



ROUSE

LUSHENG

LAW FIRM

Member of the Rouse Network

路盛律师事务所

新形势下直播电商商业模式的知识产权合规挑战 IPR Compliance Challenges for Live Streaming E-Commerce

2020/12/8

万亿市场预期下，全民直播时代正在到来

With a trillion-yuan market in the making, the era of live streaming is here

艾媒咨询数据显示，

2019年中国直播电商行业总规模为：4338亿元，预计2020：9610亿元。

According to iiMedia Research, China's live streaming e-commerce market reached 433.8 billion RMB in 2019, and is expected to reach 961 billion RMB in 2020.

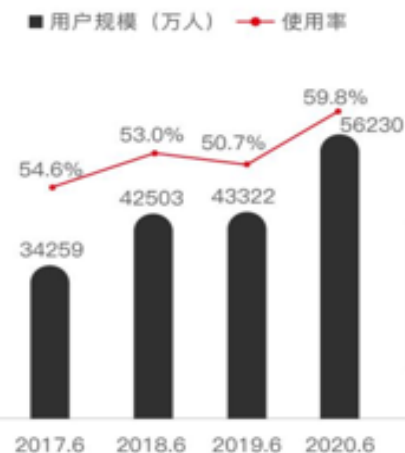
中国互联网络信息中心数据显示，截至2020年6月，网络直播用户规模达5.62亿，占网民整体的59.8%，其中电商直播用户规模为3.09亿。2020年上半年国内电商直播超过1000万场，活跃主播超过40万，观看人次超过500亿，全民直播正在到来。

According to China Internet Network Information Center, by June 2020, the number of live streaming users has reached 562 million, accounting for 59.8% of the total internet users. Of all the live streaming users, 309 million are for e-commerce streaming. In the first half of 2020, there were over 10 million e-commerce streaming events, over 400,000 active streamers, and over 50 billion viewers. The era of live streaming is here.

2017-2020年直播电商市场规模及预测（单位：亿元）



2017年6月-2020年6月网络直播用户规模及使用率



2020年上半年
电商直播用户**3.09亿**
电商直播场次**1000万+**
观看人次**500亿+**

数据来源：艾媒咨询、CNNIC

欧洲相关情况概述

Europe

法律现状：《电子商务指令》(EC E-Commerce Directive) /2000

Present: EC E-Commerce Directive / 2020

- 平台遵循: 通知-删除原则,
- Platforms follow the principle of “notice and take-down”
- EU 着手制定《数字服务法案》(Digital Services Act) , 针对在线平台
- EU is working on the Digital Services Act, targeting online platforms
- 内容审核、不正当竞争、社交媒体非法内容、虚假信息等
- Content review, unfair competition, illegal content on social media, false information, etc.
- 在识别、验证、监控卖方采取有效措施、对非法产品、服务采取更积极行动、执法部门密切合作
- More effective measures for identifying, verifying, and monitoring sellers; a more proactive approach to illegal products and services; closer ties with law enforcement
- 但目前没太多维权案例
- Limited infringement disputes so far

欧洲的直播带货主要有两种方式：

Two major live streaming models in Europe:

(1) 商家自播带货 By merchants

(2) 网红直播带货 By influencers

- 目前：KOL以创作内容、推荐产品以赚取广告费为主
- At present, it's mainly the KOLs who create content and promote products for advertising revenue
- Amazon、YouTube、Facebook、Instagram等电商和社交平台，不断提升网红直播带货功能
- E-commerce and social media services such as Amazon, YouTube, Facebook, and Instagram are stepping up their influencer live selling features.
- 规模较小、体量都较小，没有统一的一站式体验的直播购物平台
- Smaller in size and volume. No integrated one-stop live selling platforms

中国 China

新商业模式：电子商务 + 宣传促销 + 导购卖货 + （娱乐互动）

New business model: e-commerce + marketing and promotion + guided shopping + (entertainment and interactions)



图片来自网络

Courtesy of the Internet

中国法律、法规政策

China's acts, regulations, and policies

新兴业态，法律关系复杂，电子商务、直播、营销广告交叉与关联。

An emerging industry with complex legal relationships: e-commerce, live streaming, intertwined with marketing and advertising.

早期法律：《电子商务法》、《广告法》、《合同法》、《产品质量法》《反不正当竞争法》《网络安全法》，《商标法》等的规定。

Early acts: E-Commerce Law, Advertising Law, Contract Law, Product Quality Law, Cybersecurity Law, Trademark Law...

