Beijing Internet Court

Civil Judgment

(2019) Jing-0491-Min-Chu No. 16794

Plaintiff: Tencent Technology (Shenzhen) Co. Ltd., domiciled in 35/F, Tencent Building, Keji Middle 1st Road, SHIP, Nanshan District, Shenzhen, Guangdong.

Legal representative: Ma Huateng, Chairman and General Manager.

Attorney: Yan Chunde, lawyer of Unitalen Law Office Shanghai Branch.

Attorney: Zhou Dandan, lawyer of Unitalen Law Office.

Plaintiff: Shenzhen Tencent Computer Systems Co., Ltd., domiciled in 5-10/F, FIYTA High-tech Building, Gaoxin South 1st Road., SHIP, Nanshan District, Shenzhen, Guangdong.

Legal representative: Ma Huateng, General Manager.

Attorney: Yan Chunde, lawyer of Unitalen Law Office Shanghai Branch.

Attorney: Wang Jiayu, lawyer of Unitalen Law Office.

Defendant: Beijing Qingshu Network Technology Co. Ltd., domiciled in Room A-0812, 2/F, Building# 3, Courtyard# 30, Shixing Street, Shijingshan District, Beijing.

Legal representative: Xia Yan, Executive Director.

Attorney: Sun Yueheng, lawyer of Beijing Jinshi Law Office.

In respect of the dispute over the infringement of the right to communicate works through information network between the plaintiffs Tencent Technology (Shenzhen) Co. Ltd. (hereinafter “Tencent Technology”) and Shenzhen Tencent Computer Systems Co., Ltd. (hereinafter “Tencent Computer”) and the defendant Beijing Qingshu Network Technology Co. Ltd. (hereinafter “Qingshu”), after the case was accepted, the Court applied ordinary procedures according to law and convened a public court session. Yan Chunde and Zhou Dandan, the attorneys of the plaintiff Tencent Technology, Yan Chunde and Wang Jiayu, the attorneys of the plaintiff Tencent Computer, and Sun Yueheng, the attorney of the defendant Qingshu, participated in the court session online through the electronic litigation platform of the Court. This case is decided now.

**The two plaintiffs jointly pray as follows:** to order the defendant to pay RMB 500,000 for economic losses and reasonable expenses, of which the reasonable expenses include the attorney fee RMB 10,000 and notarization fee RMB 544, a total of RMB 10,544. Facts and reasons: On August 29, 2016, Tencent Technology completed the fine art work “WeChat Emoticons Series 1.0”, which includes 6 WeChat emoticons involved (hereinafter the “WeChat emoticons involved”, see Annex 1), and registered it on July 20, 2018. On January 10, 2011, Tencent Technology authorized Tencent Computer to operate the WeChat app and its upgraded versions, and granted the latter the exclusive right to use the corresponding fine art work. All the WeChat emoticons involved are used in the WeChat app. Since the WeChat app was put on the market, it has quickly accumulated hundreds of millions of users for the plaintiffs, and has formed a very high visibility and influence among the relevant public. Once the WeChat emoticons and other features provided in the WeChat app were launched, they gained widespread response and popularity. The plaintiffs found that the defendant developed and operated the app ChuiNiu and provided download and installation services on its official website (www.meetqs.com) and several mobile app download platforms. The chat emoticons provided in the ChuiNiu app (hereinafter the “alleged infringing emoticons”, see Annex 2) are identical with or substantially similar to the plaintiffs’ prior WeChat emoticons involved. The defendant’s act has infringed the plaintiffs’ right of communication through information network with respect to the WeChat emoticons involved.

