patents. Lifang & Partners handled four of those lawsuits and won three of them. One of the three successful cases was again selected by the Supreme People’s Court as a “Top 50 IP Cases of 2018”.

Mr YU Haidong, Partner, along with Mr HAO Tingji, Senior Associate, CHEN Liuye, Associate, and DONG Fang, Associate, formed the team that represented Sogou against Baidu. Through four years of relentless effort, this dedicated Lifang & Partners team brought their talents into full play. They not only won an interim judgment in the main actions, but also removed all potential infringement risks from counter litigations, and were thus highly praised by Sogou.

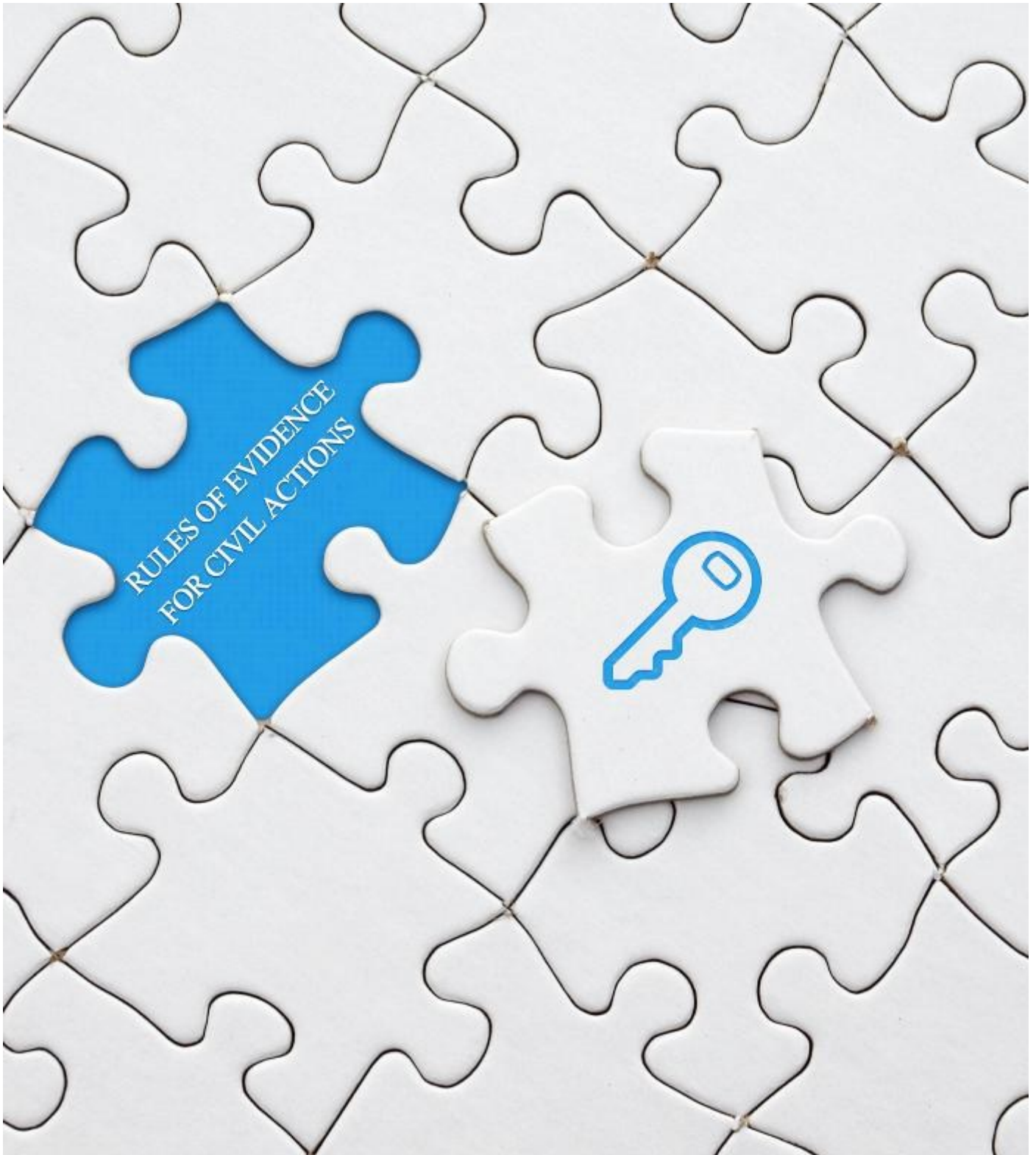
Sogou v. Baidu, which arose from an IME dispute, concerned much of Chinese society because it was the first and most significant patent infringement case ever in the Chinese internet industry, and moreover, the litigants were two giants of that industry. Therefore, this case is known as “*The First Internet Patent Case*”. As few internet technology companies had previously tried to protect their intellectual property rights by legal means, this case was a milestone in the history of internet-related IP protection.

