

# [中] 最高法：涉及GPL开源协议争议的软件权利人即使未开源，亦有权针对侵权行为维权

上诉人浙江亿邦通信科技有限公司、苏州启奥网络科技有限公司因与被上诉人网经科技（苏州）有限公司及一审被告刘某某、吴某某、谢某侵害计算机软件著作权纠纷案（2021）最高法知民终 51 号

## 翻译 Translators:

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简介：管理学博士，瑞士苏黎世联邦理工学院联合培养博士。中国科学学与科技政策研究会优博，国际开放式创新学会（SOI）理事。曾任世界知识产权组织法律顾问办公室顾问。持有国家法律职业资格证书、国家专利代理师资格证。研究方向为开源数字创新与知识产权治理、专利制度经济学。在 SCI、SSCI、CSSCI 等来源期刊上发表文章 10 余篇，主持国家社会科学基金项目 1 项、工业和信息化部项目 3 项。

September, 2024 2024 年 9 月

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中华人民共和国最高人民法院  
民事判决书  
Supreme People's Court of P.R.China  
Civil Judgment

(2021) 最高法知民终 51 号

(2021) Supreme Court-IP Tribunal-Civil Case-Final Judgment No.51

当事人

Parties

上诉人（一审被告）：浙江亿邦通信科技有限公司。

住所地：浙江省杭州市临平区经济技术开发区新洲路 1066 号。

法定代表人：胡东，该公司董事长兼总经理。

委托诉讼代理人：邱戈龙，广东长昊律师事务所律师。

委托诉讼代理人：谢富裕，广东长昊律师事务所律师。

Appellant (Defendant of the first instance): Zhejiang Yibang Communication Technology Co., Ltd.

Domicile: No. 1066, Xinzhou Road, Economic and Technological Development Area, Linping District, Hangzhou City, Zhejiang Province.

Legal Representative: Dong HU, the chairman and general manager.

Appointed Litigation Agent: Gelong QIU and Fuyu XIE, lawyers of Guangdong Changhao Law Firm.

上诉人（一审被告）：苏州启奥网络科技有限公司。

住所地：江苏省苏州工业园区林泉街 399 号 8 号楼 302 室。

委托诉讼代理人：闫红艳，山东博睿（深圳）律师事务所律师。

Appellant (Defendant of the first instance): Suzhou Qi'ao Network Technology Co., Ltd.

Domicile: Room 302, Building 8, No. 399 Linquan Street, Suzhou Industrial Park, Jiangsu Province.

Appointed Litigation Agent: Hongyan YAN, lawyer of Shandong Borui (Shenzhen) Law Firm.

被上诉人（一审原告）：网经科技（苏州）有限公司。

住所地：江苏省苏州工业园区金鸡湖大道 1355 号国际科技园一期 1630 单元、153D 单元、1610 单元。

法定代表人：金宁，该公司总经理。

委托诉讼代理人：刘继明，男，该公司员工。

委托诉讼代理人：吕成伟，北京德恒（苏州）律师事务所律师。

Appellee (Plaintiff of the first instance): Wangjing Technology (Suzhou) Co., Ltd.

Domicile: Unit 1630, Unit 153D, Unit 1610, International Science and Technology Park, No. 1355 Jinji Lake Avenue, Suzhou Industrial Park, Jiangsu Province.

Legal Representative: Ning JIN, General Manager.

Appointed Litigation Agent: Jiming LIU, Male, Employee of Wangjing Technology (Suzhou) Co., Ltd..

Appointed Litigation Agent: Chengwei LV, Lawyer of Beijing Deheng (Suzhou) Law Offices.

一审被告：刘某某。

委托诉讼代理人：董翔，江苏大名大律师事务所律师。

委托诉讼代理人：刘学松，江苏大名大律师事务所律师。

一审被告：吴某某。

委托诉讼代理人：黄雪芬，广东长昊律师事务所律师。

一审被告：谢某。

委托诉讼代理人：闫红艳，山东博睿（深圳）律师事务所律师。

Defendant of the first instance: LIU.

Appointed Litigation Agent: Xiang DONG and Xuesong LIU, lawyers of Jiangsu DMD Law Office.

Defendant of the first instance: WU.

Appointed Litigation Agent: Xuefen HUANG, lawyer of Guangdong Changhao Law Firm.

Defendant of the first instance: XIE.

Appointed Litigation Agent: Hongyan YAN, lawyer of Shandong Borui (Shenzhen) Law Firm.

上诉人浙江亿邦通信科技有限公司（以下简称亿邦公司）、苏州启奥网络科技有限公司（以下简称启奥公司）因与被上诉人网经科技（苏州）有限公司（以下简称网经公司）及一审被告刘某某、吴某某、谢某侵害计算机软件著作权纠纷一案，不服江苏省苏州市中级人民法院于2020年7月14日作出的（2018）苏05民初845号民事判决，向本院提起上诉。本院于2021年1月11日立案后，依法组成合议庭，并于2021年1月27日对本案当事人进行了询问。上诉人亿邦公司的委托诉讼代理人谢富裕，上诉人启奥公司及一审被告谢某的共同委托诉讼代理人闫红艳，被上诉人网经公司的委托诉讼代理人吕成伟、刘继明，一审被告刘某某的委托诉讼代理人董翔、刘学松，一审被告吴某某的委托诉讼代理人黄雪芬到庭参加诉讼。本案现已审理终结。Appellants Zhejiang Yibang Communication Technology Co., Ltd. (hereinafter referred to as **Yibang Company**) and Suzhou Qi'ao Network Technology Co., Ltd. (hereinafter referred to as **Qi'ao Company**), appealed against the civil judgment No.(2018) Su 05 Minchu 845 to this Court, ordered by the Suzhou Intermediate People's Court of Jiangsu Province on July 14, 2020, as regards the dispute of computer software copyright infringement with Appellee Wangjing Technology (Suzhou) Co., Ltd. (hereinafter referred to as **Wangjing Company**) and Defendants of the first instance, LIU, WU, XIE. The Court formed a panel according to law after the case was registered on January 11, 2021, and made inquiry to the parties on January 27, 2021. Fuyu XIE, the appointed litigation agent of the Appellant Yibang Company, Hongyan YAN, the appointed litigation agent of the Appellant Qi'ao Company and the Defendant of the first instance XIE, Chengwei LV and Jiming LIU, the appointed litigation agent of the Appellee Wangjing Company, Xiang DONG and Xuesong LIU, the appointed litigation agent of the Defendant of the first instance LIU, and Xuefen HUANG, the appointed litigation agent of the Defendant of the first instance WU, appeared before the Court to participate in the inquiry. The case is now concluded.

#### 上诉人请求

#### Appellants' Claim

**亿邦公司上诉请求：**撤销一审判决，改判驳回网经公司全部诉请，本案一、二审诉讼费用由网经公司承担。Yibang Company claimed that the Court should revoke the decision of the first instance, and dismiss all the claims of Wangjing Company, and that Wangjing Company should bear all trial fees as regards the first and second instance.

**事实与理由：**（一）网经公司并不享有 OfficeTen800 系统软件（以下简称涉案软件）的著作权。涉案软件系在 OpenWRT 系统软件基础上经二次开发形成的，而 OpenWRT 系统软件又受到开源协议 GPLv2（以下简称 GPLv2 协议）的约束。故采用 OpenWRT 系统软件源代码进行编译、改编等行为需遵循 GPLv2 协议的约定。根据 GPLv2 协议约定，对于受 GPLv2 协议约束的软件，开发者应公开其源代码，并免费许可所有第三方使用该软件。故被诉行为本身并不构成侵害著作权的行为。（二）亿邦公司没有实施侵害涉案软件著作权的行为。亿邦公司既无侵害涉案软件的故意，亦无侵害涉案软件的客观行为。亿邦公司与启奥公司是各自独立法人主体，被诉侵权 1800Z 软件（以下简称被诉软件）全部委托启奥公司自主研发，亿邦公司并未参与实际研发过程，故亿邦公司并未实施任何侵害涉案软件著作权的侵权行为。（三）启奥公司交付被诉软件后，亿邦公司仅行使了被诉软件的“复制权”和“发行权”，均属财产权利，并不涉及人身权利，故亿邦公司不应承担赔礼道歉的民事责任。（四）网经公司存在以非法手段谋取不正当利益的行为。在本案尚未审结、明确相关侵权事实是否成立的情形下，网经公司就曾多次在亿邦公司参与的竞标活动中利用本案恶意诋毁亿邦公司，造成亿邦公司在多次招投标活动中失利，给亿邦公司带来了巨大经济损失。

**Facts and Reasons:** (1) Wangjing Company did not hold the copyright of OfficeTen800 system software (hereinafter referred to as the **Software at issue**). The Software at issue was developed based on the OpenWRT system software, which was licensed under the open source license GPLv2 (hereinafter referred to as "**GPLv2 agreement**"). Therefore, the compilation and adaptation of the source code of OpenWRT system software should be subject to the GPLv2 agreement. As was provided in the GPLv2 agreement, the developer shall disclose all the source code of the software under GPLv2 agreement and grant the license at no charge to all third parties for the use of the software. Therefore, the alleged acts did not constitute copyright infringement *per se*. (2) Yibang Company did not infringe the copyright of the Software at issue. Yibang Company had neither the intention nor the objective act to infringe the Software at issue. Yibang Company and Qi'ao Company were independent legal entities, and Yibang Company entrusted Qi'ao

Company to independently develop the allegedly infringing 1800Z software (hereinafter referred to as the **accused Software**). Yibang Company did not participate in the actual research and development of the accused Software, so Yibang Company did not conduct any copyright infringement as regards the Software at issue. (3) After Qi'ao Company delivered the accused Software, Yibang Company only exercised the "right of reproduction" and the "right of distribution" as regards the accused Software, which were property rights and did not involve any moral rights, so Yibang Company should not bear the civil responsibility of apologizing. (4) Wangjing Company had sought illegitimate benefits by illegal means. While present case had not yet been concluded, with the related infringement not established yet, Wangjing Company had used present case to conduct malicious defamation to Yibang Company for several times in the bidding activities in which Yibang Company participated by, resulting in the failure in such bidding activities of and great economic losses to the Yibang Company.

**启奥公司上诉请求：**撤销一审判决，改判驳回网经公司全部诉请，本案一、二审诉讼费用由网经公司承担。Qi'ao Company appealed and claimed that the Court should revoke the judgment of the first instance, and dismiss all the claims of Wangjing Company, and that Wangjing Company should bear the trial fees of the first and second instances of present case.

**事实与理由：**（一）网经公司并不享有涉案软件的著作权。涉案软件系在 OpenWRT 系统软件基础上经二次开发形成的，而 OpenWRT 系统软件又受到 GPLv2 协议的约束。故采用 OpenWRT 系统软件源代码进行编译、改编等行为需遵循 GPLv2 协议的约定。根据 GPLv2 协议约定，对于受 GPLv2 约束的软件，开发者应公开其源代码，并免费许可所有第三方使用该软件。故被诉行为本身并不构成侵害著作权的行为。（二）一审法院审理本案程序错误。本案已进入刑事程序，但无任何结论，网经公司不能在刑事案件审理过程中将同一事由同时提起民事诉讼，一审法院应驳回其诉讼请求。并且，一审法院在调取相关刑事案件材料时仅调取对启奥公司不利的材料，而未调取对启奥公司有利材料。此外，本案审理时间近两年之久，严重超出了审理期限。

（三）一审法院适用法律错误。启奥公司不存在侵权故意，并且有避免知识产权侵权的意愿及行为。即便构成侵权，启奥公司也无过错，不应承担民事责任。故一审法院判定启奥公司承担相关民事责任的判决结果属法律适用错误。

**Facts and Reasons:** (1) The Wangjing Company did not hold the copyright of the Software at issue. The Software at issue was developed based on the OpenWRT system software under GPLv2 agreement. Therefore, the use of OpenWRT system software source code for compilation, adaptation and other uses were subject to GPLv2 agreement. According to GPLv2 agreement, the developer should disclose the source code and grant license to all third parties to use the software under GPLv2 agreement at no charge. Therefore, the alleged act did not constitute copyright infringement *per se*. (2) The court of first instance heard the case with incorrect procedures. The case had entered into criminal proceedings with no conclusion reached yet, Wangjing Company was not allowed to file a civil lawsuit while it had entered into the criminal proceedings for the same cause of action. The court of first instance should have dismissed its claims. Moreover, the court of first instance only got access to the materials of the criminal proceedings unfavorable to Qi'ao Company, without any materials favorable to Qi'ao Company. In addition, the case was heard for nearly two years, seriously exceeding the trial period. (3) The court of first instance applied the law incorrectly. Qi'ao Company had no infringement intention, and had the will and act to avoid intellectual property infringement. Even if it was involved in any infringement, Qi'ao Company was not at fault and should not bear civil liability. Therefore, the court of first instance's decision that Qi'ao Company should bear the relevant civil liability was the result of an incorrect application of the law.

被上诉人答辩

Appellee's Defense

**针对亿邦公司、启奥公司的上诉，网经公司统一答辩称：**请求驳回上诉，维持原判，理由如下：（一）网经公司一审提交的权利证据，包括了涉案软件的著作权登记证书，且有充分证据证明涉案软件开发的全部记录。在本案之前的刑事侦查阶段，公安部门亦确认网经公司对涉案软件源代码享有著作权。亿邦公司、启奥公司均无法提供反证推翻该事实认定。故一审法院关于网经公司是涉案软件著作权人的事实认定及法律适用均正确。（二）针对有关 GPL 开源协议问题，涉案软件中虽然包含部分开源代码，但相关开源代码仅是搭建了基础框架，在该框架上针对各种具体的功能需求开发的模块均为网经公司自行开发，相关功能模块的文件夹目录下也无任何受 GPLv2 约束的文件，且网经公司通过套接字（socket）与命令行（command line）等技术

手段，在该功能相关文件夹与底层框架之间建立了隔离层进行通信，通信内容也不涉及内部数据结构信息，由此使得与功能有关的源代码构成了“独立且可分离的”的程序，故至少该部分软件不受 GPLv2 协议的约束。因此，亿邦公司、启奥公司提出的与开源协议 GPLv2 有关的相关抗辩理由均不能成立。（三）根据本案关联刑事案件侦查阶段的大量讯问笔录，亿邦公司与启奥公司之间存在密切关联，启奥公司财务与人事直接由亿邦公司控制。刘某某、吴某某以及其他大量启奥公司员工表示，启奥公司就是亿邦公司开设在苏州的研发中心，一审证据还显示，亿邦公司在猎聘网上曾发布招聘软件工程师，其工作岗位隶属研发二部，工作地址系启奥公司注册地址。根据本案查明事实，足以认定启奥公司实质上是亿邦公司实施被诉侵权行为的工具，亿邦公司与启奥公司被诉行为构成共同侵权。（四）一审判决对亿邦公司、启奥公司的责任认定恰当。虽然一审判决的 50 万元在扣除合理费用后仅剩 40 多万，但鉴于一审判决整体尚能接受，故网经公司未提出上诉。此外，一审判决已说明酌定数额的相关依据，特别提到了涉案软件源代码中包括开源内容作为考量因素之一。再者，一审法院并未判决赔礼道歉，而是根据软件保护条例第二十四条之规定判决消除影响，故亿邦公司的相关上诉理由属适用法律错误。

**In response to the appeals of Yibang Company and Qi'ao Company, Wangjing Company uniformly replied and argued that the Court should dismiss the appeals and affirm the judgment of the first instance for the following reasons:** (1) The evidence of rights submitted by Wangjing Company in the first instance included the copyright registration certificate of the Software at issue, and there was sufficient evidence to prove the development of the Software at issue. In the criminal investigation stage before present case, the public security department also confirmed that Wangjing Company held the copyright of the source code of the Software at issue. Neither Yibang Company nor Qi'ao Company could provide counter-evidence to overturn the factual finding in this section. Therefore, the court of first instance was correct in its determination of fact and application of law that Wangjing Company is the copyright holder of the Software at issue. (2) Regarding the open source license GPL, the open source code in the Software at issue was only used to build the underlying framework, and the modules developed on the framework for various specific functional demands were all developed independently by Wangjing Company itself, and there were no files under GPLv2 agreement in the directory of the relevant functional modules. Wangjing Company had established an isolation layer for communication between the function folder and the underlying framework through sockets and command lines, with the communication content not involving internal data structure information, which made the source code of the function an “independent and separate program”, so at least this part of the software was not subject to the GPLv2 agreement. Therefore, the defenses raised by Yibang Company and Qi'ao Company as regards the open source license GPLv2 were not established. (3) According to the large number of interrogation transcripts in the investigation stage of the related criminal proceedings, there was a close connection between Yibang Company and Qi'ao Company, and Qi'ao Company's finance and personnel were directly controlled by Yibang Company. LIU, WU and a large number of other Qi'ao employees said that Qi'ao Company is the R&D center set by Yibang Company in Suzhou, the evidence in the first instance also indicated that the recruitment information of software engineers published by Yibang Company in Liepin platform indicated that this position is set under the second R&D Department, and the working place was in the Qi'ao Company's registered address. Based on the facts of present case, it can be determined that Qi'ao Company is essentially the tool by which Yibang Company conducted the alleged infringement, and that a joint infringement by Yibang Company and Qi'ao Company could be established. (4) The determination in the first instance for Yibang and Qi'ao Company's liability was appropriate. Wangjing Company found the first instance judgment as a whole acceptable, despite around CNY 400,000 after deducting the reasonable fees from CNY 500,000 decided by the first instance judgment, therefore did not appeal. In addition, the basis on which the damages are decided had already been specified in the first instance judgment, with the open source part in the source code of the Software at issue specifically taken into consideration. Furthermore, the court of first instance did not decide that the Yibang Company should apologize, but it should eliminate the effect of acts subject to the Article 24 of the *Regulations on the Protection of Software*, therefore, the grounds of relevant appeal of Yibang Company are the incorrect application of the law.

