

Online Counterfeiting Issues and Enforcement in China 中国互联网假冒问题及执法现状

Prepared by the INTA Anticounterfeiting Committee China Subcommittee
本文由国际商标协会反假冒委员会中国分委员会起草

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The sale of counterfeit goods in China is increasingly shifting online, due in large part to the unique advantages that the Internet offers to counterfeiters. Ecommerce allows sellers in China to interact with and sell directly to wholesalers and consumers in the US, EU and around the world, as well as to Chinese consumers, while remaining anonymous and hiding the counterfeit nature of the goods they are selling.

售假者假冒商品在中国的销售正日益向互联网转移，这在很大程度上缘于互联网为售假者所提供的特殊便利。电子商务让中国的卖家可以在保持其匿名并隐藏其所售商品的假冒性质的情况下，直接与身处中国、美国、欧盟及世界其他地区的批发商和消费者进行交易。

Online counterfeiting poses unique challenges to law enforcement, brand owners and online service providers seeking to prevent this illicit trade. The Internet allows criminals to remain anonymous, thereby avoiding capture and discovery. The global nature of ecommerce also means that many of the counterfeiters are located in different countries with different legal systems in which laws and interpretations governing online infringement are still developing. This only makes it more difficult to effectively address the counterfeiting network as a whole. Furthermore, to date, there has been relatively little cross-border cooperation between authorities to stop international online counterfeiting rings.

互联网售假为执法部门、品牌权利人和互联网服务提供商带来了前所未有的挑战。互联网可以帮助犯罪分子保持匿名，从而避免其被抓获和发现。电子商务的全球性也意味着许多售假者都身处不同的国家，而这些不同的国家适用不同的法律体系。在这些法律体系中，法律条文和法律解释对于互联网侵权这一问题的回应，仍然处于发展阶段。这使得从整体上解决互联网售假问题变得更为困难。除此之外，迄今为止，在应对国际互联网售假方面，各国执法机关的跨境合作相对较少。

Although many challenges continue to exist, China is rapidly developing its legal and enforcement framework for addressing online counterfeiting with legislation and court decisions now strengthening penalties against sellers of counterfeits and clarifying the duty of care of intermediaries to much the same standard as found in other major countries. Over the past few years, the central government has encouraged local police and administrative enforcement authorities to become more active in monitoring and investigating online counterfeiting. This is most amply illustrated in the June 2014 action plan of the Office of the National Leading Group on the Fight Against IPR Infringement Counterfeiting (NLG), which sets out in detail the responsibilities of different ministries for strengthening enforcement online.

尽管目前有很多的挑战，但中国目前正在迅速完善其立法和执法体系，以应对互联网售假。目前，法律条文和司法判决正不断加大对售假者的处罚力度，并明确了中间商所需要履行的注意义务，这些举措已经逐渐地与其他主要国家接轨。在过去的几年间，中央政府鼓励

地方公安部门和行政执法部门，在监测和调查互联网假冒方面采取更为积极的举措。这一点，在全国打击侵犯知识产权和制售假冒伪劣商品工作领导小组（“双打办”）于 2014 年 6 月制定的行动计划中得到最为充分说明。该行动计划详细规定了各部委有关加强互联网执法的职责。

This paper is drafted by the China Subcommittee of INTA's Anticounterfeiting Committee (ACC). The ACC is comprised of rights holders and law practitioners with in-depth experience in addressing counterfeiting over the Internet and in working with enforcement officials and online service platforms. This paper, therefore, provides brand owners' perspective on the viability of existing criminal, administrative and civil enforcement options under Chinese law to fight online counterfeiting as well as recent advances in partnering with online trading platforms and other Internet service providers. This paper also sets out recommendations for more effective enforcement, including through legislative and regulatory reforms, new enforcement programs and more structured cooperation in investigations and enforcement work among relevant stakeholders.

本文由国际商标协会反假冒委员会中国分委员会起草。国际商标协会反假冒委员会由品牌权利人和在互联网售假领域以及与执法部门和互联网服务提供商协作方面具有丰富经验的法律从业者组成。因此，本文是以品牌权利人的视角，在中国现行法律框架下探讨打击互联网假冒问题的刑事、行政和民事执法手段，以及有关网络销售平台和其他互联网服务提供商合作的最新进展动向。同时，本文还为更高效的执法行动提供了一系列建议，其中包括立法和监管层面的改革、新型执法项目、调查人员和执法主体之间更为体系化的合作。

Summary of Recommendations

建议摘要

Proposals for strengthening criminal and administrative enforcement:

