

Guiding Opinions Issued by the Supreme People's Court

"Regarding the Trial of Civil Cases Involving IP Rights on E-commerce Platforms"

To the Higher People's Courts of all Provinces, Autonomous Regions and Municipalities directly under the Central Government; the Military Court of the People's Liberation Army; and the Production and Construction Corps Branch of the Higher People's Court of Xinjiang Uygur Autonomous Region:

The "*Guiding Opinions of the Supreme People's Court Regarding the Trial of Civil Cases Involving IP Rights on E-commerce Platforms*" are hereby issued to you. Please implement them carefully and thoroughly.

Supreme People's Court

September 10, 2020

Supreme People's Court

Guiding Opinions Regarding the Trial of Civil Cases Involving

IP Rights on E-commerce Platforms

These guidelines are an embodiment of the practice of IP trials and they have been formulated in order to fairly hear civil cases involving IP rights on e-commerce platforms, to protect the legitimate rights and interests of all parties in the e-commerce field in accordance with the law, and to promote the standardized, orderly and healthy development of business activities on e-commerce platforms.

1. People's Courts hearing cases involving IP disputes on e-commerce platforms shall adhere to the principle of strict protection of IP rights. They shall punish acts of providing infringing goods or services such as counterfeits, pirate copies, etc., through e-commerce platforms in accordance with the law, and they shall actively guide parties to respect the principle of good faith and to exercise rights properly in accordance with the law. They shall also properly resolve relationships between parties such as the owners of IP rights, e-commerce platform operators, operators within the platform, etc.
2. When hearing cases involving IP disputes on e-commerce platforms, the People's Courts shall, in accordance with Article 9 of the E-commerce Law of the People's Republic of China (hereinafter referred to as the E-commerce Law), determine whether the relevant parties are e-commerce platform operators or operators within the platform [vendors].

When a People's Court determines whether the acts of an e-commerce platform operator constitute a self-operating business, it can consider the following factors: the "self-operating" information shown on the product sales page; the selling entity information marked on the physical goods; the selling entity, etc., information displayed on tax invoices and other transactional documents.

3. If an e-commerce platform operator knows or should be aware of an infringement of IP rights by an operator within the platform, it shall take necessary measures in a timely manner, based on the nature of the right, the specific circumstances and technical conditions of the infringement, as well as the preliminary evidence of the infringement and the categories of services. The necessary measures taken should follow the principle of reasonable prudence, including de-listing measures such as, but not limited to, removal [of content], blocking [of content], disconnection, etc. If an operator within the platform [vendor] has repeatedly and deliberately infringed IP rights, the e-commerce platform operator is entitled to take steps to terminate transactions and services.
4. According to the provisions of Article 41, Article 42 and Article 43 of the E-Commerce Law, e-commerce platform operators may formulate in-platform notifications and specific implementation measures for declaration mechanisms based on the type of IP rights, the characteristics of the goods or services, etc. However, the relevant measures must not set unreasonable conditions or obstacles to the parties' actions to protect their rights in accordance with the law.
5. In accordance with Article 42 of the E-commerce Law, a notice issued by an IP rights holder to an e-commerce platform operator will generally include [the following]: a certificate for the IP right and truthful identity information regarding the rights holder; information allowing the goods or services accused of infringement to be located; preliminary evidence of infringement; a written guarantee regarding the authenticity of the notice, etc. The notice should be in writing.

Where the notice involves patent rights, the e-commerce platform operator may require the IP right holder to submit a description of the comparison of technical features or design features, a utility model or design patent evaluation report, etc.

6. When a People's Court determines whether a notifying party has "bad faith" as referred to in Article 42, Paragraph 3 of the E-commerce Law, it may consider the following factors: forged or altered certificates of rights have been submitted; false infringement comparison and appraisal opinions / experts opinions have been submitted; notices have been sent out and it is clearly known that the status of rights is uncertain; it is clearly known that the notice is wrong but the notice is not withdrawn or corrected in time; incorrect notices are submitted repeatedly, etc.

Where an e-commerce platform operator / an operator within a platform [vendor] a lawsuit with a People's Court based on the ground of an incorrect notification / the bad faith issuance of an incorrect notification, this may be tried together with the case involving the IP dispute on the e-commerce platform.

7. In accordance with Article 43 of the E-commerce Law, where an operator within a platform submits a declaration of non-infringement to the e-commerce platform operator, this will generally include [the following]: truthful identity information regarding the operator within the platform [vendor]; information allowing the locating of the goods or services for which termination of necessary measures is being sought; preliminary evidence that there is no infringement, such as ownership certificates, authorization certificates, etc.; written guarantees of authenticity, etc. The declaration should be in writing.

Where the statement involves patent rights, the e-commerce platform operator may require the operator within the platform [vendor] to submit materials such as descriptions of technical features or a design feature comparison.

8. When a People's Court determines whether a declaration made by an operator within a platform is made in bad faith, it may consider the following factors: forged or invalid proofs of rights and authorization have been provided; the declaration contains false information or is obviously misleading; a declaration is issued even though the [take-down] notice was accompanied by an effective judgment or administrative decision determining that infringement has taken place; it is clearly known that the contents of the declaration are wrong but the declaration is not withdrawn or corrected in a timely manner.
9. Where the circumstances are urgent, if an e-commerce platform operator does not immediately take product de-listing, etc., measures and this will cause irreparable damage to an IP rights holder's legitimate interests, the IP rights holder may apply to a People's Court for preservation measures in accordance with Articles 100 and 101 of the *Civil Procedure Law of the People's Republic of China*.

Where circumstances are urgent, if an e-commerce platform operator does not immediately restore a product link, the notifying party does not immediately withdraw its notification or stop sending notifications, etc., and this will cause irreparable damage to the legitimate interests of the operator within the platform [vendor], the operator within the platform [vendor] may apply to the People's Court for preservation measures in accordance with the legal provisions mentioned in the previous paragraph.

Where an application by an IP rights holder / an operator within a platform complies with the provisions of the law, the People's Court should support it in accordance with the law.

10. When a People's Court adjudicates whether an e-commerce platform operator has taken reasonable measures, it may consider the following factors: the preliminary evidence of infringement; the likelihood that infringement will be established; the scope of the infringement; the specific circumstances of the infringement, including whether there are circumstances such as bad faith infringement, repeated infringement; the effectiveness of preventing an increase in harm; the potential impact on the interests of operators within the platform [vendors]; the type of service and technical conditions of the e-commerce platform, etc.

Where an operator within a platform has evidence proving that the patent right involved in the notification has been invalidated by the State Intellectual Property Office and an e-commerce platform operator accordingly suspends necessary measures, the People's Court shall not support a request by the IP rights holder for a determination that the e-commerce platform operator has failed to take necessary measures in a timely manner.

11. Where one of the following circumstances exists with respect to an e-commerce platform operator, the People's Court may determine that it "should have been aware" of the existence of the infringement:
 - (1) Failure to fulfil legal obligations such as formulating IP protection rules and reviewing the operating qualifications of operators on the platform;
 - (2) Failure to verify evidence of rights for operators whose store types on the platform are marked as "flagship store" or "brand store";
 - (3) Failure to adopt effective technical measures to filter and block infringing product links containing words such as "close imitation" / "fake goods", etc., and infringing product links that are re-listed after a complaint has been upheld;

- (4) Other circumstances where there has been a failure to carry out reasonable checks and a failure of duty of care.