

Online IP Protection in China



IP Advisors
for Greater China

October 27, 2021

BEIJING • HONG KONG • SHANGHAI

An aerial night view of a city skyline, likely Shanghai, featuring prominent skyscrapers and the Oriental Pearl Tower. The image is dark with a blue tint, and the text 'Background / Big Picture' is overlaid in white. A solid blue vertical bar is on the left side of the image.

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



An aerial night view of a city skyline, likely Shanghai, featuring the Oriental Pearl Tower and a river. The image is dark with a blue tint, and the text "Draft Ecommerce Law" is overlaid in white. A solid blue vertical bar is on the left side of the image.

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



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

SAMR Draft Ecommerce Law Revisions (2)



Issue	Industry Proposals
Suggestions for Further Amendments	
Clarify/expand platform duty of care-- particularly where there's reason to suspect/know of hanky-panky	<ul style="list-style-type: none">a) More DD / proactive investigationsb) Obligation to ban vendors that have not secured business licensesc) Cooperate with IP owner investigations / enforcement effortsd) Specifically: to disclose info on infringers and transactionse) Subpoena powers for courts and MSBs for info deemed privatef) Prohibit discriminatory treatment
Foundational principles	Basic tort principles should be applied, e.g.: <ul style="list-style-type: none">- Reasonable response based on specific circumstances- "Balance of convenience"

SAMR Draft Ecommerce Law Revisions (3)



Issue	Industry Proposals
Suggestions for Further Amendments	
“Difficult” cases normally bounced by platform	a) Apply common sense when deciding whether to intervene 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 LawS](#)

- SIPS assessment:

[Draft Amendment to the PRC E-commerce Law](#)

- Position papers of INTA and QBPC

An aerial night view of a city skyline, likely Shanghai, featuring the Oriental Pearl Tower and the Bund. The text "What next?" is overlaid in white. A blue vertical bar is on the left side of the image.

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.

BEIJING

LG TWIN TOWERS, EF08, EAST TOWER
B-12 JIANGUOMENWAI AVENUE
CHAOYANG, BEIJING 100022, PRC

T: +86 10 8523 3225
F: +86 10 5120 8358

HONG KONG

25/F, 3 LOCKHART ROAD
WANCHAI
HONG KONG SAR, PRC

T: +852 3468 7500
F: +852 2866 6408

SHANGHAI

GUANGQI CULTURAL PLAZA, ROOM 208
BUILDING B. NO. 2899 XIETU ROAD
XUHUI DISTRICT, SHANGHAI 200030, PRC

T: +86 21 3477 0522
F: +86 21 3477 0526



IP Advisors
for Greater China

mail@sips.asia
www.sips.asia