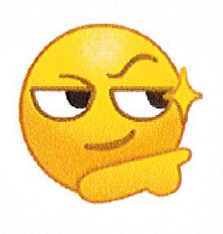
**The defendant’s defense:** First, the defendant recognizes that the WeChat emoticons involved are original and constitute fine art works. Second, the evidence on the record cannot prove the plaintiffs hold the copyright of the WeChat emoticons involved. 1. Jin Zhaoping applied for registering the trademark on November 21, 2017, which was earlier than the registration date on Tencent Technology’s work registration certificate. So the company cannot be confirmed as the copyright owner of the emoticon “facepalm”. 2. The emoticon “smirk” is same as or substantially similar to the prior emoticon “funny” designed by Baidu. Thus Tencent Technology cannot be confirmed as the copyright holder of the emoticon “smirk”. 3. Some of the WeChat emoticons involved come from the contribution of the WeChat emoticons open platform. Their copyright doesn’t belong to the plaintiffs. 4. The prototype of the emoticon “heyha”  comes from Lu Zhengyu’s stickers. So Tencent Technology cannot be confirmed as the copyright owner of the emoticon “heyha”. 5. The plaintiffs are able to modify the signature information of the chat emoticons in the WeChat app. Third, even though Tencent Technology has the copyright of the WeChat emoticons involved, it has granted the copyright of the WeChat emoticons involved to Tencent Computer for its exclusive use. Hence, only Tencent Computer can initiate the litigation for right protection. Tencent Technology is not a qualified plaintiff. Fourth, the defendant used the alleged infringing emoticons which are same as the WeChat emoticons involved in the ChuiNiu app without the permission of the right holder. However, the defendant has stopped the above use. Fifth, the economic losses and reasonable expenses claimed by the plaintiffs are too high and lack legal basis. 1. The plaintiffs did not suffer losses due to the WeChat emoticons involved, nor did the defendant profit from them. The WeChat emoticons involved are free. So the plaintiffs neither make profit nor suffer any economic losses. The defendant did not charge the public for the allegedly infringing emoticons in the ChuiNiu app. Nor would the relevant public choose to download the ChuiNiu app because of the WeChat emoticons involved, thus bringing proceeds to the defendant. 2. Existing evidence cannot prove that the infringement claimed by the plaintiffs lasts long. The download number of the ChuiNiu app is cumulative and has nothing to do with the number and influence of the app that contains the allegedly infringing emoticons downloaded by the relevant public. So the plaintiffs’ evidence cannot be used as a reasonable basis for determining the amount of compensation. 3. The plaintiffs’ claim for the compensation amount lacks evidential support. In summary, the defendant requests the Court to dismiss all the plaintiffs’ claims.

**The parties submitted evidence based on their claims. The Court organized evidence exchange and cross-examination among the parties, on which basis the following facts are ascertained.**

**I. Facts about the Ownership of the WeChat Emoticons Involved**

**(I) Facts about Tencent Technology’s Claims in Respect of the WeChat Emoticons Involved**

On August 3 and August 29, 2016, Tencent Technology successively applied for evidence preservation for the files “New Emoticons 0729.zip” and “Big Yellow Face.zip” to authenticate the two files at the UniTrust Time Stamp Authority (http://www.tsa.cn) and downloaded the corresponding trusted timestamping authentication certificates. The “Big Yellow Face.zip” contains the WeChat emoticons involved, and the “New Emoticons 0729.zip” contains the WeChat emoticons involved except the emoticon “frown”. Both the two trusted timestamping authentication certificates specify that “This is to certify that the file (or electronic data) already exists at the time of timestamping application, and the content remains intact without any alteration”, and show their respective digital fingerprints. Through verification, it was found that the digital fingerprints on the above original files are the same as those on the respective trusted timestamping authentication certificates.

On October 18, 2016, Tencent Technology applied for evidence preservation for the file “WeChat Emoticon 20161018.zip”, which contains the WeChat emoticons involved except the emoticon. On November 28, 2016, the file “The History of Yellow Face 1.jpg” was subject to evidence preservation. Both the two trusted timestamping authentication certificates specify that “This is to certify that the file (or electronic data) already exists at the time of timestamping application, and the content remains intact without any alteration”, and show their respective digital fingerprints. Through verification, it was found that the digital fingerprints on the above original files are the same as those on the respective trusted timestamping authentication certificates.

The screenshot of the WeChat’s emoticon management platform submitted by Tencent Technology shows that the “Big Yellow Face” emoticons were submitted to the WeChat emoticon management platform on August 29, 2016, and were put into use on August 30, 2016. With exception to the above information, some information on the screenshot was pixelated. The defendant raised objections to the authenticity of the screenshot. In this regard, the Court believes that the screenshot did not obscure the key information such as the emoticon name, the time of submission, and the time when it was put into use. Without evidence to the contrary, the authenticity of the evidence cannot be denied.

