

New Tech and New Strategies in IPR Protection and Enforcement 知识产权保护与执法领域 新技术、新策略

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18 November 2020

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2020年11月18日

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New Tech and New Strategies in IPR Protection and Enforcement 知识产权保护与执法领域新技术、新策略

Topics 主题

- Introduction to Protection of IPR in Cross-border E-commerce 跨境电商知识产权保护简介
- Data Protection Principles (incl Cross-border Data) 数据保护原则（含跨境数据）
- Law Enforcement Collection of Evidence 执法证据搜集
- Summary 总结

New Tech and New Strategies in IPR Protection and Enforcement

知识产权保护与执法领域新技术、新策略

Introduction to Protection of IPR in Cross-border E-commerce

跨境电商知识产权保护简介

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Some Challenges with IPR in Cross-border E-commerce 跨境电商知识产权保护面临的部分挑战

- Territoriality of IP rights 知识产权的地域性
- Global scale of e-commerce 电商的全球体量
- Enormity of transactions and postal and express courier packages 订单、快递物流量巨大
- Anonymity 匿名化
- Misuse of artificial intelligence (AI) to scale illegal commerce 滥用人工智能进行非法交易

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Court of Justice of the European Union Rulings 欧盟法院裁决

- C-324/09, *L' Oreal v Ebay* (trade mark infringement through targeted marketing)
- C-324/09号欧莱雅诉Ebay案 (定向营销侵犯商标权)
- C-98/13, *Blomqvist* (actual delivery of copyright and trade mark infringing products)
- C-98/13号Blomqvist案 (销售并交付侵权与商标的产品)
- C-5/11, *Donner* (cross-border sale of copyright infringing goods together with transportation)
- C-5/11号Donner案 (跨境销售、运输版权侵权商品)
- C-516/13, *Dimensione* (marketing of goods like in Donner-ruling)
- C-516/13号Dimensione案 (销售与Donner案类似商品)
- C-567/18, *Amazon* (fulfillment services)
- C-567/18号亚马逊案 (履约服务)
- C-772/18, *A v B* (import and storage)
- C-772/18号A诉B案 (进口、仓储)

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Data Protection Principles (incl Cross-border Data) 数据保护原则（含跨境数据）

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EU Data Protection Framework 欧盟数据保护框架

- European Convention on Human Rights (ECHR) (1950), Article 8 (right to privacy)
- 《欧洲人权公约》(ECHR) (1950年) 第8条 (隐私权)
- EU Charter on Fundamental Rights (2000), Article 8 (right to data protection)
- 《欧盟基本权利宪章》(2000年) 第8条 (数据保护权)
- General Data Protection Regulation (GDPR) (2016)
- 《通用数据保护条例》(GDPR) (2016年)
- Directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (2016)
- 关于主管机关为预防、调查、侦查或起诉刑事犯罪或执行刑事处罚而处理个人数据以对自然人进行保护的指令，以及关于自由移动该等数据的指令 (2016年)
- Directive on privacy and electronic communications (2002, updated 2009)
- 隐私保护和电子通信指令 (2002年，更新于2009年)

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Data Protection Principles 数据保护原则

- GDPR applies to data processing carried out in EU or extraterritorially when goods or services are offered to citizens in EU or the behaviour of EU citizens are monitored (Art. 3)
- 《通用数据保护条例》适用于在欧盟内执行的数据处理，以及向欧盟内公民提供商品或服务时或欧盟公民的活动受到监控时在欧盟外执行的数据处理（第3条）
- Privacy by technical design and default (Art. 25)
- 通过技术设计和默认设置保护数据隐私（第25条）

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Data Protection Principles 数据保护原则

- Personal data must be processed (Art. 5(1)) in a
 - Lawful (contract, legal obligation, necessary to protect vital or public interests)
 - Fair, transparent, proportional and accurate way that is
 - limited to purpose or subject to freely given informed consent
 - not extended longer than necessary
 - maintaining integrity and confidentiality
- 处理个人数据的方式必须满足（第5(1)条）：
 - 合法性（合约、法律义务、为保护重大利益或公共利益目的）
 - 公平性、透明性、合理性、准确性并且：
 - 限于初始目的，或征得当事人自愿知情许可
 - 限期存储
 - 保持数据完整性、保密性
- More extensive protection of sensitive data (Art. 9)
- 对敏感数据进行更广泛的保护（第9条）

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Cookies, E-Privacy Directive Art. 5(3)

