

Provisions of the Supreme People's Court on Evidence in Intellectual Property Civil Litigation

(Adopted at the 1815th Session of the Judicial Committee of the Supreme People's Court on 9 November 2020, and coming into force on 18 November 2020)

For the purposes of guaranteeing and facilitating a party's exercise of litigation rights according to law, and ensuring the fair and timely trial of IP-related civil cases in the people's courts, the Provisions are formulated in accordance with the Civil Procedure Law of the People's Republic of China and other relevant legal provisions and in light of the IP-related civil trial practices.

Article 1 The parties of intellectual property civil litigation shall comply with the principle of good faith, and provide evidence actively, comprehensively, correctly, and honestly in accordance with laws and judicial interpretations.

Article 2 The parties shall provide evidence to support the claims they make. Dependent on the trial situation of the case, the people's court may apply Article 65.2 of the Civil Procedure Law to request the parties to provide relevant evidence based on their claims, the facts to be proved, possession of evidence, and capability of producing evidence, etc.

Article 3 Where the product manufactured by a patented process is not a new product, the plaintiff in the patent infringement dispute shall produce evidence to prove the following facts:

(1) the product manufactured by the defendant is the same product as that manufactured using the patented process;

(2) there is a high likelihood that the defendant uses the patented process to manufacture its or his product;

(3) the plaintiff has made reasonable efforts to prove that the defendant uses the patented process.

After the plaintiff has completed the production of evidence mentioned in the preceding paragraph, the people's court may require the defendant to produce evidence to prove that the process used in the manufacture of its or his

product is different from the patented process.

Article 4 The defendant who claims according to law the defense of legitimate source shall produce evidence to prove that the alleged infringing product or reproduction is obtained legally, including through a legal purchase channel, at a reasonable price, and from a direct supplier.

Where the evidence of the source of the alleged infringing product or reproduction provided by the defendant is commensurate with its or his reasonable duty of care, it can be ascertained that the defendant has completed the production of evidence mentioned in the preceding paragraph, and it can be presumed that he has no knowledge that the alleged infringing product or reproduction infringes intellectual property rights. The defendant's business scale, degree of professionalism, market trading norm, etc. can serve as evidence to determine its or his reasonable duty of care.

Article 5 The plaintiff who brings an action for confirmation of non-infringement of intellectual property rights shall produce evidence to prove the following facts:

(1) the defendant issues an infringement warning to the plaintiff or files an infringement complaint against the plaintiff;

(2) the plaintiff issues a reminder on the exercise of the right of complaint to the defendant along with the time of the reminder and the time of service;

(3) the defendant has not filed the lawsuit within a reasonable time period.

Article 6 Where the basic facts that have been ascertained by an administrative act on which no administrative litigation is initiated within the statutory period, or part of the basic facts ascertained by an administrative act has been affirmed by effective judgment, the party does not need to prove such facts in intellectual property civil litigation, unless there is sufficient evidence for rebuttal.

Article 7 The objects and bills, etc. obtained by the right-holder or by an entrusted person through purchasing in-

fringing goods from the alleged infringer under the name of a normal purchaser for discovering or proving the infringement of intellectual property rights can be used as evidence to sue the alleged infringer for infringement.

Evidence formed by the alleged infringer's infringement of intellectual property rights on account of the act of another person can serve as evidence for the right-holder to sue the alleged infringer for infringement, except that the alleged infringer's intellectual property infringement is committed on account of the right-holder's evidence collection only.

Article 8 For the following evidence formed outside the territory of the People's Republic of China, where the party raises an objection solely on the grounds that the evidence has not gone through notarization, legalization or other certification procedure, the people's court shall not support such objection:

- (1) evidence confirmed by an effective judgment of the people's court;
- (2) evidence confirmed by an effective result of an arbitration institution;
- (3) publications and patent literature, etc. that can be obtained from official or public channels;
- (4) evidence whose authenticity can be verified by other evidence.

Article 9 For the evidence formed outside the territory of the People's Republic of China under any of the following circumstances, where the party raises an objection solely on the grounds that the evidence has not gone through the legalization procedure, the people's court shall not support such objection:

- (1) the party who raises the objection clearly recognizes the authenticity of the evidence;
- (2) the opposing party provides witness testimony to confirm the authenticity of the evidence, and the witness clearly expresses that he is willing to be subject to punishment if he commits perjury.

