



 IPKey

CHINA

**New Development of Online
Counterfeiting and Piracy in China:
Legislation, Cases and Practice**

STUDY

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TABLE OF CONTENTS

TABLE OF CONTENTS	I
ABBREVIATION.....	III
ABSTRACT	1
EXECUTIVE SUMMARY	2
I. RESEARCH BACKGROUND AND OBJECTIVES	2
II. RELEVANT LEGISLATION AND REGULATIONS ON ONLINE COUNTERFEITING AND PIRACY	3
III. PLATFORM NEW INITIATIVES AND CHALLENGES	3
IV. RELEVANT CHINESE COURT DECISIONS	4
V. FEEDBACK FROM EU RIGHTS OWNERS.....	4
VI. KEY TAKEAWAYS.....	5
VII. CONCLUSION	5
METHODOLOGY	7
CHAPTER 1 RELEVANT LEGISLATION AND REGULATIONS ON ONLINE COUNTERFEITING AND PIRACY	9
I. Development on Legislations, Judicial Interpretations and Regulations in China	9
1. Recap of E-Commerce Law	9
2. The Phase One Agreement.....	10
3. Civil Code	11
4. SPC Judicial Interpretations	11
5. SAMR Administrative Regulations Regarding Online Transactions	15
6. Municipal level administrative rules and guidelines	17
7. National standard - Intellectual Property Protection and Management for E-commerce Platforms (GB/T 39550-2020)	18
8. Industry rules and codes of conduct.....	18
9. Research reports	19
II. EU Legislation and Practice in Comparison.....	20
1. Legislative developments.....	20
2. Implementation of MoUs.....	21
CHAPTER 2 PLATFORM NEW INITIATIVES AND CHALLENGES.....	23
I. Major Platforms' New Initiatives and Progress.....	23
II. Platform IP Protection and Complaint Rules	29
III. New Challenges and Rules for Live-Streaming Platforms.....	29
CHAPTER 3 RELEVANT CHINESE COURT DECISIONS.....	31
CHAPTER 4 FEEDBACK FROM EU RIGHTS OWNERS	38
I. Overall Observation	38
1. Changes of platform governance rules and practice after the E-Commerce Law	38
2. Challenges and difficulties	38
3. Recommendations for platform initiatives	39
II. Complaint Channels, Materials and Processing	39

1. Complaint channels	39
2. Requirements on complaint materials and standard of review	40
3. Non-infringement counter notice	41
4. Information disclosure and sharing	41
III. 2019-2020 Trends and Data	41
IV. MoUs	42
CHAPTER V KEY TAKEAWAYS	43
1. Legislative development	43
2. Proactive and preventive measures taken by platforms	43
3. Platform rules	43
4. Stakeholder collaboration	44
5. Platform liabilities	44
6. MoUs	44
CONCLUSION	46
ANNEXES	47
I. LIST OF CITED LEGAL DOCUMENTS	47
II. LIST OF CASES REVIEWED	47
III. BILINGUAL TEXTS OF LEGAL DOCUMENTS	47
IV. INTERVIEW OUTLINES	47

ABBREVIATION

AACA	Alibaba Anti-Counterfeiting Alliance
AI	Artificial Intelligence
CNIPA	China National Intellectual Property Administration
EC	European Commission
EU	European Union
IPR	Intellectual Property Right
MoU	Memoranda of Undertaking
SAMR	State Administration for Market Regulation
SPC	The Supreme People's Court
SMEs	Small and Medium Enterprises
QBPC	Quality Brands Protection Committee China Association of Enterprises with Foreign Investment

ABSTRACT

China's e-commerce market is one of the largest and most robust in the world. The booming of live streaming and social media further complicates the e-commerce landscape. The technology development and complex dynamics brings challenging legal issues for all stakeholders. This study aims to identify and assess the changes in the legal framework of China after *E-Commerce Law* and its effects on dealing with online counterfeiting and piracy, by analyzing the legislative development, platform voluntary measures, latest cases, and right owner feedbacks.

EXECUTIVE SUMMARY

I. RESEARCH BACKGROUND AND OBJECTIVES

The global e-commerce powered technology upgrades is a huge contribution to global digital economy. China's e-commerce market is one of the largest and most robust in the world. In 2019, China's e-commerce transactions hit 34.81 trillion yuan (about 4.28 trillion euros). China e-commerce sales surpassed the combined total of Europe and the United States. Today, China has the largest digital buyer population in the world, amounting to more than 710 million people.¹ The large online population lays the foundation for phenomenal growth of China e-commerce market.

The past two years mark a new turning point for e-commerce in China. During the COVID-19 pandemic, offline retail sales dropped dramatically, and many offline retailers are forced to move online. The booming of live streaming and social media further add to the e-commerce landscape. Social e-commerce platforms as well as live streaming platforms are the new go-to for shopping.

The technology development and dynamics of e-commerce brings challenging issues for market players and policymakers. The *E-Commerce Law* is a milestone and has set up a comprehensive framework of e-commerce governance. It is designed to balance the rights and interests of multiple market players and sustainable development of e-commerce market. However, this law is relatively new and there still exists lack of clarity on implementing rules.

In this context, the study aims to identify and assess the changes in the legal framework of China after E-Commerce Law and its effects on dealing with online counterfeiting and piracy.

On January 15, 2020, China and US have reached *the Economic and Trade Agreement Between China and the U.S. (the "Phase One Agreement")*. The issue of piracy and counterfeiting on E-Commerce Platforms is explicitly addressed. In Section E of the Phase One Agreement, China has made substantive commitments on combating online infringement by providing effective enforcement procedures and impose sanctions to online platforms for repeatedly failing to curb online counterfeiting or piracy. The Phase One Agreement commitments have been implemented into the new legislations, judicial interpretations, etc., and have substantial impacts on current Chinese legislation and its implementation in practice.

This study mainly focuses on the changes in the implementation of the China *E-Commerce law* and related guidelines taking into account the execution of the Phase One Agreement, the relevant implementing guidelines and the actual effects of these on the ground.

After addressing the above aspects, the study also analyzes the voluntary measures, especially the MoU (memoranda of understanding) approach, as an update based on the achievements of the previous studies, namely the "*Lessons from the EU experience with MoU in tackling the online sale of counterfeit good*" ("the Previous Study"). Analysis has to be also done concerning the relevance of its conclusion and recommendations for implementing the MoU approach.

¹ Ma Yihan. "E-commerce in China - statistics & facts". <https://www.statista.com/topics/1007/e-commerce-in-china/>

II. RELEVANT LEGISLATION AND REGULATIONS ON ONLINE COUNTERFEITING AND PIRACY

The *E-Commerce Law* is the first standalone legislation covering various aspects of e-commerce platform operation. It sets the framework of e-commerce governance, but still leaves blanks to fill on the specific requirements. After November 2019, there have been some vibrant developments both in terms of rules and practice. The *Civil Code*, SPC judicial interpretations, and several administrative regulations have come into effect successively to provide more practical guidance for platform operators, right owners, platform vendors as well as administrative authorities and courts. There is also a huge growth in cases involving e-commerce. We will analyze in detail in Chapter 3.

Following the Phase One Agreement, SPC published the two new judicial interpretations, namely *the Guideline on the Trial of IPR Disputes Involving E-commerce Platforms (the "Guideline")*, and *Official Reply on Several Issues Concerning the Application of Law to Online Intellectual Property Infringement Disputes (the "Reply")*. Both judicial interpretations are generally believed to provide effective complement to the implementation of the *E-Commerce Law* in practice by clarifying the specific requirements of take down notices and counter notices, factors to consider in determining bad faith and whether platforms have taken reasonable measure, among others. In particular, the Reply extends 15 days for right owners to file complaint or litigation in the *E-Commerce Law* to a reasonable period but no longer than 20 working days, allowing necessary time for foreign right owners to do notarization and legalization.

In addition, we have observed the promulgation of multiple rules and guidelines by administrative authorities, provincial courts and municipal authorities. These rules are even more specific and practical.

III. PLATFORM NEW INITIATIVES AND CHALLENGES

It should be acknowledged that major e-commerce platforms have continued to bring innovative and proactive measures to tackle online counterfeiting and piracy issues. The positive observations are:

- (1) Big data and AI-based technologies become the necessary foundation to support initiatives across different platforms. Almost all major platforms have exploited screening technologies to block counterfeits from entering the platforms while reducing the necessary costs and manual efforts.
- (2) The social governance structure is forming. When counterfeiting becomes a systemic issue for all right owners and consumers across platforms, MoUs become a common solution to ensure regular communication and collaboration. Almost all platforms have signed MoUs with various stakeholders, including without limitation government authorities, right owners and industry associations. Alibaba takes one step further to launch the Boundless Initiative, engaging the support of general consumers.

We also take note of the following aspects that further improvement may be needed:

- (1) The access channels for right owners to participate in some of the mentioned platform initiatives may not be as visible and transparent as they are supposed to be.
- (2) Manual review is still necessary despite the development of all sorts of screening technologies. Despite the screening technologies, infringers are getting more cunning and sophisticated. There are still a huge number of infringing links that get past the automatic screening. Platforms might still need to ensure sufficient manpower to do manual content review and take necessary actions swiftly.
- (3) It is still challenging to counter counterfeiting and piracy in live streaming or other new business models. No substantially new and effective measures adopted by major live streaming e-commerce platforms have been found for the time being in 2020.
- (4) Very few platforms have rules or policies specially designed for SMEs.

IV. RELEVANT CHINESE COURT DECISIONS

Up to December 31, 2020, there are 122 judgments issued since January 2020 that cited the *E-Commerce Law* and related to IP enforcement. There should be much more cases in which e-commerce platforms got sued as defendants/co-defendants but did not cite specifically the *E-Commerce Law*. In addition, there are 3 cases that implemented *the Guideline* and 1 case that implemented *the Reply*.

Based on the statistical review, trademark and copyright remain as top 2 categories of IP rights, whilst cases involving patents are relatively less due to difficulty in determining on technical issues. Alibaba/Taobao/T-mail is the most often involved platforms, which accounts for nearly 60% of the cases. However, e-commerce platforms are rarely held liable for the IPR infringement. Insufficient notice is one of main reasons for failure in complaint with platforms.

V. FEEDBACK FROM EU RIGHTS OWNERS

Right owners acknowledged that the leading e-commerce platforms usually have an IP complaint system in place already. However, for the live streaming platforms and less developed e-commerce platforms, filing complaints by email is still common. It will generally take longer.

Following the *E-Commerce Law* and various regulations and guidelines, the e-commerce platforms in overall have updated the platform rules to reflect the legal requirements. This is generally positive change because it gives right owners some certainty and consistency. However, right owners reported inconvenient or stringent formality requirements, such as that requirements on proof of right is rigorous and mechanical, and some platforms now require court or administrative decisions as preliminary supporting evidence, which is quite burdensome.

Regarding information disclosure, major platforms do better than others in terms of publicizing the progress of complaints and releasing regular statistics. However, there are no specific rules on what could be provided to right owners, especially due to the increasing concern of data protection. It may help to work out a set of rules on what information can be made available to right owners in the pursuit of suspicious infringing activities, as opposed to what information could only be subpoenaed

by courts. Also, Right owners would appreciate more feedback and report on platform enforcement data.

On forms and types of infringement, right owners agree that infringers get cunninger and better at hiding their traces. Infringers now sometime use the online stores as a front to attract user traffic but direct consumers to do the transaction via social media. In such case, right owners could no longer count on the sales volume and revenue numbers shown on the e-commerce platforms to calculate the damages. Also, freeriding and passing off conducts are growing.

Right owners could not give accurate numbers of complaints and success rates, but majority confirmed the success rate is promising. Two of the interviewees put the approximate success rate at above 90%. However, most successful cases are based on complaints on pure counterfeits. Complaints claiming similar trademarks or patent infringement would have a lower success rate unless court or administrative decisions are provided.

VI. KEY TAKEAWAYS

1. Legislative development: there has been major development in the past two years that fill in the blanks of *E-Commerce Law*, which falls short on implementing rules. While vowing to strengthen IP protection, the current laws and regulations also set restrictions on bad faith complaints and provide injunctive relief for platform vendors.
2. Proactive and preventive measures taken by platforms: it should be acknowledged that major platforms have all adopted proactive and preventive measures and most has been effective. However, rights owners would expect more regular and detailed sharing of statistics and cases from platforms, which could help developing the best practice and understanding how right owners may contribute to improve accuracy and effectiveness of these proactive and preventive measures. Additionally, it is recommended for e-commerce platform operators to increase public exposure of these initiatives and how to participate.
3. Platform rules: right owners acknowledge that platform rules are now more specific than before, while some designs and rules are too specific and even rigid. For right owners with a good complaint track record, it might help to explore a whitelist for these trusted complaint filers and provide expedited complaint channel and process. The rules and measures still need improving targeting complex and emerging forms of counterfeit and piracy.
4. Stakeholder collaboration: stakeholder cooperation and collaboration are the necessary trend. Right owners would appreciate more data and feedback on what proactive measures platforms have been developing and how they work, so that right owners know how they could engage and contribute.
5. MoUs: MoUs are believed to help stakeholders build trust relationship and exchange information and best practice, but it will need much more work to implement the EU approach.

