**Beijing Internet Court**

**Civil Judgment**

(2018) J. 0491 M. C. No. 1

Plaintiff: Beijing Microlive Vision Technology Co., Ltd., located at 408, F4, No. 51, Zhichun Road, Haidian District, Beijing, China.

Legal representative: Liang Rubo, general manager.

Agent ad litem: Song Xuejiao, female, employee of the company.

Agent ad litem: Yang Heping, lawyer of Zhong Lun Law Firm, Beijing.

Defendant: Baidu Online Network Technology (Beijing) Co., Ltd., located at F3, Baidu Campus, No. 10, Shangdi 10th Street, Haidian District, Beijing.

Legal representative: Xiang Hailong, general manager.

Defendant: Beijing Baidu Netcom Science and Technology Co., Ltd., located at F2, Baidu Campus, No. 10, Shangdi 10th Street, Haidian District, Beijing.

Legal representative: Liang Zhixiang, general manager.

The agent ad litem jointly entrusted by the above two defendants: Wang Kaixiong, lawyer of Hai Run Law Firm, Beijing.

The agent ad litem jointly entrusted by the above two defendants: Tan Hongjuan, lawyer of Hai Run Law Firm, Beijing.

In respect of the dispute over the right of work communication through information network between the plaintiff Beijing Microlive Vision Technology Co., Ltd. (hereinafter referred to as “Beijing Microlive Vision”) and the defendants Baidu Online Network Technology (Beijing) Co., Ltd. (hereinafter referred to as “Baidu Online”) and Beijing Baidu Netcom Science and Technology Co., Ltd. (hereinafter referred to as “Baidu Netcom”), the Court has accepted the case, applied ordinary procedures which include evidence exchanges, pre-trial meetings, etc., and convened a public court session on Oct. 30, 2018. Song Xuejiao and Yang Heping, authorized by the plaintiff Beijing Microlive Vision and Wang Kaixiong and Tan Hongjuan, jointly entrusted by Baidu Online and Baidu Netcom, participated in the court session. This case is decided now.

The plaintiff prays as follows: 1. To order the two defendants immediately stop the infringement of the plaintiff’s copyright and stop providing the online playing and download service of the alleged infringing short video; 2. To order the two defendants post a statement for 24 consecutive hours at a conspicuous place on the website homepage of Baidu.com ([www.baidu.com](http://www.baidu.com)) and the homepage of Huopai client to eliminate ill effects within three days from the date this judgment takes effect; 3. To order the two defendants compensate the plaintiff for economic loss of RMB one million and reasonable expenses of RMB 50,000.

Facts and reason: The website and mobile app of Douyin (collectively, “Douyin Platform”) is an original short video sharing platform legally owned and operated by the plaintiff. “Black Face V (黑脸V)” is a well-known verified user on the Douyin Platform who is very well received by users on the platform for his imaginative and uniquely designed image and video works. He has been followed by 26.37 million fans. His every work has a high click and like rate. The short video “On May 12, I Want to Tell You” published on May 12, 2018 (hereinafter referred to as the short video “I Want to Tell You”) was independently created and uploaded by "Black Face V". The 13-second short video is a work that is done through design, arrangement, editing, performance, etc. in the memory of the tenth anniversary of the Wenchuan Earthquake. Once published, the work was widely praised by netizens and got more than 2.8 million likes. It became a work created by a method that is similar to filmmaking (hereinafter referred to as “film-like work”). With the authorization of "Black Face V", the plaintiff lawfully enjoys the worldwide and exclusive right to communicate the short video “I Want to Tell You” through information network and the exclusive right of right protection in the name of the plaintiff.

Baidu Online and Baidu Netcom are respectively the developers of Huopai mobile app for the Android and iOS systems. The two defendants jointly provide users with download, installation, operation, and update and maintenance of relevant functions of Huopai mobile app, and advertise and promote the app. Without the permission of the plaintiff, the two defendants arbitrarily disseminated the short video “I Want to Tell You” on Huopai and provided download and sharing services, thus attracting a large number of online users to browse and watch on Huopai and infringing the plaintiff’s right of communication through information network in respect of the short video “I Want to Tell You”. Moreover, the watermarks of Douyin and user ID are not displayed on the alleged infringing short video. Hence the two defendants inevitably removed the watermarks, so there is intention to destroy the plaintiff’s technical measures. This behavior constitutes an infringement of the plaintiff's right of communication through information network. The two defendants’ above two behaviors caused great economic losses to the plaintiff and negative influence on the reputation of the plaintiff. The court is requested to support all the plaintiff's claims. During the trial, the plaintiff acknowledged that the alleged infringing short video had been deleted, and relinquished the claim of “to order the two defendants immediately stop the infringement of the plaintiff’s copyright and stop providing services for the online display and download of the alleged infringing short video”.