In another first, the interim judgment mechanism was used in this case for an IP infringement dispute. An interim judgment was made after the hearings, and said judg-

ment was made only in regard to “*whether infringement is established*”, which promptly prevented further infringement and protected the lawful rights and interests of Sogou. This mechanism effectively improves the trial efficiency of complicated IP cases. Additionally, we introduced the subrogation concept to this case to solve the problem regarding the eligibility of common licensees taking part in infringement proceedings, elaborated on the general application of the burden of proof during infringement disputes involving computer programs, and discussed the rules for claim construction involving functional module definitions. All of these concepts now provide guidance in the trial of patent infringement cases involving software.

A number of cases handled by Lifang & Partners have been selected as Leading Cases by the Supreme People’s Court and many other courts at all levels. This is recognition of the high-quality legal services that Lifang & Partners has been providing. Lifang & Partners will, relying on its rich experience and professionalism, carry on its client-oriented, faithful, dedicated, specialized and highly efficient work to provide clients with all-round strategic IP and corporate legal services.

The Supreme People's Court Released Amendments to the Rules of Evidence for Civil Actions



China does not employ a disclosure system in which all parties to a dispute must reveal all information under their control that is relevant to the dispute. Rather, a litigant has a general obligation to prove the facts on which its claims are based using evidence, except under some limited circumstances. This, understandably, often results in parties only volunteering to offer information that is favorable to them, which coupled with a judiciary that has limited powers of inquiry, can be a practical obstacle to accessing justice.

However, the Supreme People's Court has recognized the problems facing the evidence system and access to justice. The Decision of the Supreme People's Court Regarding Amendment to the Several Provisions on Evidence for Civil Actions ("Amendment Decision"), which comprises 115 articles in total, was recently released to modify the Several Provisions on Evidence for Civil Actions ("Evidence Provisions"), which, after modification, comprises 100 articles in total. The new Evidence Provisions retains only 11 articles from the original provisions, revises 41 articles and adds 47 articles.

In the following, we explore the explanation notes given by the Supreme People's Court regarding the key points and the significance of this new piece of judicial interpretation.

A. Improving the system of "document disclosure order[s]" to strengthen the ability of litigants to collect evidence

The purpose of fact-finding in civil proceedings is to identify the realities of a case insofar as is possible. However, litigants are always fettered by their limited capabilities and channels to access evidence, which makes it difficult to realize the realities of a case. This is especially so for environmental torts and other special types of action. A litigants' inability to access evidence often leads them to defeat and has an adverse impact on their substantive rights and their access to justice.

To this end, Article 112 of the *Interpretations of the Supreme People's Court on Application of the Civil Procedures Law* (2015) ("*Interpretations*") sets forth a principle regarding "document disclosure order[s]". Based on the *Interpretations*, the *Amendment Decision* further provides the conditions for seeking a "document disclosure order", the procedures for examining such evidence, the scope of disclosure obligations, and the consequences of disobeying such an order, all of which improve the disclosure system.

Moreover, based on Article 113 of the *Amendment Decision*, "*the provisions regarding documentary evidence apply to audio and video materials and electronic data.*" It includes audio and video materials within the scope of "document disclosure order[s]" which expands the evidence collection means available to litigants. The *Amendment Decision* will play an active role in facilitating fact-finding inquiries, which will further improve the objectivity and impartiality of judgments.

B. The rules relating to the admission of facts have been revised and improved to better balance the rights of parties during litigation with the needs of the courts to uncover the truth.