亿邦公司与启奥公司相互同意对方的上诉请求和依据的事实理由。

Yibang Company and Qi'ao Company agreed with each other's appeals and the underlying facts and reasons.

**针对亿邦公司的上诉，吴某某、谢某答辩称：**认可亿邦公司、启奥公司的上诉请求和依据的事实理由；刘某某答辩称：请法院查明是否存在被诉侵权行为。

**In response to the Yibang Company's appeal, WU and XIE replied and argued that they recognized the Yibang Company and Qi'ao Company's appeals and underlying facts and reasons; LIU argued and requested the Court to find out whether the alleged infringement is established.**

**针对启奥公司的上诉，吴某某、谢某、刘某某答辩称：**认可启奥公司的上诉请求和依据的事实理由。



**In response to Qi'ao Company's appeal, WU, XIE, LIU replied and argued that they recognized Qi'ao Company's appeal and the underlying facts and reasons.**

一审原告诉称

The plaintiff of the first instance claims that:

**网经公司向一审法院提起诉讼**，一审法院于 2018 年 7 月 16 日立案受理，网经公司向一审法院起诉请求判令：1. 亿邦公司、启奥公司、刘某某、吴某某停止对涉案软件著作权的侵害行为；2. 亿邦公司、启奥公司、刘某某、吴某某共同赔偿网经公司经济损失及维权合理费用共计 300 万元，谢某对启奥公司的债务承担连带赔偿责任；3. 亿邦公司在其官方网站公开赔礼道歉、消除影响；4. 本案诉讼费由亿邦公司、启奥公司、刘某某、吴某某承担。

**Wangjing Company filed a lawsuit to the court of first instance**, which registered the case on July 16, 2018. Wangjing Company claimed that: 1. Yibang Company, Qi'ao Company, LIU and WU should cease the copyright infringement of the Software at issue; 2. Yibang Company, Qi'ao Company, LIU and WU were jointly liable for Wangjing Company's economic loss and the reasonable costs of enforcing the rights, with a total of CNY 3 million, XIE was jointly liable for the liability of Qi'ao Company; 3. Yibang Company should make an apology publicly on its official website and eliminate the effects of its infringement; 4. The trial fees of present case should be borne by Yibang Company, Qi'ao Company, LIU and WU.

**事实和理由：**网经公司是一家国家重点高新技术企业，自 2009 年起，网经公司陆续投入研发经费约 2589 万元，完成了一款名称为“OfficeTen”的网关产品系统软件，并于 2013 年取得国家版权局“OfficeTen1800 系统软件（V1.8）”的著作权登记证书。该软件面向的客户多为中国移动、中国电信等国内大型通信运营商，拥有非常广阔的市场前景。刘某某、吴某某均曾是网经公司员工，曾分别在网经公司处任硬件工程师、嵌入式工程师。二人在职期间是涉案软件开发项目组的重要成员，均能够正常接触到该软件开发所涉及的技术信息。网经公司与刘某某、吴某某均签订了劳动合同与保密协议，在劳动合同中约定，刘某某、吴某某在职期间创作、开发的作品、发明创造，均归属网经公司所有；在保密协议中约定，刘某某、吴某某在离职之后，仍有对网经公司商业秘密的保密义务。后刘某某、吴某某各自从网经公司处离职，并未向网经公司告知其真实去向。2015 年 12 月，网经公司在参加广东电信网关设备公开招标的过程中发现，亿邦公司也参加了此次招标。招投标过程中，网经公司听说亿邦公司曾向广东电信研究院的测试人员宣称，其产品与网经公司产品相同，并称技术来自网经公司的离职人员，故网经公司就此展开调查。2016 年 1 月 5 日，网经公司从亿邦公司的经销商处购得亿邦公司生产的企业网关一台，经比对，该设备软件运行结果中存在网经公司软件源代码特殊标记，且两软件运行结果存在其他相同的指标。后网经公司深入调查发现，亿邦公司在刘某某、吴某某离职后，就与二人接触并将二人聘为其员工。亿邦公司间接设立了启奥公司作为“防火墙”，刘某某、吴某某名义上受聘于启奥公司，实质上直接为亿邦公司开发网关用软件，启奥公司直接受亿邦公司管理与控制，启奥公司发布在招聘网站上的招聘广告也确认其是亿邦公司的“研发二部”，因此亿邦公司、启奥公司在本案中的行为具有共同意思联络。

**Facts and Reasons:** Wangjing Company is a national key high-tech enterprise. Since 2009, Wangjing Company has invested about CNY 25.89 million in the development of a gateway product system software named “OfficeTen”, and obtained the certificate of copyright registration of “OfficeTen1800 System Software (V1.8)” from the National Copyright Administration in 2013. The software had a vast market, oriented to large domestic communications operators like China Mobile, China Telecom. LIU, WU were employed by Wangjing Company as hardware engineer and embedded engineer respectively, who were both essential members of the project team for the development of Software at issue during their employment, having access to the technical information related to the software development. Wangjing Company executed a Labor Contract and a Non-Disclosure Agreement with LIU and WU respectively. It was provided in the Labor Contract that Wangjing Company held the intellectual property rights as regards any works or inventions created or made by LIU and WU during their employment, and in the Non-Disclosure Agreement that LIU and WU bear the obligation of confidentiality as regards Wangjing Company's trade secrets even after their employment. Later LIU and WU left their job in the Wangjing Company without informing the Wangjing Company of their whereabouts. In December 2015, Wangjing Company participated in the public bid for gateway equipment solicited by Guangdong Telecom, and found that Yibang Company also participated in the bid. During the bid, Wangjing Company heard that Yibang had told the testers of Guangdong Telecom Research Institute that its products were the same as those of Wangjing Company, and that the technology was developed by Wangjing Company's departed personnel, so Wangjing Company initiated an investigation in this regard. On January 5, 2016, Wangjing Company purchased an enterprise gateway produced by Yibang Company from Yibang's distributor. By comparison with its own products, Wangjing Company found that there was a special mark for the source code of

Wangjing Company's software in the running results of this gateway device in addition to other identical factors. Wangjing Company found after their in-depth investigation that the Yibang Company employed LIU and WU after they left their jobs. Yibang Company indirectly set up Qi'ao Company as a "firewall", controlling Qi'ao Company directly, with LIU and WU nominally employed by Qi'ao Company but essentially developing the gateway software for Yibang Company. The recruitment ads published on the job-hunting platform by Qi'ao Company also indicated that it was "the second R&D Department" of Yibang Company. Therefore, Yibang Company and Qi'ao Company had a shared intention of infringement in present case.

吴某某作为涉案软件开发的核心技术人员之一，在2015年5月31日从网经公司处离职后，第二天就立即与启奥公司建立了劳动关系；2015年8月12日，吴某某非法登录网经公司的服务器，下载了涉案软件的源代码，使启奥公司在数月时间内完成了与涉案软件高度相似的被诉软件；而被诉软件系专门用于亿邦公司生产的网关产品的嵌入式软件，亿邦公司在市场上公开销售相应的网关产品，并直接在各类招标中与网经公司发生竞争关系，抢夺原本与网经公司合作的客户，获利不菲。

WU, as one of the core developers of the Software at issue, immediately established an employment relationship with Qi'ao Company the day after he left the job in Wangjing Company on May 31, 2015; On August 12, 2015, WU illegally accessed Wangjing Company's server and downloaded the source code of the Software at issue, enabling Qi'ao Company to complete, within several months, the accused Software that was highly similar to the Software at issue. The accused Software was specifically designed as embedded software for the gateway products produced by Yibang Company. Yibang Company publicly sold these corresponding gateway products in the market and directly competed with Wangjing Company in various tenders, seizing customers who had originally cooperated with Wangjing Company, thereby making substantial profits.

网经公司于2016年7月以吴某某、亿邦公司涉嫌侵犯著作权罪向苏州市公安部门报案。经公安部门询问，刘某某陈述其是在亿邦公司的授意下，引诱网经公司的员工离职并将其聘用，并组织大量从网经公司处离职的员工为亿邦公司开发了被诉软件；吴某某陈述，其是应亿邦公司的要求，作为核心技术人员主导开发了被诉软件，为赶工，其于2015年8月12日非法登录了网经公司服务器，下载了涉案软件的源代码并大量抄袭；刘某某、吴某某以及其他名义上隶属于启奥公司的员工在询问中均表示，启奥公司与亿邦公司实质上是“同一主体”，在经营、管理与财务上均存在高度混同。而经公安部门委托鉴定机构进行鉴定，被诉软件与涉案软件的1800-c版本非开源源代码相同率高达90.2%，二者实质相似。

Wangjing Company reported to the Suzhou public security department in July 2016, alleging that WU and Yibang Company were suspected of copyright infringement. Upon inquiry by the police, LIU stated that he lured employees from Wangjing Company to resign and hire them under instructions from Yibang Company, organizing a large number of former Wangjing Company employees to develop the accused Software for Yibang Company; WU stated that at the request of Yibang Company, he led the development of the accused Software as a core developer, and in order to meet deadlines, he illegally accessed Wangjing Company's server on August 12, 2015, downloaded the source code of the Software at issue, and made extensive copies thereof. Both LIU and WU, along with other employees nominally employed by Qi'ao Company, indicated during the inquiry that Qi'ao Company and Yibang Company were essentially "one and the same entity", with significant overlap in their operations, management, and finances. According to the authentication institution commissioned by the police, the similarity rate between the non-open-source code of the accused Software and the 1800-c version of the Software at issue was as high as 90.2%, indicating substantial similarity.

根据中华人民共和国《计算机软件保护条例》（以下简称软件保护条例）第八条，软件著作权人依法享有修改权、复制权、发行权等权利。本案中，亿邦公司、启奥公司、刘某某、吴某某以非法手段获取并复制了网经公司享有著作权的涉案软件源代码，该行为侵害了网经公司对该软件享有的复制权；亿邦公司、启奥公司、刘某某、吴某某对涉案软件源代码的修改行为，侵害了网经公司对该软件享有的修改权；亿邦公司将烧录有与涉案软件源代码高度近似的软件的网关产品在市面上公开销售，亦侵害了网经公司对涉案软件享有的发行权；以上侵害涉案软件复制权、修改权、发行权的行为，获利颇丰，同时还侵害了网经公司作为著作权人的获得报酬权。该等行为已严重影响网经公司的正常经营，并在网经公司员工中造成了极其恶劣的影响，故网经公司将亿邦公司、启奥公司、刘某某、吴某某共同诉至法院，要求其承担相应的侵权责任。特别地，亿邦公司作为以上一系列侵权行为的始作俑者，其原本并不具备开发网关用嵌入式软件的能力，通过从网经公司处挖人、设置启奥公司作为“防火墙”等一系列行为，在几个月的时间内就开发出了与涉案软件高度近似的被诉软件，并直接从中获利。亿邦公司对于启奥公司、刘某某、吴某某的一系列行为显属明知，并积极为其提供帮助，主观恶意极其明显，应当承担较重的侵权责任。就谢某侵权责任问题，启奥公司系自然人独资的有

限责任公司，股东为谢某，根据《中华人民共和国公司法》第六十三条规定，若谢某无法提供证据证明公司财产独立于其财产，则其应对启奥公司的债务承担连带责任。综上，请求一审法院判如所请。

According to Article 8 of the *Regulations of the People's Republic of China on the Protection of Computer Software* (hereinafter referred to as the *Regulations on the Protection of Software*), software copyright holders lawfully enjoy rights as to modification, reproduction, distribution, etc. In present case, Yibang Company, Qi'ao Company, LIU, and WU obtained and reproduced the source code of the Software at issue, which Wangjing Company held copyright over, through illegal means, infringing upon Wangjing Company's right to reproduce this software; the modification of the source code of the Software at issue by Yibang Company, Qi'ao Company, LIU, and WU infringed upon Wangjing Company's right to modify the software; Yibang Company's public sale of gateway products with software burned onto them that is highly similar to the source code of the Software at issue infringed upon Wangjing Company's right to distribute the software; these acts of infringing the right to reproduce, modify, and distribute the software resulted in substantial profits and also infringed upon Wangjing Company's right to remuneration as a copyright holder. Such acts have severely affected the normal operation of Wangjing Company and caused extremely detrimental effects among its employees. Therefore, Wangjing Company sued Yibang Company, Qi'ao Company, LIU, and WU in court, demanding that they bear the corresponding liability for infringement. Specifically, as the initiator of the series of infringing acts, Yibang Company, which originally lacked the capability to develop embedded software for gateways, managed to develop software substantially similar to the Software at issue within a few months by poaching employees from Wangjing Company and setting up Qi'ao Company as a "firewall". Yibang Company clearly knew about and actively assisted in the series of acts by Qi'ao Company, LIU, and WU, demonstrating obvious malicious intent, and should therefore bear heavier liability for infringement. Regarding XIE's liability for infringement, Qi'ao Company is a limited liability company solely owned by a natural person, with XIE as the shareholder. According to Article 63 of the *Company Law of the People's Republic of China*, if XIE cannot provide evidence proving that the company's assets are independent of his own assets, he shall bear joint and several liabilities for the debts of Qi'ao Company. On these grounds, Wangjing Company requested that the court of first instance could approve its claims.

#### 一审被告答辩

#### Defendants' Responses and Arguments in the First Instance

**刘某某一审答辩称**，网经公司的诉讼请求没有任何事实和法律依据。第一，刘某某是硬件工程师，不了解不接触网经公司的软件，不存在侵权的可能性；第二，刘某某于2011年7月29日即从网经公司处离职，而涉案软件著作权形成时间为2013年7月5日，远晚于刘某某离职时间，刘某某不具有了解获悉该软件的可能性；第三，刘某某从未指示任何人非法获取涉案软件，更不存在直接的侵权行为，即使是其招用从网经公司处离职的人员也是正常的招聘行为，为法律所允许。第四，启奥公司是否存在侵权行为由法院认定，但所有行为均与刘某某无关，即使存在侵权行为，也是职务行为，应当由雇主承担责任。此外，吴某某不是刘某某招聘，只是刘某某向有关单位推荐，具体的录用情况与其无关。综上，请求法院驳回网经公司的诉讼请求。

**LIU, in his defense in the first instance, replied and argued that Wangjing Company's claims lacked any factual or legal basis.** Firstly, as a hardware engineer, LIU claimed no knowledge or contact with Wangjing Company's software, ruling out any possibility of infringement. Secondly, having resigned from Wangjing Company on July 29, 2011, much earlier than July 5, 2013, the time when the copyright of the Software at issue was formed, he argued that he could not have been aware of this software. Thirdly, LIU denied ever instructing anyone to illegally obtain the Software at issue and stated that hiring former Wangjing Company employees was lawful. Fourthly, any alleged infringement conducted by Qi'ao Company would be determined by the court, but he insisted that all actions were unrelated to him, and if there was any infringement found by the court, it was an act of employment for which the employer should be liable. He further clarified that WU was not hired by him but rather recommended to relevant entities by, and the actual employment was not within his purview. On these grounds, he requested the court to dismiss Wangjing Company's claims.

