



CHINA

# STUDY ON ONLINE COUNTERFEIT IN CHINA:

Could the EU Memoranda of Understanding  
approach help, and if so – how?

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## EXECUTIVE SUMMARY

The literature to date suggests that Intellectual Property (IP) infringement online in China – through e-commerce – has been acknowledged by a variety of stakeholders as a challenge for several years. As owners and sellers of intellectual property in various sectors in China, many European firms have engaged firms to help them take down infringing websites, and also attempted to prosecute infringing sellers in China to try to halt their infringement online. Between 2013 and 2018, there were 24 cases launched by EU firms in China in relation to online IP protection. Furthermore, e-commerce platforms, seeking also to show themselves as responsible and trusted players, have also invested in take-down mechanisms and processes, using algorithms and specific agencies to remove infringers and respond.

However, the literature also suggests that recent and likely future growth of China's e-commerce sector have the potential to make these actions more challenging and costly for all stakeholders involved. China's E-commerce Law introduced in January 2019 has a number of articles aimed at addressing online counterfeit (in sum, Articles 1, 9, 17, 31, 41, 42, 43, 44, 45 and 84) and could be very helpful in protecting European and other intellectual property rights holders.

This study seeks to examine whether, in the context of the new E-commerce law, more is needed to protect European intellectual property rights online, and if so, what specifically. The study zeros in on a particular approach – a Memorandum of Understanding (MoU) approach – which has been used to address counterfeit online in Europe.

The literature review of over 50 documents, over 40 cases and coupled with over 30 tailored surveys and interviews undertaken for this study reveal the following three key findings in relation to actions post-January 2019, when the E-commerce Law was introduced:

1. European firms have generally welcomed the introduction of the E-commerce Law. Specifically, the law as designed has the potential to both strengthen the incentive for e-commerce platforms themselves to take action to remove intellectual property infringers, and increase the likelihood of successful prosecution of infringers as well as the e-commerce platforms themselves. However, some European firms believe there is a great deal more to be done to specify the law, and a very limited number believe that the situation will never be analogous to that in the EU.
2. E-commerce platforms have also generally welcomed the introduction of the E-commerce Law, which formalises and standardises expected actions to manage and halt online counterfeit, including reporting on such actions. However, practice is mixed. Some e-commerce platforms are going beyond what is required by the law, and some are doing more than others, including with regards to reporting.
3. The E-commerce Law, 11 months old, is already being used to launch prosecutions. To date, 33 cases have already been examined, 6 of those relating specifically to intellectual property protection, although none of these brought by European (or other international) firms. One of the cases has successfully prosecuted a vendor for malicious notification. However, since January 2019 – whether based on the e-commerce law or

other existing law, no e-commerce operators have been found responsible for violations – only sellers. Thus, the situation with regards to e-commerce operators and the law appears to remain as per before the law was introduced. There are also new areas of uncertainty created by the E-commerce Law, for instance around the notification rules, which indicate continued challenges for EU firms seeking to hold platforms responsible for IP infringement.

Based on these three key findings, the report moves on to analyse remaining gaps in online IP protection, and examines the case for a Memorandum of Understanding (MoU) between e-commerce platforms and rights-holders in China focused on counterfeit goods. The report analyses how and why such an MoU could be helpful, and proposes options for whom it could be facilitated by.

Overall, the report finds twelve gaps in online IP protection, and of these, it finds that for seven, an MoU between e-commerce platforms and rights-holders in China could be helpful.

These seven gaps most relevant to potential inclusion in an MoU are listed below:

1. Enhance ability to catch up with the sophisticated environment
2. Increase transparency and consistency of data/information for pro-active identification of infringements
3. Address lack of clarity of or loopholes in laws and regulations
4. Align incentives and/or overcome disincentives to respond to rights-holders
5. Increase public awareness
6. Increase availability of data and tools to support pro-active take down.
7. Address challenges in prosecution of e-commerce platforms.

An MoU could be designed to address these gaps, and potentially more.

In addition, the literature review and survey/interview results suggest that the MoU should aim to:

1. Increase communications between government institutions, platforms, rights owners and industry associations or chambers, particularly being the voice for SMEs, to improve knowledge and clarity of the law;
2. Focus on engaging smaller platforms and social media platforms (with data, promoting best practices, penalties etc.);
3. Improve data consistency and transparency by the e-commerce platforms, especially the larger platforms, and especially with respect to notification rules;
4. Encourage regular joint review of the effectiveness of the E-commerce Law by rights holders and platforms, and inputs into updates of the E-commerce Law (e.g. update penalty amounts, standardising practice)

The analysis also suggests that should an MoU be implemented, it will be key to aim for an independent and objective facilitator. Chambers of commerce, particularly those that have been active in the past on IP issues and have adequate resources, could be ideal, but a new organisation could equally be charged with this task.

Finally, the report recommends that efforts should continue to be made by the Chinese government to clarify and interpret the E-commerce Law, including based on continued and active regular dialogues between rights-holders and e-commerce platforms.

## 1. INTRODUCTION

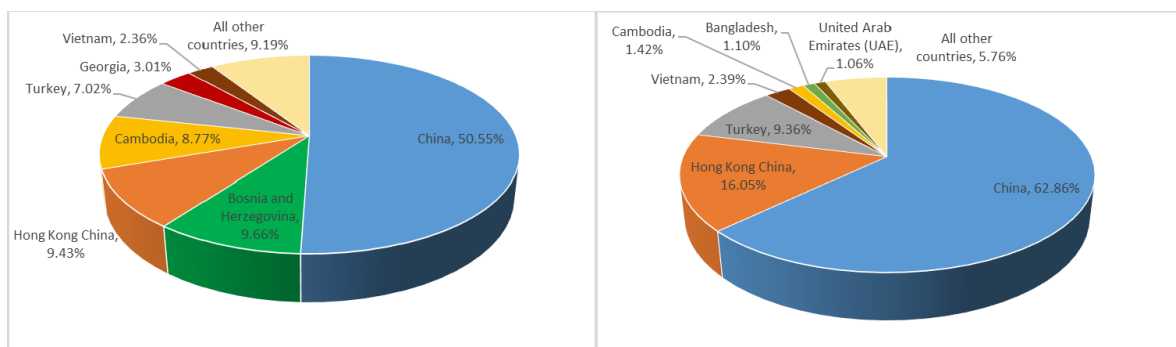
### 1.1 Project Background – The role of China and e-commerce in EU trade

The European Union (EU) is the second largest trade partner for China and China the largest trade partner for the EU. In 2018, China imported EUR 395 billion worth of goods from the EU, while China exported EUR 201 billion worth of goods to the EU<sup>i</sup>.

However, counterfeiting represents a significant loss on this trade – according to a June 2019 study led by the EUIPO, counterfeit loss is valued annually at EUR 60 billion to the European economy, with a related loss of almost half a million jobs across the EU<sup>ii</sup>. Counterfeit goods such as health and cosmetic products, automotive parts, toys, food and electrical goods also carry potential health and safety risks.

A recent OECD/EU report put the value of physical trade in counterfeit and pirated goods (i.e. excluding online trade) at 3.3% of global trade<sup>iii</sup>. China is believed to be the world's largest source of counterfeit goods. Most counterfeit goods arriving in the EU originate from China (including Hong Kong), representing more than 80% of the seizures at custom checks at EU borders in 2018<sup>iv</sup> as shown in Figure 1. A European Commission report in March 2018<sup>v</sup> concluded that China is and remains the chief concern from EU stakeholders with regards to the protection and enforcement of intellectual property rights.

*Figure 1: Country of provenance of IPR infringing goods arriving in the EU in 2018, by (a) articles, and (b) value<sup>iv</sup>*



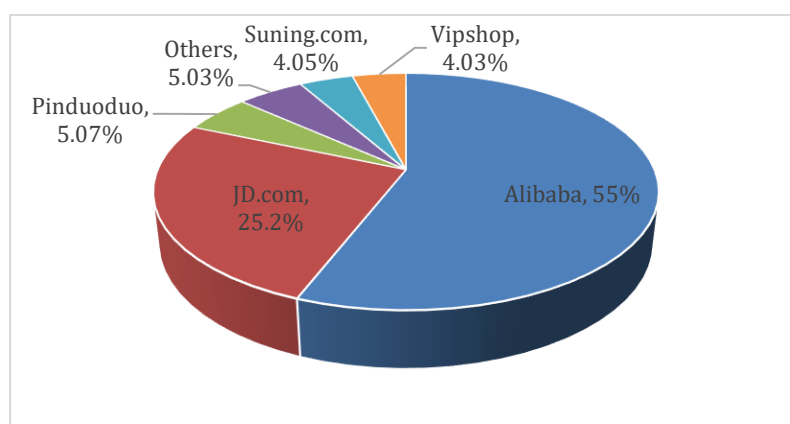
China is not only important in terms of the overall counterfeit market, but is also important specifically with regards to counterfeiting on online (e-commerce) markets.

China is home to the biggest e-commerce market in the world<sup>vi</sup>. In 2018, it became the world's first trillion-dollar e-commerce market reaching USD 1.1 trillion in total retail sales<sup>vii</sup>. China's online retail sales are expected to increase steadily at an 8.5% compound annual growth rate through to 2022, which would mean, based on forecasts by Forrester<sup>viii</sup>, China's e-commerce market could increase to double that of the US, and 10 times larger than Japan's e-commerce market.

Moreover, the rapid growth of e-commerce in global trade has become a key factor in stimulating and propelling the markets for infringing products<sup>ix</sup>. 2016 OECD report<sup>x</sup> explained that consumers are drawn to e-commerce websites and applications because they are available 24 hours a day, seven days a week, and access is relatively easy. E-commerce has therefore become a major enabler for the distribution and sale of counterfeit and pirated tangible goods as it opens new possibilities for counterfeiters to get access to huge new markets and potential consumers. Counterfeiters are also more easily able to function across multiple jurisdictions, evading capture, and can take down and set up new websites overnight without necessarily losing their customer base.

In China, retail e-commerce sales are dominated by Alibaba with 55% of the market share, followed by JD.com (25.2%) and Pinduoduo (5.2%), with these three together taking up 80% of the market in the first half of 2018 as shown in Figure 2.

*Figure 2: Market share of China's online retailers in first half of 2018 (%)<sup>xi</sup>*



However, the market is dynamic. For instance, in the third quarter of 2018, the market share of Pinduoduo (RMB 344.8 billion) rose to a similar level as JD.com (RMB 394.8 billion)<sup>1</sup>. In 2018, Pinduoduo grew to having more total active users on its platform than JD.com<sup>xii</sup>.

With China being both the world's largest exporter of counterfeit goods and the world's largest, fastest growing and most dynamic E-commerce market, and with the EU being a key producer of sought-after quality and trademarked brands, online counterfeit sold on the above-mentioned e-commerce platforms is therefore a major concern for European businesses operating in China.

## 1.2 Purpose and scope of the report

<sup>1</sup> In terms of Gross Merchandise Value (GMV) in the twelve-month period ended September 2018. GMV is defined as the total value of all orders for products and services placed in the company's online direct sales business and on the company's online market places, regardless of whether the goods are sold or delivered or whether the goods are returned.



In January 2019, including in response to the challenges raised above, China's E-commerce Law took effect. A number of articles of the law are specifically aimed at addressing online counterfeit issues. In addition, online operators – e-commerce platforms and others – have been taking their own steps to address online counterfeiting.