Tencent Technology registered the work “WeChat Emoticon Series 1.0” on July 20, 2018. The registration number is Guo-Zuo-Deng-Zi-2018-F-00584306. The author is Tencent Technology. The work category is fine art work. The completion time is August 29, 2016. The first publication time is August 30, 2016. The “WeChat Emoticon Series 1.0” contains the WeChat emoticons involved in the case.

Huang Ying issued a statement on June 5, 2019, stating that he is an employee of Tencent Technology and the designer of the fine art work “WeChat Emoticon Series 1.0” (registration number: Guo-Zuo-Deng-Zi-2018-F-00584306). “The ideas of the work are the results of my design team members’ discussions. The work is based on the company’s “QQ emoticons”, created by me according to the company’s requirements, specifically designed and produced by myself through communication with team members, and finally confirmed and released by the company. The company enjoys the complete copyright of the work. So the corresponding liability relating to the work should be borne by the company, and has nothing to do with me.” The statement is accompanied by a copy of Huang Ying’s ID card and a copy of his work card, which are affixed with the official seal of Tencent Technology.

Liang Sikun issued a statement on June 5, 2019, stating that he is an employee of Tencent Technology Company, “On August 29, 2016, I uploaded the fine art work “WeChat Emoticon Series 1.0” (registration number: Guo-Zuo-Deng-Zi-2018-F-00584306) created by the company’s employee Huang Ying onto the company’s intranet “timestamping for work protection” (http://time.oa.com).” The statement is accompanied by a copy of Liang Sikun’s ID card and a copy of his work card, which are affixed with the official seal of Tencent Technology.

**(II) Facts about Tencent Computer’s Claims for the WeChat Emoticons Involved**

On January 10, 2011, Tencent Technology issued a letter of authorization as the copyright holder of the WeChat app to authorize Tencent Computer to operate the above application and its upgraded versions, and meanwhile granted the copyright of the above application and its upgraded versions (including but not limited to the copyright of related elements and works used in the application) to Tencent Computer for exclusive use without excluding the use by Tencent Technology. Tencent Computer may remedy against the infringement of the above-mentioned legal rights by itself or jointly with Tencent Technology by litigation and non-litigation means. The authorization expires when the authorizer withdraws this authorization. So far, Tencent Technology has not withdrawn its authorization.

During the trial, the defendant asserted objection to the authenticity of the above letter of authorization. In this regard, the Court holds that first, the two parties involved in the authorization letter are the plaintiffs of this case, and they both recognize the authenticity of the authorization letter; second, based on the actual performance, the WeChat app and related elements and works are actually operated and used by Tencent Computer, which can prove that there is indeed a relationship between the two plaintiffs in respect of the licensed use of the works; finally, the defendant did not submit contrary evidence to deny the authenticity of the authorization letter. Therefore, the Court admits the above authorization letter and confirms the relationship between the two plaintiffs in respect of the licensed use of the works.

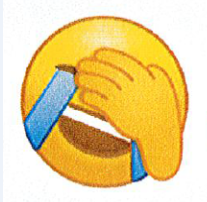
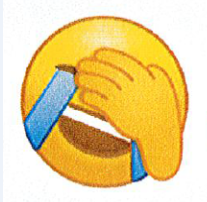
**(III) Facts about the Defendant’s Defense in Respect of the WeChat Emoticons Involved**

On November 21, 2017, Jin Zhaoping applied for registering as a trademark. The registration number is 27608754. It is designated for use on shirts, baby suits, scarves and other goods. The preliminary review announcement date was August 13, 2018. The trademark is currently in dispute.

The emoticon “funny” (Baidu Tieba emoticon) is designed by the Baidu team. On April 9, 2015, Baidu Experience published an article “Drawing a Super Funny Emoticon with PS”, which showed the process of drawing the emoticon “funny”. The defendant contends that the emoticon “smirk” claimed by the plaintiffs is the same as or substantially similar to the Baidu team’s emoticon “funny”, and that the emoticon “funny” was published in April 2015, and its copyright owner is not the plaintiffs. The plaintiffs believe that there are substantial differences between the above two emoticons.

