

## THE MAIN ASPECTS OF INTELLECTUAL PROPERTY PROTECTION IN THE FIELD OF E-COMMERCE IN CHINA

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The article deals with the problems of intellectual property protection in the sphere of electronic commerce. The authors analyze norms of "E-Commerce Law of the People's Republic of China". It is emphasized that the law is a special normative act, and therefore has a higher force in relation to general norms. The authors pay attention to the problem of implementing the "notification-deletion" rule and come to the conclusion that this rule should be improved.

**Ключевые слова:** e-commerce; intellectual property; legislation; hierarchy of legal acts "notification-deletion" rule.

Since the world wide web was developed in 1989, it transformed the Internet from a technological infrastructure into a popular network linking people in diverse communities throughout the world, what followed is the arrival of the Internet age. As of January 2021, the numbers of active internet users worldwide has reached 4.66 billions, which is 59.5 % of the global population. From 2015 to 2019, the Permeability of Internet users worldwide has risen from 16.8% to 53.6%. Regionally, Europe owns the most usage rate of Internet and Africa owns the least usage rate of Internet. Especially, the north Europe has the highest Internet penetration-97%. Since the global internet usage rate is 51.4%, there is still space for the rate to increase [1].

Internet has brought tremendous changes into our lives. In the age of Internet, there have been many unprecedented new forms of commerce have appeared and they are gradually changing people's lives.

E-commerce is the activity of electronically buying or selling of products on online services or over the Internet. E-commerce arises from the development of the internet and has become the main business application model worldwide.

In China, the "E-Commerce Law of the People's Republic of China" was officially implemented on January 1, 2019 (hereinafter referred to as the "E-Commerce Law"). Articles 41 to 45 provide a complete construction of the legal system for intellectual property protection of China's e-commerce platforms. The protection system takes the platform as the core and establishes the intellectual property protection system. This system can be regarded as a major development in intellectual property protection in the field of e-commerce. The provisions of Articles 41 to 45 of the "E-Commerce Law" only apply to e-commerce platform operators and not to other fields. The obligations and responsibilities of operators in other fields to protect intellectual property rights are subject to general legal provisions.

The regulations pay more attention to the leading role of e-commerce platforms in the online trading environment, and pay more attention to their efficient advantages and control capabilities in the governance of the online environment. These regulations generally put forward a new approach to the serious problem of intellectual property infringement in the field of e-commerce: enhance the governance function of e-commerce platform operators, and require them to assume more responsibilities and obligations for actively managing intellectual property issues. For example, e-commerce platform operators can independently manage, formulate intellectual property protection rules, and implement intellectual property

governance measures. These powers are not only their governance powers, but also their legal obligations.

As the first comprehensive law in the field of e-commerce in China, the "E-commerce Law" has established a specific intellectual property protection system for e-commerce platforms. It provides a basic criterion in the field of e-commerce, which is in line with the "Tort Liability Law", "Trademark Law", "Patent Law", "Copyright Law", "Anti-Unfair Competition Law", etc., in order to clarify and standardize e-commerce platforms and platform sellers. It provides a basis for intellectual property governance obligations and legal responsibilities, and escort the protection of the healthy development of e-commerce.

It also must be understood that although the "E-commerce Law" is the basic law of e-commerce, it is only the basic law applicable to the field of e-commerce. In other words, in the field of e-commerce, the "E-commerce Law" is still a special law applicable in special fields, compared to the general provisions of basic civil and commercial law, intellectual property law and even Internet law. Therefore, compared with the "Tort Liability Law" and the "Civil Code" Infringement Liability Code, the "Copyright Law" and other major intellectual property laws, and the "Regulations on the Protection of the Right of Network Information Dissemination" and even the "Cyber Security Law", etc., the "E-Commerce Law" occupies the status of a special law. Therefore, the relevant provisions of the "E-commerce Law" in the field of e-commerce, if they conflict with the above-mentioned general provisions, shall be deemed to have priority application effect in accordance with the "Special Law Superior to General Law" rule of the "Legislative Law of the People's Republic of China".

The "E-Commerce Law" introduces the "notification-deletion" rule, which plays an important role in the protection of intellectual property. The "notification-delete" rule proposed in Articles 41 to 45 first appeared in the second part of the US Digital Millennium Copyright Act "Limitations of Liability for Online Copyright Infringement". A similar provision is made in Article 22 of China's "Regulations on the Protection of the Right to Propagate Information on the Internet", expressing "notification-deletion" as an exemption clause. However, in the e-commerce law, this system has not only been used as an exemption clause for defense of infringement liability, but also as an imputation clause for determining infringement liability.

According to the relevant provisions of the E-Commerce Law, the platform shall take necessary measures in a timely manner after receiving the qualified notice from the right holder and forward it to the operator on the platform. If the operator on the platform has objections, it can counter-notify and the platform receives the counter-notification. After that, it should be forwarded to the right holder and told to file a complaint or prosecution with the public authority. If the platform does not receive the notice of complaint or prosecution within 15 days after the counter-notification reaches the right holder, the measures taken shall be terminated.

Although the "notification-delete" rule originated in the second part of the United States Digital Millennium Copyright Act [2], the "Online Copyright Infringement Liability Limitation", its purpose is to provide a safe haven system for network service providers, but in China, the "notice-delete" system is concluded from the design and application of the system that the value of the system is mainly reflected in the ability to quickly stop infringements at a very low cost, without the right holders needing to file a lawsuit. It is precisely because of the rapidity and convenience of the system in the implementation process that it inevitably reduces the accuracy of the platform in judging notifications, which leads to the problems of false notifications and malicious notifications. The legislators are also aware of

this, so the Electronic Commerce Law has added a counter-notification procedure, and also stipulates the legal liability of double compensation for malicious notification.

But even so, according to the data reported by the platform, the proportion of false notifications and malicious notifications is still worrying. If the phenomenon of malicious complaints is not regulated, it will only intensify. This is not unreasonable speculation. First of all, because compared with information network dissemination rights, patent and trademark infringement judgments are more professional. Generally, platforms can only conduct formal inspections on notifications without substantive reviews. Malicious complainants take advantage of the fact that the platform does not conduct substantive review to make malicious complaints against competitors' links. Although the complaint may not be effective in the end, the complained link may be disconnected as a result for 15 days, causing huge commercial losses. Secondly, because the competition between product links is particularly fierce within the platform, the actor has a particularly strong motivation to abuse the "notify-delete" rule for unfair competition. Thirdly, the consequences of the counter-notification provided by the E-Commerce Law cannot immediately terminate the effect of the necessary measures. Instead, it must enter a 15-day waiting period. In the ever-changing platform competition, it is likely to cause huge commercial losses to the notified party, such as before the promotion day or before the holiday. Finally, although the e-commerce law provides for the «ex post» remedy for damage caused by wrong or malicious notifications, it takes time and effort for the notified person to obtain compensation and relief. Even if the lawsuit is won, it is very difficult to calculate the loss, which often leads to malicious complainants can't pay the right price.

A system cannot be perfect. Under the condition that the proportion of error handling is not high, the loss of the author should be tolerated, because the benefits of providing a fast and convenient system for rights protection greatly exceed the losses caused by the wrong notification. However, if the proportion of mistaken deletions is too high, and the loss of mistaken deletion under the operation of the rule is even higher than the benefits of quick rights protection, then this rule will lose its rationality. Not only the interests of the notified person are easily damaged by malicious notifications, but the normal operating order of the entire platform can also be disrupted. Thus, this norm should be improved.

### References

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