The two defendants jointly argued that they disagree to the plaintiff’s claims and should not bear the legal responsibility claimed by the plaintiff for the following reasons. First, the short video “I Want to Tell You” is not original and does not constitute a work under the protection of copyright law. The idea expressed in the short video is no different from that of other users who imitate gesture dance and upload short videos. Hence it’s not original and cannot meet the requirements on originality of film-like works. The video lasts only 13 seconds. The creation space is limited. The materials mainly come from the demonstration video of Party Media Platform with few independent creation factors. There is no selection or screening in the shooting of the materials, and the selection and arrangement of the frames. It can hardly form the originality of film-like works by using software to cut out figure images. There are a lot of short videos on the Internet that are similar to or identical with the short video “I Want to Tell You”. And the performer is not the right holder himself. Second, the plaintiff and the defendants are inappropriate subjects. The authorizer claimed by the plaintiff is not the author or right holder of the short video “I Want to Tell You”. Hence the plaintiff does not have the right to sue the two defendants. The second defendant Baidu Netcom is responsible for operating Huopai mobile app and the first defendant Baidu Online is only the registered developer of the software. Therefore, the first defendant Baidu Online is not an appropriate defendant in the case. Third, the second defendant Baidu Netcom should not bear the legal liability claimed by the plaintiff on the following grounds. 1. Huopai mobile app only provides information storage services. The short videos on it are uploaded by netizens themselves, and the alleged infringing short video was uploaded by Huopai’s registered user ID451670; 2. Baidu Netcom has indicated clearly in the user agreement that it is not allowed to upload content that infringes on the intellectual property rights or other rights of others, and also has informed rights holders of the complaint methods and channels. Baidu Netcom has fulfilled the prompt and management obligations according to law; 3. After receiving the valid complaint from the plaintiff, Baidu Netcom deleted the video in a timely manner. It has no fault and should not bear civil liability; 4. The plaintiff’s claims lack factual and legal basis. The economic loss of RMB one million claimed by the plaintiff is estimated based on the counts of view, forwarding, and likes on Douyin, which can be operated by the plaintiff. So the claim on economic loss lacks authenticity. The liability-bearing means “eliminating ill effects” is not applicable to infringement of property rights. Its claim for publishing a statement to eliminate ill effects lacks legal basis. To sum up, the Court is requested to dismiss all the plaintiff’s claims in accordance with law.

The parties submitted evidence to support their claims. The court organized the parties involved to conduct evidence exchange and cross-examination. Based on the statements of the parties and the evidence that has been verified through examination, the Court ascertains facts as follows.

1. Facts on the Plaintiff and the Defendants
2. Facts on the Plaintiff
3. The plaintiff is the operator of Douyin (domain name: douyin.com) and Douyin mobile app (for Android system and iOS system).
4. On May 29, 2018, Xie (the authorizer) issued an authorization confirmation to the plaintiff (the authorized) to grant the plaintiff worldwide, exclusive, irrevocable, and transferable right of communication through information network (i.e., the right of communication through information network and the rights related thereto) to publish all the contents posted in his Douyin account from January 1, 2018 to January 1, 2019, and authorized the plaintiff to independently protect rights in the name of the authorized. The authorizer no longer claims rights procedurally or substantially.
5. According to the background information with Douyin, the user with the Douyin account number 145651081 is nicknamed “Black Face V”, whose registration information includes mobile phone number but the real name and identity information. The background information with Toutiao shows the information of the operator of Toutiao account “Black Face V” includes the name Xie, a half-figure photo, ID card photo and mobile number, etc. The mobile numbers in the background registration information of the above two platforms are the same.

During the trial, outsiders Xie and Lei participated in the lawsuit. The two defendants requested to disclose the real name of Xie. Xie specifically submitted a confidentiality application to the Court, saying that publishing the real name of the operator of the “Black Face V” account will destroy the deliberately designed and maintained mystery, and thus reducing the appeal to the netizens and damaging his legitimate rights and interests. The Court verified Xie’s personal information including real name during the trial. Whether to disclose his real name does not affect the trial of the case, the exercise of the procedural rights of both parties, and public interest. Therefore, the Court respected his wishes, and hided personal information such as the real name of Xie and Lei in the public court session and this judgment.

Xie, under the witness of the notary public, logged in the aforementioned “Black Face V” account of Toutiao mobile app and Douyin mobile app by entering the above mobile number and corresponding verification code. The two defendants claimed that the owner of the above mobile number should be Lei, so the “Black Face V” user should be Lei, not Xie. In addition, the confidentiality application signed by Xie was sent by post to the Court by Lei. To find out relevant facts, the court informed Xie and Lei to create a real-name account on the Court’s e-litigation platform to accept questioning. Lei admitted to be the owner of the above mobile number, but said the user of the number is Xie and that he is irrelevant with the “Black Face V” account and the production and rights of the short video “I Want to Tell You”. Xie said the “Black Face V” account involved in the case was registered and used by him, and the short video “I Want to Tell You” was also filmed and produced by him. He confirmed that the signatures on the *Introduction to the Creation of the Video “On May 12, I Want to Tell You”* and the authorization confirmation were his and recognized the contents of the aforementioned documents in its entirety.

1. Facts on the Defendants

The registration information at the app store (Android and iOS systems) shows: Baidu Online is a developer of Huopai mobile app (for Android system), and Baidu Netcom is the developer of the app for iOS system. No other subject information such as operator is displayed. The two defendants asserted that both the operators of the above two versions are Baidu Netcom, and Baidu Online does not participate in the operation. As for the display in the registration information at the app store that the developer of the iOS version is Baidu Online, the two defendants explained that they registered the developer of partial products as Baidu Online because the country has set a limit on the number of mobile apps under each subject account, and that the user agreement of Huopai mobile app also has indicated the service provider is Baidu Netcom.

The above facts can be proved by the screenshots of ICP filing information inquiry and the home page of Douyin website submitted by the plaintiff, the screenshot of the developer information of Douyin mobile app (for Android and iOS systems), the authorization letter issued by Xie, the notarial certificate numbered (2018) J. D. F. N. M. Z. Z. No. 10028, the notarial certificate numbered (2018) Y. G. N. Y. No. 8614, the screenshot of the developer information of Huopai mobile app (for Android and iOS systems) and the corresponding block chain evidence collection certificate, as well as the parties’ statements and records.

1. Facts on the Short Video “I Want to Tell you”
2. The Background of the Production of the Short Video “I Want to Tell you”

On the occasion of the tenth anniversary of the Wenchuan Earthquake, the National Party Media Information Public Platform (hereinafter referred to as the “Party Media Platform”) joined hands with people.cn as well as nearly 100 party media to jointly launch an interactive activity themed “bear in mind the martyrdom, pay tribute to rebirth, and devote our strength to move forward” in order to commemorate the Wenchuan Earthquake with actions. By cooperating with the social media platform Douyin, the activity launched the topic # On May 12, I Want to Tell You# on the platform to invite netizens to relay the initiative in the form of gesture dance and remember the Wenchuan Earthquake with personalized expression.