有关增强**刑事和行政执法**力度的建议：

- Eliminating or reducing thresholds for criminal prosecution and conviction of counterfeiters who sell online.
在互联网售假案件中，取消或者降低刑事诉讼和对售假者刑事定罪的门槛
- Establishing and expanding the work of specialized investigation units that proactively police online trade platforms and websites for counterfeiting.
建立和扩大针对售假网络销售平台和网站进行积极监督的特别调查机构的工作
- In cities where “pilot programs” are being pursued, encouraging local authorities to work more closely with brand owners in generating leads and testing for more innovative investigation and enforcement tools.
在开展“试行性执法举措”的城市，鼓励当地有关部门与品牌权利人更加紧密地合作，争取在收集线索和尝试新调查手段方面有所斩获
- Reviewing and amending laws and regulations governing online privacy to make it harder for those selling counterfeit goods online to remain anonymous.
审订和修改规制网络隐私方面的法律法规，以增大匿名售假的难度
Establishing procedures to facilitate more effective access by enforcement authorities to information relating to counterfeit sales kept by online trading platforms and other Internet service providers.

建立相应的机制，以便于执法机关更有效地从网上交易平台和其他互联网服务供应商中获取售假交易的相关信息

- Addressing the various practical and legal barriers to cross-border investigations and enforcement and establishing new protocols and promoting greater cooperation between law enforcement authorities in China and countries where the consumers are being targeted (particularly the US and EU).
解决跨境调查和执法的现实问题和法律障碍，签署新的协议，并大力促进中国和存在售假目标消费群的国家的执法机构之间（尤其是美国和欧盟）的合作
- Establishing protocols for obtaining swifter access by police and civil courts to information controlled by Chinese entities or individuals but located overseas, including in servers based outside of China.
建立公安部门和民事法庭对中国企业或个人所掌控的、储存在海外（包括中国法域之外的服务器上）的信息的便捷访问渠道

Proposals for strengthening **civil enforcement**:

有关增强**民事执法**力度的建议：

- Encouraging the SPC to hasten the issuance of a new judicial interpretation governing online counterfeiting.
鼓励最高人民法院加紧出台针对互联网假冒问题的新司法解释
- Adding new provisions in Chinese law that would allow civil actions against infringers whose identities are not confirmed.
增加新的法律条款，允许权利人对身份尚未确定的侵权人提起民事诉讼
- Adding provisions to the law allowing brand owners to obtain evidence of infringements from third parties, including ISPs, online trading platforms, payment service providers and other intermediaries.
增加新的法律条款，允许品牌权利人从第三方机构（如互联网服务提供商、网络销售平台、支付服务提供商和其他中间商）获取侵权证据
- Concluding treaties on the mutual recognition of civil judgments between China and other major countries where such treaties do not already exist.
与其他尚未签署民事判决互认协议的主要国家尽快签署民事判决互认协议
- Adapting civil procedural rules to facilitate the admissibility of evidence obtained overseas, as well as the prompt disclosure of evidence to establish the identity of counterfeiters.
调整民事诉讼法律，促进海外证据的可采性和证据的及时公开以便确认侵权人的身份

Proposals for encouraging and facilitating **voluntary cooperation between brand owners and intermediaries**, such as online trading platforms, web hosts, domain name registrars and payment processors:

有关鼓励和促进**品牌权利人和中间商**（比如：网络销售平台、网络服务器提供商、域名注册机构和支付平台）的**自愿合作**的建议：

- Strengthening procedures for identifying and taking more effective action against repeat offenders.
增强识别和有效打击累犯的举措
- Increasing the use of preventive measures by intermediaries, such as filters and identity verifications and improved customer screening.

增加中间商的预防措施，比如设置过滤条件、身份认证和改善客户审查

- Improving disclosure policies to facilitate access by brand owners and law enforcement information about counterfeiters, including seller identities and sales information.

改进信息披露政策，协助品牌权利人和执法机关获取售假者的信息，包括卖家身份和销售详情

A. **Overview of Online Counterfeiting**

互联网售假的概况

1. Modes of Online Counterfeiting

互联网售假的模式

Online counterfeiting takes two predominant forms: sales made from stand-alone websites and sales made from online stores hosted on B2B/B2C/C2C trading platforms. In addition, social media sites and spam sales increasingly feed traffic to these websites and platforms. Each of these forms poses significant enforcement challenges:

互联网售假有两种主要模式：独立网站售假和 B2B/B2C/C2C 网络销售平台售假。另外，社交媒体网站和垃圾邮件销售也成为这些网站和销售平台的售假渠道。上述每一种模式都给执法带来了严重的挑战：

a. Stand-Alone Websites

独立网站

Counterfeit stand-alone websites are generally set up to appear to consumers to be a particular brand's authorized website by copying the brand's own product photos, marketing images and text and locating the website at a cyber-squatted domain name containing the brand (e.g. cheap[brand name].com or wholesale[brand].org). These sites are written in English (or in the language of the target market) and accept credit card payments in US dollars (or in the local currency of the target market).