VII. CONCLUSION

While e-commerce platform operators and rights owners continue to develop and deploy new technologies to combat counterfeiting and piracy, infringers also learn from experience and invent new ways to freeride. There are also issues that remain unsolved, and even made harder to resolve given the evolving technologies. Right owners would expect and appreciate more information sharing and collaboration with platforms and authorities to act in concert in building best practice especially in tackling the complex and emerging forms of online counterfeit and piracy.

METHODOLOGY

In the course of the study, the following research methods were used :

1. Comparative Research

Comparative research method is often adopted and considered useful to connect rules to its effects, which may establish causation by comparing differences and similarities to eliminate unrelated factors. It provides different perspectives for legal reforms and predict where the legislation and practice could go. In this study particularly, we mainly use EU practices as a comparative subject to help EU stakeholders understand the Chinese context and identify what is missing. This comparative research also covers both legislations and related guidelines as well as the voluntary initiatives, such as the MoUs.

2. Empirical Research

(1) Quantitative Data Descriptive Analysis

Quantitative data study helps set up the parameters for further qualitative studies and identify the key factors for improvement. Also, quantitative analysis may help connect the provisions to the effects, especially how changes in laws impact enforcement as well as judicial and industrial practice.

(2) Qualitative Data Analysis

To better elaborate on the history, status quo and effects, we also use qualitative data analysis. We have consulted 5 right owners via one-on-one interviews.

(3) Case Studies

We have paid special attention to landmark and high-profile cases to evaluate application of provisions in specific contexts. We have been focusing on cases and statistics involving EU brand owners and other stakeholders, and to compare the differentiated judgements on Chinese and foreign owned firms operating in China, if any.

Being a civil law country, China sets up its legal basis on statutes. However, with the implementation of the guiding case system and that more cases are made available to public, cases have gradually become an indispensable part of the Chinese legal system. Landmark cases vividly demonstrate how legal provisions are interpreted and applied to actual cases and provide guidance to stakeholders when facing similar fact patterns. Case studies are always useful to see how the provisions currently in force are applied to judicial cases on intellectual property in practice, and to identify the current provisions that have a negative impact on the possibility of right holders, especially EU brand owners, to have their rights enforced by the Chinese courts.

3. Limitations of Methodology

Issues and/or risks to be considered for the correct implementation of the study may include: (1) Lack

of response from certain key stakeholders; (2) certain key data may not be available due to government control or confidentiality agreement between the stakeholders; (3) the literatures, case and data acquired may not fully reflect the practices of small-sized platforms or SMEs, which could generate potential bias; (4) the ongoing impact of the Covid-19 affect the face-to-face interview with certain stakeholders; (5) lack of implementation of these new rules in judicial and administrative cases considering the short duration.

CHAPTER 1 RELEVANT LEGISLATION AND REGULATIONS ON ONLINE COUNTERFEITING AND PIRACY

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The Previous Study prepared a comprehensive list of laws before 2019 and after, including the *E-Commerce Law* itself. Here, we focus on presenting the new development, changes, and specifications of relevant rules.

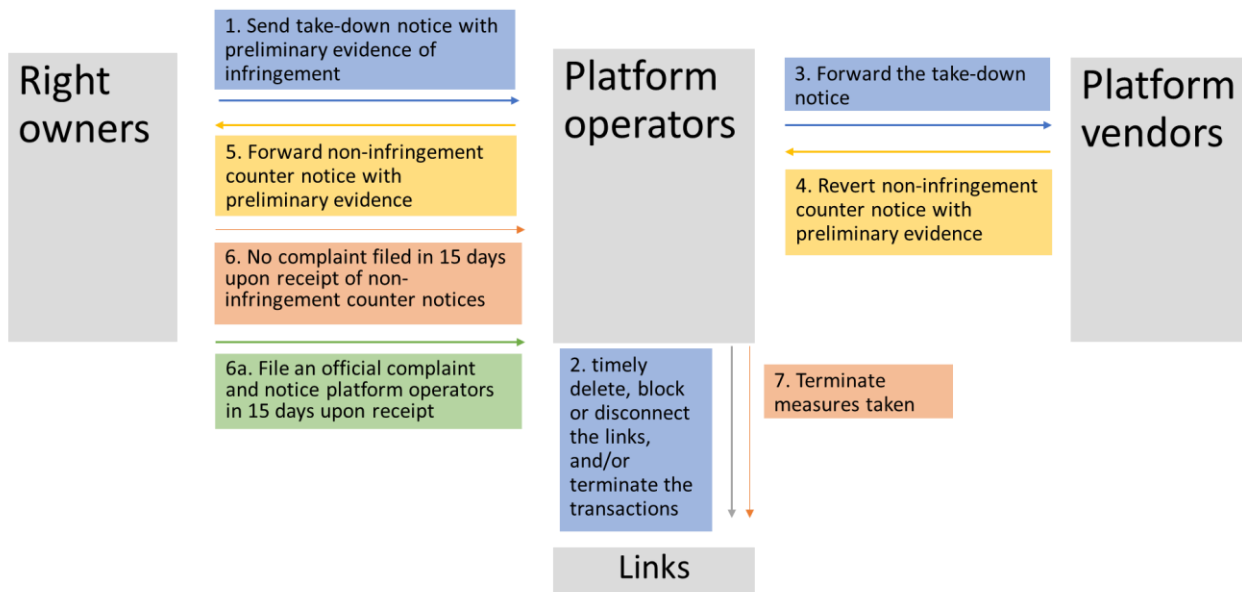
I. Development on Legislations, Judicial Interpretations and Regulations in China

1. Recap of E-Commerce Law

In the *E-Commerce Law*, Art. 9 gives the definitions of e-commerce operators, e-commerce platform operator, platform vendors; Art. 41 – 45 impose obligations of e-commerce platform operators, requiring IP protection rules, take-down notice mechanism, duly publication of take-down results. If obligations are complied with, e-commerce platform operators will be in the safe harbour. Art. 42 and Art. 45 stipulate the scenarios where e-commerce platform operators shall take joint and several liabilities: e-commerce platform operators shall be jointly liable with platform vendors for the expanded damages due to failure of taking timely necessary measures. If e-commerce platform operators know or should have known IP infringement by platform vendors, they shall be jointly liable with platform vendors if failing to take necessary measures. Art. 84 specifies the administrative liabilities for e-commerce platform operators where they fail to fulfil the obligations in Art. 42 and 45.

The take-down mechanism is the centre of these rules. For purpose of comparison with new legislative developments, the below chart demonstrates how the notice and take down mechanism under the *E-Commerce Law*.

Chart 1 Summary of Notice and Take Down Mechanism under E-Commerce Law²



While being acknowledged for setting a comprehensive regulatory framework, there is still voice of criticism against *E-Commerce Law*. It gives right owners a specified and short period of only 15 days to file judicial or administrative complaints upon receiving platform vendors’ non-infringement counter notices. This counter notice design is intended to give platform vendors a weapon to counter bad faith frivolous complaints. However, the lack of leeway and consideration for foreign right owners in setting strictly the 15- day period has been one of the key challenges.

Preparing formal complaint materials costs much time, especially for foreign right owners where notarization and legalization of authorization documents are needed. Therefore, such 15-day period essentially requires right owners to start planning formal complaints before sending the take-down notice, which is considered burdensome for right owners and potentially forcing unnecessary civil litigations or administrative complaints.

2. The Phase One Agreement

Despite that the Phase One Agreement is signed between the U.S. and China, the commitments made by China reflect the common concerns of foreign right owners.

In Art. 1.13 and Art. 1.14 in Section E of the Phase One Agreement, China commits to combat online infringement by providing effective enforcement procedures and impose sanctions to online platforms for repeatedly failing to curb online counterfeiting or piracy.

China vows to:

- provide enforcement procedures occurs in the online environment, including an effective

² On August 31, 2021, SAMR published the amendments to E-Commerce Law, proposing to extend the 15-day response time to 20 working days. If passed, the amended E-Commerce Law will be made consistent with SPC judicial interpretations.

- notice and takedown system;
- require expeditious takedowns;
- eliminate liability for erroneous takedown notices submitted in good faith;
- extend to 20 working days the deadline for right holders to file a judicial or administrative complaint after receipt of a counter-notification;
- ensure validity of takedown notices and counter-notifications, by requiring relevant information for notices and counter-notifications and penalizing notices and counter-notifications submitted in bad faith;
- provide that e-commerce platforms may have their operating licenses revoked for repeated failures to curb the sale of counterfeit or pirated goods.

The Phase One Agreement commitments have been implemented into the new legislations, judicial interpretations, *etc.*

3. Civil Code

The *Civil Code* is the first and only law named as “Code” in P.R.C, marking the milestone in the history of China legal system. It is released on May 28, 2020 and effective as of January 1, 2021. It covers comprehensively all aspects of civil activities and liabilities, and replaces many previous standalone laws as the *General Principles of Civil Law, Tort Law, Contract Law, etc.*

The *Civil Code* does not specifically mention e-commerce, but Art. 1194 – 1197 set the new rules for network service providers. Most rules are consistent with *E-Commerce Law*, except that Art. 1196 stipulates that network service providers shall timely terminate measures if they do not receive notice of official complaint or litigation in reasonable time upon being served the non-infringement counter notice. Compared to the specific 15 days given by *E-Commerce Law*, the Civil Code gives some leeway to right owners.

4. SPC Judicial Interpretations

SPC judicial interpretations are important source of legal rules and provide valuable reference to implementation of laws.

On April 15, 2020, SPC promulgated the *Opinions on Comprehensively Strengthening Judicial Protection of Intellectual Property*, committing to improve the judicial adjudication standards for determining infringement in the e-commerce area: *strengthen the fight against and rectification of online infringement of IPRs, and effectively respond to the demands of right owners for the protection of their rights on e-commerce platforms. Improve the governance rules of e-commerce platforms, including the take-down notice mechanism, and smooth the channels for rights holders to defend their rights online. To properly adjudicate disputes over online infringement of IP rights and malicious complaints about unfair competition, we should not only exempt the responsibility of those who submitted the notification in good faith, but also urge and guide e-commerce platforms to actively fulfil their legal obligations and promote the healthy development of e-commerce, and pursue the legal responsibility of those who abuse their rights and maliciously complain, so as to reasonably balance the interests of all parties.*

Following the above opinions and respectively on September 10 and 14, 2020, SPC published the two new judicial interpretations, namely *the Guideline on the Trial of IPR Disputes Involving E-commerce Platforms*, and *Official Reply on Several Issues Concerning the Application of Law to Online Intellectual Property Infringement Disputes*. Both judicial interpretations are generally believed to provide effective complement to the implementation of the *E-Commerce Law* in practice. Below are some preliminary assessments of the two judicial interpretations.

Guideline on the Trial of IPR Disputes Involving E-commerce Platforms (“the Guideline”)

The Guideline aims to promote standardized, orderly and sound development of e-commerce operating activities. It is the first judicial interpretation issued by SPC specifically for the protection of IP rights in the field of e-commerce, covering basic principles, general provisions, rules and measures for the protection of intellectual property rights of e-commerce platforms, and the legal responsibilities of e-commerce platform operators, etc. Various provisions in the Guideline echoed the requirements of Phase One Agreement on combating piracy and counterfeiting on e-commerce platforms.

Highlights of the Guideline are specified as the below table.