**吴某某一审答辩称**，网经公司指诉没有事实和法律依据，不应予以支持，具体理由如下：第一，网经公司无权进行起诉。网经公司提出控告的涉案软件与其著作权登记的软件，以及鉴定所用软件是否一致，网经公司尚未予以证明。第二，相关软件是基于 OpenWRT 系统软件作为开源框架搭建的，而基于 OpenWRT 系统软件进行的二次开发，属于 OpenWRT 系统软件的衍生品，均要遵循 GPR2.0 协议的要求，权利属于 OpenWRT 系统软件源代码权利人。网经公司所认为的其软件与启奥公司的软件存在相似性，若该相似性属实，也属于开源代码，故网经公司本案诉讼请求没有权利基础。第三，吴某某所在启奥公司开发的被诉软件系其独立开发完成，与涉案软件并不相同，不存在利用网经公司技术的行为。网经公司诉讼主张所依据的上海东方鉴定所的 2017 鉴字第 52 号、2016 第 63 号鉴定报告不合规不合法，不能作为客观事实。第四，吴某某不存在



非法获取网经公司源代码的情况。吴某某从网经公司处离职之后，是应网经公司市场部经理黄某某的要求，帮助网经公司解决相关技术问题，是因为修改过程中需要用到网经公司代码，吴某某也是在网经公司同意并提供账号密码的情况下登录了网经公司服务器，网经公司还支付了 7500 元作为吴某某提供技术支持的服务费，两者可相印证。此外，本案民事诉讼之前有刑事纠纷，该刑事案件至今没有结论，请法院考虑是否存在重复立案。

**WU, in his defense in the first instance, replied and argued** that Wangjing Company's accusations lack any factual or legal basis and should not be affirmed. His specific reasons included: Firstly, Wangjing Company lacked standing to sue since it had not proven that the Software at issue was identical to the software registered under its copyright. Secondly, the Software at issue was developed based on the OpenWRT system software, an open-source framework. The derivative works resulting from any secondary development based on the OpenWRT system software, shall be subject to the GPL 2.0 agreement, and the rights shall be held by the original authors of the open source code of OpenWRT system software. If the alleged similarities between Wangjing Company's software and Qi'ao Company's software were true, such similarities should be attributed to the open source code, thus Wangjing Company's claim lacks a legal basis. Thirdly, the accused software developed by Qi'ao Company was independently created without utilizing Wangjing Company's technology, which is different from the Software at issue. He contested that the reports No. 52 of 2017 and No. 63 of 2016 issued by Shanghai Oriental Computer Forensic Institute were non-compliant and unlawful. Fourthly, WU denied illegally acquiring Wangjing Company's source code. After leaving Wangjing Company, he assisted in solving technical problems for Wangjing Company at the request of HUANG, the marketing manager of Wangjing Company, which resulted in his accessing Wangjing Company's server with permission and provided credentials, since the codes of Wangjing Company were necessary for solving the problems. Wangjing Company paid him CNY 7,500 for providing technical support services, which corroborated his assistance. Additionally, prior to this civil lawsuit, there was a pending criminal proceeding, which may lead to the duplicative registering of the case.

**亿邦公司一审答辩称：**第一，亿邦公司与刘某某、吴某某不存在雇佣关系，与启奥公司不存在实体经营上的关联关系。本案中刘某某、吴某某均属于启奥公司的员工，并非亿邦公司员工，与亿邦公司无实际联系。网经公司员工大量离职跳槽原因是因为网经公司经营管理上的失误导致长期拖欠员工工资，最终导致员工不满离职，并非由亿邦公司的主导作用导致其员工离职。第二，亿邦公司与启奥公司仅仅是技术合作关系，亿邦公司因生产经营的需要于 2016 年 1 月 1 日与启奥公司签订了技术开发合同，委托启奥公司进行网关 VPN 功能开发项目的技术合作。后双方合作进展顺利。亿邦公司又于 2016 年 7 月 1 日与其签订了第二份技术开发合同，委托启奥公司为其进行 FSU 功能开发项目的技术开发。合作过程中，亿邦公司依照合同履行了为启奥公司提供资金支持的义务，并派遣相关的工作人员到启奥公司进行监督和项目成果的验收工作等，双方只存在技术合作开发的关系，并不存在经营、管理、财务上高度混同的情况。第三，亿邦公司对被诉软件是否侵犯第三人权利的情况不知情。第四，亿邦公司并不存在抢夺网经公司客户的行为。第五，亿邦公司对网经公司提交的鉴定报告真实性存疑。第六，网经公司的经济损失审计无法律依据，网经公司所称的损失也并非亿邦公司直接造成，相关损失不应由亿邦公司承担。综上，请求驳回网经公司对亿邦公司的诉讼请求。

**Yibang Company, in its defense in the first instance, replied and argued that:** Firstly, it had no employment relationship with LIU or WU and no operational association with Qi'ao Company. In present case, both LIU and WU were employees of Qi'ao Company, not Yibang Company, with no actual connection to it. The mass resignation of Wangjing Company's employees was due to mismanagement and long-term wage arrears, not orchestrated by Yibang Company. Secondly, Yibang Company's relationship with Qi'ao Company was purely a technical cooperation. It signed a Technology Development Contract with Qi'ao Company on January 1, 2016, for the development of gateway VPN functions, and another one on July 1, 2016, for FSU function development based on the smooth progress of the first cooperation. Throughout the cooperation, Yibang Company fulfilled its contractual obligations, providing financial support and dispatching staff for supervision and project acceptance, indicating no significant overlap in operations, management, or finances. Thirdly, Yibang Company was unaware of any infringement of third-party rights as regards the accused Software. Fourthly, it did not engage in customer poaching from Wangjing Company. Fifthly, it questioned the authenticity of the appraisal report submitted by Wangjing Company. Sixthly, the audit of Wangjing Company's loss lacked legal basis, and any losses claimed were not directly caused by Yibang Company, hence it should not be liable for them. On these grounds, it requested the dismissal of Wangjing Company's claims against Yibang Company.

**启奥公司一审答辩称：**第一，启奥公司经营范围为计算机网络科技通讯工程领域内的技术开发，招聘人员进行研发实属合情合理合法，并且与刘某某、吴某某签订的劳动合同约定不允许用其他竞业公司的商业秘密或技术信息，即便刘某某、吴某某有侵权行为，启奥公司也不应承担连带责任。第二，网经公司所主张的源代

码信息本身就属于开源代码，是遵循 OpenWRT 系统软件开源代码协议所开发，即便是其真实的开发，也无法取得著作权，著作权应该属于 OpenWRT 系统软件的原作者。且网经公司也没有任何证据能够证明其进行了单独的研发。第三，网经公司利用启奥公司员工的职务行为，侵害了启奥公司源代码的著作权。如果在 OpenWRT 系统软件开源框架下所作出的修改拥有著作权，那么吴某某在启奥公司工作期间为启奥公司所进行的源代码的修改，应是属于启奥公司的财产，网经公司所主张权利的源代码当中本身就有属于启奥公司的著作权部分，网经公司没有权利追究启奥公司的法律责任。第四，亿邦公司与启奥公司属于独立经营公司，不具有关联关系，两公司只是经营范围有所相近，在业务上有委托合作，但并没有公司混同管理，不应该被认定具有关联关系，也不应对本案承担连带责任。

**Qi'ao Company, in its defense in the first instance, replied and argued that:** Firstly, as a company operating in the field of computer network technology communications engineering, hiring personnel for R&D was entirely reasonable and lawful. It contracted with LIU and WU prohibited the use of trade secrets or technical information from competing companies, and even if they had conducted any infringement, Qi'ao Company should not bear joint liability. Secondly, the source code claimed by Wangjing Company inherently was open source code, developed subject to the open source license applied to the OpenWRT system software. Even if Wangjing Company developed the software itself, it could not acquire copyright, which should be held by the original author of the OpenWRT system software. Moreover, Wangjing Company had no evidence of separate research and development. Thirdly, Wangjing Company, by exploiting the duties of Qi'ao Company's employees, infringed upon Qi'ao Company's copyright in the source code. If modifications to the open source OpenWRT system software framework were copyrightable, then any modification to the source code made by WU during his employment at Qi'ao Company would be Qi'ao Company's intellectual property. Wangjing Company was not entitled to enforce the right against Qi'ao Company, since Qi'ao Company held the copyright in parts of the source code in which it claimed the right. Fourthly, Yibang Company and Qi'ao Company operated independently and did not have an associated relationship. Qi'ao Company was only similar in business scope and had entrusted cooperation in business with Yibang Company, which did not result in any corporate management overlap. Therefore Qi'ao Company should not be considered to have an associated relationship with Yibang Company and bear joint liability in present case.

**谢某一审答辩称：**启奥公司为有限责任公司，其法律承担的主体为公司，而非法定代表人。谢某对于本案的发生并没有过错，不应当承担连带责任。

**XIE, in its defense in the first instance, replied and argued that:** Qi'ao Company was a limited liability company. It was the company itself, but not the legal representative that shall be held liable. XIE had no fault found in the case and should not bear joint liability.

#### 一审法院认定事实

#### The court's Fact Finding in the First Instance

##### 一审法院认定如下事实：

The court of first instance found the following facts:

##### (一) 网经公司主张计算机软件著作权相关情况

###### Regarding Wangjing Company's Assertion of Computer Software Copyright

网经公司成立于 2006 年 7 月 12 日，注册资本 6033.77 万元，经营范围为“研究、设计、开发、生产程控用户交换机、接入网系统设备、用户接入服务管理器、网关设备、无线通信设备、终端设备，销售本公司自产产品，研究、设计、开发企业融合通信平台系统，提供通讯系统集成、解决方案等相关技术咨询、售后服务及其相关业务；研发计算机软硬件，并提供技术服务；计算机系统集成；从事上述商品的进出口业务”。网经公司获评江苏省高新技术企业。网经公司投资研发了涉案软件，网经公司于 2014 年 6 月 5 日取得国家版权局“网经科技 OfficeTen1800 系统软件 V1.8”计算机软件著作权登记证书，证书记载开发完成日期 2013 年 7 月 5 日，首次发表日期 2013 年 11 月 25 日，权利取得方式为原始取得。

Wangjing Company was established on July 12, 2006, with a registered capital of CNY 60.3377 million. Its business scope is “the research, design, development and production of program-controlled user switches, access network system equipment, user access service manager, gateway equipment, wireless communication equipment, terminal equipment; sales of the company's own products; the research, design and development of enterprise integrated

communication platform system; providing communication system integration, solutions and other related technical consultation, after-sales service, etc.; developing computer hardware and software, and providing technical services; computer system integration; the import and export of the above-mentioned commodities”. It was awarded as a high-tech enterprise in Jiangsu Province. Wangjing Company invested in the development of the Software at issue and obtained the copyright registration certificate for “Wangjing Technology OfficeTen1800 System Software V1.8” from the National Copyright Administration on June 5, 2014. The copyright registration certificate indicates that the completion date of the software development was July 5, 2013, and the first publication date was November 25, 2013, and that the rights were acquired through original creation.

根据网经公司举证江苏省苏州市吴中区公证处（2017）苏吴证民内字第 9950 号公证书记录，其于 2017 年 11 月 9 日在苏州工业园区金鸡湖大道 1355 号国际科技园二期 1401-2（网经公司向苏州工业园区科技发展有限公司租赁办公研发用房）导出开发 OT1800D\_1.8.0.0\_Beijing\_Unicom 软件 SVN 版本控制系统数据，记录反映该软件开发自 2009 年 10 月开始至 2015 年 8 月的连贯及完整过程。网经公司说明系统数据中软件名称 OT1800D\_1.8.0.0 中的 OT 是网经公司对 Officeten 软件的简写，后面的 \_Beijing\_Unicom 是当时到北京联通参加投标的一个版本。

According to the notarial certificate (2017)苏吴证民内字 No.9950 issued by the Notary Office of Wuzhong District, Suzhou, Jiangsu Province presented by Wangjing Company, data of the SVN version control system for the development of OT1800D\_1.8.0.0\_Beijing\_Unicom software was extracted at the Room 1401-2, International Science and Technology Park(2nd stage), No. 1355 Jinji Lake Avenue, Suzhou Industrial Park, Jiangsu Province. (leased by Wangjing Company from Suzhou Industrial Park Science and Technology Development Co., Ltd as an office). The records of data showed a coherent and complete development process of this software from October 2009 to August 2015. Wangjing Company explained that the “OT” in the software name OT1800D\_1.8.0.0 was a shorthand for Officeten software, and “\_Beijing\_Unicom” referred to a version developed for a bid solicited by Beijing Unicom.

另，网经公司于 2006 年 8 月 21 日向国家商标局申请注册“OfficeTen”（5554790 号）、“itibia”（5554774 号）商标，于 2009 年获得核准注册。网经公司同时使用“itibia”作为其英文字号。网经公司在其官网及网络域名（www.itibia.com.cn）上均突出使用“itibia”。

Moreover, Wangjing Company applied for the registration of the trademarks “OfficeTen” (No. 5554790) and “itibia” (No. 5554774) with the State Trademark Office on August 21, 2006, obtaining approval in 2009. Wangjing Company also used “itibia” as its English name and prominently displayed “itibia” on its official website and domain name (www.itibia.com.cn).

## （二）被诉主体情况

### Regarding the Defendants

刘某某曾就职于网经公司。2010 年 6 月 24 日，网经公司与刘某某签订《劳动合同》，聘用刘某某任硬件工程师。双方同时签订《保密协议书》。《劳动合同》中约定，在职期间创作/开发的发明创造、作品，其权利归属网经公司所有；《保密协议书》中约定，离职之后仍承担保密义务。2011 年 7 月 29 日，刘某某离职。

LIU previously worked at Wangjing Company. On June 24, 2010, Wangjing Company entered into a Labor Contract with LIU, hiring him as a hardware engineer. They simultaneously signed a Non-Disclosure Agreement. The Labor Contract stipulated that Wangjing Company should be the right holder of inventions and works created during LIU’s employment. The Non-Disclosure Agreement stipulated that LIU shall bear the post-employment confidentiality obligation. LIU left the job on July 29, 2011.

吴某某曾就职于网经公司。2011 年 6 月 1 日，网经公司与吴某某签订劳动合同，聘用吴某某任嵌入式工程师。双方同时签订《保密协议书》。《劳动合同》中约定，吴某某在职期间创作/开发的发明创造、作品，其权利归属网经公司所有；《保密协议书》中约定，离职之后仍承担保密义务。2015 年 5 月 29 日，吴某某离职。

WU also previously worked at Wangjing Company. On June 1, 2011, Wangjing Company entered into a Labor Contract with WU, hiring him as an embedded systems engineer. They also signed a Non-Disclosure Agreement. The Labor Contract stipulated that Wangjing Company should be the right holder of inventions and works created during WU’s employment. The Non-Disclosure Agreement stipulated that WU shall bear the post-employment confidentiality obligation. WU left the job on May 29, 2015.

亿邦公司成立于2010年1月21日，经营范围“通信设备、仪器仪表、工业控制设备、通信机柜、电力机柜、设备配件、电子产品的开发、制造、维修，通信工程和网络工程的系统集成，集成电路设计，网络技术服务，软件开发，技术咨询服务，经营进出口业务”。在猎聘网发布的亿邦公司招聘信息中，招聘岗位包括Linux嵌入式软件工程师（苏州）、IC前端设计工程师（杭州/上海）等。Linux嵌入式软件工程师（苏州）岗位招聘信息中亿邦公司地址为工业园区林泉街399号东南大学文昌院，岗位所属部门为研发二部。

Yibang Company was founded on January 21, 2010, with a business scope covering the development, manufacturing and maintenance of communication equipment, instrumentation, industrial control equipment, communication cabinets, power cabinets, equipment accessories, electronic products; system integration of communication engineering and network engineering, integrated circuit design, network technology services, software development, technical consulting services, import and export. The recruitment information posted on Liepin platform by Yibang Company shows that recruitment positions include Linux embedded software engineer (base Suzhou), IC front-end design engineer (base Hangzhou/Shanghai), etc.. The details of the position for Linux embedded software engineer shows that Yibang Company is located at Wenchang Academy of Southeast University on Linquan Street No.399, Suzhou Industrial Park, and that this position is set under the development department (2nd).