On July 29, 2015, the WeChat emoticon team issued an announcement to invite artists to create chat emoticons and submit contributions. The announcement said that the copyright of the emoticon works uploaded to the WeChat emoticon open platform still belonged to the contributor or authorizer.

On May 25, 2019, the defendant took screenshots of relevant WeChat emoticons, which show that the emoticon comes from “Small Yellow Face Acting Cute (卖萌小黄脸)” authored by “Wang Peipei”; the emoticon “wronged” and the emoticon “squint eyed grim” come from “Non-official Small Yellow Face (非官小黄脸)” created by “Lin Xiaona”; the emoticon “facepalm”C:\Users\bic\Desktop\捕获.PNG comes from “Magic Big Yellow Face (魔性大黄脸) ①”. The plaintiffs contended that the above emoticons were submitted and put into use after the WeChat emoticons involved as claimed by the plaintiffs were completed, submitted and put into use, and submitted several screenshots of the WeChat emoticon management platform which show the “Non-official Little Yellow Face” emoticons were submitted on November 13, 2016 and put into use on December 8, 2016; the “Little Yellow Face Acting Cute” emoticons were submitted on January 16, 2017 and put into use on February 13, 2017; the “Magic Big Yellow Face ①” emoticons were submitted on July 31, 2018 and put into use on August 18, 2018; and part of the information in the above screenshots was blurred. The defendant raised objections to the authenticity of the screenshots submitted by the plaintiffs. In this regard, this court holds that the defendant’s evidence on the record cannot prove the completion and publication time of the relevant WeChat emoticons. Furthermore, the screenshots submitted by the plaintiffs did not obscure key information such as emoticon name, submission time and the time when the emoticon was put into use. In the absence of evidence to the contrary, the authenticity of the evidence cannot be denied. Hence, the plaintiffs’ counter-evidence is admitted.

On November 21, 2016, Timedg.com published an article from its official website “Has the Big Yellow Face Emoticon “heyha” Flooded Your Screen Recently? Never Thought that the Prototype Was Him!”. The article stated that the prototype of the emoticon “heyha” was Lu Zhengyu, and attached a sticker of Lu Zhengyu (see Annex 3). The defendant believes that the emoticon was not created by the plaintiffs, so the plaintiffs do not own its copyright. The illustrations of the article displayed the “Latest Sequel to the Classic Big Yellow Face Emoticon”, but the information “WeChat Face” was not shown. The defendant alleged that it found the plaintiffs claimed the authorship of the big yellow face emoticon album when collecting evidence on May 25, 2019, thus believing that the plaintiffs were able to modify the information of relevant pages.

The above facts can be supported by notarial certificates (2018) Y. G. G. Z. No. 178062, (2019) Y. G. N. Y. No. 12846, (2018) S. Q. Z. Z. No. 028505, and (2019) Y. G. N. Y. No. 12847, statements, trusted timestamping authentication certificates, webpage screenshots and authorization letter submitted by the plaintiffs, as well as webpage screenshots, the parties’ statement and trial transcripts submitted by the defendant.

**II. Facts about the Defendant’s Alleged Infringement**

The copyright owner of the ChuiNiu app is the defendant. The registration number is 2018SR010307, and the registration date is January 4, 2018. During the trial, Qingshu stated that the ChuiNiu app was mainly used for social chatting and purchase of game equipment. On October 23, 2018, Tencent Technology found the ChuiNiu app (for iOS and Android) operated by the defendant used six chat emoticons exactly the same as the WeChat emoticons involved.

The above facts can be supported by the notarial certificates (2018) S. Q. Z. Z. No. 026015, No. 029770 and No. 029771, the parties’ statement and trial transcripts submitted by the plaintiffs.