《电子隐私指令》（又名《Cookie指令》）（第5(3)条）

- A cookie can be placed if
- 使用cookie [译注：浏览信息跟踪器] 的前提条件
 - Strictly necessary, or
 - 绝对必要，或者
 - Consent is given
 - 征得同意

	Strictly Necessary 绝对必要	Not Strictly Necessary 非绝对必要
Shopping Cart Cookie 购物车cookie		
Authentication 身份验证		
Security 安全		
Network Management 网络管理		
User Preferences 用户偏好		
Adtech (Advertising Technology) 数字广告技术		

	Strictly Necessary 绝对必要	Not Strictly Necessary 非绝对必要
Shopping Cart Cookie 购物车cookie	Necessary session cookie to create shopping basket 购物车创建所需的会话cookie	All persistent cookies 所有持久cookie
Authentication 身份验证		
Security 安全		
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Authentication 身份验证	Necessary session cookie to authenticate user for access 用户访问验证所需的会话cookie	All persistent cookies 所有持久cookie
Security 安全	Necessary cookie for security of requested service 所请求服务安全性所需的cookie	A cookie for security of not requested service 未请求服务安全性所需的cookie
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Security 安全	Necessary cookie for security of requested service 所请求服务安全性所需的cookie	A cookie for security of not requested service 未请求服务安全性所需的cookie
Network Management 网络管理	Necessary cookies for traffic and load management 流量与负载管理所需的cookie	Traffic analytics cookies 流量分析cookie
User Preferences 用户偏好		
Adtech (Advertising Technology) 数字广告技术		

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Authentication 身份验证	Necessary session cookie to authenticate user for access 用户访问验证所需的会话cookie	All persistent cookies 所有持久cookie
Security 安全	Necessary cookie for security of requested service 所请求服务安全性所需的cookie	A cookie for security of not requested service 未请求服务安全性所需的cookie
Network Management 网络管理	Necessary cookies for traffic and load management 流量与负载管理所需的cookie	Traffic analytics cookies 流量分析cookie
User Preferences 用户偏好	Necessary cookies used to set language and similar features 语言及类似功能设置所需的cookie	Social media plugins and tracking cookies 社交媒体插件及追踪cookie
Adtech (Advertising Technology) 数字广告技术		

	Strictly Necessary 绝对必要	Not Strictly Necessary 非绝对必要
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Security 安全	Necessary cookie for security of requested service 所请求服务安全性所需的cookie	A cookie for security of not requested service 未请求服务安全性所需的cookie
Network Management 网络管理	Necessary cookies for traffic and load management 流量与负载管理所需的cookie	Traffic analytics cookies 流量分析cookie
User Preferences 用户偏好	Necessary cookies used to set language and similar features 语言及类似功能设置所需的cookie	Social media plugins and tracking cookies 社交媒体插件及追踪cookie
Adtech (Advertising Technology) 数字广告技术	Never necessary 绝不必要	Always not strictly necessary 始终非绝对必要

New Tech and New Strategies in IPR Protection and Enforcement 知识产权保护与执法领域新技术、新策略

Cross-border Data Transfer 跨境数据转移

- Chapter V of the GDPR, 'Transfers of personal data to third countries or international organisations'
- 《通用数据保护条例》第五章 “将个人数据转移到第三国或国际组织”
- The GDPR restricts transfers of personal data outside the European Economic Area (EEA) unless the rights of the individuals in respect of their personal data is protected in another way, or one of a limited number of exceptions applies (e.g. 'adequacy decision' (Art. 45), 'appropriate safeguards' (Art. 46) and certain derogations (Art. 49))
- 《通用数据保护条例》限制欧洲经济区外部个人数据的转移，除非采用其他方式保护所涉个体的权利或适用例外规定（例如，第45条“充足保护”、第46条“适当安全保障”和第49条“特定克减”）

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CJEU Rulings on Data Transfer 欧盟法院关于数据转移的裁决

- C-362/14, *Schrems*, a decision of 26 July 2000 on the adequacy of the protection provided by the *safe harbour privacy principles* - in which the US was found to ensure an adequate level of protection - was invalid
- C-362/14号Schrems案：2000年7月26日依据“安全港隐私原则”（依据该原则，美国提供了充足保护）就数据保护充足性作出的决定无效
- C-311/18, *Schrems II*, a decision of 12 July 2016 on the adequacy of the protection provided by the *EU-US Privacy Shield* was invalid
- C-311/18号Schrems II案：2016年7月12日依据“欧盟-美国隐私盾”就数据保护充足性作出的决定无效

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Law Enforcement Collection of Evidence 执法证据搜集

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Challenges with E-evidence 电子证据带来的挑战