启奥公司成立于2015年5月28日，类型为有限责任公司（自然人独资），股东及法定代表人均为谢某，经营范围“计算机网络科技、通讯工程领域内的技术开发、技术服务、技术咨询；销售：通讯设备、电子产品、电子配件、电脑配件，并提供相关售后服务”，公司地址江苏省苏州工业园区林泉街399号8号楼302室。启奥公司提交其委托浙江新中天会计事务所有限公司作出的《苏州启奥网络科技有限公司专项审计报告》，审计结论为：经审计，未发现2015年5月28日至2020年5月31日期间启奥公司法定代表人、股东谢某与启奥公司财产存在财务混同情况。

Qi'ao Company was established on May 28, 2015, as a limited liability company (privately owned), with XIE as the shareholder and legal representative. Its business scope included technical development, technical service and technical consultation in the field of computer network technology and communication engineering; Sales of communication equipment, electronic products, electronic accessories, computer accessories, and providing related after-sales service. Qi'ao Company is located at Room 302, Building 8, Linquan Street No.399, Suzhou Industrial Park, Jiangsu Province. Qi'ao Company submitted the *Special Audit Report on Suzhou Qi'ao Network Technology Co.,Ltd* made by Zhejiang Xinzhongtian Accounting Firm Co., Ltd., which concluded that no financial overlap was found between XIE (the shareholder and legal representative of Qi'ao Company) and Qi'ao Company from May 28, 2015 to May 31, 2020.

### （三）被诉侵权事实

#### Facts of the Alleged Infringement

网经公司在市场竞争中发现亿邦公司生产、销售的EB-MIG-2100G企业网关设备涉嫌侵害其计算机软件著作权，于2016年1月5日从亿邦公司的经销商太原华泰诺科技有限公司处购得亿邦公司生产的型号为EB-MIG-2100G的企业网关1台。网经公司运行该设备软件，发现其中存在网经公司源代码的特殊标记，且与网经公司的软件存在其他相同的指标，遂以吴某某、亿邦公司涉嫌侵犯著作权罪向苏州市公安局园区分局报案。

In the course of market competition, Wangjing Company discovered that the EB-MIG-2100G enterprise gateway devices produced and sold by Yibang Company were suspected of infringing upon its computer software copyright. On January 5, 2016, Wangjing Company purchased one EB-MIG-2100G enterprise gateway device manufactured by Yibang Company from Taiyuan Huataino Technology Co., Ltd., a distributor of Yibang Company. Upon running the device's software, Wangjing Company identified special markers of its source code and other identical factors, leading to the report of a criminal complaint alleging copyright infringement against WU and Yibang Company to the Industry Park Branch of the Suzhou Public Security Bureau.

在公安部门侦办过程中，分别讯问启奥公司职员刘某某、吴某某、张某某、陶某、龙某、王某某、杨某、宋某某、肖某某、王某、薛某某等人。

During the investigation by the police, several employees of Qi'ao Company, including LIU, WU, ZHANG, TAO, LONG, WANG, YANG, SONG, XIAO, WANG, and XUE, were interrogated.

刘某某在2016年10月12日的讯问笔录中陈述：在离职后，把个人简历放在人才招聘网上，亿邦公司招聘其搞硬件开发，双方谈妥在苏州成立个公司搞研发。后亿邦公司派王某某办理了公司注册手续，成立启奥公司。



其又给亿邦公司推荐了吴某某、龙某、宋某某等人进启奥公司工作，办公地点是通过其认识的教授公司的人租下来的，在苏州工业园区林泉街 399 号 8 号楼 302 室。其所在启奥公司没有财务，财务都是在亿邦公司，由亿邦公司把工资发至员工银行卡，日常工作中需要的费用都是把发票寄到杭州，由总公司报销给员工。吴某某是软件、网关项目负责人。吴某某应该是负责收集每个人编好的软件程序，然后形成系统的软件程序。其本人不懂软件开发。刘某某在 2016 年 10 月 13 日的两次讯问笔录中一致陈述：启奥公司其实就是亿邦公司在苏州开的公司，是亿邦公司在苏州的研发中心。平时的工资、包括财务都是从亿邦公司走账的。研发中心的工作计划、安排等也都是胡某他们来制定、布置的。在其后的多次讯问笔录中，刘某某所作陈述基本保持一致。

LIU, in his interrogation transcripts made on October 12, 2016, stated that after leaving Wangjing Company, he put his resume on a job recruitment website. Yibang Company recruited him for hardware development, agreeing to set up a company in Suzhou for R&D. Yibang Company later had Wang handle the company registration procedures, and set up Qi'ao Company. LIU recommended WU, LONG, SONG, and others to work at Qi'ao Company. The office, located at Room 302, Building 8, No. 399 Linqun Street, Suzhou Industrial Park, was rented through connections he had with in an Education Investment Company. Qi'ao Company did not have its own finance department; financial matters were handled by Yibang Company, which paid salaries directly to employee bank accounts. Expenses incurred during daily operations were reimbursed by the head office in Hangzhou. WU was in charge of the software and gateway projects. WU was supposed to be responsible for collecting software programs programmed by each employee and then forming a systematic software program. LIU himself did not understand software development. In subsequent interrogations on October 13, 2016, LIU consistently stated that Qi'ao Company was essentially a subsidiary of Yibang Company in Suzhou, serving as its R&D center. Salaries and financial matters were processed through Yibang Company. The work plan and arrangement of the R&D center were also made and arranged by HU and others. In the subsequent several interrogations, LIU's statements basically remained consistent.

吴某某在 2016 年 10 月 12 日的讯问笔录中陈述：其参与网经公司 OfficeTen 系列网关产品系统软件开发团队，做底层驱动，涉及所有 OfficeTen 系列的底层驱动源代码。另外有百分之七八十的 OfficeTen1800 型网关上层软件源代码，是研发团队工作时从公司服务器下载至自己笔记本电脑。2015 年 5 月经原同事张某某、刘某某介绍，从网经公司辞职，并至亿邦公司在苏州开办的启奥公司工作，负责网关产品研发。起初想自己编写源代码，主要是从 OpenWRT 系统软件网站上下下载源代码改编，后遇到技术问题，其提供留在笔记本上的 OfficeTen1800 源代码，公司的网关软件大部分抄袭网经公司的 OfficeTen1800 源代码然后做的修改。软件测试结束后，公司根据电信的需求开发功能，软件进一步完善，现在已经有很多版本。启奥公司没有告诉亿邦公司有抄袭行为，对亿邦公司是否知晓不知情。2015 年 7 月，网经公司周某、黄某某联系其帮助解决 GPON 网关的对接问题，给其开通了服务器的账号密码，其通过 VPN 远程登录网经公司服务器，帮助解决了问题，周某给了 7000 多元。其后又在 2016 年 8 月帮助解决 EPON 网关的对接问题。吴某某在 2016 年 10 月 13 日的讯问笔录中陈述：“起先都是从网上下载源代码自己改写，做着做着遇到困难，就问我有之前网经公司 OfficeTen 网关的源代码，我就拿出来给大家参考。当时做研发的时候遇到困难大家想偷懒就抄袭了网经公司的源代码，大家也想快点完成增进公司业绩。记得网关是 2016 年 6 月投入生产的，产品型号是 EB-MIG-1800Z，使用的软件系统的源代码是抄袭网经公司的，中标广州电信 18000 台的网关招标工程。网经公司也去投标，因其网关 OfficeTen1800 没有通过测试，没办法竞标。启奥公司负责研发，销售都是亿邦公司，启奥公司等于就是亿邦公司的子公司负责研发，启奥公司的员工工资都是亿邦公司发的。”在其后的多次讯问笔录中，吴某某所作陈述基本保持一致。

WU, in his interrogation transcripts made on October 12, 2016, stated that he participated in the development team for the OfficeTen series gateway product system software at Wangjing Company, working on the source code development of the underlying driver components as to OfficeTen series. Around seventy to eighty percent of the source code for the upper-level software of the OfficeTen1800 gateway was downloaded from the company server on his own laptop when working in the development team. In May 2015, introduced by former colleagues ZHANG and LIU, he resigned from Wangjing Company and joined Qi'ao Company, established by Yibang Company in Suzhou, where he was responsible for gateway product R&D. He initially intended to write the source code himself, mainly by adapting the source code downloaded from the OpenWRT system software website, but later he encountered technical difficulties. He provided the OfficeTen1800 source code downloaded on his laptop. Much of Qi'ao Company's gateway software was copied from and modified based on Wangjing Company's OfficeTen1800 source code. After the software testing, the company developed additional features according to Telecom's requirements, further refining the software, which now derived into multiple versions. Qi'ao Company did not inform Yibang Company about the copying, and WU was unsure whether Yibang Company was aware of such a situation. In July 2015, ZHOU and HUANG from Wangjing Company contacted him to help resolve GPON gateway interoperability issues, providing server login credentials. Via remote login, WU helped solve the problem, for which ZHOU paid over CNY 7,000. He

later assisted again in August 2016 to resolve EPON gateway interoperability issues. In his interrogation statement on October 13, 2016, WU stated that: “Initially, we downloaded source code online and modified it ourselves. As difficulties arose, I was asked if I had the source code for Wangjing Company’s OfficeTen gateway, which I shared for reference. When facing challenges, we resorted to copying Wangjing Company’s source code to expedite our work and boost company performance. I remembered that the gateway went into production in June 2016, with the model number EB-MIG-1800Z, the source code of which was copied from Wangjing Company’s source code, and we won the Guangzhou Telecom tender for 18,000 gateways. Wangjing Company also participated in the bid, but because its OfficeTen1800 gateway failed the test, it couldn’t compete. Qi’ao Company was responsible for R&D, while sales were handled by Yibang Company. Essentially, Qi’ao Company was a subsidiary of Yibang Company, focusing on R&D, with salaries for Qi’ao Company employees paid by Yibang Company.” In subsequent interrogations, WU’s statements basically remained consistent.

张某某在 2016 年 10 月 12 日、10 月 13 日、10 月 14 日、11 月 1 日的讯问笔录中一致陈述：其 2010 年始在网经公司工作，2015 年 7 月始在启奥公司工作，启奥公司网关软件开发由吴某某负责，其负责语音软件部分，软件部门的各组把各自负责的模块代码写好后上传至编译服务器，由吴某某打包生成程序。其编写代码编不下去，就借鉴吴某某电脑上的语音软件部分的代码，有 OfficeTen 标记，知道这是网经公司的代码。其不知道刘某某作为公司总负责人是否清楚开发出来的网关软件是基于网经公司的软件。

ZHANG, in his interrogation transcripts made on October 12, 13, 14, and November 1, 2016, consistently stated that he started working at Wangjing Company in 2010 and moved to Qi’ao Company in July 2015. The development of Qi’ao Company’s gateway software was led by WU, with ZHANG responsible for the voice software component. Each group in the software department wrote the code for their respective responsible modules and uploaded them to the compilation server, where WU packaged them into a program. When ZHANG reached an impasse in writing code, he referred to the voice software code shared by WU, and he found the “OfficeTen” marker and recognized it as Wangjing Company’s code. He was unsure whether LIU, as the company’s overall leader, was aware that the developed gateway software was based on Wangjing Company’s software.

陶某在 2016 年 11 月 9 日、11 月 10 日的多次讯问笔录中陈述：其 2012 年底入职网经公司任研发员，2015 年 6 月入职启奥公司。启奥公司研发 EB-MIG 网关产品，刘某某负责开发硬件，吴某某带领其本人、曾某某、张某某、杨某开发软件代码。其开始工作时 EB-MIG 产品的源代码已经成型了，其工作是修改 BUG，增加一些功能。EB-MIG 界面与网经公司 OfficeTen1800-c 差不多。2015 年 8 月亿邦公司吴某 1 来开会，要求对 EB-MIG 的源代码进行删改，主要就是把代码里涉及到“OfficeTen”字样的代码删减掉。

TAO stated in multiple interrogation transcripts made on November 9 and 10, 2016, that he joined Wangjing Company as a developer at the end of 2012 and then joined Qi’ao Company in June 2015. At Qi’ao Company, they developed the EB-MIG gateway product, with LIU responsible for hardware development and WU leading TAO, ZENG, ZHANG, and YANG in software code development. When he started working at Qi’ao, the source code for EB-MIG was already in place, and his job involved fixing bugs and adding features. The user interface of EB-MIG was similar to that of Wangjing’s OfficeTen 1800-c. In August 2015, WU from Yibang Company came to a meeting and requested changes to the source code of EB-MIG, mainly removing references to “OfficeTen” from the source code.

苏州市公安局园区分局侦查过程中，于 2016 年 8 月 8 日委托上海东方计算机司法鉴定所对网经公司生产的 OfficeTen1800-c 与亿邦公司生产的 EB-MIG-2100G 两者的软件相似性进行鉴定（沪东方 IT 司鉴所 2016 鉴字第 35 号），送检设备为网经公司生产的 OfficeTen1800-c 样本设备与亿邦公司生产的 EB-MIG-2100G 检材设备各壹台。上海东方计算机司法鉴定所经由用 SecureCRTV8.0.2 终端仿真软件分别登录样本设备及检材设备，查看系统分区大小和名称；分别查看样本设备及检材设备呼叫流程中的特殊信令；查看检材设备文件；用 web 方式分别登录样本设备及检材设备，查看设备的 STUN 配置界面中服务器的 IP 地址等检验步骤，作出分析说明。上海东方计算机司法鉴定所出具鉴定意见为：两者的软件系统分区大小一致，分区名称基本相同。亿邦公司生产的 EB-MIG-2100G 检材设备的呼叫流程中的特殊信令中存在网经公司特有的“OfficeTen”字样。亿邦公司生产的 EB-MIG-2100G 检材设备的文件中存在网经公司的名称“itibia”。亿邦公司生产的 EB-MIG-2100G 检材设备中存在网经公司的服务器 IP 地址……（略）。网经公司生产的 OfficeTen1800-c 样本设备中导出的目标程序代码中路径……（略）和……（略）目录下脚本有 136 个；亿邦公司生产的 EB-MIG-2100G 检材设备中存在的目标程序代码中路径……（略）目录下脚本也有 136 个。两者的脚本文件有 105 个相同，14 个相似。两者的脚本文件的相似率是 87.5%。亿邦公司生产的 EB-MIG-2100G 设备的软件与网经公司生产的 OfficeTen1800-c 设备的软件实质性相似。

During the investigation conducted by the Industrial Park Branch of the Suzhou Public Security Bureau, on August 8, 2016, Shanghai Oriental Computer Forensic Institute was commissioned to conduct a forensic analysis (No. 35 of 2016 Hu Oriental IT Appraisal) to compare the software similarity between Wangjing's OfficeTen 1800-c and Yibang's EB-MIG-2100G. The inspected devices included one OfficeTen 1800-c, the sample device produced by Wangjing Company and one EB-MIG-2100G, the test device produced by Yibang Company. The inspection included logging into the sample device and the test device using SecureCRT V8.0.2 terminal emulator software to check the system partition sizes and names, inspecting special signaling in the call process, examining the files of the test device, and accessing the STUN configuration interfaces via web login to check the server IP addresses. The appraisal opinion issued by Shanghai Oriental Computer Forensic Institute indicated that: "Both systems had identical partition sizes and mostly the same partition names." Special signaling in the call process of Yibang Company's EB-MIG-2100G contained the unique "OfficeTen" marker of Wangjing. Files in Yibang Company's EB-MIG-2100G contained the name "itibia" of Wangjing Company. The server IP address of Wangjing Company was present in Yibang Company's EB-MIG-2100G....[omitted] There were 136 scripts in the directory paths [omitted] and [omitted] of the object program code exported from Wangjing Company's OfficeTen 1800-c. Yibang's EB-MIG-2100G also had 136 scripts in the path [omitted]. Of these, 105 were identical and 14 were similar, resulting in a similarity rate of 87.5%. The software of Yibang Company's EB-MIG-2100G was substantially similar to that of Wangjing Company's OfficeTen 1800-c.