**III. Facts about the Damages and Reasonable Expenses Claimed by the Plaintiffs**

**(I) Facts about the Visibility and Usage of the WeChat Emoticons Involved**

On December 28, 2016, Tech.qq.com published an article “Zha Wen: WeChat Users Like Cute Emoticons the Most More Than 50% of Users Use Small Yellow Faces Every Day”, which indicates that “Emoticons are popular with Chinese users because they can fully express feelings in exaggerated and humorous ways… The number of emoticons sent is huge and can be hundreds of millions. The exposure is much better than ordinary ads,…” On February 15, 2017, mobile.163.com published an article “99% of Netizens Like Using the Bitchy WeChat Emoticon ‘Facepalm’” which contains the WeChat emoticon involved. On February 24, 2017, Baijiahao published the article “The Prototype of the WeChat Emoticon Is Him? Will You Still Use It After Reading This Article?” which specifies “Do you know the average number of WeChat users who log in every day? 768 million! More than 50% of these users use the system-default small yellow faces”. The article was illustrated with the WeChat emotions “facepalm” and “frown” involved.

**(II) Facts about the Download Number of the ChuiNiu App**

According to the data update on October 11, 2018, the ChuiNiu app had been downloaded for 320,000 times on Huawei application market, 189,000 times on Wandoujia, and 60,000 times on Baidu Mobile Assistant, a total of 569,000 downloads. As shown on the notarial certificate (2019) S. Q. Z. Z. No. 005152 and related screenshots, as of January 22, 2019, according to the statistics of Qimai Data, the total downloads of the ChuiNiu app had exceeded 7.18 million, and the average daily downloads in the past 30 days exceeded 100,000. The download data of the app on eight application markets including Baidu, myapp.com and 360 was also shown.

**(III) Facts about the Plaintiffs’ Reasonable Expenses**

The plaintiffs have paid attorney fees of RMB 10,000 and notary fees of RMB 544 for the lawsuit in this case.

The above facts can be supported by the notarial certificates (2019) S. Q. Z. Z. No. 005151 and (2018) S. Q. Z. Z. No. 026016, invoices, statement of the parties and transcripts submitted by the plaintiffs.

**The Court holds that:**

**According to the contentions of the plaintiffs and the defendant, the focuses of the dispute in this case are: I. Whether the plaintiffs own the copyright of the WeChat emoticons involved and whether Tencent Technology is a qualified plaintiff in this case; II. Whether the defendant has infringed the plaintiffs’ right of communication through information network, and should bear the legal liability if an infringement is constituted.**

**I. Whether the Plaintiffs Own the Copyright of the WeChat Emoticons Involved and Whether Tencent Technology Is a Qualified Plaintiff in This Case**

**(I) Whether the WeChat Emoticons Involved Constitute a Work**

The Article 2 of the *Regulations for the Implementation of the Copyright Law of the People’s Republic of China* provides “the term ‘works’ as referred to in the Copyright Law means intellectual creations with originality in the literary, artistic or scientific domain, insofar as they can be reproduced in a tangible form.” The eighth paragraph of Article 4 of the Regulations stipulates “‘works of fine arts’ means two or three dimensional works of the plastic arts created in lines, colors or other media which impart aesthetic effect, such as paintings, works of calligraphy and sculptures”. In this case, all the WeChat emoticons involved are vivid and interesting cartoon images that adopt the “yellow face expressions” as design concept, namely, representing the face by a yellow round and, on the basis of this basic shape, showing emotions by variation in the expressions of eyes, mouth, and gestures. They reflect certain personalized choices and original expressions in the use of lines and colors and are of aesthetic significance, thus constituting works of fine art and are protected by the copyright law.

The defendant asserts that the emoticon “smirk” is the same as or substantially similar to the prior emoticon “funny” designed by Baidu. In this regard, the Court holds that by comparing the above two emoticons, we can see that both the two are cartoon images with “yellow face expressions” as design concept, but there are obvious and objectively identifiable differences in the position, length and shape of eyebrows, the position, size and shape of eyes, and the shades of blush, etc. of the emoticons “funny” and “smirk”. The emotions and meanings conveyed by the two emoticons also differ significantly. This difference is also reflected in the naming of the two. Therefore, the emoticon “smirk” is original. This defensive claim of the defendant cannot be established.