Table 1: Highlights of the Guideline

Art.	Highlights
<p>Art. 3 Principle and considerations to determine what necessary measures are</p>	<p>Where an e-commerce platform operator is or should be aware that a platform vendor has infringed upon intellectual property, it shall promptly adopt the requisite measures based on:</p> <ul style="list-style-type: none"> • the nature of the rights • the specific circumstances of the infringement • the technical conditions, as well as the preliminary evidence of the infringement and the type of service. <p>The necessary measures to be taken shall follow the principle of reasonableness and prudence, including but not limited to measures such as deletion, blocking and disconnection of links.</p> <p>Where there are multiple instances of intentional infringement of intellectual property by a business operator using the platform, the e-commerce platform operator shall have the right to take measures to terminate transactions and services.</p>
<p>Art. 4 Implementing platform rules</p>	<p>E-commerce platform operators may formulate implementing rules on notice and take down mechanism but should not set unreasonable conditions or obstacles for right owners to enforce.</p>
<p>Art. 5 Requirements of take-down notice</p>	<p>Information that should be included in right owners’ written take-down notice:</p> <ul style="list-style-type: none"> • true identities of right owners • proof of IP right • information that could accurately identify the alleged infringing

	<p>product/services</p> <ul style="list-style-type: none"> • preliminary evidence of infringement • written guarantee for the authenticity of the notice <p>E-commerce platform operators may require right owners to submit statements on the comparison of technical or design features, evaluation report for utility model or design patents, and other materials where the take-down notice involves patent rights.</p>
Art. 6 Factors to determine bad faith take-down notice	<ul style="list-style-type: none"> • submitting forged or altered certificates of right • submitting false appraisal opinions and expert opinions on infringement • sending a notice despite knowing that the status of right is unstable • failing to withdraw a notice or make corrections in a timely manner despite knowing the fact that the notice is wrong • repeatedly submitting wrong notices
Art. 7 Requirements of counter notice	<p>Information that should be included in platform vendors' non-infringement counter notice:</p> <ul style="list-style-type: none"> • true identities of vendors • proof of IP right, certificate of authorization or license or other preliminary proof of non-infringement • information that could accurately identify the alleged infringing product/services • written guarantee for the authenticity of the notice <p>E-commerce platform operators may require platform vendors to submit statements on the comparison of technical or design features and other materials where the take-down notice involves patent rights.</p>
Art. 8 Factors to determine bad faith non-infringement counter notice	<ul style="list-style-type: none"> • fabricated or invalid proof of right • false or apparently misleading information in the notice • where the counter notice is sent where the take-down notice already attached binding judgments or administrative decisions acknowledging infringement • failing to withdraw the counter notice or make corrections in a timely manner despite knowing it is wrong
Art. 9 Injunctions in urgent circumstances	<p>In face of urgent situations (taking down the alleged infringing products or restore the link of the products) that will cause irreparable damages, both right owners and platform vendors may file for injunctive relief.</p>
Art. 10 Factors for courts to determine whether e-commerce platform operators have taken reasonable measures	<ul style="list-style-type: none"> • preliminary evidence of infringement • likelihood of infringement does exist • potential scope of impact • specifics of infringing activities, including whether there are bad faith infringement or repeated infringement • effectiveness of measures to prevent damages from being enlarged

	<ul style="list-style-type: none"> • potential impact for platform vendor interests • service types and technical conditions of the e-commerce platform
Art. 11 Factors for courts to determine that e-commerce platform operators should have known existence of infringement	<ul style="list-style-type: none"> • failing to perform statutory obligations, such as formulating rules on the protection of IPRs and examining the business qualifications of business operators using its platform • failing to review the certificate of rights of the business operators indicating the type of the store as "flagship store" or "brand store" on the platform • failing to adopt effective technical means to filter and intercept links to infringing goods containing such words as "high-quality counterfeit" and "fake", and links to infringing goods which are put on shelves again after the complaint is established • other circumstances in which the obligations of reasonable examination and care are not performed

Official Reply on Several Issues Concerning the Application of Law to Online Intellectual Property Infringement Disputes (“the Reply”)

On top of the Guideline, the Reply clarified the time limit for online service providers and e-commerce platforms to deal with non-infringement claims submitted by online users and platform operators, the conditions for applying punitive damages to non-infringement claims submitted in bad faith, and the exemption of rights holders from civil liability for submitting false notices in good faith. The following Table presents the key provision of the Official Reply.

Table 2: Highlights of the Reply

Application of injunction	Where an IPR holder claims infringement upon its rights and applies for preservation, requiring the relevant network service provider or e-commerce platform operator to promptly take removal measures such as deletion, blocking and disconnecting links, the people’s court shall conduct an examination and render a ruling in accordance with the law.
Joint and several liabilities	Upon receipt of a notice issued by the intellectual property holder pursuant to the law, the network service provider or the e-commerce platform operator shall promptly forward the notice of the intellectual property holder to the relevant network user or the business operator using the platform, and adopt the requisite measures based on the preliminary evidence of the infringement and the type of service; where the network service provider or the e-commerce platform operator does not adopt the requisite measures pursuant to the law and the intellectual property holder claims that the network service provider or the e-commerce platform operator should bear joint and several liability with the network user or the business operator using the platform for the escalated portion of the damages, the people’s court may uphold the claim pursuant to the law.
Reasonable period	Where the network service provider or the e-commerce platform

for right owners to file official complaint or litigation	operator does not receive a notice from the IP holder stating that a complaint or lawsuit has been filed within a reasonable period from receiving the counter notice of non-infringement, it shall promptly terminate the measures such as deletion, blocking and disconnecting links. The delay caused by such special circumstances beyond the control of the right holder as notarization and certification, etc. shall not be included in the aforesaid time limit, but the time limit shall not exceed 20 working days .
Punitive damages	IV. Where the e-commerce platform operator terminates the requisite measures due to malicious submission of a statement and causes the intellectual property holder to suffer damages, and the intellectual property holder requests for the corresponding punitive compensation pursuant to the relevant provisions of the law, the people’s court may support the request pursuant to the law.
Good faith of take-down notice	V. Where the contents of the take-down notice are inconsistent with facts, but the IP holder asserts in the lawsuit that the notice is submitted in good faith and requests exemption from liability, and is able to prove so , the people’s court shall uphold the assertion upon examination and verification pursuant to the law .

The Reply extends 15 days for right owners to file complaint or litigation in the E-Commerce Law to a reasonable period but no longer than 20 working days, allowing necessary time for foreign right owners to do notarization and legalization. This is consistent with the *Civil Code* and Article 1.13.2(c) in the Phase One Agreement.

5. SAMR Administrative Regulations Regarding Online Transactions

Watching live streaming and purchasing all sorts of products via live streaming channels have become part of life. The COVID-19 pandemic further boosts development of online marketing via live streaming and social media platforms, as offline retailers are forced to move online due to social distancing and quarantine requirements. With the rapidly growing popularity and diversity of live streaming marketing activities, legal disputes have also rocketed.

For quite some time, it was a grey area whether live streaming platform activities shall be subject to the *E-Commerce Law*. Since 2020, SAMR has issued several administrative regulations to regulate and promote healthy development of online transactions and particularly marketing activities by live streaming. These administrative regulations make clear parties engaged in online marketing activities by live streaming shall constitute either e-commerce platform operators or platform vendors and shall perform relevant obligations according to *E-Commerce Law*. Relevant provisions are specified below:

<i>Guiding Opinions on Strengthening the Regulation of Online Live-streaming Marketing Activities</i>	Where a network platform provides online business premises, transaction matchmaking, information release and other services for the business operators that sell goods or provide services in the form of online live-streaming so
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<p><i>Released and effective as of November 5, 2020</i></p>	<p>that the two or more parties to transactions can carry out transactions independently, especially where the network platform provides the settling-in function for the business operators of promotion services through online live-streaming, or provides live-streaming technical services for the business operators that promote goods or services in the form of online live streaming, it shall perform the responsibilities and obligations of e-commerce platform operators in accordance with the <i>E-Commerce Law</i>.</p>
<p><i>Measures for the Supervision and Administration of Online Transactions</i></p> <p><i>Released on March 15, 2021; effective as of May 1, 2021</i></p>	<p>The measures develop a series of specific rules, clarify the obligations of online transaction platform operators and vendors in online trading activities. Despite that the measures do not specifically mention IP enforcement obligations, they set the requirements for reporting of vendor identities and record keeping of live stream videos, among others. These requirements may to some extent help right owners to locate infringers and preserve evidence of infringement.</p> <p>Article 20 stipulates that live streaming videos shall be kept not less than 3 years.</p> <p>Article 24-29 refine the provisions of the management obligations and responsibilities of platform operators, including: (1) the platform shall report the identity information of operators to the provincial market supervision department every six months; (2) the platforms shall establish a system of inspection and monitoring of business activities to timely report violations; and (3) the platform shall not interfere with the independent operation of operators within the platforms.</p>
<p><i>Administrative Measures for Online Live-Streaming Marketing (for Trial Implementation)</i></p> <p><i>Release on April 23, 2021; effective as of May 25, 2021</i></p>	<p>Art. 2: Those who engage in online live-streaming marketing activities are market players defined as "operators of e-commerce platforms" or "operators on platforms" in the <i>E-Commerce Law</i>, and such players shall perform corresponding responsibilities and obligations in accordance with the law.</p>
<p><i>Notification on Further Regulate the Registration Work of E-Commerce Operators</i></p> <p><i>Draft released for public</i></p>	<p>The opinion provides guidelines for the registration of e-commerce operator. Where an e-commerce operator applies for registering itself as an individual industrial and commercial household, it is allowed to register its online place of business as its business premises. Where an e-commerce operator engages in business activities on more</p>

<i>comments on May 11, 2021</i>	than one e-commerce platform, it shall register its multiple online places of business in which it engages in business activities with the registration authority.
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6. Municipal level administrative rules and guidelines

In addition to national laws and regulations, we have observed the promulgation of multiple rules and guidelines by provincial courts and municipal authorities where e-commerce activities and business are centralized and booming. These rules are even more specific and practical.

Title	Effective Date	Authority	Highlights
<i>Beijing Expedited Processing Rules of Patent Infringement Disputes in E-Commerce (for Trial Implementation)</i> ³	2019.09.01	Beijing Municipal Intellectual Property Office	<p>Patent related complaints are the headache for e-commerce platform operators, due the complexity and difficulty in determination of patent infringement.</p> <p>The rules set the procedures for e-commerce platform operators to transfer complex complaints to Beijing Municipal IP Office for expedited processing where the parties filing the complaint and being complained both agree to such transfer.</p> <p>Where materials are deemed acceptable in 5 working days upon receipt, Beijing Municipal IP Office may conduct mediation and issue a mediation agreement in 5 working days.</p>
<i>Guiding Opinions on the Trial of Intellectual Property Civil Cases Involving E-Commerce Platforms</i>	2019.12.23	Zhejiang High People's Court of Zhejiang Province	<p>It is the first comprehensive judicial trial guidance document on e-commerce IPR since the implementation of <i>E-Commerce Law</i>.</p> <p>Article 7-17. ["Notice-Delete" rule] Article 18-24. [determination of fault of the e-commerce platform] Article 25-37. [determination of false notice and malicious notice]</p> <p>The "notice" issued by the IPR holder shall include (1) the identity and contact information of the IPR holder; (2) the information or website which can accurately locate the suspected infringing product,</p>

³ Beijing's e-commerce rights protection is on the "fast track". <http://ip.people.com.cn/n1/2019/0920/c179663-31363743.html>.

			<p>service or content; (3) preliminary evidence of infringement, including evidence of ownership and evidence of infringement.</p> <p>The “counter-notice” submitted by the operator in the platform shall include (1) the name, contact information and other subject information of the counter-notifier; (2) the website which requests to terminate the necessary measures of the product, service or content;(3) the preliminary evidence of non-infringement.</p>
<p><i>Various Opinions on Shanghai Municipal E-Commerce IP Protection</i></p>	<p>Released on 2021.06.08</p> <p>To take effect as of 2021.7.15</p>	<p>Shanghai Municipal IP Office; Shanghai Copyright Bureau; Shanghai Municipal Commission of Commerce</p>	<p>Art. 3: supervisory agencies shall cooperate to guide e-commerce platform operators to formulate comprehensive IP protection rules, conduct trainings and help resolve complicated IP disputes.</p> <p>Art. 6: e-commerce platform operators shall build up the IP complaint and reporting mechanism and improve the management systems for identity certification, information release and dispute resolution.</p> <p>Art. 7: e-commerce platform operators shall establish and improve entry management of platform vendors. If platform vendors should mark the online stores as flagship store, franchise store, exclusive shop, etc., e-commerce platform operators should request them to provide proof of right and review the same.</p>

7. National standard - Intellectual Property Protection and Management for E-commerce Platforms (GB/T 39550-2020)

On November 9, 2020, SAMR and CNIPA jointly released the first national standard on e-commerce IP enforcement effective as of June 1, 2021, *the Intellectual Property Protection and Management for E-commerce Platforms (GB/T 39550-2020)*. This standard covers the definitions and scope of application, accountability and obligations of e-commerce platforms in terms of information management, management system and IP dispute resolution, information network requirements and organizational IP management. This standard aims to set the best practice for e-commerce platforms but has no compulsory effect.

8. Industry rules and codes of conduct

The relevant codes of conduct published by industry associations have an important reference role for enterprises in the industry. Since the implementation of the *E-Commerce Law*, especially under

the influence of the COVID-19 epidemic, live-streaming shopping has ushered in a boom. In response to the irregularities that have emerged in live-streaming shopping, the relevant industry associations have announced relevant rules as follows.

