

# VIVIEN CHAN & Co.

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## NEWSLETTER

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### IP UPDATE



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## The First E-Commerce Law in China

On 31 August 2018, the Standing Committee of the National People's Congress promulgated the long-awaited E-Commerce Laws. The E-Commerce Laws, which will come into effect on 1 January 2019, reflects the Chinese government's determination in fighting counterfeits and protecting consumers in one of the largest e-commerce market in the world (if not the largest).

In this article, we will highlight some of the changes brought by the E-Commerce Laws that a brand owner may need to pay attention to.

### I. PROTECTION OF INTELLECTUAL PROPERTY (IP) RIGHTS

The E-Commerce Laws clarify the uncertainties under Article 36 of the PRC Tort Laws, mandating a complaint procedure to be in place in the e-commerce platform, and putting the onus on e-commerce platform operators to take necessary measures such as taking down the infringing listings, disabling the relevant webpages and terminating the transactions if they detect any potential infringements to IP rights.

While complaint systems have already been put in place in most of the popular e-commerce platforms, the E-Commerce Laws specify the procedures and consequences that e-commerce platform operators shall follow:-

If an IP rights owner has reasons to believe that a business operator on the platform has infringed its rights, the rights owner may notify the platform operator by submitting a notice of IP right infringement (the "Notice") to request the platform operator to take the necessary measures against the business operator. The requirement of the Notice is that the rights owner shall submit "prima facie evidence of infringement" at the same time.

Upon receipt of the Notice, the platform operator shall timely take the necessary measures against the business operator, and to redirect the Notice to the business operator, failing which the platform operator will be held jointly and severally liable for additional damages caused by the prolonged infringement.

On the other hand, upon receipt of the Notice, the business operator may submit a declaration of non-infringement (the "Declaration") to the platform operator. Such Declaration, similar to the Notice, shall be submitted together with "prima facie evidence of non-infringement". Upon receipt of the Declaration, the platform operator shall forward the same to the rights owner and inform the rights owner that it may file complaints with the relevant administrative authorities or commence legal proceedings against the business operator in the Court. In the event that the platform operator does not receive notice from the rights owner on the filing of complaint or commencement of legal proceedings within 15 days, the platform operator shall timely cease all necessary measures taken against the business operator.

This is a welcoming development to codify the complaint procedures so that rights owners would have a more certain expectation that their complaints will be properly handled, and necessary measures will be taken against the infringer promptly without delay. On the other hand, the existence of procedures for business operator to submit non-infringement declaration strikes a balance to mitigate the risk of squatters making attempts of bad faith complaints to disrupt the business of legitimate operators on the e-commerce platform. The E-Commerce Laws provide that the complainant shall bear civil liability for the loss and damage suffered by a business operator for a wrongful complaint, and the liability shall be doubled in case of malicious complaint.

However, it is yet to be clarified as the levels of evidence required and the meanings of "prima facie evidence of infringement" and "prima facie evidence of non-infringement".

As for IP rights owner, there is always a concern that detailing the differences in feature between genuine products and counterfeit products may educate the infringer in future infringement. Given that the Notice will be redirected to the infringer, and the notice shall include "prima facie evidence of infringement", the details required for meeting the threshold will be crucial for minimizing leakage of valuable and confidential information to the infringer.

On the other hand, the necessary measures would be ceased in case the business operator provides "prima facie evidence of non-infringement" and the IP rights owner fails to take actions within 15 days. The absence of a reply mechanism, and the need to take actions within 15 days (which is unlikely to be sufficient for overseas rights owner to even prepare the formality documents) may mean that the necessary measures will be ceased should the infringer be prepared to fabricate "authorization" documents (which is also not uncommon). The rights owner may therefore have to be prepared to take action against infringer following e-commerce platform complaint, and to explore using such "authorization" documents (if so fabricated) against the infringer in subsequent legal actions.

## II. ENHANCED PROTECTION OF CONSUMER RIGHTS

The E-Commerce Laws place great emphasis on the protection of consumer rights. Behaviors which may damage the e-commerce credit system like false advertising are explicitly prohibited. The E-Commerce Laws protect consumers against fake reviews by banning dishonest practices such as hiring agents to write positive reviews, luring customers to leave favorable reviews with monetary rewards, disclosing credibility records selectively and deleting unfavorable comments, unless they are defamatory or otherwise forbidden.

The E-Commerce Laws also requires e-commerce platform operators to shoulder greater responsibility in ensuring the quality of items listed on their platform. For goods or services that affect the health and safety of consumers, like medical products, platform operators will be held jointly liable with the business operator if they fail to examine the qualifications of business operators on its platform. Consumers are entitled to seek compensation directly from platform operators, who can subsequently seek reimbursement from the actual retailers.

Under the E-Commerce Laws, all business operators on e-commerce platforms, like traditional businesses, must be registered and licensed with the State Administration and Industry and Commerce (SAIC), except for sellers of home-grown agricultural products and crafts. They are required to make their license information available on their webpages and provide their identity information to platform operators. These mandatory requirements will make it easier for consumers and right owners to identify infringers and make it harder for infringers to evade enforcement actions by simply closing down their online stores.

While the E-Commerce Laws have been passed to keep up with the massive growth in PRC's e-commerce market, it remains to be seen as to how the same will be applied and enforced in real cases. It is expected that further interpretation notes and/or guidelines would be published for clarification and more updates as to the actual practice will be provided after the E-Commerce Laws actually come into force. Stay tuned.

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