

INTA Suggested Modifications to the Draft E-Commerce Law

INTA 关于《中华人民共和国电子商务法（草案）》的修改建议

Introduction

The International Trademark Association (INTA) thanks the National People's Congress of China for the opportunity to provide suggestions to the draft E-Commerce Law. In 2013, the Association was proud to submit comments to the National People's Congress of China for the Revised Trademark Law. INTA hopes to continue this relationship with the National People's Congress of China by submitting some suggested modifications to the E-commerce Law in 2017.

简介

国际商标协会（INTA）感谢中国全国人民代表大会提供了对《中华人民共和国电子商务法（草案）》提出建议的机会。2013年，INTA成功向中国全国人民代表大会提交了关于《中华人民共和国商标法》修改的评论。INTA希望继续与中国全国人民代表大会保持这种良好的关系，并在2017年对《中华人民共和国电子商务法（草案）》提出一些修改建议。

E-commerce is a rapidly growing sector of the global economy and many governments around the world are studying and amending laws to better regulate this sector. The International Trademark Association (INTA) understands that China is drafting proposed legislation to address E-commerce and applauds these efforts to improve e-commerce activity. On behalf of our global membership, INTA would like to offer some recommendations to the draft E-commerce Law. INTA recommends that an E-commerce Law:

- States clearly its scope given the international and cross-border nature of e-commerce;
- Provides detailed timelines and procedures that promote the protection of trademarks should the law address violations of trademark rights; and
- Prevents the abuse of trademarks through domain names and acts of unfair competition.

电子商务是全球经济中一个迅速增长的产业，世界多国政府正在研究和修订法律，以更好地规范这个产业。国际商标协会（INTA）了解到中国正在起草立法来规范电子商务，并赞赏为促进电子商务所做出的此等努力。INTA代表我们的全球会员，希望对《中华人民共和国电子商务法（草案）》提出一些建议。我们建议，一部电子商务法应该做到以下几点：

- 鉴于电子商务的国际和跨国性质，明确其适用范围；
- 如果法律要解决侵犯商标权的问题，就要规定促进商标保护的详细时间表和程序；
- 通过保护域名和反不正当竞争等行为来防止商标的滥用。

INTA is a membership association of more than 7,000 trademark owners and professionals from more than 190 countries. In China, we have 240 members, including many global Chinese brands across several industries, including finance, transportation, technology and consumer goods. INTA total membership collectively contribute almost US \$12 trillion to global GDP annually. The Association's member organizations represent some 30,000 trademark professionals and include brand owners from major corporations as well as small- and medium-sized enterprises, law firms and nonprofits. INTA undertakes advocacy work throughout the world to advance trademarks and related rights, and offers educational

programs and informational and legal resources of global interest. A key objective of INTA's work is to protect consumers and to promote fair and effective commerce.

INTA 的会员包括来自 190 多个国家的 7000 多名商标所有者和专业人士。在中国，我们有 240 多个会员，包括多个全球性的中国品牌，遍及金融、交通、科技和消费品等行业。INTA 的会员每年共为全球 GDP 贡献近 12 万亿美元。协会的成员单位代表了约 3 万商标专业人士和品牌所有者，既有大公司，也有中小型企业，还有律师事务所和非营利组织。INTA 在全世界进行政策倡导活动，以促进商标和其他相关权利的保护，并根据世界各地的不同需求，组织培训项目，提供信息法律资源。INTA 工作的一个重要目标是保护消费者和促进商业的公平和效率。

Recommended Changes to the Draft E-Commerce Law

《电子商务法（草案）》建议修改的部分

Recommendation: **Modify “Article 2: Scope of Application” to determine the exact scope of the Draft E-Commerce Law.**

Policy Rationale:

INTA believes that Article 2 of the Draft E-Commerce Law should be clarified to state the scope of the law and whether the law would apply to E-Commerce activities that occur outside the territory of China or involve E-Commerce business entities or consumers within the territory of China. The scope of the jurisdiction of the Draft E-Commerce Law must be clearly defined to understand exactly to whom the Law would apply.