Code	Date Issued	Issuing Authority	Relevance of Online Intellectual Property Protection
The Basic Code of live video shopping operations and services (Exposure Draft)	2020.06.11	Professional Committee of Media shopping, China General Chamber of Commerce	The code details the provisions on livestreaming shopping, including basic requirements for livestreaming shopping business management and services, quality requirements on commodity, operator management, etc.
Code of Conduct of Live commerce Marketing	2020.6.24	China Advertising Association	The code regulates the behavior of merchants, anchors, platform operators, anchor service providers and participating users in live commerce marketing.
Code of E-commerce Live streaming Training and Evaluation	2020.6.30	Zhejiang E-commerce Promotion Association	The code establishes the first domestic standard for e-commerce livestreaming, which is applicable to the training and management of live e-commerce practitioners in educational and training institutions based in Zhejiang Province.

9. Research reports

Research Report on IPR Legal Liabilities in the E-Commerce Field⁴

As the domicile of Alibaba and a relatively economically developed area, Zhejiang province is a center of cases involving e-commerce platforms, either under *E-Commerce Law* or other IP laws.

In March 2020, Zhejiang High People’s Court released an empirical study of IP infringement cases involving e-commerce platforms in Zhejiang to summarize major characteristics analyze the key issues on determination of legal liabilities, including how to interpret the notice and take down mechanism, how to determine the fault and liabilities of platform operators and how to regulate false and malicious complaints.

According to this research report by analyzing the cases handled by Zhejiang courts from 2014 to 2018, the number of cases rocketed with an average increase rate of 88.46%. In addition, there are few cases that ruled e-commerce platform operators to bear joint and several liability of damages.

⁴ Joint research group of Zhejiang Provincial High Court. “Research Report on IP Legal Liabilities in the E-Commerce Field”. <https://www.chinacourt.org/index.php/article/detail/2020/03/id/4871104.shtml>

Many right owners would withdraw the claims against the platform operators after confirming the infringing links are deleted.

E-Commerce Intellectual Property Protection Development Research Report (2020)

On December 28, 2020, the Intellectual Property Development & Research Center of CNIPA issued the E-commerce Intellectual Property Protection Development Research Report (2020) (“2020 E-commerce Report”). This 2020 E-commerce Report has a comprehensive introduction of laws, rules, guidelines, new platform initiatives and practices, including voluntary measures undertaken by rights owners, platforms and anti-counterfeiting associations, in the face of emerging forms of e-commerce and technology, such as selling products by live streaming.

II. EU Legislation and Practice in Comparison

1. Legislative developments

The notice and take down mechanism now applied in the e-commerce field was initially introduced by U.S. and EU in combating copyright infringement in the online environment. In EU, the notice and take down mechanism can be traced back to *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000⁵ (“Directive on electronic commerce”)*, which seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the EU Member States.

Under the Directive on electronic commerce, service providers, whose role solely consists in the transmission of information originating from third parties and the provision of access through a communication network, cannot be held liable for third party illegal content if they do not initiate the transmission; do not select the receiver of the transmission; do not select or modify the information transmitted.⁶ Service providers cannot be held liable for third party illegal content when providing caching facilities provided they: do not modify the information; comply with conditions on access to information and with rules on the updating of the information; do not interfere with lawful use of technology to obtain data on the use of the information; expeditiously act to remove the access to the information stored when informed that the information has been removed from the network, when access to it has been disabled or when a responsible authority has ordered the removal.⁷ Service providers who store information supplied by and at the request of a recipient of the service are not liable if: they do not have actual knowledge of illegal activity or information and as regards claims for damages and are not aware of the facts or circumstances from which the illegal activity or information is apparent; or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information.⁸

⁵ European Commission. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000. <https://eur-lex.europa.eu/eli/dir/2000/31/oj>

⁶ Article 12 of Directive on electronic commerce of 2000, https://www.legislation.gov.uk/eudr/2000/31/pdfs/eudr_20000031_adopted_en.pdf.

⁷ Article 13 of Directive on electronic commerce of 2000, https://www.legislation.gov.uk/eudr/2000/31/pdfs/eudr_20000031_adopted_en.pdf.

⁸ Article 14 of Directive on electronic commerce of 2000, https://www.legislation.gov.uk/eudr/2000/31/pdfs/eudr_20000031_adopted_en.pdf.

After the Directive on electronic commerce, digital technologies and business models have evolved significantly. The following are recent legislative developments in EU. They signal the intention of implementing more proportionate and tailored obligations and liabilities, in particular – greater duty of care and obligations for big online platforms.

DIRECTIVE (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (“Directive on Copyright in the Digital Single Market”) introduced new rules and raised the level of duty of care for online content-sharing service providers. Essentially, online content-sharing service providers are required to proactively obtain authorization from right owners. If no authorization is granted, online content-sharing service providers shall demonstrate best efforts to ensure the specific copyrighted works are made unavailable and act expeditiously to disable access or remove from websites of the content upon receiving a sufficiently substantiated notice from right holders. Member States are given until June 2021 to finish transposing the requirements in this Directive.

The European Commission (EC) proposed two legislative initiatives relating to the digital market: *Digital Services Act* and the *Digital Markets Act*. These initiatives are still being discussed and considered by the European Parliament and Member States.

The Digital Services Act makes comprehensive and substantial improvements to measures of regulating online platforms and clarifies scenarios of liabilities and exemptions from liabilities, giving more certainty to platform operators. Specifically, it introduces new measures such as a mechanism for users to flag illegal goods, services or content online, and for platforms to cooperate with “trusted flaggers”; it also imposes new obligations on traceability of business users in online marketplaces to help identify sellers of illegal goods. The duty of care and public oversight is even enhanced for online platforms that reach more than 10% of the EU’s population.⁹

The Digital Markets Act on the other hand introduces rules for online platforms that act as “gatekeepers” and aims to prevent gatekeepers from imposing unfair conditions on businesses and consumers and at ensuring the openness of important digital services.¹⁰

2. Implementation of MoUs

While new technologies and forms of infringement keep coming up, existing laws and cases may become insufficient and outdated to look for best anti-counterfeiting practice. It is not unique for any given platform or right owner, but instead has become a systemic issue which grows with the booming of e-commerce market.

MoUs are considered an effective approach to systemically address this issue. By bringing all stakeholders together and hold them accountable in MoU framework, it becomes possible to advance

⁹ European Commission. The Digital Services Act. https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en#new-rules-in-a-nutshell

¹⁰ Digital Markets Act: Ensuring fair and open digital markets. https://ec.europa.eu/cyprus/news_20201216_2_en

stakeholder collaboration and raise the obligations for platforms by calling for more proactive and preventive measures beyond the minimum requirements in existing laws.

massive scale of the problem and need to keep pushing up the obligations for platforms.

The MoU on the sale of counterfeit goods on the internet, is a voluntary agreement facilitated by the EC first introduced in May 2011 and later revised in 2016 to prevent offers of counterfeit goods from appearing in online marketplaces.¹¹ The signatories to the MoU now extend to 14 rights owners, 8 online platforms including Alibaba, and 8 business associations. In 2018, an additional MoU on online advertising was established.

The EC regularly reviews the status and effectiveness of MoUs. The latest report was released in August 2020, namely *Report on the functioning of the Memorandum of Understanding on the sale of counterfeit goods on the internet*¹². This report reviews the practice in the period between June 2017 and October 2019. Latest updates during COVID-19 pandemic will be covered in the next report.

This report collects the observations and suggestions on 6 aspects: (1) proactive and preventive measures by online platforms; (2) notice and take-down procedures; (3) repeat infringers; (4) cooperation, including sharing information; (5) cooperation with customs and other law enforcement authorities; (6) consumer confidence and information protection. Majority of signatories acknowledged collaboration under the MoU positive but expressed reservations on what could be done further.

To summarize the key observation and recommendations:

- Despite the continued efforts, counterfeit and piracy is still common and largely available online. Cooperation and information exchange with online platforms may fall short of the commitments made under the MoU.
- The MoU can be considered as a laboratory to test what could be best practices to combat online infringement and piracy. It could help if more diversified parties such as search engines, payment services, social media and shippers could join the MoU to fight collaboratively at all fronts.
- Keeping up regular meetings and information exchange on new trends, challenges and best practices sets the cornerstone for the MoUs to continue operating effectively.

The EU experience on MoUs is valuable reference when it comes to advance e-commerce platform governance. The challenges and major concerns of EU stakeholders are mostly in line with that in China.

¹¹ Memorandum of understanding on the sale of counterfeit goods on the internet.

https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement/memorandum-understanding-sale-counterfeit-goods-internet_en

¹² European Commission. Report on the functioning of the Memorandum of Understanding on the sale of Counterfeit Goods on the internet. <https://ec.europa.eu/docsroom/documents/42701>

CHAPTER 2 PLATFORM NEW INITIATIVES AND CHALLENGES

Art. 7 of the Ecommerce Law stipulates: The State establishes a coordinated administration system which satisfies e-commerce characteristics, and promotes the formation of an e-commerce market governance system jointly participated by the relevant departments, e-commerce industry organizations, e-commerce business operators, consumers, etc.

It should be acknowledged that major e-commerce platforms have continued to bring innovative and proactive measures to tackle online counterfeiting and piracy issues. This responds to the proposal of enhancing technology support and uniting joint efforts of all stakeholders brought by *Opinions Involving Strengthening IP Protection issued by General Office of the Central Committee and General Office of the State Council in November 2019*.

I. Major Platforms' New Initiatives and Progress

The 2020 E-commerce Report summarized systemic measures and technical measures deployed by various platforms and relevant progress. As to systemic measures, major platforms commonly enhanced the detection and response mechanisms to control entry of products and vendors. For instance, when vetting vendor background, JD Red Net may cross check vendor credibility information in the database and block high risk vendors from entering the platform. The Red Net system could also intercept suspicious infringing or counterfeit brands from uploading links of specific goods and prevent vendors to abusively use famous brand names to attract user traffic. As to technical measures, the trend is platforms use AI technologies, big data, cloud computing, blockchain technologies, etc., to empower proactive and automatic monitoring on the platforms.

Below is a summary of new initiatives by major e-commerce platforms from 2019 up to date. We would like to provide some more details on how the initiatives work and what they aim for.

Table 3 Summary of Major E-commerce Platforms' New IPR Protection Initiatives

Platforms	Initiatives	Progress
Alibaba	<p>1. Boundless Initiative¹³</p> <p>This revolutionary initiative is launched officially in January 2020 in collaboration with Auto Navi and 50+ pilot right owners, including foreign right owners as Adidas, Jaguar, Richemont, Penfolds, Bose, Victoria's Secret, etc.</p> <p>This initiative connects online counterfeiting with clearing offline infringing stores with the help of</p>	<p>Up to the end of 2020, The Boundless Initiative has covered 30 provinces, flagged over 20,000 licensed stores and involved over 30,000 volunteers to submit clues.</p> <p>For the Queqiao Initiative, 187 domestic and foreign right owners have participated in it up to December 2020. In the future,</p>

¹³ "Boundless Initiative". https://m.21jingji.com/article/20200107/herald/95b81bea373ea154125998efaf4c4b4b_zaker.html

	<p>general consumers. With the support from Auto Navi, right owners may flag genuine and licensed offline stores and prioritize the licensed stores in brand search on Auto Navi's Amap. When consumers ever found suspicious offline stores of a brand, consumers may upload the onsite photos and locations to online clue reporting platform accessible on Taobao and Alipay. Such clues may be preliminarily processed by Alibaba process center and then forwarded to right owners for authentication. Consumers reporting useful clues could get bonus points for public services.</p> <p>2. SME Simp' Ali Program and Support Center¹⁴</p> <p>In 2019, Alibaba started the program of supporting SMEs. In a research targeting SMEs in 2020, it is discovered that SMEs may require specialized and tailored enforcement scheme due to its lack of IP protection experience and diverse enforcement needs as opposed to common issues that big enterprises face.</p> <p>Alibaba launched SME Support Center in 2020 aiming to provide tailored support to SMEs and guidelines.</p> <p>3. Queqiao Initiative</p> <p>Alibaba launched a cooperation initiative where right owners may submit samples of infringing products to Alibaba. Alibaba would then integrate the samples into algorithms to do automated detection across the platform. When vendors post such products online, the algorithms will immediately send alerts and block them.</p>	<p>Alibaba aims to upgrade the algorithms to detect highly similar variations of sample infringing goods and send the variations to right owners for confirmation. Once confirmed as infringing, these variations will also be monitored and blocked automatically.</p>
<p>JD</p>	<p>1. Red Net¹⁵</p> <p>The JD Red Net system may cross check vendor credibility information in the database and block high risk vendors from entering the platform.</p>	