- Anonymization 匿名化
- Scale and proximity 规模与邻近性
- Jurisdictional limitations 司法管辖限制
- Technical capability of investigators 调查人员的技术能力
- New criminal structures unique for online environment 网络环境特有的新型犯罪结构
- Criminal patterns and modus operandi, incl use of artificial intelligence (AI) 犯罪模式及作案手法，包括使用人工智能
- Anti-forensic strategies 反取证策略

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- Anti-forensic strategies 反取证策略

Susan Brenner, 'Toward a Criminal Law for Cyberspace: A New Model of Law Enforcement?', 30 Rutgers Computer & Tech. L.J. 1, 104 (2004)

Susan Brenner, “网络空间刑法探究：一种新的执法模式？”《罗格斯计算机与技术法期刊》，第30期，第1卷，第104页（2004年）

“... cybercrime differs in several fundamental aspects from real-world crime, the type of crime which our existing model of law enforcement was developed to address. As a result, the traditional model is not an effective means of dealing with cybercrime.”

“...网络犯罪与真实世界犯罪在多个根本方面存在差异；现有执法模式旨在解决真实世界犯罪，因此不是应对网络犯罪的有效方式。”

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Obtaining E-evidence from E-commerce Platforms 从电商平台获取证据

	Procedural Requirements 程序要求	Speed of Obtainment 获取速度	Scope of Evidence 证据范围	Quality of Evidence 证据质量
Open Source Intelligence (OSINT) 开源情报				
Voluntary Cooperation Measures 自愿合作措施				
Login Credential Access 登录凭据访问				
International Judicial Cooperation 国际司法合作				

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Open Source Intelligence (OSINT) 开源情报	Normally Few Requirements 一般几乎无要求	Immediate 立即	Relatively Limited 相对有限	Variable 参差不齐
Voluntary Cooperation Measures 自愿合作措施				
Login Credential Access 登录凭据访问				
International Judicial Cooperation 国际司法合作				

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Open Source Intelligence (OSINT) 开源情报	Normally Few Requirements 一般几乎无要求	Immediate 立即	Relatively Limited 相对有限	Variable 参差不齐
Voluntary Cooperation Measures 自愿合作措施	Normally Few Requirements 一般几乎无要求	Medium Speed 中等速度	Often Limited 往往有限	High 高
Login Credential Access 登录凭据访问				
International Judicial Cooperation 国际司法合作				

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Open Source Intelligence (OSINT) 开源情报	Normally Few Requirements 一般几乎无要求	Immediate 立即	Relatively Limited 相对有限	Variable 参差不齐
Voluntary Cooperation Measures 自愿合作措施	Normally Few Requirements 一般几乎无要求	Medium Speed 中等速度	Often Limited 往往有限	High 高
Login Credential Access 登录凭据访问	Often Special Procedure 经常为特殊程序	Immediate 立即	Relatively Extensive 相对广泛	High 高
International Judicial Cooperation 国际司法合作				

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Voluntary Cooperation Measures 自愿合作措施	Normally Few Requirements 一般几乎无要求	Medium Speed 中等速度	Often Limited 往往有限	High 高
Login Credential Access 登录凭据访问	Often Special Procedure 经常是特殊程序	Immediate 立即	Relatively Extensive 相对广泛	High 高
International Judicial Cooperation 国际司法合作	Always Specific Procedure 总是专用程序	Slow 慢	In Principle Complete 原则上完整	Very High 非常高

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Summary

总结

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Take-away Points 启示

- International e-commerce poses new and difficult challenges to protection of IPR
- 国际电子商务为知识产权保护带来新难题
- CJEU has quite effectively adapted the legal framework for copyright and trade marks to remain functionable for e-commerce
- 欧盟法院较为有效地调整了著作权和商标的法律框架，使之对电子商务依旧可用
- Data protection in the EU is one of the most important fundamental rights that has implications on almost all aspect of e-commerce, e.g. data processing, use of cookies and cross-border data transfers
- 欧盟数据保护是对电子商务几乎所有方面（例如，数据处理、cookie的使用、跨境数据转移）产生影响的一项最重要基本权利
- Crime carried out through e-commerce is difficult for law enforcement to investigate but use of OSINT, voluntary collaboration, access through login credentials and international judicial cooperation provides tools that can be used effectively
- 执法机构难以调查通过电子商务途径发生的犯罪，但是利用开源情报、自愿合作、登录凭据访问以及国际司法合作可提供有效的工具



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#oamitweets



[youtube/oamitubes](https://www.youtube.com/oamitubes)

Thank you

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