Under the topic # On May 12, I Want to Tell You# on Douyin, Party Media Platform and people.cn respectively released a demonstration video to commemorate the 10th anniversary of the 5.12 Wenchuan Earthquake (see the videos in Appendix 2 and 3). In the above demonstration videos, two women played gesture dance to the music, and the light or clothes change from dark to bright.

On May 18, 2018, www.zgjx.cn published an article titled *Total Participation in the Interactive Activity of National Party Media Platform’s Commemoration of 5.12 Wenchuan Earthquake Exceeds 600 Million*, which reported that the above activity was widely participated by netizens.

On October 16, 2018, under the topic # On May 12, I Want to Tell You # on Douyin mobile app, there are several videos, three of which were played (see Annex 4 for the videos). In the videos of the above three users, we can see that someone is performing gesture dance, and in the video in which the performer is a female the candlelight in the background changes from dark to bright when the gesture dance comes to the end.

1. The Content and Production of the Short Video “I Want to Tell You”

On September 11, 2018, the account of the verified user on Douyin nicknamed “Black Face V” (Douyin account number: 145651081) was logged in. The user page on Douyin mobile app of Android system shows “157.751 M likes”, “26.359 M fans” and “95 works”, etc., and user page on Douyin mobile app of iOS system shows “157.753 M likes”, “26.359 M fans” and “96 works”. The short video “I Want to Tell You” can be found and played among the “works” of the user in the above two systems (See the video in Appendix 1).

The overall length of the short video “I Want to Tell You” is 13 seconds. On the play page, there are words “On May 12, I want to tell you that let us remember the pain and disaster, pass on the touch and blessing, pay tribute to rebirth, and be grateful!” The video shows a masked man wearing a black hoodie standing in the ruins, with ground cracked, poles tilted, building dilapidated and sky dark. He is praying with gesture dance. After the pray, the lens zooms from near to far. The crack becomes healed, poles stand up, green trees line up, blue sky and white clouds reappear, and the performer’s sleeves become red. The whole process is accompanied by music. The page also shows “@ Black Face V”, “2.815 M likes” and other information. The plaintiff also furnished the screenshot of the background information of the short video “I Want to Tell You” on September 5, 2018, which displays information including “2.811 M likes”.

The notarial certificate submitted by the defendants shows the short video “I Want to Tell You” can be found and displayed in the accounts of the users nicknamed “@Cute Baby(萌宝)” and “@ Black Face V” (Douyin account number: hei\_lian\_666) on Douyin on October 15 and October 24, 2018. There are watermarks “Douyin” and “ID: 145651081” on the play page of the above short video. The plaintiff and the defendants confirm the short video uploaded by the abovementioned two users come from “Black Face V” (Douyin account number: 145651081), and the short video “I Want to Tell You” was shared; adding watermark after the short video is downloaded from the platform is a common practice in the industry.

The *Introduction to the Creation of the Video “On May 12, I Want to Tell You”* issued by Xie specifies: “The creative design, shooting, post-production in the series of short videos by Douyin account “Black Face V” are completed by myself alone. The character image, namely the image of the masked man wearing a hoodie, in the series of short videos in the account is shot and produced by me with the authorization of the performer. … Creation Background: … On May 10, 2018, I saw the topic # On May 12, I Want to Tell You # launched by Party Media Platform on Douyin Recommendation to commemorate the Wenchuan Earthquake. Introduction to the Creative Idea: I want to present the picture of vibrant post-disaster reconstruction through cool special effects and convey a warm blessing and a beautiful wish. The gesture dance relay initiative of the Party Media Platform can just express this warm blessing. Video Production: the title officially published by the Party Media Platform is adopted directly for the title of the short video. As for character image, the image of the masked man wearing a hoodie usually in the Black Face video series is employed. Green screen is used for shooting, and the figure is cut out in the post-production. Then the character image and background materials are combined to form new video frames. The materials of background pictures are found on the Internet. The dynamic scenes of the video background and the visual special effects are made using Adobe After Effects (commonly known as AE) software based on the picture materials.” The introduction is followed by a printout of the background material pictures of the short video “I Want to Tell You”.

At trial, the plaintiff confirmed the gesture dance and accompanying sound in the short video “I Want to Tell You” came from the Party Media Platform and the demonstration video of the people.cn, and that the background pictures were downloaded online.

On October 29, 2018, through the inquest of the plaintiff and the defendants as organized by the Court, the background information of Douyin shows the short video “I Want to Tell You” was created at 19:21:32 on May 12, 2018; it has been played for 41,023,503 times, receiving 2.804 M likes. The comparison shows that the number of likes on the day of inquest is less than that at the time of notarization. Hence, the two defendants believe that the count of likes is not true. The plaintiff explained that this is because those liked the video cancelled their likes. The two defendants did not recognize this.

The above facts can be proved by the screenshot of “Total Participation in the Interactive Activity of National Party Media Platform’s Commemoration of 5.12 Wenchuan Earthquake Exceeds 600 Million” and the blockchain evidence collection certificate submitted by the plaintiff, the notarial certificate numbered (2018) J. D. F. N. M. Z. Z. No. 10026, screenshot of background information of the short video “I Want to Tell You”, the *Introduction to the Creation of the Video “On May 12, I Want to Tell You”*, a photocopy of the background material pictures, the notarial certificates numbered (2018) J. F. Z. N. J. Z. Z. No. 05654, No. 05658, No. 05698, No. 05655 and No. 05917, as well as the parties’ statements and records.

