Changes & Challenges of the Safe Harbor Under E-Commerce Law

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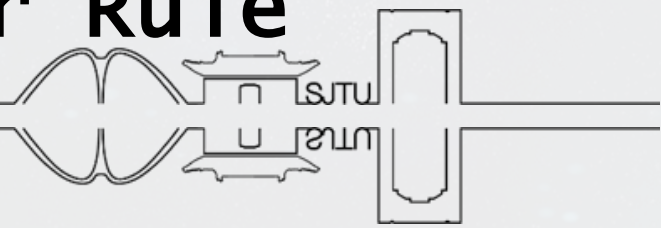
Development of The Safe Harbor Rule

A.2006 Regulation　　B.2009 Tort Law

Changes and Challenges under the ECL

A. Changes　　B. Challenges

I. Development of The Safe Harbor Rule



A. 2006 Regulation

Article 15 of the Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks provides:

"The network service provider, after **receiving notification from the owner**, shall **immediately delete or disconnect** the link to the work, performance, or audio-visual recording suspected of infringing on an other's right, and meanwhile shall transfer the notification to the service object of the work, performance, or audio-visual recording; if the network address of the service object is not clear and the notification cannot be transferred, the network service provider shall publicize the content of the notification through the information network."

- **delimits the liability of the network service provider for copyright infringement;**
- **stipulates the measures the network service provider should take-take down or disconnnect;**
- **treats providers of different network services in different ways.**

- Article 20 is about automatic transmission, Article 21 automatic storage for enhancing network transmission efficiency, Article 22 providing information storage space, and Article 23 searching or linking. For providers of these services not to be liable for compensation, one condition is that they have not altered the work. But those who provide information storage space or searching or linking services shall also have not known and have no justified reason to know that the work provided by the service object have infringed upon other's right. So the Notice and Take Down Mechanism applies to such providers.

The wechat little program case

Facts- Defendent One, an Internet company in Changsha, registered a little program on wechat which was developed by Defendent Two, the Tencent Company, and communicated some works through the little program without the permission by Plaintiff, an Internet company in Hangzhou, who was entitled to communicate these works to the public over information networks.

The wechat little program case

Issue- Whether the Notice and Take Down Mechanism applies to a provider of a little program？

Holding- The Notice and Take Down Mechanism provided in the Regulation only applies **when it is possible for** the provider of information storage space or searching or linking services **to find that what is communicated causes copyright infringement**. What shall be deleted is what have been stored and is controlled by the provider or the link **that causes infringement** rather than any user of the service or any website the link may lead to. The provider of a little program is technically unable to find exactly what causes infringement and it only provides **“basic network services” in nature**.

Distinguisihed by Its Nature of Service

B. Protection through Tort Liability

Article 36.2 of the Tort Law of the People's Republic of China:

"Where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service provider to take such necessary measures as deletion, block or disconnection. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall **be jointly and severally liable for any additional harm with the network user.**"

- **delimits the liability of the network service provider for tort;**
- E.g. The network service provider should take measures against defamatory comments on its website pursuant to Article 36.2.
- **stipulates different "necessary measures" for different rights;**
- E.g. The criteria for patent infringement, trademark infringement and copyright infringement are different, and so are the "necessary measures" to be taken by the network service provider. **"Transfer the notification" can also be a "necessary measure".**
- Yi Nian v. Taobao et al
- Jia Yi Kao v. Tmall et al
- The Aliyun case
- Covers all kinds of ISP

Yi Nian v. Taobao et al

In Yi Nian v. Taobao et al (2001), Yi Nian company sent notification of infringement to Taobao seven times after it found that Du Guofa was selling infringing goods through Taobao and Taobao checked and deleted the goods information posted by Du Guofa in response everytime. Taobao argued that it had taken necessary measures.

The court holds that the network service provider should take further necessary measures to prevent further infringement if the user of the network service continues its infringement through the service after the provider deletes the relevant information. What are the necessary measures should be decided by factors **such as the type of the network service, the technical feasibility and cost of the measure, and the circumstances of the infringement**. In the case of an online trade platform, it may openly warn the user, or reduce the user's credit rating, or restrict what the user posts about its goods till it logs out, etc.