An admission of fact made in the course of proceedings exempts the other party from the burden of having to prove that fact. The rules on the admissions of facts are specified in Article 8 of the old *Evidence Provisions* and have played a positive role in improving legal certainty in regard to the application of civil procedure rules and in guiding the conduct of litigants during litigation.

However, after decades of use, some parts of the old rules are no longer fit for purpose. Therefore, the Amendment Decision makes revisions, supplements and improvements to Articles 4 to 8. Those changes mainly include the following:

- First, regarding admissions made by an attorney, the court will no longer consider whether any special authorization was granted, so long as such admissions were not explicitly excluded in the Power of Attorney. That is, the admissions of an attorney are regarded as the admissions of a litigant.
- Second, restrictions for a litigant to withdraw an admission have been relaxed. If an admission is made under coercion or due to a serious misunderstanding, the litigant is no longer required to prove his or her admission does not tally with the facts. Moreover, the Amendment De-

cision also makes provisions on any admissions made by a joint litigant and conditional admissions.

C. The regulations on undertakings of litigants, witnesses and appraisers have been improved, and the penalties for litigants, witnesses and appraisers that make a false statement or appraisal have been elaborated. This facilitates the implementation of the good faith doctrine in the civil litigation system.

The *Civil Procedure Law*, in 2012, underwent a major amendment relating to the good faith doctrine, which is of great significance for regulating the behavior of civil litigants and maintaining order within the civil litigation system. In accordance with the spirit of the *Civil Procedure Law* and on the basis of the *Interpretations*, the *Amendment Decision* improves the regulations on litigant and witness undertakings to make true statements, adds a provision requiring appraisers to sign a letter of commitment to strengthen their self-discipline, and provides corresponding penalties for litigants and witnesses who intentionally make a false statement and appraisers who intentionally conduct false appraisals to promote the implementation of the good faith doctrine in the civil litigation system.

D. The regulations on the scope of electronic data have been supplemented and improved, and the rules for reviewing and examining electronic data have been clarified.

Electronic data was a new form of evidence that was introduced into the *Civil Procedure Law* in 2012. In 2015, the *Interpretations* further provided principled and general regulations defining electronic data. In order to solve the practical issues in trials, the *Amendment Decision* provides detailed regulations on the scope of electronic data (see Article 15), sets out requirements for litigants to provide electronic data and for the court to investigate,

collect and preserve electronic data (see Articles 16 and 25), and provides rules for reviewing and examining electronic data (see Articles 105 and 106), all of which improve the rules for using evidence in the form of electronic data. The *Amendment Decision* is of positive significance for improving legal certainty and protecting litigants' rights of action.

Closing remarks

The Supreme People's Court is actively taking steps to improve the legal system. The Amendment Decision is one of the several New Year's gifts delivered by the Chinese judiciary at the turn of the year, and give us high hopes for the coming year.

A Study on Jurisdiction over Offers to Sell Infringing Products on Social Media

Based on Case (2019) Zui Gao Fa Zhi Min Xia Zhong No. 85^[1]

