



IP Litigation in China under New Evidence Rules: Self-Admission and Estoppel

Featured Article

On December 25, 2019, the Supreme People's Court of China promulgated a revised version of *Several Provisions on Evidence in Civil Proceedings* ("New Evidence Rules"), which came into effect on May 1, 2020. There are many highlights in the New Evidence Rules, one of which is to clarify and to detail an admission in the law of evidence to relieve the opposing party of its burden to prove the same if a party admits to a fact unfavorable to its position. This is also called as self-admission.

Given many years of experience in intellectual property litigation, the author discusses the evolution of the doctrine of self-admission in China, putting forward some questions and providing some solutions in hope to benefit litigation participants.

1. Evolution of the doctrine of self-admission

1.1 In 2001, the Supreme People's Court promulgated *Provisions of the Supreme People's Court on Evidence in Civil Proceedings* ("Provisions on Civil Evidence"). Article 8 stipulates, in the process of litigation, if one party expressly admits the facts stated by the opposing party, the opposing party does not need to provide evidence to satisfy its burden to prove those facts provided that the facts are not related to personal identity. If one party neither admits nor denies the facts advanced by the opposing party and further maintains the same attitude when is put on enquiry by the judge in the course of litigation, that party shall be deemed as to have admitted to those facts.

Where a party entrusts an attorney to participate in the litigation, the attorney's admission shall be deemed as the party's self-admission, unless the attorney does not have specially authorized

power and the admission leads to the recognition of the other party's claim. The self-admission also exists in a scenario where the attorney makes an admission in the party's presence, but the party does not deny the attorney's admission.

However, if a party withdraws its admission and obtains consent of the opposing party before the end of court hearing, or there is sufficient evidence to prove that the admission is made under coercion or major misunderstanding and is inconsistent with the facts, the burden of proof of the opposing party shall not be exempted.

1.2 In 2015, the Supreme People's Court promulgated *Interpretation of the Supreme People's Court on the application of the Civil Procedure Law of the People's Republic of China* ("Interpretation on Civil Procedure Law"). Article 92 stipulates, if one party expressly

admits the facts unfavorable to himself orally in court proceedings, or in written materials such as complaint, statement of defense, and statement of the procurator, the other party does not need to provide evidence to prove such facts. The above provisions of the self-admission shall not apply to the facts that should be investigated by the people's court according to authority, such as those involving identity relations, national interests, social and public interests. If the facts admitted by the party do not conform to what is ascertained by the court, the court shall not confirm such facts.

1.3 On December 25, 2019, the Supreme People's Court promulgated the New Evidence Rules, which further modified and perfected an admission in the law of evidence to relieve the opposing party of its burden to prove the same if a party admits to a fact unfavorable to its position, including clearly defining applicable scenario of self-admission, presuming an attorney's admission, stipulating self-admission rules in a joint action and conditions of self-admission, stipulating inadmissibility of self-admission, and further regulating a withdrawal of self-admission.

Article 3 of the New Evidence Rules stipulates, in the course of litigation, any party states any fact unfavorable to himself or explicitly admits any fact unfavorable to himself, the other party need not produce evidence to prove the same. In the course of exchanging evidence, making inquiries, conducting investigations, or making statements in any written materials such as any statement of claim, statement of defense, or statement made by an attorney, any of the parties explicitly admits to a fact which is unfavorable to the parties, the provisions of the preceding paragraph shall apply.

Article 4 stipulates, where a party neither acknowledges nor denies facts advanced by the opposing party and further maintains the same attitude when is put on enquiry by the judge in the course of litigation, that party shall be deemed as to have admitted to those facts.

Article 5 stipulates, where a party entrusts an

attorney to participate in a lawsuit, the attorney's admission shall be deemed as the party's self-admission, unless the power of attorney expressly excludes the attorney's power to admit any facts. However, if a party explicitly denies the attorney's admission before the court, the attorney's admission shall not be deemed as the party's self-admission.

Article 6 stipulates, in a common joint action, the self-admission made by one or more of the joint litigants shall have effect on the party making the self-admission. In a necessary joint action, if one or more of the joint litigants make self-admission while the other joint litigants deny it, the admission is not admissible. However, if the other co-litigants neither admit nor deny it, and still do not express their opinions clearly after the explanation and inquiry by the judge, it shall be deemed as self-admission is made by all co-litigants.

Article 7 stipulates, where a party to a lawsuit acknowledges with restrictions or conditions, that a fact asserted by the other party against him is unfavorable, the court shall take into account of the facts in deciding whether the acknowledgment constitutes a self-admission.

Article 8 stipulates, self-admission shall not apply to the facts specified in section 1 of article 96 of the Interpretation on Civil Procedure Law. If the facts admitted are inconsistent with the facts already ascertained, the court shall not confirm such facts.