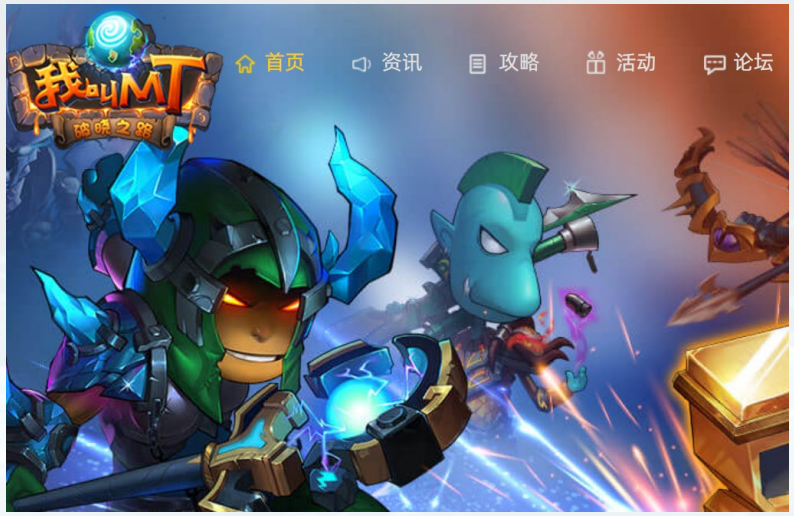
Jia Yi Kao v. Tmall et al

Sometimes an online trade platform does not have to bear liability for joint infringement even if it has not deleted the information that causes infringement. For instance, in the patent infringement case “Jia Yi Kao v. Tmall et al”, the court, considering Tmall’s ability to find whether goods infringe a patent right, the rate of success among complaints of infringement in the platform and the balance between different interests and so on, holds that Tmall as the provider of an e-commerce platform, is not necessarily required to delete or screen out from buyers the complained goods after receiving a complaint.

The Aliyun case

In August 2015, Locojoy received complaint from some its game player that a website (www.callmt.com) was providing the download and top-up services of a game “I’m MT fresh version.” Locojoy found that those who had developed this game might have illegally copied the pockets of its computer game and that the data of the game in question were stored in the servers of Alibaba Cloud. So Locojoy notified Alibaba Cloud of that twice asking it to delete those infringing data and to offer information of the servers lessee but it did not get a desirable reply. Locojoy sued Alibaba Cloud for involving in joint infringement.

LOCOJOY



阿里云
aliyun.com

The Aliyun case

The trial court-

- ✓ Locojoy's notifications to Alibaba Cloud is "valid";
- ✓ Alibaba Cloud had been negative toward the notification for eight months, since the first notification and before it took measures after legal proceedings began, which is much longer than a reasonable period for reaction. It is shown that Alibaba Cloud, having ignored the resulted damage, is subjectively at fault, and objectively speaking, it makes the damage worse by not taking measures. Therefore Alibaba Cloud shall be liable.

The Aliyun case

The appellate court –

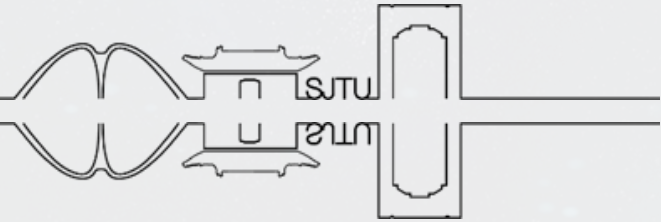
- ✓ the rental cloud server provided by Alibaba Cloud is different from information storage space in view of their technical characteristics, the laws regulating them and how they are treated by the industry regulator. It is also different from automatic access, automatic transmission and automatic storage for enhancing network transmission efficiency in view of their technical characteristics and how they are treated by the industry regulator. The provider of rental cloud servers is an "IDC (Internet data center)", not an "ISP (Internet service provider)." Therefore neither the Copyright Law nor the Regulation but Article 36 of the Tort Law applies to this case.
- ✓ Locojoy's notifications are invalid and thus the network service provider is under no obligation to make further contact or check.

The Aliyun case

The appellate court –

- ✓ Article 36.2 of the Tort Law stipulates the rule of "notify and take necessary measures" because the infringed interests may generates from copyright, or trademark right, or personality right etc. varying in nature and the difficulty to decide whether infringement exists. That is also because the network service provider probably not only provides "information storage space" or "searching or linking." For a provider of other services, if it simply removes relevant information or links or take other measures of the same nature, its legitimate interests or those of its users may be harmed. Under such circumstances where direct deletion is inappropriate, to warn the infringer and to some extent prevent the damage from worsening, to "transfer the notification" may become a "necessary measure" which relieve the provider of liability. If the notification is valid and Alibaba Cloud fails to "transfer" it within a reasonable period, and if there is direct infringement, then Alibaba may be liable for aiding infringement.