苏州市公安局园区分局又于2016年8月8日委托上海东方计算机司法鉴定所对网经公司生产的OfficeTen1800-c设备与启奥公司开发、亿邦公司生产的EB-MIG-2100G设备两者软件源代码的相似性进行司法鉴定（沪东方IT司鉴所2016鉴字第63号），鉴定材料包括网经公司生产的OfficeTen1800-c设备的软件源代码光盘和启奥公司开发、亿邦生产的EB-MIG-2100G检材的软件源代码的光盘各壹张。上海东方计算机司法鉴定所经比对两者的源代码文件，作出分析说明：样本中的.....（略）两个子目录在检材中均存在。检测比对结果显示，两者的.....（略）子目录中共有33056个文件，其中相同的文件有32306个，显示内容相似但实际相同的文件有19个，两者高度相似。样本的.....（略）目录下有1个.....（略）子目录，.....（略）子目录下有.....（略）等10个子目录。除.....（略）子目录外，检材中存在.....（略）等其余9个子目录。经对检材中.....（略）目录下.....（略）子目录的.....（略）子目录的比对，两者相同的文件有1764个，显示相似内容但实际相同的文件有7个。样本中其余9个子目录与检材的比对结果是两者相同的文件有1403个，显示相似但实际相同的文件有4个。合计两者相同文件有32306+1764+1403=35473个，显示内容相似但实际相同的文件19+7+4=30个，因此，两者相同的文件共有35473+30=35503个。而样本文件共有33056+1907+1863=36826个。计算出两者的相同率是 $(35503/36826) * 100\% = 96\%$ 。上海东方计算机司法鉴定所鉴定意见为：网经公司生产的OfficeTen1800-c设备的软件源代码文件共有36826个，由启奥公司开发、亿邦公司生产的EB-MIG-2100G设备中，有35503个的软件源代码与之相同，两者的相同率是96%。由启奥公司开发、亿邦公司生产的EB-MIG-2100G设备，与由网经公司生产的OfficeTen1800-c设备的软件源代码，两者存在实质性相似。

On the same date, August 8, 2016, the Industrial Park Branch of the Suzhou Public Security Bureau commissioned Shanghai Oriental Computer Forensic Institute to conduct another forensic analysis (No. 63 of 2016 Hu Oriental IT Appraisal) to compare the software source code similarity between Wangjing Company's OfficeTen 1800-c and EB-MIG-2100G developed by Qi'ao Company and produced by Yibang Company. The materials for appraisal included CDs containing the source code of Wangjing's OfficeTen 1800-c and EB-MIG-2100G, developed by Qi'ao Company and produced by Yibang Company. The comparison made by Shanghai Oriental Computer Forensic Institute revealed that: "The subdirectories [omitted] in the sample were present in the test material." In the [omitted] subdirectory, there were 33,056 files, of which 32,306 were identical, and 19 displayed similar content but were actually identical, indicating a high degree of similarity. The sample had 1 [omitted] subdirectory in the [omitted] directory, and in the [omitted] subdirectory there were 10 subdirectory, including the [omitted] subdirectory. Except for [omitted], the remaining 9 subdirectories were present in the test material. Comparing the [omitted] subdirectory of the [omitted] subdirectory of the [omitted] directory in the test material, there were 1,764 identical files and 7 files displaying similar but actually identical. Comparing the remaining 9 subdirectories of the sample with the test material resulted in 1,403 identical files and 4 files displaying similar but actually identical. In total, there were 32,306 + 1,764 + 1,403 = 35,473 identical files and 19 + 7 + 4 = 30 files displaying similar but actually identical, for a total of 35,503 identical files. The sample had a total of 33,056 + 1,907 + 1,863 = 36,826 files. The similarity rate was calculated as  $(35,503 / 36,826) * 100\% = 96\%$ . The appraisal concluded that Wangjing Company's OfficeTen 1800-c had a total of 36,826 source code files, and 35,503 of these were identical in the EB-MIG-2100G developed by Qi'ao Company and produced by Yibang Company, giving a similarity rate of 96%. The software source code of the EB-MIG-2100G developed by Qi'ao Company and produced by Yibang Company was substantially similar to that of Wangjing Company's OfficeTen 1800-c.

苏州市公安局园区分局还于 2017 年 5 月 23 日聘请上海东方计算机司法鉴定所对网经公司生产的 OfficeTen1800-c 设备系统软件 (V1.8) 源代码中非开源部分与启奥公司编写的 1800Z 软件中的非开源源代码的相似性进行司法鉴定 (沪东方 IT 司鉴所 2017 鉴字第 52 号), 鉴定材料包括网经公司生产的 OfficeTen1800-c 设备的系统软件 (V1.8) 非开源源代码的光盘和启奥公司编写的 1800Z 软件源代码光盘各壹张。上海东方计算机司法鉴定所经计算送检光盘和光盘中哈希值; 运行 Beyond Compare 版本 3.1.10 简体中文版软件, 比对两者的…… (略) 子目录中非开源源代码文件等检验步骤, 作出分析说明: 样本中的…… (略) 子目录在检材中均存在。检测比对结果显示, 两者的…… (略) 子目录中非开源的文件共有 1694 个, 其中相同的文件有 924 个, 显示内容相似但实际相同的文件有 604 个, 两者高度相似。因此, 两者相同的文件共有 924+604=1528 个。而样本文件共有 1694 个, 则两者的相同率是  $(1528/1694) * 100\% = 90.2\%$ 。上海东方计算机司法鉴定所鉴定意见为: 启奥公司编写的 1800Z 软件源代码与网经公司生产的 OfficeTen1800-c 设备中的非开源软件源代码之间存在实质性相似。

The Industrial Park Branch of the Suzhou Public Security Bureau also engaged the Shanghai Oriental Computer Forensic Institute on May 23, 2017, to conduct a forensic analysis (No. 52 of 2017 Hu Oriental IT Appraisal) to compare the non-open-source parts of the source code of the system software (V1.8) of the OfficeTen 1800-c device produced by Wangjing Company with the non-open-source source code of the 1800Z software written by Qi'ao Company. The appraisal materials included CDs containing the non-open-source source code of the system software (V1.8) of the OfficeTen 1800-c device produced by Wangjing Company and the 1800Z software source code written by Qi'ao Company. The comparison involved calculating the hash values of the submitted CDs and running Beyond Compare version 3.1.10 Simplified Chinese Edition software to compare the non-open-source source code files in the [omitted] subdirectory. The analysis found that: "The [omitted] subdirectory in the sample material existed in the test material." In the non-open-source part of the [omitted] subdirectory, there were 1,694 files, of which 924 were identical, and 604 displayed similar content but were actually identical, indicating a high degree of similarity. Therefore, there were  $924 + 604 = 1,528$  identical files. With a total of 1,694 files in the sample material, the similarity rate was  $(1,528 / 1,694) * 100\% = 90.2\%$ . The appraisal concluded that there was substantial similarity between the non-open-source source code of the 1800Z software written by Qi'ao Company and the non-open-source software source code in the OfficeTen 1800-c device produced by Wangjing Company.

本案一审中, 就五被告分别异议提出的对检查样本进行比对检验时是否遵循应排除影响比对的内容, 如公共程序文件、第三方文件和通用公共许可的程序等; 涉案鉴定中是否只是做一个单纯的相似度的检测, 不去做哪些是开源性的检索, 不排除开源的内容; 对有没有运用开源框架以及权利归属鉴定报告中是否有表述; 双方的目标程序代码中除 136 个脚本之外, 还有无别的文件; officeten1800v1.8 软件源代码非开源部分进行相似度鉴定, 鉴定机构对委托人提交材料是否百分百予以采信等问题, 上海东方计算机司法鉴定所出庭作证答复: 一、鉴定机构根据司法部发布的《软件相似性检验实施规范》SF-ZJD403001-2014 开展鉴定。二、鉴定是根据委托方所提供的检材, 鉴定机构只对检材负责。鉴定对委托人委托的鉴定事项进行比对, 是对整体的检材做鉴定, 不是针对检材中某些部分的鉴定。三、开源性与非开源性的问题, 软件如果有关联性的情况下, 不能讲是开源还是非开源。因为在一个开源内核上可以去开发不同软件, 可以是自己开发非开源的, 也可以是拿来的开源的。鉴定的核心是软件的一致性。四、两者脚本文件的相似率是 87.5%, 其他文件不在鉴定范围之内。亿邦公司的软件中有网经公司特有的名称、特有的地址, 这本身也能够从一个侧面反映说明两者存在相似。上海东方计算机司法鉴定所还就吴某某提出的鉴定机构执业范围不包括软件比对的异议作出说明: 上海东方计算机司法鉴定所鉴定业务范围为计算机司法鉴定, 司法部关于司法鉴定范围明确计算机司法鉴定包括与软件有关的事项, 上海东方计算机司法鉴定所成立于 2005 年, 始终有软件比对项目的鉴定资格。

In the first instance of present case, regarding the objections raised by the five defendants as to: whether the content that could affect the comparison should be excluded during the comparison, such as common program files, third-party files, and programs under general public licenses; whether the appraisal merely involved a simple similarity test without checking for and excluding open source content; whether the report addressed the use of open source frameworks and rights ownership; whether there were any other files besides the 136 scripts in the object program codes of both parties; whether the appraisal institution fully accepted the materials submitted by the entrusting party for the non-open-source part of the OfficeTen 1800 v1.8 software source code for the similarity appraisal, Shanghai Oriental Computer Forensic Institute testified as follows:

1. The appraising institution conducted the appraisal subject to the *Implementation Standard for Software Similarity Inspection (SF-ZJD403001-2014)* issued by the Ministry of Justice.
2. The appraisal was based on the test material provided by the entrusting party, and the appraising institution was responsible only for the test material. The appraisal focused on the overall test material, not just certain parts of it.



3. Regarding the issue of open source versus non-open-source, in case of the similarity between the software, it cannot be simply classified as open source or non-open-source. An open-source kernel can be used to develop different software, which can be either non-open-source or open source. The core of the appraisal focuses on the consistency of the software.

4. The similarity rate of the script files was 87.5%, and other files were not within the scope of the appraisal. The presence of Wangjing Company's specific name and address in Yibang Company's software itself indicates a degree of similarity.

In response to WU's objection that the appraising institution's scope of practice did not include software comparison, Shanghai Oriental Computer Forensic Institute explained that its scope of practice includes computer forensic appraisals, and the Ministry of Justice explicitly includes matters related to software within the scope of computer forensic appraisals. The Shanghai Oriental Computer Forensic Institute was established in 2005 and has always had the qualifications for software comparison appraisals.

另，网经公司检查其服务器数据，发现吴某某在离职后于2015年8月12日使用.....（略）用户名登录服务器，下载了 officeten1800 系统软件的源代码。

Additionally, Wangjing Company checked its server data and discovered that WU logged in to the server using the username [omitted] after leaving the company on August 12, 2015, and downloaded the source code of the OfficeTen 1800 system software.

#### **(四) 网经公司主张的经济赔偿依据**

The basis of the economic compensation claimed by Wangjing Company

网经公司就其经济损失的赔偿提交三项证据：1.在招投标相关网站上查询到的中国电信股份有限公司广东分公司在2016年3月和5月进行的“2016年广东公司PON上行（多语音口）政企网关（4FE/GE+4POTS）集中采购项目”6万台以及“2016年广东公司第三批PON上行（多语音口）政企网关（8FE/GE+8POTS）集中采购项目”4万台招投标中标信息，亿邦公司分别为第二中标候选人及第一中标候选人。按照招标公告“本项目划分份额如下：份额一数量为本次采购各型号数量总量的70%；份额二数量为本次采购各型号数量总量的30%”计算，亿邦公司中标销售量分别为18000台和28000台。2.网经公司2016年9月26日委托苏州明诚会计事务所有限公司作出的审核报告，就PON上行（多语音口）政企网关（4FE/GE+4POTS）投标产品盈利预测为525415.53元；就PON上行（多语音口）政企网关（8FE/GE+8POTS）投标产品盈利预测为3308029.43元。该两份审核报告表述“根据我们对支持这些假设的证据的审核，我们没有注意到任何事项使我们认为这些假设没有为预测提供合理基础。而且，我们认为，该预测是在这些假设的基础上恰当编制的，并按照企业会计准则编制基础的规定进行了列报”“由于预期事项通常并非如预期那样发生，并且变动可能重大，实际结果可能与预测性财务信息存在差异”。3.网经公司就涉案纠纷委托律师代理合同及支付的律师费7万元。向江苏省苏州市吴中公证处支出公证费5000元。

Wangjing Company submitted three pieces of evidence regarding the compensation for its economic loss: 1. the “2016 Guangdong Company PON Uplink (Multi-Voice Port) Government and Enterprise Gateway (4FE/GE+4POTS) Centralized Procurement Project” conducted by China Telecom Corporation Guangdong Branch in March and May 2016, which was found on the bidding related website “In the bidding information of 60,000 units and 40,000 units of the third batch of PON uplink (multi-voice port) government enterprise gateway (8FE/GE+8POTS) centralized procurement project” of Guangdong Company in 2016, Yibang Company was the second winning bidder and the first winning candidate respectively. According to the bidding announcement “the project is divided into shares as follows: share one quantity is 70% of the total quantity of each model in this procurement; share two quantity is 30% of the total quantity of each model in this procurement”, Yibang won the bidding for the sales volume of 18,000 and 28,000 units respectively. 2. On September 26, 2016, Wangjing Company commissioned Suzhou Mingcheng Accounting Firm Co., Ltd. to produce an audit report. The report projected a profit of CNY 525,415.53 for the PON uplink (multi-voice port) government-enterprise gateway (4FE/GE+4POTS) bid product and a profit of CNY 3,308,029.43 for the PON uplink (multi-voice port) government-enterprise gateway (8FE/GE+8POTS) bid product. The two audit reports stated, “Based on our review of the evidence supporting these assumptions, we have not noted any matters that would lead us to believe that these assumptions do not provide a reasonable basis for the forecast. Furthermore, we believe that the forecast has been properly prepared on the basis of these assumptions and presented in accordance with the provisions of the enterprise accounting standards.” The reports also cautioned, “As anticipated events often do not occur as expected, and the changes may be significant, actual results may differ from the forecasted financial information.” Additionally, Wangjing Company incurred a lawyer's fee of CNY 70,000 for the lawyer retained for the dispute in question and paid a notary fee of CNY 5,000 to the Wuzhong Notary Office in Suzhou, Jiangsu Province.

## (五) 其它相关事实

### Other relevant facts

启奥公司举证《劳动合同》两份，证明其于 2015 年 6 月 9 日聘用刘某某从事硬件开发工作；于 2015 年 6 月 10 日聘用刘某某从事硬件开发工作。

Qi'ao Company adduced two copies of Labor Contract, proving that it employed LIU on June 9, 2015 to engage in hardware development work; and on June 10, 2015, it employed LIU to engage in hardware development work.

启奥公司举证穗司鉴 19010462700014 号鉴定意见书，委托鉴定事项为“对启奥公司编写的智能路由软件的洁净性进行检查，检查该软件中是否包含第三方代码”，以证明其开发的被诉软件源代码编写是运用 OpenWRT 系统软件开源框架进行的，遵循 GPLv2 协议的约束。

Qi'ao Company adduced Sui Si Jian 19010462700014 appraisal opinion, commissioned the appraisal matters for “the clearance review of the intelligent routing software written by Qi'ao Company to check whether the software contains third-party code,” in order to prove that its development of the accused Software source code is written using OpenWRT system software open source framework, which is subject to the GPLv2 agreement.

亿邦公司与启奥公司举证双方于 2016 年 1 月 1 日签订《技术开发合同书》，亿邦公司委托启奥公司进行网关 VPN 功能开发。亿邦公司于 2016 年 4 月至 7 月间前后多次支付启奥公司技术服务费共计 110 万元。双方还于 2016 年 7 月 1 日签订《技术开发合同书》，亿邦公司委托启奥公司进行 FSU 功能开发项目。亿邦公司于 2016 年 7 月至 10 月间前后多次支付启奥公司技术服务费共计 87 万元。

Yibang Company and Qi'ao Company adduced that on January 1, 2016, they signed a Technology Development Contract, whereby Yibang Company entrusted Qi'ao Company to develop the gateway VPN function. Yibang Company made multiple payments to Qi'ao Company a total of CNY 1.1 million in technical service fees between April and July 2016. The parties also entered into another Technology Development Contract on July 1, 2016, whereby Yibang entrusted Qi'ao to carry out the FSU function development project. Yibang Company made multiple payment to Qi'ao Company a total of CNY 870,000 in technical service fees between July and October 2016.

