

An Analysis of the Intellectual Property Rights Protection Obligations and Joint Liabilities of E-Commerce Platform Operators

Changjun Wu, Xu Yong

School of Law, Beijing Wuzi University, Beijing, China

ABSTRACT

In order to strengthen the public's awareness of intellectual property protection, reduce intellectual property infringements, and promote the healthy development of e-commerce platforms, this article focuses on the intellectual property protection obligations and joint liabilities of platform operators. The thesis uses a variety of research methods such as comparative research methods and case analysis methods to consult a large number of relevant theories in the field of e-commerce and intellectual property, and has an in-depth understanding of the intellectual property protection obligations of platform operators. The thesis focuses on the study of Articles 41 to 45 of the Electronic Commerce Law, while covering other relevant laws and regulations, and comprehensively sorts out and summarizes the intellectual property protection obligations of platform operators. In addition, the article analyzes the constitutive elements of the joint liability of the platform operator and discusses the division of the responsibility of the platform operator. The article finally puts forward suggestions on improving the joint liability system for platform operators' intellectual property rights infringement. One is to clarify the rights and obligations of platform operators, and to reasonably divide the responsibilities of all parties; the other is to make joint efforts by the whole society to give full play to administrative and judicial organs. The third is to strengthen the internal construction of e-commerce platforms, train professionals, and tackle intellectual property infringements from the source.

KEYWORDS: E-commerce; E-commerce platform operators; Intellectual property protection

I. INTRODUCTION

A. Purpose of research

According to data released by the National Bureau of Statistics, the national online retail sales in 2019 was 10,632.4 billion yuan, an increase of 16.5% over the previous year. With the development of science and technology and the improvement of logistics and other infrastructure, online shopping has gradually become a daily life for people. In order to strengthen the governance of e-commerce platforms and regulate the behavior of e-commerce operators, the "E-commerce Law" was promulgated on August 31, 2018, and will be officially implemented on January 1, 2019.

The promulgation of the "E-commerce Law" filled the legal gap in the field of e-commerce. On the one hand, it clarified the concepts of the parties in the field of e-commerce, and on the other hand, it stipulated the intellectual property rights of e-commerce platform operators (hereinafter referred to as platform operators). The obligation of protection clarifies the responsibility of platform operators. The filling of the legal gap has adapted to changes in real life and the needs of the people, and has further promoted the improvement of my country's legal system.

The provisions on intellectual property protection obligations of the Electronic Commerce Law mainly focus on

Article 5, Article 41-45 and Article 84. Among them, Articles 5 and 41 stipulate that platform operators have the obligation to protect intellectual property rights. Articles 42-45 inherit the relevant provisions of the Tort Liability Law and strengthen the "safe harbor principle" and "The Red Flag Principle" emphasizes the responsibility of platform operators who violate their obligations to protect intellectual property rights. Article 84 stipulates the administrative responsibilities that platform operators must bear when they violate their obligations to protect intellectual property rights.

This article mainly focuses on the "E-Commerce Law", combined with the "Tort Liability Law", "Information Network Communication Right Protection Regulations" and other laws and regulations, with platform operators' intellectual property protection obligations and joint and several liability as the research object, aiming to improve The theoretical research in this field promotes the implementation of the "E-Commerce Law" and contributes to the construction of the rule of law in China. This article hopes to explore the system design of joint liability for infringement of intellectual property rights of platform operators, protect the legal rights of third parties in

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intellectual property rights, properly resolve disputes, and promote the healthy development of e-commerce platforms.

B. The significance of the research

1. Realistic significance

In the field of legislation, it provides legislative ideas for improving the intellectual property protection system in the field of e-commerce, promotes the proposal of relevant judicial interpretations, and builds a socialist legal system with Chinese characteristics. In the judicial field, through the elaboration of the relevant concepts of the "E-Commerce Law", it provides an effective reference for the court to determine and stop disputes, ensure the fairness and justice of case trials, and maintain judicial justice. In the field of law enforcement, strengthen the administrative supervision of e-commerce platforms, improve the law enforcement capabilities of administrative law enforcement personnel, and promote exchanges and cooperation between administrative agencies and e-commerce platforms. In real life, clarify the intellectual property rights protection obligations of platform operators and the joint responsibilities that they need to bear, urge platform operators to actively perform their obligations, improve people's thinking and awareness of intellectual property protection, and build a harmonious society.

2. Theoretical significance

Deepen the theoretical research on the obligations of intellectual property protection, explore the obligations and responsibilities of platform operators' intellectual property protection, and improve research in related fields. Establish close links between laws and regulations, and construct the theoretical structure and framework of intellectual property protection obligations in the field of e-commerce. Rooted in the legislative concept of the "E-Commerce Law", explore the theoretical meaning of "joint and several liability" in the "E-Commerce Law", deepen theoretical research, and explore new research fields.

C. Research status at home and abroad

1. Current status of domestic research

Since China's "E-commerce Law" was only released on August 31, 2018, the number of documents studying the "E-commerce Law" is limited. After combing and analyzing the literature of relevant scholars, the theoretical research of the "E-commerce Law" is mainly concentrated in the following aspects:

A) Definition of the main body of the e-commerce platform operator

Professor Wang Zejun analyzed the legal characteristics of platform operators, and proposed that the definition of platform operators needs to be grasped in sequence from four aspects: subject, behavior purpose, behavior method, and behavior effect. [1]

B) Research on the intellectual property protection obligations of e-commerce platform operators