建议：修改“第二条：适用范围”，明确《电子商务法（草案）》的确切适用范围。

政策理由：

INTA 认为《电子商务法（草案）》第二条应当明确法律的适用范围，以及该法律是否适用于在中国境外发生的电子商务活动，或适用于涉及中国境内的电子商务实体或消费者。《电子商务法（草案）》必须明确界定其管辖范围，以便准确理解该法律的适用人群。

Recommendation: **Modify “Article 19: Examination and Registration, Information Inspection and Monitoring” to provide clarification on reporting authorities and measures.**

Policy Rationale:

Article 19 of the Draft E-Commerce Law should provide further elaboration on the types of measures required when reporting violations and shall provide more information on the required “relevant authorities.” The required reporting of violations should be clearly stated so that the third party e-commerce platforms know who to report to and what they need to report.

建议：修改“第十九条：审查和登记，信息审查和监控”，明确汇报机关和方式。

政策理由：

《电子商务法（草案）》第十九条应进一步明确汇报违规行为的方式，和“相关主管部门”。这样第三方电商平台才能确定向谁报告和如何报告。

Recommendation: **Modify “Article 25: Recordal and Preservation of Information on Goods, Services and Transactions” to extend the amount of time that goods and services information and transaction information is kept.**

Policy Rationale:

Article 25 of the Draft E-Commerce Law should be amended to extend the amount of time that goods and services information and transaction information is kept to five years:

“Third party e-commerce platforms shall record and preserve goods and services information posted on their platforms as well as transaction information, and shall ensure the veracity, completeness and accuracy of such information. Goods and services information, and transaction information shall be kept for no less than five years from the date when the transaction is concluded. Where the law has provide otherwise, then such provisions shall apply.”

The Draft E-Commerce Law should require platforms to keep services information and transaction information for at least five years. The rationale behind this extension of time is that if the infringer assumes criminal liabilities due to selling fake products, the statute of limitations is five years which would make the time for maintaining the records and the statute of limitations the same. Finally, the five year time period is reasonable given the additional burden and cost of retaining the data which should be manageable for platforms.

建议：修改“第二十五条：记录、保存平台上发布的商品、服务和交易信息”，延长商品、服务和交易信息的保存时间。

政策理由：

应修改《电子商务法（草案）》第二十五条，将商品和服务信息及交易信息的保存期限延长至五年：

“电子商务第三方平台应当记录、保存平台上发布的商品和服务信息、交易信息，并确保信息真实、完整、准确。商品和服务信息、交易信息保存时间自交易完成之日起不少于五年。法律另有规定的除外。”

《电子商务法（草案）》应当要求平台将服务信息和交易信息保持至少五年。延长时间的理由是，如果侵权人因销售假冒产品而承担刑事责任，其诉讼时效为五年。将保存信息的时间延长到五年，可以使信息保存时间和诉讼时效一致。最后，考虑到平台管理数据需要承担的额外负担和成本，五年的时间是合理的。

Recommendation: **Modify Article 46: “Collection of E-commerce Personal Information” to include “goods” in addition to services rendered by the e-commerce business operators.**

Policy Rationale:

The word “goods” should be included in the second paragraph of Article 46 when discussing e-commerce business operators who may force users to agree to the collection, processing and utilization of personal information for clarity and accuracy. Therefore, the following language should be added to Article 46:

E-commerce business operators shall collect users’ personal information according to legitimate, proper and necessary principles, expressly explain to users the rules for collecting, processing and utilizing information in advance and shall obtain the users’ consent.

E-commerce business operators shall not, on the grounds of refusing to provide users “goods and” services, force users to agree the collection, processing and utilization of personal information.

It is prohibited to collect personal information through illegal transaction, invasion, fraud, coercion or other means without authorization from users.

E-commerce business operators shall not revise the rules for collecting, processing and utilizing personal information, unless otherwise agreed by users. If users do not agree, e-commerce business operators shall provide appropriate remedies.

建议：修改第四十六条：电子商务经营主体提供“服务”时不得“收集用户个人信息”，还应加上提供“商品”时也不得收集。

政策理由：

第四十六条第二段讨论了电子商务经营主体提供服务时可能强迫用户同意其收集、处理、利用个人信息，为了更加清楚和准确，应在此处加上“商品”一词。因此，第四十六条中建议修改如下：

电子商务经营主体收集用户个人信息，应当遵循合法、正当、必要原则，事先向用户明示信息收集、处理和利用的规则，并征得用户的同意。

电子商务经营主体不得以拒绝为用户提供“商品和”服务为由强迫用户同意其收集、处理、利用个人信息。禁止采用非法交易、非法入侵、欺诈、胁迫或者其他未经用户授权的手段收集个人信息。

电子商务经营主体修改个人信息收集、处理、利用规则的，应当取得用户的同意。用户不同意的，电子商务经营主体应当提供相应的救济方法。

Recommendation: Ensure e-commerce business entities offer appropriate procedures and facilities to facilitate protection of IP rights by rights holders.