**(II) Whether the Plaintiffs Own the Copyright of the WeChat Emoticons Involved**

According to Article 11 of the *Copyright Law of the People’s Republic of China* (hereinafter the “Copyright Law”), the copyright in a work shall belong to its 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; where a work is created under the auspices and according to the intention of a legal entity or other organization, which bears liability for the work, the said legal entity or organization shall be deemed to be the author of the work. In this case, according to the copyright registration, the author of the WeChat emoticons involved is Tencent Technology. Tencent Technology also submitted the statements of the creator and the uploader of the WeChat emoticons involved, the trusted timestamping authentication certificates and the application information of the “Big Yellow Face.zip” containing the WeChat emoticons involved and other files, and the screenshots of the WeChat emoticon management platform and other evidence, together forming a chain of evidence to prove that Tencent Technology is the author of the WeChat emoticons involved. Furthermore, the above evidence shows that the WeChat emoticons involved were completed on August 29, 2016. Thus Tencent Technology has been holding the copyright of the WeChat emoticons involved since that day.

The defendant alleges that the emoticon “facepalm” involved is the same as Jin Zhaoping’s trademark, which was registered on November 21, 2017, earlier than the registration time of the WeChat emoticon involved, and thus Tencent Technology is not the author of the emoticon “facepalm” involved. The Court holds that a copyright exists when a work is completed. Tencent Technology has initially proved that the WeChat emoticon involved was created on August 29, 2016, and was first published on August 30, 2016, both earlier than Jin Zhaoping’s application for trademark registration. In addition, the defendant did not submit evidence to prove that the trademark was created by Jin Zhaoping, thus failing to prove Jin Zhaoping is the author of the “facepalm” emoticon involved. Therefore, the defendant’s defense cannot be established.

As to the defendant’s contention that the emoticon “smirk” involved is the same as or substantially similar to the prior emoticon “funny” designed by the Baidu team, and therefore Tencent Technology is not the copyright owner, the Court has found that there are objectively identifiable differences between the two and the emoticon “smirk” involved is the work of Tencent Technology. Accordingly, defendant’s argument that Tencent Technology is not the copyright owner cannot be established.

Regarding the defendant’s claim that the prototype of the emoticon “heyha” involved comes from Lu Zhengyu’s stickers and thus Tencent Technology is not the copyright owner, the Court believes that first, the evidence on the record cannot prove Lu Zhengyu’s stickers were created earlier than the emoticon “heyha”; second, even if the prototype of the emoticon indeed comes from Lu Zhengyu’s stickers, the forms of expression are not same. People’s facial expressions are only the natural facial expressions or facial performances that express feelings. They are not works. In order to create a chat emoticon from the expressions of a real man, the author has to select, judge and make choices on lines and colors, etc., which is intellectual work with originality. Therefore, the defendant’s argument that Tencent Technology is not the copyright owner cannot be established.

The defendant also asserted that Tencent Technology is not the copyright owner of some of the WeChat emoticons involved as they were derived from the emoticons “squint eyed grim”,  and “wronged”on the WeChat emoticons open platform. According to the work registration certificate submitted by Tencent Technology and the screenshots of the WeChat emoticon management platform, the WeChat emoticons involved were first published on August 30, 2016, earlier than the time when the three emoticons from the open platform were submitted and put into use. Hence, the defendant’s claim that the copyright owner of the WeChat emoticons involved is not Tencent Technology is not sustained. The defendant believes that Tencent Technology has the ability to modify the WeChat emoticon’s signature information, but the evidence on the record is insufficient to prove its claim, so the Court does not support its grounds for defense.

To sum up, Tencent Technology is the author of the WeChat emoticon involved and enjoys the copyright by operation of law.

**(III) Whether Tencent Technology Is a Qualified Plaintiff in This Case**

Pursuant to Article 119 of the *Civil Procedure Law of the People’s Republic of China*, the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case. This case is about a dispute over copyright infringement, so only the copyright owner or other interested persons have the right to bring the action. The defendant contends that as Tencent Technology has granted the copyright of the WeChat emoticons involved for the exclusive use by Tencent Computer, only Tencent Computer can sue for right protection and Tencent Technology is not an eligible plaintiff in this case.