If the perjury committed by the witness in the second item of the preceding paragraph constitutes the circumstances specified in Article 111 of the Civil Procedure Law, the people's court shall handle it according to law.

Article 10 If, in the first-instance proceedings, a power of attorney has been notarized, legalized or otherwise certified in accordance with Article 59 and Article 264 of the Civil Procedure Law, the people's court may no longer require the above certification of the power of attorney in sub-

sequent proceedings.

Article 11 The people's court shall take into account the following factors when examining the application for evidence preservation filed by the party or an interested party:

- (1) whether the applicant has provided *prima facie* evidence for its or his claim;
- (2) whether the evidence can be collected by the applicant on its or his own;
- (3) the likelihood that the evidence will be lost or will be difficult to obtain in the future, and the impact of such occurrence on the facts to be proved;
- (4) the impact of the preservation measures that may be taken on the holder of the evidence.

Article 12 The people's court, when carrying out evidence preservation, shall limit the evidence preservation to the extent that the evidence is effectively fixed to minimize the damage to the value of the preserved object and the impact on the normal production and operation of the evidence holder.

If the preservation of evidence involves a technical solution, preservation measures such as making an on-site inspection transcript, drawing, photographing, audio and video recording, design reproduction, and production drawing may be adopted.

Article 13 Where the party refuses to cooperate or obstructs the preservation of evidence without any justified reason, and the evidence preservation is as a result rendered impossible to proceed, the people's court may determine that the party shall be responsible for the adverse consequences. If this constitutes the circumstances specified in Article 111 of the Civil Procedure Law, the people's court shall handle it according to law.

Article 14 With respect to the evidence for which the people's court has taken preservation measures, where the party without authorization assembles and disassembles the physical evidence, tampers with the evidence, or performs other acts of destroying the evidence, and the evidence is as a result rendered unusable, the people's court may determine that the party shall be responsible for the adverse consequences. If this constitutes the circumstances specified in Article 111 of the Civil Procedure Law, the people's court shall handle it according to law.

Article 15 The people's court, when carrying out evidence preservation, may require the party concerned or its or his agent *ad litem* to be present, and when necessary, notify a person with expertise to be present as per the appli-

cation of the party or assign a technical investigator to participate in the evidence preservation.

If the evidence is held by a non-party to the case, the people's court may take preservation measures in respect of the evidence held by the non-party.

Article 16 The people's court, when carrying out evidence preservation, shall make a transcript and a list of the preserved evidence, and shall record the time, place, and executors of the preservation, the attendees, the preservation process and the state of the preserved objects, which shall be signed or sealed by the executors and attendees. The refusal of an attendee to sign or seal shall not affect the effectiveness of the preservation, and the people's court may indicate this on the transcript with photographing or videotaping.

Article 17 Where the respondent raises an objection to the scope, measures, necessity, etc. of the evidence preservation and provides relevant evidence, the people's court may, if it deems that the objection is established after examination, change, terminate or dissolve the evidence preservation.

Article 18 Where the applicant gives up using the preserved evidence, but the preserved evidence is involved in the investigation of the basic facts of the case or another party claims the use of the evidence, the people's court may examine and verify the evidence.

Article 19 The people's court may entrust an authentication on the following specialized issues of the facts to be proved:

(1) similarities and differences between the alleged infringing technical solution and the patented technical solution as well as the corresponding technical features in the prior art in terms of means, functions, and effects;

(2) similarities and differences between the alleged infringing work and the work claiming for rights protection;

(3) similarities and differences between the trade secret claimed by the party and the information already known to the public in the field, and similarities and differences between the alleged infringing information and the trade secret;

(4) similarities and differences between the alleged infringing object and the patented species in terms of features and characteristics, and whether the differences are caused by non-genetic variation;

(5) similarities and differences between the alleged infringing integrated circuit layout design and the integrated

circuit layout design claiming for protection;

(6) whether the technology involved in the contract has defect;

(7) authenticity and completeness of electronic data; and

(8) other specialized issues that require an authentication.

Article 20 With the approval of the people's court or the consent of both parties, the authenticator may entrust some of the test items involved in the authentication to other test institutions for testing, and the authenticator shall be legally responsible for the authentication opinions provided on the basis of the test results.