1. Facts on the Plaintiff’s Claims and the Defendants’ Answer with Respect to the Alleged Infringement
2. Facts on the Plaintiff’s Assertion of the Two Defendants’ Infringement

In respect of the infringement of Huopai mobile app upon the short video “I Want to Tell You”, the notarial certificate submitted by the plaintiff indicates on September 6, 2018 the alleged infringing short video (see Appendix 5 and 6 for details) can be played on the page of the user nicknamed "Black Face V" (ID451670) on Huopai mobile app (Android system and iOS system) but doesn’t show the short video can be downloaded and shared. Therefore, the two defendants believe there are not the circumstances of download and sharing but display. There was no watermark on the play page of the alleged infringing short video. The comparison shows the alleged infringing short video is exactly the same as the short video “I Want to Tell You”.

1. Facts on the Two Defendants’ Assertion of the Only Provision of Information Storage Services

In order to prove that it is only the network service provider that provides information storage space, Baidu Netcom submitted the service terms for Huopai mobile app users and the background records of the user with ID451670, the collection of which was notarized. The service terms show Huopai mobile app features the function of releasing information by users, and has informed users that the uploaded content can not infringe the intellectual property rights of others, and the contact information is announced.

The background records of the user with ID451670, the collection of which was notarized, submitted by the defendants show: On October 24, 2018, we logged into the background network of Baidu.com, entered “the background of Tieba Nicknames”, entered relevant page by clicking “Nani User Management”, then entered relevant page by clicking “Inquiry of User Information”, entered “451670” in the blank of “Nani ID” on the page and clicked “search”, showing: The user’s uid is 94221060643; nani nickname is “Black Face V”; user name is nani-cd5c977aga63; and registration time is May 7, 2018. The registration IP and mobile number of the user are also shown. Then we went back to the “login information – Amis Tieba Nickname” page and clicked “search”. Such information as the login IP and time was shown, including on May 12, 2018, the user logged in twice at “12:51:33” and “20:09:36” respectively. The plaintiff believes that the above-mentioned background data can be falsified, and thus does not recognize it.

Upon inquiry, regarding the nature of the defendants’ behavior, the plaintiff stated that it will make claims in accordance with the facts ascertained by the Court; if the alleged infringing short video is uploaded by a user, it will file claims against the user.

1. Facts on “Notification - Deletion”

In respect of the plaintiff’s claim that it sent three letters to the two defendants requesting the deletion of the alleged infringing short video, it is ascertained as follows: On September 30, 2018, under the witness of the notary, the plaintiff's agent ad litem Song Xuejiao logged in Google email-box, and entered the e-mail page. By inputting sender, recipient, theme, etc. in the search field and selecting the date, relevant emails were found. The emails were written in English. The plaintiff submitted relevant translation.

The first email shows: On April 28, 2018, Apple sent an email titled “Apple Inc. (our reference number: APP95636-A) to several recipients including heningning@baidu.com from [AppStoreNotices@apple.com](mailto:AppStoreNotices@apple.com), and copied to the plaintiff.

The second email shows: On August 24, 2018, the plaintiff (IPP@bytedance.com) sent an email titled “Re: Apple Inc. (Our reference ID: APP95636-A)” to Apple (AppStoreNotices@apple.com), and also copied to heningning@baidu.com. The email specifies: “We found some new links to our exclusive video. We require Nani to remove the infringing links as soon as possible.” The email contains the URL of the alleged infringing short video. Nani is the former name of Huopai mobile app.

Furthermore, on September 6, 2018, the plaintiff sent a paper complaint letter requesting the deletion of the alleged infringing short video to the two defendants according to the address published by Huopai video mobile app. The complaint letter states: Our company enjoys the exclusive right to communicate the works of Douyin users including ‘Black Face V’ through information network as well as the right to defend rights in Chinese mainland (see appendix for details of the right certificate). Recently, we found that your Huopai client provides online play and download services of related works (see the attached list for the infringing links) without authorization. Such behavior has seriously infringed on our exclusive right to communicate the work through information network.… Please immediately stop the infringement, delete the infringing video, close the infringing account, and publish a statement to eliminate the adverse effects upon receiving this notice. Otherwise, we will safeguard our rights and interests through legal means including litigation.” The letter is accompanied by the links of the alleged infringing short video, Xie’s authorization confirmation and explanation, etc. The recipient of the email is Baidu Netcom's Legal Department, and the mailing address is the same as the contact address published by Huopai mobile app.

Baidu Netcom received the above complaint letter on Friday, September 7, 2018, and stated that the alleged infringing short video was deleted on Monday, September 10, 2018. The deletion record is also recorded in the background record of the user involved. The background record whose collection was notarized shows: We entered the Tieba Video Examination & Processing Platform, clicked “Review Status”, “Deleted” and then “Publisher”, entered “nani-cd5c977aga63” and clicked “search”, showing: duration: 13 seconds; deletion reason: other; publishing time: May 12, 2018 20:10:59; operation time: September 10, 2019 20:57:36, etc.

As for the above two e-mails, the two defendants recognized that heningning@baidu.com was the e-mail address used by Baidu Netcom's staff He Ningning, but contended they had verified with He Ningning who denied the receipt of the two e-mails. Accordingly, the Court requested the plaintiff to produce further evidence with respect to the defendants’ questioning. The plaintiff expressed that it had no new evidence to prove that the above mails were successfully sent or replied.