Policy Rationale:

E-commerce business entities should set up procedures to facilitate right holders to protect their rights and provide practical standards for the right holders as having provided sufficient evidence. These procedures should be reasonably obtainable to aid right holders in enforcing their rights in E-Commerce businesses.

建议：确保电子商务企业提供恰当的程序和设施，以促进权利人对其知识产权的保护。

政策理由：

电子商务企业应当制定程序，方便权利人保护自己的权利，并提供“充分证据”的实际可操作性标准。。这些程序的信息应当能被合理地获得，以帮助权利所有人在电子商务中执行他们的权利。

Recommendation: Modify Article 53: “Intellectual Property Protection” to include language that addresses procedures for a rights holder to protect their rights.

Policy Rationale:

INTA believes that Article 53 should be modified to include the following language:

E-commerce business entities shall protect intellectual property according to the law and establish rules for intellectual property protection, “and also set up procedures to facilitate right holder to protect their rights. Under the condition that the right holder has provided sufficient evidence.” E-commerce business entities shall take necessary measures when they discover obvious acts of intellectual property infringement including deletion, screening, disconnection, and termination of transactions and services. “If necessary, the right holder shall be required to provide a guarantee.”

The added language will aid right holders in enforcing their rights in E-Commerce businesses.

建议：修改第五十三条：“知识产权保护”，加入权利持有人保护其权利的程序的表述。

政策理由：

INTA 认为应修改第五十三条，以包括以下语言：

电子商务经营主体应当依法保护知识产权，建立知识产权保护规则“，并制定程序，方便权利人保护自己的权利。在权利人提供充分证据的条件下，”电子商务第三方平台明知平台内电子商务经营者侵犯知识产权的，应当依法采取删除、屏蔽、断开链接、终止交易和服务等必要措施。“如有必要，权利持有人应当提供保证。”

增加的语句将有助于权利人在电子商务中行使他们的权利。

Recommendation: **Modify Article 54: “Transfer of Intellectual Property Infringement Notifications by Third Party Platforms” to include specific time limits for each party to fulfill their obligations under the E-Commerce Law, set requirements for the business operator’s statement, and include information as to where the platforms should post the notices.**

Policy Rationale:

Clarification should be provided as to where the third party e-commerce platforms should post the periodic notices and statements received as well as any resolutions.

Additionally, the statements on behalf of the business operator in the second paragraph of Article 54 should include some evidentiary standards such as preliminary evidence that no infringement has taken place in order to deter unethical business owners from increasing the burden of fighting the alleged infringement by issuing a complex statement. Furthermore, a strict timeline for when each party has to act is an important addition to the E-Commerce law. Without deadlines for action, a right holder could be waiting for an indefinite amount of time before their complaint is resolved against the infringer. Additionally, a set location of where the third party e-commerce platforms should post notices and resolutions should be set standardization purposes.

Therefore, the following language should be added to Article 54:

In the event that a third-party e-commerce platform receives a notice from an intellectual property rights holder of an act of intellectual property infringement committed by a business operator on the platform, the platform shall “within 72 hours” forward the notice to the business operator and take measures according to the intellectual property rights holder’s notification. Intellectual property rights holders shall bear civil liability for losses suffered by platforms due to errors in their notices.

In the event that the business operator, after receiving the notice forwarded by the platform, submits a statement “and preliminary evidence to prove that no infringement has taken place.” the platform shall terminate the measures taken in a timely fashion “within 5 working days”, forward the business operator’s statement to the intellectual property rights holder who sent the notice, and inform the intellectual property rights holder that it can file a complaint with relevant administrative authorities or file a civil suit with People’s Courts.