独立网站一般都通过复制某品牌自身的照片、营销图片和文字，将该网站链接于包含该品牌的抢注域名（比如，cheap[品牌名].com，或 wholesale[品牌名].org 等域名），从而以伪装成某品牌的授权网站的方式呈现给消费者。这些网站都是英文书就（或目标市场的语言），并接受美元信用卡支付（或在目标市场流通的当地货币）。

Counterfeiters generally sell products at price points that more closely mimic authentic pricing with only smaller promotional discounts. As a result, consumers are often unaware that they are buying a fake, but instead believe they are getting 'a good deal' on genuine goods.

售假者一般都是以接近正品销售价格的定价并提供小额促销折扣的模式销售产品。这样导致消费者往往不知道自己购买的是假货，而是认为他们用“优惠价”买到了正品。

It is easy and inexpensive to set up a counterfeit website, therefore criminal rings simultaneously operate hundred or even thousands of websites at the same time. When one site is shut down, another immediately takes its place. As a result, certain brands are faced with thousands of counterfeit websites at any time.

由于建立一个假冒的独立网站轻而易举且成本低廉，因此刑事团伙可以同时经营成百或上千的网站。当一个售假网站被关闭，另一个售假网站立即取而代之。这导致有些品牌时时刻刻都面临着成百上千的假冒网站。

b. Online Trading Platforms

网络销售平台

Counterfeiters also sell illicit goods via selling pages on online B2B/B2C/C2C trading platforms. Like standalone websites, listings on trading platforms can make a counterfeit goods seem legitimate through use of a brand's own product photos and descriptions and even go so far as posting fabricated 'letters of authorization'. Many platforms provide (for a fee) verification seals and badges and high search placement to make a seller seem more trustworthy than it is. Some platforms have their own payment services and escrow services that can facilitate sales and further enhance the perception that such products are legitimate. As with standalone websites, counterfeit rings operate many seemingly unrelated stores simultaneously so that if one is removed, there is no great loss. For certain platforms, all or virtually all of the branded goods being sold are counterfeit.

售假者还可以通过 B2B/ B2C/ C2C 网络销售平台的网页销售假货。与独立网站类似，售假者通过使用原品牌自身产品的照片和说明、甚至捏造“授权书”，使得销售平台上所展示的假货很像正品。很多平台提供（收费）商家认证徽章和更靠前的搜索竞价排名，使得这些售假者看起来更值得信赖。有些网络销售平台拥有自行开发的支付服务和第三方钱财保管服务从而促进交易，并进一步增强消费者认为这些产品是正品的可能性。与独立网站类似，售假团伙可同时经营很多看似毫无关联的网店。这样一来，即便其中一个被删除，也不会带来很大的损失。在某些网络销售平台上，所有或几乎所有出售的品牌商品均为假冒产品。

2. Anonymity

匿名性

Counterfeiters are able to remain anonymous in virtually every aspect of online counterfeiting. Registering a domain name, maintaining a website or selling page on a platform, accepting orders, shipping packages and processing payments can be performed using false or incomplete names making identification and capture by law enforcement or the brand extremely difficult. A seller's real identity is not available to consumers or brand owners.

售假者能够在互联网售假的几乎每一个环节上都保持其匿名性。注册域名、在独立网站或网络销售平台上运营网店、接受订单、发货包装和处理付款等各个具体环节都可以使用虚假或不完整的名字从而导致识别卖家身份和执法行动变得极为困难。消费者和品牌权利人都无法获取售假卖家的真实身份。

Trading platforms and online service providers and intermediaries are lax in verifying that sellers are using accurate seller information. The information that registrants of counterfeit stand-alone websites sites provide for the WHOIS database is generally

false or incomplete. Shippers and express couriers often do not require senders to supply correct or complete return addresses. Counterfeit goods are generally shipped with a fake or incomplete return address via EMS China, China Post or another courier. This anonymity makes it impossible for brands or law enforcement, especially in foreign countries, to locate the sender. Privacy laws in China further stymie the ability to discover the identities of the counterfeiters.

互联网交易平台和互联网服务供应商和中间商疏于核实卖家的具体信息。销售假货的独立网站所提供的 WHOIS 数据库信息，一般都是虚假或不完整的。货运公司和快递公司往往不需要发件人提供正确的或完整的退件地址。仿冒品一般都以一个伪造的或不完整的退件地址，通过中国 EMS，中国邮政或其他快递发送。这一匿名性使得品牌权利人和执法机关几乎不可能找到售假者，尤其是位于国外的售假者。中国的隐私保护法则进一步增大了发现售假者身份的难度。

3. Cross-Jurisdictional Crime

跨境犯罪

Online counterfeiting is a global enterprise that typically cuts across many jurisdictions. The brand owners and victims are often located outside of China, as is the evidence of the counterfeit sale and often times certain key aspects of the operation. For example, it is very common for a China-based ring to operate websites that are targeting consumers in the US and EU using Internet Service Providers (ISPs) that are located in the US, with goods being transshipped through Hong Kong and Singapore, using payment processors located in the US and EU, but with funds eventually flowing back to Chinese bank accounts.