In this context, the overall aim of the report is to provide an independent assessment of the following three questions as systematically as possible<sup>2</sup>:

- a) In view of the relevant existing laws and regulations, the introduction of the 2019 E-commerce Law in January 2019, and actions by e-commerce platforms themselves, are there remaining gaps in online IP protection?
- b) Might a Memorandum of Understanding (MoU) between e-commerce platforms and rights-holders in China focused on counterfeit goods be helpful to meeting the above-mentioned gaps in future, and if so, why and how?
- c) If an MoU approach were to be pursued, who would be best placed to facilitate it?

The report concludes with recommendations relevant to both European and Chinese stakeholders.

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<sup>2</sup> Issues in relation to how Chinese operators are entering and complying with IPR enforcement in EU markets are not explored in this study.

## 2. METHODOLOGY AND DATA

### 2.1 Overall approach of the study

This study has required a mixed methodology. It has involved desk research, a literature review, online surveys, and interviews with a pool of stakeholders, cutting across different countries and sectors.

The stakeholder views have been drawn from a wide range of EU markets and industries in China such as retail, Fast Moving Consumer Goods (FMCG), Food and Beverage (F&B) - sectors that are most likely to be significantly affected by online counterfeit, as they are processed, branded, and not heavy goods<sup>xiii</sup>. Services, as well as issues related to patents and geographical indications are excluded from this study.

The report also explores actions and measures (existing and potential) taken by e-commerce platforms, both Chinese and international, with regards to rights infringers who sell or attempt to sell counterfeit goods to consumers within China and cross-border to other global markets from China. Interactions with advertising agencies and social media platforms are included in the study, however, implications vis-a-vis “daigou”<sup>3</sup> are not within the scope of the study.

The study has been primarily conducted in China, where the new E-commerce Law is being implemented, however, some aspects, including interviews and surveys, have involved stakeholders situated in the EU. Special attention has also been paid to EU brands’ and businesses’ experiences, although experience of other international brands and businesses has also been drawn upon where directly relevant.

### 2.2 Data collection and analysis

In order to be as comprehensive and objective as possible, this report utilises a wide range of primary and secondary literature including legal frameworks and documents from both the EU and China. Overall, the report draws on over 50 documents, listed in the Annexes.

More specifically, the desk research covers the following:

- China’s E-commerce Law itself and other documents relating to China’s legal framework on IP;
- Case law of over 40 relevant court actions, including 33 applied under the E-commerce Law;
- Broader information such as Chinese and EU government speeches and published articles;
- E-commerce platform documents, including annual reports and specific reports related to online IPR protection;

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<sup>3</sup> Daigou” refers to informal sellers on social media channels (e.g. We chat). Typically, daigou make trips overseas and are expected to import “authentic” goods exclusive of taxes, sometimes at a discount (e.g. last year’s season fashion).

- Existing MoUs, including the EU MoUs and other relevant MoUs in China, and associated evaluations;
- 5 position papers and business confidence surveys from 3 Chambers of Commerce in China;
- Analysis of the E-commerce Law by experts and stakeholders and other communication materials (such as media interviews, videos, infographics, and social media messages).

From this, the report identifies overall trends, provides a clear understanding of relevant data and case law, and makes robust cross-China/EU comparisons.

In addition to the desk research set out above, the report draws on the results of structured detailed online surveys<sup>4</sup> and face-to-face<sup>5</sup> or phone interviews with a wide range of stakeholders, the majority based in China. The stakeholder analysis uses a “purposive sampling approach” – meaning it prioritises the responses of stakeholders that likely have major relevance to the study topic and thus the greatest potential for providing valuable information or data.

However, there were considerable challenges in collecting primary data. Several rights holders and e-commerce platforms expressly declined the invitation to discuss these issues, even with the option of full anonymity. Some European chambers of commerce in China also stated they did not have enough resources to discuss these issues or required membership to do so.

In total, the report thus utilises responses from the following 32 stakeholders in various categories:

- 13 rights holder companies;
- 6 Chinese and international e-commerce platforms with operations in China;
- 6 chambers of commerce representing over 3000 members in China/EU;
- 2 rights-holder’s associations;
- 3 law firms;
- 1 research and consulting service;
- 1 Chinese publishing authority.

The surveys were designed quantitatively to gather as much raw data as possible to enable analysis, in the form of bar charts, graphs, infographics and tables to enhance understanding of key findings and recommendations. Thus, for instance, many questions used the Likert scale<sup>xiv</sup> as per best practice. The interview and survey questions used can be found in Annex V.

## 2.3 Limitations of the methodology

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<sup>4</sup> The online surveys were disseminated in English and Chinese through email and other online platforms to over 200 stakeholders on 10<sup>th</sup> October 2019 with a deadline of 20<sup>th</sup> October 2019. The deadline was then extended, and a total of 2 reminders were sent by email to each recipient who had not responded.

<sup>5</sup> A number of pre-planned international, EU, and China meetings and forums were attended to gather more face-to-face interviews.

This report does not cover any countries in which the E-commerce Law or MoU approach has not been implemented. This may limit the findings, but could be addressed in a future study.

Furthermore, many European chambers of commerce note that only a select number of their member companies actually get most of their primary business online. The great majority of their members are small and medium enterprises, who may face IP challenges but, in some cases, do not have resources to use litigation. Furthermore, many of their larger European members are focused on dealing with patent infringements, rather than trademark infringements *per se*.

As a result, the data may contain some implicit biases. For instance, over 70% of the companies that responded to the survey or joined an interview were large corporations that have been selling and maintaining IPR in China and the EU for over ten years. Only one SME responded to the interview/survey request. Some chambers of commerce also admitted to having limited resources and few were able to keep up in depth with their SME membership. Furthermore, no advertising agencies were available to be directly interviewed or surveyed.

Similarly, it is possible that the e-commerce platforms that published IP reports, or agreed to interview or survey were willing to so because they are, or consider themselves to be, high-performers in this industry.

### 3. LITERATURE REVIEW

#### 3.1 Analysis on online counterfeit in China prior to the E-commerce Law

China has been the world's largest e-commerce market since 2013, and with multiple Chinese e-commerce platforms listing on international exchanges since 2014 (see Table 5). In 2015, China's State Administration of Industry and Commerce (SAIC) unveiled that only 37% of the luxury goods authorities examined on Alibaba's Taobao platform were genuine<sup>xv</sup>. High profile cases against Alibaba were launched in 2015 by the Kering Group, owner of European luxury brands such as Gucci and Saint Laurent<sup>xvi</sup>. According to Yao<sup>xvii</sup>, the supply and demand of counterfeit goods in China are driven by lower-income consumers who value but can't afford brand names (including many from the EU), as well as the large potential profit margins from counterfeit goods production and sales.

However, literature suggests that since 2015 the platforms have started to directly establish policies and processes and invested dedicated resources to control the appearance of counterfeit goods on their platforms. This may be due to a mix of government and rights-holder pressure as well as the burgeoning Chinese middle and upper-class demand for authentic products. For instance, in their annual report, VIPshop.com wrote that "a public perception that non-authentic or counterfeit goods are sold on our Vipshop Online Platform, even if factually incorrect, could damage our reputation, reduce our ability to attract new customers or retain our existing customers, and diminish the value of our brands". They refer to a particular case in 2015, when a vendor supplied non-authentic Maotai liqueur on the platform, and note that they both removed the vendor from their platform and compensated consumers to the tune of 40 million RMB in total (approx. €5.2 million)<sup>xviii</sup>.

In and before 2015, Alibaba, according to Jungong Sun, the company's VP, spearheaded a new model for intellectual property protection by integrating technology, business models and the law<sup>xix</sup>. Some of the examples he illustrated include that the company uses big data modelling identification to provide IP rights holders with links to suspected IP infringements, giving them "one-click rights protection". Another example is the Alibaba Express IPP program which provides right holders with an upgraded IP enforcement service, by eliminating frivolous, bad faith complaints. Under the program, 95 percent of IP notifications can be processed within 24 hours. Jungong's report also noted that in 2017 Alibaba's Taobao introduced its "three strikes and you are out" policy to clamp down on repeat offenders.

JD.com became known for high-quality electronics through its self-operated online store, in which JD.com itself buys and sells goods. In this case, it was highly incentivized to ensure counterfeit goods were not on the platform as revealed in an interview with a former senior employee. The interviewee also highlighted that in order to compete with Alibaba, it has been in JD's interests to establish themselves as a reliable platform for authentic goods.

Another e-commerce operator Pinduoduo view counterfeit goods as "bad data" for their algorithms. As they are a recommendations-based platform, a fake good means loss of trust. Customer demand for reliability and pressure from IP right-holder partners are cited as incentives for them to proactively fight against counterfeiting. Of Pinduoduo's roughly 6000

employees, approximately one quarter work in IP protection in one way or another. They have active accounts with 522 brands, which they identify based on the Baidu top 1000 brand rankings. Each brand has its own requirements and characteristics, up to 600 specific parameters and design rules, and in some cases pre-screening models.

WeChat have also implemented measures to disrupt and deter counterfeit since 2016 when the Weixin (WeChat) Brand Protection Platform was launched to facilitate cooperation between rights holders and WeChat against counterfeiting on their platform.

### 3.2 China's legal framework for online IPR prior to the E-commerce Law

Prior to January 2019, online IP protection in China was enforced based on six applicable state laws. These laws are set out in Table 1.

Table 1: Online IP protection legislation in China prior to 2019

Specific legislation	Relevance to online IP protection
1. The Trademark Law (2013) <sup>xx</sup> , Patent Law (2009) <sup>xxi</sup> , and Copyright Law (2010) <sup>xxii</sup>	The three primary types of law IPR holders are relying on to bring a counterfeit case, both in online and offline spaces.
2. General Principles of the Civil Law <sup>xxiii</sup>	Article 118. If a citizen's or legal person's right of authorship (copyright), patent right, right to the exclusive use of a trademark, right of discovery, right of invention or other right pertaining to scientific or technical achievements is infringed upon in the form of plagiarism, falsification or imitation, the citizen or legal person shall have the right to demand that the infringement be stopped, the effects of the infringement eliminated and damage compensated for.
3. The Criminal Law <sup>xxiv</sup>	Chapter III, section 1. Crimes of Manufacturing and Selling Fake and Shoddy Goods; Chapter III, section 7. Infringement of Intellectual Property Rights.
4. The Tort Liability Law <sup>xxv</sup>	Article 36 of the PRC Tort Law used to be the main claim for IPR holders bringing an online counterfeit case before the E-commerce Law passed. Clearly prescribed by the law, an internet service provider, including e-commerce platform operators, should take necessary measures if they are aware of the infringing activities. However, article 36 does not talk about the scenario that an ISP/e-commerce platform operator <i>does not</i> know but <i>should</i> have known about the infringing acts.
5. The Anti-unfair Competition Law <sup>xxvi</sup>	Under Article 6, there are four types of "confusing behaviour", the first three of which are deemed to have the effect of misleading people in the abovementioned manner: (1) using or copying the name, packaging or decoration of another's famous goods, (2) using another's trade name, (3) using another's domain name, website name or any other

	name in the internet context, and (4) other confusing behaviours. Type (4) is a residual open-ended category and would catch for instance the use / copying of the overall appearance of another's goods, the names and colour schemes used in the marketing of another's goods etc., provided that confusion can be established. Where a business operator violates the provision, the People's Court shall, in accordance with the extent of the infringement, award compensation of less than RMB5 million to the rights holder.
<b>6. The Consumer Rights Protection Law<sup>xxvii</sup></b>	Article 44 of the Consumer Rights Protection Law requires the platform operators provide the true name, address and valid contact method of the seller or the service provider, or the consumer may seek compensation from the platform operators.