Written By XU Manxia and DONG Fang

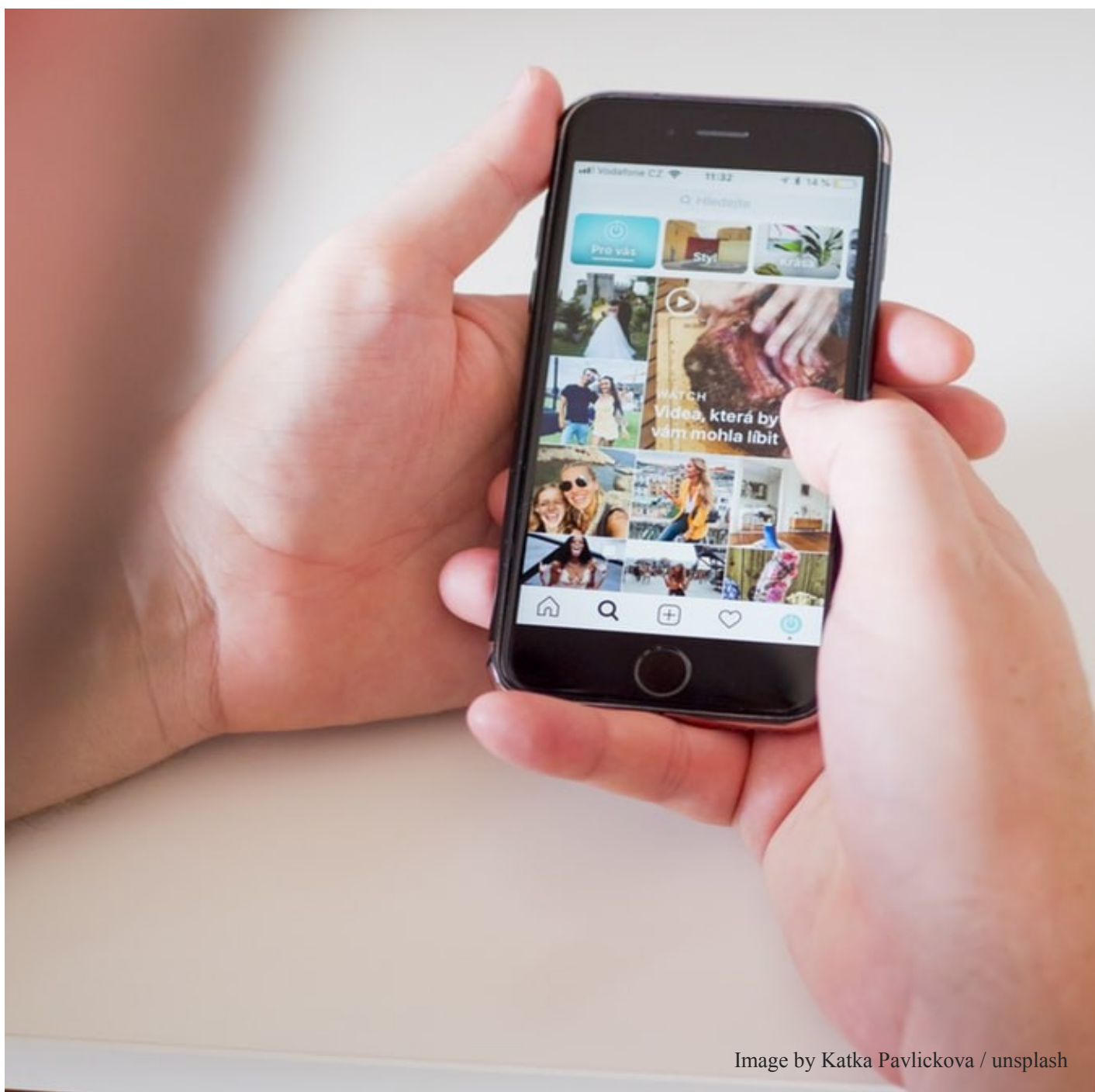


Image by Katka Pavlickova / unsplash

In any IP case involving copyright or trademark infringement on a social media platform, it is theoretically and practically indisputable that a plaintiff may sue the relevant social media company as a co-defendant and request a court with geographical jurisdiction over said social media company to handle the case if a social media user exhibits any works that infringe upon the copyrights or trademarks of others on a relevant social media platform. However, in terms of patent infringement cases, there are few academic discussions or cases regarding whether a rights holder can sue a social media company as a co-defendant and request a court with geographical jurisdiction over the social media company to handle the case if a user posts information about infringing products on the social media platform. The lack of discussion surrounding this might be because it is controversial to suggest that the posting of information about infringing products on a social media platform constitutes an offer to sell, and that a social media company can be considered a co-seller who offers infringing products for sale.

Recently, the writer handled a dispute involving two defendants, namely, Anshan Lifu Electrical Appliance Factory (“**Anshan**”), a manufacturer and social media user, and Sina Corporation (“**Sina**”), a social media company that owns the Weibo social media platform. Both Beijing Intellectual Property Court and the Supreme People’s Court ruled that a court with geographic jurisdiction over Sina could hear the case, so long as the plaintiff could adduce preliminary evidence proving that the two defendants had committed joint infringement by way of Weibo. This case is used as an example of how an appropriate jurisdiction may be selected in a situation involving offers to sell infringing products on social media platforms.