互联网售假是一个全球性运作，其经常涉及多个司法管辖区域。品牌权利人和受害者往往位于中国境外，售假的证据以及经常而言售假的某些主要运营也都是位于中国境外。举例一个很常见的例子来说，一个位于中国的售假团伙通过使用位于美国的互联网服务提供商（ISPs）开设了针对美国和欧盟的消费者的网站，通过香港和新加坡转运货物，使用位于美国和欧盟的支付平台服务商处理账单，但资金却最终回流到其设在中国的银行账户。

With enforcement traditionally limited to a particular country, it is difficult for any law enforcement body or brand owner to achieve comprehensive enforcement.

由于执法传统上都是仅限于某一特定国家，因此，对任何执法机构或品牌权利人而言，实现跨境执法的难度非常大。

B. Criminal and Administrative Enforcement

刑事和行政执法

The following briefly summarizes our understanding of the laws and policies relied upon by Chinese authorities in their efforts to investigate and take enforcement action against infringers.

以下将简要概括我们对于中国有关主管部门在努力调查和打击侵权人时所依据的法律和政策的理解。

1. Criminal Enforcement

刑事行动

China's Code imposes sanctions of up to seven years imprisonment where sales of infringing products are deemed "huge" or up to three years where they are deemed "relatively large" or where "serious circumstances" are deemed to exist. Judicial interpretations of the Supreme People's Court (SPC) set out numerical thresholds for determining whether crimes have been committed, with the lowest standard being RMB 50,000 (US \$8,000) in completed transactions or triple this amount where infringing goods are seized but not yet sold.

中国的法律规定，若销售侵权产品被认定为是“巨大的”，则侵权人将面临最高长达7年的有期徒刑处罚；若销售侵权产品被认定为是“比较大”或者“情节严重”，则侵权人将面临最高长达三年的有期徒刑处罚。最高人民法院（SPC）的司法解释对是否构成犯罪的标准设置了数字底线，其中已销售的侵权金额的最低标准是5万元人民币（约合8,000美元），尚未售出的侵权货物的货值金额最低标准为前述标准的三倍，即为15万元人民币。

Chinese police will generally only commence investigations into cases where there is a strong possibility that these thresholds can be met following investigations. As a consequence, online infringers generally attempt to avoid keeping evidence of sales over the relevant thresholds, which they are able to do by keeping low inventories and locating fulfillment separately from operation and maintenance of the websites.

中国的公安部门通常只在案件有极大可能性达到上述最低标准的前提下，才会展开调查。其结果是，互联网售假者通常能够通过保持低库存清单、或避开网站运营而单独执行订单，从而有意避免保存其假冒销售额突破相应的底线的证据。

At present, there are no guidelines that explicitly allow for criminal prosecution against repeat offenders, and the above numerical thresholds are imposed in virtually all cases.

目前，并没有任何针对累犯刑事诉讼的明晰指导方针，而上述底线要求却强加在几乎所有的案件中。

Chinese police have increased the number of online counterfeiting cases they pursue, relying upon investigative information from brand owners as well as trade platforms. Still, criminal investigations into online cases can be difficult and time-consuming, with additional legal and practical obstacles arising in cases involving cross-border trade.

通过品牌权利人和互联网交易平台所提供的调查信息，中国的公安部门已经增加了他们追查互联网售假案件的数量。不过，互联网刑事案件的调查是相当困难和耗时的，尤其是在跨境贸易的情况下，这类案件还将面临额外的法律上和实践操作上的障碍。

Under former Premier Wen Jiabao, the State Council indicated plans to reduce thresholds for criminal enforcement against counterfeiters and other IP violations, and we understand that relevant authorities are continue to take into consideration current realities of online enforcement as part of their research into possible changes in the law. However, the status of efforts to revise the Criminal Code and related judicial interpretations remains unclear.