Through this existing law, the China National Intellectual Property Administration reports that the total number of trademark violating cases investigated and dealt with in 2017 was 30,130, while in 2018 there was 31,194<sup>xxviii</sup>. Furthermore, in 2017, China Customs report taking a total of more than 22,500 IPR protection measures, detaining 19,100 batches of copyright infringing goods, involving 41 million pieces. In 2018, the figures increased significantly to 49,700 IPR protection measures, detaining 47,200 batches of IPR infringing goods, involving 25 million commodities<sup>xxix</sup>.

Annex III provides a table of the **24 published cases** related to online copyright infringement over the 5 years prior to 2019. Two of the cases with the highest compensation awards are detailed as case studies in Box 1. They illustrate that even before the E-commerce Law, it was possible to prosecute successfully for IP infringement online in China. However, note that none of these cases involve successful prosecution of an e-commerce platform operator.

#### Box 1 – pre-2019 online counterfeit case studies

##### **Case Study 1: (2015) Yuezhifashangminchu No.54**

**Plaintiff: Segger Microcontroller GmbH & Co. KG**

**Defendant: Peng Zhen, Guangzhou Jiawei Computer Technology Co., Ltd.**

This case was heard in Guangzhou Intellectual Property Court, and relied on Article 10 (1) of Copyright Law; and Article 8 of Regulations on the Protection of Computer Software.

The plaintiff Segger Microcontroller GmbH & Co. KG (based in Germany) had previously applied and registered for trademark 'J-LINK' and 'SEGGER' in China and had been using them regularly. The plaintiff believed the defendant used the registered trademark on the product package and their Taobao online shops without permission, which infringed its well-known mark 'J-LINK' and 'SEGGER'. The plaintiff owned software copyright of 'J-LINK' and registered in American Copyright Office. The defendant deliberately avoided and destroyed the plaintiff's technical measure, copied and distributed the computer software without permission. Thus, the plaintiff claimed the compensation of 3 million Yuan which later increased to 10 million Yuan.

The judgment was as follows:



1. Trademark infringement - The court found that the defendant changed the font of the registered trademark and use it on the alleged products which is essentially the same as registered trademark and caused confusion to consumers, thus constituting trademark infringement.

2. Software copyright infringement - The court ruled that the alleged product had the driver software of 'J-LINK' with copyright notice included. The defendant did not provide enough evidence and evidence of copyright licensing from the plaintiff. The behaviour of selling relevant software without permission constituted copyright infringement. Compensation awarded was just over 3 million RMB (approx. 383,000 Euros).

#### **Case study 2: (2016) Su 01 Minchu No.55**

**Plaintiff: CARTIER CREATION STUDIO SA**

**Defendant: Nanjing Wachi Trading Co., Ltd., Xia Bing and Shenzhen Longdu Electronic Commerce Co., Ltd.**

The case was heard in Nanjing Intermediate People's Court of Jiangsu Province. The plaintiff CARTIER CREATION STUDIO SA (based in Switzerland) applied for the design patent of a watch, number ZL200630124283.7 and manufactured the watch CARTIER BALLON BLEU DE CARTIER as a special branded product. The defendant run a shop name 'binger' on Tmall website and sold binger watch. The plaintiff believed the shape and decoration of watch and other detailed are same as CARTIER, which infringed its design patent.

The judgement was as follows:

The court ruled that three defendants collude with each other maliciously, deliberately concealing the information of real producers and commodity sources, so as to deceive the relevant public and avoid tort liability. Therefore, the behaviours of the three defendants constitute unfair competition. The three defendants conspired to infringe on the design patent.

Compensation awarded was 0.5 million RMB (approx. 64,000 Euros).

Finally, it is also worth noting the trial application and jurisdiction arrangement for e-commerce related disputes before January 2019. To date, three internet courts in Hangzhou, Beijing and Guangzhou have been the first instance trial courts within the jurisdiction of their own cities. Most appeals are heard by the intermediate courts in their respective jurisdictions. However, online copyright-ownership and infringement disputes tried by Guangzhou and Beijing Internet courts are usually appealed to the Intellectual Property Courts in their respective cities. Intellectual Property Courts only adjudicate civil and administrative IP cases but not criminal cases, whereas the specialized regional IP tribunals have integrated jurisdiction over civil, administrative and criminal IP cases.

According to the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts", the court has jurisdiction over the following first-instance civil and administrative Internet-related cases:

1.	Disputes arising from the execution or performance of online shopping contracts concluded via e-commerce platforms;
2.	Disputes over network service contracts for which execution and performance activities are completed online;



3.	Disputes over financial loan contracts or small loan contracts for which execution and performance activities are completed online;
4.	Disputes over copyright or neighboring right of works first published on the Internet;
5.	Disputes arising from online infringement of the copyright or neighboring right of works published or distributed online;
6.	Ownership, infringement and contract disputes over Internet domain names;
7.	Disputes arising from online infringement of the personal right, property right and other civil-law rights and interests of others;
8.	Product liability disputes arising from infringement of personal right or property right of others due to defects of the products purchased on e-commerce platforms;
9.	Internet public interest cases filed by procuratorates;
10.	Administrative disputes arising from administrative activities of administrative agencies such as Internet information service management, Internet-based product transactions and related service management; and
11.	Other Internet civil and administrative cases designated by people's courts at a higher level.

It is worth noting that, even if the parties have the agreement to file cases to the Internet Court, if it is not within the scope of the jurisdiction stipulated in the Provisions, the Internet Court shall not accept it. In other words, if there is no actual connection between the case and Beijing, Guangzhou or Hangzhou, the Internet courts in the three places have no jurisdiction over the dispute.

### 3.3 An overview of China's new E-commerce Law

China's new E-commerce Law<sup>xxx</sup>, introduced on 1<sup>st</sup> January 2019, *inter alia* covers the protection of intellectual property, but does not change the outlined jurisdiction rules above. For the first time, however, it directly places legal responsibilities on e-commerce platforms for IP rights infringement. By doing so it introduces some key novel aspects to the law as relevant to online IP, as detailed in Table 2.

Table 2: Novel aspects of the E-commerce Law for Online IP

<b>Definition of e-commerce operator</b>	<b>Article 9:</b> <ul style="list-style-type: none"> <li>- "E-commerce operators" mean the natural persons, legal persons or unincorporated organizations that engage in the operational activities of selling goods or providing service through Internet and other information network, including e-commerce platform operators, operators on platform and ecommerce operators selling goods or providing service via their self-built websites or other web service.</li> <li>- "E-commerce platform operators" mean legal persons or other unincorporated organizations that provide online business premises, transaction matching, information distribution and other services to two or more parties to an ecommerce transaction so that the parties may engage in independent transactions. For the purpose of this Law, "operators on platform" mean e-commerce operators that sell goods or provide services through an e-commerce platform.</li> </ul>
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<b>Disclosure</b>	<b>Article 17</b> – E-commerce operators shall comprehensively, truly, accurately and timely disclose the information of goods or services, protect information rights and selection rights of consumers. E-commerce operators shall not deceive or mislead consumers through false or misleading commercial promotion by means of fictitious sale, making up users' appraisal, etc.
<b>Information retention</b>	<b>Article 31</b> – E-commerce platform operators shall record and retain information of goods and services and transaction information listed on their platforms, and ensure the integrity, confidentiality and availability of such information. The information of goods and services and transaction information listed on their platforms shall be retained for not less than three years with effect from the date of completion of transaction. Any failure to keep such records will result in significant fines.
<b>“Take down notice” principle and procedures</b>	<p><b>Article 42</b> – An IPR holder shall be entitled to notify the e-commerce platform operator to take such necessary measures as deletion, blocking, disabling the link, termination of transaction and service if the IPR holder believes that there is any infringement upon its or his IPR or IPRs. Such notice shall include <i>prima facie</i> evidence on the constitution of infringement. The e-commerce platform operator shall timely take necessary measures and forward such notice to operators on platform upon receipt of the same. Failure to timely take necessary measures shall result in the joint and several liabilities of the e-commerce platform operator for the enlargement of damage, together with the operators on platform. Anyone who causes loss of operations on the platform due to its wrong notice shall assume civil liability in accordance with the laws. Anyone who causes loss of operations on platform due to its maliciously wrong notice shall assume double liability for compensation.</p> <p><b>Article 43</b> – Upon receipt of the forwarded notice, operators on platform may submit a statement of no infringement to the e-commerce platform operator. Such statement shall include <i>prima facie</i> evidence on no act of infringement. Upon receipt of such statement, the e-commerce platform operator shall forward such statement to the IPR holder who issues the notice and informs the IPR holder of the right to file a complaint to relevant competent authority or bring a lawsuit before a people's court. If the e-commerce platform operator has not received any notice within fifteen days as of the arrival of the forwarded statement at the IPR holder that the right holder has filed a complaint or lawsuit, it shall immediately stop the measures it has taken.</p>
<b>Specific fines</b>	<b>Article 84</b> – Where an e-commerce platform operator fails to legally take necessary measures for any infringement upon IPRs by operators on platform in violation of Article 42 or 45, it shall be ordered by relevant IPR administrative authorities to make rectification within a prescribed time limit. If it fails to make rectification within such time limit, it shall be given a fine of ranging from RMB50,000 to RMB500,000

	Yuan, or (in serious case) a fine of ranging from RMB500,000 Yuan to RMB2,000,000 Yuan.
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There are two further vital aspects of the new Law to recognise. First, as specified by point one in Table 2, is that, by defining an e-commerce operator in a fairly wide manner, the law appears to place legal responsibilities not just on well-known e-commerce platforms such as Taobao or JD.com but also on social media platforms such as WeChat, Weibo and even online streaming and short video messages services such as Douyin (TikTok) and other customised sales apps (e.g. Net-A-Porter). While arguably these wider platforms could have been covered by Tort Law prior to 2019, this makes it more explicit, and through Article 84, introduces a specific fine.

Second, prior to the 2019 Law, the onus was primarily on the rights holder to inform the e-commerce operator of counterfeit activity through so-called “take-down notices”. The legal precedent for this take-down notice procedure had been established in 2012 by the Beijing Higher People's Court on the Trial of E-commerce Infringement of Intellectual Property Rights. However, under the 2019 Law, the e-commerce operator can now act without having been notified by the rights holder, which should mean in principle a reduction of these notices, and *ceteris paribus* a reduction in legal costs for rights holders. On the other hand, the law also introduces the potential for the e-commerce operator to be informed of a counterfeit activity by another party that is *not* the rights-holder, with some provisions for penalising malicious notification. This then raises the question of what kind of evidence the e-commerce platforms accept when responding to a take-down notice, and how efficient this process is in general (for instance – amount of time to qualify as “reasonable notice”).

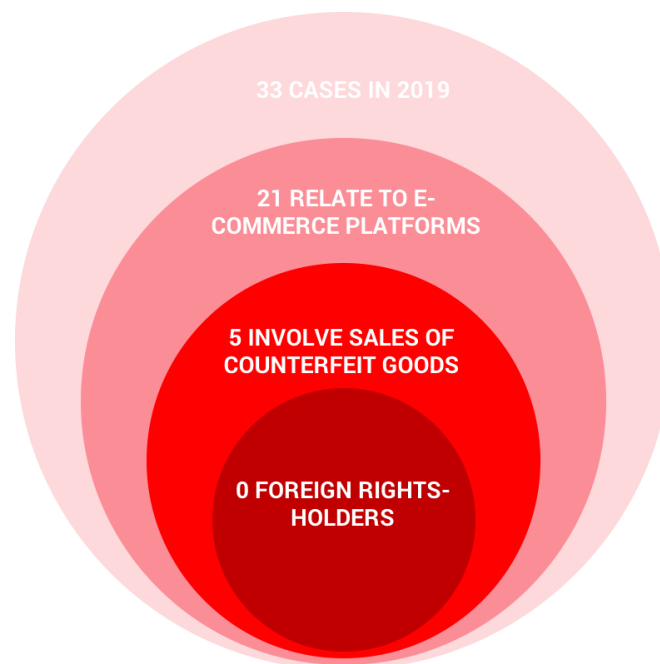
## 4. KEY FINDINGS – what impact has the E-commerce Law had to date?