近几年最高法、市场监管总局、网信办等部门陆续出台相关规定，主要包括：

In recent years, the Supreme People's Court, the State Administration for Market Regulation, the Cyberspace Administration, etc., have issued a series of regulations, including:

- 《国家广播电视总局关于加强网络秀场直播和电商直播管理的通知》（广电发〔2020〕78号，2020年11月23日发布）
- Notice of the State Radio and Television Administration on Strengthening the Management of Online Live Shows and E-commerce Live Streams (No.78 [2020], November 23, 2020)
- 国家互联网信息办公室关于《互联网直播营销信息内容服务管理规定》（征求意见稿）（2020年11月13日）
- The Cyberspace Administration of China on the Provisions on Managing Information Services for Online Live Marketing (Draft for Public Comments) (November 13, 2020)
- 《市场监管总局关于加强网络直播营销活动监管的指导意见》（2020年11月06日）
- Guidelines of the Administration for Market Regulation on Strengthening the Regulation of Online Live Marketing (November 6, 2020)
- 市场监管总局关于《网络交易监督管理办法（征求意见稿）》（2020年10月20日）
- The Administration for Market Regulation on Guidelines for Supervising and Managing Online Transactions (Draft for Public Comments) (October 20, 2020)
- 《网络直播营销行为规范》（2020年7月1日施行，中国广告协会制定和发布，非强制性规定）
- Online Live Marketing Code of Conduct (Effective on July 1, 2020, developed and issued by the China Advertising Association, nonmandatory)
- 《网络信息内容生态治理规定》（2020年3月1日生效，国家互联网信息办公室令第5号）
- Provisions on Governing the Online Information and Content Ecosystem (Effective on March 1, 2020, Order No.5 of the Cyberspace Administration of China)
- 《互联网直播服务管理规定》（2016年12月1日生效，国家互联网信息办公室）
- Provisions on Managing Online Live Streaming Services (Effective on December 1, 2016, Cyberspace Administration of China)
- 《最高人民法院关于涉网络知识产权侵权纠纷几个法律适用问题的批复》（法释〔2020〕9号，自2020年9月14日起施行）
- Official Reply of the Supreme People's Court on Several Issues Concerning the Application of Law to Disputes over Internet-Related IPR Infringement (No.9 [2020], effective on September 14, 2020)
- 《最高人民法院关于依法加大知识产权侵权行为惩治力度的意见》（法发〔2020〕33号，自2020年9月14日起施行）
- Opinions of the Supreme People's Court on Enhanced Punishments for Infringements of Intellectual Property Rights (No.33 [2020], effective on September 14, 2020)
- 《最高人民法院关于审理涉电子商务平台知识产权民事案件的指导意见》（法发〔2020〕32号，自2020年9月10日起施行）
- Guiding Opinions of the Supreme People's Court on Civil Trials of Intellectual Property Cases Involving E-Commerce Platforms (No.32 [2020], effective on September 10, 2020)

法律主体定义

Definitions of Legal Entities

- 商家：销售商品或者提供服务的商业主体。
- Merchants: business entities that sell products or provide services
- 主播：指在网络直播营销活动中与用户直接互动交流的人员
- Streamers: people who directly interact with users in online live selling events
 - 身份、法律关系复杂：店铺内部员工主播、外部主播
 - Complex identities and legal relationships: internal vs. external streamers
雇佣关系、服务、居间合同关系
Employees | service providers | intermediaries
- 平台（网络直播营销平台经营者）：提供直播技术服务的各类社会营销平台：电商平台、内容平台、社交平台等
- Platforms (operators of online live selling platforms): online marketing platforms with live streaming features: e-commerce sites, content platforms, social media...
- 主播服务机构（网络直播营销主播服务机构，是指培育主播并为其开展网络直播营销活动提供服务的专门机构(如MCN机构等)）。
- Streamer service providers: specialized agencies that produce streamers and help them with online live selling, such as MCNs
- 用户：指使用互联网直播信息内容服务购买商品或者服务的组织或者个人，即网络直播服务的最终用户
- Users: the end users of online streaming services—organizations or individuals that purchase products or services based on online live streams.

监管部门 Regulators

- 国家（地方）网信部门负责统筹协调全国（本行政区域内）网络信息内容服务和相关监督管理工作，（地方）各有关主管部门依据各自职责做好网络信息内容服务的监督管理工作。 Cybersecurity Administrations at the national and local levels are responsible for coordinating online information and content services, and the supervision and management thereof. Competent authorities at the local level shall supervise and manage the above services in line with their responsibilities.
- 市场监督管理局
- Administrations for Market Regulation
- 国家广电总局
- National Radio and Television Administration
- 国家药品监督管理局
- National Medical Products Administration
- 行业协会（广告协会等）
- Industrial associations, including advertising associations



Outline



网络直播营销普遍问题及知识产权问题
General problems and IPR-related issues

网络直播营销中的知识产权合规及案例
IPR compliance and case study

网络直播营销中的合规挑战与建议
Compliance challenges and suggestions

网络直播营销涉及的普遍性规范问题

General compliance issues

- 知识产权保护
- IPR protection
- 反对虚假宣传、违法广告和不正当竞争
- False or unlawful advertising, and unfair competition
- 合法、诚信、健康、向上。
- Legal, honest, healthy, and positive.
- 不为违法失德艺人提供公开出境发声机会，防范遏制炫富拜金、低俗媚俗等不良风气
- Banning artists with legal or ethical violations; discouraging show-offs / money worship behaviors and low, vulgar and kitschy content
- 消费者的知情权和选择权等合法权益
- Consumers' legal rights and interests, including the right to be informed and the right to choose
- 数据安全合规，依法履行网络安全与个人信息保护等方面的义务
- Data security compliance: fulfilling cybersecurity and privacy protection obligations
- 合同契约，各主体订立相关合同明确各自权利义务
- Contracts and agreements: all legal entities shall clearly define each other's rights and obligations with contracts