根据前国务院总理温家宝的指示，国务院曾表示计划降低有关售假者和其他知识产权侵权行为的刑事执法的相关门槛。我们理解，有关部门正在将互联网执法当前所面临

的现实问题作为其研究修改现行法的一部分进行考虑。然而，有关修订刑法及相关司法解释的进展尚不明晰。

2. Administrative Enforcement 行政执法

China offers administrative enforcement principally through the Administrations for Industry and Commerce (AICs), which are authorized under the PRC Trademark Law to conduct seizures of infringing products and relevant evidence from commercial premises without a warrant and to impose fines of up to 500% of the “illegal business amount” (typically the value of goods seized plus revenues generated from prior sales). Where cases meet relevant thresholds for criminal prosecution, AICs are required to transfer their files to the Public Security Bureau (PSB) for criminal investigation and eventual prosecution. Brand owners can also file civil actions for compensation and injunctions in conjunction with evidence gathered by AICs.

中国主要是通过工商局（AICs）来开展行政执法活动。根据中国商标法授权，工商局有权，在无需保证金的情况下，在营业现场扣押假冒货物和相关证据，并处以最高为“非法经营数额”（通常包括了扣押商品的货值和先前销售的营业收入）五倍的罚款。凡案件符合相关刑事起诉门槛，工商局需将案件转移到公安局（PSB）进行刑事调查，并最终提起刑事诉讼。品牌权利人也可以根据工商局所搜集的证据，提起民事诉讼赔偿和申请禁令。

The AICs lack the legal authorization to compel parties, such as online trading platforms, banks and payment processing services providers that hold relevant evidence of prior transactions to disclose this evidence to them. AICs likewise lack the power to detain suspected infringers.

工商局缺乏足够的法律权威来迫使保存有交易记录和证据的相关第三方，比如网络销售平台、银行、支付服务提供商等，披露相关证据。工商局也无权拘留涉嫌侵权人。

The powers to compel disclosure of such evidence are reserved to Chinese police, prosecutors and the courts. But in practice, the AICs are not legally permitted to obtain this evidence through formal requests through these authorities.

强制获取证据的权力仅限于公安局、检察院和法院。但在实践中，工商局也没有权利通过正式的申请向上述机关调取相关证据。

The AICs and PSBs are increasingly working together in investigating counterfeiting cases under the “Dual Strike” program (双打) established by national authorities. However, when working on their own, AICs focus most, if not all, of their resources in pursuing “hard targets”, warehouses and factories. After such raids, the AICs will generally impose penalties based only on the goods seized, and without the benefit of transactional evidence from online trading platforms, banks and payment processing services providers. Thus, the ability of the AICs to generate evidence of the full scope of prior business dealings is critically hampered.

在国家有关机关的“双打”项目下，工商局和公安局在调查互联网售假方面，正在越来越多地开展共同协作。然而，在其独自执法时，工商局则将其大部分，若非全部的资源，用于锁定一些“硬目标”——绝大部分是仓库和工厂。类似的工商执法行动之后，工商局通常只根据所扣留假货的货值来进行处罚，而无法考虑互联网交易平台、银行

或支付服务提供商等相关交易证据所带来的收益。因此，工商局在收集有关过往交易的全部记录方面存在严重的束缚。

Due to a variety of practical and legal considerations, the AICs have largely refrained from dealing with online counterfeiting cases. However, IP owners are watching closely as the State Administration for Industry and Commerce (SAIC) introduces reforms in this regard following the NLG's latest action plan. These plans appear to include closer monitoring of repeat offenders under a national database that will include records of all administrative violations. At present, it remains unclear just how successful these enforcement initiatives will prove.

出于各种实务上和法律上的考虑，工商局在很大程度上会尽量避免处理互联网售假案件。然而，中华人民共和国国家工商行政管理总局（SAIC）日前发布了落实双打办的最新行动计划的改革方案，这引起了很多品牌权利人的密切关注。这些计划包括建立一个记录各种行政违法行为的国家数据库用于密切监控累犯。目前，尚不清楚这些举措将会取得多大的成效。

Despite recent progress, much could be done to fight online counterfeiting through criminal and administrative means, including:

虽然目前针对打击互联网售假的措施有所进展，但是在刑事和行政执法方面，仍然有很多可以改进之处，包括：

- **Eliminating or reducing thresholds for criminal prosecution and conviction of counterfeiters who sell online.**
在互联网售假案件中，取消或者降低刑事诉讼和对售假者刑事定罪的门槛
- **Establishing and expanding the work of specialized investigation units that proactively police online trade platforms and websites for counterfeiting.**
建立和扩大针对售假网络销售平台和网站进行积极监督的特别调查机构的工作
- **In cities where “pilot programs” are being pursued, encouraging local authorities to work more closely with brand owners in generating leads and testing for more innovative investigation and enforcement tools.**
在开展“试行性执法举措”的城市，鼓励当地有关部门与品牌权利人更加紧密地合作，争取在收集线索和尝试新调查手段方面有所斩获
- **Reviewing and amending laws and regulations governing online privacy to make it harder for those selling counterfeit goods online to remain anonymous.**
审订和修改规制网络隐私方面的法律法规，以增大匿名售假的难度
- **Establishing procedures to facilitate more effective access by enforcement authorities to information relating to counterfeit sales kept by online trading platforms and other Internet service providers.**
建立相应的机制，以便于执法机关更有效地从网上交易平台和其他互联网服务供应商中获取售假交易的相关信息
- **Addressing the various practical and legal barriers to cross-border investigations and enforcement and establishing new protocols and promoting greater cooperation between law enforcement authorities in China and countries where the consumers are being targeted (particularly the US and EU).**
解决跨境调查和执法的现实问题和法律障碍，签署新的协议，并大力促进中国和存在售假目标消费群的国家的执法机构之间（尤其是美国和欧盟）的合作