Article 9 stipulates, under any of the following circumstances, if a party concerned revokes a confession before the conclusion of a court hearing, the court shall approve the revocation: (1) Where the agreement of the other party is obtained. (2) Self-admission is made under the coercion or major misunderstanding. Where the court approves revocation of self-admission by a litigant, the court shall make a verbal or written ruling.

2. Self-admission and estoppel

In a civil litigation, if one party states the facts unfavorable to himself or explicitly admits the facts unfavorable to himself, the opposing party

is relieved from proving such facts. So, in the process of intellectual property litigation, would all facts that one party claims against himself constitute self-admission? If the party denies his previous self-admission, what would happen next?

Below is an analysis of legal facts from the perspective of burden of proof according to each step of intellectual property litigation.

2.1 Basis of rights

In intellectual property litigation, a party's right relies upon, namely, patent right, trademark right, copyright, trade secret, etc. All of them have the nature of intangible property, which is a kind of absolute right. Therefore, with regard to the confirmation of such right, even if one party claims facts against himself or admits the existence and validity of the other party's intellectual property right, the burden of proof of the other party shall not be exempted, otherwise legitimate interest of the public or the 3rd party may be infringed. The party has no right to dispose public or 3rd party's interest. Therefore, in cases of intellectual property ownership dispute and infringement dispute, the party claiming intellectual property rights shall bear the burden of proof for basis of intellectual property rights, which shall not be exempted due to the recognition of the other party.

In *Guangzhou Flower Culture v. Guangzhou GOMO* which is a dispute over infringement of right of network dissemination of works, Guangdong High People's Court did not consider a fact advanced by the defendant GOMO who admitted the right of the plaintiff, and further ascertained that GOMO was assigned right of network dissemination of works. Accordingly, the court ruled the demand that the plaintiff Flower Culture requested for compensating its economic losses in retrial lacked the factual and legal basis, which was not supported by the court.

In a dispute over an intellectual property contract, for issues relating to the contract's establishment and effectiveness, revision,

dissolution, termination, cancellation, and performance, due to the involvement of two parties, the admission of one party would be admissible and relieve the other party from the burden of proof.

2.2 Infringement act

Whether defendant has carried out the alleged infringement is the content of his personal experience, so defendant's self-admission to the infringement will not exceed his cognitive ability, and will not generally damage to the public or the third party's interest. Therefore, it shall constitute self-admission and exempt plaintiff from the burden of proof.

It is worth noting that in the New Evidence Rules, contents article 67 of Provisions on Civil Evidence have been deleted, where the recognition of facts made by one party for the purpose of reaching a mediation or settlement shall not be used as evidence against him in a subsequent litigation, which however is stipulated in article 107 of Interpretation on Civil Procedure Law. Therefore, the facts recognized by one party to reach a mediation or settlement still do not constitute self-admission. In addition, facts displayed on website of one party, or recognized in another case can also constitute self-admission and estoppel is not allowed generally. In *Shenzhen Tenda v. Shenzhen Dunjun* over a dispute on an invention patent infringement, the Supreme People's Court held that three types of alleged infringing products adopted method of patent-in-dispute to realize a compulsory portal function. Tenda described the portal function of the alleged infringing products on its website and flagship shops on e-commerce platform, introducing and promoting web authentication function of the alleged infringing products (web authentication process involves the compulsory portal technology). According to Tenda's self-description, the court held the alleged infringing products infringed right of patent-in-dispute.

In a dispute of intellectual property infringement and unfair competition between

Zongrong Li and *Xinzheng Jin*, the Supreme People's Court held that in another case, Zongrong Li confessed the fact that 18000 words in the eighth chapter of Introduction were quoted from five articles jointly signed by Xinzheng Jin and others. Although Li Zongrong asserted that Xinzheng Jin was only a titular author, he did not submit evidence to prove which was not supported by both 1st instance and 2nd instance courts.

2.3 Amount of infringement profit

A defendant should be the one to know about profits resulting from infringement. Defendant's self-admission to the infringement profits will not exceed his cognitive ability, and generally will not damage public or 3rd party's interest. Therefore, self-admission to infringement profits by defendant should exempt a plaintiff from the burden of proof.

In judicial practice, it is often seen that for the commercial purpose, an infringer publicly declared information such as sales volume, market share, and profitability through its official website, various media, etc. Such evidences can be used to against them to demonstrate the profits amount resulting from infringement. In absence of evidential support, a denial by the infringer would not be approved by the court.

Article 30 of *Answers of Beijing High People's Court to questions about trial of trademark civil disputes* provides a guidance regarding the question of whether an infringer's disclosure about the sales quantity of infringing products in newspapers, magazines and other media shall be taken as a reference to determine the quantity of the infringing products: in absence of any other evidence, the disclosed sales quantity in relevant media is admissible to determine quantity of the infringing products sold by infringer.