First, research on individual clauses in the Electronic Commerce Law. Professor Liu Xiaochun believes that the "notification + deletion" system stipulated in the "E-Commerce Law" violates the original intent of the legislation and should be corrected as an exemption clause. [2] Professor Zhang Defen took the responsibility of e-commerce platforms in patent infringement disputes as an

example, and affirmed the "notification and removal" rule in the "E-Commerce Law", but he also believed that this rule violated the basic theory of the patent system and distorted the legal status of the platform operator may not be able to play its actual role. [3] Second, conduct a comprehensive study on the intellectual property protection obligations in the Electronic Commerce Law. Professor Xiong Ying proposed that e-commerce platform operators have general and specific obligations in the protection of intellectual property rights, and discussed the joint civil and administrative liabilities that platform operators should bear when they fail to perform legal obligations. [4]

C) Analysis of civil liability of e-commerce platform operators

Two scholars, Tuo Juanjuan and Zhang Youliang, discussed the disputes in three typical cases based on Article 36 of the Tort Liability Law, and elaborated on the basis for e-commerce platform providers to bear joint liability, existing legislative flaws and improvement measures. [5] Through combing the previous literature, it can be found that the current research focuses more on controversial areas and the research direction is relatively single. Based on the current research situation, this article will center on the "E-Commerce Law" to sort out and summarize relevant laws and regulations, improve the research on the intellectual property protection obligations of platform operators, and meet the needs of the development of e-commerce platforms.

2. Current status of foreign research

With the acceleration of China's economic development and the process of rule of law, the construction of a socialist legal system with Chinese characteristics has also received extensive attention from international scholars. Regarding China's "E-Commerce Law", foreign scholars have come to the following conclusions after conducting research: The article stated: The new law clearly stipulates joint and several liability on the platform for "existence of infringement" without taking necessary measures. This reduces the evidence requirements of right holders to a certain extent, because they only need to prove the possibility of knowing. What is considered "should be known" may still be subject to future judicial interpretations. [40] Weijun, Huang and Xiaoqiu, LI affirmed that the "E-commerce Law" as a basic law in the field of e-commerce is of great significance for balancing the interests of different groups and protecting the vitality of the market economy. At the same time, it is recommended to publish relevant judicial interpretations and implementation as soon as possible Rules. [41] Yongpei and Liu conducted research on the draft of the "E-Commerce Law" and affirmed that China's "E-Commerce Law" will focus on the protection of intellectual property rights in the future. [42] Loney and Michael stated that China's new E-Commerce Law still has loopholes for infringers. They stated that the law on the duty of care of e-commerce platforms is still unclear, which may impose a huge new burden on IP operators. At the same time, it believes that Article 43 of the Electronic Commerce Law makes the owner of intellectual property bear heavier responsibilities. [43] By analyzing the status quo of foreign research, due to the differences in national conditions and the application of laws among various countries, foreign scholars believe that the intellectual property protection system stipulated in China's "E-Commerce Law" has certain

shortcomings, and it is necessary to issue a judicial interpretation as soon as possible. The concept is refined. Therefore, this article will consider the suggestions put forward by foreign scholars, combined with my country's actual situation, to provide ideas for the introduction of judicial interpretations.

3. Review of research status at home and abroad

According to the existing literature, there are two main directions for research in this field: The first direction is to study all the clauses in a general way. Some scholars focused on the "E-Commerce Law", sorting out and studying the intellectual property protection clauses involved, and expounding what happens when platform operators violate their obligations. Responsibilities to be taken. However, in addition to the "E-commerce Law", there are still other laws and regulations such as the "Trademark Law" and the "Regulations on the Protection of the Right to Dissemination of Information Networks" that provide for the intellectual property rights protection obligations of platform operators. Currently, no scholar has integrated these provisions. Make it show a systematic trend. The second direction is to study some articles in the "Electronic Commerce Law", mainly focusing on the study of the "notice + deletion" obligation in Article 42 and the meaning of "know or should know" in Article 45. Scholars have conducted in-depth discussions on the above content based on the legislative concepts of the Electronic Commerce Law, but have not paid close attention to the "joint and several liability" under Article 42 and Article 45.

Through the analysis and summary of the research status at home and abroad, this article believes that further research is needed. On the one hand, it is necessary to systematically study the intellectual property protection obligations of platform operators, and on the other hand, it is necessary to clarify the responsibilities between the parties. Undertake, understand the meaning and nature of "joint and several liability", and continuously improve the system design in the field of e-commerce.

II. Analysis on the obligation of the operators of e-commerce platform to protect intellectual property rights

A. Definition of basic concepts

1. E-commerce platform

The "E-commerce Law" does not elaborate on the legal concept of an e-commerce platform. Combined with the provisions of Article 2 of the "E-commerce Law", an e-commerce platform can be defined as: a natural person, a legal person or an unincorporated person through information networks such as the Internet An information network platform for organizing business activities such as selling goods or providing services. And service platforms such as Tencent Video and iQiyi that use information networks to provide audio and video programs and other content are not e-commerce platforms. The meaning of the e-commerce platform can be understood from the role of the e-commerce platform. It is clear that the main role of the e-commerce platform is to provide online trading venues, match buyers and sellers, and publish product information. The difference from other electronic media platforms is that e-commerce platforms have strong Economic function, more commercial.

There are various classification methods for e-commerce platforms. According to the forms of transactions of goods and services that e-commerce platforms participate in, they can be divided into third-party operating platforms (C2C mode), self-operating platforms (B2C mode), and a combination of both businesses. Sexual platform (C2C+B2C mode). [6] Specifically, the representatives of the B2C model include Jingdong self-operated, Dangdang, etc. The platform operator in this model is similar to the operator of a supermarket. It has built an online store through the Internet and innovated consumers the way of shopping provides great convenience for consumers. The difference between the C2C model and the B2C model lies in the role of the platform operator. Under the C2C model, the platform operator's main role is to provide an online trading venue. Buyers and sellers can freely trade goods or services on the e-commerce platform. Platform operators do not directly engage in sales and purchase relationships with consumers. The most famous e-commerce platform of this model is Taobao.