The two defendants argued with regard to the above two e-mails that the plaintiff did not file complaints in the ways of complaint posted on Huopai mobile app, rendering the notice invalid for inconformity with the elements of notice as required by law, and that the plaintiff sent the complaint in English to Apple and copied to He Ningning for the purpose of removing Huopai mobile app from Apple Store rather than complaint. The plaintiff countered that its complaint was valid as it had known the contact address published by the Huopai video mobile app before sending the aforementioned email, but believes that it has the right to choose any way other than the contact address published by the two defendants; it once filed a complaint to Baidu by email and Baidu deleted, so it had reason to believe the effectiveness of e-mail complaint. The plaintiff fails to adduce evidence on its successful complaint, and the two defendants do not recognize this. The plaintiff recognizes the fact that the two defendants received the paper complaint letter on September 7, but does not recognize the background record whose collection was notarized that the alleged infringing short video was deleted on September 10. However, it fails to submit evidence to prove the alleged infringing short video continues to exist after September 10.

The above facts can be proved by the notarial certificate (2018) J. D. F. N. M. Z. Z. No. 10634, the notarial certificate (2018) J. G. X. N. J. Z. Z. No. 06977 and the translation thereof, the notarial certificate (2018) J. G. X. N. J. Z. Z. No. 06978 and the translation thereof, complaint letter submitted by the plaintiff, the notarial certificate (2018) J. F. Z. N. J. Z. Z. No. 05852 and No. 05916 provided by the defendants as well as the parties’ statements and records.

1. Facts on the Amount Claimed by the Plaintiff

The plaintiff’s claim for the economic loss of RMB one million is based on: 1. the number of fans, popularity, and influence of "Black Face V" (Douyin account No. 145651081); 2. video views, likes and comments of the short video "I Want to Tell You"; 3. that the alleged infringing short video has been played for a long time since May 12, 2018 on Huopai mobile app.

In order to prove the reasonable expenses for this case, the plaintiff submitted an invoice of attorney fees of RMB53,000 and an invoice of notary fees of RMB15,700 yuan to the Court. The invoice of notary fees is issued by the Beijing Dongfang Notary Public Office. Four notarial certificates involved in the case are issued by the notary office. The two defendants recognize the authenticity of the above-mentioned invoices, but do not recognize the relevance.

The above facts can be proved by the invoices of attorney fees and notary fees submitted by the plaintiff as well as the parties’ statements and records.

The Court holds that according to the facts ascertained the focuses of the dispute in this case are: 1. Whether Microlive Vision Technology and Baidu Online are the appropriate subjects of the case; 2. Whether the short video “I Want to Tell You” constitutes a film-like work; 3. Whether the two defendants infringed upon the short video “I Want to Tell You” and whether they should bear liability. The Court hereby renders judgments on the above disputes respectively as follows.

1. Whether Microlive Vision Technology and Baidu Online are the Appropriate Subjects of the Case
2. Whether the Plaintiff is an Appropriate Subject of the Case

In this case, the plaintiff asserts that the outsider Xie is the author of the short video “I Want to Tell You”, and that it has procured the right to communicate the short video “I Want to Tell You” through information network with Xie’s authorization. But the two defendants don’t recognize Xie as the original right holder. So it’s necessary for the case to first review whether Xie is original right holder.

Article 11 of the *Copyright Law of the People's Republic of China* (hereinafter referred to as the “Copyright Law”) stipulates that copyright belongs to the author. The citizen, legal entity or other organization whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work. Article 15 of the Copyright Law provides that the copyright in a cinematographic work and any work created by an analogous method of film production shall be enjoyed by the producer of the work. According to the above-mentioned law, in the absence of evidence to the contrary, the attribution of rights may be presumed based on the signature on the work.

Short videos refer to video contents that are played on various new media platforms on the Internet and are suitable for watching on mobile. The duration ranges from a few seconds to a few minutes. Generally, there is no specially-made signature or ownership statement in the videos. Therefore, when a short video is uploaded to a platform, the author will automatically mark “@ video producer” at the corner of the short video, which can be regarded as the signature of the short video. According to the signature presumption rule in the Copyright Law, in the absence of evidence to the contrary, the signatory shall be presumed to be the producer of the short video and enjoy copyright.

In this case, “@ Black Face V” is marked at the corner of the short video “I Want to Tell You”. If the short video constitutes a work, then according to the above criteria, the producer of the short video “I Want to Tell You” can be presumed to be “Black Face V”. If the signature is not a real name, the party claiming the right shall bear the burden of proof in respect of the real correspondence between the signature and the author's identity. Where the author’s signature on his work published on the Internet is not a real name, if the party claiming the right can prove there is a real correspondence between the signature and the author by logging into the account, etc., he may be presumed to be the author. Because "Black Face V" is not the real name of the producer, the plaintiff who asserts that Xie is the producer should bear the burden of proof as to the real correspondence between "Black Face V" and Xie. The notarized certificate submitted by the plaintiff shows that Xie logged in the aforementioned account “Black Face V” on Toutiao mobile app and Douyin mobile app by inputting the mobile phone number registered at the background and the corresponding verification code. The above evidence can presume Xie is the producer of the short video “I Want to Tell You”.

The two defendants believe the owner of the mobile number used for registering the “Black Face V” account is Lei, so the producer should be Lei. Considering that Lei had mailed a confidentiality application signed by Xie to the Court, the plaintiff arranged Xie and Lei to accept inquiry as required by the Court. According to the statements made by Xie and Lei online during inquiry, Lei and Xie both acknowledged that the mobile number belongs to Lei but has been used by Xie, that the “Black Face V” account involved in the case was registered and has been used by Xie, and that the short video “I Want to Tell You” was shot and produced by Xie. Given that the situation of the “separation of owner and machine” actually exists in real life and the two defendants have no evidence to deny the above statement, the defendants’ claim cannot be established.

Accordingly, according to the authorization confirmation issued by Xie, the plaintiff has procured the exclusive right to communicate the short video produced by Xie and the right of right protection during the period from January 1, 2018 to January 1, 2019. The plaintiff has a direct interest in the case. In accordance with the first paragraph of Article 119 of the *Civil Procedure Law of the People's Republic of China*, the plaintiff has the right to file a lawsuit in this case.