还查明，在吴某某离职网经公司后，网经公司黄某某、周某曾联系吴某某帮助解决相关技术问题。吴某某于 2015 年 8 月 21 日向网经公司黄某某发送了有关“失败 OAM 流程”的邮件。2015 年 6 月 5 日，周某向吴某某微信转账 7500 元。

It was also found that after WU left Wangjing Company, HUANG and ZHOU of Wangjing Company had contacted WU to help solve relevant technical problems. WU sent an email regarding the “failure of the OAM process” on August 21, 2015 to HUANG employed by Wangjing Company. On June 5, 2015, ZHOU transferred CNY 7500 to WU's WeChat.

一审法院认为

The court of first instance held that

**一审法院认为**，本案争议焦点为：（一）网经公司是否享有涉案软件著作权；（二）五被告是否存在侵害涉案软件著作权的行为；（三）如构成侵权，五被告侵权责任如何承担。

**The court of first instance held** that the key disputes in present case were: (a) whether Wangjing Company owned the copyright of the Software at issue; (b) whether the five defendants infringed on the copyright of the Software at issue; and (c) if the infringement was established, how would the five defendants be liable for their infringement.

### (一) 网经公司是否拥有涉案软件著作权

Whether Wangjing Company owned the copyright of the Software at issue

网经公司开发涉案软件的事实有系统、完整的研发记录在案证实，网经公司亦取得国家版权局“网经科技 OfficeTen1800 系统软件 V1.8”计算机软件著作权登记证书，对其软件著作权应予确认。启奥公司、吴某某主张基于 OpenWRT 系统软件开发的软件，应当遵循 GPLv2 协议的约束，权利属于 OpenWRT 系统软件开源代码权利人。其一涉及的是基于 OpenWRT 系统软件开源框架开发软件的著作权归属，应区分不同情况，基于开源产品本身进行的功能修改、优化及开发，应按开源协议确定其著作权归属；但只是调用开源产品或者基

于开源产品之上进行的二次开发，开发者付出创造性劳动足以构成独立作品的，则开发者享有自己的著作权。启奥公司、吴某某主张一概无著作权或著作权属于 OpenWRT 系统软件开源代码权利人，缺乏依据。其二涉及是否应当遵循 GPLv2 协议进行开源。根据 GPLv2 协议的相关规定，GPLv2 协议的许可客体是在 GPLv2 协议许可下批准的受版权保护的程序以及基于该程序的衍生产品或修订版本。但不能简单认为与该程序相关的所有软件就必须开源。启奥公司的举证仅是证明涉案网关软件含有开源代码，但并不能就此证明该网关软件仅是对开源代码的使用（增改或删除）。本案中并没有证据表明涉案软件各目录下均存在 GPLv2 协议开源代码。况且，本案中涉案软件源代码并非公开，不存在启奥公司有权在 GPLv2 协议授权下使用第三方开源程序并构建衍生软件产品的先决条件。

Wanjing Company's development of the Software at issue in the case is substantiated by systematic and comprehensive R&D records. Additionally, Wanjing Company has obtained a computer software copyright registration certificate from the National Copyright Administration for "Wanjing Technology OfficeTen1800 System Software V1.8", which should be confirmed by the court. Qi'ao Company and WU's argument that the software developed based on the OpenWRT system software should be subject to the GPLv2 agreement, with rights belonging to the OpenWRT system software open-source code owners. **Firstly**, regarding the copyright ownership of software developed based on the OpenWRT system software open-source framework, it was necessary to distinguish different situations. For functionality modifications, optimizations, and developments based on the open-source product itself, the copyright ownership should be determined according to the open-source license. However, if the development involved only called the open-source product or the secondary development was only based on the open-source product, and the developer's creative efforts were sufficient to constitute an independent work, then the developer held their sole copyright. Qi'ao Company and WU's claims that there was no copyright or that the copyright belonged to the OpenWRT system software open-source code owners lacked basis. **Secondly**, whether the software should be open-sourced according to the GPLv2 agreement. Under relevant provisions of the GPLv2 agreement, the subject of the GPLv2 license is the copyrighted program granted under the GPLv2 agreement and its derivative products or revised versions. However, it cannot be simply assumed that all software related to the program must be open-sourced. Qi'ao Company's evidence could only prove that the gateway software at issue contained open-source code, but this did not demonstrate that the gateway software merely used (modified or deleted) the open-source code. There was no evidence in present case indicating that all directories of the Software at issue contained GPLv2'd open-source code. Furthermore, the source code of the Software at issue was not publicly available, and there was no precondition that Qi'ao Company was authorized to use third-party's open-source programs and create derivative software products under the GPLv2 agreement.

## （二）五被告是否存在侵害涉案软件著作权的行为

Whether the five Defendants infringed on the copyright of the Software at issue

启奥公司多个员工在公安讯问笔录中一致陈述了启奥公司在网关软件开发中参考并部分复制涉案软件的事实过程。上海东方计算机司法鉴定所接受委托分别就网经公司生产的 OfficeTen1800-c 与亿邦公司生产的 EB-MIG-2100G 两者的软件相似性、网经公司生产的 OfficeTen1800-c 设备与启奥公司开发、亿邦公司生产的 EB-MIG-2100G 设备两者软件源代码的相似性、涉案软件源代码中非开源部分与被告软件中的非开源源代码的相似性进行的三次鉴定，结论为相似度分别高达 87.5%、96%、90.2%；鉴定中同时发现亿邦公司生产的 EB-MIG-2100G 检材设备的呼叫流程中的特殊信令中存在网经公司特有的“OfficeTen”字样，亿邦公司生产的 EB-MIG-2100G 检材设备的文件中存在网经公司的名称“itibia”。基于上述证据，足以作出被诉软件部分复制涉案软件的事实判断。

Multiple employees of Qi'ao Company consistently stated in police interrogation transcripts that Qi'ao Company referenced and partially copied the Software at issue in the development of the gateway software. The Shanghai Oriental Computer Forensic Institute was commissioned to conduct three appraisals: one on the similarity between Wanjing Company's OfficeTen1800-c software and Yibang Company's EB-MIG-2100G software, one on the similarity between the software source code of Wanjing Company's OfficeTen1800-c device and EB-MIG-2100G device developed by Qi'ao Company and created by Yibang Company, and one on the similarity between the non-open-source parts of the source code of the Software at issue and the non-open-source code in the accused Software. The results showed a similarity of 87.5%, 96%, and 90.2%, respectively. During the appraisal, it was also discovered that the unique "OfficeTen" label of Wanjing Company appeared in the special signaling of the call process in the EB-MIG-2100G device produced by Yibang Company, and the name "itibia" of Wanjing Company was found in the files of the EB-MIG-2100G device produced by Yibang Company. Based on the above evidence, it was sufficient to conclude that the accused Software partially copied the Software at issue.

## （三）五被告侵权责任如何承担

## How would the five defendants be liable for their infringement

本案证据充分地证明启奥公司与亿邦公司在被诉侵权网关产品源代码开发和复制的行为上存在共同性。不仅限于签订《技术开发合同书》，双方在启奥公司筹建、人员招募、资金使用、项目决策等诸多方面均存在异常紧密的关联，在涉案被诉侵权网关产品源代码的开发和复制过程中存在着目标、行为和利益上的联结。故，启奥公司与亿邦公司应就涉案被诉启奥公司开发网关软件以及亿邦公司复制该网关软件，制造、销售网关产品的侵权行为承担共同的侵权责任。

The evidence in present case sufficiently proved that there was a commonality between Qi'ao Company and Yibang Company's development and copying acts of the source code for the alleged infringing gateway products. This commonality was included but not limited to the signing of the Technology Development Contract; the fact that the two companies were exceptionally closely associated in various aspects, such as the establishment of Qi'ao Company, personnel recruitment, use of funds, and project decision-making. There was a linkage of goals, behaviours, and interests during the process of development and copying of the source code for the accused infringing gateway products. Therefore, Qi'ao Company and Yibang Company should bear joint liability for the infringement related to the development of the gateway software conducted by Qi'ao Company and the acts of copying, manufacturing, and sale of the gateway products conducted by Yibang Company.

关于刘某某为硬件工程师，并不从事软件开发。刘某某就职于启奥公司，其所从事招聘及管理工作，属职务行为。网经公司指诉刘某某侵害其软件著作权，缺乏事实和法律依据，一审法院不予支持。

Regarding LIU, he is a hardware engineer and was not engaged in software development. LIU is employed by Qi'ao Company and his recruitment and management work falls within the scope of his job duties. Wangjing Company's claim that LIU infringed its software copyright lacked factual and legal basis, and was not supported by the court of first instance.

关于吴某某，网经公司主张吴某某非法登录网经公司服务器下载源代码，但吴某某举证证明在其离职后网经公司工作人员找其解决技术问题，向其提供相关登陆用户名及密码，在该过程中下载相关网关源代码。就这一情节，表明网经公司在无劳动合同关系约束的情况下向其离职员工提供源代码下载，显然存在管理漏洞。也因此，一审法院对网经公司提出的吴某某是非法登录网经公司服务器下载源代码的主张，不予采信。而对于吴某某在启奥公司研发过程中提供出其所掌握的网经公司网关源代码，该行为本身并不直接构成侵害著作权。在案证据表明，启奥公司负责软件开发的小组成员在软件代码开发中各自参考网经公司网关源代码，启奥公司整编形成的网关系统软件存在对网经公司软件的部分复制，亿邦公司在采用启奥公司开发软件的网关产品上进一步复制了该软件，上述行为均为公司经营行为，相关侵权责任主体应为启奥公司及亿邦公司。网经公司主张吴某某侵害其软件著作权，证据不足。

Regarding WU, Wangjing Company claimed that WU illegally logged into their server to download the source code. However, WU provided evidence showing that after he left the company, Wangjing Company's staff contacted him to solve technical problems and provided him with the relevant login username and password, during which he downloaded the related gateway source code. This fact indicated a management loophole on the part of Wangjing Company, as they provided a former employee with access to download the source code without any constraints of an employment contract. Therefore, the court of first instance did not support Wangjing Company's claim that WU illegally logged into their server to download the source code. Regarding the fact that WU provided the gateway source code he possessed during Qi'ao Company's R&D process, it did not directly constitute copyright infringement *per se*. The evidence indicated that the members of Qi'ao Company's software development team individually referenced Wangjing Company's gateway source code during their software code development. The gateway system software compiled by Qi'ao Company contained parts of Wangjing Company's software, and Yibang Company further copied this software in their gateway products using Qi'ao Company's developed software. These acts were the business activities of a company, and the relevant liability shall be borne by Qi'ao Company and Yibang Company. Wangjing Company's claim that WU had infringed on their software copyright lacked sufficient evidence.

综上，启奥公司、亿邦公司未经网经公司许可，部分复制涉案软件，构成侵权，应承担停止侵害、消除影响、赔偿损失的民事责任。因本案所涉侵害著作权不涉及著作权人身权，对网经公司提出赔礼道歉的诉讼主张，一审法院不予支持。对网经公司主张亿邦公司在其官方网站上公开消除影响，可予支持。关于赔偿损失，根据《中华人民共和国著作权法》（以下简称著作权法）的规定，侵犯著作权或者与著作权有关的权利的，侵权人应当按照权利人的实际损失给予赔偿；实际损失难以计算的，可以按照侵权人的违法所得给予赔偿。赔偿数额还应当包括权利人为制止侵权行为所支付的合理开支。权利人的实际损失或者侵权人的违法所得不能确定的，由人民法院根据侵权行为的情节，判决给予五十万元以下的赔偿。本案中网经公司举证委托会计事



务所作出的对投标产品盈利预测审核报告，但该审核报告系基于“假设的证据”，难以采信。且就涉诉招标项目的具体情况来看，招标规则为由第一、第二中标候选人按招标采购数量 70%、30% 份额确定，但网经公司并不在前三名中标候选人排名之列，其所主张的盈利预测缺乏现实的可能性。而就侵权人的违法所得，因缺乏关联性证据，难以计算。故，一审法院根据侵权行为的具体情节对侵权赔偿金额予以酌定，重点考量下列因素：1. 亿邦公司委托启奥公司开发的网关软件，存在对涉案软件的部分复制，该行为主要的利益在于节约开发时间以及避开开发难度；2. 软件著作权人与侵权人之间存在现实的市场竞争利益，被诉软件所涉用途产品经济价值较高；3. 涉案被诉侵权行为表现出较强的计划性；4. 涉案软件基于 OpenWRT 系统软件开发，存在一定程度上的相似性；5. 被诉侵权行为发生于 2015 至 2016 年，此后双方未就网关软件有持续或新发生的纠纷；6. 权利人为制止侵权行为已实际支付较多的费用。综上考量，判定启奥公司、亿邦公司应给予 50 万元的赔偿。

To sum up, Qi'ao Company and Yibang Company partially reproduced the software without the permission of Wangjing Company, which constituted infringement, and should bear the civil liability for remedies such as ceasing the infringement, eliminating the effects of the act, and paying the compensation for damages. As the alleged infringing copyright in present case did not involve the moral rights of copyright, the court of first instance did not support the claim of making a public apology. The court of first instance supported Wangjing Company's claim that Yibang Company shall eliminate the effects of the infringement acts on its official website. Regarding the compensation for damages, according to the *Copyright Law of the People's Republic of China* (hereinafter referred to as the *Copyright Law*), the infringer shall, when having infringed upon the copyright or the rights related to copyright, make a compensation on the basis of the obligee's actual losses; where the actual losses are difficult to be calculated, the compensation may be made on the basis of the infringer's illegal gains. The amount of compensation shall also include the reasonable expenses paid by the obligee for stopping the act of infringement. Where the obligee's actual losses or the infringer's illegal gains cannot be determined, the people's court shall, on the basis of the seriousness of the act of infringement, adjudicate a compensation of CNY 500,000 or less. In present case, Wangjing Company provided evidence in the form of a profitability forecast audit report for the bidding product, prepared by an accounting firm. However, this audit report was based on "hypothetical evidence" and was difficult to admit and adopt. Moreover, considering the specifics of the disputed bidding project, the bidding rules dictated that the first and second candidates should be allocated 70% and 30% of the procurement quantity, respectively. Wangjing Company was not listed among the top three candidates. Therefore, the claimed profitability forecast lacked practical feasibility. Regarding the illegal gains of the infringers, due to the lack of relevant evidence, it was difficult to calculate. Therefore, the court of first instance determined the amount of infringement compensation based on the specific circumstances of the infringement, focusing on the following factors: 1. The gateway software commissioned by Yibang Company and developed by Qi'ao Company was partially reproduced from the Software at issue, mainly benefiting from saving development time and avoiding development difficulties. 2. There were actual market competition interests between the software copyright owner and the infringer, and the products using the accused Software had significant economic value. 3. The alleged infringement acts were highly planned. 4. The Software at issue was developed based on the OpenWRT system software, indicating a certain degree of similarity. 5. The alleged infringement acts occurred between 2015 and 2016, with no ongoing or new disputes over the gateway software thereafter. 6. The rights holder had incurred substantial expenses to stop the infringement. Considering all these factors, the court ordered that Qi'ao Company and Yibang Company should pay the compensation of damages totaling CNY 500,000.

此外，关于谢某，系启奥公司自然人独资股东，谢某举证审计机构作出的《苏州启奥网络科技有限公司专项审计报告》结论为未发现 2015 年 5 月 28 日至 2020 年 5 月 31 日期间启奥公司法定代表人、股东谢某与公司财产存在财务混同情况。在此情况下，网经公司主张谢某对启奥公司的债务承担连带责任，缺乏依据，一审法院不予支持。

Additionally, regarding XIE, who is the sole individual shareholder of Qi'ao Company, XIE provided evidence of *pecial Audit Report on Suzhou Qi'ao Network Technology Co.,Ltd* made by an audit institution, which concluded that no financial commingling/overlap was found between the Qi'ao Company's assets and XIE, the legal representative and shareholder, from May 28, 2015, to May 31, 2020. Under these circumstances, Wangjing Company's claim that XIE should bear joint liability for Qi'ao Company's debts lacked basis, and was not supported by the court of first instance.