- Establishing protocols for obtaining swifter access by police and civil courts to information controlled by Chinese entities or individuals but located overseas, including in servers based outside of China.
建立公安部门和民事法庭对中国企业或个人所掌控的、储存在海外（包括中国法域之外的服务器上）的信息的便捷访问渠道

C. Civil Enforcement **民事诉讼**

In addition to criminal and administrative options, brand owners can pursue online violations through civil litigation. Sellers of counterfeit goods can be held directly liable for infringement, and under recent changes to China's Trademark Law (effective May 1, 2014), courts are authorized to impose much higher compensation awards, including (a) statutory damages of up to RMB 3 million (US \$500,000); and (b) punitive damages of up to 300% of actual damages or profits earned by infringers.

除了刑事和行政执法，品牌权利人还可以通过民事诉讼追究互联网售假行为。假售假者对互联网售假侵权负有直接责任，并且，根据最近修订的中国商标法（2014年5月1日起生效），法院有权判处更高的赔偿金，其中（一）法定赔偿额上限提高到300万元人民币（约合50万美元）；及（二）权利人实际损失或侵权人所获利益三倍的惩罚性赔偿。

The revised Trademark Law also shifts the burden of proof to infringers to provide transactional records, failing which courts are encouraged to award plaintiffs compensation in line with their claims.

新商标法还设置了举证责任转移。侵权人必须提供交易记录，否则，法院将支持原告有关赔偿请求的主张。

Chinese law permits IP owners to seize infringers' assets on an ex parte basis subject to the payment of a bond, and plaintiffs routinely apply for the freezing of infringer assets held in bank and Alipay accounts.

中国法律允许知识产权权利人在提交足额保证金的前提下，单方申请对侵权人的财产进行财产保全。中国法律也允许权利人时常向法院申请财产保全，冻结侵权人的银行账号和支付宝账号。

Chinese law also permits IP owners to request courts to seize evidence of infringements, including transactional and communication records. In theory, China's civil tribunals have the power to compel third parties to disclose relevant evidence, including emails, Short Message Service (SMS) messages and payment records. However, few brand owners have not yet tested the effectiveness of the remedies.

中国法律还允许知识产权权利人向法院申请执行证据保全，保全包括交易记录和聊天记录等证据。理论上，中国法院的民庭有权力要求第三方披露相关证据，包括电子邮件、短信和支付记录。然而，很少有品牌权利人检验过类似救济方式的有效性。

The basic authority for pursuing civil liability against intermediaries such as online trading platforms and ISPs is set out in the PRC's Tort Liability Law, as well as the PRC Trademark Law. However, the actual duty of care of these parties has been developed over time through decisions of the civil tribunals of the People's Courts in various cities, most notably in Beijing. The Beijing Higher People's Court issued a paper in December

2012 that addresses a wide range of issues typically arising in civil disputes against online trading platforms. The SPC is said to be drafting a judicial opinion that will build on the concepts set out in the Beijing Higher People's Court's document.

对于追究中介商（例如，网上交易平台和互联网服务供应商）的民事责任，是属于中国的侵权责任法和商标法规制的范畴。然而，随着时间的推移，这些中间商的实际责任的确立已经通过各级人民法院的民事法庭，尤其是在北京地区的法庭，得以发展和完善。北京市高级人民法院于 2012 年 12 月发布了一份文件，该文件涉及一系列网上交易平台的民事纠纷问题。据称，最高人民法院可能会在北京市高级人民法院的这份文件的基础上起草司法解释。

To date, few foreign brand owners have pursued civil actions against intermediaries in online cases, in large part due to the low damages that have been issued in prior cases. It is unclear whether the quantum of damages will rise dramatically under the latest changes to the PRC Trademark Law. But brand owners will no doubt be testing the courts over the next year to clarify the utility of the revised law.