1. Whether Baidu Online is an Appropriate Subject of the Case

The operator of a mobile app should be determined based on the operator indicated in the app store registration information and the mobile app information. If the operator specified in the application store registration information is inconsistent with that specified in the mobile app information, they can be determined as joint operators. In this case, Huopai mobile app (for Android system) only shows that the developer is Baidu Online. No other operator information such as name of operator is displayed. Thus Baidu Online which is registered as mentioned above should be determined as the operator. Baidu Online denied that it is the operator of the system. The explanation of the two defendants is that the country has a limit on the number of mobile app under each subject account, so the Android system of Huopai mobile app is registered under the name of Baidu Online. The Court holds that, first of all, the two defendants’ behavior of circumventing administrative supervision cannot be an effective defense; secondly, the disclosure of the right holder's information on the relevant software is not only necessary for meeting the administration requirements of law enforcers, but also has the significance of promising the public that it will assume relevant civil responsibilities. The trust of the public based on the disclosure should be protected; thirdly, although the two defendants claimed that the operator of Huopai mobile app user agreement indicates the operator is Baidu Netcom, the relevant provisions are not valid for any third party outside the contract. In addition, even if as explained by the two defendants that Baidu Online lends relevant enterprise qualifications to Baidu Netcom, Baidu Online still should be jointly and severally liable with Baidu Netcom. In summary, the Court has determined that Baidu Online is the appropriate defendant in this case.

II. Whether the Short Video “I Want to Tell You” Constitutes a Film-like Work

Article 2 of the *Regulations for the Implementation of the Copyright Law of the People's Republic of China* (hereinafter referred to as the “Regulations”) stipulates that works mean original intellectual achievements in the literary, artistic, and scientific domains that can be reproduced in a tangible form. Article 4 of the Regulations provides that cinematographic works and works created by means similar to cinematography refer to works filmed on a certain medium, consisting of images with or without accompanying sounds, and disseminated with the aid of certain appropriate devices or other methods. In this case, the short video “I Want to Tell You” apparently meets the elements that “filmed on a certain medium, consisting of images with or without accompanying sounds, and disseminated with the aid of certain appropriate devices or other methods”. The plaintiff contends that the short video “I Want to Tell You” constitutes a film-like work, while the defendants believe that the short video does not have the originality as required for film-like works. The key to determine whether the short video is a film-like work lies in the judgment of its originality. Article 15 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in the Trial of Civil Disputes over Copyright* stipulates where works of the same theme are created by different authors and the work expression is completed independently and original, the authors shall be deemed to have their own Independent copyright. According to the above provision, original works should meet two elements: 1. it is created by the author independently; 2. it has “creativeness”.

1. Determination of “Independent Creation”

In this case, in response to the initiative of the Party Media Platform and people.cn, the producer, taking “bear in mind the martyrdom, pay tribute to rebirth, and devote our strength to move forward” as the theme, made the short video “I Want to Tell You” with the gesture dance in the demonstration videos of the Party Media Platform and people.cn, accompaniment, and light changes as the basic elements and pictures download online as basic materials in combination with software technologies. Therefore, the determination of whether the short video “I Want to Tell You” meets the requirement of “independent creation” depends on whether there is a difference between the short video and the abovementioned demonstration videos and online pictures that can be objectively identified. The same theme does not prejudice the determination of whether the short video “I Want to Tell You” is created independently.

According to ascertained facts, the demonstration videos of the Party Media Platform and people.cn and the pictures downloaded online are independent elements that have nothing to do with each other. The short video “I Want to Tell You” made by “Black Face V” by combining the abovementioned elements is identifiably different from them. There is also a big difference between the short video and the short videos produced by other users participating in the same topic on Douyin. And there is no evidence to prove that there are same or similar short video contents before the short video is released on Douyin. So the Court holds the short video “I Want to Tell You” is created by the producer independently.

1. Determination of Creativeness

The standards of creativeness are always related with social environment and industry characteristics in the course of its formation and development, and keep developing and improving according to the characteristics of the actual social environment and various types of works themselves. With the popularization of mobile intelligent terminals and the development of software development technologies, a large number of mobile short video applications have been emerging and short video content startups have experienced explosive growth since 2016, ushering the short video industry in a rapid development period. Short videos combine texts, images, voices and videos to intuitively and stereoscopically satisfy the diverse expression and communication needs of users. In this context, defining the creativeness standards of short video works has important and practical significance for ensuring the normal and orderly dissemination of short videos, promoting cultural prosperity and creating social wealth. A cautious yet positive attitude should be adopted and the judgment standards of creativeness should be applied properly in judicial trials to facilitate the growth of emerging industries.

Short videos with such characteristics as low creation threshold, short filming time, clear theme, strong social and interactive purpose, and easy dissemination are new-type videos. These characteristics generally simplify the short video production process, so the producers are mostly individuals or small teams. As the creation and dissemination of short videos is conducive to the diversified expression of the public and the prosperity of the culture, it’s inappropriate to be too demanding on creation attainment when judging whether a short video meets the creativeness requirements, and any work that can reflects the individual expression of the producer can be considered creative.