一审裁判结果：

The result of the first instance:

一审法院依照著作权法第三条第八项、第十条、第四十八条第一项、第四十九条、软件保护条例第二十四条第一款第一项之规定，判决：“一、浙江亿邦通信科技有限公司、苏州启奥网络科技有限公司立即停止侵害网经科技（苏州）有限公司“OfficeTen1800 系统软件”计算机软件著作权的行为；二、浙江亿邦通信科技有限公司、苏州启奥网络科技有限公司共同赔偿网经科技（苏州）有限公司经济损失及维权合理费用共计 50 万元；三、浙江亿邦通信科技有限公司应就涉案侵权事项在其官网刊登告示以消除影响（刊登时间不少于连续 15 天，内容须经法院审核）；四、驳回网经科技（苏州）有限公司的其他诉讼请求。案件受理费 30800 元，由浙江亿邦通信科技有限公司、苏州启奥网络科技有限公司共同负担。”

The court of first instance, in accordance with the provisions of Article 3(8), Article 10, Article 48(1), Article 49 of the *Copyright Law*, and Article 24(1)(a) of the *Regulations on the Protection of Software*, ruled that: “1, Zhejiang Yibang Communication Technology Co., Ltd. and Suzhou Qi’ao Network Technology Co., Ltd. shall immediately enjoin from infringing the computer software copyright of “OfficeTen1800 system software” held by Wangjing Technology (Suzhou) Co. Ltd.; 2, Zhejiang Yibang Communication Technology Co., Ltd and Qi’ao Network Technology Co., Ltd shall compensate Wangjing Technology (Suzhou) Co., Ltd jointly, a total of CNY 50,000, for its economic losses and reasonable expenses incurred in defending the right; 3, Zhejiang Yibang Communication Technology Co.. Ltd. shall publish a notice on its official website to eliminate the effects of the infringement (the publication period shall be not less than 15 consecutive days, and the content shall be examined and approved previously by the court); 4, The court denied other claims of Wangjing Company Technology (Suzhou) Co., Ltd. The trial fees totaling CNY 30,800 shall be borne jointly by Zhejiang Yibang Communication Technology Co., Ltd and Suzhou Qi’ao Network Technology Co., Ltd.

## 二审法院认定事实

### The Court’s Fact Finding in the Second Instance

本院二审期间，各方当事人均未提交新证据。本院经审理查明：一审法院查明事实属实，本院予以确认。

During the second instance of this Court, all parties did not submit new evidence. **Upon consideration, this Court finds that: the court of first instance found the facts to be accurate and credible, this Court confirms it.**

#### 本院另查明：

##### The Court also finds that:

（一）关于 GPLv2 协议。上文所称 GPLv2 协议的全称为 GNU General Public License, version 2，其中文翻译为《GNU 通用公共许可（版本 2）》。GPLv2 协议的发布者自由软件基金会（Free Software Foundation）。

Regarding the GPLv2 agreement. The full name of the above mentioned GPLv2 agreement is GNU General Public License, version 2, its Chinese translation is “GNU 通用公共许可证（版本 2）”。The publisher of GPLv2 agreement is Free Software Foundation.

（二）关于 OpenWRT 系统软件。OpenWRT 系统软件是通讯领域的系统操作控制软件，该软件为开源软件，适用的许可证协议为 GPLv2 协议。OpenWRT 系统软件的代码贡献者人数众多，开发者可在国际互联网上免费获取 OpenWRT 系统软件的源代码。

Regarding the OpenWRT system software. The OpenWRT system software is the system operation and control software in the field of communication, which is open source software, and the applicable license agreement is GPLv2 agreement. The OpenWRT system software has a large number of code contributors, and developers can freely access the source code of the OpenWRT system software on the international Internet.

（三）关于涉案软件。涉案软件系以 OpenWRT 系统软件为基础经二次开发形成的衍生软件，具体可分为两个部分：一部分是对 OpenWRT 系统软件所对应源代码进行增删、修改、调整而形成的涉案软件底层系统（以下简称底层系统软件），另一部分则是与涉案软件具体功能相对应的新增源代码形成的上层功能软件（以下简称上层功能软件）。网经公司声称其在底层系统软件与上层功能软件之间采用套接字（socket）与命令行（command line）等技术手段建立了隔离层，且二者之间通信内容不涉及内部数据结构信息，由此使得上层功能软件构成 GPLv2 协议项下“独立且分离的”的程序，进而不受 GPLv2 约束。

Regarding the Software at issue. The Software at issue is a derivative software secondarily developed based on the OpenWRT system software, which can be divided into two parts: one part is the underlying system of the Software at issue (hereinafter referred to as the **underlying system software**) formed by adding, deleting, modifying and adjusting the corresponding source code of the OpenWRT system software, and the other part is the upper layer

functional software (hereinafter referred to as the **upper layer functional software**) formed by adding new source code corresponding to the specific functions of the Software at issue. Wangjing Company claimed that it had established an isolation layer between the underlying system software and the upper layer functional software by means of socket and command-line, and that the communication content between these two sorts of software did not involve information of internal data structures, which made the upper layer functional software constitute an “independent and separate” program under GPLv2 agreement, and thus is not subject to the GPLv2 agreement.

(四) 关于被诉软件。被诉软件系启奥公司员工利用在网经公司曾经任职的便利，登录网经公司涉案服务器后下载涉案软件源代码，对其进行少量修改而形成的与涉案软件具有基本相同功能的软件。根据上海东方计算机司法鉴定所出具的两次鉴定意见及该所派员一审出庭作证答复内容，涉案软件与被诉软件二者源代码实质性相似。此外，本案中并没有证据证明启奥公司进一步采取了任何旨在防止 GPLv2 协议约束的隔离技术措施。Regarding the alleged Software. The alleged Software is the software with basically the same function as the Software at issue, which was developed by the employee of Qi’ao Company who took advantage of convenience of his former position in the Wangjing Company, logged into the server at issue of the Wangjing Company and downloaded the source code of the Software at issue, and made a small amount of modification. According to the two appraisal opinions issued by Shanghai Oriental Computer Forensic Institute and the content of the reply of the first instance’s testimony, the source codes of the Software at issue and the alleged Software constitute substantial similarity. In addition, there is no evidence in present case to prove that Qi’ao Company has taken any further isolation technical measures to prevent the constraints of GPLv2 agreement.

二审法院认为

The Court of Second Instance holds that

**本院认为**，本案系侵害计算机软件著作权纠纷，被诉侵权行为的存续时间在 2010 年修正的著作权法施行日（2010 年 4 月 1 日）之后、2020 年修正的著作权法施行日（2021 年 6 月 1 日）之前，本案应适用 2010 年修正的著作权法。根据当事人的诉辩情况及案件事实，本案二审争议焦点为：（一）网经公司就涉案软件是否享有软件著作权；（二）亿邦公司与启奥公司是否实施共同侵权行为；（三）亿邦公司与启奥公司基于 GPLv2 协议的不侵权抗辩是否成立；（四）如果侵权成立，一审法院确定的民事责任承担是否适当。

The Court holds that present case is a dispute over the infringement of computer software copyright, and as the existence of the alleged infringement is conducted after the enforcement date of the *Copyright Law* amended in 2010 (April 1, 2010) and before the enforcement date of the *Copyright Law* amended in 2020 (June 1, 2021), the *Copyright Law* amended in 2010 should be applied to present case. According to the pleadings of the parties and the facts of the case, the key disputes of second instance are that: (1) whether Wangjing Company enjoys the software copyright of the Software at issue; (2) whether Yibang and Qi’ao committed joint infringing act; (3) whether the non-infringement defense raised by Yibang Company and Qi’ao Company based on the GPLv2 agreement is established; and (d) if the infringement is established, whether the civil liabilities determined by the court of first instance is appropriate.

#### （一）网经公司就涉案软件是否享有软件著作权

Whether Wangjing Company enjoys software copyright of the Software at issue

著作权法第三条规定：“本法所称的作品，包括以下列形式创作的文学、艺术和自然科学、社会科学、工程技术等作品：（八）计算机软件”。《中华人民共和国著作权法实施条例》第二条规定：“著作权法所称作品，是指文学、艺术和科学领域内具有独创性并能以某种有形形式复制的智力成果。”软件保护条例第二条规定：“本条例所称计算机软件（以下简称软件），是指计算机程序及其有关文档”；第五条第一款规定：“中国公民、法人或者其他组织对其所开发的软件，不论是否发表，依照本条例享有著作权”；第七条第一款规定：“软件著作权人可以向国务院著作权行政管理部门认定的软件登记机构办理登记。软件登记机构发放的登记证明文件是登记事项的初步证明。”

Article 3 of the *Copyright Law* stipulates: “The term ‘Works’ as referred to in this Law shall include works of literature, art, natural science, social science, engineering technology and the like-made in the following forms: (8) computer software”. Article 2 of the *Regulations on the Implementation of the Copyright Law of the People’s Republic of China* stipulates that “The term ‘Works’ as referred to in the Copyright Law means intellectual creations with originality in the literary, artistic or scientific domain that can be reproduced in a tangible form.” Article 2 of the *Regulations on Software Protection* stipulates, “The term ‘Computer software (hereinafter referred to as software)’ as referred to in these Regulations means computer programs and relevant documents”; Article 5(1) stipulates, “Chinese

citizens, legal entities or other organizations shall enjoy, in accordance with these Regulations, copyright in the software which they have developed, whether published or not.”. The first paragraph of Article 7 stipulates: “A software copyright owner may register with the software registration institution recognized by the copyright administration department of the State Council. A registration certificate issued by the software registration institution is a preliminary proof of the registered items.”

本案中，涉案软件系由网经公司投资研发的名称为“OfficeTen”的网关产品系统软件，能够实现通信运营商经营业务所需的特定网络功能；网经公司于2014年6月5日取得国家版权局“网经科技 OfficeTen1800 系统软件 V1.8”计算机软件著作权登记证书，该证书记载涉案软件的开发完成日期为2013年7月5日，首次发表日期为2013年11月25日，权利取得方式为原始取得。此外，根据一审法院查明事实，上海东方计算机司法鉴定所的检测比对结果显示，涉案软件……（略）子目录中非开源的文件多达1694个，该数据与网经公司有关研发成本投入的事实主张可相互印证，说明网经公司为开发涉案软件投入大量成本。据此可知，涉案软件具有独创性且可以有形形式复制，构成著作权法项下的作品，应当依法获得保护。他人未经网经公司许可，不得擅自复制、修改、发行涉案软件，否则将构成侵害涉案软件著作权的违法行为。

In present case, the Software at issue is a gateway product system software named “OfficeTen” invested and developed by Wangjing Company, which is capable of realizing specific network functions required for the operation business of the communication operators; Wangjing Company obtained the certificate of copyright registration named “Wangjing Technology OfficeTen1800 System Software V1.8” issued by the National Copyright Administration on June 5, 2014, which recorded that the development of the Software at issue was completed on July 5, 2013, and the date of its first publication was November 25, 2013, and the right was originally acquired. In addition, according to the facts identified by the court of first instance, the test and comparison results of Shanghai Oriental Computer Forensic Institute indicated that the non-open source files in the …… (omitted) subdirectory of the Software at issue amounted to as many as 1,694 files. This data corroborated the claim of Wangjing Company regarding the cost invested in developing the software, demonstrating that Wangjing Company has invested significant costs in the development of the Software at issue. Accordingly, the Software at issue is an original creation and can be reproduced in a tangible form, could be qualified as a Work under the Copyright Law, and should be protected in accordance with the law. No person could reproduce, modify or distribute the Software at issue without the permission of the Wangjing Company, otherwise it would constitute an illegal act of infringing the copyright of the Software at issue.

## （二）亿邦公司与启奥公司是否实施共同侵权行为

Whether Yibang Company and Qi’ao Company committed joint infringing acts

首先，关于被诉行为是否侵害涉案软件著作权。软件保护条例第八条第一款规定：“软件著作权人享有下列各项权利：（三）修改权，即对软件进行增补、删节，或者改变指令、语句顺序的权利；（四）复制权，即将软件制作一份或者多份的权利；（五）发行权，即以出售或者赠与方式向公众提供软件的原件或者复制件的权利”。该条例第二十三条规定：“除《中华人民共和国著作权法》或者本条例另有规定外，有下列侵权行为的，应当根据情况，承担停止侵害、消除影响、赔礼道歉、赔偿损失等民事责任：（五）未经软件著作权人许可，修改、翻译其软件的”。该条例第二十四条第一款规定：“除《中华人民共和国著作权法》、本条例或者其他法律、行政法规另有规定外，未经软件著作权人许可，有下列侵权行为的，应当根据情况，承担停止侵害、消除影响、赔礼道歉、赔偿损失等民事责任；同时损害社会公共利益的，由著作权行政管理部门责令停止侵权行为，没收违法所得，没收、销毁侵权复制品，可以并处罚款；情节严重的，著作权行政管理部门并可以没收主要用于制作侵权复制品的材料、工具、设备等；触犯刑律的，依照刑法关于侵犯著作权罪、销售侵权复制品罪的规定，依法追究刑事责任：（一）复制或者部分复制著作权人的软件的；（二）向公众发行、出租、通过信息网络传播著作权人的软件的”。本案中，根据启奥公司多个员工在公安讯问笔录中的一致陈述、吴某某在离职后登录服务器下载涉案软件源代码、上海东方计算机司法鉴定所就涉案软件与被诉软件出具的鉴定结果、被诉软件中含有涉案软件特有的“OfficeTen”字样以及网经公司名称“itibia”等相互可印证的多节事实，足以认定启奥公司在开发被诉软件过程中复制并修改了网经公司涉案软件的源代码；此外，根据本案查明事实，亿邦公司实施了销售被诉软件的行为。该等复制、修改、发行行为均未经网经公司许可，侵害了网经公司享有的涉案软件著作权。故一审法院关于被诉行为侵害涉案软件著作权的认定结论具有充分的事实与法律依据，本院予以认可。但一审法院仅评述了被诉复制行为，忽略了对被诉修改、发行行为的评述，本院予以补充。亿邦公司与启奥公司虽对其被诉行为事实认定提出异议，但未提交充分反证推翻前述事实认定，故亿邦公司与启奥公司有关被诉软件完全是自主研发成果、未侵害涉案软件著作权的相关上诉理由均缺乏事实与法律依据，本院不予支持。



**First of all**, whether the alleged acts infringed the copyright of the Software at issue. Article 8(1) of the *Regulations on the Protection of Software* stipulates: “The software copyright owner shall enjoy the following rights: (3) the right of alteration, that is, the right to supplement or abridge the software, or to change the sequence of instructions or statements; (4) the right of reproduction, that is, the right to produce one or more copies of the software; (5) the right of distribution, that is, the right to provide the original copy or reproductions of the software to the public by selling or donating.” Article 23 of these Regulations stipulates: “Except as otherwise provided in the *Copyright Law of the People’s Republic of China* or these Regulations, anyone who commits any of the following acts of infringement shall, in light of the circumstances, bear civil liability by means of ceasing infringements, eliminating ill effects, making an apology, or compensating for losses: (5) to alter or translate a piece of software without the permission of the software copyright owner.” The first paragraph of Article 24 of these Regulations stipulates: “Except as otherwise provided in the *Copyright Law of the People’s Republic of China*, these Regulations or other laws and administrative regulations, anyone who, without the permission of the software copyright owner, commits any of the following acts of infringement shall, in light of the circumstances, bear civil liability by means of ceasing infringements, eliminating ill effects, making an apology, or compensating for losses; where such act also prejudices the public interest, the copyright administration department shall order the infringer to cease infringements, confiscate the illegal income, confiscate and destroy the infringing copies, and may impose a fine concurrently; where the circumstances are serious, the copyright administration department may confiscate the materials, tools, equipment, etc., mainly used to produce the infringing copies; and where the act violates the *Criminal Law*, criminal liability shall be investigated for the crime of infringing upon copyright or selling infringing copies in accordance with the provisions of the *Criminal Law*: (1) to reproduce, wholly or in part, a piece of software of the copyright owner; (2) to distribute, rent or communicate to the public through information network, a piece of software of the copyright owner.” In present case, according to the mutually corroborative facts that: the consistent statements made by several employees of Qi’ao Company in the police interrogation transcripts, the fact that WU, after leaving the company, logged into the server to download the source code of the Software at issue, the appraisal results issued by Shanghai Oriental Computer Forensic Institute on the Software at issue and the alleged Software, the fact that the alleged Software contained the label “OfficeTen” which was unique to the Software at issue and the name “itibia” of Wangjing Company, it is sufficient to establish that Qi’ao Company had copied and modified the source code of the Software at issue of Wangjing Company in the course of the development of the alleged Software; moreover, according to the facts found in present case, Yibang Company had carried out the acts of selling of the Software at issue. These acts of copying, modifying and distributing without permission of Wangjing Company, infringed the copyright of the software owned by Wangjing Company. Therefore, the court of first instance’s conclusion on the software copyright infringement is established on the sufficient factual and legal basis, and the Court recognizes it. However, the court of first instance only commented on the reproduction act and neglected to comment on the acts of modification and distribution, which the Court supplements. Although Yibang Company and Qi’ao Company objected to the factual finding of the accused acts, but it did not submit sufficient counter-evidence to overturn the aforementioned factual finding. Therefore, Yibang Company and Qi’ao Company’s appeal grounds that the alleged Software is completely a result of independent research and development, and does not infringe on the copyright of the Software at issue are lack of factual and legal basis, and are thus not supported by this Court.