In addition, platform operators have the same status as the operators in the platform when they conduct self-operated business. There is a direct economic connection between the platform operators and consumers, and they are no longer independent third parties. Therefore, the e-commerce platform under the B2C model not within the scope of this article.

2. E-commerce platform operators

Article 9 Paragraph 2 of the "E-Commerce Law" clearly states the meaning of related concepts. The platform operator and the operator within the platform have a platform service contract relationship [7], and the platform operator can provide network business premises and matchmaking for services such as transactions and information release, the direct transaction relationship occurs between operators and consumers on the platform.

When defining platform operators, it is necessary to consider multiple aspects. First, the nature of the platform operator is a legal person or an unincorporated organization. A partnership or partnership organization can also become a platform operator after obtaining qualifications in accordance with the law; second, the platform operator is an independent third party and is not an e-commerce transaction activity. The role of the parties involved in e-commerce transactions is to provide an online trading platform for the parties involved in e-commerce transaction activities. The service content is to conduct transaction matching, information release, etc.; third, the platform operator has a profit-making purpose, and the fundamental purpose of providing online transaction services is to obtain commercial benefits; Fourth, platform operators need to provide stable and continuous services to parties involved in e-commerce transactions, and the way they provide services is to use information networks such as the Internet; fifth, platform operators are the owners of e-commerce platforms and can The platform exercises the rights of possession and disposal.

All in all, the definition of platform operators needs to be considered from multiple angles and aspects, taking into account the independence and commercial nature of

platform operators and their substantive rights and obligations.

B. Analysis of the legal status of e-commerce platform operators

Regarding the legal status of the platform operator, there have been controversies such as the seller's theory, the partnership theory, the entrusted agent theory, the intermediary contract theory, the service contract theory, the counter rent theory, etc. [8], but in general, the platform operator is an e-commerce platform Organizers and managers of Between the platform operator and the platform operator, the platform operator is not an intermediary, nor is it a counter renter. The reason is that the platform operator has no intention to facilitate the transaction between the operator and the consumer on the platform, nor does it follow Gain profit from the transaction. At the same time, although platform operators provide online trading venues and charge part of the fees to operators on the platform, it can be found in the "Implementation Rules for Taobao Shop Opening and Exiting" that the nature of the fees is "margin" rather than "rent", and There is no lease clause in the service agreement between the two parties, so it is more appropriate to define the platform operator as a new type of transaction intermediary.

There is no direct trading relationship between platform operators and consumers, but a platform service contract relationship. As the intermediary of e-commerce transaction activities, platform operators do not favor any party. Before entering the e-commerce platform to conduct transactions, consumers need to reach a service contract relationship with the platform operator, abide by the platform's transaction rules, and obtain access qualifications before forming a sales contract relationship with the platform operator.

In an e-commerce platform, platform operators have diversified functions. Therefore, when analyzing their legal status, they need to consider specific behaviors and actors, instead of restricting their legal status to one aspect.

C. Analysis of the obligation to protect the intellectual property rights of e-commerce platform operators

1. The content of intellectual property protection of e-commerce platform operators

With the development of e-commerce, the number of operators on the platform has increased, and the types of goods or services have increased year by year, and these goods or services contain a large number of intellectual achievements, involving most of the intellectual property rights including copyrights, trademarks and patent rights. All kinds of intellectual property rights may become the object of infringement, and platform operators need to pay attention and protect them.

2. "E-commerce Law" principled provisions on the protection of intellectual property rights of e-commerce platform operators

According to Article 5 of the "E-Commerce Law", e-commerce operators have the obligation to protect intellectual property rights when engaging in business activities. This article is a blanket and principle provision, and it is also a comprehensive clause in the "E-Commerce Law"., Acting on all e-commerce operators, emphasizing that

all operators have the obligation to protect intellectual property rights, and play an important guiding and advocacy role.

3. Specific provisions on the protection of intellectual property rights of e-commerce platform operators in the E-commerce Law

A) Obligation to "protect intellectual property rights according to law"

Article 41 of the "E-Commerce Law" requires platform operators to protect intellectual property rights in accordance with the law. The specific manifestation is to strengthen cooperation with intellectual property rights holders and establish intellectual property protection rules.

On the one hand, this clause highlights that platform operators should have a certain awareness of intellectual property protection, that is, platform operators should implement the legislative spirit of the "E-Commerce Law" and establish intellectual property protection rules based on the actual situation of the platform to actively maintain knowledge the interests of property right holders. Articles 17 and 25 of the "Taobao" platform's "Content Creator Management Rules" specifically stipulate the punishment measures when the operators on the platform infringe the intellectual property rights of others, which are the implementation of the content of this clause.

On the other hand, this clause requires platform operators to strengthen cooperation with intellectual property rights holders. Given that platform operators are independent third parties, they have only conducted formal audits on the intellectual property rights of operators on the platform, and there may be some Therefore, the purpose of this clause is to encourage platform operators to strengthen cooperation with intellectual property rights holders, to handle intellectual property disputes in a timely manner before or after the event, respect the rights holders' intellectual property rights, and maintain the order of the platform.

In addition, the obligation to protect the intellectual property rights of platform operators should be a positive obligation, that is, platform operators must first respect the intellectual property rights of the right holders, and they cannot actively infringe intellectual property rights themselves. At the same time, they also have the obligation to actively protect intellectual property rights. When the platform operator fails to actively perform the obligation, after the damage is caused, it also needs to independently bear legal responsibility.