### 4.1 Shifts in litigation outcomes since the E-commerce Law was introduced

#### 4.1.1 Case Law

Since its introduction in January 2019, as of November 18<sup>th</sup>, there have been 33 cases brought directly under the new E-commerce Law. Among them, there are 19 online shopping contract disputes, 2 ordinary contract disputes, 3 network tort liabilities disputes, 1 unfair competition dispute, 2 product liability disputes, 1 infringement of work information network dissemination right dispute, 1 infringement of design patent right dispute, 1 insurance dispute, 1 technical service contract dispute, and 2 private lending disputes. Among these 33 cases, 21 cases relate to E-commerce platforms, 5 cases involved the sale of counterfeit goods, and within these 5 there were no foreign-related cases.

*Figure 3: Typology of Cases brought under the E-Commerce Law to date*



The five “direct” cases using the e-commerce law as their direct basis and involving counterfeit goods are presented in Table 3.

At the same time, during 2019, there were several other cases that were heard relating to online IP infringement, in which the E-commerce Law was not directly applied, but may have been referenced. Three such “indirect” cases are presented in Table 4 as important examples.

Table 3: Summary of five e-commerce platform-related cases under the 2019 E-commerce Law

Case number	Key information		
(2019) Sumingzhong NO.641	Court: Jiangsu Higher People's Court	(2019) Sumingzhong NO.641	Court: Jiangsu Higher People's Court
	Plaintiff: Suzhou Natong Biological Nanometer Technology Co., LTD		
	Defendant: Guangzhou Baiyun District Shengjiemei Beauty Instrument Factory and Hangzhou Alibaba Advertising Co., LTD		
	Relevant E-commerce platform: Alibaba (Taobao/Tmall)		
	Facts: The plaintiff believed that the products involved were displayed and sold on the Alibaba platform, and similar infringing products were still sold on the Alibaba platform after the first-instance judgment. Therefore, the plaintiff believed that Alibaba constituted sales and promised sales infringement.		
(2018, concluded in 2019) Zhe 8601 Minchu No.868	Judgements: The plaintiff did not provide evidence that Alibaba knew or should have known that the defendant sold the infringing product on its platform, so the court did not support the plaintiff's claim.		
	Award made: Guangzhou Baiyun District Shengjiemei Beauty Instrument Factory compensated Suzhou Natong Biological Nanometer Technology Co., LTD for economic losses and reasonable expenses of 100,000 yuan.		
	Court: Hangzhou Railway Transport Court	(2018, concluded in 2019) Zhe 8601 Minchu No.868	Court: Hangzhou Railway Transport Court
	Plaintiff: Lei Wang      Defendant: Hai Jiang		
	Third Party: Zhejiang Taobao Network Co., Ltd.		
(2019) Zhe 08 Minzhong	Relevant E-commerce platform: Alibaba (Taobao/Tmall)		
	Facts: Hai Jiang complained to Taobao about the sale of fake goods in the shop operated by Lei Wang on Alibaba intellectual property protection platform, which resulted in the deletion of link of the products-in-suit. After investigation, the court found that Hai Jiang was not the trademark owner and sold fake goods. The defendant used a fake stamp and made false accusations against the plaintiff through Taobao IP protection platform in the name of the TM right holder, Under Armour. In fact, the plaintiff Lei Wang is the qualified seller in China with the permission of TM right holder, Under Armour. Taobao then took down the links of plaintiff's products according to the infringement complaints. Afterwards, the defendant was caught by Sichuan Deyang public security bureau due to selling counterfeit goods of Under Armour. Lei Wang was finally allowed to sell the parallel import products.		
	Judgements: Hai Jiang used false materials to make malicious complaints when it sold fake goods, which constituted unfair competition.		
(2019) Zhe 08 Minzhong	Award made: Hai Jiang compensated Lei Wang for economic loss of 2,100,000 yuan.		
	Court: Zhejiang Shengzhou Intermediate People's Court	(2019) Zhe 08 Minzhong No.1085	Court: Zhejiang Shengzhou Intermediate People's Court

No.1085	<b>Plaintiff:</b> Xuewen Zheng <b>Defendant:</b> Zhejiang Taobao Network Co., Ltd. and Jiangshu Hong		
	<b>Relevant E-commerce platform:</b> Alibaba (Taobao/Tmall)		
	<b>Facts:</b> Xuewen Zheng purchased a wooden fish tank on Taobao. The plaintiff's chat record with the customer service before the purchase showed that the customer service guaranteed that the fish tank was made of "Hedgehog rosewood" wood. After the plaintiff received the goods, she believed that the goods were adulterated, and the customer service acknowledged that part of the fish tank was made of "Pear" wood. Xuewen Zheng asked Taobao to assume joint responsibility.		
	<b>Judgements:</b> The chat records can prove that the buyer and seller have reached a contract that the fish tanks are made of Hedgehog rosewood. The seller shall be liable for breach of contract. Taobao took necessary measures, including intervening in disputes, providing recordings and mediating dispute. Taobao should not bear joint responsibility <b>Award made:</b> Jiangshu Hong compensated the plaintiff's loss of 30,000 yuan.		
(2019) E 09 Minzhong No.929	<b>Court:</b> Jingmen City Intermediate People's Court, Hubei Province	<b>(2019) E 09 Minzhong No.929</b>	<b>Court:</b> Jingmen City Intermediate People's Court, Hubei Province
	<b>Plaintiff:</b> Xue Yang <b>Defendant:</b> Shaoci Wang		
	<b>Facts:</b> Shaoci Wang purchased a Marni bag on Taobao platform at 8,000 Yuan and sold it to Xue Yang as 8,500 Yuan after using it for more than one year. When mailed the bag to Hong Kong for the repairment, Xue Yang was told the fact of the fake bag.		
	<b>Judgements:</b> The court at second instance upheld the verdict and ruled that Shaoci Wang, as the operator in the platform, constituted fraud. Since Shaoci Wang sold the bag through the second-hand online platform 'Xianyu', she was the operator in the platform under E-commerce Law. As Shaoci concealed the fact that the bag was purchased from Taobao platform and led Xue Yang to make a false expression that the bag was bought directly from French, which constituted fraud under the Law of Protection of Rights and Interests of Consumers. Shaoci shall refund the price of the goods paid by Xue Yang and compensate three times the amount of the price of goods. <b>Award made:</b> Shaoci Wang refunded the payment of 8,500 Yuan and compensated Xue Yang of 25,500 Yuan.		
(2019) E 01 Minzhong No.7131	<b>Court:</b> Wuhan Intermediate People's Court of Hubei Province	<b>(2019) E 01 Minzhong No.7131</b>	<b>Court:</b> Wuhan Intermediate People's Court of Hubei Province
	<b>Plaintiff:</b> Wei Cai <b>Defendant:</b> Zhejiang Taobao Network Co., Ltd.		
	<b>Relevant E-commerce platform:</b> Alibaba (Taobao/Tmall)		
	<b>Facts:</b> The plaintiff appealed against the verdict by the court at first instance and claimed that the defendant Taobao platform should have noticed the infringing behaviour by the operator in Taobao and Taobao refused to provide information of the operators in Taobao which constituted consumer right infringement. The plaintiff bought a Gucci bag from an online Taobao vendor, then later suspected he had bought a fake bag. He returned the bag and requested a refund, which the seller agreed to. The plaintiff did not however return the		

	bag in time, which led to five mutual exchanges to resolve the situation. After the fifth exchange, the plaintiff returned the bag and the seller paid the money back. During this period, the plaintiff found out that the business scope of the seller does not cover the sale of the bag. He concluded that Taobao had paid insufficient attention to the plaintiff's background information, and brought the suit to court. The court rejected his first case. He then appealed, and won. However, the first court did not overturn their initial verdict, stating that the plaintiff cannot prove the bag is fake one and also cannot prove Taobao's violations.
	<b>Judgements:</b> The court at second instance affirmed the verdict and dismissed the appeal. The court found that the plaintiff failed to prove the breach of Article 38 of E-commerce Law by the defendant Taobao platform. Since the purchase agreement was reached between the plaintiff and the seller, the plaintiff shall claim against the seller for the dispute related to the alleged product. As the platform, Taobao had published the actual information of the seller, thus it was not liable for the compensation.

Table 4: Three cases related to E-commerce applied under other Laws that referenced the E-commerce Law

Case number	Key information		
(2018, concluded in 2019) Zhe 019 Minchu NO.7184	Court: Hangzhou Internet Court	(2018, concluded in 2019) Zhe 019 Minchu NO.7184	Court: Hangzhou Internet Court
	<b>Plaintiff:</b> Hangzhou Daodou Network Technology Co., LTD <b>Defendant:</b> Changsha Baizan Network Technology Co., LTD., Shenzhen Tencent Computer Systems Co., LTD <b>Relevant E-commerce platform:</b> Tencent		
	<b>Facts:</b> The defendant Baizan Company provided the online broadcasting service of the works through its WeChat applet without permission. The plaintiff believed defendant Tencent Company has the obligation to audit as the platform manage. Tencent Company did not take measures against the infringement of the defendant Baizan Company in the case of knowing. The behaviour of Tencent constitutes assisting infringement.		
	<b>Judgements:</b> Tencent as a basic network service provider is unable to fulfil the audit obligation, not applicable to the 'notice-deletion' rule.		
	<b>Award made:</b> Changsha Baizan Network Technology Co., LTD. compensated the plaintiff for economic losses and reasonable expenses of 15,000 yuan.		
(2019) Qiong	Court: Hainan Second Intermediate People's	Cause of action: Infringement of	Laws and regulations cited: Trademark Law



<b>97 Minchu NO.2</b>	Court	trademark rights dispute	with reference to article 17 of E-commerce Law
	<b>Plaintiff:</b> Anglofranchise Limited (BOY LONDON)		
	<b>Defendant:</b> Huang Zhanglun		
	<b>Facts:</b> The plaintiff found that the defendant used the plaintiff's trademark on the products sold and promised to be sold in the shop (shop ID: overseas purchasing tide bar) opened on the www.taobao.com website without authorization.		
	<b>Judgements:</b> The judge applied Article 17 of E-commerce Law and remove an evidence. The judge held that the defendant infringed the plaintiff's trademark because the defendant sold products in the online shop operated on the Alibaba platform without authorization. The plaintiff has the exclusive right to use the trademark. The defendant, without the permission of the plaintiff, infringed the exclusive right of the above-mentioned registered trademark of the plaintiff. <b>Award made:</b> Huang Zhanglun compensated the plaintiff for economic losses and reasonable expenses of 60,000 yuan.		
<b>(2019) Jing 02 Minzhong NO.2498</b>	<b>Court:</b> Beijing Second Intermediate People's Court	<b>Cause of action:</b> Online shopping contract dispute	<b>Laws and regulations cited:</b> Copyright Law with reference to articles 27 and 38 of E-commerce Law
	<b>Plaintiff:</b> Yu Zhifu		
	<b>Defendant:</b> Guangzhou Jici Pharmaceutical Chain Co., LTD., BEIJING JINGDONG 360 DU E-COMMERCE LTD.		
	<b>Relevant E-commerce platform:</b> JD		
	<b>Facts:</b> The plaintiff believed that JD, as an E-commerce platform, did not fulfil reasonable auditing obligations to the operators in the platform and the products it sells, and should be responsible. <b>Judgements:</b> The court held that the plaintiff's evidence was insufficient, and JD had submitted the name, address and contact information of the seller. The court rejected the plaintiff's claim. <b>Award made:</b> Guangzhou Jici Pharmaceutical Chain Co., LTD. refunded the payment of the product (1308 yuan) and paid compensation of 13,080 yuan.		