其次，关于亿邦公司与启奥公司实施的被诉行为是否构成共同侵权。一审法院基于亿邦公司与启奥公司签订的《技术开发合同书》以及双方在启奥公司筹建、人员招募、资金使用、项目决策等诸多方面均存在紧密关联等多节事实，认为在被诉软件开发和复制过程中存在目标、行为和利益上的联结，并据此认定启奥公司与亿邦公司应就被诉侵权行为承担共同侵权责任。该节事实认定具有事实与法律依据，并无不当，本院予以认可。因此，就涉案复制、修改、发行等被诉侵害涉案软件著作权的行为而言，启奥公司与亿邦公司实为共同侵权人，其被诉侵权行为应作为一个整体予以评述。亿邦公司虽对此提出异议，但未提交足以推翻共同侵权事实认定结论的反证，故亿邦公司关于其未参与被诉软件研发、亦未实施任何侵权行为、两公司不存在共同侵权等上诉理由与本案查明事实不符，本院不予支持。

**Secondly**, whether the alleged acts of Yibang Company and Qi’ao Company constitute joint infringement. The court of first instance, based on the “Technology Development Contract” signed between Yibang Company and Qi’ao Company, as well as the close association between the two companies in various aspects such as the establishment of Qi’ao Company, personnel recruitment, use of funds, project decision-making, considered that there was a linkage of goals, behaviors, and interests during the process of development and copying of the accused Software and accordingly found that Qi’ao Company and Yibang Company should bear joint liability for the alleged infringing acts. The Court recognizes the factual and legal basis of this finding, which is not inappropriate. Therefore, in respect of the acts of copying, modifying, distributing and other acts of infringement of the software copyright, Qi’ao Company and Yibang Company are joint infringers, and their acts of infringement should be evaluated as a whole. Although Yibang Company objected to this, but it did not submit sufficient counter-evidence to overturn the factual finding of joint

infringement. Therefore, Yibang Company's appeal reasons that it does not involved in the research and development of the alleged Software, that it does not carry out any infringing acts, and that the two companies commit no joint infringement are inconsistent with the findings of present case, and are thus not supported by this Court.

### (三) 亿邦公司与启奥公司基于 GPLv2 协议提出的不侵权抗辩是否成立

Whether the non-infringement defense raised by Yibang Company and Qi'ao Company based on the GPLv2 is established.

亿邦公司与启奥公司上诉认为，在案证据足以证明涉案软件受 GPLv2 协议约束，根据 GPLv2 协议约定网经公司本就负有公开涉案软件源代码的开源义务，因此，亿邦公司与启奥公司即使使用了涉案软件源代码，该使用行为亦不构成侵权。对此，本院认为，亿邦公司与启奥公司基于 GPLv2 协议提出的不侵权抗辩不能成立，理由如下：

Yibang Company and Qi'ao Company appealed and claimed that the evidence in the case was sufficient to prove that the Software at issue was subject to the GPLv2 agreement, and that according to the GPLv2 agreement, Wangjing Company was obliged to open source and disclose the source code of the Software at issue, and therefore, even if Yibang Company and Qi'ao Company used the source code of the Software at issue, such use did not constitute an act of infringement. In this regard, the Court holds that the defense of non-infringement raised by Yibang Company and Qi'ao Company based on the GPLv2 agreement could not be established for the following reasons:

首先，本案系针对涉案软件的著作权侵权纠纷，而非合同纠纷。尽管涉案软件涉及 GPLv2 协议这一许可合同，但在 OpenWRT 系统软件权利人并非本案当事人情形下，基于合同相对性原则，本案不宜对涉案软件是否全部或部分受 GPLv2 协议约束、网经公司是否违反 GPLv2 协议、以及网经公司是否因此需承担任何违约或侵权责任等问题进行审理。其次，关于涉案软件是否受 GPLv2 协议约束，该问题涉及底层系统软件是否受 GPLv2 协议约束、上层功能软件是否构成 GPLv2 协议项下“独立且分离的程序”、二者间采用的隔离技术手段、通信方式、通信内容等如何界定以及软件领域对 GPLv2 协议传导性的通常理解与行业惯例等因素。在 OpenWRT 系统软件权利人并非本案当事人情形下，亦难以查明与 GPLv2 协议有关的前述系列事实。再者，亿邦公司与启奥公司并无证据证明网经公司通过 GPLv2 协议已放弃其就涉案软件依据我国著作权法享有的著作权。退而言之，即便假定网经公司因违反 GPLv2 协议导致涉案软件存在权利瑕疵，该假定瑕疵亦不影响网经公司在本案中针对被诉行为寻求侵权救济。

**Firstly**, present case is a copyright infringement dispute over the Software at issue, not a contractual dispute. Although the Software at issue is subject to a license agreement, *i.e.* the GPLv2 agreement, based on the principle of the privity of contract, it is not appropriate to determine all in present case whether the Software at issue is wholly or partially subject to the GPLv2 agreement, whether Wangjing Company violates the GPLv2 agreement and whether Wangjing Company shall bear any liability for breach of contract or infringement, while the right holder of the OpenWRT system software is not a party to this case. **Secondly**, while the right holder of the OpenWRT system software is not a party to this case, it is also difficult to find out the facts related to the GPLv2 agreement as follows: whether the Software at issue is subject to the GPLv2 Agreement, this issue involves the following considerations: whether the underlying system software is subject to the GPLv2 agreement, whether the upper layer functional software constitutes an “independent and separate program” under the GPLv2 agreement, and how to define the technical measures of isolation, the mechanism of communication and the semantics of communication between the two software, and common understanding and common practices about the copyleft effects of the GPLv2 agreement. **In addition**, Yibang Company and Qi'ao Company have no evidence to prove that Wangjing Company has renounced its copyright under *Copyright Law of People's Republic of China* on the Software at issue through the GPLv2 agreement. Assuming Wangjing Company did violate GPLv2 agreement and its right to the Software at issue was flawed thereof, such flaw in right shall not affect its right to seek remedies in present case against defendants' infringement.

综上所述，在软件尚未被开源、该软件著作权人认为其软件不受 GPLv2 协议约束、被诉侵权人则依据 GPLv2 协议提出不侵权抗辩的侵权纠纷中，软件开发者自身是否违反 GPLv2 协议和是否享有软件著作权，是相对独立的两个法律问题，二者不宜混为一谈，以免不合理地剥夺或限制软件开发者基于其独创性贡献依法享有的著作权。但需指出，本案最终认定被诉行为构成侵权并支持网经公司部分诉请，并不表明网经公司将来在潜在的违约和/或侵权之诉中可免于承担其依法应当承担的违约和/或侵权责任。

For the reasons stated above, in an infringement dispute where the software has not yet been open-sourced, the copyright owner of the software believes that the software is not subject to the GPLv2 agreement, and the accused infringer raises the non-infringement defense based on the GPLv2 agreement, the question of whether the software

developer *per se* has violated the GPLv2 agreement and the question of whether he or she enjoys the software copyright are relatively independent legal issues, and it is inappropriate to confuse the two issues, so as not to unreasonably deprive or restrict the software developer's rights based on his or her original contributions in accordance with the law. However, it should be noted that the final ruling in present case, which finds the accused acts to constitute infringement and upholds part of Wangjing Company's claims, does not exempt Wangjing Company from his liability in potential lawsuits of either breach of contract or infringement in the future.

#### (四) 如果侵权成立，一审法院确定的民事责任承担是否适当

Whether the civil liability determined by the court of first instance is appropriate if the infringement is established

著作权法第四十八条第一项规定：“有下列侵权行为的，应当根据情况，承担停止侵害、消除影响、赔礼道歉、赔偿损失等民事责任；……（一）未经著作权人许可，复制、发行、表演、放映、广播、汇编、通过信息网络向公众传播其作品的，本法另有规定的除外；……”；第四十九条规定：“侵犯著作权或者与著作权有关的权利的，侵权人应当按照权利人的实际损失给予赔偿；实际损失难以计算的，可以按照侵权人的违法所得给予赔偿。赔偿数额还应当包括权利人为制止侵权行为所支付的合理开支。权利人的实际损失或者侵权人的违法所得不能确定的，由人民法院根据侵权行为的情节，判决给予五十万元以下的赔偿。”

The Article 48(1) of the *Copyright Law* stipulates: “anyone who commits any of the following acts of infringement, in light of the circumstances, bear civil liability by means of ceasing infringements, eliminating ill effects, making an apology, or compensating for losses; …… (a) without the permission from the copyright owner, reproducing, distributing, performing, projecting, broadcasting, compiling, disseminating his work to the public through the information network, except where otherwise provided in this Law; ……”; Article 49 stipulates: “The infringer shall, when having infringed over the copyright or the rights related to copyright, make a compensation on the basis of the obligee's actual losses; where the actual losses are difficult to be calculated, the compensation may be made on the basis of the infringer's illegal gains. Where the obligee's actual losses or the infringer's illegal gains cannot be determined, the people's court shall, on the basis of the seriousness of the act of infringement, adjudicate a compensation of CNY 500,000 or less.”

本案中，根据在案证据，因网经公司实际损失与亿邦公司、启奥公司的违法所得均不能确定，一审法院综合考虑被诉行为性质与情节、涉案软件经济价值较高、被诉侵权行为表现出较强计划性、涉案软件是基于 OpenWRT 系统软件二次开发的成果、被诉行为持续时间、权利人为制止侵权实际支付费用等多种因素，判定亿邦公司、启奥公司应共同赔偿网经公司 50 万元。该处理并无不当，酌定数额亦无明显畸高，且已考虑到 OpenWRT 系统软件等因素，本院予以认可。鉴于网经公司就本案维权支付的律师费 7 万元及公证费 5000 元，前述 50 万元赔偿额可分为经济赔偿 42.5 万元与合理开支 7.5 万元。

In present case, according to the evidence in the case, as the actual losses of Wangjing Company or the illegal gains of Yibang Company and Qi'ao Company could not be determined, the court of first instance considered the nature and circumstances of the accused acts, the high economic value of the Software at issue, the strong planning showed from the alleged infringing acts, the Software at issue was the result of the secondary development of the software based on the OpenWRT system software, the duration of the alleged acts, and the expenses actually paid by the right holder for ceasing the infringement, the court of first instance hereby ruled that Yibang Company and Qi'ao Company should jointly compensate Wangjing Company for CNY 500,000 for their infringement of OpenWRT system software. The Court recognizes that this decision is not inappropriate, and that the adjudicated amount is not excessively high, as the factors such as the OpenWRT system software have been taken into account. Given that Wangjing Company has paid CNY 70,000 for attorney's fee and CNY 5,000 for notary fee for right defense in present case, the aforementioned CNY 500,000 damages can be divided into CNY 425,000 for financial compensation and CNY 75,000 for reasonable expenses.

特需指出的是，涉案软件是在 OpenWRT 系统软件基础上经二次开发形成的独立软件，故本案在计算侵权损失过程中，应着重考虑网经公司二次开发部分在整体软件作品中所占比例，合理地剥离 OpenWRT 系统软件的已开源部分，仅计算涉案软件中网经公司有独创性表达的开发部分。由于 OpenWRT 系统软件已是较为成熟的通信控制软件，且为该软件作出贡献的开发者众多，编写的代码量较大。从一审判决金额来看，一审法院对此已有考量，符合前述比例原则，本院予以确认。

It should be particularly noted that the Software at issue is an independent software secondarily developed on the basis of OpenWRT system software, therefore, in granting damages in present case, the Court shall duly consider the proportion of Wangjing Company's secondary development in the overall software works, and reasonably separate the open-source part of the OpenWRT system software, and reduce the amount to keep in line with Wangjing Company's contribution of original expression to the Software at issue. Since the OpenWRT system software is

already a relatively mature communication control software, with contributions from numerous developers and a substantial amount of written code, the court of first instance has already taken this into consideration when looking at the adjudicated amounts, which also aligns with the aforementioned principle of proportionality. Therefore, the Court supports the adjudicated amount.

此外，考虑到被诉软件与涉案软件二者相似度较高，在相关市场上有直接的竞争关系，加之被诉软件开发人员曾在网经公司任职，故有必要消除被诉软件对涉案软件带来的负面商业影响，尽可能恢复相关市场对涉案软件及其经营主体网经公司的认知。因此，一审法院判令亿邦公司就涉案侵权事项在其官网刊登告示以消除影响，该处理于法有据，并无不当，本院予以维持。亿邦公司与启奥公司虽对一审判赔 50 万元并判令亿邦公司消除影响的判决结果提出异议，但缺乏充分的事实与法律依据，本院不予支持。

In addition, taking into account the high similarity between the accused Software and the Software at issue, the fact that there is direct competition in the relevant market, coupled with the fact that the developers of the accused Software had worked for Wangjing Company, it is necessary to eliminate the negative commercial effects of the accused Software on the Software at issue, and to restore as far as possible the relevant market's awareness of the Software at issue and its operating body, Wangjing Company. Therefore, the court of first instance ordered Yibang Company to publish a notice on its official website to eliminate the effects of the infringement act, which was in accordance with the law and not inappropriate, and the Court affirms the judgment of first instance. Although Yibang Company and Qi'ao Company objected to the judgment of the court of first instance that Yibang Company should pay compensation of CNY 500,000 and eliminate the effects of the infringement, they lack sufficient factual and legal basis. Therefore, the Court does not support their objections.

## 二审法院判决

The Court of Second Instance holds that:

综上所述，亿邦公司与启奥公司的上诉请求均不能成立，应予驳回；一审判决认定事实清楚，适用法律正确，应予维持。依照 2010 年修正的《中华人民共和国著作权法》第三条第八项，第十条第一款第三、五、六项，第四十八条第一项，第四十九条，《中华人民共和国著作权法实施条例》第二条，《计算机软件保护条例》第二条，第五条第一款，第七条第一款，第八条第一款第三、四、五项，第二十三条第五项，第二十四条第一款第一、二项，《中华人民共和国民事诉讼法》第一百七十七条第一款第一项之规定，判决如下：

For the reasons stated above, Yibang Company and Qi'ao Company's motions to appeal are not established and should be denied; the judgment of the first instance found the facts to be clear and the application of the law correct, and should be affirmed. Under Article 3(8), Article 10(1)(c), (e) and (f), Article 48(1), Article 49 of *Copyright Law of the People's Republic of China* (amended in 2010), Article 2 of *Regulations on the Implementation of the Copyright Law of the People's Republic of China*, Article 2, Article 5(1), Article 7(1), Article 8(1)(c), (e) and (f), Article 23(5), and Article 24(1)(a) and (b) of the *Regulations on the Protection of Computer Software*, and Article 177(1)(a) of the *Civil Procedure Law of the People's Republic of China*, the Court hereby orders as follows:

驳回上诉，维持原判。

The Court DENIES the motion to appeal and AFFIRMS the original judgment.

二审案件受理费 8800 元，由浙江亿邦通信科技有限公司与苏州启奥网络科技有限公司共同负担。

The trial fees of second instance totaling CNY 8,800, shall be borne jointly by Zhejiang Yibang Communication Technology Co., Ltd and Suzhou Qi'ao Network Technology Co., Ltd.

本判决为终审判决。

This judgment is the FINAL JUDGMENT.

审判长 原晓爽

审判员 张新锋

审判员 孔立明

二〇二三年十月十二日

法官助理 负璇

法官助理 喻琰



法官助理 戴芳芳

书记员 郑帅

Chief Judge : Xiaoshuang YUAN

Trial Judge: Xinfeng ZHANG

Trial Judge: Liming KONG

October 12, 2023

Judge's Assistant: Xuan YUN

Judge's Assistant: Yan YU

Judge Assistant: Fangfang DAI

Clerk of Court: Shuai ZHENG