B) Obligation to "notify + delete"

Article 42 of the "E-Commerce Law" stipulates the "notice + deletion" obligation of platform operators. This clause is also known as the "safe harbor" rule, which follows the "Regulations on the Protection of the Right to Disseminate Information Network" and the "Tort Liability Law". The relevant provisions of the "Notice-Deletion-Counter-notification-Selection Period" eventually developed into a complete model. By comparing the "notification + deletion" rules of the three laws and regulations, it can be found that the "E-Commerce Law" has made obvious improvements: In terms of preliminary measures that can be taken, the "E-Commerce Law" stipulates that platform operators can depend on the situation. By adopting measures of

"terminating transactions and services", this article gives platform operators greater regulatory powers and more effectively reduces consumer losses; On the issue of publicity, Article 44 of the E-Commerce Law It is required that all notices, declarations and processing results of platform operators need to be publicized. The content and scope of the publicity are more extensive, not just the publicity that cannot be transferred. This regulation strengthens the supervision rights of consumers and platform operators. Makes the behavior of platform operators more transparent and standardized; In the handling of follow-up measures, the "E-Commerce Law" gives intellectual property rights holders more options, that is, right holders can choose to complain or sue within 15 days.

All in all, compared with previous regulations, the "E-Commerce Law" further refines the "notice + delete" rule, and at the same time strengthens the responsibilities and obligations of platform operators in the protection of intellectual property rights, and the related improvements are in line with the development of e-commerce Need to more effectively protect the intellectual property rights of third parties.

C) Obligation to "take necessary measures when you know or should know"

Article 45 of the "E-commerce Law" is the "red flag principle" in the field of e-commerce, in which the interpretation of the meaning of "know or should know" will directly affect the responsibility of platform operators. The "E-Commerce Law" clearly uses the expression "know or should know", and combined with the similar expressions in Article 36, paragraph 3 of the "Tort Liability Law" and Article 23 of the "Regulations on the Protection of the Right of Information Network Communication", Its connotation understood as "knowingly" and "should know" is more in line with the spirit of relevant legislation.

It is worth noting that "knowingly" contains two interpretations, namely self-knowledge and notification to know. In the case that the platform operator "knowingly" but still allows the damage to occur, it is a joint infringer that needs to bear joint liability. Correspondingly, "should know" also has two interpretations, namely, presumed to know and should know but unknown. The former shows that the existing evidence highly proves that the platform operator may know the relevant facts and his subjective mentality is intentional, while the latter shows the platform. Operators have not fulfilled their duty of care, and their subjective mentality is more biased towards negligence.

If "knowing or ought to know" is understood as "knowingly" and "should know", it means to a certain extent the reasonable duty of care of the platform operator, and the platform operator needs to detect and deal with intellectual property infringements in a timely manner to reduce The loss of the right holder will better promote the protection of intellectual property rights. At the same time, standards should be set for the duty of care of platform operators to avoid unnecessary responsibilities and damage the healthy development of e-commerce platforms.

4. Provisions of other laws and regulations on the obligations of e-commerce platform operators to protect intellectual property rights

A. Relevant provisions of the "Consumer Rights Protection Law"

Article 44 of the "Consumer Rights Protection Law" deals with the responsibility of online trading platform providers to consumers. This article is similar to Article 36 of the "Tort Liability Law", and both stipulate the circumstances under which online platform providers bear civil liabilities. There are links and differences between these rules, but they all require network platform providers to bear joint and several liability when they "knowingly" or "should know" the actions of the infringer without taking necessary measures.

B. The relevant provisions of the "Regulations for the Implementation of the Trademark Law"

Article 75 of the "Regulations for the Implementation of the Trademark Law" concretizes the "providing conditions for convenience" stipulated in Article 57, Item 6 of the "Trademark Law", clearly stating that the act of providing an online commodity trading platform for infringement of the exclusive rights of others' trademarks also requires . The actual infringer shall jointly bear the corresponding responsibilities. This provision essentially emphasizes the need for online trading platform providers to strengthen the management of the actions of operators and service providers within the platform to avoid unnecessary responsibilities.

III. Analysis of Joint Liability of E-commerce Platform Operators for Intellectual Property Infringement

A. Analysis of the constitutive elements of e-commerce platform operators' joint liability

As a new type of transaction intermediary, the platform operator should not be liable for the infringement of intellectual property rights of the operator on the platform itself. However, Article 42 and Article 45 of the "E-Commerce Law" set up joint liability for the platform operator. The premise of the joint liability of the platform operator is to constitute a joint infringement. Since the platform operator has not directly committed a specific infringement, there has been no intentional contact with the operator on the platform, and the two have neither joint intention nor joint negligence. , It is the actions of both parties that led to the actual damage results, and the two parties have joint torts at the objective level. According to the principles of the Tort Liability Law, the constituent elements of tort liability include: infringement, damage facts, causality, and fault. Therefore, the theoretical basis for platform operators to bear joint liability should also be analyzed from the above four aspects.

1. Infringement

The infringements of platform operators generally manifest themselves in the form of "inaction", that is, their failure to actively perform their obligations to protect intellectual property rights.

For example, before the infringement occurred, the platform operator failed to perform reasonable duty of care, failed to review the goods or services, and allowed the infringing products or services to circulate in the e-commerce platform; or failed after receiving a complaint from the

intellectual property right holder. Taking necessary measures in a timely manner to delete related links or remove related goods and services, resulting in further enlargement of the losses of the right holder. The above is a manifestation of "indirect infringement." If the platform operator instigates and encourages the operator on the platform to commit intellectual property infringements, he shall bear joint and several liability for direct infringement.

In addition, the "inaction" of the platform operator can also be manifested as a negative reaction to judicial activities, not actively assisting the judicial organs to provide relevant information about the operators on the platform, or not actively taking relevant measures after receiving the judicial organ's handling plan, etc.