II. Changes and Challenges under the ECL



1.Primary provisions

Article 42 of the E-Commerce Law:

"Where the owner of an intellectual property right considers that his or her intellectual property right has been infringed upon, he/she shall have the right to notify the e-commerce platform business of taking necessary measures, such as deletion, blocking or disconnection of links and termination of transactions and services. The notice shall include prima facie evidence that the infringement has been committed. The e-commerce platform business shall, after having received the notice, **take timely and necessary measures and forward the notice to the in-platform business**; and if e-commerce platform business fails to take timely and necessary measures, it shall be jointly and severally liable with the in-platform business for any aggravation of the injury. Civil liability shall be assumed according to the law for any damage caused to the in-platform business by erroneous notice. Double compensation liability shall be assumed according to the law for any damage caused to the in-platform business by erroneous notice given in bad faith."

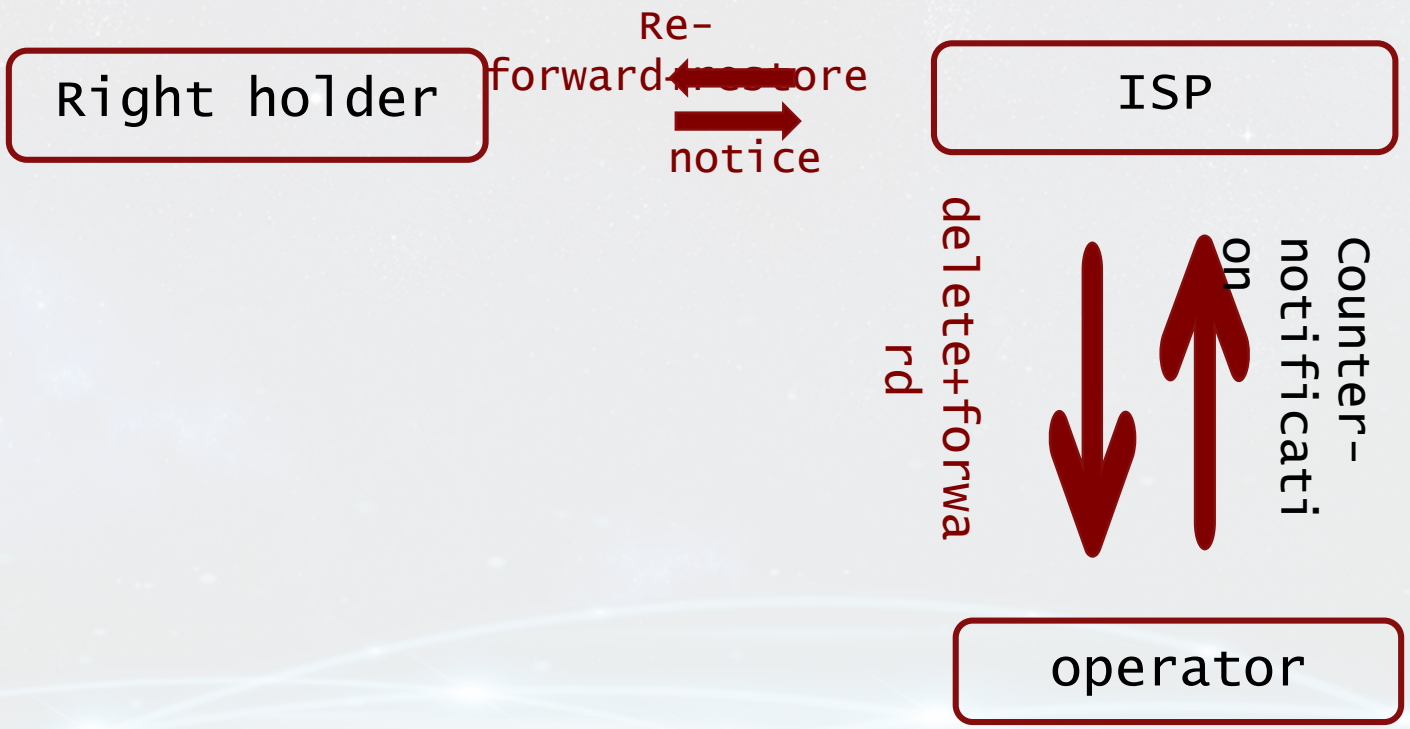
1.Primary provisions

Article 43.2 of the E-Commerce Law:

