

## CASE TRANSLATION: CHINA

### CASE CITATION:

*Xinchuan Online (Beijing) Information Technology Co. Ltd. v Zigong Branch of China Network Communication Group (2008) Min Shen Zi No. 926*

### NAME AND LEVEL OF COURT:

**Supreme People's Court of the People's Republic of China**

### DATE OF DECISION:

**13 February 2009**

*Intellectual property infringement; electronic evidence; probative force of notarial certificates; reliability of method of collecting electronic evidence*

Supreme People's Court of the People's Republic of China

Paper of Civil Ruling

(2008) Min Shen Zi No. 926

Petitioner (plaintiff at the first instance trial, and appellant at the second instance trial): Xinchuan Online (Beijing) Information Technology Co. Ltd.

Place of residence: Floor 4&5, Building 31, No. 8, Tiuyuan Road, Chongwen District, Beijing

Legal representative: Yutang Yang, general manager

Agent: Yan Li, attorney at Sichuan Zhanhua Law Firm

Respondent (defendant at the first instance trial, and appellee at the second instance trial): Zigong Branch of China Network Communication Group

Place of residence: A1, Mingzhuxiaoqu, Huidong New District, Zigong City, Sichuan Province

Legal representative: Chao Zhu, general manager

Agent: Lei Wang, attorney at Sichuan Tahota Law Firm

Agent: Jinyan Wu, staff of Sichuan Branch of China Network Communication Group

Regarding the case of *Xinchuan Online (Beijing) Information Technology Co. Ltd. (hereafter Xinchuan Online) v Zigong Branch of China Network Communication Group (hereafter Zigong CNC)* on Infringement of the Communication Right, the High People's Court of Sichuan Province reached their Final Judgement on 23 May 2008. The judgement has become legally effective. The case citation is (2008) Chuan Min Zhong Zi No. 185. On 10 September 2008, Xinchuan Online applied for retrial to this court. This court has formed a collegial panel in accordance with the Civil Procedure Law of the People's Republic of China. Now the review is concluded.

In accordance with the application for retrial, Xinchuan Online claims: First, the High People's Court of Sichuan Province did not abide by the rule of evidence that "the burden of proof is borne by the claimant". In the absence of opposite evidence by Zigong CNC, the court ignored the probative force of the following two notarial certificates issued by Shudu Notary Office of Chengdu City, which are (2007) Cheng Shu Zheng Nei Jing Zi No. 22931 (hereafter NC 22931) and (2007) Cheng Shu Zheng Nei Jing Zi No. 110182 (hereafter NC 110182). This violated the Law of Notary, the Law of Civil Procedure and the Evidence Stipulation in Civil Litigation of the Supreme People's Court. Secondly, the court speculated that Xinchuan Online took advantage of computer technology to fabricate the fact of infringement. Such subjective conjecture violated the fundamental rule of civil procedure. Thirdly, the court did not correct the violations by the Intermediate People's Court of Zigong City of taking an auxiliary expert's statement as evidence and taking testimony as evidence when the witness was absent from court examination.

Zigong CNC responds: Zigong CNC did not infringe the communication right. In addition, there was no "Daan Operating Room" mentioned in NC 110182. The NC provided by Xinchuan Online was only capable of proving the work in question was displayed on the local computer screen, but not capable of proving the work was provided on the internet. Xinchuan Online provided the computer

to the notary, in which it was possible to enable a technological operation to proceed. “The Chengdu Notary Office of Chengdu City, appointed by Zigong CNC, proved that technically it was possible to provide the work on the internet.”<sup>1</sup> Therefore, Zigong CNC requests the court to reject the application for retrial.