2. Damage facts

The fact of damage refers to the property loss, personal injury or mental injury suffered by the right holder. The ultimate goal of the operators on the platform to sell goods or provide services is to obtain economic benefits, and the infringement of intellectual property rights will also directly affect the property income of the right holder and the indirect infringement of the platform operator further contributed to the occurrence of the damage result and aggravated the property loss suffered by the right holder. The amount of compensation for infringement of intellectual property rights can be determined by referring to Article 65 of the Patent Law, Article 49 of the Copyright Law and Article 63 of the Trademark Law.

At the same time, the determination of the damage result also needs to be divided according to the magnitude of the responsibilities of both parties. The difference in the division of responsibilities will directly affect the amount of compensation that the platform operator and the operator within the platform need to bear.

3. Causality

The causal relationship in tort liability is actually a logical relationship, which can be understood as the relationship between the cause and the caused between the action and the result. The failure of the platform operator to actively perform the duty of care and the failure to take necessary measures in a timely manner led to the occurrence of the damage. There is a considerable causal relationship between the actions of the platform operator and the damage to the available interests of the intellectual property rights holder, and the help of the platform operator. It will indirectly lead to the occurrence of infringement damage results, and the platform operator constitutes a helping indirect infringement.

4. Fault

There are two main types of subjective faults of platform operators, namely negligence and deliberateness. As the manager and organizer of the e-commerce platform, the platform operator fails to perform reasonable duty of care without actively fulfilling the obligation of protecting intellectual property rights. If it is "knowledgeable but unknown", it is negligent; after receiving the effective notice from the right holder, the platform operator failed to take necessary measures such as deleting the link or removing the infringing product or service, resulting in the expansion of the damage result, which is "knowingly", it is intentional.

"Fault" is the subjective psychological state of the perpetrator, which will greatly increase the difficulty of proof for the right holder. Therefore, when proving the "fault" of the platform operator, it can be investigated from an objective level whether it has actively fulfilled the obligation of intellectual property protection.

B. The significance of the joint liability system for e-commerce platform operators

The important significance of requiring platform operators to bear joint and several liability is that it can strengthen the duty of care of platform operators. When platform operators bear joint liability, in order to reduce liability, they will actively take corresponding measures to prevent possible damage. It helps to reduce the occurrence of intellectual property infringements from the source.

In addition, because the right holder is relatively weaker than the infringer, the right holder has limited knowledge of the infringer's identity information, it is difficult to collect evidence of infringement, and it is difficult to obtain damages. Therefore, platform operators are regarded as common. The bearer of the infringement liability can appropriately reduce the burden of proof of the right holder, and at the same time, it can also ensure that the intellectual property right holder can request the platform operator to take responsibility under the situation that the platform operator cannot be held accountable, so as to obtain all the damages. Protect the actual interests of right holders.

C. Joint and several liability analysis of e-commerce platform operators' failure to perform the obligation of "notice to delete"

1. The meaning of "enlarged part of damage"

Typical case: Zhejiang Tmall Network Co., Ltd., Weihai Jiayi Baking Home Appliances Co., Ltd. dispute over infringement of invention patents

After the court (2015) Zhezhi Zhongzi No. 186 Civil Judgment ruled that Tmall should bear joint liability for Jin Shide's infringement, in terms of the specific amount of compensation, the Zhejiang Higher People's Court stated: Comprehensive consideration of the duration and duration of the infringement Tmall Company should know the time of the infringement facts and determine that Tmall Company shall bear joint and several liability for compensation for RMB 50,000.

The above-mentioned case occurred in 2015. At that time, the "E-Commerce Law" had not yet been promulgated. Therefore, the Zhejiang Higher People's Court applied Article 36 of the "Tort Liability Law", but the case can also be used to understand the meaning of "the enlarged part of damage" Provide reference. Judging from the above-mentioned precedents, the "expansion of damage" is mainly determined from two aspects. On the one hand, consider the time when the platform operator receives the "effective notice"; on the other hand, consider the infringement after receiving the "effective notice" The duration of the behavior continuing to occur. In addition, it is still necessary to pay attention to whether the "notice" of the right holder is valid, that is, the content of the notice requires preliminary evidence of infringement.

2. The issue of the right of recourse after the operator of an e-commerce platform assumes joint liability

According to Article 42 of the "E-Commerce Law", platform operators only need to bear joint liability for the "enlarged part of damage" when they fail to perform the obligation of "notification + deletion". After the enlarged part of the damage is confirmed, the right holder can request the platform operator or the operator on the platform bears full responsibility. According to the basic principles of the civil law and the provisions of Article 14 of the Tort Liability Law, it is necessary to distinguish the share of responsibility between the parties in the ultimate responsibility. In the process of infringement of intellectual property rights, because the direct infringer's subjective fault is greater and the damage caused is more serious, it should bear the main responsibility. Although platform operators have also committed indirect infringements and failed to take necessary measures in time to prevent the expansion of damages and caused certain damages, their faults are relatively minor and should bear secondary liability. If platform operators have great malice, they need to bear the same responsibility as the direct infringer.

Therefore, within the scope of the "enlarged part of damage", after the platform operator bears joint liability, it can request the platform operator to bear half or even more than half of the share. [9]

D. Joint and several liability analysis of e-commerce platform operators' failure to perform the obligation of "taking necessary measures when they know or should know"

1. The division of responsibilities between the e-commerce platform operator and the e-commerce platform operator

Different from the provisions of Article 42(2) of the "E-Commerce Law", in the circumstances stipulated in Article 45, the platform operator shall be jointly and severally liable for all damages suffered by the right holder.