¹⁴ "Improving the business environment of small and medium sized enterprises". https://www.sohu.com/a/458331860_100191050

¹⁵ "Jingdong Red Net has protected intellectual property rights of over 2100 brands". <https://baijiahao.baidu.com/s?id=1687492575616369946&wfr=spider&for=pc>

	<p>The Red Net system could also intercept suspicious infringing or counterfeit brands from uploading links of specific goods and prevent vendors to abusively use famous brand names to attract user traffic. By doing this, this system could provide targeted protection for famous brands and trade names. So far, it has protected 2,100 famous brands.</p> <p>2. Qing Zhou IP Platform¹⁶</p> <p>JD launched this platform in February 2020 to provide a one-stop IP service and protection platform, covering evidence preservation, IP right registration, IP transaction, infringement complaints.</p>	
<p>WeChat</p>	<p>1. Signing multiple MoUs¹⁷</p> <p>On October 29, 2019, WeChat signed IP strategic collaboration MoUs respectively with Beijing Anti-Piracy Publisher Alliance, International Publishers Copyright Protection Coalition (IPCC), China Industrial Media Copyright Protection Alliance. The MoUs mainly focus on building regular communication and collaboration regarding infringement information over books, textbooks, newspaper, journals and other publications as well as complaint response mechanism.</p> <p>2. Actions against WeChat Video Accounts</p> <p>WeChat Video Accounts are a new function launched by WeChat, which allow users to post videos and interact with friends. WeChat set up a database for famous brands and names and cross checks all account names in the database. In addition, WeChat has a keyword alert system – if any suspicious keywords jump out when reviewing user video content, the content will be forwarded for manual confirmation.</p> <p>3. Special task force during COVID-19</p> <p>During COVID-19 pandemic quarantine, people</p>	<p>Under special task force, above 30,000 movies and TV series as well as above 20,000 e-books have been taken down for online copyright infringement.</p>

¹⁶ See <http://www.qingzhouip.com>

¹⁷ “WeChat releases 2020 IP Protection Report”. http://www.h2l.cn/news/202011/newsif_13405.html

	rely heavily on watching movies and reading books for entertainment and homeschooling, creating a window for online infringement. WeChat launched a special task force to tackle infringing videos and e-books online.	
Douyin (TikTok in overseas)	<p>Original Content Alliance</p> <p>In February 2020, Douyin launched the Original Content Alliance in collaboration with 12426 Copyright Monitoring Center and Beijing Copyright Monitoring Center. This alliance provides free of charge infringement monitoring and enforcement services across 20 platforms.</p> <p>Setting up E-Commerce Department¹⁸</p> <p>In June 2020, Douyin announced setting up e-commerce department, marking it officially enters the e-commerce market.</p>	<p>Since the beginning of 2021, Douyin accepted 38,918 counts of copyright infringement complaints and took down 23,215 pieces of infringing videos. In daily routine check, Douyin took down over 720,000 pieces of suspicious videos.</p> <p>Douyin also shut down permanently 2,429 accounts and punished over 140,000 accounts for copyright infringement.</p> <p>Over 30,000 original content makers joined the Original Content Alliance, which helped complaining</p> <p>There are no updates or numbers available for taking down infringing goods.</p>
Pinduoduo	<p>1. Signing MoUs¹⁹</p> <p>In November 2019, Pinduoduo signed an IP protection collaboration agreement with the Publishers Association of China aimed to improving the cooperation mechanism of intellectual property rights protection, assisting in dealing with piracy infringement and promoting e-commerce book sales, and to jointly promoting the healthy and orderly development of the publishing industry.</p> <p>In April 2020, Pinduoduo signed an IP collaboration MoU with SIPA. Pinduoduo and SIPA vow to jointly support platform operators to file IP registration, advance operators' IP protection</p>	<p>According to this report, Pinduoduo used big data risk control system combined with manual review. 97% of suspected infringing links were blocked before they went online, and more than 88,000 suspected illegal stores were shut down. Over the past year, the platform has handed over more than 1,000 clues to law enforcement agencies at all levels nationwide. In the past year, the platform has handed over 1,000 clues to law enforcement agencies at all levels, and assisted police in arresting more than 200 suspects,</p>

¹⁸ "Douyin officially set up e-commerce department; more fierce e-commerce competition in 2020".
<http://app.myzaker.com/news/article.php?pk=5eeb083b8e9f096e59372054>

¹⁹ "Join hands with Shanghai Intellectual Property Office to upgrade Pinduoduo's intellectual property protection system".
<https://baijiahao.baidu.com/s?id=1665021968160915489&wfr=spider&for=pc>

	<p>awareness and provide more guidance in this regard.</p> <p>2. AI-powered technology to support platform governance²⁰</p> <p>On March 15, 2020, Pinduoduo released 2019 Consumer Right Protection Annual Report, which mentioned various techniques for platform governance.</p>	<p>involving over 100 million yuan.</p>
<p>Xiao Hong Shu</p>	<p>1. THEMIS System</p> <p>Since 2019, Xiao Hong Shu has set up a THEMIS system covering multiple processes and perspectives to implement IP protection. The system is equipped with big data and AI technologies to monitor fake comments, high risk complaints and suspicious user traffic to detect counterfeit stores.²¹</p> <p>2. Panda Initiative²²</p> <p>On January 25, 2021, Xiao Hong Shu released progress made in terms of brand IP protection in 2020. In the past year, via the three-layered mechanism combining AI screening, manual review and volunteer reporting, Xiao Hong Shu provided over 30,000 pieces of clues to right owners on suspicious products. On the same day, Xiao Hong Shu announced the launch of a special Panda Initiative.</p> <p>Xiao Hong Shu is known for its huge community base and consumer content sharing, which has also been taken advantage by marketing personnel and infringers. This initiative aims to assist brands in clearing fake comments posted by counterfeiters and marketing personnel instead of genuine consumers. Accounts posting fake comments to attract user traffic and market</p>	

²⁰ "Pinduoduo released annual report on consumer protection (2019), with R & D of 3.87 billion yuan".

<https://baijiahao.baidu.com/s?id=1661413259074276619&wfr=spider&for=pc>

²¹ "Xiaohongshu and International Trademark Association will jointly promote the protection of authentic products".

<https://baijiahao.baidu.com/s?id=1647353316256282518&wfr=spider&for=pc>

²² See <https://www.dsb.cn/137910.html>; <https://finance.sina.com.cn/tech/2021-02-01/doc-ikftpnny3193302.shtml>

	counterfeits will be taken down. Progress will be publicly released every month.	
Mei Tuan²³	Meituan is a leading lifestyle and delivery online platform. On April 29,2020, Meituan signed an MoU on Collaboration on IP Protection with Shanghai Huangpu District Administration for Market Supervision. No specific content is available.	

From the above summary, we have two positive observations:

- (1) Big data and AI-based technologies are the necessary foundation to support initiatives across different platforms.

Almost all major platforms have exploited screening technologies to block counterfeits from entering the platforms while reducing the necessary costs and manual efforts. In addition, Alibaba and JD both launched one-stop IP protection platforms for right owners, to facilitate right owners to file registrations and preserve evidence via blockchain technology. The blockchain technology can store original works in the form of videos and images into the blockchain platform and encrypt them accordingly, ensuring the traceability of products and providing an encrypted environment for future transactions of genuine works.

- (2) The social governance structure is forming. Regular communication and collaboration via MoUs among all stakeholders become common.

Almost all platforms have signed MoUs with all stakeholders, including without limitation government authorities, right owners and industry associations. Alibaba takes one step further to launch the Boundless Initiative, engaging the support of general consumers.

In recent years, the emerging media publicity method of short video has been rapidly developing in major e-commerce platforms. Alibaba has developed the "Video Copyright Protection Program" in response. The scope of intellectual property protection of WeChat platform has been expanded with the expansion of its video number application, and the protection has also been enhanced.

Despite the positive changes, we also take note of the following:

- (1) The access channels for right owners to participate in some of the mentioned platform initiatives may not be as visible and transparent as they are supposed to be.

²³ "Huangpu: create a new situation of Internet intellectual property protection".
<http://www.shzgh.org/zscq/mtij/n2512/u1ai25810.html>

The right owners being interviewed rarely mentioned any of these new initiatives, suggesting these initiatives may still just benefited a limited number of right owners. Though the scattered articles mentioned various platforms released annual IP protection reports, we still had difficulty to find the original texts of these reports and statistics. We will provide more feedback from right owners in Chapter VI.

(2) Manual review is still necessary despite the development of all sorts of screening technologies.

Despite the screening technologies, infringers are getting more cunning and sophisticated. There are still a huge number of infringing links that get past the automatic screening. Platforms might still need to ensure sufficient manpower to do manual content review and take necessary actions swiftly.

(3) It is still challenging to counter counterfeiting and piracy in live streaming or other new business models. No new and effective measures adopted by major live streaming e-commerce platforms have been found for the time being in 2020.

(4) Except for Alibaba, we did not find other major platforms have rules or policies specially designed for SMEs.

II. Platform IP Protection and Complaint Rules

Platforms have generally refined the platform IP protection and complaint rules to implement the obligations of the *E-Commerce Law*. The practicing rules mostly are promulgated in 2019 or 2020.

The SPC Opinions and the Reply clarified requirements regarding bad faith complaint, non-infringement statement and factors for consideration whether platform operators have taken reasonable measures. In specific, the Reply changed the hard core 15-day period for right owners to respond to non-infringement statements to a reasonable period of time up to 20 working days excluding the necessary time for notarization and legalization. This change is consistent with the general requirements for online infringement in the Civil Code.

However, the major platforms did not seem to update IP protection and complaint rules again following the promulgation of these judicial interpretations. The practicing rules of major platforms mostly still set 15 days as the response time for right owners for non-infringement statements.

III. New Challenges and Rules for Live-Streaming Platforms

For some time, it was not settled whether live streaming platforms would constitute e-commerce platforms and be subject to obligations under the *E-commerce Law*. The *Administrative Measures for Online Live-Streaming Marketing (for Trial Implementation)* effective as of May 25 this year just made it clear that internet live streaming marketing platforms shall oblige by the *E-commerce Law*.

However, the characteristics of live streaming create new infringement risks and make it challenging to rely on traditional technologies for monitoring and evidence preservation.

First, marketing by photo and/or video live streaming is more complicated than purely displaying an introductory page for products. It could also be infringing if the live streaming channel sells genuine products but uses copyrighted background music without authorization. How platforms shall take proportionable measures while still rendering sufficient and timely protection for right owners will be a practical issue.

Second, it is challenging for right owners to monitor in advance, preserve evidence and take swift actions. The products being marketed may or may not be announced before live streaming and hence much less traceable. Timewise, live streaming is usually scheduled at nights, not work hours. It takes extra planning and efforts to do monitoring on a regular basis and preserve evidence by notarization where necessary.

Third, wrong complaints might do greater harm in case of live streaming than taking down a link. Product sales are done almost instantly or concentrated in a very short time. If the streaming channels are shut down immediately during the live streaming but later found to be a mistake, the loss of traffic and revenues would be done in a very short time.

Currently, live streaming platforms still commonly use emails to receive and handle complaints. This is relevantly traditional and slow compared to the fast dissemination of content via live streaming. Also, we have not yet seen comprehensive IP complaint rules formulated by the top live streaming platforms.