知识产权问题

IPR issues

I. 产品自身引发问题

I. Product issues

1. 在电子商务平台上涉嫌侵犯知识产权的商品：

1. Products with alleged IPR infringement on e-commerce platforms:

(1) 自身销售商品（“自营商品”）

(1) First-party products (1P)

(2) 商家销售的商品（“他营商品”）

(2) Third-party products (3P)

- 自营商品：审核较为严格；知识产权侵权少；平台承担作为销售者的侵权责任明确，争议较少。
- 1P products: stricter reviews; few IPR violations; fewer disputes as platforms' liabilities as sellers are well-defined.
- 他营商品：平台对商家入驻资质审核；但平台对信息展示、交易过程等环节控制较为薄弱，知识产权侵权的频率明显高于自营商品
- 3P products: platforms review vendors' credentials before their participation, albeit with less control over listings and transactions... IPR infringements happen significantly more often than 1P products.

2. 主要涉及商标、专利（实用新型、外观）、著作权侵权

2. Mainly trademark, patent (utility and design), and copyright infringements

知识产权问题

IPR issues

II. 侵权人（销售方）的认定

II. Determination of the infringing party (seller)

1. 主播是否销售方

1. Is the streamer also the seller?

(1) 商铺直播：内部员工、销售人员，职务行为；

(1) Live streaming by merchants: employees, hired sales representatives – act of duty;

(2) 外部主播（达人、网红、明星、KOL等）：服务协议、代言；

(2) Third-party streamers (influencers, celebrities, KOLs...): service agreement and product endorsement;

- 是否为主播的平台账号自营
- Is it a 1P product of the streaming platform?
- 主播直播（商铺直播例外），点击直播平台上的链接跳转至电商经营者网页完成购物，网络购物合同的双方：电商经营者和消费者。主播不承担直接违约责任。
- In live sales by third-party streamers, where the purchase is made by clicking the link on the streaming platform which redirects to the e-commerce site, the parties of such online purchase contracts are: the e-commerce site and the consumer. The streamers are not directly liable.
- 明知欺骗、误导消费者的虚假广告，仍参与发布或者代言的，可能与广告主的侵权行为承担连带责任。
- If the streamers willingly participate in misleading or false advertising, they might be jointly liable with the advertisers.

2. 电商平台不公示店铺注册主体时，可以推定电商平台自营实施销售行为；

2. When an e-commerce site does not show the store registrant, such site shall be assumed as the 1P seller.

3. 直播平台兼具销售平台功能时，以销售平台认定；

3. If a streaming platform has concurrently the features of a selling platform, such platform shall be determined as the seller.

4. 平台代为收取销售款，将直接收取销售款的主体认定为销售主体；

4. If a platform collects purchase payments on behalf of other entities, the entities that directly collect such payments shall be determined as the sellers.

知识产权问题 IPR Infringement

III. 侵权责任的认定 Determination of Liability

1. 单方侵权 Single-party infringement

- 店铺、货物提供方 The online store; the provider of infringing products
- 侵权属性具有隐蔽性，假冒商标或著作权或外观设计，主播经合理注意义务仍不能辨识带货产品的侵权性，不应认定帮助侵权。The streamer should not be held liable as a contributory infringer if it was unable to identify, with reasonable diligence, *disguised infringement* of trademarks, copyrights or designs

2. 共同侵权 Joint infringement by the platform and the streamer

- 主播明知、应知；The streamer had knowledge of or ought to have known the infringement
- 平台参与销售、代收款项，按照销售额、利润分成等 The platform was engaged in product sale, payment collection, profit sharing, etc.
- 平台明知应知但未采取必要措施防止侵权，共同侵权 The platform should be held liable for not taking necessary measures to prevent infringement if it had knowledge of or ought to have known the infringement
- 直播平台、电商平台性能重叠发生混同，情况较为复杂 Live streaming and e-commerce platforms have overlapping operations which complicate matters

知识产权问题 IPR Infringement

IV. 《电子商务法》等框架下的平台知识产权保护义务：IPR protection obligations of e-commerce platforms under the E-Commerce Law

1) 知识产权权利人认为其知识产权受到侵害的，有权书面形式通知平台采取删除、屏蔽、断开链接、终止交易和服务等必要措施，并提供初步侵权证据（**适格通知**）：IPR holders have the right to notify e-commerce platforms, in writing, of taking such necessary measures as removing, blocking and disconnecting access, and terminating transactions or services, if any infringement upon their IPR(s) is perceived. Such notice should include prima facie evidence of the infringement (**proper notice**):