I. Case brief

In this case, the plaintiff, based on investigations and evidence, was able to show that Anshan had not only sold and offered to sell the alleged infringing products on Taobao but had also released promotional materials and sold such products via its Weibo account. Therefore, the plaintiff filed a patent infringement lawsuit against Anshan and Sina, which has operations in Beijing, at Beijing Intellectual Property Court on the ground that the defendants had jointly made offers of sell. Anshan raised an objection to jurisdiction, arguing that the Beijing Intellectual Property Court, which does have geographical jurisdiction over Sina, had no jurisdiction over Anshan because the defendants did not jointly offer the products for sale.

However, the first instance court held that since the plaintiff had produced preliminary evidence to prove that Anshan had released videos showing the alleged infringing products on Weibo and Sina had provided a social media service to Anshan, Sina might have committed joint infringement if Anshan’s release of videos on Weibo constituted an offer to sell. Therefore, a court with geographical jurisdiction over Sina could handle the matter.¹²¹ The above ruling of the first instance court was upheld on appeal to the Supreme People’s Court.

II. Jurisdiction analysis

This was a typical case which involved the offering things for sale on a social media platform and objections to jurisdiction. When the plaintiff took Sina as a co-defendant, disputes over the following issues could have occurred regarding jurisdiction:

A. Does a seller who publishes infringing product information on a social media platform make an offer to sell?

According to Article 24 of *Several Provisions of Supreme People’s Court on Issues Relating to Laws Applicable for the Trials of Patent Dispute Cases (2001)*, “offering for sale” refers to “the expression of an intent to sell commodities by means of advertisements, window displays at stores or exhibitions”.

In light of the above definition, the writer believes that so long as a seller expresses its intent to sell infringing products on a social media platform, such as Weibo, and the social media platform is actually able to facilitate transactions, the posting of infringing product information on a social media platform can be considered an offer to sell by that seller. Unlike ecommerce platforms, such as Taobao, social media platforms generally do not facilitate direct transactions. Therefore, the issue of whether social media platforms can facilitate transactions is controversial. In this regard, the writer believes that so long as the social media platform is available to the general public and users of that social media platform are

able to communicate with each other, the social media platform should be considered as having the ability to “*facilitate transactions*”.

For example, Weibo, the social media platform in the case discussed, provides users with not only the ability to post information, but also the ability to spread and communicate (“*Comments*”) specific information with the public. Moreover, Weibo has a service called “*Message*”, which allows users to contact and communicate with members of the public who are interested in the information that they post. In practice, we can see that many Weibo users have posted product-related videos or pictures to attract potential customers who they might communicate with via “*Message*” or they have posted product information containing web links to their Taobao stores to sell products or services, such as clothing, fast-moving consumer goods, wedding photography services, and other things.

Although Weibo is not a traditional ecommerce platform on which customers can directly select products and make payments, it is an information posting, dissemination and communication platform available to the general public, on which sellers can promote their products or services, and even negotiate and bargain prices when attempting to make sales. Therefore, in the current social environment where online shopping is popular and accounts for a significant share of the retail market, Weibo actually functions as a *de facto* ecommerce platform on which sellers can offer things for sale. For the general public, they can use the “*Comments*” or “*Message*” ability of Weibo to enquire about product features, prices, delivery information and other things from sellers. When the terms and conditions are settled, the transaction between the parties can be concluded.

In summary, the writer believes that if:

- 1) a seller expresses its intent to sell infringing products on a social media platform;
- 2) the general public can purchase infringing products via that social media platform; and
- 3) the infringing products posted on that social media platform fall within the protection scope of the patent at issue;

then said act of posting should be regarded as a form of offering to sell infringing goods, which in itself is patent infringement.

B. Are social media platforms operators and sellers joint infringers?

Article 9.1 of *Tort Law of the People's Republic of China* stipulates that: “*Persons who instigate or assist others in committing a tortious act shall bear joint and several*

liability with the doer.”

We can see by applying Article 9.1 to the facts of the case under discussion that the seller intentionally posted videos about the infringing products on its Weibo account, which is certified and managed by Sina, the operator of Weibo. However, Sina, as the manager and service provider of Weibo, failed to fulfil its obligation of review, and such failure led to the dissemination of information about the infringing product. Thus, Sina objectively assisted Anshan in offering to sell infringing products. Therefore, Anshan and Sina may be taken as joint sellers who offered to sell the infringing products. That is to say, they may be considered joint infringers.