In this case, the platform operator and the operator on the platform constitute a joint tort. Although the two have no intention to contact, the actions of the two parties together cause and promote the occurrence of the damage result, which constitutes a joint tort at an objective level. After analyzing the meaning of "know or should know" in Article 45 of the "E-Commerce Law" mentioned above, it can be found that platform operators have two subjective attitudes when they constitute joint liability under Article 45. If they should be known but unknown, it is negligence; if it is knowingly but not handled according to law, it is intentional.

In the above two cases, there is a certain difference in the division of responsibilities between the platform operator and the operator within the platform, taking into account factors such as causality, degree of fault, etc., in the former case, the platform operator is at fault, and the subjective malignancy is relatively high. If it is small, its liability can be appropriately mitigated. However, the operator on the platform has direct infringement and its subjective fault is large and should bear more than 50% of the liability.

In the latter case, the platform operators are more subjective and malicious, with indirect intentions, and should bear the same responsibility as the operators on the platform, and the

division of responsibility between the two parties is approximately 50%.

2. Analysis of the right of recourse after the operator of an e-commerce platform assumes joint liability

Based on the above analysis, comprehensively considering the subjective mentality of the platform operator and the degree of fault, the responsibility of the platform operator needs to be distinguished differently, and the difference in responsibility will affect the exercise of the platform operator's right of recovery. In addition, since the "E-Commerce Law" stipulates the assumption of joint liability, the right holder has the right to request part or all of the joint liability holders to bear the liability when the lawsuit is filed, and the party who bears all the liability can pay for the part that exceeds its share of liability. Expenses exercise the right of recovery.

IV. Ways to improve the joint liability system for IP infringement of e-commerce platform operators

A. Improve the design of the legal system

Through the above analysis of the intellectual property protection obligations and joint liability system of e-commerce platform operators, it can be found that the current "E-commerce Law" still needs to be further clarified: on the one hand, the standards for platform operators to perform their intellectual property protection obligations are too vague. Combining relevant judicial practice cases, it can be found that different judges in different courts have inconsistent standards for platform operators to perform their intellectual property protection obligations. Such differences can easily lead to different judgments in the same case. In this regard, we must think about what is meant by "effective notification"? Does the platform operator need to review and confirm the "effective notice"? What measures are necessary and effective after the platform operator receives the notification? These will affect the joint liability of platform operators.

On the other hand, the division of responsibilities between platform operators and those within the platform is not clear. The "E-Commerce Law" has clearly established a joint liability system for intellectual property infringement. In order to stimulate the motivation of platform operators to manage the platform, further division of responsibilities is still needed. In view of the above current situation, the main suggestions put forward in improving the legal system are:

1. To specify the rights of e-commerce platform operators in intellectual property protection

As the owner of the e-commerce platform, the platform operator manages and organizes the e-commerce platform in accordance with the law, and the platform operator also needs statutory rights to protect its legitimate rights and interests in order to fulfill the active obligation of intellectual property protection. Regarding the improvement of the legal system, whether it is possible to consider granting platform operators certain penalties and dispute judgment powers to facilitate platform operators to manage e-commerce platforms and resolve disputes reasonably.

For example, the exercise of the dispute judgment power of the platform operator requires the consent of both parties to give play to the role of the platform operator as a neutral third party on the e-commerce platform to quickly resolve

disputes. The right of punishment of the platform operator can be expressed in that the platform operator uses technical means to investigate the intellectual property infringement of the operator on the platform and impose a certain amount of fines on it. The fine is collected by the platform operator and contacted by the right holder for compensation. It demonstrates the determination and strength of platform operators to protect intellectual property rights, and also seeks legitimate interests for right holders.

2. Establish standards for e-commerce platform operators to perform their intellectual property protection obligations

The standards that need to be determined are: first, what is included in the "effective notice"; second, what is meant by "necessary measures." Regarding the content of "valid notice", Article 43 of the "E-Commerce Law" requires preliminary evidence of infringement. However, in general, e-commerce platforms are limited to technical capabilities and only conduct formal inspections on "valid notices". To protect its own rights and interests, the content of the notice should be as complete and detailed as possible. The factors that should be considered when establishing the content contained in the "valid notice" are: "The proof of the subject's identity; materials that can preliminarily prove the existence of infringement; suspected the specific link address of the infringing product." [10] According to the "Alibaba Intellectual Property Protection Platform Complaint Guidelines", it requires identification materials and proof of rights when complaining. The identification materials include valid identification documents or business licenses, and the proof of rights includes Corresponding valid rights certificates such as trademark rights, patent rights, copyrights, etc., in the case of non-intellectual property owners, also need to provide a power of attorney issued by the intellectual property owners. The above content can be used as a standard for "effective notification" content.

The prerequisite for platform operators to take necessary measures such as deleting links is to receive an "effective notice" from the right holder, and this is only the most basic part. The key to taking necessary measures lies in the judgment of the establishment of infringement, in order to protect the operators on the platform. For legitimate rights and interests, platform operators need to be cautious in taking measures such as deleting links and blocking shops. When courts handle intellectual property infringement cases, the standards for necessary measures should also follow the principle of equal rights and responsibilities, analyze specific issues in detail, and reasonably consider the need for platform operators to take measures.

3. Clarify the division of responsibilities between the parties

The joint liability system for intellectual property rights infringement of e-commerce platform operators requires platform operators to bear joint liability. Although it is beneficial to safeguard the interests of right holders, it actually increases the responsibility of platform operators and balances the rights and obligations of platform operators. Specific legal provisions should be adopted to reasonably divide the responsibilities between the parties to ensure that the platform operator can exercise the right of recovery from the operator on the platform after assuming joint liability, reduce the actual loss of the platform operator,

and protect the platform operator to perform its obligations Positivity.