- 权利人姓名（名称）、联系方式和地址等信息 IPR holders' name, contact information, address, etc.
- 足以准确定位被控侵权交易信息的具体信息 Details sufficient to accurately locate the alleged infringing listing / transaction
- 证明权利归属、侵权比对、侵权成立等相关情况的证据材料，通知涉及专利权的，电子商务平台经营者可以要求知识产权权利人提交技术特征或者设计特征对比的说明、实用新型或者外观设计专利权评价报告等材料。Evidence that proves the ownership of IP rights, the similarity between the allegedly infringing goods or services and those of right holders, the constitution of infringement, etc. If the notification involves patent rights, the e-commerce platform may require that IPR holders submit a comparison of technical or design features, or an evaluation report of utility model or design patent, etc.
- 权利人对通知真实性负责的承诺 IPR holder's guarantee of the authenticity of the notification

2) 平台接到通知后，应当及时将该通知转送商家，并根据构成侵权的初步证据和服务类型采取必要措施；未及时采取必要措施的，对损害的扩大部分与商家承担连带责任。且，平台知道或者应当知道商家侵害知识产权的，应当根据权利的性质、侵权的具体情形和技术条件，以及构成侵权的初步证据、服务类型，及时采取必要措施。E-commerce platforms shall forward such notice to merchants that sell the allegedly infringing goods or services on the platforms upon receipt and take necessary measures on the basis of prima facie evidence and the type of services. E-commerce platforms and merchants shall be jointly and severally liable for the additional damage caused due to their failure of taking necessary measures in time. If platforms had knowledge of or ought to have known the infringement by merchants, they should take necessary measures in time based on the nature of the IP rights, the specific circumstances and technical conditions of the infringement, as well as the prima facie evidence and the type of services.

- 平台对商家侵权商品或服务采取的措施：Measures taken by e-commerce platforms regarding the allegedly infringing goods or services provided by merchants:
 - 暂时的措施：删除、屏蔽、断开链接等下架措施。Temporary measures: removing, blocking and disconnecting access
 - 永久的措施；如遇到严重的侵权情况（多次侵权、故意侵权的），可以采取终止交易和服务的措施，也就是平台与商家解除合同。Permanent measures: terminating transactions and services in case of serious infringement (repeated / intentional infringement), which means the e-commerce platform terminates its contract with the merchant

知识产权问题 IPR Infringement

IV. 《电子商务法》等框架下的平台知识产权保护义务： IPR protection obligations of e-commerce platforms under the E-Commerce Law

3) 商家收到通知后，提交不侵权声明及初步证据（**适格的反通知**）； Upon receipt of the forwarded notice, merchants may submit a statement of non-infringement and prima facie evidence of non-infringement to e-commerce platforms (**proper counter-notice**):

- 商家的真实姓名（名称）、联系方式和地址 Merchants' name, contact information, address, etc.
- 足以准确定位交易信息的具体信息 Details sufficient to accurately locate the alleged infringing transaction
- 不构成侵权的证明材料：权属瑕疵、侵权不成立、独立抗辩 Supporting evidence of non-infringement: ownership defects, unfounded infringement, independent defense
- 商家对反通知真实性负责的承诺 Merchants' guarantee of the authenticity of the counter-notification

4) 平台将该声明转送给权利人，告知权利人其投诉、起诉的权利 Upon receipt of such statement, e-commerce platforms shall forward it to right holders and inform them of the right to file a complaint or lawsuit

5) 权利人15日内未投诉或起诉的，平台终止所采取的措施。因办理公证、认证手续等权利人无法控制的特殊情况导致的延迟，不计入上述期限，但该期限最长不超过20个工作日（《关于涉网络知识产权侵权纠纷几个法律适用问题的批复》）。 If right holders do not file a complaint or lawsuit within 15 days upon receiving the forwarded statement, e-commerce platforms may stop the measures it has taken. Delays caused by special circumstances beyond the control of right holders, such as notarization and authentication procedures, are not included in the 15-day period, but the total period may not exceed 20 working days (*Reply to Several Issues Concerning the Application of Law in Online Intellectual Property Infringement Disputes*)

- 《电子商务法》第43条：15日； Article 43 of the E-Commerce Law of the People's Republic of China: 15 days
- 《中美经贸协议》第1.13条：20个工作日； Article 1.13 of the Economic and Trade Agreement Between the United States of America and the People's Republic Of China: 20 working days
- 《民法典》第1196条：合理期限； Article 1196 of the Civil Code of the People's Republic of China: within reasonable period of time

知识产权问题 IPR Infringement

V. 直播带货过程中的其他知识产权问题 IPR infringement during live-streaming sale activities

- 直播间布置违法使用他人的知名包装装潢、装饰物等； Illegal use of other's well-known packaging, decoration, ornament, etc. in the live streaming studio;
- 直播过程中使用的背景音乐、视频剪辑、照片等他人拥有著作权的作品； Unauthorized use of other's copyrighted works such as background music, video clips, images, etc. during live streaming;
- 直播过程中使用他人的肖像虚拟头像等 Unauthorized use of other's portraits, avatars, etc. during live streaming
- 直播过程中不正当竞争： Unfair competition during live-streaming sale activities:
 - 虚假宣传、夸大事实、引人误导； False / misleading advertising; exaggeration;
 - 有奖销售，没有有奖销售规则并对外公布等 Prize-giving sales without specified rules or disclosure thereof