Moreover, article 33 of *Guiding opinions of Beijing High People's Court on determining the liability for damages caused by copyright infringement* stipulates, if a defendant claims more infringing copies being sold in the alleged infringing publications or advertisements than

that has been claimed in the court, unless the evidences to the contrary, the quantity claimed in the publications or advertisements shall be taken as a basis for determining the amount of compensation.

In *Zhongshan Topband v. Shenzhen Rnice* over a dispute on invention patent infringement, the Supreme People's Court has admitted the submitted printed copies of Rnice's webpage containing a statement of the Rnice production scale as "daily production [reaches] 30000 units," based upon which, in absence of actual data of manufactured and sold infringing products, fully supported the compensation amount demanded by Topband.

3. Enlightenment to the party or his attorney

3.1 Self-admission made by the attorney

Where a party entrusts an attorney to participate in a lawsuit, the attorney's admission shall be deemed as the party's self-admission, unless the power of attorney expressly excludes the attorney's power to admit any facts. However, if a party explicitly denies the attorney's admission before the court, the attorney's admission shall not be deemed as the party's self-admission.

To avoid adverse consequences, litigants had better to participate with the attorney in any proceeding. If they can't participate, they need to clearly list the matters that can't be recognized by the agent in the power of attorney.

As an attorney representing clients, before participating in the litigation, it is necessary to confirm and communicate with clients in advance the facts that need to be ascertained in the court, and it had better to write them down in an email or memorandum, so as to prevent client from denial. In addition, for the facts beyond the prior confirmation, if clients do not participate in proceeding, it is necessary to make clear in the court that he needs to confirm with client before reply.

3.2 Joint litigation

In a common joint action, self-admission made by one or more of the joint litigants shall have

effect only on the party who makes the self-admission, not on other parties. In a necessary joint action, if one or more of the joint litigants make a self-admission and other joint litigants expressly deny it, the effect of self-confession shall not take place.

When the parties and agents participate in the joint action, they should distinguish the necessary joint litigation and the common joint litigation, and deal with self-admission of some parties according to different situations.

3.3 Self-admission with conditions

In judicial practice, a party will admit a fact conditionally based on various considerations. In this case, it should be examined whether the additional conditions and the confessed facts are inseparable. If they are separable, self-admission is established. If they are not, self-admission is not established, which has been specified by Article 7 of New Evidence Rules.

For the parties or attorneys, in order to avoid adverse consequences, they should use the recognition with conditions carefully. If not handled properly, it may be regarded as having the effect of self-admission, while the additional conditions cannot be approved.

3.4 Exceptions to self-admission

Article 7 of New Evidence Rules stipulates, self-confession shall not be applied to what possibly bring damage to national interests and public interests, what involving identity relations, litigation (public interest litigation)

stipulated in the article 55 of the *Civil Procedure Law*, with possibility of malicious collusion of the parties to damage the legitimate rights and interests of others, adding additional parties, suspension of litigation, termination of litigation, avoidance, etc. according to the court's authority.

The above exceptions are related to the public interest or legitimate rights and interests of others, or the independence of the court, which the parties cannot and do not have right to dispose and self-admission is naturally not established.

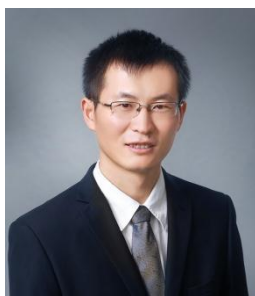
3.5 Conditions to revoke self-admission

Article 9 of New Evidence Rules stipulates, the court shall approve the revocation under circumstances that agreement of the other party is obtained or the self-admission is made under coercion or major misunderstanding.

Of course, if it can be proved that the content of self-admission is inconsistent with the facts, no matter the self-admission is based on coercion or major misunderstanding, it will not take effect.

4. Conclusion

In this article, based on the understanding of New Evidence Rules and experience in intellectual property litigation, combined with some typical judicial cases, the author discusses the self-admission and estoppel in intellectual property litigation, putting forward some questions and provides some solutions accordingly, in hope of benefitting litigation participants.



ZHANG, Yongkang

Partner, Senior Patent Attorney, Attorney at Law

Mr. Yongkang ZHANG has expertise and experience in agency in the fields of pharmacy, chemistry, biotechnologies and new materials, as well as on patent reexamination, invalidation and litigation. Mr. ZHANG has represented over 1000 patent cases submitted to China and Japan and also represented patent invalidity and litigation cases for many domestic and foreign well known company clients. Mr. Zhang joined Lung Tin in October 2006.