Article 21 Where a unified registration and management system for authenticators and authentication institutions for relevant business sector is not in place, the people's court may, in accordance with the procedures for the selection and appointment of authenticators as prescribed under Article 32 of Several Provisions of the Supreme People's Court on Evidence in Civil Litigation, decide on the professional institutions and professionals of appropriate technical level for the authentication.

Article 22 The people's court shall listen to the opinions of all parties and take into account the evidence presented by the parties to determine the scope of authentication. In the course of authentication, if one party applies for a change of the scope of authentication and the other party has no objection, the people's court may approve the change of scope.

Article 23 The people's court shall take into account the following factors when examining the authentication opinions:

(1) whether the authenticator possesses the appropriate qualification;

(2) whether the authenticator has the required knowledge, experience and skills for addressing relevant specialized issues;

(3) whether the authentication methods and procedures are standardized, and whether the technical means are reliable;

(4) whether the materials submitted for authentication have been cross-examined by the parties and meet the conditions for authentication;

(5) whether the authentication opinions are sufficiently based;

(6) whether the authenticator has statutory reason for

abstention;

(7) whether the authenticator has practiced favoritism, fraud or other behaviors that affect the fair authentication during the authentication process.

Article 24 Where the party who bears the burden of proof applies in writing to the people's court for ordering the opposing party in control of the evidence to submit the evidence and the reason for the application is established, the people's court shall make a ruling ordering the submission of the evidence.

Article 25 Where the people's court requires a party to submit relevant evidence according to law and the party refuses to submit the evidence without justified reason, provides false evidence, destroys the evidence, or conducts other acts that render the evidence unusable, the people's court may presume that the opposing party's claim for the matter to be proved relating to the evidence is established.

If the act performed by the party in the preceding paragraph constitutes the circumstances specified in Article 111 of the Civil Procedure Law, the people's court shall handle it according to law.

Article 26 Where the evidence involves trade secrets or other business information that needs to be kept confidential, the people's court shall request that the relevant litigation participants, prior to accessing the evidence, sign a confidentiality agreement, make a pledge of confidentiality, or order them in the form of ruling or other legal documents not to disclose, use, or allow others to use the secret information accessed during the proceedings for any purpose other than the litigation of the case at issue.

Where the party applies for restricting the personnel with access to the evidence mentioned in the preceding paragraph, the people's court shall, if it deems necessary upon examination, approve the application.

Article 27 Witnesses shall testify in court for questioning by judges and the parties.

Where, with the consent of both parties and the approval of the court, a witness does not appear in court, the people's court shall arrange the parties to cross-examine the witness' testimony.

Article 28 The party may apply for the appearance of a person with expertise in court to provide opinions on professional issues. With the approval of the court, the party may question the person with expertise.

Article 29 Where the people's court appoints a technical investigator to participate in the pre-trial conference or

trial, the technical investigator may question the parties, agent *ad litem*, persons with expertise, witnesses, authenticators, inspectors, etc. about the technical issues involved in the case.

Article 30 Where the party raises an objection to a notarized document and provides sufficient evidence for rebuttal, the people's court shall not accept the notarized document.

Where the reason for the party's objection to the notarized document is established, the people's court may ask a notary institution to issue an explanation or a supplement and correction, and, in combination with other relevant evidence, examine and verify the notarized document.

Article 31 Account books, accounting vouchers, sales contracts, purchase orders and delivery notes, annual reports of listed companies, prospectuses, company websites or brochures provided by the party; transaction data stored in devices and systems; commodity circulation data collected and compiled by third-party platforms; evaluation reports; intellectual property licensing contracts; and records of market supervision, taxation and financial departments, etc. can serve as evidence to support the amount of compensation claimed by the party for infringement of intellectual property rights.

Article 32 Where the party claims a reasonable multiple of the intellectual property licensing fee for determination of damages, the people's court may examine and verify the evidence of licensing fee by taking into consideration the following factors:

(1) whether the licensing fee is actually paid and the payment method, and whether the licensing agreement is practically performed or filed for recordal;

(2) rights of use, method, scope, and duration of the licensing;

(3) whether the licensee and the licensor are interested parties; and

(4) common standards for licensing in the industry.

Article 33 These Provisions shall enter into force as of 18 November 2020. Where any relevant judicial interpretations previously issued by this court contradict these Provisions, these Provisions shall prevail.