知识产权案例： IPR Infringement Case Study (1):



案例1： 主播在快手直播带货售山寨机
Streamer selling knock-off iPhones on Kuaishou

法院： 构成欺诈 退一赔三

Court ruled against the defendant in fraud allegation and awarded the plaintiff refund and compensation (3x the value)

王某某诉 许某某、北京快手科技有限公司 (2020/09/22) Wang v. Xu & Kuaishou (2020/09/22)

- 王某某： 买方 Wang: buyer
- 许某某： 主播 Xu: streamer
- 快手平台： 直播平台 Kuaishou: live streaming platform
- 微信： 交易平台 WeChat: payment platform
- 产品： 二手苹果手机（山寨机） Product: used iPhone (knock-off)

诉求： 网络购物合同纠纷， 欺诈， 退还购机款4000元， 并赔偿12000元及合理开支； 快手连带责任

The plaintiff claimed online shopping scam, and demanded refund (¥4,000) + compensation (¥12,000), and Kuaishou be held jointly and severally liable

北京互联网法院： 2020/7/8公开审理 Beijing Internet Court: public hearing on Jul 8, 2020

王某某 vs. 许某某、北京快手科技有限公司 (2020/09/22) Wang v. Xu & Kuaishou (2020/09/22)

2020/9/21 一审判决：欺诈，解除合同，快手不承担责任

2020/9/21 court decision in the first instance: constitution of fraud; termination of contract; Kuaishou not liable for fraud

主要问题： Key issues considered:

- (1) 主播是否构成经营者; Whether the streamer constitutes operator
- (2) 平台身份; The role of the platform
- (3) 快手是否采取必要措施; 是否尽到义务 Whether Kuaishou took necessary measures and fulfilled its obligations
- (4) 快手直播规范公示 Kuaishou's guidelines for live streaming activities



知识产权案例：IPR Infringement Case Study (2):

案例2：被投诉商家申诉证据不足，电商平台是否应该机械执行法律规定，在权利人没有采取起诉或行政投诉的情况下，无条件恢复链接？ Should the e-commerce platform unconditionally restore access in accordance with relevant regulations, where the allegedly infringing merchant appeals on the grounds of insufficient evidence, and the right holder does not proceed with legal or administrative actions?

全国首例电商平台涉“反通知义务”网络侵权责任纠纷上诉案 The first appeal case pertaining to an e-commerce platform's counter-notification obligation in an online infringement dispute

- 一审法院认为淘宝公司处罚不当、未及时终止处罚措施，对损失的扩大亦负有责任。判处淘宝公司共同赔偿被投诉商家经济损失5万元，承担40%的责任。被投诉商家和淘宝公司均不服，上诉至上海一中院。 The first instance court found Taobao taking inappropriate punitive measures against the merchant, failing to terminate said measures in time, and partially liable for additional loss caused. For its part, Taobao was to pay the merchant RMB50,000 in compensation (40% of the liability). Neither the merchant or Taobao was satisfied with the ruling and appealed to a higher court (Shanghai No. 1 Intermediate People's Court).
- **专家认为：淘宝公司并未及时终止处罚措施，对损失的扩大亦负有责任。** Legal expert commentary: Taobao did not terminate the punitive measures in time and should be liable for additional losses
- **2020/8/18：二审开庭，目前未宣判** The second instance trial began on August 18, 2020, currently pending court decision



知识产权合规挑战 IPR Compliance Challenges

挑战： Challenges:

知识产权侵权性质无变化、基本原则也无变化；但案件事实认定难度加大、法律法规的不一致： The nature and principles regarding IP infringement remain unchanged. However, the difficulty in fact-finding has increased, and legal inconsistency abounds:

- 1) **交易环节增多；** More steps in the transaction;
- 2) **交易的隐藏性、互联网性质；** Lack of transparency in online transactions;
- 3) **交易主体的增多、法律主体关系的交叉性；** More parties (with complex relations) to the transaction;
- 4) **主体身份的混同、竞合** A web of mixed-up legal roles in “coopetition”
 - **主播身份** The role of the streamer
 - **平台身份** The role of the platform
- 5) **主管部门增多** Increased number of competent authorities

知识产权合规挑战和建议：平台 IPR Compliance Challenges & Suggestions: Platforms

建立知识产权保护的闭环，优化知识产权侵权投诉处理流程 A closed loop system for IP protection and an improved processing mechanism for infringement complaints