迄今为止，仅有少数外资品牌权利人追究过中间商的侵权责任。这在很大程度上是由于以往的民事损害赔偿额度较低。目前还不清楚赔偿金额是否将随着最新修改的商标法大幅提升。但是，品牌权利人无疑将在未来一年的法院判决书中看出最新修改的商标法的效应。

At the same time, civil lawsuits against Chinese large groups of anonymous online counterfeiters are becoming increasingly common in the US and EU, with brands obtaining injunctions to disable tens of thousands of web sites direct at residents in that jurisdiction and to freeze payment accounts found in that jurisdiction. These actions are limited, however, because it is not currently possible to enforce these actions in China where the infringers are located, as Chinese law does not recognize civil judgments issued by courts in the US and most EU member states. These types of lawsuits against anonymous online counterfeiters would not currently be possible in China, as Chinese law does not currently permit the filing of civil actions unless the identity of the defendant is clear. Given that counterfeiters are able to remain virtually anonymous in the operations, it is nearly impossible to bring civil litigation in China, especially when the counterfeiting is directed to foreign targets.

与此同时，在美国和欧盟针对中国大型的匿名互联网售假者提起民事诉讼变得越来越普遍。品牌保护人通过取得禁令，关闭了以该地域消费者为目标群体的、数以千计的侵权网站，并冻结其在该司法管辖区内的银行账户。然而，这些行动成效有限。其原因在于，目前中国不承认在美国或者欧盟国家法院所出具的判决书，从而不会根据此类判决书对中国境内互联网售假者采取相应的法律行动。同时，由于中国法院不接受针对身份无法确定的被告所提起的诉讼，因此该等针对匿名互联网售假者的民事诉讼在中国也不可行。由于售假者能够在售假的许多环节中保持匿名，通过民事诉讼在中国保护品牌权利人的权益几乎是不可能的，尤其是当售假针对外国客户的情况下。

The following improvements to laws, policies and enforcement would increase the effectiveness of efforts to combat online counterfeiting:

如下几点法律、政策和执行措施方面的改进将有助于提高打击互联网售假的有效性：

- Encouraging the SPC to hasten the issuance of a new judicial interpretation governing online counterfeiting.

鼓励最高法院加紧出台针对互联网假冒的新司法解释

- Adding new provisions in Chinese law that would allow civil actions against infringers whose identities are not confirmed.
增加新的法律条款，允许权利人对身份尚未确定的侵权人提起民事诉讼
- Adding provisions to the law allowing brand owners to obtain evidence of infringements from third parties, including ISPs, online trading platforms, payment service providers and other intermediaries.
增加新的法律条款，允许品牌权利人从第三方机构（如互联网服务提供商、网络销售平台、互联网支付平台和其他中间商）获取侵权证据
- Concluding treaties on the mutual recognition of civil judgments between China and other major countries where such treaties do not already exist.
与其他尚未签署民事判决互认协议的主要国家尽快签署民事判决互认协议
- Adapting civil procedural rules to facilitate the admissibility of evidence obtained overseas, as well as the prompt disclosure of evidence to establish the identity of counterfeiters.
调整民事诉讼法律，促进海外证据的可采性和证据的及时公开以便确认侵权人的身份

D. Cooperation with Trading Platforms and Other Intermediaries **与互联网交易平台和其他中间商的合作**

Internet service providers such as B2B/B2C trading platforms, web hosts, domain name registrars and payment processors provide services needed by legitimate businesses to market, promote and sell products. Counterfeiters also take advantage of these services to operate their illegal business. Online service providers are often in the best position relative to governments and rights holders to stop counterfeiters since they have a direct business relationship with counterfeiters and might be the only ones who know their true identities. Therefore, efforts by intermediaries in the fight against counterfeiting on the Internet are crucial.

诸如 B2B/B2C 互联网交易平台、网络服务器提供商、域名注册机构和支付处理交易平台等互联网服务提供商为合法商业的营销、促销和销售提供服务。互联网售假者也利用这些互联网服务来实现其不法目的。通常来说，相较于政府机构和品牌权利人而言，互联网服务提供商在防止互联网售假方面，有着天然的优势。其原因在于它们有着与互联网售假者直接的商业合作，并且很可能是唯一一个知悉售假者真实身份的主体。因此，中间商对互联网打假行动的贡献将不容忽视。

Online service providers have recently taken steps to address counterfeits on the Internet in order to provide a clean marketplace for their customers. Online service providers are also under some legal obligation since under Chinese law, trading platforms and ISPs can be held directly liable as joint infringers where they obtain a “direct economic benefit” from infringing transactions. They may also face contributory liability for failing to act “promptly” to take down infringing offers where there is actual or constructive knowledge that goods may violate IP rights. As a result, online service providers have taken proactive steps to address this issue:

互联网服务提供商最近已经开始针对售假问题采取行动，以期为其消费者提供一个更为洁净的市场。同时，根据中国的法律，互联网服务提供商也负有一定的法律义务。销售平台和互联网服务提供商如果直接与售假者的合作中“获得利益”的话，其将被视为共同侵