Three important observations arise from these five “direct” and three “indirect” cases.

First, that the pace of legal activity in relation to e-commerce has increased in 2019 in comparison to the previous five years.

Second, that the E-commerce Law appears to be a viable additional means to successfully prosecute online counterfeiters. However, despite the Law’s specific focus on e-commerce platforms, the Law has not yet led to prosecution for platforms for negligence or lack of information. In all relevant cases outlined in Tables 3 and 4, the platforms argued successfully that they were not responsible. It is worth noting that the platforms involved were the largest e-commerce platforms (Alibaba, JD), and one of which was a social media platform (WeChat).

Third, as the E-commerce Law is still new, some articles and aspects are yet to be tested in courts. For example, according to Article 31, e-commerce platform operators are expected to record and retain information of goods and services and transaction information listed on their platforms, and ensure the integrity, confidentiality and availability of such information. Any failure to keep such records will result in significant fines. These records may be evidenced in the litigation, however, as yet none of the cases referred to in Table 3 or Table 4 suggest that the courts or administrative enforcement authorities have ordered the platforms to comprehensively share or disclose such records.

#### 4.1.2 Implementation policies and guidelines issued related to the E-commerce Law

Since the introduction of the E-commerce Law, a total of four implementation (“action”) plans and one amendment related to the E-commerce Law have been released. These plans and guidelines typically emphasize, restate, and specify that online transactions shall be conducted in a legal manner under appropriate supervision, consistent with the E-commerce Law. However, it is worth noting that only the amendment has the power to “affect” the E-commerce Law – the action plans do not. The amendment and action plans also do not impose stricter scrutiny than the Law itself. The action plans and amendment are summarized below:

1. The **2019 Online Market Regulation Special Action Plan<sup>xxxix</sup> (June 2019)** was specified to establish online inspection mechanisms, and the monitoring, identification and investigation of online infringements. It is aimed at promoting the implementation of the E-commerce Law and urges the operators of e-commerce platforms to implement take-down notices (stipulated in Article 41-43 of the E-commerce Law). It also establishes a communication and contact mechanism between law enforcement departments and platform operators and rights holders.

2. **Promulgation of the Implementing Measures for Strengthening Intellectual Property Law Enforcement in the Fields of Online Shopping and Import and Export<sup>xxxii</sup> (April 2019)** specified 6 aspects:
  - 1) Strengthening law enforcement regulation in accordance with the law;
  - 2) Broadening the source channels of clues;
  - 3) Strengthening law enforcement coordination and linkage;
  - 4) Striving to promote the administrative-criminal penalty connection;
  - 5) Improving the social co-governance mechanism;
  - 6) Establishing work assurance system.
3. The **Work Plan for the Management of Counterfeit and Inferior Key Areas (2019-2021)<sup>xxxiii</sup> (January 2019)** focused on the special management of the rural market, special foods, school foods, catering services and online ordering, false promotion, illegal activities such as buying and selling licenses.
4. The **Notice of State Administration for Market Regulation (SAMR) and China National Intellectual Property Association (CNIPA) on the "Tie Quan" Action Plan of Intellectual Property Enforcement in 2019<sup>xxxiv</sup> (April 2019)** pointed out that it is necessary to establish a long-term plan, to strengthen the law enforcement in the field of e-commerce, including monitoring, identification and investigation of online infringement, information collection and evidence fixation, and severe investigation and punishment of infringement, counterfeiting by e-commerce platform operators. At the same time, the plan proposes to promote the implementation of the E-commerce Law and urges the operators of e-commerce platforms to implement the responsibility of 'principle of notice deletion'.
5. The **Amendment on Administrative Measures for Online Transaction (Draft for Comment)<sup>xxxv</sup> (April 2019)** is at the time of writing still open for comments. After the introduction of the E-Commerce Law, the contents of the "Administrative Measures for Online Transactions" needs to be amended to be consistent. In particular, the E-Commerce Law (Article 27) requires that e-commerce platform operators shall require business operators who apply to sell goods or provide services on the platforms to provide their identity information, address, contact details, administrative licensing information etc. for verification and registration, establish registration files, and verify and update regularly. Similarly, Article 34 of "Administrative Measures for Online Transactions" stipulates that, "the operator of an online trading platform shall require the business operators applying for access to the platform for sale of goods or provision of services to provide their identities, addresses, contact information, administrative licenses and other true

information for verification and registration, establish registration files, and check and update them on a regular basis.” The two articles will be streamlined.

It is important to note that neither the implementation plans or amendments issued to date appear to clarify the E-commerce Law or its implementation with regards to the key novel areas identified in Table 2. It is expected that more guidance will be published in the near future, covering implementation rules for the E-commerce Law and the judicial interpretations of the Supreme People’s Court (SPC) for application of the E-commerce Law.

## 4.2 China’s e-commerce platform actions to enforce IPR online

An introduction to and summary of e-commerce platforms actions prior to 2019 was provided in the literature review.

Table 5 provides a summary of self-reported counterfeit measures and results from these platforms, released after the introduction of the E-commerce Law, as well as those of some others that took part in interview.

Table 5: Summary of actions by online platforms to tackle counterfeiting

Platform name and description	Total head-count (Number on IP protection Issues)	Proactive cooperation with rights holders or other e-commerce platforms?	Preventative measures with advanced technology?	Automated notice and take-down?	Stricter punishments than legally mandated?	Other key reporting?
Alibaba Headquartered in Hangzhou, runs Business to Business e-commerce platform (Alibaba.com), Consumer to consumer (Taobao), and Business to consumer (Tmall) marketplaces. Also facilitates cross-border trade via AliExpress & uses integrated "Alipay" payment system. Listed on NYSE in 2014.	100,000-150,000 (N/A)	- Alibaba Anti-Counterfeit Alliance (2016) & MoU with China Britain Business Council - Partnership with Net-A-Porter (2018)	Product intelligence, image and semantic recognition algorithms, real-time monitoring and interception, bio-identification, and algorithms to detect abnormal merchant behaviour	Yes - IPP Platform	Yes - 3-Strike Rule	96% takedown requests are processed within 24 hours No of takedown requests submitted by rights holders decreased by 32% - 96% removed before a single sale
JD.com Headquartered in Beijing, known for their self-operated business to consumer (B2C) model in which JD buys and sells the products itself. They now also run an open marketplace with vendors, especially targeted at cross-border B2C shops. Listed in 2014.	150,000-200,000 ("Several entire floors" in their HQ devoted to IP protection.)	- JD Tracing and Anti-Counterfeit Alliance (2017) & - MoUs with rights holders* - MoU with CBBC (China Britain Business Council) - Partnership with FarFetch (2017) and Ruyi (2018) Food safety food blockchain traceability alliance (with Walmart &	From website: "The company has a sophisticated supervision system including strict criteria for merchant approval, stringent control of supply channels, random sampling inspection, independent research, strict penalties system and a guaranteed return policy."	Yes - IPP Platform and info	Yes - 1-Strike Rule*	

		Tsinghua) Part of Global Blockchain Freight Alliance (BiTA) since 2018				
Pinduoduo Founded in Shanghai, Social and recommendation-based ecommerce platform (group- buying deals). Began with low-tier cities, has moved to first-tier. A marketplace platform (like Alibaba). Listed on NYSE in 2018.	5,000-10,000 (Roughly 1/4 of total headcount)	Active "accounts" and relationships with over 500 brands, each of which has its own unique profile and set of standards. If a Baidu top-1000 brand has a China office, it is quite likely that they have an existing relationship with PDD.	Each brand has its own requirements and characteristics, up to 600 specific parameters and design rules, and in some cases pre-screening models*	Yes - Report centre.	Yes - 10 times the price for all counterfeit products sold once identified. *	Take-down requests increased 10x after portal. Submitted take- down notifications increases from 10,000 to 100,000
DHGate Based in Beijing, focused on B2B-cross-border trade & multilingual (i.e. exports out of China only).	500-1,000 (A few dozen full-time staff and external consultants)	White list and key words.	White list and key words.	Yes - IPP Portal.	N/A	
MOGU INC Affordable fashion platform, headquartered in Hangzhou, focusing on "influencer" economy and "consumer to factory" (C2F) model, some brands incubated on platform, uses live-streaming. Listed on NYSE in 2018, Tencent = largest shareholder (17%).	1,000-5,000 (N/A)	MoUs with brands.	N/A	It does not appear so.	Yes - They "broadly follow Alibaba's best practices," including 3 strikes.	
VIPSHOP.com	N/A	N/A	N/A	N/A	It does not	Repayment of

Specializes in online discount sales, based out of Guangzhou, listed on NYSE in 2012. Reports over 50 million customers.					appear so	same value of goods (deducted from deposit)
WeChat Hugely popular social media platform, also incorporating “WeChat Pay” payments and apps-within-an-app “mini-programmes”, including E-shops.	Parent company Tencent had approx. 54,000 in 2018  (N/A)	-Tencent signed MoU with the CBBC and the International Publishers Copyright Council (IPCC) in 2019. They will provide information to CBBC and IPCC regarding IP protection policies, infringement reporting processes, and keep both organisations and their members informed of any related changes. - Brand Protection Platform was changed from ‘invitation system’ to ‘application system’. As of the first half of 2019, more than 280 well-known brand rights holders have joined the WeChat brand rights protection platform, an increase of 10% compared with the end of 2018.	- Adding more than “6,500 brand trademark keywords” for official accounts and Mini Programs over the 2018-2019 data set, for a total of over 60,000, and “intercepting more than 11,000 counterfeit registrations” every day. -Linked personal account strike -Fully Electronic Infringement Complaints and Feedback Mechanism -Multi-lateral Cooperation among WeChat, Users and Brands -Online and offline joint strike	Yes – Weixin Brand Protection Platform, Full Electronic Infringement Complaint System	Punitive measures taken on the WeChat platform for violators, such as banning accounts or suspending access to Moments feature.	N/A

During interviews, one of the European business associations as well as two other e-commerce platforms suggested that the Alibaba procedure is seen as the market-standard setter. However, this may be due to lack of awareness of other platforms. Overall, it is clear that several e-commerce platforms – beyond Alibaba - have taken certain measures which may constitute “best practices”.