4. Set standardized duty of care for e-commerce platform operators

The duty of care of the platform operator can be divided into the duty of care beforehand and the duty of care afterwards. As far as the duty of precaution is concerned, due to the limited management capabilities of the platform operator, it is difficult to identify infringements of intellectual property rights. If the platform operator is required to assume an excessive duty of precaution, it will be detrimental to the development and growth of the e-commerce platform. Therefore, in the standard setting of the duty of precaution, as long as the platform operator fulfills the reasonable identity information review obligation and establishes the intellectual property protection rules, he does not need to bear the corresponding joint liability.

Regarding the standard setting of the duty of care after the fact, if the platform operator has been aware of the infringement of the operator on the platform but has not taken corresponding measures, regardless of his subjective mentality is "intentional" or "negligence", the platform operator can be identified Neglect to fulfill the obligation of care afterwards and require them to bear corresponding joint and several liabilities in order to better protect the interests of third parties.

B. Innovating the concept of network intellectual property protection law enforcement

At present, the protection of intellectual property rights in e-commerce platforms mainly relies on e-commerce operators, but due to the professionalism and complexity of intellectual property infringements, relying solely on the power of e-commerce operators is not enough to fully cover the intellectual property rights in e-commerce platforms protection. For this reason, the reasonable introduction of public power is needed to effectively manage the e-commerce platform.

As far as government agencies are concerned, they should still adhere to the basic principles of administration according to law in their concepts, and at the same time have a pragmatic and innovative attitude, actively explore new law enforcement methods, and carry out special actions for intellectual property protection within e-commerce platforms. The actual situation establishes a long-term mechanism for intellectual property protection.

Administrative law enforcement agencies first need to recognize the importance of intellectual property protection on e-commerce platforms, strengthen the construction of administrative law enforcement teams, absorb more relevant professionals, and improve the level and capabilities of the entire administrative law enforcement team; secondly, administrative agencies should The "Business Law" formulates relevant implementation rules to strengthen the operability of the intellectual property protection mechanism of e-commerce platforms, and at the same time actively publicize relevant laws and regulations to increase the public's awareness of intellectual property protection; further, special inspections are carried out to ensure that platform operators are active Fulfill the obligation to protect intellectual property rights and stop the

occurrence of intellectual property infringements from the source.

In addition, administrative law enforcement agencies must also take care of both error correction and prevention. While actively combating intellectual property infringements in e-commerce platforms, they must also assist platform operators to build effective prevention mechanisms and strengthen the relationship between platform operators and administrative agencies. Cooperation to help platform operators review and identify complaints that are difficult to identify.

C. Establish and improve a non-litigation and multiple dispute resolution mechanism

The "E-Commerce Law" provides two paths for intellectual property rights holders to defend their rights. However, it should be noted that intellectual property infringements in e-commerce platforms occur from time to time, and the identification period of intellectual property infringement is relatively long. Relevant competent authorities are unable to deal with all intellectual property infringement complaints in a timely manner. Prosecution in the court requires a large amount of appraisal fees and extremely high litigation costs. As a result, there may be shortcomings in the protection of right holders.

The advantage of establishing a non-litigation multiple dispute resolution mechanism is that, on the one hand, it respects the independent wishes of the parties, provides more channels for the parties to resolve disputes, and gives them more autonomy; on the other hand, the non-litigation multiple dispute resolution mechanism can effectively resolve social conflicts, repair social relations, maintain social stability, and effectively reduce administrative costs and judicial costs. According to the status quo of intellectual property protection of e-commerce platforms, reconciliation, mediation, and arbitration can be combined to establish a complementary and effective conflict resolution mechanism.

D. Improve the judicial trial mechanism

1. Improve the trial mechanism of Internet courts and intellectual property courts

According to the provisions of the Civil Procedure Law and the Civil Procedure Interpretation, cases in the field of intellectual property infringement are under the jurisdiction of the defendant's domicile and the people's court at the place of infringement, and the level of jurisdiction is determined by the intermediate people's court determined by the Supreme People's Court. And the basic people's court jurisdiction. In addition, my country has established intellectual property courts in Beijing, Shanghai, and Guangzhou, and Internet courts in Beijing, Hangzhou, and Guangzhou.

The importance of improving the trial mechanism of Internet courts and intellectual property courts lies in the fact that the intellectual property infringement cases of e-commerce platforms rely on the Internet, which are highly professional and fictitious, and ordinary grassroots courts may not be able to try such cases; In addition, the trial of intellectual property infringement cases by intellectual property courts and Internet courts is conducive to promoting the diversion of cases, deepening the reform of the civil litigation system, and promoting judicial justice.

It should be noted that China's Internet courts are still grassroots courts and do not have exclusive jurisdiction, and there are no relevant laws and regulations governing the existence of Internet courts. They are still in the initial and pilot stages, and are incompatible with the development of e-commerce in China. If it is not fully adapted, relevant laws should be promulgated as soon as possible, so that the existence and construction of Internet courts and intellectual property courts can be followed, and the process of building the rule of law should be accelerated.

Based on the above considerations, my country should accelerate the pace of building intellectual property courts and Internet courts to ensure that intellectual property infringement cases can be heard fairly and fairly.

2. Improve the jurisdiction system for intellectual property disputes on e-commerce platforms

In general infringement cases, the jurisdictional connection point is the defendant's domicile and the place of infringement. The place of infringement also includes the place where the infringement is carried out and the place where the infringement result occurs. However, intellectual property infringement cases that occur on e-commerce platforms are involved. The connection point may also involve the location of the computer and other information equipment that carried out the alleged infringement.