- 1) 网络秀场直播或电商直播的平台管理-登记备案：2020/11/30日前全国网络视听平台信息管理系统
Management platform for online live shows or e-commerce live streaming activities (registration and filing):
National Information Management System of Online Audio-Visual Platforms (Launch date: 2020/11/30)
- 2) 严格审查商家入驻资质及产品服务的行政许可 Scrutiny of merchants' / applicants' qualifications and licenses for marketing of products & services
- 3) 对直播商家和个人资质审查和实名认证，加强活动合规性审查； Qualification review and real name verification of merchants and individuals; strengthened compliance review of live streaming events
- 4) 建立完善的投诉和处理机制，并在与商家签订的服务条款中明确平台对于涉嫌侵权行为的处理流程及权限 Improved complaint and response system; clearly defined process of and jurisdiction over suspected infringement in the platform's Terms of Service
- 5) 承担必要的、合理的知识产权合法注意义务，权利人或平台也应当主动、及时采取必要措施。该合法注意义务应根据其所属行业提供服务的性质、方式、内容以及通常应具备的信息管理能力和经营能力等综合判定。 The platform (or the right holder) should take the initiative to fulfill its necessary, reasonable legal obligations of identifying IP infringement, and take necessary measures in time. Such obligations should be determined by the nature, content, and type of services provided by the platform, and its data management and operational capabilities



知识产权合规建议：平台 IPR Compliance Suggestions: Platforms

建立知识产权保护的闭环，优化知识产权侵权投诉处理流程 A closed loop system for IP protection and an improved processing mechanism for infringement complaints

6) 在明知和应知情情形下，应当及时采取措施，否则会被认定有过错。明知是实际知道侵权行为存在，应知是按照利益平衡原则和合理原则要求在某些情况下应当注意到侵权行为的存在。 If the platform had knowledge of or ought to have known the infringement, it should take necessary measures in time or be deemed at fault. “Had knowledge of” means the platform was aware of the infringement, and “ought to have known” means, given the circumstances, the platform ought to have known the infringement, if *the balance of interests doctrine* and *the reasonableness principle* were duly followed.

- 被控侵权交易信息位于网站首页、栏目首页或其他明显可见位置 The alleged listing was conspicuously displayed (on the platform’s homepage, subpages, etc.)
- 平台主动对被控侵权交易信息进行了编辑、选择、整理、排名、推荐或修改 The platform chose to edit, select, sort, rank, recommend or otherwise modify the alleged infringing listing
- 知名商品或服务已明显不合理的价格出售足以使人相信侵权可能性比较大 Unreasonably priced well-known goods or services should have raised a red flag
- 权利人的通知足以使人相信侵权的可能性较大 Right holders’ notice should have raised a red flag
- 平台针对相同商家就同一权利的重复侵权行为未采取相应的合理措施 The platform failed to take reasonable measures against a merchant who had repeatedly infringed on the same IPR
- 被侵权交易信息中存在商家的侵权自认 Infringement by the merchant’s own admission in the listing
- 平台从被控侵权交易信息的网络传播或被控侵权交易行为中直接获得经济利益 The platform received direct financial benefits by promoting the alleged listing or from the transaction thereof

7) 对于恶意投诉的，造成商家损失的，可由商家起诉加倍索赔 For malicious complaints that cause damage to the merchant, a lawsuit may be filed for double recovery

知识产权合规建议：商家 IPR Compliance Suggestions: Merchants

经营资质 Operation credentials

- 相应的资质、许可，并亮证亮照经营。 Qualifications, permits and licenses (on display) for operation.
- 药品、医疗器械、保健食品、特殊医学用途配方食品等特殊商品时，相应的资质或行政许可。 Qualifications or administrative licenses required for special products such as medicines, medical devices, dietary supplements and foods for special medical purposes (FSMP).

基本要求 Basic requirements

- 入驻网络直播营销平台，提供真实有效的主体身份、联系方式、相关行政许可等信息。 Provision of authentic and valid ID, contact information, administrative permits, etc. as pre-condition for joining the live streaming platform.

商品和服务品质保证 Quality assurance

- 合法合规，非违禁商品或服务； Legally compliant; free of prohibited goods or services;
- 符合相关法律法规对商品质量和使用安全的要求，符合使用性能、宣称采用标准、允诺等，不存在危及人身或财产安全的不合理风险。 Compliant with regulations on product quality and safety; consistent with performance requirements, declared standards and promises; free of unreasonable risk to personal or property safety.

知识产权合规建议：商家 IPR Compliance Suggestions: Merchants

- **品牌规范和知识产权保护：**按照网络直播营销平台规则要求提供真实、合法、有效的商标注册证明、品牌特许经营证明、品牌销售授权证明等文件。**Brand guidelines and IP protection:** provision of authentic, legal and valid trademark certificates, franchise licenses, marketing authorization letter, etc. in accordance with the requirements of the live streaming platform.
- 合法、合理维权，遵守平台投诉规则，不滥用权利 Reasonable acts of IPR protection in compliance with the platform rules (no abusive use of complaints)
- **营销规范：**信息，应当真实、科学、准确，不得进行虚假宣传，欺骗、误导消费者。涉及产品、服务标准的，应当与相关国家标准、行业团体标准相一致，保障消费者的知情权。广告法规定。**Marketing rules:** authentic, evidence-based and accurate information; free of false / misleading advertising; product and service criteria consistent with national and industry standards; protecting the consumer's right to be informed; compliant with the Advertising Law.
- **与主播签协议：**主播资质审查、信誉审查、合同约定权利义务明确，要求及限制 **Contractual agreement with streamers:** examining the streamer's qualifications and credibility; clearly defined contractual rights and obligations, requirements and restrictions
- **践约与售后服务：**保障消费者合法权益，积极履行自身作出的承诺，依法提供退换货保障等售后服务。**fulfillment and after-sales service:** protecting consumers' rights and interests; fulfilling promises; providing after-sales service as legally required (returns, refunds and exchanges)

