

## **INTA Suggested Modifications to the Draft E-Commerce Law**

### **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 third reading of the Draft E-Commerce Law, as it did for the first and second readings.

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 is a membership association of more than 7,200 trademark owners and professionals from more than 191 countries. In China, we have 268 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 31,000 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.

### **Recommended Changes to the Draft E-Commerce Law**

***Recommendation:***     **Modify Article 42 to allow platforms discretion when evaluating evidence submitted by a seller against alleged infringement.**

#### *Policy Rationale:*

INTA believes that Article 42 should be modified to include the following language:

Upon receipt of notice set forth in the preceding Article, operators on platform may submit a statement to the e-commerce platform operator to warrant that there is no infringement. Such statement shall include prima facie evidence on no act of infringement. Upon receipt of such statement, the e-commerce platform operator shall promptly evaluate the IPR holder's notice, the dealer's statement and the preliminary evidence submitted by both parties. If the e-commerce platform operator determines in its reasonable discretion that the operator infringes intellectual property rights, it shall continue to take and maintain the necessary measures according to Article 41 of this Law. In the event the e-commerce platform operator decides to terminate the enforcement measures taken, it should notify the IPR holder immediately, and inform the IPR holder that they can lodge a complaint to the relevant department or file a lawsuit to the people's court. At the same time, the e-commerce platform operator should provide the IPR holder a copy of the materials submitted by the dealer including the non-infringement notice, evidence submitted by the

dealer, and identity information / contact details for the dealer such as the dealer's name, business name, address, email address, WeChat account, phone number, etc. to allow IPR holders to determine the relative parties and jurisdiction and seek legal action to prevent further IPR infringement by the dealer or provide additional relevant information to the e-commerce platform operator about the dealer's past infringing activities.

INTA believes that Article 42 of the Draft E-Commerce Law should be amended to allow platforms reasonable discretion when evaluating evidence submitted by a seller warranting that there is no infringement. Upon receipt of notice set forth in the preceding Article, sellers on a platform may submit a statement to the e-commerce platform operator to warrant that there is no infringement. Such statement shall include prima facie evidence of no act of infringement.

As drafted, Article 42 mandates that platforms must reinstate infringing listings whenever a seller submits "a statement...to warrant that there is no infringement" accompanied with "prima facie evidence of no act of infringement." There is a significant risk that the law as drafted will allow counterfeiters to take advantage the system by protesting every online listing takedown, therefore causing the burden to shift to the rights owner to pursue the takedown through formal legal channels. Article 42 appears to take away the discretion that platforms currently have to evaluate the evidence submitted and decide whether to reinstate a listing when a seller files a counter-notice. Instead, mandating that platforms will be obligated to "immediately stop the measures it has taken" and reinstate the listing.

If allowed to proceed to law, Article 42 poses significant risks to consumers and rights owners. Many highly counterfeited brands submit takedown notices for hundreds of thousands of listings for infringing products from Chinese marketplaces every year. It is not practical to expect a brand to file lawsuits or engage in arbitration for even a fraction of these infringing offers. Furthermore, under current the Draft E-Commerce Law, online marketplaces and platforms are not expressly permitted to share information about the true identity of the sellers of counterfeit goods with brand holders. This limitation makes it extremely difficult for a brand owner to build a case against an anonymous seller. (see, e.g., Articles 23, 25).

Article 42 should be revised to reflect the current status quo to (1) give platforms discretion to evaluate and reject seller appeals when appropriate and (2) maintain the enforcement action until the matter is resolved by a court or arbitration body, with IPR holder bearing costs/damages if the court finds the takedown was not made in good faith.

### **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 Senior Coordinator, Anticounterfeiting, Tiffany Pho at [tpho@inta.org](mailto:tpho@inta.org) or Asia-Pacific Chief Representative, Seth Hays at [shays@inta.org](mailto:shays@inta.org), if you have any questions or concerns.