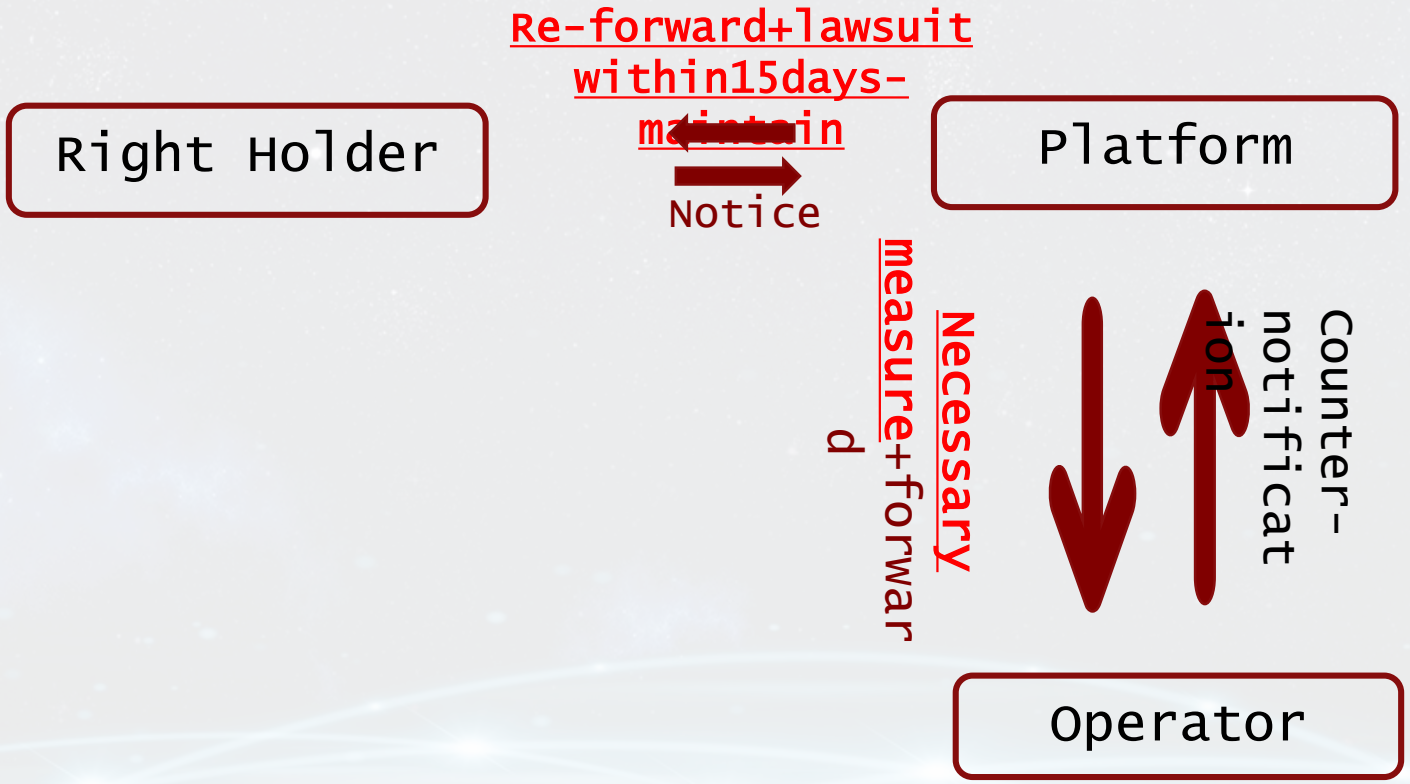
"The e-commerce platform business shall, upon receipt of the declaration, forward it to the owner of the intellectual property right that gives the notice, and advise the owner that he/she may file a complaint with the relevant competent authority or bring an action in the people's court. If the e-commerce platform business does not receive notice, within 15 days after the forwarded declaration reaches the owner of the intellectual property right, that the owner has filed a complaint or sued, the e-commerce platform business shall promptly terminate the measures it has taken."


CHANGE

Regulation


Right holder
Re-
forward/restore
notice
ISP
delete+forwa
rd
Counter-
notificati
on
operator

E-Commerce Law



2.The main question

- In the context of the E-Commerce Law, the rule of “waiting for 15 days” will largely increase the number of lawsuits; meanwhile, the cost in safeguarding IP rights will increase significantly;
- the in-platform operator “is warned” by necessary measures and the forwarded notice, and even its goods are removed off shelves and links deleted, which amounts to a preliminary injunction without security and will cause the in-platform operator an irretrievable heavy loss.

	2018年	2017年
100亿	2分05秒	3分01秒
500亿	26分03秒	40分12秒
571亿	35分17秒	1小时0分49秒
1000亿	1小时47分26秒	9小时0分4秒

191亿

2018年 仅4分20秒 超越 2012年天猫双11全天成交额

362亿

2018年 仅12分14秒 超越 2013年天猫双11全天成交额

912亿

2018年 仅1小时16分37秒 超越 2015年天猫双11全天成交额

2.The Main Problem

- How to respond?