The Court holds that as the author of the WeChat emoticons involved, Tencent Technology enjoys all personal and property rights in the WeChat emoticons involved. It clearly stated in the letter of authorization for Tencent Computer that “Tencent Technology grants Tencent Computer exclusive use right without excluding the use by Tencent Technology. Tencent Computer may remedy against the infringement of the above-mentioned legal rights by itself or jointly with Tencent Technology by litigation and non-litigation means.” Therefore, Tencent Technology only granted partial property rights to Tencent Computer, and did not waive the copyright in the WeChat emoticons involved and the right to take actions. As the copyright owner of the WeChat emoticons involved, it has direct interests in this case and has the right to file a lawsuit as the plaintiff. The defendant’s defense that Tencent Technology is not a qualified plaintiff has no factual and legal basis and thus is not supported by the Court.

Accordingly, both Tencent Technology, as the author of the WeChat emoticons involved, and Tencent Computer, based on the authorization of Tencent Technology, have legal rights in the WeChat emoticons involved and are protected by the Copyright Law.

**II. Whether the Defendant Infringed the Plaintiffs’ Right of Communication through Information Network, and Should Bear the Legal Liability if an Infringement Is Constituted**

According to the first paragraph of Article 48 of the Copyright Law, anyone who commits any of the following acts of infringement shall, depending on the circumstances, bear civil liability such as ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages. In this case, the defendant, who without permission used chat emoticons exactly the same as the WeChat emoticons involved in the ChuiNiu app operated by it so that the app users can access the WeChat emoticons involved at the time and place of their choice, infringed upon the plaintiffs’ legal right of communication through information work and should bear corresponding civil liability.

The plaintiffs’ claim that the defendant should compensate them for economic losses and reasonable expenses has factual and legal basis, and is thus upheld by the Court.

Regarding the specific amount of compensation, Article 49 of the Copyright Law stipulates that the compensation shall include the reasonable expenses that the right owner has paid for putting a stop to the infringement; where the actual losses of the right owner or the unlawful gains of the infringer cannot be determined, the People’s Court shall, in light of the circumstances of the infringement, decide on a compensation amounting to not more than RMB 500,000. In regard to the application of this clause, the second paragraph of Article 25 of the *Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Copyright Dispute Cases* provides that the people’s court should fully consider such circumstances as the work type, reasonable use fee, the nature and consequences of the infringement before making determinations. Furthermore, when determining the amount of compensation, it should also be noted that not only should the compensation system be made full use of to recover the right holder’s actual losses, but also to punish and curb infringements.

In this case, the plaintiffs failed to present evidence to prove their actual economic losses or the defendant’s illegal proceeds, and contend to calculate the economic losses as per statutory compensation. The Court believes that, given the above provisions, the factors that should be considered in applying the statutory compensation include: 1. the type, popularity and market value of the work, the visibility of the right holder, the originality of the work, etc.; 2. The defendant’s subjective fault, way, time, scope and consequences of the infringement, etc.; 3. other factors. For this case, the Court will take the following factors into consideration to determine the compensation amount as appropriate in accordance with law: 1. Chat emoticons are an artistic form of human daily expressions in the network environment. Creative chat emoticons can increase the chat fun of network users, produce unexpected chat effects, and improve user experience. 2. The WeChat app, a piece of instant messaging software, has hundreds of millions of users. As the relevant elements in the use of the WeChat app, the valid and interesting WeChat emoticons involved have a big usage volume and high popularity. Through widespread use and dissemination, they have been widely recognized and loved by numerous users. 3. The WeChat emoticons involved appreciate in value due to widespread use and dissemination. From the perspective of business operations, if others want to be authorized for the WeChat emoticons involved, they need to pay higher consideration. 4. The defendant, the operator of the ChuiNiu app, which is also an instant messaging tool mainly used for commercial purposes, used chat emoticons exactly the same as the WeChat emoticons involved while knowing the prior use of the WeChat emoticons involved and their high visibility, showing obvious subjective fault. In addition, both the download number and infringement scope of the ChuiNiu app are large. 5. The WeChat emoticons involved are creative to a certain degree. But the creation is neither costly nor very difficult. Moreover, the ChuiNiu app has stopped using the WeChat emoticons involved. In view of the above, the Court believes that the economic losses claimed by the plaintiffs lack sufficient basis and the amount is relatively high, and decides the defendant should compensate the plaintiffs for RMB 300,000 for their economic losses.