Specifically the analysis suggests that best practice includes the following:

- **Regular consultations with government and rights-holders** (Alibaba, JD.com, WeChat): A few of the e-commerce platforms have this. The earliest was established by the Alibaba Group in mid-2016, and now has over 120 international rights holders as members, including over 50 European members (now the largest regional representation)<sup>6 xxxvi</sup>. It meets quarterly and brings in enforcement agencies to encourage dialogue, data sharing and enforcement actions. WeChat’s alliance has more members, while JD’s alliance only has 25 members to date, however, importantly, the latter was initially established in partnership with China’s Ministry of Agriculture, the General Administration of Quality Supervision, Inspection and Quarantine, and the Ministry of Industry and Information Technology.
- **IP Protection Portals** (Pinduoduo, DHGate, WeChat): The portals are established to automate the notification and take-down process. Number of take-down request skyrocketed by 10 times for Pinduoduo since launch of the portal. For DHGate, 95% of complaints are made through the portal. WeChat reported that as of December 2017, over 75,000 brand infringement notifications were submitted by brand owners through its Weixin Brand Protection Channel platform, with over 95% passing review, with average total review completion time under seven working days.
- **Stricter rules than legally mandated** (JD, Pinduoduo): The legal penalty as set out by the E-commerce Law is 3 times the price of reported goods, however, Pinduoduo punishes counterfeit vendors at 10 times the price for all counterfeit products sold, whether the buyer reports it or not. As noted earlier, some firms also fully remove infringing operators from their platforms – JD do so after one infringement finding, Alibaba and MOGU after three findings.
- **Advanced technology** (Alibaba, JD): Advanced technology enables Chinese platforms to take preventative measures cost-efficiently. For example, Artificial intelligence can help automatically filter out or block luxury goods that are on sale at suspiciously low prices. Block-chain technology can be used to ensure product traceability and therefore brand protection. AI is being used especially by Alibaba, blockchain by JD.com.
- **Specific partnerships or business models** (JD, Alibaba): Certain e-commerce platforms are setting themselves out apart and created new partnerships specifically to claim stronger IP protection. For instance, JD.com’s operating model seeks to embed quality verification, and its partnership with the luxury brand e-based retailer Farfetch<sup>xxxvii</sup> was widely interpreted to be a response to concerns about counterfeit in China previously

<sup>6</sup> 155 members total, 34 of whom are Chinese.

expressed by international brands. The 2019 partnership between Alibaba and Net-A-Porter, previously operating outside of China, establishing a new T-Mall shop for luxury brands under the Richemont Group (Net-A-Porter will be establishing its own Chinese app in 2020), can also be seen in this light.

Beyond these best-practices, three key points are of note with regards to e-commerce platforms actions since the E-commerce Law has been introduced.

First, the e-commerce platforms all self-report and do so in very different ways. This is very challenging and does not appear to have changed since the law was introduced. Data remains limited, potentially skewed towards larger e-commerce operators, and with potential selection bias. There are questions regarding the role of smaller online platforms, such as China-based business to business marketplaces Xxjcy.com and China-telecommunications.com, which were recently identified in an EU report for not acting on complaints, being unresponsive to notifications, with zero impact on take-downs<sup>xxxviii</sup>. Information regarding actions to address online counterfeit by, for instance, VIPSHOP.com is sparse and unclear.

Second, it is notable that in the past it was the larger e-commerce platforms that have been subject to and involved in multiple lawsuits for promoting counterfeit products, as set out in Annex III and Table 3. However, the platforms have remained confident despite these legal challenges. For instance, while embroiled in a 2015 case, Jack Ma, then CEO of Alibaba, said “I would (rather) lose the case, lose the money” than settle. “But we would gain our dignity and respect.”<sup>xxxix</sup>. They have also taken significant steps – including partnerships and advanced use of technology – to address these concerns, many commencing before the law was introduced and continuing to strengthen thereafter. However, as noted earlier, no e-commerce operators have yet been prosecuted successfully under the E-commerce Law, and so it is not clear whether the law itself is driving improved behaviour by e-commerce platforms, or if such improvement simply makes economic sense.

Third, China’s e-commerce market is very dynamic. Despite the fact that rights-holders suggest improvements by e-commerce platforms in the take-down process (as shown later in Figure 7), it is not clear from any of these reports or broader government reports whether there has been an actual reduction in online appearance of counterfeit goods or repeat infringers.

### 4.3 European firms’ views on the E-commerce Law

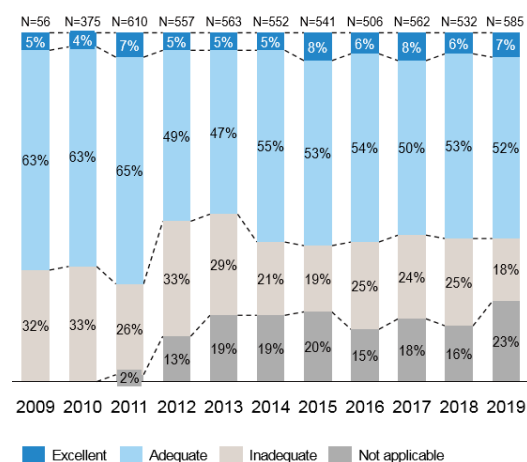
The views and actions of European firms, as well as other international firms, with regards to China’s online counterfeit environment have already been summarised. This section specifically summarises the views and actions since the E-commerce Law was introduced.

In a 2019 confidence survey of EU businesses in China, EU business owners expressed concern that progress of IPR enforcement slowed in 2019, although a positive jump was observed in 2018 as illustrated in Figure 4 from the same survey report<sup>xl</sup>.

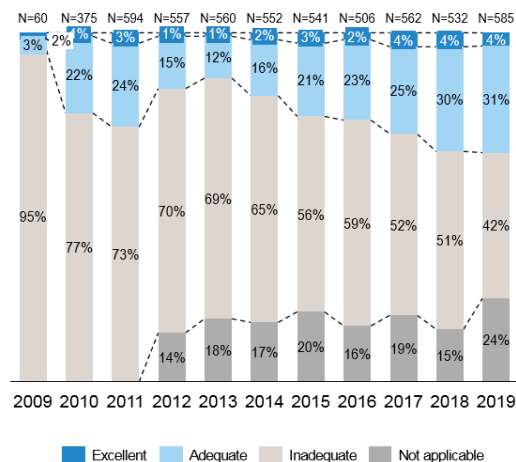


Figure 4: Enforcement of IPR laws and regulations in China stagnates<sup>1</sup>

How does your company rate the effectiveness of China's written intellectual property (IP) protection and enforcement system?



How do you rate the enforcement of China's IPR laws and regulations?



Indeed, in this same survey, companies that have been affected by IPR infringement in China, 69% said the infringement took place within the past two years. Further, the 2019/2020 European Business Position Paper by the European Union Chamber of Commerce in China made 'strengthening online IP protection' one of the top 4 recommended action points for addressing IPR issues in China<sup>xli</sup>.

In April 2019, the China Britain Business Council (CBBC) in April 2019 published a position paper<sup>xlii</sup> about the new E-Commerce Law 2019. As an illustration, Table 6 shows the specific concerns and recommendations with regards to the new law set out by CBBC:

Table 6: CBBC suggestions and recommendations for specific articles of the E-commerce Law<sup>lii</sup>

Article 41
<ul style="list-style-type: none"> <li>• Rights owners to strengthen their knowledge about how e-commerce platforms will establish relevant rules and protect IP rights;</li> <li>• E-commerce platforms to clarify the measures they will take to comply with the law and their impact on rights owners;</li> <li>• Communication between stakeholders, such as e-commerce platforms, government institutions, and associations, and rights owners should be increased;</li> <li>• Industry associations to take a more relevant role and be the voice for small and large companies that experience the same issues;</li> <li>• E-commerce platforms to increase cooperation and communication between them to share their experiences and lists of blacklisted shops, and unify requirements for rights owners.</li> </ul>
Article 42
<ul style="list-style-type: none"> <li>• E-commerce platforms to conduct strict reviews of preliminary evidence of infringement for good faith rights owners on their platforms. This is in response to the possibility of bad faith trademark squatters potentially blackmailing rights owners during online promotional days, or filling malicious complaints against honest online stores;</li> <li>• E-commerce platforms to create new measures for new trends in IP infringements, such as selling counterfeit through repair services.</li> </ul>
Articles 43 and 44
<ul style="list-style-type: none"> <li>• E-commerce platforms and rights owners to discuss and find solutions for sellers that distribute products by mixing counterfeits and genuine products, which would otherwise go unnoticed;</li> <li>• E-commerce platforms to provide rights owners with the right to judge counter evidence;</li> <li>• E-commerce platforms to take the initiative and proactively evaluate whether the evidence submitted by the party that has been complained about qualifies as initial evidence for non-infringement, and also allow the opinion of the rights owners to be submitted;</li> <li>• The 15-day quiet period would be too challenging and demanding for rights owners, therefore it is recommended for e-commerce platforms to close a case immediately whenever obvious infringement happens. Whenever necessary, it is also recommended for e-commerce platforms to conduct preliminary review of complaints evidence to avoid the system being abused by bad faith third parties.</li> </ul>

The prior mentioned European survey also returned with suggestions including preventative measures which could include raising punitive compensation caps and increasing the number of years that infringers are barred from the industry.

These overarching views are also reflected in the over thirty interviews and surveys with a range of stakeholders undertaken for this study. Six particular observations arise.

First, rights-holders indicated some general improvement over time, and they were mostly aware of the new law and its potential.

Table 7: Survey results (1)

<b>Rights holders' view of how the online IP environment in China has changed in recent years. (From 1 = worsening, to 5 = improving)</b>	3.2 <sup>7</sup>
<b>Proportion of companies aware of the new E-commerce Law in China.</b>	90.0% <sup>8</sup>
<b>Extent to which the E-commerce Law has impacted rights holders' business operations. (From 1 = not at all, to 5 = significantly)</b>	2.6 <sup>9</sup>

Second, they noted the following positive effects of the E-commerce Law:

- There is now a greater and clearer incentive for platforms to cooperate with rights-holders. Particularly for smaller platforms which did not mandate certain processes such as sharing of seller information;
- There is a stronger identification and governance process for online counterfeit goods;
- The credit rating system in the e-commerce business is being improved with stricter rules on in-genuine (fake) comments;
- E-commerce platforms are now taking more responsibility for day-to-day take-down processes, meaning resources in law enforcement can be better utilised to crack down on violators, manufacturers, and the most severe cases which impact public health (such as food safety, and vaccines).

Third, when businesses that were already aware of the new E-commerce Law were asked directly what impact China's E-commerce Law has had on their operations (if any), the majority suggested they had seen some specific improvements, as shown in Figure 5.

Figure 5: Survey results: rights holders views of the E-commerce Law

<sup>7</sup> Among respondents that have IP registered in China.

<sup>8</sup> Among respondents that sell IP protected products in China.

<sup>9</sup> Based on responses from all respondents that were aware of the new E-commerce Law in China.



Fourth, while European firms allocate significant resources to managing IP in China, there still appeared to be a relatively lower use of the court system directly to manage online IP issues. For instance, about the same number of EU businesses responded that they had taken IPR cases to court in China compared to in the EU, yet more had experienced difficulties in IP enforcement in China than in the EU, and the likelihood of success was judged as lower in China than it is in the EU (Note: It is not clear whether success was being judged with regards to e-commerce operators or infringers directly).

Table 8: Survey results (2)

	China	EU
Percentage of companies that have experienced difficulties in enforcement <sup>10</sup>	93%	38%
Percentage of companies that have taken IPR infringement cases to the court <sup>11</sup>	67%	65%
Success score on results for those who have taken cases to the court (1 unsuccessful - 5 successful)	3.6	3.9

Fifth, and reflecting the findings in the CBBC position paper, for the firms surveyed for this study – both within operations in China and the EU and as shown in Figures 6 and 7 below – the notice and take down process was reported as bringing difficulties, as well as repeat infringement. These are issues on which the E-commerce Law provides further guidance, but are also areas in which e-commerce platforms have the potential to address directly through their own actions.