Due to the nature of the Internet, intellectual property infringement cases that occur on e-commerce platforms may have situations where the identity of the defendant is unknown, and the location of the defendant's information equipment is overseas. Traditional jurisdictional models may not be sufficient to effectively protect the interests of the right holders. In addition, taking the location of the computer and other information equipment that carried out the alleged infringement as the connection point will cause the connection point of the case to be too broad, and may be subject to jurisdictional objections raised by the defendant, which is not conducive to the litigation process of the right holder. Therefore, in order to effectively protect the legitimate interests of the right holders and reduce the litigation burden of the right holders, it is possible to consider the place of delivery of the operators on the platform, the place of receipt of online shopping, etc. as the jurisdictional connection point.

In addition, it needs to be affirmed that in the case of platform operators who need to bear joint and several liabilities, the domicile of the platform operators can be used as the jurisdictional connection point, which also provides convenience for right holders to seek judicial relief.

3. Improve evidence review and clarify the burden of proof for all parties

In intellectual property infringement cases, the platform operator assumes the responsibility for fault, according to the principle of "who claims, who presents evidence", the right holder needs to bear the burden of proof for the platform operator's subjective fault, and the right holder claims that the platform operator bears joint liability. Two types: One is the joint liability when the platform operator fails to take necessary measures in time after receiving the notice. In view of the publication obligation of the platform operator in Article 44 of the E-Commerce Law, in this case

the right holder collects relevant Evidence is more convenient, and the principle of fault liability can be adopted.

The other is that the platform operator knows or should be aware of joint and several liability for the infringement of intellectual property rights without taking necessary measures. In this case, it is inappropriate to adopt the principle of liability for fault. In judicial practice, platform operators' defenses against "knowing or ought to know" are: 1. claim that they do not know the existence of infringing information and have no fault for infringement; 2. claim that there are many products on the e-commerce platform and are in dynamic change, Unable to conduct prior review; 3. Claim that the obligation of precaution and review of the information publisher has been fulfilled. As a legal person or unincorporated organization with a complete system, the platform operator has a professional legal team and has extensive experience in handling intellectual property infringement cases. However, the right holder cannot have a deep understanding of the internal operation mechanism of the e-commerce platform, and it is more difficult to collect relevant evidence. Big. In addition, platform operators operate and manage e-commerce platforms and have complete technical advantages, making it easier to prove that they cannot and should not know the fact that the operators in the platform infringe intellectual property rights. Therefore, in this case, the implementation of the inversion of the burden of proof will be more conducive to the protection of intellectual property rights.

E. Improve the internal governance mechanism of e-commerce platform operators

1. Strengthen internal governance rules for the protection of intellectual property rights of e-commerce platform operators

In order to maintain the market order of the e-commerce platform and promote the protection of intellectual property rights, platform operators should strengthen the internal governance mechanism of the e-commerce platform, establish a complete intellectual property protection system, increase personnel input, and fully Use existing technical means and big data support to conduct carpet inspections, audits and supervision of goods and services in e-commerce platforms, and respond to obvious intellectual property infringements (such as brand-name goods that are far from market prices). Proactively deal with it without waiting for the notice of the intellectual property right holder, thus avoiding excessive liability for infringement. Use feasible technical means to review product information, search for descriptive words of the product by keywords, and block or delete words that contain "fake goods" and "A goods" in the product information.

2. Strengthen the construction of the intellectual property appraisal team of e-commerce platform operators

The infringement of intellectual property rights is highly concealed and professional, and it is difficult for platform operators to undertake substantive examination of patent infringement. For this reason, platform operators need to strengthen the construction of intellectual property appraisal teams, absorb professionals in intellectual property, proactively provide technical and knowledge training for personnel, improve the professionalism of team members, and reduce complaints due to errors and deal with

the operators on the platform the loss caused. In addition, platform operators can also strengthen cooperation with intellectual property rights holders and patent administrative departments, understand the ownership of existing intellectual property rights, and build a linkage mechanism for the settlement of intellectual property infringement disputes in the field of e-commerce.

3. Build a platform for identity information and credit review of all parties

Platform operators should strictly review the identity information of the operators on the platform to ensure that the operators on the platform provide true and effective identity information. At the same time, they also need to review their sales qualifications, such as requiring the operators on the platform to provide goods for sale. Proof of the exclusive right to use trademarks, the authorization certificate of the intellectual property right holder, etc. At the same time, major e-commerce platforms can strengthen the cooperation between identity information and credit platforms, and keep identity information and credit conditions unblocked. If an operator on a certain e-commerce platform is blocked due to intellectual property infringement, other Platform operators can also choose to prohibit their entry, so as to prevent infringements by operators on the platform and demonstrate the determination of platform operators to protect intellectual property rights. In addition, platform operators can also strengthen cooperation with administrative departments to increase the review standards for operators with criminal records of infringement of intellectual property rights to prevent the recurrence of intellectual property infringements.

V. Conclusion

With the rapid development of e-commerce in China, e-commerce platforms have sprung up like mushrooms after a rain, and online shopping has become an indispensable part of people's daily lives. The sound development of e-commerce platforms has not only greatly promoted the growth of China's economic level, but also The increase in consumption level has also played a strong role in promoting the development of other industries such as the logistics industry. While the development of e-commerce has greatly promoted economic growth, we must also face up to the new challenges to be faced. The increase in intellectual property infringements and counterfeit and pirated products flood the market. Even if platform operators take proactive measures to stop this behavior, they still cannot completely eliminate it. The occurrence of the behavior. Therefore, how to effectively manage intellectual property infringements in e-commerce platforms, how to regulate the behavior of operators, and to ensure that platform operators perform their knowledge protection obligations to the maximum extent are issues that must be paid attention to in the development of e-commerce platforms.

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