When determining the creativeness of the short video “I Want to Tell You”, the Court considers the following factors. First, the length of the video is not necessarily related to creativeness judgment. Objectively speaking, as the video length is too short, it may be difficult to form an original expression. But some videos, although not long, can fully express the producer's thoughts and feelings, thus being possible to become a work. In this case, the shorter the video is, the more difficult it is for creation, and the more likely to be creative. Second, the short video “I Want to Tell You” shows creativeness. The producer made the video with given theme and material in limited creation space in response to the call of the Party Media Platform, rendering the creation highly difficult. The short video depicts a masked man wearing a black hoodie praying with gesture dance in the post-disaster ruins; a vibrant scene shows at the end of the gesture dance as the light turns from dark to sunny, the ground turns from rugged to even, tilted poles stand up, and the man’s sleeves become red; at last, the man made a finger heart. The short video constitutes an organic audio-visual whole, which contains many aspects of the intellectual labor of the producer. Hence it’s creative. Although the short video is created based on existing materials, its arrangement, selection and presentation to the audience are completely different from the short videos of other users, reflecting the individual expression of the producer. Third, the short video “I Want to Tell You” evokes the audience's resonance. Self-improvement and courage to face great disasters have always been the outstanding spiritual connotation of the Chinese nation. At the tenth anniversary of Wenchuan Earthquake, the short video “I Want to Tell You” conveyed a reassurance, a warm blessing, and a forward force in a form acceptable to the public, responding to the public’s memory of Wenchuan Earthquake, tribute to people in the disaster area, the longing for a better life. The spiritual enjoyment of the audience brought by the short video also reflects its creativeness. Other Douyin users’ sharing of the short video “I Want to Tell You” also evidence the creativeness of the video. Therefore, the court finds that the short video “I Want to Tell You” meets the requirement on creativeness.

In summary, the short video “I Want to Tell You” meets the requirement on originality as provided in copyright law and constitutes a film-like video.

1. Whether the Two Defendants Infringed upon the Short Video “I Want to Tell You” and Whether They Should Bear Liability

In this case, the evidence submitted by the plaintiff show that Huopai mobile app can play the alleged infringing short video. The plaintiff claimed that the two defendants provided the alleged infringing short video, while the defendants argued that it only provided information storage services. The dispute focus between the two parties lies in whether the two defendants provided the alleged infringing short video, or only provided the information storage services; and if the two defendants are only online service provider, whether the behavior constitutes an infringement and whether they should assume liability.

1. Whether the Two Defendants Provided the Alleged Infringing Short Video, or Only Provided the Information Storage Services
2. In cases concerning infringement of the right of communication through information network, the defendant who asserts the only provision of information storage services shall bear the burden of proof. The evidence submitted by it is generally determined based on the following factors: the evidence provided by the defendant can prove that its website has the function of providing information storage services for users; relevant content on the defendant’s website clearly indicates the provision of information storage services for users; the defendant can provide evidence of the uploader’s username, registered IP address, registration time, uploaded IP address, upload time, and contact details, etc.

In this case, the two defendants have publicly announced their user agreement when providing Huopai mobile app service. The agreement specifies that Huopai mobile app has the function for users to publish information, and has informed users that contents uploaded shall not infringe the intellectual property rights of others, and announced contact information. In addition, the background record submitted by it contains the user name, registered IP address, registration time, upload IP address, upload time and contact information of the alleged infringing short video uploader. It can be determined that the alleged infringing short video was uploaded by outsiders, and the two defendants are information storage service providers. The plaintiff’s claim that the two defendants who directly provided the works committed a direct infringement could not be established.

2. In this case, the plaintiff claimed that the two defendants deleted the watermark on the short video “I Want to Tell You”, damaging the technical measures taken by the company. The Court believes that according to the industry practices and technology presentation recognized by both parties the short video “I Want to Tell You” downloaded from Douyin Platform shall bear the watermarks of Douyin Platform and user ID, while these watermarks are not shown on the alleged infringing short video played on Huopai mobile app, rationalizing the presumption that these watermarks were removed.

First of all, the nature of the above watermarks is not a technical measure claimed by the plaintiff. Article 26 of the Regulations on the Protection of the Right of Communication Through Information Network (hereinafter referred to as the “Regulations on Information Network Rights”) provides that technical measures refer to effective technologies, devices or components used to prevent or restrict browsing or appreciating a work, performance, or sound or video recording, or making available to the public through information network a work, performance, or sound or video recording without permission from the right owner. Accordingly, technical measures can be divided into contact control measures and copyright protection measures. They are taken for preventing unauthorized contact or work exploitation. There are two main differences between the technical measures in the sense of copyright law and that in the purely technical sense. First, the technical measures in the sense of copyright law are applicable to specific objects in copyright law such as works, performances and sound recordings. Second, technical measures in the sense of copyright law have the function of preventing specific actions from being taken on the specific objects mentioned above. The legislative purpose of the copyright law can only be achieved by the technical means of preventing others from taking specific actions. The watermarks in this case obviously cannot achieve the above functions. From the perspective of the public, watermarks have attributes that indicate a certain identity. The Regulations on Information Network Rights provides that“electronic rights management information” means information which identifies a work, performance, or sound or video recording and its author, performer or producer or its right owner, or information concerning the terms and conditions of use of the work, performance, or sound or video recording, or any numbers or codes which represent such information. The watermarks in this case contain the ID number of the short video “I Want to Tell You” and indicate the information of the producer, thus should be determined as right management information. Furthermore, the word “Douyin” in the watermarks indicates the information of the communicator. Secondly, the alleged infringing short video was uploaded by outsiders, and it’s not the two defendants who removed the watermarks.

Since watermark is not a technical measure in the sense of the copyright law and the watermarks were not removed by the two defendants, the plaintiff’s claim that the two defendants destroyed the technical measures and infringed on the right of communication through information network could not be established and is not supported by the Court.