建议：修改第五十四条：“电子商务第三方平台转述知识产权侵权行为通知”，应包括每一方履行义务的具体时间限制，规定经营者声明的要求，并明确平台发布通知的地点。

政策理由：

应当明确第三方电子商务平台应在何处公布所收到的定期通知、声明以及处理方法。

此外，第五十四条第二段中提到的经营者的声明应囊括一些证据标准。例如，包括初步证据证明没有发生侵权行为，以防止不道德的经营者通过发布复杂的声明来增加阻止侵权的负担。另外，电子商务法需要补充每一方必须遵循的严格的时间表。没有采取行动的最后期限，权利持有人等待投诉解决的时间可能是无限的。此外，第三方电子商务平台发布通知和决议的位置应当标准化。

因此，建议在第五十四条中增加以下表述：

电子商务第三方平台接到知识产权权利人发出的平台内经营者实施知识产权侵权行为通知的，应当“在 72 小时内”将该通知转送平台内经营者，并依法采取必要措施。知识产权权利人因通知错误给平台内经营者造成损失的，依法承担民事责任。

平台内经营者接到转送的通知后，向电子商务第三方平台提交声明“和初步证据”保证不存在侵权行为的，电子商务第三方平台应当“在 5 个工作日内”及时终止所采取的措施，将该经营者的声明转送发出通知的知识产权权利人，并告知该权利人可以向有关行政部门投诉或者向人民法院起诉。

Recommendation: Modify “Article 55: Prohibition of Acts of Unfair Competition” to include the prohibition of the use of domain names that will likely mislead the public and add in the unauthorized use of trademarks as a prohibited act of unfair competition.

Policy Rationale:

Under Article 55, Subsection 1 should be modified to include the language “likely to mislead the public”:

“Unauthorized use of the main portion of domain names, website names, page names and other markings that are similar or identical to those of well-known enterprises’ markings which will likely mislead the public and result in market confusion”

Additionally, language including the unauthorized use of trademarks should also be listed as Subsection 6 as a prohibited act of unfair competition:

“(6) Unauthorized use of trademarks;”

The addition of the language “likely” to mislead the public and the addition of “unauthorized use of trademarks” should be added to the Draft E-Commerce Law in order to broaden the scope of the section.

建议：修改“第五十五条：禁止不正当竞争行为”，此条应包括禁止使用“可能误导公众的”域名，并在禁止的不正当竞争行为中增加“未经授权使用”商标的行为。

政策理由：

应修改第五十五条第（一）款，以包括“可能误导公众”的表述：

“擅自使用与他人域名主体部分、网站名称、网页等知名商业标识相同或者近似的商业标识，可能误导公众，导致市场混淆；”

此外，禁止的不正当竞争行为中应将未经授权使用商标列为第六款：

“（6）未经授权使用商标；”

在电子商务法草案中应增加“可能”误导公众的表述，并增加“未经授权使用商标”，以扩大大节的范围。

Recommendation: **Modify Article 86: “Liability for Legal Violations by Express Logistics Service Providers” to include clear liability for violations stipulated in Article 41 “Relevant Norms for Accepting and Delivering Items.”**

Policy Rationale:

Although Article 41 of the draft law clearly imposes an obligation on express logistics service providers to refuse items with incomplete or inaccurate waybill information, no punishment in violation of these obligations is clearly stipulated in the draft. The waybill information can be very helpful in tracing and pursuing the infringers engaging in e-commerce. Therefore, the relevant legal liabilities should be included in Article 86 which already touches on legal violations by express logistics service providers.

建议：修改第八十六条：“快递物流服务提供者的违法责任”，以囊括第四十一条“接受和交付物品的相关规范”规定的违约责任。

政策理由：

虽然草案第四十一条明确规定了快递物流服务提供者有义务拒绝信息不完整或不准确的运单，但草案中并没有明确规定违反这些义务的惩罚。运单信息非常有助于追踪和追究电子商务中侵权者的责任。因此，第八十六条已涉及快递物流服务提供者的违规行为，也应进一步囊括相关的法律责任。

Conclusion:

INTA appreciates your serious consideration of INTA’s recommendations for an E-commerce Law.

This document was drafted by the INTA Anticounterfeiting Committee and staff. Please do not hesitate to contact Manager, Anticounterfeiting, Maysa Razavi at mravazi@inta.org or Asia-Pacific Chief Representative, Seth Hays at shays@inta.org, if you have any questions or concerns.

总结

INTA 感谢您认真考虑 INTA 关于《中华人民共和国电子商务法（草案）》的建议。

本文件由 INTA 防伪委员会及其工作人员起草。如果您有任何问题或疑虑，请随时联系防伪委员会主管 Maysa Razavi mravazi@inta.org，或亚太地区首席代表 Seth Hays shays@inta.org。