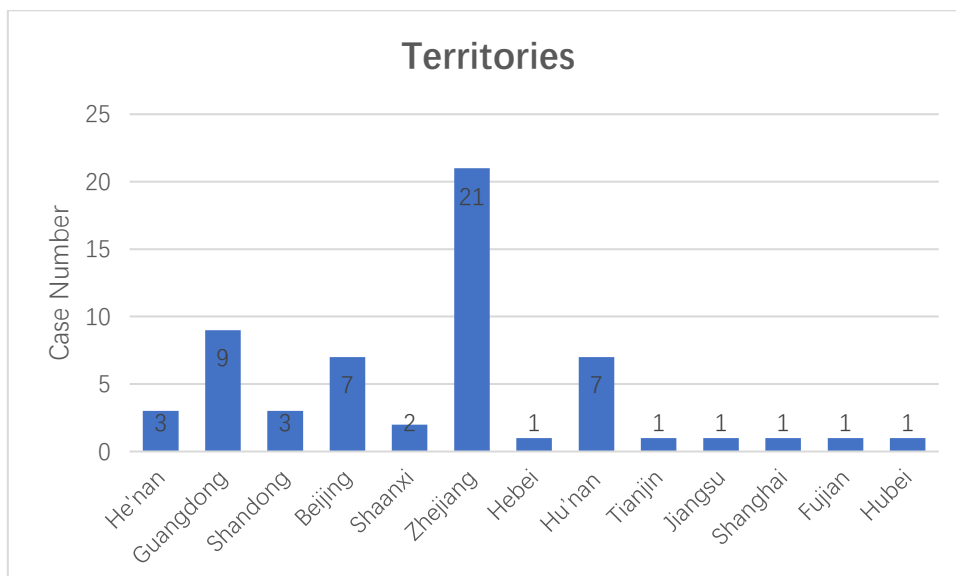
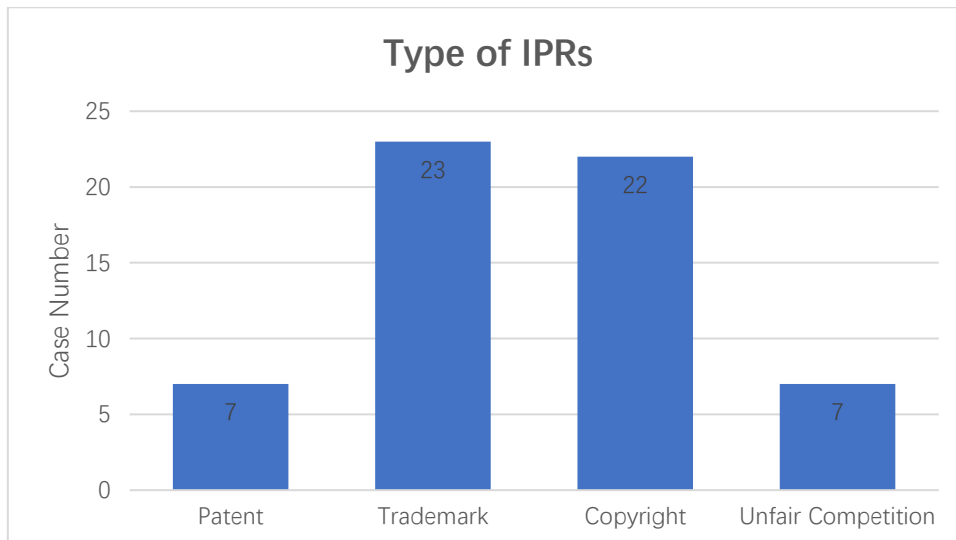
CHAPTER 3 RELEVANT CHINESE COURT DECISIONS

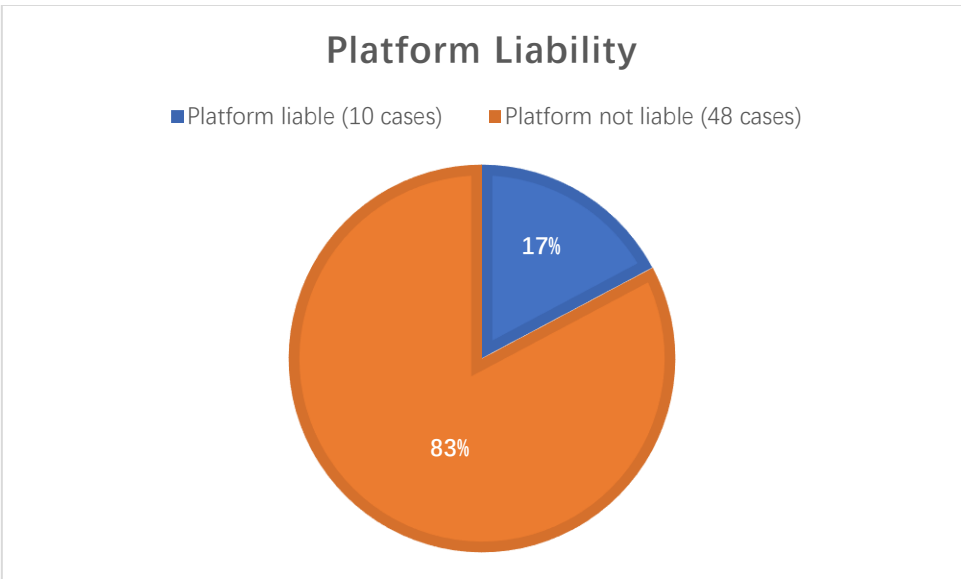
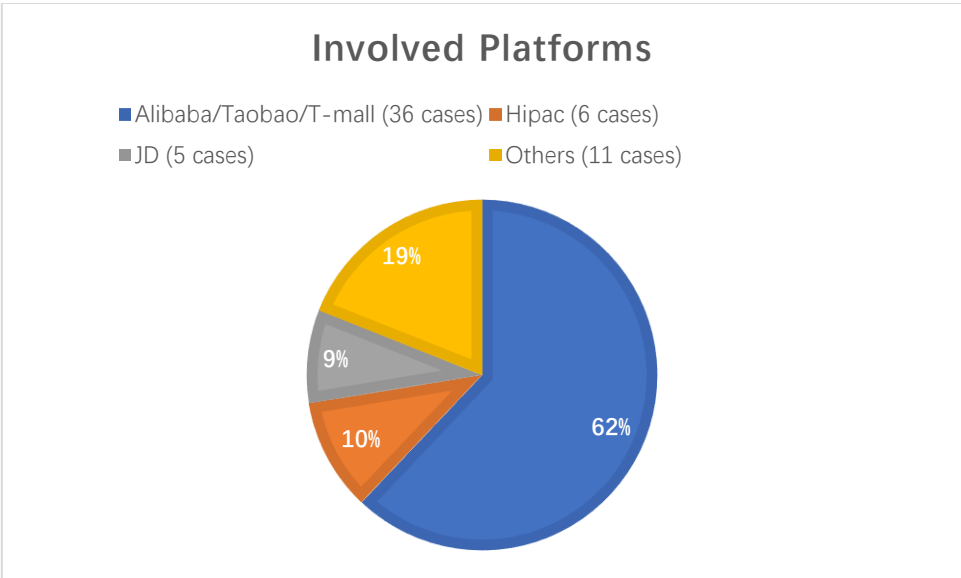
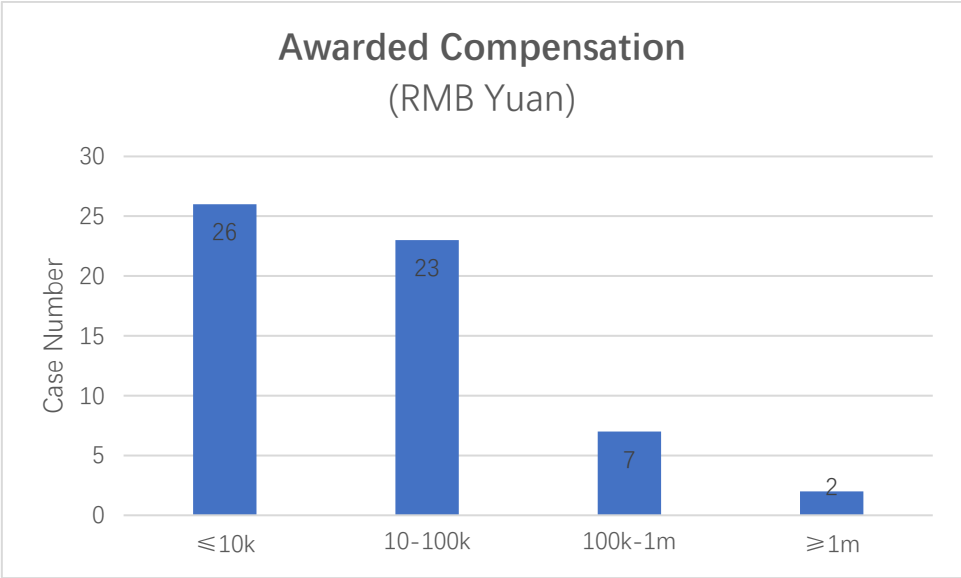
Up to December 31, 2020, there are 122 judgments issued since January 2020 that cited the *E-Commerce Law* and related to IPR and unfair competition. There should be much more cases in which e-commerce platforms got sued as defendant/co-defendant, which did not cite specifically the *E-commerce Law*.

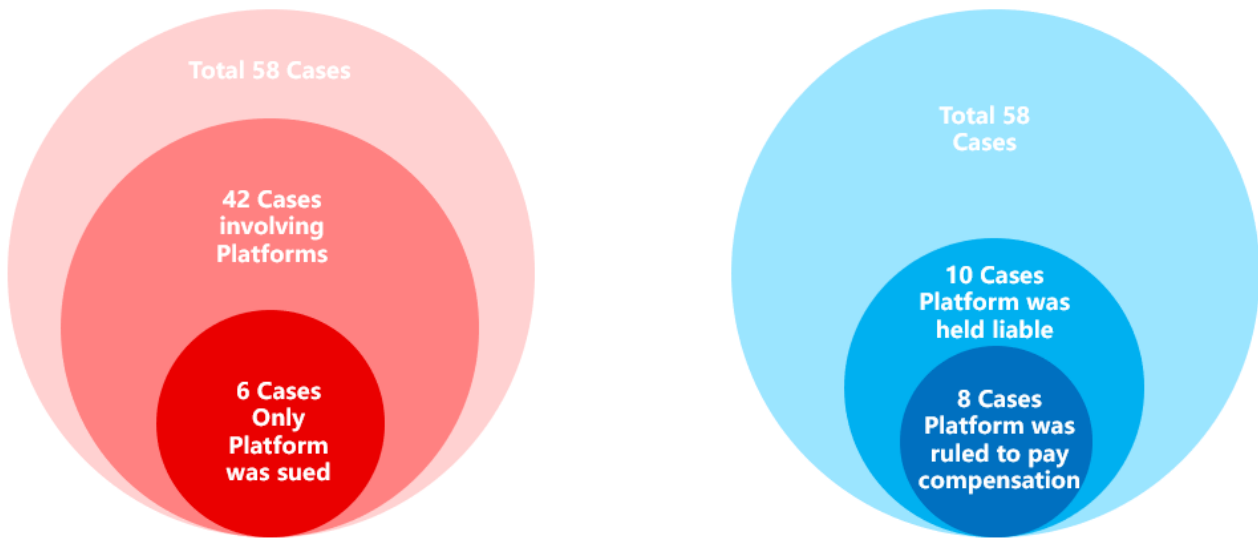
In addition, 3 cases implemented *the Guideline* and 1 case implemented *the Reply* after the execution of the *Phase One Agreement* in January 2020. We have crossed check various databases and comb through the new cases with special focus on judgments issued since the Previous Study. Attention should also be paid to cases where E-commerce platforms are held liable by Chinese court due to counterfeits and piracies occurred on the platform.

We have categorized the cases by issues, e.g., cases involving different types of IPRs, cases filed in different territories, cases concerning the liabilities of online platforms, etc. We have also summarized and compiled key facts and rulings of some example cases and present with the form of a chart and reach a conclusion re the tendencies of judicial/enforcement practices.

Firstly, below is a statistic overview of 58 cases we have reviewed.







From charts above we can see:

- (1) Trademark and copyright still remain as top 2 infringed IPRs, whilst cases involving patents are relatively less due to difficulty in determining on technical issues.
- (2) Alibaba/Taobao/T-mail is the most often involved platforms, which accounts for nearly 60% of the cases. Accordingly, the number of cases heard by courts in Zhejiang Province where operating entities of Alibaba/Taobao/T-mail are located are relatively high.
- (3) Although e-commerce platforms are often sued as co-defendants, they are hardly held liable for the IPR infringement. As commented by Zhejiang High People’s Court in its *Research Report on IPR Legal Liability in E-commerce Field*²⁴ (“Research Report”), the plaintiffs usually sued platforms to urge them to stop the infringements or for jurisdiction purposes, and nearly a half of them withdrew or gave up the claims against the platforms; there is only one case where the platform (Alibaba) was ruled to pay compensation, but it was for its direct infringement by using other’s copyrighted works on its platform without authorization.

Secondly, this research mainly discusses 4 cases that has implemented the Guideline and the Reply recently. 3 cases implemented the Guideline, which are presented in Table 4 as follows. Another case implemented the Reply, which is presented in Table 5 in detail. Some other cases are also cited when discussing major issues/developments in judicial practice.

Table 4. Brief information of the judicial cases implementing the Guideline

Case Number	Key Information	
(2020) Lu 15 Minchu NO.229	Court : Shangdong Province Liaocheng Intermediate People’s Court	Rules Quoted by the Defendant: Article 11 (but it was not accepted by the court)
	Plaintiff: WANG Xingchuan	

²⁴ Research Report on IPR Legal Liability in E-commerce Field, published by Zhejiang High People’s Court on 27 March 2020, see <https://www.chinacourt.org/article/detail/2020/03/id/4871104.shtml>.