1. If the Two Defendants Are Only Online Service Providers, Whether the Behavior Constitutes an Infringement and Whether They Should Assume Liability

According to paragraphs 2 and 3, Article 36 of the *Tort Law of the People's Republic of China* (hereinafter referred to as the “Tort Law”), where a network user commits a tort through network services, the victim of the tort shall be entitled to notify the network service provider to take such necessary measures as deletion, block or disconnection. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user. Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user. Therefore, there are two prerequisites for a network service provider to assume liability. First, the network user commits an infringement through network services. Second, the network service provider is subjectively faulty in implementing the abovementioned infringement. Article 22 of the Regulations on Information Network Rights provides that a network service provider which provides information storage space to a service recipient, thus enabling the service recipient to make available to the public through information network a work, performance, or sound or video recording, and which meets the following conditions, bears no liability for compensation (namely, the so-called safe harbor principle academically): (1) it clearly indicates that such information storage space is provided for the service recipient, and it makes known to the public its name, the person to be contacted and network address of the network service provider; (2) it does not make any modification to the work, performance, or sound or video recording made available by the service recipient; (3) it does not know or has no reasonable grounds to know that the work, performance, or sound or video recording made available by the service recipient is an infringement; (4) it does not gain any direct financial benefit from the service recipient making available the work, performance, or sound or video recording; and (5) upon receiving a written notification of the right owner, it removes, in accordance with the provisions of these Regulations, the work, performance, or sound or video recording which the right owner believes to be an infringement.

Paragraphs 2 and 3, Article 36 of the Tort Law provide the constituent elements of tort liability for network service providers. If the principle of safe harbor is not met, it shall also judge whether the network service provider shall bear the corresponding tort liability according to Article 36 of the Tort Law.

In this case, the two defendants clearly stated that Huopai mobile app was provided for users and disclosed the name, contact person and website of Baidu Netcom, and the plaintiff failed to provide evidence to prove the defendants didn’t satisfy paragraph (II)-(IV), Article 22 of the above Regulations on Information Network Rights. Therefore, the key to whether the two defendants shall be liable lies in whether the two defendants have fulfilled the “notification-deletion” obligation.

The plaintiff asserts with two emails that it notified the two defendants on August 24, 2018 to delete the alleged infringing short video, but they didn’t delete the video until on September 10 as claimed by them, failing to fulfil the “notification-deletion” obligation within a reasonable period. The two defendants who are not applicable to the safe harbor principle shall bear corresponding legal liabilities. However, when the two defendants claimed that they did not receive the above-mentioned mails, the plaintiff could not prove that the above-mentioned emails reached the two defendant’s email system. Therefore, the court doesn’t recognize the above claims of the plaintiff.

Although the plaintiff does not recognize the time points of the two defendants’ receipt of the paper complaint letter from the plaintiff on September 7, 2018 and the deletion of the alleged infringing short video on September 10, the plaintiff failed to submit evidence to the contrary to disapprove the background record of the deletion operation submitted by the two defendants. So the above time points are admitted by the Court. Considering that the two time points are different by four days which include weekends, the Court believes that the two defendants deleted the alleged infringing short video within a reasonable period of time after receiving the valid complaint. Therefore, since the existing evidence cannot prove that the two defendants have a subjective fault of knowing or should have known whether the alleged infringing short video is infringing, and the two defendants deleted the alleged infringing short video after receiving the notice from the plaintiff, the Court finds the behavior of the two defendants meets the elements for entering the “safe harbor”. In such case, no matter if the user of Huopai mobile app involved has committed an infringement, the two defendants, as the network service providers, do not constitute infringement and should not be held liable.

It should be noted that the “notification-deletion” rule is set for the purpose of balancing the interests of copyright owners and network service providers in the network environment. It’s beneficial to the healthy development of network platforms and to the right protection of copyright owners. Therefore, the “notification-deletion” rule should be applied in the principle of good faith so as to give play to the goodwill of the rule to the maximum extent. In this case, the plaintiff should defend rights in the most economical and direct manner when there is access to public complaint channels. As providers of platform services, it is not enough to rely solely on the safe harbor principle, and the two defendants are responsible for fulfilling their platform obligations through more active and effective management.

In summary, the Court believes that:

First, Xie is the producer of the short video “I Want to Tell You”. Microlive Vision Technology, who has obtained the exclusive right to communicate the short video through information network and the right of right protection in a certain period with Xie’s permission, has the right to institute the lawsuit;

Second, Baidu Online, as the operator of Huopai mobile app (for Android system), should bear legal liability for the platform that uses the software. Baidu Online is an appropriate defendant in this case;

Third, the short video “I Want to Tell You” is made through selection and arrangement based on existing materials, reflects the individual expression of the producer, and brings viewers positive spiritual enjoyment. It’s a film-like work with originality;

Fourth, the alleged infringing short video is provided by the user (ID: 451670) on Huopai mobile app;

Fifth, Baidu Online and Baidu Netcom, as network service providers that provide information storage space, do not have subjective faults in Huopai mobile app users’ provision of the alleged infringing short video, haven’t committed infringement, and shall not bear relevant liabilities after fulfilling the “notification-deletion” obligation.

In accordance with subparagraph 6 of Article 3, subparagraph 12, paragraph 1 of Article 3, and subparagraph 1 of Article 48 of the *Copyright Law of the People's Republic of China*, and Article 22 of the *Regulations on the Protection of the Right of Communication through Information Network*, the Court orders as follows:

1. All the claims of the plaintiff Beijing Microlive Vision Technology Co., Ltd. are dismissed.
2. The case acceptance fee is RMB14,250, and shall be borne by the plaintiff Beijing Microlive Vision Technology Co., Ltd. (already paid).
3. Appeal shall be brought by the dissatisfying party to Beijing Intellectual Property Court within 15 days from the issuance of this decision in the number of copies corresponding to the number of adverse parties.

Presiding Judge: Zhang Wen

Judge: Lu Zhengxin

Judge: Zhu Ge

Beijing Intellectual Property Court (Sealed)

December 26, 2018

Judge Assistant: Lu Ning

Clerk: Liu Hanyi

Clerk: Huang Liwang

This copy has been verified as identical with the original.

Appendices:

1. The short video “I Want to Tell You”;
2. The demonstration video of Party Media Platform;
3. The demonstration video of people.cn
4. The short videos of the other three users of Douyin;
5. The alleged infringing short video (on Android system);
6. The alleged infringing short video (on iOS system).