Figure 6: Survey results

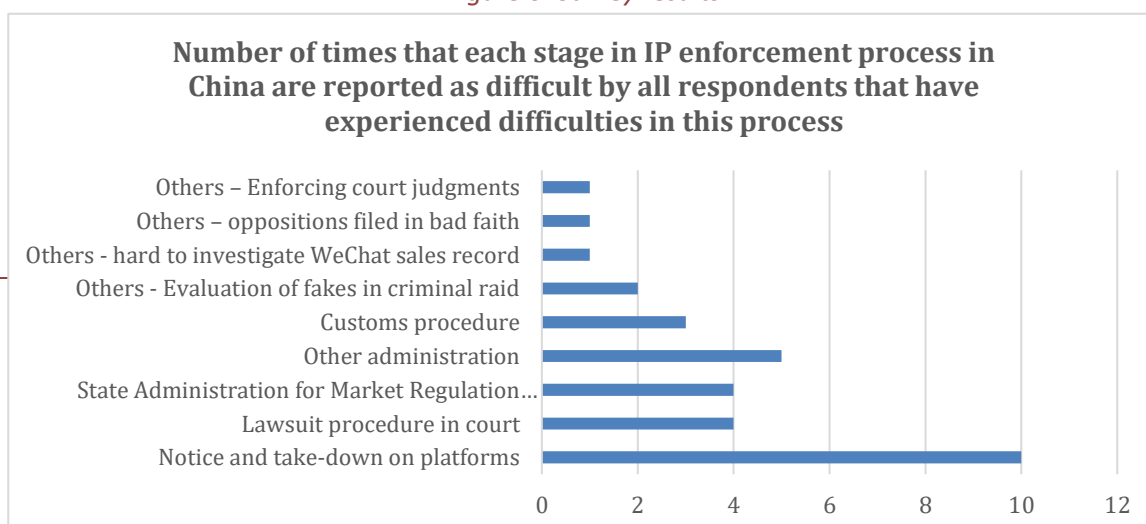
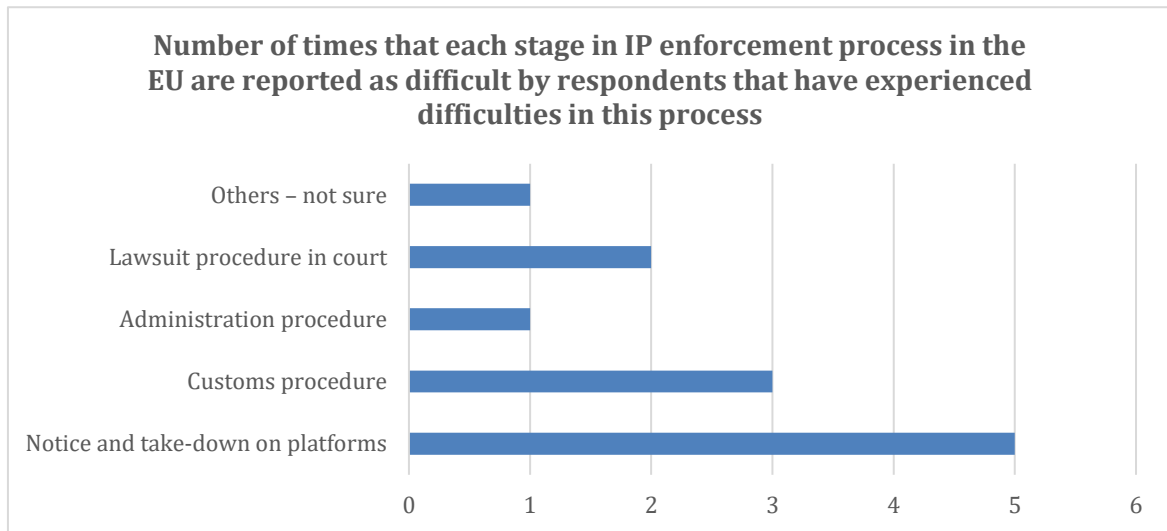


Figure 7: Survey results



Sixth and finally, several firms interviewed suggested that their direct work with e-commerce platforms is delivering important results. Alliances in particular appear to be proving helpful. For instance, one of the interviewees – Lego Group - was recently cited saying “As a member of AACA, we are grateful for the level of support we’ve received from Alibaba, especially in our actions against illegal copycat products in China and globally,” Alibaba itself reported that the cooperation with Chinese law enforcement and rights-holders that it has tried to stimulate through its Alliance in the first 10 months of 2019 had resulted in the closure of 492 counterfeit manufacturing rings and the arrest of 687 criminal suspects. The total value of these cases has been estimated at 1.24 billion RMB (€160 million)<sup>xliii</sup>. This is a significant reduction on 2018, however, which saw arrests of 1,277 suspects, closure of 524 manufacturing and distribution locations, and counterfeit product seizures of the value 3.6 billion RMB (€464 million)<sup>xliiv</sup>.

## 5. ANALYSIS

Having set out recent progress with regards to tackling e-commerce counterfeiting in China, this section now considers the applicability of the EU's MoU approach to potential gaps in addressing online counterfeit. It begins with an introduction to the EU MoU approach, and continues on to assess gaps and match those to potential solutions.

### 5.1 A brief introduction to the EU MoU approach and results to date

In 2009 and 2010, the European Commission, with the objective to promote collaborative solutions to existing problems, held several meetings among stakeholders in the field of IPR enforcement to discuss the strategy for fighting online counterfeiting in the fast-moving E-commerce environment<sup>xlv</sup>.

In 2011, the dialogues resulted in a Memorandum of Understanding<sup>xlvi</sup> between EU rights holders and E-commerce sales platforms. The aim of the MoU is to establish a code of practice in the fight against the sale of counterfeit goods over the internet and to enhance collaboration between the signatories. This approach creates three lines of defence in online IPR protection with significant support from online platforms:

- Education and appropriate information sharing to and between sellers and buyers;
- Proactive and preventative measures;
- Notification and take-down at discovery.

The MoU was set to be reviewed and updated regularly and its effectiveness monitored through a set of KPIs. An additional MoU with online advertisers was established in 2018 in response to the escalation of counterfeit goods appearing on online advertising intermediaries.

The 2013 MoU evaluation<sup>xlvii</sup> suggested that the MoU approach, which aims to enhance cooperation, is much better than litigation, which neither enhances market efficiency nor fosters consumer trust. The MoU promotes trust in the online marketplace by providing detailed measures against online offers of counterfeit goods as well as enhanced protection for consumers who unintentionally buy a fake or counterfeit good.

The 2017 MoU evaluation<sup>xlviii</sup> suggested that online platforms had increased their proactive removals of listings from 86.3% in 2016 to 97.4% in 2017, with a corresponding fall in the number of listings that had been removed due to notification by rights owners. Repeat infringements is also better controlled, shown by the fact that the percentage of seller restrictions imposed on alleged counterfeit goods were reduced from 4.5% in Nov-Dec 2016 to 2.7% in May-Jun 2017). This suggests less burden over time on rights owners. Both the number of listings removed as a result of measures taken by e-commerce platforms and as a result of notices sent by rights owners have increased. Signatories of the MoU provided feedback in the same survey that the MoU has opened a much-needed dialogue between rights owners and platforms as well as facilitated joint efforts between them. However, counterfeit listings continue to reappear on most of the e-commerce platforms. Further

cooperation is needed to improve the results, for example, allowing rights owners to evaluate the efficiency of the filters used and, where needed, improve them with their specific experience and knowledge.

In June 2018, an additional MoU for online advertising was signed by parties involved in placing, buying, selling and/or facilitating advertising. The initial 12-months assessment period concluded that the MoU has contributed to minimise the placement of advertising on IPR-infringing websites and mobile applications. Signatories will continue to exchange and promote good practice, and develop further new initiatives, including on technology and tools; cooperation at national, EU and global levels; and actions to be taken under the ‘follow the money’ approach to IPR enforcement<sup>xlix</sup>.

## 5.2 Existing relevant MoUs in China

Today in China, there are already MoUs signed between CBBC, British rights holders and three major Chinese platforms - JD.com, Alibaba, and WeChat (Tencent), in 2017, 2016 and 2019 respectively. These MoUs were built upon prior successes in cooperation between all relevant parties with regard to online IP protection for British businesses in China. The Director of Business Environment and China Policy at CBBC shared a summary of key points covered in these MoUs:

1. Recognizing the importance of IP protection online;
2. Recognizing the previous cooperation and history between all parties;
3. Agree to cooperate to achieve more favourable online IP environment thus increasing consumer confidence for British companies;
4. Sharing of information about latest policies and promotion through media channels;
5. Special attention to products potentially affecting public safety;
6. Acting rapidly upon infringing products notified by British companies;
7. Cooperate with brand owners to develop enhanced pre-emptive measures;
8. Provide CBBC with a priority channel to deal with complaints;
9. CBBC to bring delegations of British rights owners to meet and discuss IP issues and cooperation.

Similar to the EU MoU, the CBBC MoUs facilitate cooperation and information sharing as stated in 3, 4 and 7 above. Apart from that, it is worth noting these CBBC MoUs specifically help platforms prioritize British businesses per points 6, 8 and 9.

## 5.3 Gap analysis

During interviews and surveys, European chambers of commerce, experts and firms were asked directly what gaps they believe China’s approach does not yet or necessarily address. E-commerce platforms were also asked the same. These, coupled with analysis arising from the findings summarised in previous sections, are listed below in Table 9. They are presented in no particular order.

Table 9 also includes further analysis to indicate an assessment of whether these gaps could be addressed by an adaptation of the EU’s MoU approach for China – i.e. a non-binding agreement between rights holders and E-commerce platforms, facilitated by a suitable third-party (discussed later).

Table 9: Gaps in China's E-commerce Law and how they could be addressed

Gaps	Can this gap be addressed by EU MOU approach? If so, what specifically?
1. Enhance ability to catch up with the sophisticated environment – China has a huge number of users; the market is constantly dynamic nature and transactions are carried out across time-zones. In addition, smaller new E-commerce platforms crop up all the time, including in specific localities outside of large cities, which can be targeted by copyright infringers.	Yes – use MoU specifically to target smaller E-commerce platforms and help them build reputation and brand awareness.
2. Increase transparency and consistency of data/information for pro-active identification of infringements - rights holders still see E-commerce platforms reluctant to share information on infringers or the platform protection procedures they are using. This is especially the case for smaller E-commerce platforms and social media platforms – who argue against measures that would require them to compromise the privacy of users that establish closed areas for communication by allowing routine access in order to monitor for ECL violations.	Yes - use MoU to propose a specific standardised set of data that E-commerce platforms should all be reporting annually
3. Reduce the cost of online IP protection - E-commerce platforms are still not convinced that their efforts/investment in technology to protect IP will pay-off in terms of reputation. Some competing vendors may even take advantage of the law to accuse each other of violations. SMEs also complain of high costs – even of trademarking in first place.	Possibly – E-commerce platforms could use MoU as means to get information from rights-holders on reputation management.
4. Increase capacity and incentives of government and legal professionals – e.g. in terms of knowledge and qualifications to deal with IPR Protection, unbalanced resources (rights holder VS. infringers), Insufficient regulation underneath the law to define and support successful implementation at the local levels, and rigid regulations that can quickly lose relevancy due to the dynamic nature of the relations among rights owners, counterfeiters, platforms, and consumers.	Possibly – MoU could include clauses for E-commerce platforms to provide more training about their IP measures and how EU firms can take advantage of these.
5. Address “whack-a-mole” issues – i.e. the situation where an infringer's sales are closed down but they pop up again on the same platform or on another platform. This is challenging, as China's market is very dynamic, but investigations and due process are time-consuming, with law enforcement unable to	Possibly <ul style="list-style-type: none"> <li>1) Expert support and tools to improve knowledge</li> <li>2) Information sharing between platforms, rights</li> </ul>



respond speedily at times.	holders and local authorities.  However, a non-legally binding MoU approach may not be powerful enough to crack down the issue given the scale and complexity of the economic activities for counterfeit goods
<p>6. Address lack of clarity of or loopholes in laws and regulations, in particular, around Articles 42 and 43, and <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>- Potential loophole for bad faith trademark squatters to blackmail brand owners. They could maliciously report brand owners during platform promotion, once evidence is accepted, rights owner's shop will be closed for 15 days.</li> <li>- Potential loophole of letting infringers opportunity to revert take-down with evidence if rights holders don't escalate to legal procedure in 15 days</li> <li>- The lack of a definition of '<i>prima facie</i> evidence'.</li> </ul>	Yes – MoU could introduce stronger standards of “promptly” and other definitions lacking clarity.
7. Align incentives and/or overcome disincentives to respond to rights-holders. For instance, there are some rights-holders that only formally sell on one e-commerce platform, but infringement may occur on another platform. In this case, the other platform may have little incentive to support the rights-holder, as they are not their direct clients.	Yes - Could be specific MoUs (and dialogues) between rights holders and several e-commerce platforms/social media platforms on this issue (esp. smaller emerging platforms).
8. Enhance power of legal actions at source - the market supervision bureaux have generally proved unwilling to take enforcement action in routine online cases, arguing difficulty in asserting jurisdiction where the precise location of the infringer and its stocks are unknown.	Possibly - MoU approach could be modified to specifically address this issue.