知识产权合规建议：主播 IPR Compliance Suggestions: Streamers

- **明确合同关系、权利义务** Clearly defined contractual relations, rights and obligations
- **熟悉产品、审慎选品、资质证照审查** Familiarity with products; prudent selection of products; review of qualifications and licenses
- **加强直播间管理，符合法律法规和国家有关规定，不得含有违法和不良信息，不得以暗示等方式误导用户（意见稿）：** Enhanced management of live streaming studios; legal compliance; free of illegal or harmful information; free of misleading suggestions (ref. Draft for Public Comments):
 - 直播间运营者账号名称、头像、简介； The account name, avatar and profile of the live streaming studio operator;
 - 直播间标题、封面； The title and cover picture of the live streaming studio;
 - 直播间布景； The stage settings of the live streaming studio;
 - 直播营销人员着装、形象； The dress code and presence of the streamer.
 - 其他易引起用户关注的重点环节。 Other details that might be noticed by the audience.
- **信息管理：**直播间运营者、直播营销人员应当依据平台服务协议做好语音和视频连线、评论、弹幕等互动内容的实时管理，但不得以删除、屏蔽相关不利评价等方式欺骗、误导用户。（意见稿） **Information management:** The live streaming studio operator and staff *should*, based on the platform terms of service, curate audial/visual/textual interactions in real time. But they *may not* deceive or mislead users by deleting or blocking unfavorable reviews (ref. Draft for Public Comments).
- **肖像虚拟使用：**使用其他人肖像作为虚拟形象，应当征得肖像权人同意，不得利用信息技术手段伪造等方式侵害他人的肖像权。对自然人声音的保护，参照适用前述规定。（意见稿） **Use of portraits:** Use of other's portrait as avatar only with right owner's consent; no infringement on other's portrait right by (digital) photo forgery; protection of the voice of natural persons (ibid.) (ref. Draft for Public Comments).

知识产权合规建议：主播 IPR Compliance Suggestions: Streamers

- **宣传规范（符合广告法的规定） Marketing practices (the Advertising Law)**
 - 主播发布的商品、服务内容与商品、服务链接应当保持一致，且实时有效。 The goods and services promoted by the streamer should be consistent with the content in the linked listings
 - 主播在直播活动中，应当保证信息真实、合法，不得对商品和服务进行虚假宣传，欺骗、误导消费者 The streamer should only provide authentic and legally compliant information during live events; no false / misleading advertising
- **消费者权益保护 Protection of consumer's rights and interests**
 - 重要消费信息提示：法律、法规规定需要明示的直接关系消费者生命安全的重要消费信息，应当对用户进行必要、清晰的消费提示 Display of important information: Necessary and clear display, in line with legal requirements, of important information directly related to consumer safety
 - 消费保障：主播在直播活动中做出的承诺，应当遵守法律法规，遵循平台规则，符合其与商家的约定，保障消费者合法权益 Consumer protection: Promises made by the streamer during live events should be compliant with legal requirements, platform rules and contractual obligations, and consumer's legal rights and interests should be protected

中国广告协会：网络直播营销行为规范

China Advertising Association: Online Live Marketing Code of Conduct

自律性文件：2020/7/1施行

Effective July 1, 2020, Self-Disciplinary Guidelines

中国广告协会：网络直播营销行为规范 China Advertising Association: Online Live Marketing Code of Conduct

自律性文件：2020/7/1施行
Effective July 1, 2020, Self-Disciplinary Guidelines

有效的合规借鉴：Key compliance rules:

1. 电商直播营销活动内容规范 Code of conduct for live streaming e-commerce activities
2. 对商家的行为规范 Code of conduct for merchants
3. 对主播的行为规范 Code of conduct for streamers
4. 对网络直播营销平台经营者的行为规范 Code of conduct for live streaming platforms
5. 对主播服务机构的规范 Code of conduct for streamer service providers
6. 参与用户的行为规范 Code of conduct for users