From a procedural perspective, a plaintiff may only sue a social media platform as a liability-bearing joint infringer if the plaintiff has submitted preliminary evidence to prove a relationship between the manufacturer and the social media platform. In the (2016) Jing 73 Min Xia Zhong No. 1176 judgment that was issued by Beijing Intellectual Property Court in 2018 and relates to a typical second instance case involving a jurisdiction objection, the plaintiff argued that the defendant published the plaintiff’s cartoon works on Weibo without permission, and had thus infringed upon the plaintiff’s copyright. In this case, the court ruled that the plaintiff’s preliminary evidence had proven that the defendant and Sina, as a co-defendant, had jointly committed infringement, and the plaintiff, during litigation, explicitly requested orders to enjoin the two defendants from committing infringement and to require them both to apologize. Therefore, the defendant and Weibo were co-defendants. According to Article 35 of the *Civil Procedure Law*: “*in a lawsuit for which two or more People’s Courts have jurisdiction, the Plaintiff may file a lawsuit with either court.*” Therefore, Beijing Intellectual Property Court, which has geographical jurisdiction over Sina, was competent to hear the dispute.

C. Judging the existence of an offer for sale in the face of an objection to jurisdiction

As only product information was published on the social media platform, whether the products exhibited were infringing products was a critical factor in deciding whether the Anshan and Sina had jointly offered infringing products for sale. However, such matters are normally something that should be determined following a substantive hearing, and should not affect the issue of jurisdiction. In this regard, the second instance court held:

In a case involving an objection to jurisdiction, the court, in principle, need only hear facts related to the establishment of jurisdiction. Where such facts also involve substantive disputes, the court need

only ascertain whether preliminary evidence can serve as an arguable jurisdictional connection, rather than expressly rule on the particulars of the substantial disputes. Therefore, the patentee argued that the manufacturer and seller of the alleged infringing products, together with Sina, jointly offered the alleged infringing products for sale. The court with geographic jurisdiction over Sina may hear the case. Whether the manufacturer and seller of the alleged infringing products, along with Sina, have committed joint infringement and whether they shall bear joint infringement liabilities is an issue subject to substantive hearing, and will not affect the determination of jurisdiction^[31].

Therefore, when dealing with the objections to jurisdiction, the criteria that the court was concerned with when deciding upon jurisdiction was whether the plaintiff had preliminary evidence to prove that Anshan and Sina committed infringement in association, so as to establish that the defendants' acts were joint for the purpose of infringement. This creates a jurisdictional connection between the facts and the court with geographic jurisdiction over Sina.

III. Epilogue

It is controversial to say that releasing information about infringing products on a social media platform constitutes an offer to sell and the issue of whether the social media platforms can be co-sellers is rarely discussed. The writer is of the opinion that according to the above legal interpretation of “*offering for sale*”, if a seller expresses their intention to sell infringing products on a social media platform and that platform might have facilitated the transaction in some way, the seller's publication of product information will constitute an offer to sell. For instance, a social media platform does, in fact, assist a seller to offer infringing products for sale by spreading information about the infringing products, either deliberately or negligently, and so, they are co-infringers. In addition, as infringement should only be determined following a substantive hearing, if a plaintiff, in response to an objection to jurisdiction, has preliminary evidence to prove that the seller and the social media platform acted in association to carry out infringement, it is feasible to argue that the parties engaged in joint infringement, and thus a jurisdictional connection between the facts of a case and a court with geographic jurisdiction over the social media platform can be established.

【1】（2019）最高法知民辖终85号案例

【2】（2018）Jing 73 Min Chu No. 1626 Decision

【3】（2019）Zui Gao Fa Zhi Min Xia Zhong No. 85 Decision

XU Manxia

LIFANG & PARTNERS
Partners

DONG Fang

LIFANG & PARTNERS
Associate



LIFANG & PARTNERS
立 方 律 师 事 务 所



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www.lifanglaw.com

Email: info@lifanglaw.com

Tel: +8610 64096099

Fax: +8610 64096260/64096261