

China's evidence rules explained

Understanding Chinese law on evidence is crucial to winning a lawsuit. **Huang Hui, Zhang Shuhua** and **Xia Zhize** of **Wanhuida** provide a guide to the rules

Evidence is the centerpiece of a lawsuit, with legal proceedings revolving around the question of how to prove a case most effectively. There is no evidence statute in China at present; provisions on evidence are scattered throughout the laws on procedure and related judicial interpretations and opinions. This article discusses some noteworthy matters on evidence in IP-related cases to help foreign IP owners better understand how to litigate to protect their rights in China.

Notarization and legalization

China has strict rules on notarization and legalization.

Powers of attorney

As a general principle, a power of attorney made outside China by a foreign party must undergo notarization and legalization as provided by China's Law on Civil Procedures. The foreign party may also issue a power of attorney in China. If it does so then (i) no notarization or legalization is required if a foreign natural person signs it before the trial judge in China on production of his ID and arrival records; (ii) if the foreign natural person signs the power of attorney and has it notarized in China, he need not get notarization in his own country; (iii) if a legal representative or responsible person of a foreign organisation produces a document stating that he has the right to sign the power of attorney and the document itself is notarized and legalized, then he may act in the same manner as the natural person mentioned above.

Incorporation certificates

A foreign entity that intends to litigate in China must provide proof of its existence and have it notarized, legalized or otherwise supported. Where there is a judicial assistance agreement between China and the country in which the company was incorporated, the formalities must be carried out according to the agreement.

Trade mark registration certificates

When a foreign party produces a trade mark registration certificate issued in his own country as evidence to a Chinese court, it is unnecessary to legalize the certificate under Article 6 quinquies of the Paris Convention for the Protection of Industrial Property.

Other evidence

As a general rule, no notarization or legalization is required for evidence obtained from official or publicly accessible foreign publications or patent searching databases, or affirmed and admitted by other valid court judgments or arbitration awards in China, or proven to have been accepted by the opposing party, or admitted by the party that submits such evidence.

Evidence obtained by entrapment

In IP litigation, a plaintiff often uses notarization to fix evidence of a defendant's infringing acts or their damaging consequences. The defendant often raises the so-called entrapment defence, denying the probative value of such evidence. Chinese courts generally draw a distinction between the following situations: (i) if the defendant intends to perform (for example, offers to sell) or has performed infringing acts before the rights holder makes the notarized purchase, and the purchase merely provides the infringer with an opportunity for infringement, then the evidence obtained through "affording opportunity" is admissible, as the Supreme People's Court ruled in the *Beida Founder* case; (ii) if the alleged infringer does not intend to infringe but is induced to plan and perform an infringing act by the way in which the rights holder collects the evidence. In the latter case, courts will reject such evidence as inadmissible.

Burden of proof

In IP cases, the burden of proof lies according to the maxim "he who asserts must prove", but it may sometimes shift or invert. For example, where a patent

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infringement dispute concerns a patented invention for making a new product, entities or individuals that make the same product must prove that their methods differ from those used for the patent being litigated. If a seller of infringing products claims no liability for damages, he is obliged to prove he had no intention to infringe. If an applicant requests cancellation of a registered trade mark on the grounds that it has not been used for three consecutive years, it is incumbent on the

If the defendant fails to surrender its financial books and records to the court within a prescribed period or provides false or incomplete financial books and records, the court may support the plaintiff's demand that profits made from infringement be calculated on the basis of the defendant's past business performance and scale or the production and sales of allegedly infringing products proclaimed in the defendant's advertising or news releases.

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registrant either to produce evidence of use before the third party filed the cancellation application or to justify its non-use.

Even though the law does not expressly provide for the inversion of the burden of proof, the court may adjust it in a number of circumstances where the party bearing the burden of proof is far less capable of raising evidence than the opposing party, or where the evidence is in the sole control of the opponent, or where there is a high probability that the fact claimed by the bearer of the burden of proof actually occurred: each of these would lead to some degree of unfairness if the general principle of allocating the burden of proof is adhered to.

Inferences may be drawn in evidence adducing. In determining liability for damages, an infringer who is proven to have performed multiple infringing acts may be inferred to have committed continuous infringement, on which the amount of damages will be based.

Time limits

Chinese rules provide for time limits for adducing evidence, exchanging evidence and presenting new evidence.

Time limit for adducing evidence

Usually, the period for submitting evidence for a trade mark review and adjudication is three months from the filing of an application or defence. However, in cases where cancellation of a registered trade mark is sought on the grounds of non-use for three consecutive years, the registrant must tender evidence of use within two months of receiving a notice from the Trademark Office. In administrative proceedings, the defendant must produce evidence within 10 days of receiving a copy of the complaint; where evidence is required for the plaintiff or a third person, it should be supplied before the case is heard or on the designated date for evidence exchange. In civil cases, the period for adducing evidence is dictated by the court or agreed upon by the parties; but in no case will the period be shorter than 30 days.