9. Improve severity and reliability of enforcement - currently notable e-comm platforms are already using stricter rules than legal requirements in terms of take down procedure. However repeat infringers still exist. This is because, in practice, and according to case laws reviewed in this study, the infringers only need to take-down products discovered at one platform instead of 'staying down' completely or permanently in the entire e-commerce market	Possibly – MoU could include requirement for reporting on police/customs interactions by e-commerce operators. In addition, EU's regular evaluations of its MoU have helped in identifying gaps in enforcement and if, for example, penalties need to be increased, etc.  However, this would also need clearer and transparent government company blacklists, demonetization of infringers, halting production of manufacturing at source, etc.
10. Increase public awareness – put simply, some customers buy counterfeit deliberately (e.g. to cut costs)	Yes - Could be specific MoUs (and dialogues) between rights holders and several e-commerce platforms/social media platforms on anti-counterfeit messaging (especially for smaller emerging platforms).
11. Increase availability of data and tools to support proactive take down - especially for smaller platforms and SME rights holders	Yes - Could be specific clause in MoU.
12. Address challenges in prosecution of e-commerce platforms – platforms have avoided prosecution to date, despite having different rules and standards for processing notices, collaborating with others, etc.	Yes - use MoU to harmonise best practice by e-commerce platforms linked to ECL articles

Overall, the analysis above suggests that out of the twelve gaps identified through interviews, surveys and analysis, for seven of those gaps is the EU's MoU approach very likely to be relevant, and for all there are at least some aspects that could be integrated into the MoU.

That said, the extent to which the MoU approach would be relevant in China depends on how many of the above outlined gaps are able to be covered in a bespoke MoU – some of them are not currently mentioned in the EU's MoU. Indeed, when questioned, most survey respondents and interviewees suggest that the EU's MoU approach may be ineffective in China, especially as many of the gaps relate more to the enforcement of the E-Commerce law and other laws in China rather than the policies themselves. Only one respondent who is an EU MoU signatory (selling in China not EU) felt that the EU approach should be adopted in China as it could set a higher standard. Furthermore, where MoUs are proposed, analysis and interviewers suggested that the best approach will be to have very specific agreements with clear, quantifiable deliverables.

## 5.4 Facilitating an MoU approach in China

If an MoU approach is to be taken in China, between rights holders and E-commerce platforms, it is important to consider which organisation(s) should be involved, and which of

these would be best placed to facilitate this. All or certain e-commerce platforms in China would need to be involved, and as many as possible rights holders or their representatives. The literature review suggested that the EU MoU did not have enough SME rights holders – it is important for this be considered when designing any MoU for China.

Should an MoU be implemented, it will also be key to aim for an independent and objective facilitator. The EU MoU was/is facilitated by the EUIPO, and given the effectiveness of their activities, as shown in the 2017 evaluation<sup>1</sup>, it forms an example case for any MoU facilitator in China. The key activities that EUIPO facilitates are summarised below:

- Provide knowledge, data and resources;
- Facilitate communications through workshops and meetings;
- Regular evaluation with expert knowledge.

These activities, as well as appropriate support in tackling the gaps outlined in the previous sections, would be key to the success of an MoU facilitator specific to China. Table 10 provides a list of options for facilitators, including a potential newly established organisation.

Table 10: Options for MoU facilitating organisations in China, with pros and cons

Organisation	Pros	Cons
MOFCOM	As the ministry in China dedicated to managing domestic and international trade, MOFCOM carries legitimacy and access benefits.	Questions around appropriateness of legislator also governing any MoU
China National Intellectual Property Administration	As the organisation in China primarily responsible for the organization and coordination of intellectual property rights protection work nationwide, CNIPA is well placed to facilitate an MoU.	Questions around appropriateness of legislator also governing any MoU
An extension of Alibaba's existing Alliance	Already has many rightsholders involved.	Only includes one e-commerce platform organisation – Alibaba, and they may not be willing to include a wider set of platforms nor remove their name from the organisation.
An extension of CBBC's MoUs with Tencent, JD.com, and Alibaba	Already has many rights holders involved, as well as three of the main e-commerce platforms	These MoUs are separate to one another, and only include UK rights holders. CBBC or their partners may be unwilling to extend the existing MoUs.
One of the/an alliance of the european chambers of commerce in China	Able to gather large numbers of rights holders, incentives to support members.	May not have sufficient resources or legitimacy to manage process and

		interactions with small and large e-commerce platforms
A newly founded organisation dedicated to facilitating an MoU	Can be structured so as to help facilitate an MoU most appropriately	Setting up a new organisation would carry significant time and financial costs.

## 6. CONCLUSIONS AND RECOMMENDATIONS

### 6.1 Conclusions

Intellectual property infringement online in China has been acknowledged by many stakeholders as a challenging and increasing problem for many years. Indeed, prosecution for intellectual property infringement online in China is not new, and EU firms consistently allocate financial resources to managing the problem. However, China's new E-commerce Law, in force for just 11 months to date, has been introduced to improve the environment.

This study shows that the law is already having an impact on EU firms by creating additional case law. Under the law, this report finds that thirty three cases have already been examined, five of those relating specifically to intellectual property protection. However, to date no E-commerce operators have been found responsible for violations – only sellers, as per before the law was introduced. There are also new areas of uncertainty created by the E-commerce law, for instance around the notification rules, which indicate continued challenges for EU firms to demonstrate that e-commerce operators are at fault (if they are).

In addition, this report finds that while IP protection systems and actions by E-commerce platforms are being highly promoted and marketed by, in particular, large platforms, there is still a lack of clarity and consistency on their results, especially in comparison to each other. Furthermore, some E-commerce operators are clearly going well beyond the E-commerce Law, while others, typically smaller platforms, are lagging behind.

An MoU approach that therefore focuses on strengthening joint understanding of the law, and consistency and transparency particularly around notification by a wide range of E-commerce operators, may well be of significant future value. Focusing especially on smaller platforms (where “whack-a-mole” and enforceability issues are potentially more prominent) may also be of considerable value, although likely more challenging to execute.

### 6.2 Recommendations

Feedback from a wide range of stakeholders and the gap analysis completed in this study suggests that, despite and even as a result of the e-commerce law introduction in January 2019, there is room for a facilitated MoU between rights-holders and E-commerce platforms to continue the fight against online IP infringement. Specifically, the MoU should aim to:

1. Increase communications between government institutions, platforms, rights owners and industry associations or chambers, particularly being the voice for SMEs, to improve knowledge and clarity of the law.
2. Focus on engaging smaller platforms and social media platforms (with data, promoting best practices, penalties etc.)
3. Improve data consistency and transparency by the E-commerce platforms, especially the larger platforms, and especially with respect to notification rules.

4. Encourage regular joint review of effectiveness of E-commerce law by rights holders and platforms, and inputs into updates of the E-commerce Law (e.g. update penalty amounts, standardising practice).

Should an MoU be implemented, it will be key to aim for an independent and objective facilitator. There are pros and cons to all options considered in this study. Chambers of commerce, particularly those that have been active in the past on IP issues and have adequate resources, could be ideal, but a new organisation could equally be charged with this task.

Furthermore, continued efforts should be made by the Chinese government to clarify and interpret the E-commerce Law, based on regular dialogues with rights-holders and e-commerce platforms. Active regular dialogues and partnerships between rights-holders and e-commerce platforms should also continue.

The preliminary results of the study were presented at a conference jointly organised by the China Anti Infringement & Anti Counterfeit Innovation Strategic Alliance (CAASA) and IP Key on 21 November 2019 in Hainan, Haikou, on IPR protection online and innovation. A dedicated panel (See Annex VI) discussed the results of the study and its recommendations. Participants included signatories to the EU Memorandum of Understanding on online advertising and IPR White Bullet<sup>li</sup>, China Britain Business Council, and representatives from the following e-commerce platforms: Alibaba, Tencent/WeChat, DH Gate and Pinduoduo. The findings of the study were confirmed as corresponding to the reality experienced by rightholders and e-commerce platforms. Platforms and rightholders alike also all expressed interest to work together on exploring the possibility of applying the EU experience with a Memorandum of Understanding to the Chinese situation. Alibaba is already a signatory to the EU Memorandum of Understanding.

There were several speakers interested especially to look at how to exchange information across platforms on counterfeiters, as they move around from one platform to the other. Another key point raised was how to get more control over and information from the logistics chains – essential for cross-border shipments. Speakers and the audience also reflected on the importance of harmonising reporting by e-commerce platforms – for instance, on achievements by the platforms, and what is being done with requests for takedown. Some of the e-commerce platforms also noted that the high numbers of requests need to be managed – e.g. Alibaba receives around 10 million notices every year, and Nike alone files over 100 thousand notices every year.

The stakeholders noted many of these elements are between private parties but also noted there are clear links to legislative requirements on certain parts. Stakeholders would welcome if some of these discussions (e.g. harmonisation of reporting) could also be facilitated by government even if only by hosting meetings with the relevant stakeholders.

## ANNEXES

Please see the associated file called “China Online Counterfeit Study Annexes”, which lists the following annexes:

*Annex I: List of documents reviewed*

*Annex II: List of Interviewees and survey respondents (where respondents were willing to have details published)*

*Annex III: List of E-commerce cases in 5 years prior to E-commerce Law*

*Annex IV: Relevant policies and guidelines related to the E-commerce Law*

*Annex V: Interview/Survey Questions*

*Annex VI: Agenda for conference jointly organised by the China Anti Infringement & Anti Counterfeit Innovation Strategic Alliance (CAASA) and IP Key on 21 November 2019*

## REFERENCE LIST

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<sup>ii</sup> European Union Intellectual Property Office. “Up to EUR 60 Billion Lost Each Year in the EU Due to Counterfeiting in 11 Key Economic Sectors.” Publications Office of the European Union, 6 June 2019. [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/docs/2019\\_Status\\_Report\\_on\\_IP\\_R\\_infringement/2019\\_Status\\_Report\\_on\\_IPR\\_infringement\\_pr\\_ireland.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/docs/2019_Status_Report_on_IP_R_infringement/2019_Status_Report_on_IPR_infringement_pr_ireland.pdf).

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<sup>iv</sup> European Commission. “Report on the EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border, 2018.” Publications Office of the European Union, 2018. [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/2019-ipr-report.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/2019-ipr-report.pdf).

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