In response to the defendant’s assertion that neither did the plaintiffs suffer losses nor did the defendant made profits due to the defendant’s use of the WeChat emoticons involved, so the plaintiffs should not be compensated. The Court holds that first, according to the Copyright Law, obtaining permission and paying remuneration is the basic premise for using others’ works; second, the network economy is an “attention economy”. The free business model does not mean no profit or less profit. The use of chat emoticons helps to expand the users’ ways of expression. Its interestingness improves user experience to a certain extent and increases the attraction of the app to the users, so that the defendant can make profits through other value-added services by taking advantage of netizens’ attention. Therefore, it is not true that the defendant’s use of the WeChat emoticons involved neither caused economic damage to the plaintiffs nor brought benefits to the defendant because of no charge. Such claim is not upheld by the Court.

With regard to the exact amount of reasonable expenses, the plaintiffs claimed RMB 10,000 for attorney fees and RMB 544 for notarization costs and submitted the corresponding receipts. This claim is fully supported by the Court.

In view of the foregoing, according to the 12th subparagraph of the first paragraph of Article 10, Article 11, the first paragraph of Article 48 and Article 49 of the *Copyright Law of the People’s Republic of China*, it is ordered as follows:

1. The defendant Beijing Qingshu Network Technology Co. Ltd. shall compensate the plaintiffs Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Computer Systems Co., Ltd. for RMB 300,000 for their economic losses within ten days from the effectiveness of this judgment;
2. The defendant Beijing Qingshu Network Technology Co. Ltd. shall compensate the plaintiffs Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Computer Systems Co., Ltd. for RMB 10,544 for their reasonable expenses within ten days from the effectiveness of this judgment;

3. Other claims of the plaintiffs Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Computer Systems Co., Ltd. are dismissed.

If the defendant Beijing Qingshu Network Technology Co. Ltd. fails to fulfill its obligations with respect to pecuniary payment within the period specified by this judgment, it shall pay double interest on the debt for the belated payment in accordance with Article 253 of the *Civil Procedure Law of the People’s Republic of China*.

The case acceptance fee is RMB 8,800, of which RMB 3,000 shall be borne by the plaintiffs Tencent Technology (Shenzhen) Co. Ltd. and Shenzhen Tencent Computer Systems Co., Ltd. (already paid) and RMB 5,800 shall be assumed by Beijing Qingshu Network Technology Co. Ltd. (it shall be paid within seven days from the effectiveness of this judgement).

If unsatisfied with this judgement, the unsatisfied party may bring an appeal to Beijing Intellectual Property Court via this court within fifteen days from the service of this judgement.

Presiding Judge Jiang Ying

Judge Lu Zhengxin

Judge Zhu Ge

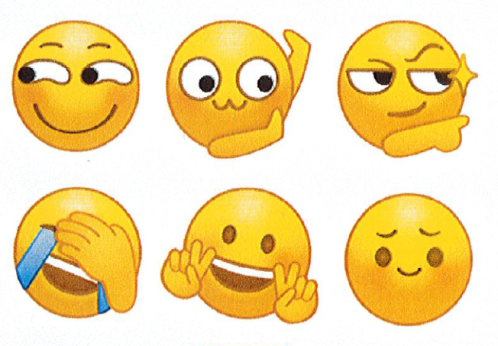
July 19th, 2019

Judge Assistant Lu Ning

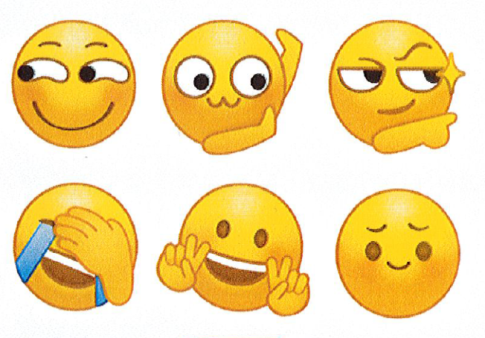
Clerk Li Minglei

Annexes:

1. The WeChat Emoticons Involved



2. The Alleged Infringing Emoticons



3. Lu Zhengyu’s Relevant Stickers