首页 关于协会 热点资讯 行业服务 自律规则 品牌活动 国际

全网热点新闻 搜热点

搜本站

中国广告协会《网络直播营销行为规范》

2020-07-02 12:42:25 来源: 中国广告协会

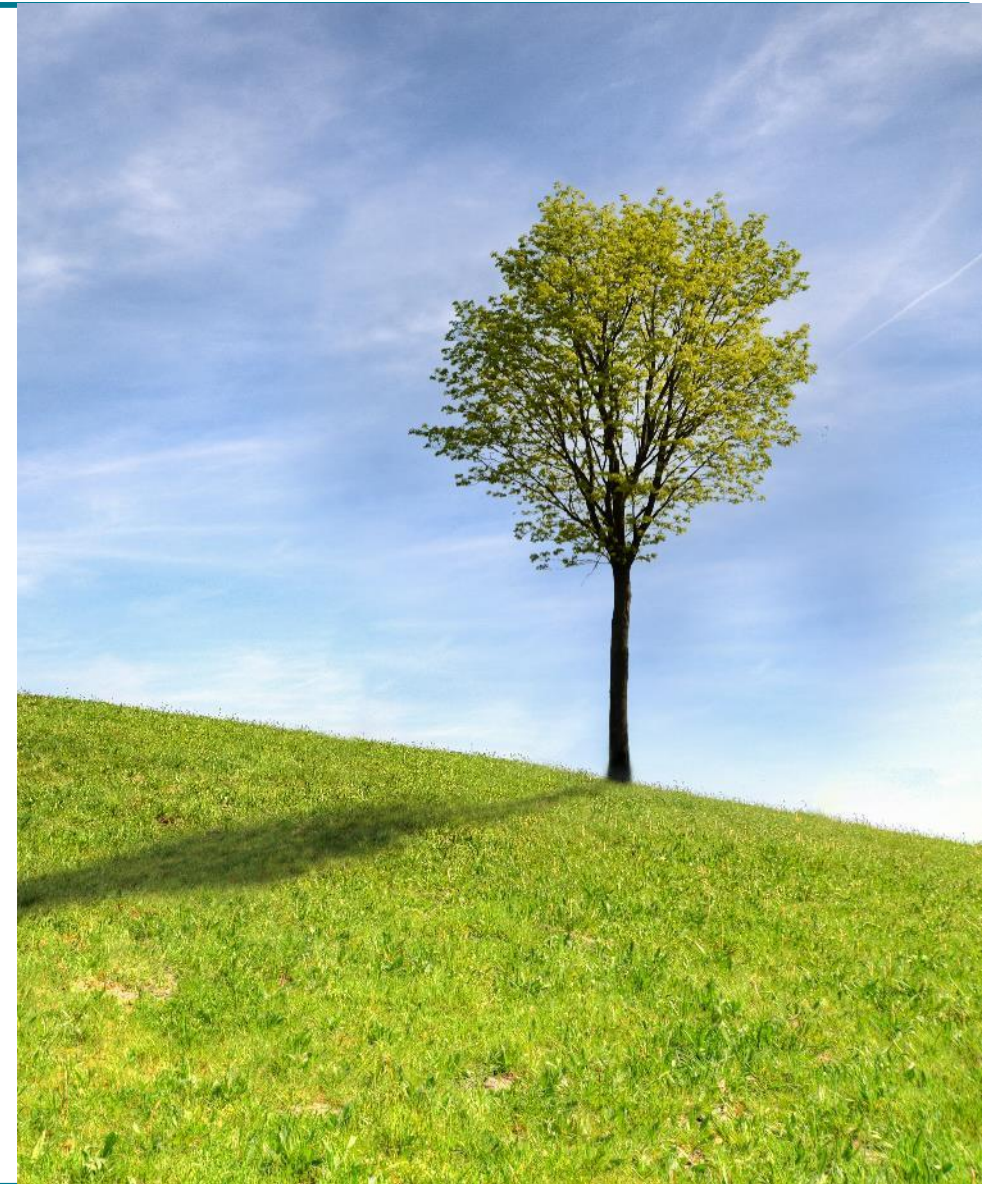
前言

网络直播营销作为一种社会化营销方式，对促进消费扩容提质、形成强大国内市场起到了积极作用。规范网络直播营销活动，促进其健康发展，需要在现行法律框架下，构建包括政府监管、主体自治、行业自律、社会监督在内的社会共治格局。网络直播营销活动的诸多要素带有明显广告活动功能和特点，广告活动的各类主体也积极参与投入网络直播营销活动，是网络直播营销新业态发展的重要力量。中国广告协会密切关注广告活动的变化以及网络直播营销新业态的发展，经过充分调研，征求意见，并得到国家市场监督管理总局有关单位、中国消费者协会的大力支持，制定了网络直播营销活动行为规范。中国广告协会将不断倡导自律规范先行，依法加强行业自律，提供自律公共服务和引导市场主体自治，推进行业诚信建设。

本规范侧重为从事网络直播营销活动的各类主体提供行为指南。非直播网络视频营销，属于广告活动的，应当符合《中华人民共和国广告法》规定；属于其他营销活动的，可参照本规范进行自律。

期望 Looking ahead...

- **监管方式 Regulatory approach**
包容审慎、创新监管理念，积极探索适应新业态特点、有利于各类市场主体公平竞争 Inclusive, prudent, and innovative; up-to-date with business innovations; instrumental in creating a level playing field
- **法律主体合法合规 Regulatory compliance**
- 健康发展，营造公平有序的竞争环境、安全放心的消费环境 Conducive to sustainable development, fair competition, and safe shopping experiences
- **依法查处 Regulatory enforcement**
侵犯消费者合法权益、侵犯知识产权、破坏市场秩序等违法行为
Targeting illegal activities that infringe upon consumer rights and IPRs, or cause market disruption





Sunny Su

ssu@lushenglawyers.com

ROUSE

LUSHENG

LAW FIRM

路盛律师事务所

Member of the Rouse Network

Thank you!