Evidence exchange

For trade mark review purposes, the Trademark Review and Adjudication Board (TRAB) should, upon receipt

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of any evidence from a party, pass it on to the opposing party in a timely manner. In administrative cases, the court may preside over evidence exchange. In civil cases, the court may, at the request of the parties, arrange evidence exchange before the trial begins. In cases where evidence is heavy or in complex cases, evidence should be swapped after the defence period expires and before the hearing starts. Where the court organises evidence exchange, the exchange date marks the end of the period for adducing evidence. If a party requests an extension for raising evidence and the court approves the request, the evidence exchange date will be postponed accordingly.

New evidence

New evidence in a trial at the first instance includes (i) evidence discovered after the period for adducing evidence expires, and (ii) evidence not available during the evidence adducing period for objective reasons and which cannot be supplied in an extended period allowed by the court.

New evidence in a trial of second instance refers to (i) evidence found after the trial of first instance is concluded, and (ii) evidence not available because the application for a court investigation before the evidence adducing period of the first instance trial expires is rejected, but obtained after the application for court investigation is approved by the court of second instance.

New evidence in a retrial means evidence that emerges after the previous trial is concluded.

Where a party is allowed to present evidence within an extended period but fails to do so for objective reasons and obvious unfairness would arise if such evidence were not considered, the court may admit such evidence as new evidence. To determine whether a piece of evidence is new, the court must take into account whether the evidence already existed during the evidence adducing period or the prescribed extended period, and whether a party's failure to deliver it within the evidence adducing period or the prescribed extended period is due to wilful or gross negligence. Even if the evidence presented is not new, it should be cross-examined if the court is of the opinion that such evidence may have an effect on the judgment.

Preserving and collecting evidence

To curb infringement, a party may apply to the court for preservation of evidence if the evidence may be destroyed or be difficult to acquire later on. Court preservation of evidence may occur before or during the litigation.

Application for evidence preservation must meet the

following conditions: the rights of the owner have no apparent defects and are in a stable state; the plaintiff can demonstrate that the evidence might be destroyed or difficult to acquire later on; the evidence is eligible to prove relevant facts; there are clear objects, locations and information to facilitate the preservation; and the applicant has provided security for the preservation.

A party that is unable to collect evidence by itself for objective reasons may ask the court to do so through an

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investigation. In such cases, the court may investigate and collect evidence, or, as the case may be, issue an investigation warrant authorising the party or its agent to conduct the investigation and taking of evidence. In respect of factual evidence that may be critical in the resolution of a dispute, the court may initiate an *ex officio* investigation for such evidence.

Examining special types of evidence

Chinese law and judicial practice include rules and conventions explaining how certain types of evidence should be treated.

Facts recognised in prior decisions

The court tends to respect prior decisions when it hears a case. Facts that have already been affirmed by a valid court judgment, decision or a valid arbitration award require no proof, unless the party concerned has counter evidence to negate them. However, the court has the

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right to examine any facts recognised by an administrative penalty order.

As regards the recognition of well-known marks, the court may immediately recognise a mark as well known if it has been officially recognised as such previously, as long as the defendant raises no opposition. Only when the defendant objects should the claimant go out of his way to prove the fact that his or her mark is well known.

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The probative value of opinion polls and surveys

In trade mark-related actions, the parties often resort to opinion polls or public surveys to prove the fame of a mark or the fact that the mark confuses or misleads the relevant public. When market research reports made by impartial parties are tendered as evidence, the court tends to treat them as circumstantial evidence.

Expert evaluation and related matters

Intellectual property cases often concern the review and determination of specialised technical facts, in which litigation assistants (i.e., experts with specialist knowledge, are called into the court to explain technical mat-

ters. Such experts may be external personnel or employees of a party, or foreign technicians in foreign-related cases. This arrangement is very similar to expert testimony in Anglo-American judicial practice. In China, the judge may also take the initiative to seek the opinions of experts on some technical issues. If this happens, the trial judge can only take the expert opinion as reference rather than evidence in considering a fact.

In disputes over well-known marks, the court will take into account market value assessment reports. In determining the amount of damages resulting from infringement, the court often makes use of the expertise of auditors and accountants, advises the parties to rely on professionals in calculation, explanation and cross-examination, and even introduces a damages determination mechanism whereby a professional entity is employed for evaluation purposes.

The court may entrust certain qualified evaluation agencies to evaluate some special issues, and such an evaluation conclusion is regarded as a special type of evidence. However, it cannot entrust the Intellectual Property Office, the Trademark Office or the Copyrights Office to evaluate whether there has been an IP infringement. In practice, a litigating party sometimes entrusts an intermediary agency to issue an *ex parte* evaluation conclusion. However, the court will not accept this as a “conclusion”, even though it is so labelled.