Online IP Protection in China
Background / Big Picture
Platform Liability in China – Legal Framework

• Legislative / regulatory efforts impressive
  • Tort Liability Law + Civil Code amendments establish foundation for take-down
    • Antecedent: landlord liability cases from the mid-2000’s
    • “Guidance” documents from higher courts
  • Raft of SAIC/SAMR regulations
  • Ecommerce Law
  • National standards (voluntary)

• Draft of planned revision to Ecommerce Law issued for comment in Sept 2021
Platform Liability in China – Status Quo

• Take-down system works smoothly by current global standards

• Scope of protection:
  • Limited to protection of trademarks and patents registered in China + copyright
  • Exception: Export-focused platforms will enforce foreign rights
  • Unfair competition + any arguable case: Forget it – or look for other legal grounds

• Administrative / criminal / civil enforcement
  • PSB and MSB only rarely investigate based on complaints/leads
  • Civil enforcement a hassle
  • Too many targets and hard to determine which to investigate more deeply
  • As such, the bulk of enforcement is limited to notice-and-take-down (NTD)

• SAMR/local MSB supervision of platforms
Platform Liability in China – Status Quo

The Elephant in the Room

- Dialogue and cooperation with industry continues
- Many IP owners say they are happy
- But concerns still over platform practices + scale of problems
- Industry / govts responsible for changing the rules of the road
Draft Ecommerce Law
Platform Liability in China – Industry Concerns

• Core concerns:
  • Platform duty of care, both general and specific
  • Transparency
  • Tools available to support IP owner investigations
  • Government enforcement – administrative, criminal and civil
  • Government role in supervising of platforms
## SAMR Draft Ecommerce Law Revisions

<table>
<thead>
<tr>
<th>Issue</th>
<th>Industry Proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SAMR Draft Law</strong></td>
<td></td>
</tr>
<tr>
<td>Art. 84</td>
<td>Allow IP owners and consumers to file complaints + establish formal review process to maximize transparency</td>
</tr>
<tr>
<td>Where conditions serious, MSB can suspend or terminate platform license to operate</td>
<td></td>
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<tr>
<td>Art. 43</td>
<td></td>
</tr>
<tr>
<td>Rejected counter-notices:</td>
<td></td>
</tr>
<tr>
<td>a) Extend deadline for IP owners to file civil/administrative complaints from 15 to 20 days;</td>
<td>a) Relax legalization requirements – otherwise even 20 days to short for foreign IP owners;</td>
</tr>
<tr>
<td>b) Allow vendors to pay bond for release of measures</td>
<td>b) Delete draft provision allowing vendors to pay bond</td>
</tr>
</tbody>
</table>

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## SAMR Draft Ecommerce Law Revisions (2)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Suggestions for Further Amendments</strong></td>
<td></td>
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</tbody>
</table>
| Clarify/expand platform duty of care--particularly where there’s reason to suspect/know of hanky-panky | a) More DD / proactive investigations  
b) Obligation to ban vendors that have not secured business licenses  
c) Cooperate with IP owner investigations / enforcement efforts  
d) Specifically: to disclose info on infringers and transactions  
e) Subpoena powers for courts and MSBs for info deemed private  
f) Prohibit discriminatory treatment |
| Foundational principles                    | Basic tort principles should be applied, e.g.:  
- Reasonable response based on specific circumstances  
- “Balance of convenience” |
# SAMR Draft Ecommerce Law Revisions (3)

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| “Difficult” cases normally bounced by platform | a) Apply common sense when deciding whether to interven  
b) Ensure staff handling cases have proper training / qualifications  
c) Encourage greater resort by platforms to ADR, including arbitration |
| Right to challenge platform behavior | a) Allow rights holders and consumers to file complaints  
b) Specifically prohibit “unreasonable burdens” from platforms |
| Social media | Explicitly state that law applies to advertising/sales via social media |
Platform Liability in China

- Draft amendments:
  Translation: SAMR Announcement on the Decision on the Amendment of the PRC E-Commerce Law

- SIPS assessment:
  Draft Amendment to the PRC E-commerce Law

- Position papers of INTA and QBPC
What next?
Opportunities for Industry to Drive Change

• Requires new thinking on solutions and strategy - globally
  • Commit to new playbook and plan for implementation

• In China
  • Boost engagement with SAMR / CNIPA
    • Sustained dialogue + cooperation
    • Support pilot programs – particularly in problem regions

• Close monitoring and engagement re: emerging norms
  • Standards
  • Civil and administrative case decisions
  • New government enforcement methods

• Working with platforms
  • Adjust engagement to accelerate progress
  • Push for piloting of new solutions, e.g., ombudsmen, new tech, ADR, etc.
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