	<p>Defendant: Shanghai Xunmeng Information Technology Co., Ltd.</p> <p>Relevant E-commerce platform: Pinduoduo</p>	
	<p>Facts: <i>The ninth rabbit: a hundred times effort is better than a correct choice's</i> copyright is owned by plaintiff. Plaintiff found some pirated books sold on defendant's platform. Plaintiff sent an Alert Notice of its Copyright to defendant. Defendant forwarded the Alert Notice to the vendors on its platform by internal letter.</p> <p>Judgements: Defendant infringed plaintiff's copyright and should undertake the liability to compensate the Plaintiff.</p> <p>Award made: Xunmeng compensated WANG of RMB 10,000.</p>	
(2020) Zhe 0110 Minchu NO.7982	<p>Court: Zhejiang Province Hangzhou Yuhang District People's Court</p>	<p>Rules quoted by the Court: Article 8 to determine whether the defendant is "malicious"</p>
	<p>Plaintiff: Nanjing Hui Nong Qian Chong Lang Agriculture Technology Co., Ltd.</p> <p>Defendant: Shi Ke Mu Zuo Wu Technology (Wuxi) Co., Ltd.</p> <p>Relevant E-commerce platform: Taobao</p>	
	<p>Facts: Defendant submitted a verification report which falsely stated that plaintiff's products are counterfeits. Defendant's complaint with Taobao against plaintiff's products constitutes a malicious complaint.</p> <p>Judgements: Defendant's behavior is unfair competition and should bear the civil liability of compensation for damages.</p> <p>Award made: Shi Ke Mu Zuo Wu Tech compensated Hui Nong Qian Chong Lang Agriculture Tech. of RMB 200,000.</p>	
(2020) Zhe 0110 Minchu NO.9076	<p>Court: Zhejiang Province Hangzhou Yuhang District People's Court</p>	<p>Rules quoted by the Court: Article 8 to determine whether the defendant is "malicious"</p>
	<p>Plaintiff: Guangzhou Zengcheng Oxycondar Agricultural Management Department</p> <p>Defendant: Guangdong Maoming Luyin Agrochemical Co., Ltd.</p> <p>Relevant E-commerce platform: Taobao</p>	
	<p>Facts: Defendant submitted a verification report which falsely stated that plaintiff's products are counterfeits. Defendant's complaint with Taobao against plaintiff's products constitutes a malicious complaint.</p> <p>Judgements: Defendant's behavior is unfair competition and should bear the civil liability of compensation for damages.</p> <p>Award made: Guangdong Maoming Luyin Agrochemical Co. compensated Guangzhou Zengcheng Oxycondar Agricultural Management Department of RMB 200,000</p>	

Table 5. The details of the case implementing the Reply

Case Number	Key Information	
(2020) Jing 01 Minzhong NO.7220	<p>Court : Beijing First Intermediate People's Court</p>	<p>Rules Quoted by the Defendant: Article 3 (and it is upheld by the court)</p>
	<p>Plaintiff: Beijing Microcast Vision Technology Co.</p>	

	<p>Defendant: Beijing Baidu Netcom Technology Co., Pan Ling</p> <p>Relevant E-commerce platform: Baidu</p>
	<p>Facts: Baidu, as a network service provider, did not delay the removal of the article in question. And at the request of the parties, the registration information of the Baidu article in question was disclosed in the lawsuit, fulfilling its statutory obligations.</p> <p>Judgements: The appeal is dismissed and the judgment is affirmed.</p>

Form the above and other cases we have reviewed, some noteworthy observations are as follows:

- (1) Number of IPR cases involving e-commerce plat forms are increasing year by year. As cited in the Research Report, only in Zhejiang Province, relevant cases jumped from 445 to 5613 from 2014 to 2018, with an annual increasing rate of 88.46%. Also, compared to the Previous Study where only 33 cases were on the record, after one year implementation, IPR cases referring to *E-Commerce Law* are over 100 in 2020. This suggests that the *E-Commerce Law* was actively enforced in the past year and more and more stakeholders are relying on the *E-Commerce Law* to protect their IPRs.
- (2) Only very limited e-commerce platforms were held jointly liable for IPR infringement, and whether reasonable and cautious measures have been taken by the platform is the key consideration in such cases. In a serial of cases filed by Blue River Nutrition Products Co., Ltd. (“Blue River”) against Hangzhou Yangtuo Network Technology Co., Ltd. (“Yangtuo”), the operator of B2B platform hipac.cn, Yangtuo defended that the letter delivered by Blue River did not include information of the exact infringers and thus it was an invalid complaint. However, the court refused Yangtuo’s argument because Yangtuo failed to further confirm the infringer information with Blue River. As a contrast, in another case filed by Blue Reiver against Shanghai Xunmeng Information Technology Co., Ltd. (“Xunmeng”), the operator of Pinduoduo, the platform liability is exempted as Xunmeng requested Bule River to supplement information of infringing links but Blue River did not reply. Generally speaking, major platforms are rarely held liable as they have established relatively comprehensive IPR protection rules and mature proceedings to handle the take down notices, which significantly helps to reduce the risk of joint infringement.
- (3) Insufficient notice is one of main reasons for failure in complaint with platforms. As indicated in the above Blue River cases, Blue River did not provide infringing links for the platform to take action. In another case “CHEN Yushui vs Xunmeng and MA Ninger”, Chen’s complaint also failed since he did not submit initial evidence of infringement. A third case is “Yunnan Kuntai Guangda Trade Co., Ltd. (“Kuntai”) vs Taobao and LU Weiqun”. Taobao asked Kuntai to provide shipment information to prove it had received the goods in dispute. However, Kuntai failed to respond, and the court ruled that Taobao had no fault to regard Kuntai’s notice as invalid. This reminds stakeholders that they should strictly follow the guidelines on take down notices as provided in the Guideline to include sufficient information in the notice, and they should also supplement any missing information if requested by the platform. Otherwise, the complaint may not be accepted and timely processed by the platforms.
- (4) It is generally not required for the platform to take proactive measures in IPR protection. In the case “Zhejiang Fanmai Technology Co., Ltd. vs Xixian New District Airport New City Wanjiahong Grocery Store”, the court clearly stated in the judgment that the platform is not obligated to take initial measures to examine and supervise whether the goods on the platform are infringing on IPRs or not. In another case “China Construction Publication and Media Co., Ltd. vs Xunmeng”, the court considered that due to huge amount of online information, the e-commerce supervisory mechanism should mainly focus on in-proceeding monitor and afterwards remedy, and thus there is no legal ground to request the platform to take initiatives to delete potential infringing links. Therefore, as a general matter, it is sufficient for the platform to take necessary measures after receiving the take down notices.

Despite of the foregoing, the platform still needs to fulfill some obligations of “reasonable care” as specified in the Guideline, including to set up IPR protection rules, filter some key words like “high-quality counterfeit”, etc. Otherwise, it will be deemed that it “should have known” about the infringement.

- (5) What constitutes a malicious notice has been clarified in judicial interpretations. In practice, it is not uncommon that competitors take advantage of the platform IP protection rules and file complaints against online operator, aiming to remove the competitive products and even the stores from the platform. Such a takedown notice, if filed in bad faith, would surely cause damages to the online operator, particularly if it is served just before big sales windows like spring festival. To address this issue, Article 8 of the Guideline provide some guidelines on determining whether a notice is malicious.

In the second and third cases listed in the above Table 4, the notices issued by the defendants were determined malicious as they submitted false verification reports to the platform. In both cases, the defendants knew that certain words like “SipstarPlus” were on the genuine products, but they still issued the verification reports stating that genuine products did not bear such words and thus the goods sold on the platform were fake.

In another case, the courts provided more insights on this issue. Malicious notice cases are usually based on unfair competition, which means the qualified defendant is normally a competitor. However, in the case “Tianjin Jiaruibao Metallic Products Co., Ltd. vs XU Guizhen, Zhao Zhenquan, DENG Yanhui, etc.”, the court held that the filing agent is also liable. The court ruled that it was a typical malicious notice filed by the defendants by forging copyright documents. DENG Yanhui, serving as the filing agent, should be very familiar with the complaint filing rules and possible consequences, but he failed to check the authenticity of the power of attorney and the identity of the principle and thus did not exercise reasonable care. Furthermore, Deng clearly knew Zhao is the competitor but still accepted his engagement and filed the complaint in the name of Xu, which assisted with the infringing activities of Zhao and thus should be held jointly liable.

- (6) Preservation measures (Injunctions) are available to fight against malicious notices. Sometimes a malicious notice could not be corrected by filing response to the platform due to complexity in the case. In September 2019, Hangzhou Yuhang District People’s Court allowed preservation measures for the first time, which ordered the respondents to immediately stop filing complaints against the applicant with Taobao for IP infringement. According to the case report²⁵, the respondents filed 23 complaints against the applicant, which led to takedown of links to 12 hot items in its Taobao store. After review, the Court supported the applicant’s request as it considered that the applicant’s request has legal and factual basis and irreparable damages would occur if preservation measures were not taken. This practice has been adopted by Article 9 of the Guideline, which provides the online business operator with the right to apply to the court for adoption of preservation measures (e.g., restore the links to the commodities, withdraw notice or stop sending notice, etc.) under urgent circumstances.
- (7) Live streaming platforms have been put under the cover of the *E-Commerce Law*.

Live streaming industry has been aggressively growing in recent years in China and driven big sales in the market. As a new phenomenon, the *E-Commerce Law* did not clearly include live streaming activities and relevant platforms under regulation. However, this has changed since *Measures for the Supervision and Administration of Online Transactions* and *Administrative Measures for Online Live-Streaming Marketing (for Trial Implementation)* took effective this May. Article 2 of Online Transaction Measures explicitly provides that the Measures shall apply to the business activities of selling goods or providing services in

²⁵ Case report see http://www.yuhang.gov.cn/art/2019/9/25/art_1532133_38386867.html.

information network activities such as online social networking and online live streaming. Article 7 further provides some examples of online transaction platform services such as providing online business premises, product browsing, order generation and online payment for live streamers.

In a recent case heard by Beijing Haidian District Court, it is for the first time that a live streaming platform is recognized as an e-commerce platform. According to reported case details²⁶, the Court determined Douyin, a popular live streaming platform in China, is an e-commerce platform because users could conduct online marketing activities on the platform, and product information is displayed during the live streaming, and users need to use shopping cart on Douyin to be connected to another platform to complete the transaction, and the users could use their Douyin account to check purchase orders.

The Court further clarified on the reasonable obligations that should be imposed on such live streaming platform. It held that it is inappropriate to be too strict in respect of examination measures taken beforehand, and other factors should be considered, e.g., whether there are entry rules and marketing rules in place, whether the platform has performed its obligation of examining the goods and operators' licenses, whether there are negative list, IP protection rules and complaint mechanism, whether the platform has taken necessary measures upon notice and actively assisted the rights owner with enforcement, etc. In view of the forgoing, the Court reached the conclusion that Douyin had fulfilled its obligations of examination and reminder beforehand and had taken timely actions afterwards and thus is not liable in this case. This case is currently under appeal, and we will wait and see if the second instance will uphold the judgment.

²⁶ For case report see <https://t.cj.sina.com.cn/articles/view/1749990115/684ebae3020013itr>.

CHAPTER 4 FEEDBACK FROM EU RIGHTS OWNERS

Rights owners are important market players in the e-commerce market and have first-hand experience on how the *E-Commerce Law* works in practice.

In this study, we have conducted in-depth interviews with 5 right owners from diverse industries as specialized chemical products, music and entertainment and consumer products. Unfortunately, we have not yet received feedback from platforms up to this point and hence unable to provide platform perspectives.

The interviews were guided by outlines as shown in the **Annexes**, covering the general observations, complaint channels, materials and processing, specific data in years 2019-2020, and comments on MoUs. We summarize the specific feedbacks and data provided as below.

I. Overall Observation

1. Changes of platform governance rules and practice after the E-Commerce Law

Majority of the interviewed right owners acknowledge there are positive changes in overall, including clearer rules and procedures for filing complaints, stricter scrutiny over vendor identities and certifications, generally quicker processing, more proactive and preventive measures enabled by technologies and more vibrant collaboration frameworks available for right owners to communicate with platforms.

As specific examples of positive changes: (1) Pinduoduo now would invite right owners to help vet vendors and confirm whether the authorization is authentic; (2) Alibaba's control extends from counterfeiting to stolen images which saves the time and cost of IP right owners.

We also heard feedback that platform rules become more specific and standardized but some designs and rules may be restrictive for perspective of right owners, which we will summarize in the next section.