The original court found: In 2006, the cinematographic works in question, entitled *The Crazy Stone*, was jointly produced by Sifangyuanchuang International Film and TV Culture Communication Co. Ltd. (hereafter Sifangyuanchuang), Warner China Film H.G. Corp. (hereafter Warner China) and Focus Film Ltd. On 2 June 2006, the Film Bureau of the State Administration of Radio Film and Television issued the Film Public Screening License (2006 Dian Shen Shu Zi No. 042). In October 2006, Focus Film Ltd. issued the Confirmation of Rights to confirm that Warner China was the owner of the right of online on-demand video. In November 2006, Sifangyuanchuang also issued the Confirmation of Rights to confirm that Warner China was the owner of the right of online on-demand video. On 11 July 2006, Warner China issued the Letter of Authorisation to confer the communication right of *The Crazy Stone* in Mainland China to Beijing Xinchuanshidai Advertisement Co. Ltd. for the period of three years. On 16 September 2006, Beijing Xinchuanshidai Advertisement Co. Ltd. changed its name to Xinchuan Online (Beijing) Information Technology Co. Ltd. On 12 December 2006, Yan Li, the agent of Xinchuan Online, appointed Shudu Notary Office of Chengdu City for the preservation of evidence. On 10 February 2007, NC 22931 stated: On 14 December 2006, in the presence of a notary, Yan Li switched on his computer and processed the following activities: 1. Click on the “screen recorder” software to start recording. 2. Search for “www.zgcnc.net” at ICP/IP Management System of the State Administration of Information Industry. The result of the search is “Zigong Branch of China Network Communication Group”. 3. Key in www.zgcnc.net, then the computer is connected to the homepage of “Zigong Broadband”. Click on the “Daily Movies” channel, and then it shows <http://www.zgcnc.net/movie/> in the address bar. 4. Search key word “Crazy Stone” on the webpage. Click on the link of “Crazy Stone” and enter the webpage. Click on the start button to play the movie until it finishes. Yan Li named the video record of the whole process as “Video 2”, and stored it in the folder of “Zigong CNC: Stone” in the removable hard disk (hereafter RHD). The NC also notes Yan Li’s activities of searching and playing other movies including “*Yesterday*

*Once More*”. Yan Li stored all the records in the RHD and gave the RHD to the notary. Meanwhile, the original court found: Zigong CNC was the owner and operator of www.zgcnc.net. On 23 May 2007, Xinchuan Online filed the lawsuit for infringement of communication right at the Intermediate People’s Court of Zigong City. NC 110182 stated: On 3 July 2007, Yan Li and the appointed notary went to Daan Operating Room of CNC near Daanjiuding Supermarket, ground floor of Anda Building, Daan District, Zigong. When enquiring about broadband, Yan Li asked the staff if *The Crazy Stone* was available at www.zgcnc.net. The staff answered that it was available and he had watched the movie on the website.

After the hearing, the Intermediate People’s Court of Zigong City decided: Xinchuan Online provided the genuine DVD of *The Crazy Stone*, which clarified that Sifangyuanchuang, Warner China and Focus Film Ltd. were the copyright owners. Since Sifangyuanchuang and Focus Film Ltd. agreed that Warner China enjoyed the right of online on-demand video, it could be identified that Warner China enjoyed the communication right of the work in Mainland China. Since Warner China provided suitable authority, Xinchuan Online enjoyed the communication right of the work in mainland China. Based on NC 22931 and NC 110182, Xinchuan Online claimed that Zigong CNC provided the service of playing *The Crazy Stone* on the internet, and therefore infringed the communication right. According to NC 22931, Xinchuan Online’s agent used the computer controlled by him to operate the process. Before the NC was issued, the computer had not been monitored or controlled by the notary. Therefore, it is not possible to exclude the possibility that the computer might have been tampered with and the film pre-loaded could not be excluded. Therefore, the evidence was not unique or exclusive. According to the NC, the RHD was provided and preserved by Xinchuan Online’s agent. Since it was not known whether the RHD had been cleaned, it was not certain that the content stored within was authentic and objective. The simulation demonstration provided by Zigong CNC showed that a pre-modified computer could display a virtual internet situation. Since the computer noted in the NC was controlled by Xinchuan Online’s agent, the court accepted that the images of the website observed by the notary were not the authentic images of the website. With regard to NC 110182, even the Operating Room staff claimed Zigong CNC provided *The Crazy Stone*, such evidence could not directly lead to a conclusion of a

<sup>1</sup> In order to support this argument, Zigong CNC appointed a technician to make a false website on which visitors may be confused that they were connected to the internet,

but actually they were visiting the local computer. This experiment was notarised by the Chengdu Notary Office of Chengdu City.

breach. In addition, the conversation was reasonable for the members of staff to make when promoting the service. In the absence of other evidence, the court did not accept the content of the NC. Therefore, the court did not accept the probative force of the evidence provided by Xinchuan Online. Since the evidence provided by Xianchuan Online was insufficient to support the claim against Zigong CNC, the court rejected the claim by Xianchuan Online.

Since Xianchuan Online refused to accept the First Instance Trial Judgement, it filed the appeal to the High People's Court of Sichuan Province, requesting that the First Instance Trial Judgement be commuted and to support its claim. Zigong CNC requested to retain the original judgement.