权者而直接承担责任。同时，若他们在主观上明知或应知侵权产品的假冒特性的情况下未能“及时”删除侵权链接，那么，他们也需要承担帮助侵权的责任。基于此，互联网服务提供商应当采取积极的措施解决这一问题：

1. Voluntary Brand Enforcement Programs 品牌保护的自愿合作项目

In the past few years, rights holders and online service providers, particularly trading platforms, have been increasingly finding ways to work together to stop counterfeiters. Almost every trading platform has a form of takedown program, whereby a rights holder can register or provide notice to the platform of its IP rights. The rights holder then reviews the platform for infringement and submits notices of claimed infringement for removal. A popular brand might submit tens of thousands of infringing listings for removal each month. These programs can be highly effective, provided there is some mechanism to ensure listings for counterfeits do not reappear immediately or that counterfeiters otherwise exploit loopholes to enforcement systems.

在过去的几年中，品牌权利人和互联网服务供应商，特别是互联网交易平台，已经越来越多地寻求合作途径以打击互联网售假者。几乎每一个交易平台都设有删除链接的投诉机制，即：品牌权利人可以注册或通知互联网交易平台有关其自身品牌的侵权状况。品牌权利人在互联网交易平台检索侵权链接，并提交通知要求互联网交易平台进行删除。一个流行的品牌可能每个月提交数以万计的链接删除请求。只要确保删除后的假冒产品不会立即重新出现或者售假者寻找到该系统的漏洞，那么这类机制将会是非常富有成效的。

These takedown programs have improved in recent years as trading platforms have begun devoting greater resources to brand protection and accepting a wider range of IP rights including copyrights and design rights, which have become necessary as counterfeiters shift away from using discernable trademarks in their listings in order to avoid takedown.

近几年来，这些互联网通知删除机制有所改善。这归功于互联网交易平台也开始投入更多的资源，开展品牌保护，接受更广泛的知识产权，包括著作权和外观设计权。由于售假者为了避免其链接因为可辨识的商标而被撤除而采取了其他规避商标侵权的措施，因此承认和接受著作权和外观设计权变得非常必要。

Platforms and other intermediaries are also increasingly inviting rights holders to meet with their brand protection team and train them about their particular brand and how to determine fakes. Trademark owners have come to see this as a valuable exercise.

互联网交易平台及其他中介商也越来越多地邀请品牌权利人与其品牌保护团队会面，培养其团队对某一品牌的认识，以及如何辨别货品真伪。品牌权利人认为这是一个很有意义的举措。

2. Memoranda of Understanding (MOUs) 合作备忘录(MOUs)

In the past few years, trading platforms have entered into agreements with brand owners and industry organizations to provide additional terms such as faster

removal times, more dedicated resources and agreements to have open lines of communication to discuss when issues arise. These MOUs are often accompanied by agreements to sell genuine products of a particular brand on a platform.

在过去的几年间，互联网交易平台与越来越多的品牌权利人和行业组织签署协议。协议的内容包括了加速链接删除速度、增加打假资源、以及开辟危机对话渠道。通常，双方签署这些合作备忘录之际会同时就该品牌在该交易平台设立官方网店等事宜签署相关协议。

3. Cooperation with Law Enforcement

与执法部门的合作

Chinese law enforcement authorities, including the Economic Crime Investigation Division of local PSBs, have been taking a greater interest in online counterfeiting occurring on both trade platforms and stand-alone websites. Trademark owners and platforms are now working more closely together to provide information and support for these enforcement actions.

中国执法部门，包括公安局的经济侦查科，已经对互联网交易平台和独立网站上所开展的互联网售假行为投入了大量的精力。品牌权利人和互联网交易平台正在更为紧密地合作，为这类执法行动提供信息和支持。

Current voluntary efforts are steps in the right direction towards effectively taking down counterfeiters' virtual storefronts. Additional steps, such as those outlined below, will go a long way towards increasing the effectiveness of current efforts and enabling more efficient takedown and investigation actions.

当前自愿合作的工作正在朝着正确的方向发展，有效地取缔售假者的网店。下述额外的举措将大大提高当前工作的成效，并实现更有效的删除和调查行动。

- Strengthening procedures for identifying and taking more effective action against repeat offenders.
增强识别和有效打击累犯的举措。
- Increasing the use of preventive measures by intermediaries, such as filters and identity verifications and improved customer screening.
增加中间商的预防措施，比如设置过滤条件、身份认证和改善客户审查。
- Improving disclosure policies to facilitate access by brand owners and law enforcement information about counterfeiters, including seller identities and sales information.
改进信息披露政策，协助品牌权利人和执法机关获取售假者的信息，包括卖家身份和销售详情。