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# Border *patrol*

K&L Gates' Edward Yao and Bianca D'Angelo discuss China's new eCommerce laws.



**C**HINA'S E-COMMERCE MARKET has grown tremendously in recent years, which has brought many new business opportunities as well as an increase in cases of intellectual property (IP) infringement. China's new E-commerce Law (ECL), which took effect on 1 January, was introduced in an attempt to regulate this market, including by enhancing consumer rights and safeguarding intellectual property.

## Who does the ECL apply to?

The ECL applies to anyone conducting business activities for the transaction of goods or services via the internet or other information networks within the territory of the People's Republic of China. It is not yet clear whether the ECL applies to social media platforms, including content sharing services such as WeChat and Weibo. Further guidance on the implementation of the ECL is expected to be available later this year.

## Previous notice-and-take-down procedure

Before the ECL, in China, operators of eCommerce markets were liable for IP infringement if they were notified of an infringement and did not take down links to the relevant material. However, there were no regulations governing the policies implemented by such operators or the notice-and-take-down procedures used. This meant that each eCommerce platform, such as Taobao, JD and Alibaba, had their own distinct notice-and-take-down procedure and IP owners wanting to take down infringing links had to follow the specific notice-and-take-down procedure on each platform.

Judicial guidance issued by the Beijing High Court in 2013 stipulated that an eCommerce market operator had the right to examine whether the links infringed the prior rights of an IP owner before deciding whether to take them down. An operator was only required to delete the infringing links if it determined the links infringed the prior rights of the IP owner. In practice, this meant that IP owners had to provide substantial evidence of infringement or else their take down request would likely be refused by the eCommerce platform.

## What has changed under the ECL?

Under the ECL, eCommerce market operators are obliged to take necessary measures to deter alleged IP infringements so long as the IP owner provides 'prima facie' evidence of the infringement. Pending further guidance, this could mean that eCommerce market operators need to take down infringing links upon receiving infringement notifications and take down requests from IP owners.

If a platform fails to take necessary measures against IP violations, fines of between US\$7,300 and US\$295,000 can be imposed. Platform operators may also be held responsible for allowing the sale of infringing goods which fail to meet health and safety requirements, where they knew or ought to have known the sales of the unsafe goods were taking place.

In another positive development, the ECL addresses the issue of vendor anonymity by requiring sellers to display the details of, or links to, their business licenses. Individuals who have set up trading accounts also need to obtain business

licenses and register with local tax authorities. Merchants selling in China will need to register for an online selling certificate to display on their online store. All eCommerce platforms have to keep records of product and service information and transaction records for at least three years.

One potential downside of the new regime is that eCommerce market operators can forego a take-down procedure where a counter-notice is filed by an alleged infringer that provides preliminary evidence of non-infringement. Once a counter-notice is filed, the eCommerce market operator can terminate the take-down procedure if the IP owner does not take court or administrative action within 15 days. This has sparked fears that counter-notices will be widely abused by bad-faith operators.

In order to deter malicious complaints, the ECL also provides that a complainant will be liable for making a false notice which causes damage to an online store owner. And if an erroneous notice is issued maliciously and causes losses to an online store owner, the compensation will be doubled.

The effectiveness of the ECL will largely depend on how it is enforced. In the meantime, IP owners should ensure they can provide preliminary evidence to prove infringement when lodging take down requests with Chinese eCommerce platforms. ■

*For more information about China's E-Commerce Law, please contact Edward Yao at K&L Gates (edward.yao@klgates.com). This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.*