After hearing of the Second Instance Trial, the High People's Court of Sichuan decided: The two NC were insufficient to prove that Zigong CNC infringed Xianchuan Online's communication right for providing *The Crazy Stone* on the internet. The reasons were as follows: According to NC 22931, the notary witnessed Xianchuan Online's agent collect and preserve the evidence at a pre-ordered hotel room with a computer prepared by Xianchuan Online's agent. Since that time, the NC did not note whether the notary checked the hotel internet connection or the computer. Meanwhile, since the NC did not note the source of the RHD for evidence preservation or whether the RHD was cleaned, the authenticity and objectivity of the content were not guaranteed. Regarding NC 110182, it stated: Xinchuan Online's agent and the notary made enquiry at the Daan Operating Room of CNC and another CNC building. However, the NC could not directly and sufficiently prove that Zigong CNC provided *The Crazy Stone*. The original court verified the authenticity of the two NCs. However, due to the defect of the content in the NC, the original court made the correct decision not to accept the content of the NC. On the request of Zigong CNC to appoint an auxiliary expert to provide testimony to the court, the original court approved this request. Based on the expert's testimony that a pre-modified computer may display virtual internet images, the original court made the decision that the infringement did not occur. This court agreed with the original court's decision. Therefore, since Xianchuan Online's reason for appeal was not sustained, and this court decided to reject the appeal.

This court agrees with the opinions of the First and Second Instance Trial concerning the facts.

This court decides: Xinchuan Online enjoys the communication right of *The Crazy Stone*. Any unauthorised infringement will result in the liability of copyright infringement. However, when claiming that Zigong CNC infringed its communication right, Xinchuan

Online must provide sufficient evidence. In this case, the primary controversy is whether the two notarial certificates provided by Xinchuan Online are sufficient to be the basis of its claims.

In this case, the admissibility of NC 22931 concerns the approval of notarial evidence in the internet environment. With regard to the notarial evidence, the courts may examine whether the notarised information is from the internet or the local computer based on the internet environment and the concrete circumstances of the internet related evidence. Then the courts should make decision based on the examination. According to the facts examined by the original court, the notarial activity relating to NC 22931 was preceded by the actions of Xinchuan Online's agent. The computer and RHD were provided by the agent. The activity was carried out by the agent. The NC does not note whether the computer or RHD has been cleaned. Meanwhile, there is a possibility that a prepared webpage may be preserved in the local computer, so that it may be displayed similarly with other real webpages on the internet. Therefore, in the absence of an examination of the local computer in the NC, NC 22931 is capable of proving the activity in front of the notary, but incapable of proving such activity occurred on the internet. This means that the NC evidence is insufficient to prove that Zigong CNC provided *The Crazy Stone* on its website. In addition, NC 110182 is capable of proving that the staff of Zigong CNC entered into conversation with the notary. However, it is incapable of proving whether the content of the conversation is true. In the absence of other evidence, the original court decided that the evidence provided by Xianchuan Online lacked authenticity and objectiveness due to the defects in the content of the two NCs. This court agrees with this decision.

To summary, this court decides that Xinchuan Online's application for retrial is not in accordance with Article 179 of the Civil Procedure Law of the People's Republic of China. In accordance with Article 181 of the Civil Procedure Law of the People's Republic of China, the court rules that: Xinchuan Online's application for retrial is rejected.

Presiding Judge: Xiaobai Yu

Trial member: Junli Xia

Acting Judge: Yanfang Wang

13 February 2009

Secretary: Shuo Bao

## Commentary

With the promulgation of the amended Civil Procedure Law in 2013, the role of electronic evidence becomes more significant. When dealing with electronic evidence in IP litigation, the Chinese courts will first examine the admissibility of the electronic evidence. If the evidence is admissible, the court will then decide the probative force of the evidence, 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. However, 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.

The case of *Xinchuan Online (Beijing) Information Technology Co. Ltd. v. Zigong Branch of China Network Communication Group* is a typical example of the problems relating to the reliability of notarised electronic

evidence. In this internet-related case, the copyright owner appointed a notary to prepare the electronic evidence. However, since the notarial certificate did not note whether the computer for evidence collecting had been checked or cleaned before the process of collecting the evidence, both the first instance court and second instance court ignored the probative force of the evidence. The copyright owner then applied for retrial to the Supreme People's Court. The Supreme People's Court reviewed and agreed the two previous judgements, and further clarified the rule of the probative force of electronic evidence.

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