2. Challenges and difficulties

While e-commerce platform operators and rights owners continue to develop and deploy new technologies to combat counterfeiting and piracy, infringers also learn from experience and invent new ways to freeride. There are also issues that remain unsolved, and even made harder to resolve given the evolving technologies.

The interviewees observed various challenges in the face of evolving infringement activities. It takes the joint efforts of platform operators and rights owners to timely spot emerging infringement activities and upgrade the platform rules as well as automatic screening technologies and algorithms accordingly.

Challenges:

- (1) Many infringers mix genuine products and counterfeits for sale. It is difficult even for the right owners to tell the difference.
- (2) Counterfeits and piracy on social e-commerce and live streaming platforms is a headache. Infringing activities are even less traceable than on traditional e-commerce platforms. Right owners need cooperation and support from these new forms of platforms to preserve evidence. It is challenging to monitor live streaming platforms and preserve evidence.
- (3) Infringers have developed more subtle ways of infringement that are less detectable by traditional technologies and algorithms, which may be challenging for e-commerce platform operators to make capable determinations. They now use photos and videos embedded with trademarks or other illegal content to promote products. Some platforms have not yet employed technologies to automatically detect and delete these photos and videos, and even deem such use as non-trademark use.
- (4) The “whack a mole” issue still exists. Right owners expect e-commerce platform operators to develop even more stringent rules on vendor entry and vetting, so that vendors whose stores have been shut down may not register a new store easily. Additionally, if unable to resolve this identity vetting issue, the three-strike rule or one strike rule (meaning that the stores will be shut down for good if found of three counts or one count of infringement) will have no value.
- (5) There are no clear rules or systems to regulate other essential players in the chain of counterfeits and piracy, such as logistics companies who may be in a better position to detect bogus mails and help track the goods.

3. Recommendations for platform initiatives

On platform initiatives, right owners mostly agree that e-commerce platform operators have more or less deployed proactive and preventive initiatives to combat counterfeit and piracy. Right owners would appreciate that platform operators could regularly publicize and share progress of the new initiatives. Additionally, right owners are willing to offer platforms with characteristics of genuine products, tips to identify counterfeits as well as key words used to refer to the genuine brands, so that platforms could integrate these into the algorithms and improve the effectiveness of automated detection.

II. Complaint Channels, Materials and Processing

1. Complaint channels

Right owners acknowledged that the leading e-commerce platforms usually have an IP complaint system in place already. However, for the live streaming platforms and less developed e-commerce platforms, filing complaints by email is still common. It will generally take longer.

One interviewee, an international industry association focusing on collective musical copyright management and enforcement, gave the strong and negative comment that enforcement is made difficult where e-commerce platforms do not provide options of manual intervention. While the introduction of automatic screening and monitoring technologies help platforms to some extent to prevent illegal content from getting online in the first place, it found the complaint filing and reviewing standards too rigid and lacks necessary manual intervention. Right owners are not given opportunities to communicate directly with staff handling the complaints where it is necessary. There is no standard communication channel to appeal a complaint, either.

2. Requirements on complaint materials and standard of review

Following the *E-Commerce Law* and various regulations and guidelines, the e-commerce platforms in overall have updated the platform rules to reflect the legal requirements. This is generally positive, because it gives right owners some certainty on what is required to file complaints and the standard of review.

However, right owners reported inconvenient or stringent formality requirements, including:

(1) Requirements on proof of right is rigorous and mechanical.

For instance, where infringers steal commercial marketing photos to freeride, some platform rules may require right owners to produce copyright registration certificates. However, right owners usually have many commercial photos and update them quickly. It is impractical and unnecessary to require right owners to file copyright registration for every commercial photo used in marketing activities.

Additionally, for international trademarks, platforms require official registration certificates and do not accept CNIPA online records. This is also inconvenient and unnecessary.

(2) Some platforms now require court or administrative decisions as preliminary supporting evidence. This is quite burdensome to right owners and goes against the intention of quick effective online take-down. Right owners suggest that court or administrative decisions should not be required especially when counterfeit is apparent.

(3) Platforms sometimes question the authenticity of infringing product sample obtained by right owners, which force right owners to do notarized purchase of alleged infringing products at higher costs and take longer time.

In terms of standards of review, right owners expect major platform operators to conduct proportionate and necessary substantive review of evidence, instead of relying solely on existing court or administrative decisions.

3. Non-infringement counter notice

In compliance with the *E-Commerce Law*, major platforms now have a counter notice mechanism in place and will give right owners the opportunity to rebut the counter notice. Before forwarding the counter notice to right owners, platforms will usually first review the counter notices and supporting evidence of non-infringement.

The common grounds of non-infringement counter notices are usually that the products are duly authorized or that the trademarks, content or technologies used are not infringing. Successful counter notices are served in relatively a small fraction of complaints.

Art. 8 of SPC Guidelines and Art. 4 of the Reply provide punitive damages for filing bad faith non-infringement counter notice, but this is still quite new and right owners being interviewed did not make use of this yet.

4. Information disclosure and sharing

Where the platforms have dedicated IP complaint systems, the progress and status of complaints is usually shared with right owners in a timely manner. However, for other platforms that still rely on emails to handle complaints, it is difficult to have a systemic display of all complaint results.

In terms of information sharing in specific cases, right owners may expect platforms to provide information of infringers for evidence use in other legal actions. Currently, there are no specific rules on what could be provided to right owners, especially due to the increasing concern of data protection. It may help to work out a set of rules on what information can be made available to right owners in the pursuit of suspicious infringing activities, as opposed to what information could only be subpoenaed by courts.

In terms of public disclosure, major platforms may release annual review reports with data and progress of platform initiatives. However, the data and progress reports are quite general. Right owners would appreciate more information sharing from platforms.

III. 2019-2020 Trends and Data

In general, trademark rights and copyright remain the major basis in most complaints. Complaints based on patent rights are still difficult.

On forms and types of infringement, right owners agree that infringers get cunninger and better at hiding their traces. Infringers now sometime use the online stores as a front to attract user traffic but direct consumers to do the transaction via social media. In such case, right owners could no longer count on the sales volume and revenue numbers shown on the e-commerce platforms to calculate the damages. Also, freeriding and passing off conducts are growing. Infringers may use identical or similar model numbers, packaging and commercial photos to promote sales. These would hurt right owners the same but are not effectively taken care of.

Right owners could not give accurate numbers of complaints and success rates, but majority confirmed the success rate is promising. Two of the interviewees put the approximate success rate at above 90%. However, most successful cases are based on complaints on pure counterfeits. Complaints claiming similar trademarks would have a lower success rate, unless court or administrative decisions are provided.

As to average response time, different right owner may have different experiences. Top platforms respond more quickly, but there are still cases that take much longer and even weeks to handle the complaint, especially around shopping festivals, such as November 11, December 12 or June 18. Right owners would expect platforms to further reduce the response time and set a clearer limitation of maximum response time.

IV. MoUs

None of the EU right owners interviewed here is one of the 14 signatories to the MoU on the sale of counterfeit goods on the internet, and therefore not able to give direct comments on EU MoU experience. However, three of them are members of Alibaba Anti-Counterfeiting Alliance (AACA) and four are members of Quality Brands Protection Committee China Association of Enterprises with Foreign Investment (QBPC), both of which have the common practice of signing MoUs at organizational level.

The rights owners generally acknowledge signing MoUs is a good way to build regular communication channels with various stakeholders, share the best practices and give feedbacks. That being said, it seems that the MoUs in China mostly serve as framework agreements to facilitate information exchange and collaboration but are not clear on Key Performance Indicators (KPIs) for signatories to review and assess the implementation status quantitatively or qualitatively.

CHAPTER V KEY TAKEAWAYS

By combing through the existing legislation, platform initiatives, case study, stakeholder feedbacks, we come to this point to summarize the key takeaways.

1. Legislative development

There has been major development in the past two years that fill in the blanks of *E-Commerce Law*, which falls short on implementing rules. The SPC Guidelines and Reply clarify the specific requirements of take down notices and counter notices, factors to consider in determining bad faith and whether platforms have taken reasonable measures, etc. The various administrative rules and guidelines make it clear that live streaming platforms offering goods for sale should constitute e-commerce platforms and hence subject these new types of platforms to regulation of the *E-Commerce Law*.

The legislative design demonstrates the intention of building a balanced and symmetrical governance system of e-commerce. While vowing to strengthen IP protection, the current laws and regulations also set restrictions on bad faith complaints and provide injunctive relief for platform vendors. The reason might be that bad faith complaints are still considered a big issue in China. There are still a big percentage of complaints are filed with inauthentic basis of right or as frivolous ways to beat competition.

2. Proactive and preventive measures taken by platforms

It should be acknowledged that major platforms have all adopted proactive and preventive measures and most has been effective. However, rights owners would expect more regular and detailed sharing of statistics and cases from platforms, which could help developing the best practice and understanding how right owners may contribute to improve accuracy and effectiveness of these proactive and preventive measures.

So far, major platforms may release some general data from time to time, but little information could be found for smaller platforms. Also, even for the major platforms and their initiatives, the access to participate in these initiatives may not be sufficiently visible. We trust that all right owners would be interested to know about the access to these initiatives and how they function.

3. Platform rules

Right owners acknowledge that platform rules are now more specific than before, while some designs and rules are too specific and even rigid. For right owners with a good complaint track record, it might help to explore a whitelist for these trusted complaint filers and provide expedited complaint channel and process.

So far, we did not see sufficient safeguards specifically designed for SMEs. Only a few platforms have special channel for SMEs to file complaints, while most systems are not designed to address SMEs' major concerns. Similarly, it is difficult to hear voice from smaller e-commerce platforms.

The rules and measures still need improving targeting complex and emerging forms of counterfeit and piracy. Also, right owners expect to see more specific rules for IP enforcement on live streaming platforms.

4. Stakeholder collaboration

Stakeholder cooperation and collaboration is the necessary trend. Right owners would appreciate more data and feedback on what proactive measures platforms have been developing and how they work in reality, so that right owners know how they could engage and contribute. Platforms are in better position to provide big data and analysis across the platforms, while right owners have more accurate understanding and experience to deal with counterfeits or piracy against particular brands, technology or content. Platforms may integrate information and key words provided by right owners to integrate platform algorithms and enhance effectiveness of the proactive and preventive measures.

Currently, there are no specific rules on what could be provided to right owners, especially due to the increasing concern of data protection. It may help to work out a set of rules on what information can be made available to right owners in the pursuit of suspicious infringing activities, as opposed to what information could only be subpoenaed by courts.

5. Platform liabilities

Based on the statistical review, trademark and copyright remain as top categories of IPR, whilst cases involving patents are relatively less due to difficulty in determining on technical issues. Alibaba/Taobao/T-mall is the most often involved platforms, which accounts for nearly 60% of the cases. However, e-commerce platforms are hardly held liable for the IPR infringement. Insufficient notice is one of main reasons for failure in complaint with platforms.

6. MoUs

There are already various MoUs directed by business associations, supervision agencies, right owners and platforms. The MoUs are believed to help stakeholders build trust relationship and exchange information and best practice. Under some MoU structures, participants may be given more resources as well from local agencies and platforms.

We agree with the proposal made in the Previous Study which includes a list of options for MoU facilitating organizations. However, we also take note of the challenges of implementing the EU approach at this point. It seems like most MoUs in China are still in a preliminary stage. They have not set KPIs or regular follow up mechanisms to evaluate qualitatively and quantitatively the implementation effect, and there is also no facilitator or supervisor to keep track of implementation.

The texts of most MoUs signed in China are not made public, and therefore unable to do documentary review and comparison.

CONCLUSION

Since *E-Commerce Law* takes effect in 2019, there has been major development in terms of e-commerce market, technologies, and legal governance framework.

Various new laws, regulations and policies help to clarify the legal requirements, which provide some certainty to stakeholders and guide platforms to build specific rules and procedures. Also, major platforms continue to develop proactive and preventive measures, the effectiveness and efforts of which should be acknowledged.

While e-commerce platform operators and rights owners continue to develop and deploy new technologies to combat counterfeiting and piracy, infringers also learn from experience and invent new ways to freeride. There are also issues that remain unsolved, and even made harder to resolve given the evolving technologies. Right owners would expect and appreciate more information sharing and collaboration with platforms and authorities to act in concert in building best practice especially in tackling the complex and emerging forms of online counterfeit and piracy.

MoUs are believed to help stakeholders build trust relationship and exchange information and best practice, but it will need much more work to implement the EU approach.

ANNEXES

- I. LIST OF CITED LEGAL DOCUMENTS**
- II. LIST OF CASES REVIEWED**
- III. BILINGUAL TEXTS OF LEGAL DOCUMENTS**
- IV. INTERVIEW OUTLINES**