A probable suggestion is to enhance the status of the platform and give it much more room for self-regulation under the E-Commerce Law.

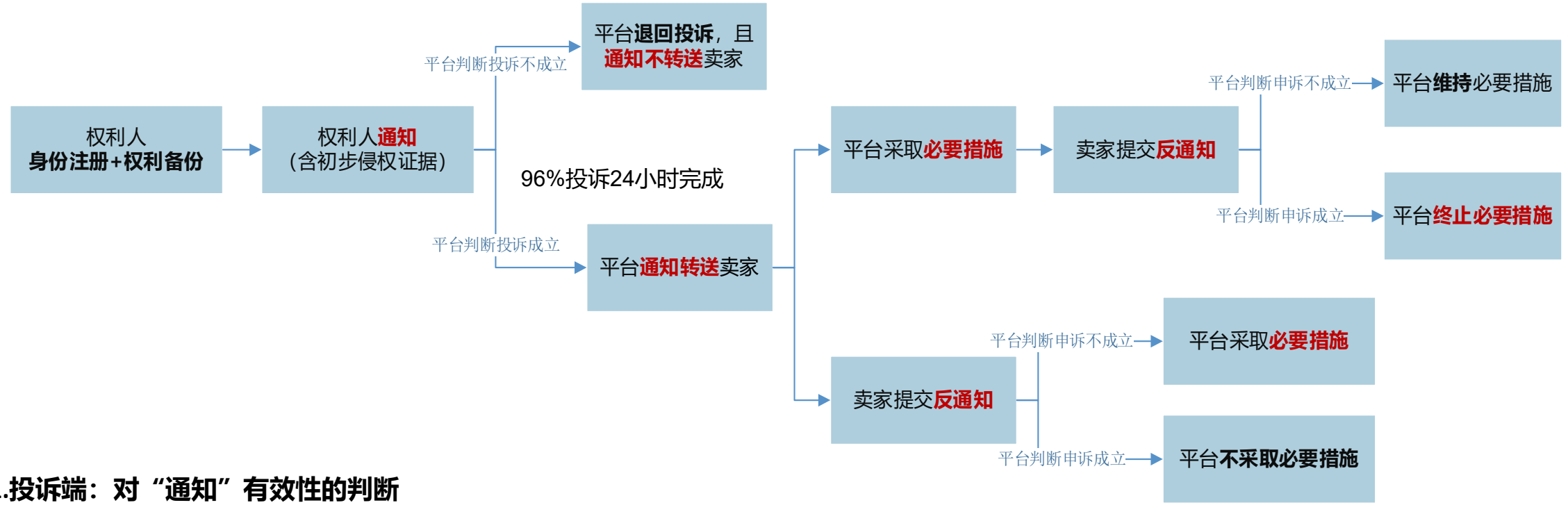
First, in the Aliyun case, the appellate court points out that "room shall be left for industry self-discipline". It indicated the platform should decide whether to take any necessary measure and whether to transfer the notice at its risk of liabilities. In this regard, the platform may conducts "substantive examination" focused on if there is infringement more than a "formal examination" of relevant materials.

Second, allow preposition of “counter-notification” in the complaint involving trademark right and patent right. That is to say, instead of deleting immediately, the platform “forward the notice” to the in-platform operator asking for a “counter-notification” and decide whether to “take necessary measures” until the “counter-notification” arrives.

This practice is feasible under Article 36 of the Tort Law. How is about Article 42.2 of the E-Commerce Law?

The latter puts “necessary measures” requirement parallel to “forward the notice”, which should be interpreted broadly. In other words, “forwarding the notice and necessary measures” are required in case of copyright infringement while “forwarding the notice + counter-notification+ necessary measures” are required and still being timely in case of patent or trademark infringement. In this manner, the balance will be maintained between the interests of the network service provider, the right owner and the in-platform business.

阿里巴巴电商平台知识产权投申诉业务实践



1.投诉端：对“通知”有效性的判断

- 平台退回投诉，且通知不转送卖家。具体情形：

1）恶意投诉（恶意未生产/官网盗图、抢注、非显著性商标等）拦截；

2）平台判断“通知” 初步证据不充分的退回（如：购买鉴定缺订单编号、假货判定依据等）

2. 申诉端：对“反通知”有效性的判断

- 申诉标准较高，不限于初步证据，需要有事实、理由和不侵权证据

3.反通知前置流程：专利场景下适用

Thank you!

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